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INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action



**Understanding armed groups
and the applicable law**



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.

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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.

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EDITORIAL: UNDERSTANDING ARMED GROUPS AND THE LAW

Even if inter-state wars have become occasional occurrences, organized armed violence is ever-present. Over the past few years, the International Committee of the Red Cross (ICRC) has certainly not observed a decline in the number of non-international armed conflicts; in all likelihood, such conflicts will continue to arise in the future. They will possibly be triggered by phenomena that we already observe today, such as the world financial crisis, state oppression, or competition over resources. Meanwhile, the recent developments in North Africa and the Middle East have given rise to unexpected new conflicts and have the potential to cause further tensions.

The existence of civil wars and armed groups is by no means a new phenomenon restricted to remote countries. The rebellion led by Spartacus in ancient Rome, Oliver Cromwell's military overthrow of the English monarchy in the seventeenth century, the American and Spanish civil wars are all proof of this. After all, the struggles of armed groups, when successful, have resulted in the foundation of many of the states we know today, and the inclusion of former rebels in mainstream political life is seen as a solution to ending many civil wars.

The 'classic model' of war – opposing two or more conventional state armies on a battlefield – continued to be, at least until the end of the cold war, the overriding scenario for which most armies were prepared, equipped, and trained. Even today, despite inter-state conflicts being the exception in reality, tanks, aircraft, missiles, and ships are still the yardstick by which a nation's military power is measured.

In the ICRC's analysis, and applying the criteria for non-international armed conflicts under international humanitarian law (IHL), at least forty-eight non-international armed conflicts occurred or were continuing to occur throughout the world in the course of 2011. This included ongoing conflicts that have been underway for decades, such as those in Afghanistan, Colombia, the Democratic Republic of Congo (DRC), the Philippines, and Somalia. It also includes new non-international armed conflicts, such as those that broke out in Côte d'Ivoire and in Libya. A distinctive feature of the non-international armed conflicts in Afghanistan, the DRC, and Somalia in particular is that they involve foreign troops intervening in support of government forces against one or more non-state armed groups. In 2010, the Uppsala Conflict Data Program similarly saw a trend towards the 'internationalization' of internal conflicts.¹ Although these military confrontations are not taking place on North American or European soil, the involvement of the armed

forces of several major world powers help to shine a spotlight on these otherwise localized conflicts and on the involvement of armed groups therein.

What then is an armed group? We are referring here to organizations that are party to an armed conflict, but do not answer to, and are not commanded by, one or more states. This broad definition belies the wide diversity of such groups and the complexity of contemporary warfare. Estimates of the number of armed groups vary widely from source to source, depending on how they are defined. In 2011 the ICRC identified around 170 active armed groups in the situations in which it operated.² This figure covers the range from small groups only able to carry out sporadic attacks all the way to forces with state-like military resources and significant control over entire populations and expanses of territory. Their origins, motivations, structures, and tactics are highly diverse. A group's cause can sometimes garner the support of the international community and can even mobilize an armed response in their favour, as the recent case of the Libyan National Transitional Council shows. Nevertheless, under national law, armed groups are generally seen as outlaws. Moreover, in the context of the 'war on terror', they are often hastily tarred with the same brush as transnational terrorist groups.

Armed groups play a central role with respect to the humanitarian concerns and legal issues involved in conflicts today. A group may fight against the government of its own country, other rival groups, a foreign state, or several states joined in a coalition. For the affected countries, these armed conflicts stand in the way of stability, prosperity, and development. For their populations, they can spell uncertainty about the future, ruin, exile, suffering, or death.

It is the population at large who is placed centre-stage in this type of conflict by both rebel and regular forces. Civilians are both the prize and the main victims of these wars. In recent years, the ICRC has observed that direct confrontations either between different armed groups or between state armed forces and armed groups tend to be rare. Violence primarily targets civilians,³ who not only suffer from all the pain and destruction that armed conflicts bring, but may also have to choose between allegiance to the government or to the rebels, without knowing which side can guarantee their safety. If they make the 'wrong' choice, they risk bloody reprisals. In many cases, this unbearable situation has forced communities to flee their homes, leaving behind their properties, losing their sources of income, and rupturing their cultural and social ties.

Rebel forces, outnumbered as they are, often adopt a survival technique whereby a guerrilla fighter should move through the population, as the Maoists term it, 'like a fish through water'. They cannot be distinguished from civilians and they therefore expose civilians – sometimes deliberately – to violent counter-attacks or reprisals by the government. By blending into the population in this way, armed groups present government forces with a dilemma: to abstain from attacking and let

1 Lotta Themnér and Peter Wallensteen, 'Armed conflict, 1946–2010', in *Journal of Peace Research*, Vol. 48, 2011, p. 525.

2 Internal estimate made by the ICRC's Unit for Relations with Armed and Security Forces.

3 See 'Operational highlights', in *ICRC Annual Report 2010*, p. 98, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 10 September 2011).

the insurgency grow, or to attack the insurgents at the cost of causing large civilian losses, possibly committing war crimes, and antagonizing the civilian population.

In response, government armed forces often use brutal counter-guerrilla tactics, inherited in particular from the colonial wars. Such tactics advocate cutting off the group from its support among the local population and 'draining the sea to kill the fish'. 'Pacification', 'law-enforcement operations', and 'psychological warfare' are only a few of the euphemisms used for what is also known as 'dirty war'. Today, such tactics may not have disappeared from the field but they no longer have a place in military manuals. The wars in Iraq and Afghanistan have been instrumental in changing the way in which strategists approach this type of conflict. Military operations have evolved in response to guerrilla tactics and are increasingly resorting to the use of special forces and to targeted attacks, made possible owing to new technologies such as drones, rather than the mass deployment of troops to occupy territory.

The recent Counter-Insurgency doctrine (COIN) of the US Army states that '[t]he protection, welfare, and support of the people are vital to success'.⁴ COIN experts recommend a comprehensive approach to the situation, taking into account not only the security dimension but also the economic, political, and cultural ones. The United States Army is already training its officers in COIN techniques using a sophisticated military-strategy simulator game (UrbanSim) that incorporates factors such as economic conditions and social ties.⁵ The game analyses how these factors can drive the population to back the government or the insurgents. On the ground, this approach requires significant resources and a long-term overall vision. Sophisticated COIN strategies, however, are not without their problems, particularly when humanitarian assistance is exploited in order to 'win the hearts and minds' of the local population or, sometimes, of the taxpayers at home, who are less and less supportive of these remote and costly operations. There is no getting around the fact that respecting the population's rights is crucial to winning their support. Such respect is also the criterion by which an increasingly well-informed international community will judge the operations.

Humanitarian actors, for their part, have no choice but to understand the crucial role played by armed groups in today's conflicts. Indeed, armed groups often control access to some key areas and communities. In times of conflict, humanitarian organizations face many risks in attempting to reach out to populations in need. These risks are aggravated by the specificities of many armed groups. A loose chain of command or of channels of communication, fragmentation into factions, funding and logistics based on looting or abductions, and a rejection of any kind of foreign presence are just a few of the factors that can endanger those working in the field. In addition, by engaging in dialogue with an armed group, if only to advocate respect for IHL, one runs the risk of incurring the wrath of the state

4 US Department of the Army, Field Manual 3–24, Counterinsurgency, app. D-2 (2006), para. 159.

5 Michael Peck, 'Confessions of an Xbox general: can a computer game teach the army how to defeat the Taliban?', in *Foreign Policy*, 28 September 2011, available at: http://www.foreignpolicy.com/articles/2011/09/28/Xbox_general (last visited 5 December 2011).

against which the group is fighting. A government engaged in an all-out war against an internal enemy may view any communication with armed groups as a kind of legitimization of their action. In the era of the so-called ‘war on terror’, some national legislations have added a new dimension to this problem by essentially criminalizing dialogue with entities classified as ‘terrorist groups’.

Humanitarian and academic actors are increasingly studying armed groups and their environment, and the applicable law and its limits in regulating them. Understanding armed groups and international rules that apply to them is an essential prerequisite for dialogue with a view to bringing about their compliance with the law. It is vital to comprehend why armed groups choose to respect or flout the law. To this end, the *Review* has chosen to devote this issue and the next to examining three main questions:

- 1) *What do we know about armed groups and the practical leverage we have to influence their action, in order to achieve greater compliance with the law?*
- 2) *How far does the current normative framework foster compliance with the law by armed groups?*
- 3) *How can tangible progress be made towards convincing such groups to comply with the law?*

The *Review* has worked on the assumption that a pragmatic approach should be adopted, taking into consideration the perspective, history, and structure of armed groups rather than seeing them merely as a threat to or an anomaly of the international system.

What do we know about armed groups and the practical leverage we have to influence their action, in order to achieve greater compliance with the law?

The *Review* opens the edition by giving a former member of an armed group the chance to share his perspective. Ali Jalali was successively an officer, a mujahideen fighter, and Interior Minister in the Karzai government from 2003 to 2005. He discusses the extent to which the action of armed groups in Afghanistan has changed since the Soviet intervention.

What is the situation at the end of a decade marked by the action of Islamist armed groups and by major wars in Iraq and Afghanistan? What consequences could the ‘Arab Spring’ have for the activity of armed groups in the region? Are we witnessing the dawn of a new era for armed groups and intra-state conflicts? The *Review* asked Arnaud Blin, from the French Institute for Strategic Analysis (IFAS), to give an overview of the activity of armed groups today. In his article, Blin looks at the phenomenon of ‘new wars’ to shed light on recent developments in non-international conflicts and, ten years on from the 11 September 2001 terrorist attacks on the United States, to sketch out what the future might hold.

Those seeking to engage in a serious dialogue with armed groups in order to foster their compliance with the law or to negotiate a peaceful outcome look

beyond those armed groups' stated political motivation and discourse. Their economic strategies, the complex ties between those groups and the population, and the historical, geographical, or political factors that fuel the conflict can ultimately determine its outcome. Professors Abdulkader Sinno, from Indiana University, and Achim Wennmann, from the Graduate Institute of International and Development Studies in Geneva, make a structural and economic reading, respectively, of the strategic choices made by armed groups. These two studies unravel the paths open to armed groups, depending on how they are organized, on the economic climate, and on the available options for engagement with them.

Many people associate armed groups with unfettered violence. At the risk of stating the obvious, armed groups are not always the ones responsible for violations of the law. Just like states, armed groups have to choose between several options and decide whether or not to comply with the law. This decision may be influenced by practical considerations or constraints, but political will remains key. Olivier Bangerter sets out and analyses the reasons for which the law is or is not respected, drawing on his field experience of contact with dozens of groups of this kind, in his capacity as ICRC adviser for dialogue with armed groups.

How far does the current normative framework foster compliance with the law by armed groups?

International law is drawn up by states. The criminalization of the act of rebellion and states' historical reluctance to take on obligations that impinge on the preserve of domestic security, continue to impact on the scope of applicable rules and on the legal status granted to parties to internal conflicts. Although there are rare historical exceptions, such as the 1793 French Declaration of the Rights of Man and of the Citizen, which conferred upon the people the 'sacred right' to rise up against any government that violated their rights, armed rebellion is generally seen by states as an illegitimate form of protest and a serious offence against security. In theory, states have a monopoly on the use of force and the members of their armed forces are the only ones empowered to wield it. It is always the state that determines who the enemy is and, under *jus ad bellum*, no entity other than the state has the right to resort to force.

When it comes to the rules governing the conduct of hostilities and protection afforded to war victims (*jus in bello*), treaties historically also reflect this state-centric vision. In 1949 and 1977 respectively, Article 3 common to the four Geneva Conventions and the adoption of Additional Protocol II extended the scope to application of IHL to non-international armed conflicts. In recent decades, several significant developments in international law have expanded the responsibilities of armed groups and strengthened the protection for victims of non-international armed conflicts. In particular, there have been developments in international criminal law, the adoption of new treaties, and the publication of the

ICRC's study on customary IHL, all of which cover both international and non-international armed conflicts.

Nevertheless, many differences still exist between the rules governing international and non-international armed conflicts. The provisions applicable to non-international armed conflicts are far fewer and still less detailed. In addition, members of armed groups, if captured, do not enjoy combatant privilege (and consequently prisoner-of-war status), which is granted to enemy soldiers in international armed conflicts. Zakaria Daboné, from the University of Geneva, analyses the 'anomaly' of armed groups in an international legal framework that reflects the Westphalian system of international relations. He demonstrates that, while states and armed groups have equal rights and obligations under IHL, they do not enjoy equal status. Moreover there are few armed groups with resources comparable to those of states. For example, how can a rebel group operating in the jungle offer the same judicial guarantees as a state with a properly functioning court system? Is it realistic to impose the same rules on states and armed groups when they do not possess the same resources and their status remains profoundly unequal? Should their obligations to each other really be the same under IHL?

This is the question that the *Review* put to Marco Sassòli from the University of Geneva and Yuval Shany from the Hebrew University of Jerusalem. These two professors defend opposing positions, with Marco Sassòli arguing in favour of a sliding scale of obligations for armed groups, depending on the degree to which they are organized, while Yuval Shany makes the case for equality. René Provost from McGill University then comments on their discussion and deconstructs the idea of formal equality in international law. This debate is the first contribution to a new section in the *Review* aimed at highlighting the main legal, ethical, and practical aspects of controversial humanitarian issues.

Armed groups are in any event not exempt from treaty and customary law governing non-international armed conflicts. Whether they like it or not, they have obligations under IHL, as shown by the number of legal proceedings undertaken before the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, and the International Criminal Court against rebel leaders for violations of the law. However, before the stage of criminal proceedings is envisaged, the focus should be on using all possible means to foster compliance with the law's provisions and to prevent violations. There are major conceptual obstacles standing in the way of armed groups' willingness to adhere to those provisions: unlike states, they do not take part in treaty-making. Furthermore the provisions were adopted (or at least endorsed) by the very states against which armed groups are fighting. By that logic, their ownership of the norms of IHL would be reduced or even non-existent. And yet, ownership is said to be one of the most effective ways to increase armed groups' compliance with the law.

Jann Kleffner, from the Swedish National Defence College, makes a critical analysis of different legal propositions of how exactly international law binds armed groups. One of the aspects that Professor Kleffner mentions is the consent of the group itself, which might be expressed through the adoption of its own code of conduct. The armed-groups expert Sandesh Sivakumaran, from the University of

Nottingham, asserts the importance of these internal codes. He analyses some of them, and in particular their content regarding the identification of targets and treatment of captives. Sivakumaran calls for greater attention to be paid to such codes, not only as a basis for dialogue with armed groups to increase their compliance with the law, but also as a complementary area of investigation alongside the study of treaties, customary law, and legal rulings that make up the law governing non-international armed conflicts.

Although codes of conduct of armed groups may not necessarily correspond to international law, they offer a rare insight into armed groups' own perceptions of their humanitarian obligations. Hence, following on from the publication in the previous issue of 'The Layha for the Mujahideen' or the Taliban code of conduct,⁶ the *Review* continues with a selection of codes of conduct collected by the ICRC's Unit for Relations with Armed and Security Forces. These codes range from the 'Three Main Rules of Discipline and the Eight Points for Attention' set out by Mao Zedong in the 1920s, to the instructions issued by the Libyan National Transitional Council in 2011. Although the legal significance of these codes falls into a grey area, they nonetheless present valuable material for humanitarian organizations working in the field and for researchers studying the practices of armed groups.

Drawing on the abovementioned practical and legal dimensions, the next issue of the *Review*, entitled 'Engaging armed groups', will address the third question: ***how can tangible progress be made towards convincing such groups to comply with the law?***

Vincent Bernard
Editor-in-Chief

6 Muhammad Munir, 'The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 103.

The new Editorial Board of the *International Review of the Red Cross*

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The editorial team of the *Review* has the privilege to introduce the new Editorial Board of the Journal. The Board was formed this year and met for the first time in Geneva in May 2011. It is composed of experts in multiple disciplines and from diverse geographical backgrounds.

The functions of the Editorial Board are to advise the editorial team, conduct peer reviews of articles, and guarantee the high academic quality of the Journal. The Editorial Board equally ensures that all relevant perspectives, both in terms of academic fields and geographic origins, are taken into account in exploring today's humanitarian challenges. The Board will convene once a year to take stock of the development of the editorial line of the *Review* and to select the future themes of the *Review*.

In order to enhance the *Review's* multidisciplinary and universal approach, lawyers, humanitarian practitioners, and social scientists from all over the world have been invited to join the new Board. Beyond their expertise in international law and international relations, the Board members bring a considerable wealth of experience in fields as diverse as military training, Islamic studies, history, sociology and humanitarian action.

The *Review* has a unique editorial line, situated at the crossroads between field realities, legal principles, and academic research. It is widely distributed to academic institutions, governments, and military legal circles by Cambridge University Press and by delegations of the International Committee of the Red Cross (ICRC) across the world. It benefits from an exceptional outreach, thanks to the yearly selections of articles in Arabic, Chinese, French, Spanish, and Russian and their web distribution.

It is important to underline that the *Review's* main aim is to foster academic research on and understanding of international humanitarian law (IHL) and principled humanitarian action. The *Review* welcomes contributions of an academic nature by all academics and practitioners. The Editorial Board has a special role to play in ensuring the academic independence of the Journal.

The *Review* will continue to maintain and develop the highest academic standards in the field of international humanitarian law, policy, and action, with a view to contributing to academic research and influencing legal reasoning and policies. At its first meeting in May 2011, the Editorial Board confirmed the current main objectives, while adopting a new editorial strategy to ensure the continuous development of the Journal and increase its outreach. This strategy is based on the following elements:

- The *Review* aims to reflect current humanitarian affairs better, with a view to improving humanitarian and legal responses, and ultimately contributes to improving the situation of people affected by armed conflicts and other situations of violence. Renewed efforts will be devoted to the promotion of the Journal as a tool of influence.
- All editions will maintain a focus on a specific theme concerned with international humanitarian law, policy, and action of particular importance. While maintaining its reference position in IHL, the *Review* will endeavour in the coming years to attract more contributions on current humanitarian policy debates.
- The *Review* will reflect current debates and will seek and encourage diversity of perspectives, approaches, and geographic origins of contributions. In particular, the Board is interested in exploring current legal and humanitarian policy gaps with a view to developing innovative responses.

The Editorial Board has already selected the future themes of the *Review* for the period March 2012–March 2013, according to their relevance and academic interest. Authors are encouraged to send their submissions to the Journal on relevant topics and preferably in the following areas:

1. March 2012 : Occupation
2. June 2012: New technologies and warfare
3. September 2012: Business, violence, and conflicts
4. December 2012: Health care in conflict
5. March 2013: The ICRC in international relations (150th anniversary of the ICRC)

The editorial team of the *Review* takes this opportunity to thank the members of the previous Editorial Board (2004–2010) for their contribution to the quality and influence of the Journal.



Vincent BERNARD (France), Editor-in-Chief of the *International Review of the Red Cross* (ICRC Geneva)

Vincent Bernard became Editor-in-Chief of the *International Review of the Red Cross* in October 2010. A graduate of Strasburg's Political Sciences Institute, he holds a Masters degree in political sciences, an LLM in international law (Law faculty in Strasburg and King's College London) and a DES in international relations from the Geneva Graduate Institute of International Studies. He won the IHL *Jean Pictet* competition as part of the Graduate Institute's team in 1995. After lecturing on international law and IHL at the University of Marmara in Istanbul, he joined the ICRC in 1998. He has worked for the institution for thirteen years, both in the field (Regional Delegation for West Africa in Dakar, Regional Delegation for East Africa in Nairobi, and Israel and Occupied territories) and at headquarters, and in various areas and capacities (integration and promotion of IHL, communication co-ordinator, head of sector for Africa, and head of operational communication).

Vincent Bernard © ICRC



Rashid Hamad AL ANEZI, Professor of International Law (Kuwait)

Rashid Hamad Al Anezi is Professor of International Law, Kuwait University School of Law. He holds a PhD from the University of Cambridge (1989), an LLM from Tulane University, USA, and a BA in Law and Sharia from Kuwait University. He was Assistant Dean for the Faculty of Law and Head of the International Law Department. He is currently a Partner at the law firm International Legal Group. He is a permanent member of various ministerial committees, including the national committee on IHL. He is a member of the Board of Editors of the *Law Journal issued by the Kuwait Lawyers Association* and the *Law Journal of Kuwait University School of Law*. He is the author of many articles and books on international law and IHL.

Rashid Hamad Al Anezi © ICRC



Annette BECKER, Professor of Modern History (France)

Annette Becker, Professor of Modern History at Paris Ouest Nanterre La Défense and a senior member of the Institut Universitaire de France, has written extensively

on the two World Wars and the extreme violence that they inflicted upon civilians, with an emphasis on military occupation and genocide. She has devoted research to humanitarian politics, trauma, and memories, particularly among intellectuals and artists. Her most recent books were *Apollinaire: Une biographie de guerre* (2009) and *Les cicatrices Rouges: France et Belgique occupées 1914–1918* (2010). She is now writing on two important voices of the twentieth century and its catastrophes, Raphael Lemkin and Jan Karski.

Annette Becker © ICRC



Françoise BOUCHET-SAULNIER, Legal Director of Médecins sans Frontières (France)

Françoise Bouchet-Saulnier, a Doctor of Law and magistrate, is the Legal Director of Médecins sans Frontières (MSF) and former Research Director at the Fondation Médecins sans Frontières. She is the author of several books and articles on humanitarian work, humanitarian law, and international justice, in particular the *Practical Guide to Humanitarian Law/ Dictionnaire pratique du droit humanitaire* (2007) and a book on Rwanda, *Maudits soient les yeux fermés* (1995). She is involved in framing the rights and responsibilities of MSF humanitarian and medical activities in situations of armed conflict or internal tension, as well as medical rights and duties when treating the sick, wounded, and victims of sexual violence and interacting with judicial systems. She currently teaches Masters courses at the Paris Institute of Political Studies and at the Paris Catholic Institute.

Françoise Bouchet-Saulnier © ICRC



Alain DELETROZ (Switzerland), Vice-President of International Crisis Group (Belgium)

Alain Déletroz is a Swiss and French national. He concentrates on European policy and advocacy issues, closely focused on the European Union (EU) and its member states. He maintains senior-level contacts and advocates International Crisis Group (ICG) recommendations to officials in Brussels, Latin America, the EU member states, and Russia. He pays regular advocacy visits to these countries and gives interviews to their media on the conflicts that ICG covers. His areas of expertise include Russia, Northern/Southern Caucasus, and Central Asia; Latin America; conflict assessment and conflict resolution; democratic reforms; and humanitarian assistance. His professional

background includes: Director, Open Society Institute, Tashkent, 1986–2001; International Committee of the Red Cross, Moscow, 1994–1998; Adult literacy and capacity-building projects, Peru, 1986–1991.

Alain Déléroz © ICRC



Helen DURHAM, Legal Advisor for the Australian Red Cross (Australia)

Helen Durham is the Strategic Adviser, International Law, for the Australian Red Cross and a Senior Fellow at Melbourne Law School. She has a PhD in the area of IHL and international criminal law and has been admitted as a barrister and solicitor of the Supreme

Court of Victoria and High Court of Australia. Helen has worked as Head of Office, ICRC Sydney and Legal Adviser to the ICRC Regional Delegation of the Pacific, and has carried out a number of short missions with the ICRC in Burma, Aceh, and the Philippines. In 2006–2008 she held the position of Director, Research and Development, with the Asia Pacific Centre for Military Law and was previously IHL Manager of Australian Red Cross. She has published a number of edited books and articles on IHL and her most recent co-authored book is *Documents on the Law of UN Peace Operations* (2010). She currently teaches in the Melbourne Law Masters programme at Melbourne Law School and has a number of research projects focusing on topics such as the Responsibility to Protect (R2P) and IHL, the legal framework of the international deployment of police, and gender and IHL.

Helen Durham © ICRC



Mykola M. GNATOVSKYY, Professor of International Law (Ukraine)

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Mykola Gnatovskyy © ICRC

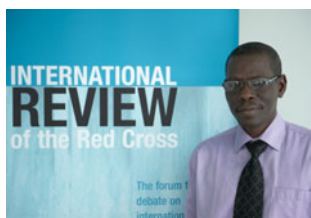


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He is an active figure in Senegalese civil society, campaigning for women's rights, against female circumcision, and for the prevention of AIDS/HIV. He is well known and well connected with universities, religious institutions, and leaders in West Africa and the Middle East. He has worked as an expert and consultant for various different international organizations and UN bodies. In co-operation with the ICRC, he runs a programme for postgraduate students in his university under the title 'Islam: sociétés en mutation'. As an external expert, advisor, and friend of the ICRC, he has attended several networking meetings organized by the global affairs unit in Africa since 2006.

Abdoul Aziz Kébé © ICRC



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Elizabeth Salmón © ICRC



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Marco Sassòli © ICRC



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Yuval Shany © ICRC



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Hugo Slim © ICRC



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Gary D. Solis © ICRC



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Nandini Sundar © ICRC



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Fiona Terry has spent most of the last twenty years involved in humanitarian operations in different parts of the world, including Northern Iraq, Somalia, the Great Lakes region of Africa, Liberia, and Sudan. She was a research director for Médecins Sans Frontières in

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Fiona Terry © ICRC



Peter WALKER (UK), Director of the Feinstein International Center, Tufts University, Boston (USA)

Director of the Feinstein International Center since September 2002 and active in development and disaster response since 1979, Peter Walker has worked for a number of British-based NGOs and environmental organizations in several African countries, and has been both a university lecturer and director of a food wholesaling company. He joined the International Federation of Red Cross and Red Crescent Societies in Geneva in 1990, where he was Director of Disaster Policy for ten years before moving to Bangkok as Head of the Federation's regional programmes for Southeast Asia. He has travelled extensively in the Middle East, Africa, Eastern Europe, and the former Soviet Union, and has published widely on subjects as diverse as the development of indigenous knowledge and famine early warning systems, to the role of military forces in disaster relief. He was the founder and manager of the *World Disasters Report* and played a key role in initiating and developing both the *Code of Conduct for Disaster Workers* and the *Sphere* humanitarian standards.

Peter Walker © ICRC



Interview with Ali Ahmad Jalali*

Distinguished Professor at the National Defense University, Washington, DC.

For this issue on understanding armed groups, the Review considered it important to invite someone who could give the inside perspective of an armed group. Minister Ali Ahmad Jalali, currently Distinguished Professor at the National Defense University in Washington, DC, is uniquely placed to do so in the context of Afghanistan: he has at once the experience of a former member of the Mujahideen during the war against the Soviet Union, a former Colonel in the Afghan National Army, and a former Minister of the Interior for Afghanistan from 2003 to 2005. Minister Jalali has published extensively on political, military, and security issues in Afghanistan, Iran, and Central Asia.

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In the face of the current armed opposition, how would you, based on your experience both as a former member of the Mujahideen and as former Minister of the Interior, compare the two types of armed groups?

On the ground, the fighting is maybe the same, but politically and strategically these two conflicts are two different things.

When the Mujahideen were fighting the Soviet occupation of Afghanistan, the majority of the international community was with them, supporting the armed opposition of the time.

The Soviet invasion actually tried to prop up an unpopular regime, against which the people were fighting. Even before the invasion, there was an uprising against the attempt by the communist government of Afghanistan to impose its lame ideology on the country. It was a kind of nationwide uprising. Therefore, that

* This interview was conducted on 8 June 2011 in Washington, DC by Vincent Bernard, Editor-in-chief of the *International Review of the Red Cross*, and Michael Siegrist, Editorial Assistant.

invasion was very different from the one you see today. The Mujahideen were popular.

The factions received a lot of support inside Afghanistan, but the problem was that they were fragmented. They did not have a unified command, a unified political leadership. Their action was more tactical than strategic.

Another difference is that at that time there was a cold war, a bipolar confrontation in a bipolar global situation. Afghanistan was the last battlefield of the cold war: it was a superpower war. The countries helping the Mujahideen were in fact also advancing their own interests. Many countries in the West supported them because they thought that the Mujahideen could give a bloody nose to the Soviet Union in Afghanistan. They thought that the Soviet Union was not going to leave Afghanistan until it had turned it into another satellite country, that the Soviet Union would not renounce easily, and that it would be a long war. They calculated that only fundamentalists, religious groups, would fight the Soviets efficiently because there would be several generations of them. The West thought that even nationalists would not have that same ideological fervour impelling them to continue and prolong the war.

So there was a tendency to favour the fundamentalist groups. And then all the religious extremists who wanted to support a cause, a religious cause, came to Afghanistan. And that is what created the problems after the Soviet Union left Afghanistan. It was that kind of a war.

The situation today is very different. The international intervention in Afghanistan in 2001 was the opposite of the Soviet Union's intervention. While the Soviets came to *prop up* an unpopular regime against which people were fighting, in 2001 the international community came to *remove* an unpopular regime against which people were fighting, or against which part of Afghanistan was fighting.

One indication that it was again a popular uprising is that the intervention actually included only a few hundred ground troops from the international community, but in less than two months the Al Qaeda network was on the run and the Taliban was removed from power. It was the desire of people to remove that regime, and the international community supported that desire.

Another indication is that during the Soviet occupation of Afghanistan close to five million Afghans left their country and became refugees, whereas after the intervention by the US-led coalition more than four million¹ returned to Afghanistan. During the Soviet occupation the occupying forces tried to impose the communist ideology from the top; during the coalition intervention in Afghanistan there was no forceful imposition of an ideology.

That is why armed groups were more acceptable to the people of Afghanistan during the Soviet occupation and received more attention and support from the outside world. Today the situation is reversed: the Taliban are a hated group internationally, and forty or more countries are fighting them in Afghanistan.

1 Note from the Editor: the exact figure is still disputed. See e.g. the statistics on Afghanistan by the United Nations High Commissioner for Refugees (UNHCR), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486eb6> (last visited 21 September 2011).

Do you see changes in the tactics and methods of today's armed opposition, compared with those of the Mujahideen?

Basically some of the tactics are the same in terms of raids, ambushes, or hit-and-run operations. However, the close relationship of the Taliban with international extremist organizations like Al Qaeda means that they get more sophisticated technical assistance from the outside terrorist networks. Because of this, new practices have appeared. Suicide attacks were unheard of in Afghanistan until recently, but are now becoming a weapon. Roadside bombs or improvised explosive devices (IEDs) are used in a more sophisticated way. Terrorism was rarely used in Afghanistan during the Soviet occupation. Afghans wanted to fight the Soviet Union face to face; they did not kill women, they did not behead people. This is being practised today by the Taliban.

Today the tactics are more radical, more brutal, and at the same time are linked to the global Jihadist movement. That movement is using local insurgencies to advance its agendas, and local insurgencies are taking advantage of the assistance they receive from it in order to advance their own agenda. That link did not exist during the Soviet occupation of Afghanistan.

Do you think that the logistical aspect and the choice of weapons available also have an impact, or is there no fundamental difference?

The methods used by the Taliban and the other associates aim at creating terror among the population, particularly at a time when the government is not strong enough to protect them. For that very reason terror tactics are having a psychological impact on the population. As long as people believe the government cannot protect them, they co-operate, or they tolerate, or in some cases they sit on the fence without supporting the government. The majority of the people of Afghanistan do not want the Taliban to come back.

During the Mujahideen period most of the people wanted the Mujahideen to succeed. However, at that time the Mujahideen were not using these brutal tactics, so people could openly help them, or even support their operations. Today, because of the fear, the terror that is created among the population, they actually do not want to stand up against the Taliban on behalf of a government that cannot protect them.

How would you describe the differences in structure and organization of the groups?

In some cases their structure is similar. Take a look at the organization of these armed groups both vertically and horizontally. Vertically there is a hierarchy, an organization, and an ideology, and horizontally there are several groups and factions who fight for different reasons.

The Taliban has a kind of known leadership, or several leaderships. Vertically they all connect to the same kind of chain of command or political affiliation. But horizontally they fight for different reasons, using that vertical political affiliation to gain legitimacy.

During the Mujahideen period there were no vertical dimensions shared by the seven factions; each faction had its own kind of hierarchy – and Iranian groups had yet another hierarchy. People were fighting just because they thought it was the right thing to do. What really unified people was the hostility towards the Soviets and the communist ideology – that was the driving force behind them. Nobody wanted to compromise on this. That was the reason why all those fragmented factions and decentralized groups actually fought against a common enemy.

The seven factions in Pakistan were only giving general guidance to their groups; all major tactical and operational decisions were made locally. It was a village war; today it's not. At that time, each village had to fight for itself because they believed that was the right thing to do. Today it's not a village war but a kind of provincial war or a wider territorial war. Today it is a national war, a war of a whole nation. It's even a regional war.

Would you say this fragmentation helped or hindered the fighting?

The whole Jihad against the Soviet Union in Afghanistan was, as I've said, decentralized; it was a 'village war'.

As such, it had its strengths and weaknesses: its strength lay in the close relationship of the fighter to his home – they were defending their homes, they fought for their homes. Secondly, because there was no centralized structure, the Soviets had to fight for every village if they wanted to defeat the leadership and make the resistance fall apart, and even when they destroyed a village, it would rise again. They were not short of enemies! That was a war of 'one thousand cuts', as they call it.

But a first weakness was that the Mujahideen could not exploit tactical successes or turn them into operational and strategic successes. Because there was no connection between all their small gains, it was not possible to transform them into a major operation and a strategic achievement. Furthermore, there was no vision for the future: when you had forced the Soviets out, what were you going to do? Many believed that once the Soviets had gone, those factions would fight each other because they could not agree on the kind of government, the policies, or the leadership that should be established.

Secondly, since they were competing with each other, factions always tolerated corruption so that corrupt members would not defect and turn to other factions. So the corruption you see today in Afghanistan actually started at that time. It became a culture of impunity.

Thirdly, another weakness was that in many areas there was infighting between the Mujahideen because of excesses committed by some of them. For example, in Helmand province two factions – Harakat-e-Inqelab-Islami and Hezb-e-Islami – fought very brutally for many years. The Jamiat-i-Islami and Hezb-e-Islami factions likewise fought each other in some areas in the north.

Infighting or turf battles also took place for control of an area and lucrative economic resources. But, despite all this, the hostility against the Soviets prevailed.

Some people actually wanted to use the Soviets against another faction, but this did not mean they would not simultaneously fight against them!

You say that the Mujahideen were supported by the population. How did the Soviets react to that?

The way the Soviet Union tried to deprive the Mujahideen of local support is another difference between now and then. The Soviets wanted two things: first, to destroy the sources of support for the Mujahideen; and secondly, to induce people either to leave the country or to come to cities, which were easy to control.

To do that, they applied Mao Tse Tung's idea that the guerrilla lives among the population like fish in the sea. They wanted to drain away the water in order to kill the fish. Consequently, during the Soviet occupation 1.5 to 2 million Afghans lost their lives through the carpet bombing of rural areas and major cordon-and-destroy operations.

In cities where they could control the people, they tried very hard to win their hearts and minds; they would help them and give them coupons to enable them to live there. Outside, in areas they could not control, they used violence.

When the Soviet Union started devastating the countryside to deprive the Mujahideen of logistical and popular support, then the Mujahideen went to establish *markaz* (strongholds) or bases in destroyed areas.

They set up these small mountain bases like Sharafat Koh in Farah to support long-distance operations because the countryside was destroyed. By the mid-1980s, some areas were so devastated that the Mujahideen had to take everything with them, even food, from their staging areas or outside bases to carry out their raids, so it became very difficult for them to sustain an attack. They would fight in what I called in my writings 'a short hit and a long run' tactics. The fighters would travel long distances on foot in order to attack one post, and then come back to resupply.

How did you see the role of humanitarian organizations in the conflict against the Soviets?

Well, it helped a lot, but later on it was also hijacked by people in the resistance who were much stronger. In many areas and in many places, their support for the humanitarian organizations was conditional: okay, you help me, and then I will protect you, something like that. But still, I think all the humanitarian organizations did not reach out to the needy populations because the local Mujahideen groups actually became a surrogate government in many areas and influenced humanitarian assistance to provide some basic services which could not be provided by the government.

I think that humanitarian assistance can take place in areas where humanitarian organizations feel safe. It is physically safe to go when the armed groups accept or support you. But unfortunately the support the local armed groups give to humanitarian assistance is often very selective. They would probably accept it

only if it helped their own agenda. So although humanitarian assistance should be separate from military operations, in many cases that is not possible, for two reasons. First, because of the security situation, as in some areas only the military can deliver humanitarian aid. Secondly, because during military operations the military wants those operations to become connected with humanitarian aid to facilitate their success.

In a conflict area there are usually two sides fighting each other, and a large population in between. If the one side controls the area and delivers services there, they are militarized services, so in one way or another they will be biased. I think the ideal conditions would be for both sides to say: 'Okay for the delivery of humanitarian assistance, we will let it go through and we will not control it.' But that will be very difficult. They will always try to control it somehow.

However, if there are neutral organizations that can be allowed to deliver at all times in a conflict area, that's the best way to deliver services to the public. In that regard, the ICRC has played a very, very effective role in Afghanistan.

Today the armed opposition has produced its own code of conduct.² Did the Mujahideen at the time have a code of conduct too, or a similar document?

Well, the Mujahideen movement was fragmented and conduct varied from place to place. For instance, the Mujahideen factions in Pakistan could not control the behaviour of their groups inside Afghanistan, so it was very decentralized. It depended on who was in charge in any one area. There were good commanders who used to stick to certain rules and treated the population well, and there were people in some parts of Afghanistan who were not that good. They abused their power, and that's why in some areas people actually joined government militias against them.

Because of Mujahideen excesses or atrocities some people fled; they either migrated to Pakistan and Iran or went to major cities. Many went to cities because they could not tolerate living under the control of certain Mujahideen groups.

Misconduct or crimes were rarely punished because, as I said, there were seven factions and no faction wanted to treat any of its members very harshly, except some groups, otherwise they would go to another faction. And most factions wanted to keep all their men, whether good, bad, or ugly.

A code of conduct would indeed have been useful, as I saw later on when I found myself involved in counter-insurgency. In such an insurgency/counter-insurgency war the two opposing sides are only two minorities. The people constitute the majority and they are in between the two. The prize goes to whoever wins the support – the hearts and minds – of the people.

Now, if you look at the population in Afghanistan today, you realize that hearts and minds are divided between the two opposing forces. At heart,

2 See 'The Islamic Emirate of Afghanistan: the Layha (code of conduct) for Mujahids', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 103–120.

the population won't support the return of the Taliban, but in mind it makes practical decisions regarding what is good for it. I see that you have to work for hearts and minds at the same time; for instance, you can win the heart of somebody but at the same time you have to protect him so that you win his mind too.

At the time, did the Mujahideen know the law of armed conflict?

I think the Mujahideen used several sources. One was the Islamic Sharia, which in fact laid down the guiding principles for dealing with the population. Another source was the customary law, tribal and non-tribal, of the different regions. And the third was some kind of residual continuation of the past government laws.

In my opinion, the law of armed conflict is important only when you are dealing with educated populations. For whom were those Mujahideen fighting in Afghanistan? Many of them were villagers; they'd never even heard about the laws of their own country, let alone international law or the Geneva Conventions. Nobody had except for some people, maybe the educated ones, but the others behaved on the basis of the sources I just mentioned. Since all the judges and enforcers of the law were gone and the people only knew Sharia law, and the influential members of the tribe knew the customary law, that was all.

Based on your experience, how do you see today's trends in the evolution of armed groups?

The armed groups include not only the Taliban or the Haqqani network or Hezb-e-Islami. There are non-state patronage networks led by powerful figures inside and outside the government in Afghanistan, such as militias and the residual continuation of the old Mujahideen groups like Jamiat-i-Islami and others. And there are the drug-trafficking networks and old factions, old armed groups, disguised as private security companies legitimizing themselves by posing as such. Then there are all the many people in Afghanistan with bodyguards, who are very closely linked to the individual person; some may have as many as 150 bodyguards. And there are illegal armed groups or the private armies; of course they are not fighting each other now but they are armed, and that undermines the effectiveness and authority of formal institutions, namely law enforcement, the army, and others, because the state institutions are informally also linked to some of these patronage networks.

The same holds true for the use of local police. If you go and create a local police force somewhere, who is going to control it? The person who is powerful locally because of his guns and money. Unfortunately, during the past thirty years of this instability and the emergence of these patronage networks, the social structure of Afghanistan has changed. The traditional leaders are no longer in charge; people with guns and money or those with connections with insurgents and access to foreign money have become the local strongmen.

What are the main risks for Afghanistan today?

I think the main risks are the continued insurgency, the weakness of the government, and the unstable environment and corruption. Corruption has become a low-risk activity in a high-risk environment, and people in an uncertain environment want to safeguard their future. So if you appoint a police officer and he doesn't know how long he will be there or what the situation tomorrow will be, he will want to accumulate some wealth unlawfully for the rainy days ahead.

How would you compare the withdrawal of the Soviets to today's slow disengagement of the multinational forces?

To my mind, there are some issues to think about. First of all, during their time here the Soviets established a very strong army, police force, and intelligence service. Today, in comparison, the set-up is not that elaborate. Just take a look at the air force: the Afghan air force was one of the strongest in the whole area back then, whereas today Afghanistan has no air force at all. If you look at the equipment, this army appears much weaker than the one the Soviet Union left behind. However, ideologically that was a different time. I think the fact that the cold war was drawing to a close and the Soviet Union was collapsing gave some kind of reason for people inside the government to rise up against the central authority and to co-operate with the Mujahideen.

Today you do not see that reaction. First, today the army is maybe not so strong, and maybe when the US leaves Afghanistan there is a possibility of civil war. But above all, there is no possibility that the internal forces or the government forces join the Taliban. Secondly, I don't think the United States or the international community will just cut loose and leave. I think it will take a long time for the international community to completely withdraw all its forces from Afghanistan. And, finally, the Cold War is over.

Armed groups and intra-state conflicts: the dawn of a new era?

Arnaud Blin*

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Abstract

Have the various profound changes that have affected the world, and particularly its geostrategic dimensions, since the end of the Cold War radically altered the nature of conflicts? Twenty years after the collapse of the Soviet Union and ten years after the destruction of the twin towers in New York, there is an apparent degree of continuity in the resilience of former centres of unresolved conflicts and of armed groups involved in them. Nonetheless, whereas most armed conflicts can today be classified as 'intra-state', the general context has changed to the extent that reference is now made to the phenomenon of 'new wars'. Increasingly unacceptable economic and political imbalances along with globalization, environmental damage and its consequences or the emergence of large-scale conflicts triggered by organized crime are some of the perils already affecting the nature of today's conflicts or potentially defining those of the future. As the period dominated by jihadist groups with a universalist vocation possibly draws to an end, the current trend seems to be towards a new generation of guerrilla fighters who stand to benefit, in particular, from the erosion of the nation-state and from geopolitical convulsions arising from the post-colonial legacy as the starting point for intensely zealous and violent long-term ventures. The impact of globalization could cause a flare-up of

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some existing conflicts that are currently limited in scope while the international community struggles to redefine other rules and to adapt them to the new dialectic of war and peace.

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*If you wish to know the deep truth about war, you need to understand that it follows the laws of the bow and arrow. The arrow is the soldier, the bow is the general, and the person doing the shooting is the sovereign.*¹ (Sun Bin)

*Peace: in international affairs, a period of cheating between two periods of fighting.*² (Ambrose Bierce)

Towards new wars?

Although it is not always possible to assert that war is a vector of social change, social change is undoubtedly a force that changes warfare. Regardless of whether it is political, geopolitical, economic, social, intellectual, spiritual, or industrial, the immediate effect of each break with the past or each revolution is to change the nature of warfare, to alter our attitude to war, and to transform the inextricable and complex relationship between political and military action. As a corollary, the new face of war is revealed to us: in other words, the face of those actively engaged in the fighting, irrespective of whether they are regular or irregular armies, battling fiercely in the hope of gaining power, recognition, and political legitimacy. Each of those breaks with the past, or revolutions, is generally fuelled by the hope that the newly beginning period will be one in which there is a clear or even definitive reduction in the number of conflicts. In most cases, unfortunately not only are there no fewer conflicts but all too often those conflicts announce a new stage in the 'progression' of violence, introducing forms of violence that had long since become obsolete or were previously unknown.

In this article, we will endeavour to outline the main trends in the geostrategic shift that has been taking place before our very eyes over the past twenty years or so by presenting a portrait of the new actors concerned. The shift is difficult to apprehend: a single occurrence does not make it customary; the break with the preceding period, that of the cold war, was not ratified by a major peace conference or by treaties aimed at restructuring the world and establishing new conditions of war and peace. There was no Peace of Westphalia, Congress of Vienna, Treaty of Versailles, or Yalta Conference. Despite the lack of formal agreements, a major

1 Sun Bin, *The Art of War* (fourth century BC), English translation of the original quote in French in *Economica*, Paris, 1996, Chapter X, p. 41.

2 Ambrose Bierce, *The Devil's Dictionary*, Dover, New York, 1993, p. 32. The American satirical journalist Ambrose Bierce (1842–1914) was extremely popular in his day. He was deeply affected by his personal experience of the American War of Secession. He disappeared without a trace during the Mexican Revolution.

peace conference, or an attempt to establish a new world order, the metamorphosis is still impressive, starting with that of war and of those making war.

This transformation in the methods of organized violence will form the leitmotif of this study, in which we will focus first of all on the most widespread and murderous conflicts of the period, intra-state conflicts – conflicts within one state rather than between two or more states – conducted by irregular armed groups; those conflicts are today at the heart of wars that are sometimes difficult to categorize as new types of conflict or alternatively as a crumbling of façades. Nevertheless, that is what we will attempt to do. Moreover, the erosion of the nation-state – or at least of its omnipotence in controlling organized violence, on which it had a monopoly until recently – is a trend that is very likely to increase, with consequences that cannot yet be foreseen and effects that cannot yet be measured.

The global decline in the nation-state, a long-term phenomenon whose short-term consequences should not be exaggerated, can be linked to the sudden collapse of some state apparatuses whose disintegration has rapid, violent repercussions beyond the borders of the countries concerned. It is evident that some free-falling countries will be in need of consistent efforts by the international community to help to repair the structures of those states that have failed or are in great difficulty. It is not unhelpful to recall that the Balkan crises that arose as a result of the disintegration of the Ottoman Empire were what led to World War I or that the burdensome legacy of the Western or Soviet colonial era (and of post-colonialism) is causing tremors similar to those that shook the Ottoman, Russian, and Austrian empires before the Great War.

In the words of Clausewitz, war is a chameleon.³ It is continuously changing and adapting. It is thus natural for war to change in style.⁴ While the twentieth century witnessed the arrival of mechanization and then of nuclear weapons, which first reinforced and then, by a strategic paradox, wiped out paroxysmal violence, the most striking phenomenon in the twenty-first century is the asymmetry between extremely high-tech warfare and new forms of organized violence, which indirectly eradicate the impact of the most sophisticated weaponry.⁵ The phenomenon referred to as ‘new wars’ also involves the erosion of all the

3 Reference may be made to the study of this subject by Raymond Aron, who tells us: ‘Thinking of contemporary wars as Clausewitz did does not consist of mechanically applying concepts applicable to Prussian officers but of faithfully following a method. As war is a chameleon in both senses of the word – war changes from one situation to the next and is complex in every situation – the primary task of a statesman is to determine the true nature of that particular war that it is his responsibility to understand or conduct’. See Raymond Aron, *Penser la guerre: Clausewitz, Tome II, l’âge planétaire*, Gallimard, Paris, 1976, p. 185 (*Clausewitz: Philosopher of War*, London: Routledge, 1983) (ICRC translation.) With regard to wars in the twenty-first century, it should also be recalled that Clausewitz was initially a theoretician of ‘small-scale war’ or guerrilla warfare – drawing his inspiration from the example of Spain – before he became a philosopher of war.

4 See the seminal work by Martin Van Creveld, *The Transformation of War*, New York, Free Press, 1991; and the surprising analysis by Roger Caillois, *Bellone ou la pente de la guerre*, Fata Morgana, Fontfroide-le-Haut, 1994. Although written by a multifaceted and hence non-specialist author, this is one of the most incisive works every produced on the evolution of war.

5 There is no better illustration of the phenomenon than the war in Afghanistan, where a superpower with the most sophisticated weapons clashes in the same setting with foot soldiers fighting (almost) as in the Middle Ages. Obviously, the asymmetry is disrupted when foot soldiers prove capable of destroying a

traditional parameters of war that distinguish between lawful and unlawful actors, states and private protagonists, soldiers and civilians, intra- and inter-state wars, and political and lucrative objectives. A concise definition of new wars is presented by Mary Kaldor:

My central argument is that, during the last decades of the twentieth century, a new type of organized violence developed, especially in Africa and Eastern Europe, which is one aspect of the current globalized era. I describe this type of violence as 'new war'. I use the term 'new' to distinguish such wars from prevailing perceptions of war drawn from an earlier era ... I use the term 'war' to emphasize the political nature of this type of violence, even though ... the new wars involve a blurring of the distinction between war (usually defined as violence between state or organized political groups for political motives), organized crime (violence undertaken by privately organized groups for private purposes, usually financial gain) and large-scale violations of human rights (violence undertaken by states or politically organized groups against individuals).⁶

What makes those wars really 'new'? The scope for discussion is vast! It may be argued that they are the fruit of all those disparate phenomena that make up the world today, beginning with those closely or remotely linked to globalization,⁷ which, as the philosopher Edgar Morin reminds us, merely 'sustains its own crisis. Its dynamism engenders multiple and various crises on a planetary scale.'⁸ *A contrario*, those new wars are also, in a way, part of the ongoing development of the guerrilla warfare of the 1960s, of the low-intensity conflicts in the period following the Korean war, and of the revolution in military affairs (RMA) that was proclaimed during the closing years of the twentieth century in the United States and driven by the Pentagon and that emphasized the armed forces' new technologies and their communication, information, and organization systems.

state-of-the-art helicopter with a simple rocket-launcher. However, political rather than strategic factors (at least at the operational level) often cancel out purely military and technological superiority with the limitations imposed on regular armies, especially when the fighting takes place far from home. See in particular, and especially with regard to humanitarian consequences, Robin Geiss, 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, December 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, March 2005, pp. 149–174.

- 6 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 2006, pp. 1–2. See also Herfried Münkler, *The New Wars*, Polity Press, Cambridge, 2005. Other authors refer to 'postmodern' warfare although, in conceptual terms, the ideas presented are very similar to those relating to new wars. See, for example, Victor Davis Hanson, 'Postmodern war', in *City Journal*, winter 2005. On the transformation of war in the twenty-first century but without engaging in semantic debates, Laurent Murawiec provides an analysis of conflicts based on the ideas developed in the context of the revolution in military affairs: *La Guerre au XXI^e siècle*, Odile Jacob, Paris, 2000. For an incisive analysis of the causes and consequences of the strategic shift, see the essay by Gérard Chaliand, *Le nouvel art de la guerre*, Hachette, Paris, 2009.
- 7 See, nonetheless, Sadowski's warnings about the relation between globalization and war in the post-cold-war period: Yahia Sadowski, *The Myth of Global Chaos*, Brookings Institution, Washington, DC, 1998.
- 8 Edgar Morin, *La Voie*, Fayard, Paris, 2011, p. 21.

Above all, the phenomenon of new wars recalls that of the major conflicts that occupied pre-Westphalian Europe, particularly those associated with the Thirty Years War (1618–1648), during which the impassioned violence of the wars of religion intertwined with the power struggles between rival factions and states. Rereading the large picaresque novel of the period, Grimmelshausen's *Simplicius simplicissimus*,⁹ reminds us that the cycles of war often cause us to relive the same situations and the same horrors. While the current situation may rekindle the European memory of the seventeenth century, it is also able to do so because the termination of the cold war put a definitive end to the system of conflict management that was set up at the end of the Thirty Years War and to which Europe – and then the world – adhered, for better or for worse, for 350 years.

In a way, we have come full circle, the Westphalian system proving incapable of preventing the major conflagrations of the twentieth century or the disintegration of the area – Europe – that it was supposed to protect. The emergence of 'new wars', whatever their historic originality, is therefore a direct consequence of there being no system of world governance capable of guaranteeing the stability and security of the entire planet. However, if one lesson must be drawn from the Thirty Years War, it is that, without effective peace mechanisms, violent localized conflicts of the kind that can be observed today may spread very quickly to other areas and drag whole regions into a downward spiral. In this overview, we will see, from what is apparent in the world today, how real that threat may be, although we are fully aware that our ability to anticipate the major upheavals of the future is regularly undermined by rarely foreseen turns of events.

In theory if not in practice, the phenomenon of 'new wars' calls into question the validity of the traditional typology of conflicts, which made a clear distinction between conventional and irregular warfare, with a whole range of conflicts extending from guerrilla warfare, urban guerrilla warfare, or low-intensity conflicts to the virtuality of nuclear war, each of which has its own particular features. From that perspective, the distinction between each of those conflicts becomes blurred, and the two poles of the spectrum of organized violence – terrorism and nuclear war – come together in the highly symbolic (and currently virtual) threat of a form of terrorism that makes use of weapons of mass destruction. Moving away from a typology that has so far been based on operational methods, the nature of the protagonists, the political objectives and demands, or the degree of violence, we now need to adopt a broader vision of conflicts, which takes account of the various factors or weighs up each of them against the others and draws attention to other phenomena outside the realm of generic categories. Furthermore, the character of present-day and future warfare underlines the very notion of a typology because, in a way, the concepts of 'new wars' or 'postmodern wars' constitute a refusal to establish cut-and-dried categories by insisting on the historicity of conflicts that are typical of the present era. In that sense, that also takes us back, in a

9 Hans Jakob Cristoffel von Grimmelshausen, *Der Abenteuerliche Simplicissimus Teutsch*, first published 1669. It has been translated several times in France and in the United Kingdom under the title of *Les aventures de Simplicius Simplicissimus/The adventures of Simplicius Simplicissimus*.

way, to a traditional view of war, in that, regardless of its form, war has intrinsic, fundamentally unchanging characteristics. It is not by chance that Clausewitz and Sun Tzu, who wrote about the strategic dimensions, are so popular today, whereas Jomini, who was once extremely influential and whose strategic thinking was essentially based on the operational dimension of war, has fallen out of favour.¹⁰ The nineteenth-century strategists, most of whom were trained soldiers, saw war and politics as two separate entities, whereas the twentieth century favoured a holistic approach, in which war was seen as a facet of politics, similar to diplomacy. This change really set in with World War I, which witnessed, on the one hand, the apotheosis of theories about total war and, on the other, the emergence of the Marxist revolutionary vision expounded first by Lenin and then by Mao, both of whom were well acquainted with Clausewitz,¹¹ Mao also being versed in classic Chinese strategic thinking.

Beyond those theoretical and semantic discussions, events oblige us to ask more mundane questions about the immediate evolution of conflicts. We are therefore prompted to ask whether the death of the figurehead of the jihadist movements, Osama Bin Laden, after a decade characterized by the media attention given to armed jihadist groups, marks the end of a period in which terrorism was affirmed as the privileged method of numerous insurrectional movements throughout the world. Are we to expect a re-emergence of classic guerrilla warfare as seen throughout the history of the twentieth century? The same applies to the impassioned conflicts that have caused millions of deaths, particularly in Africa. And what about the new threats associated with fierce competition for natural resources or the rapid deterioration of the environment? These questions will guide us through this brief survey, which is of necessity non-exhaustive but through which we will endeavour to define the planetary conflict situation. We will also pick out some of the currently most significant non-state armed groups which, for decades or in the recent past, have been using violence to challenge the authority of established regimes in various places. Having looked at warfare today and the possible implications of the 'Arab Spring', we will move on to review armed groups that are actively participating in contemporary conflicts. We will then describe more specifically the conflicts on the fringe of the former Soviet Union. Finally, we will endeavour to establish the nature of the threats and demands of various armed groups in the world and will turn our attention to the phenomenon of wars of passion, to our persistent powerlessness in the face of war, and to the new age of minorities, before concluding by defining some future paths.

10 Nonetheless, a new edition of his synthetic work has been published in France, where it is also available as a paperback: Antoine-Henri Jomini, *Précis de l'art de la guerre*, Perrin, Paris, 2008. In the nineteenth century, Jomini enjoyed tremendous prestige, far greater than that of Clausewitz.

11 Lenin's interest in the Prussian philosopher is evident in his copiously annotated copy of *On War*. In a letter to Karl Marx (1858), Engels seems to prefer Jomini: 'Jomini is definitely the better historian and, apart from a few excellent things, I do not like the innate genius of Clausewitz', while Lenin is wholehearted in his preference: 'Clausewitz is one of the most profound military writers, one of the greatest, one of the most remarkable philosophers and historians of war, a writer whose basic ideas have today become the indisputable property of every thinker'.

War today: beyond appearances

The present internet age tends to blur the borders between reality and virtuality and to do away with space–time in favour of immediacy. As the problems of war and conflict are long-term, this has logically given rise to a gap between a general perception of war as failed politics – partly owing to the fact that the military objectives do not necessarily tally with the political objectives – and hence as an anomaly, and a reality in which war tends to be a continuation of those politics by other means.¹² Consequently, our perception of conflicts is disrupted by the fusion of contemporary and potential conflicts, of global instability and real dangers, of economic crises and geostrategic disorders. Moreover, the other current phenomenon, economic globalization, has not yet genuinely produced a globalization of conflicts, since nearly three-quarters of the armed conflicts listed today are intra-state conflicts.¹³ These do not involve external elements (at least, not directly) and do not extend beyond the borders of one country.¹⁴ All in all, if there is one area in which past systems still seem to work, it is that of war.

Armed conflicts, wars, and the groups taking part therefore appear to be anything but revolutionary. On the other hand, it could almost be said that our difficulty with understanding the present moment is primarily due to the mismatch between a world that is in a state of flux and wars that have not left the past behind. Those wars are fought with conventional weapons, within state borders, for mundane reasons and classic issues, most of which are limited to power struggles or aspirations to autonomy. Ultimately, only the omnipresence of a radical Islamist ideology among a large number of active armed groups would appear to have marked a change compared with the previous decades.

Those taking part in such wars also have familiar faces: political regimes that frequently abuse their power and non-state groups motivated by territorial and/or identity claims and seeking legitimacy and means of fighting. Between the two is the famous ‘military–industrial complex’, as it used to be called, which, in accordance with the relentless logic of the market, is fuelled by all conflicts on the planet.

The world’s geopolitical stability – the most important phenomenon being the emergence of new major powers (or superpowers) – nonetheless carries on, year in, year out, aided by the fact that territorial predation, until recently a characteristic feature of human history, is simply out-dated.¹⁵ Where peace and war are

12 See, for example, the incisive analysis by Raymond Aron, *Sur Clausewitz*, Complexe, Brussels, 1987, pp. 152–183.

13 In accordance with the 2010 classification of the Heidelberg Institute for International Conflict Research (HIIC), ‘Conflict Barometer 2010’, Heidelberg, 2011.

14 Recent studies tend to show that globalization apparently increases the mortality rate in inter-ethnic conflicts in contrast to other types of conflict. See Susan Olzak, ‘Does globalization breed ethnic discontent?’, in *Journal of Conflict Resolution*, Vol. 55, No. 1, February 2011, pp. 3–32.

15 Moreover, the paradox of contemporary international politics has to do with the incapacity of the world’s leading countries to manage the crises that may arise in various places. Michael Howard sums up this dilemma: ‘Peoples who are not prepared to put their forces in harm’s way fight at some disadvantage against those who are. Tomahawk cruise missiles may command the air, but it is Kalashnikov

concerned, there is a major difference between territorial predation – which is characteristic of imperial history – and economic predation – which is characteristic of the capitalist era – in that the latter does not necessarily lead to organized violence or armed conflict. All this is an attempt to clarify a geostrategic situation that may seem confused but that, in many respects, is not. Nowadays, the strategic shift triggered by the realignment of the major powers is accompanied by relative geopolitical stability, as the configuration of the political world map has been virtually unchanged since the death of the colonial empires, the last of which to collapse was the Soviet Union.¹⁶

On closer examination, however, present conflicts have a particular feature that partly changes the matter, in that they operate in a context in which, for various reasons, the case is not cut and dried, with everything that used to constitute war being considered a war, with a beginning and an end, in a defined territory and with known and recognized players.¹⁷ All that is now challenged, as we observed above in the discussion on ‘new wars’. The very notion of power, which is nonetheless the essential – and traditional – aspect of balances of power, has now been turned completely upside down by the new conflict dynamics, not to mention the concepts of combatants and non-combatants or even of the legitimacy of the use of force.¹⁸ The fact that many wars kill far more people by the indirect impact of war – in the Congo or Sudan, for example, with a ratio of 1 : 8 for deaths occurring during the fighting or outside the fighting – thus alter the dynamics of a conflict and its setting.¹⁹

On this crucial matter, General Jean-René Bachelet writes,

The balance of power stopped being a decisive factor with the conjunction of two phenomena: on the one hand, the relative restraint shown by Western

sub-machine guns that still rule the ground. It is an imbalance that makes the enforcement of world affairs a rather problematic affair’ (Michael Howard, *The Invention of Peace: Reflections on War and the International Order*, Yale University Press, New Haven, CT, 2000, p. 102). It should be pointed out that this passage has been taken from a work that was written before the military operations in Afghanistan and Iraq.

- 16 More than territorial reconfiguration, it is the role of the state that changes. The state is becoming increasingly unable to meet the present challenges but still plays a key role, both because it is the sole body able to legitimize the use of force and frequently has a monopoly on the use of force and because as yet no other entity has really stepped into the breach. François Géré sums up the current problems regarding the state: ‘Traditionally the guarantor of a defined territory, the state is today caught between the rock of globalization and the hard place of regionalization. This phenomenon calls into question certain national entities more than others. As the organizer of domestic security and responsible for external defence, a state constitutes the interface between a given community at a particular moment in history and the other states, representing other communities made up of aggregate interests. However, the founding principle of international relations is being challenged – admittedly somewhat rapidly – in the name of globalization, micro-regionalization and the emergence of non-state actors with good or bad intentions’ (François Géré, *La Société sans la guerre*, Desclée de Brouwer, Paris, 1998, p. 267).
- 17 The privatization of war is of itself a major source of concern. See Dina Rasor and Robert Baumann, *Betraying our Troops: The Destructive Results of Privatizing War*, Palgrave, New York, 2007.
- 18 See Michael Mann, *Power in the 21st Century*, University of California Press, Los Angeles, CA, 2011.
- 19 In the Congo, for example, 350,000 of the 2,500,000 victims between 1998 and 2001 apparently died in armed combat. These figures must obviously be treated with caution. See Andreas Wenger and Simon J. A. Mason, ‘The civilianization of armed conflict: trends and implications’, in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, p. 836.

powers in the use of force; on the other hand, the irredentist position held by the 'weaker' nations, with the massive involvement of populations. The stronger party is a shackled Gulliver and the weaker party, even if without the means to achieve a real victory, can prolong the conflict indefinitely.²⁰

In such a context, in which the rules are ambiguous if they exist at all and the hierarchy of the strong and the weak²¹ becomes blurred while the gap widens between rich and poor countries, where war never seems to end²² but the conflicts remain unresolved, and where the great certainties of the past about modernization and democratization are crumbling, it is difficult to see what the future will hold. One thing is certain, however: while the operational dimension of current conflicts is familiar to us, their strategic and political dimensions have changed. That is the sense in which present wars, irrespective of whether they are classified as 'new' or 'postmodern', can be different from those of the past.

After the Arab Spring

It is a fact that the planet's geostrategic dynamics have undergone an astonishing change in two decades, at the very point in time when we celebrate the twentieth anniversary of the collapse of the Soviet Union and, with it, the end of the cold war. As if to mark that anniversary, the Arab world has treated us in 2011 to a monumental surprise with the spectacular collapse of several regimes that people believed would last at least for a long time, if not for ever. As for the post-1991 period, the political metamorphosis of the Arab world will most probably lead to internal conflicts that may well breed a new generation of armed groups with various demands, even if this only occurs as a result of the inevitable power struggle.

Will those burgeoning groups materialize from jihadist splinter groups claiming allegiance to Al Qaeda or will they be a variety of the insurgent warlords who originated in West Africa, or will we see the emergence of new kinds of entity?²³ It is still too soon to put forward serious hypotheses while the revolution is in its infancy. Nonetheless, we are already in a position to observe a phenomenon that is, at least, surprising: the negligible impact of the jihadist groups in those revolutions. While those groups derived their political legitimacy by asserting that they were the only ones able to topple the governments in place, the governments in question derived their political legitimacy by portraying themselves as the only defence against the jihadists. In this regard, events are prompting us to challenge

20 Jean-René Bachelet, *Bringing the Violence of War under Control in a Globalized World*, Forum for a New World Governance (FNGM), Paris, 2009, pp. 11–12.

21 See, for example, Ivan Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2005.

22 See Bruce Berkowitz, *The New Face of War: How War will be Fought in the 21st Century*, The Free Press, New York, 2003, p. 103.

23 See William McCants, 'Al Qaeda's challenge', in *International Herald Tribune*, 23 August 2011.

their future capacity to acquire that legitimacy. In terms of revolutionary vectors, Twitter, Facebook, and the new means of communication in general will ultimately have had more impact than a movement that was seen by many ten years ago as being the greatest threat in the twenty-first century. In particular, these revolutions have completely obliterated the notion of territorial borders; they spread rapidly from one country to the next while not even geographical proximity played a decisive role, and the leaders proved unable to prevent the spread of information and pictures.

As for the future of the region, a distinction should be made between the short and the long term. In the immediate future, a political recasting of the Arab world would be bound to lead to heterogeneous political regimes, a situation that, as we know, is generally the cause of tensions if not conflict, particularly inter-state conflict, with the possible interference, and therefore the emergence, of armed groups that may well have the backing of states wishing to become involved in their neighbour's internal affairs. Furthermore, the Libyan crisis and the intervention by the United Nations and then by NATO took us a little further towards a break with one of the basic principles of the Westphalian order that is still part of our present heritage and is included in the Charter of the United Nations,²⁴ that of absolute respect for national sovereignty and non-interference in a country's internal affairs. Paradoxically, that principle established in the seventeenth century in the name of respect for human rights – in the context of the wars of religion – is now being challenged in the name of those same human rights. However, in the absence of rock-solid principles for dealing with interference (or intervention to 'protect' – the 'responsibility to protect' evoked by the United Nations – for humanitarian reasons), a Pandora's box is opened that cannot then be closed, for better or for worse.²⁵

Alternatively, over the longer term, a wave of democratization could conceivably roll over the area and ultimately lead to the establishment of lasting

24 In Article 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

25 The principle of the 'responsibility to protect' ('RTP' or 'R2P') adopted by the United Nations in 2005 is directed towards protecting populations from mass atrocities. In accordance with the concept, 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect' (see Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', International Development Research Centre, Ottawa, 2001, pp. XI, XII, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited 1 November 2011)). The R2P was referred to by the Security Council on 22 February 2011 in the context of the Libyan crisis with this official press statement: 'The members of the Security Council called on the Government of Libya to meet its responsibility to protect its population. They called upon the Libyan authorities to act with restraint, to respect human rights and international humanitarian law, and to allow immediate access for international human rights monitors and humanitarian agencies'. See 'Security Council Press Statement on Libya', UN Doc. SC/10180, AFR/2120, 22 February 2011, available at: <http://www.un.org/News/Press/docs/2011/sc10180.doc.htm> (last visited 8 November 2011).

peace²⁶ in the entire region, including the Near East.²⁷ We have not yet reached that point. However, one thing is (almost) certain: in that region, the problem of war and peace is going to develop substantially over the next few years, with the possible or even probable outbreak of new armed conflicts, including intra-state conflicts, and fresh activities by various non-state armed groups.

It can be observed today that, in the Gaza Strip, Hamas must reach a compromise with various radical groups, similar to those in jihadist–Salafist circles, that challenge its authority and legitimacy and complicate negotiations with Israel by engaging in sporadic shooting against the latter and in southern Jordan. Similarly, the government in Yemen is having to deal with several armed groups that are challenging its authority in some regions. This applies to the best-known of those movements, Al Qaeda, with regard to the Arabian Peninsula (AQAP), which set up to the east of Yemen, whereas the army is having to deal with another armed group in the north, led by Abdel Malek al-Huthi, with a Shiite background. This type of situation tends to continue for some time without one party or the other succeeding in overthrowing or crushing its adversary. Yemen is more likely to become ensnared in war without achieving a peaceful outcome in the short or medium term. Moreover, an important distinction may appropriately be made between those two entities, with one of them (AQAP) belonging to the jihadist groups that proclaim broader, global-scale objectives – including the anti-Western struggle – while the other keeps to classic guerrilla warfare in its attempts to gain political power. The challenging of the political order in the north of the country by the Huthi movement, which is very well established among the people and has an organizational structure, contrasts with the relative security gap favouring the establishment of the AQAP in the south. Nonetheless, the political and strategic (as well as economic and logistic) necessities and the universalist character of the jihadist ideology each help to blur the traditional boundary between small groups with a national vocation and those with universal aspirations. That distinction applies elsewhere: for example, between the organizations affiliated to Al Qaeda and most of the others. The current pervading presence of radical Islamist ideology has confused the situation further still by banding together all groups claiming to adhere to that ideology, regardless of their political objectives, especially as they resort to similar techniques, beginning with that of terrorism.

26 The question of peace and democracy is at the heart of discussions on the essence of political science, as it is one of the rare political phenomena considered to be a 'law'. See, in particular, Miriam Fendius Elman (ed.), *Paths to Peace: Is Democracy the Answer?*, MIT Press, Cambridge, MA, 1997; and especially Michael Doyle, *Ways of War and Peace*, Norton, New York, 1997.

27 However, the problem of democratization and violence is complex. Reference may be made in that respect to the conclusions drawn from the Colombian experience on the notion that all groups should have access to power for democracy to be complete. See Mario Chacón, James A. Robinson, and Ragnar Torvik, 'When is democracy an equilibrium? Theory and evidence from Columbia's La Violencia', in *Journal of Conflict Resolution*, Vol. 55, No. 3, June 2011, pp. 366–396.

Armed groups: continuity and change

With a few exceptions, such as the Mexican cartels, whose aims are fundamentally criminal, the vast majority of the contemporary armed groups are primarily driven by political objectives. Although some of these groups have drifted towards criminal activities, this is first and foremost because of a need to fund their activities. Moreover, in the case of Mexico, the conflict engendered by the exponential growth of large-scale crime is seen at present to be mostly affecting people associated with organized crime (90%, according to the official figures of the Mexican government drawn up by the leaders,²⁸ which should be treated with caution; the remaining 10% – again according to the government – comprising civilians and members of the forces of order). If that tendency is confirmed, current conflicts are not automatically leading to violence against civilians. Moreover, the violence caused by drug cartels has now reached a level that makes it possible to define this other kind of conflict as war.²⁹

Whereas geopolitical and geostrategic revolutions speed up the rise and fall of non-state and transnational armed groups, they cannot prevent other groups from continuing to exist and remain active, even though the reason why they were originally established has ceased to apply because the situation has changed. Today, a world map of armed groups shows us a mix of other groups (similar to the Revolutionary Armed Forces (FARC) in Colombia) that are fighting for past causes but using means appropriate to the political (and economic) situation and of movements that have come to light during recent geostrategic shifts, such as in Central Asia or the Caucasus. The conflict in the Near East is in its seventh decade and the Palestinian armed groups have gradually evolved, particularly with regard to their ideology, with radical Islamism having largely replaced the secular ideologies as the intellectual basis for movements, some of which have, moreover, achieved greater political legitimacy. Otherwise, the conflict still seems as far from a solution as ever, although the political evolution in that area in the wake of the Arab Spring could rapidly open up new, previously un hoped-for perspectives.

Apart from some cases, such as that of the FARC, which are slowly losing pace, most armed groups that are involved in wars of national liberation seeking to break with the colonial era have logically deteriorated, with their out-of-date cause unable to generate the popular or even economic support needed to ensure their political success. Today, as in Uruguay where the former Tupamaro José Mujica was appointed President of the Republic in 2010, former guerrilla fighters have succeeded to power through democratic channels. Moreover, a certain number

28 Notably by President Calderon, who disclosed these figures publicly in April 2010.

29 Let us recall that, traditionally, war is a legal concept while conflict is primarily a sociological concept and therefore less precise. The former implies a certain level of violence while the second presents a broader range, which does not necessarily imply armed violence. More specifically, the subjective barometer that is applied nowadays is nonetheless a useful means of classifying a conflict as war: a threshold of 1,000 or more deaths. In 2010 the HIIK referred to the Mexican conflict for the first time as a war. Armed conflict is also a legal term; see, for example, 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, pp. 69–94.

of small groups that are too weak to engage in armed fighting and that were forced to resort exclusively to the weapon of terrorism have been obliged to withdraw as a result of the spectacular but unsustainable attacks organized by Al Qaeda between 2001 and 2005. The despicable and disproportionate nature of those attacks led to a substantial decrease in the room for manoeuvre and in the legitimacy of movements such as ETA (which formally announced in October 2011 that it would end its armed fight).

The map of insurrectional conflicts has actually moved distinctly from the American continent towards Asia, with an ideological shift that has for some time favoured radical Islamism over the various Marxist currents, although the latter may be about to return in force. The emergence in northern Paraguay of the Paraguayan People's Army, which follows the line taken by the FARC with its pursuit of guerrilla warfare and hostage-taking, perhaps signals a renaissance of this type of movement in a region with a long history of insurrectional warfare and a terrain that is suitable for that form of armed violence.

The year 2011 will perhaps mark a new stage in the history of conflict, with the death of Osama Bin Laden in the spring symbolically closing a period of ten years under the threat of terrorism whose failure to make a political impact was inversely proportionate to the anguished obsession of the people and the media, fed by an impressive series of attacks, primarily in Muslim countries. It may be hoped that the death of Al Qaeda's historic leader will at the same time lift the veil from other conflicts that are infinitely more murderous but have been largely forgotten as a result of insufficient media coverage. As for the economic health of the nations, the possible interest of the international community in some conflicts affecting areas on the periphery of geostrategic interests is fundamentally imbalanced; the countries described as being in the 'south', particularly on the African continent, are not treated in the same way as the 'strategic' regions that have a bearing on the political and economic interests of the 'northern' countries, which should be taken as including emerging market countries.³⁰ In that sense, the UN is, in a way, also fostering that unequal treatment, as it is keener to take more resolute and rapid action against a leader such as Gaddafi than one such as Mugabe, for example.³¹

The 2011 map thus shows that intra-state armed conflict remains largely confined to a few areas in Asia and Africa. What are the distinctive phenomena at

30 Nonetheless, it is also apparent that, however well intended, external interference does not necessarily produce positive results. See David E. Cunningham, 'Blocking resolution: how external states can prolong civil wars', in *Journal of Peace Research*, Vol. 47, No. 2, March 2010, pp. 115–127.

31 It is surprising to reread the work on peace written by the economist Thorstein Veblen around one hundred years ago (1917); the problem of war and peace, and particularly the matter of 'national interest' has apparently not changed. The following passage speaks for itself: 'Hitherto the movement toward peace has not gone beyond this conception of it, as a collusive safeguarding of national discrepancies by force of arms. Such a peace is necessarily precarious, partly because armed force is useful for breaking the peace, partly because the national discrepancies, by which these current peace-makers set such store, are a constant source of embroilment. But what they actually seemed concerned about is their preservation. A peace by collusive neglect of those remnants of feudalistic make-believe that still serve to divide the pacific nations has hitherto not seriously come under advisement.' Thorstein Veblen, *The Nature of Peace*, Transaction Publishers, London, 1998, p. 302.

present?³² First, the extension of vast areas impervious to serious fighting, such as Europe or, with a few exceptions, the entire American continent (north and south).³³ Second, the fact that intra-state conflicts are confined to their original areas; this includes areas of prolonged fighting such as the region of the Great Lakes in Africa. On the whole, internal conflicts do not lead to intervention by rival countries that are anxious to exploit the situation, as was frequently the case in other periods in history. Obviously, like Russia and China, regional powers are quick to respond when interventions encroach on their private territory but the asymmetrical balance of powers leads in such cases to generally swift, and harsh, resolution of the local disputes, with all the long-term resentment engendered by such an approach.

The periphery of the former Soviet Union

In the case of Russia, numerous conflicts have taken place on the southern fringe of the former Soviet Union, particularly in those regions deconstructed and (badly) reconstructed by Stalin, where, for many reasons, the current strategic stakes are high. That applies to Central Asia, or at least to some parts of it, and to the northern and southern Caucasus, three areas that, moreover, were traditionally coveted by one party or another from the time of the Mongols and the Timurides to the era of the British and tsarist Russia. Unlike the former Soviet republics and other European satellites, the countries of Central Asia were subject to the tyranny of former apparatchiks, as most of them still are today. The latter have merely postponed the date of an inevitable political shift that, over time, has worsened the increasingly severe, regularly surfacing tensions. Those tensions have led to acts of considerable violence that regularly hit the headlines and to outbreaks of inter-ethnic conflict that primarily express what essentially remains a substantial political (and economic) malaise.

Some countries, such as Kazakhstan, are pursuing the path of modernization while redefining the balance of regional powers, which logically favours the stronger entities over the weaker or the more reactionary, with all the popular resentment that the new situation may engender. The internal conflicts in Central Asia as in the Caucasus, where tension with regard to Europe is permanent, are mixed up with power struggles, inter-state rivalry, and regional strategic issues, with the possibility of violence erupting at any moment.

That is the case in the northern Caucasus, which has six republics, dozens of ethnic groups, and a long history of resistance. In 2010 the most murderous

32 In 2011 Lotta Themnér and Peter Wallensteen drew up a list of armed conflicts since World War II. According to their data, in 2010 there was a noticeable decrease in the number of active conflicts, taking it to the lowest level since 2003. Lotta Themnér and Peter Wallensteen, 'Armed conflict 1946–2010', in *Journal of Peace Research*, Vol. 48, No. 4, July 2011, pp. 525–536.

33 On the long-term evolution of violence, see the recent study by Steven Pinker, in which he refers to 'New Peace' in the post-cold-war world, *The Better Angels of our Nature: The Decline of Violence in History and its Causes*, Allen Lane, London, 2011.

violence took place in Dagestan, where 378 people, including 78 civilians, lost their lives. The main movement in the country, Shariat Jamaat, is not alone, as five other groups are also active in that area. The fact that Kabardino-Balkaria now ranks second in terms of political violence, although it seemed to be spared it not long ago, tends to show that the situation has been anything but resolved in that region, where the insurrectionist groups' operational approach tends to be restricted to terrorist attacks because they are unable to establish a force capable of conducting guerrilla warfare. In terms of their foundations and objectives, the armed groups in the northern Caucasus, which are guided by the jihadist ideology, nonetheless remain independent movements that have little connection with the universalism of Al Qaeda-style movements but enjoy the benefits of a better popular base in their own country. By pointing to the threat of transnational terrorism, the Russian government managed to conduct a relentless campaign in Chechnya in the 2000s without upsetting the international community in the slightest. Yet what will happen in the future? As with all wars of national liberation, independent groups can only work towards the loss of political will on the part of the adversary, which might be achieved by means of popular rejection by the Russian population of a political and military investment of this order in the six republics of the northern Caucasus. We have not yet reached that point.

Threats and demands

This leads to another observation. The jihadism inspired by Al Qaeda, whose aim, in some people's opinion, was to overthrow the international order by triggering conflicts in various places, has actually not ceased to spread but has done so without changing the geopolitical status quo. The Al Qaeda partisans have never managed to generate a mass movement anywhere or to acquire the means of conducting an armed struggle on a sizeable scale, even locally. Time will tell whether the two most visible movements at present, in Yemen and in the Sahel region, will achieve a greater scale. At present, however, there is no indication that this will occur in the short or medium term. Ultimately, only the misguided pursuits of George W. Bush were able to delude those radical movements, and we are actually nowhere near the anticipated 'clash of civilizations',³⁴ despite the numerous regrettable attacks in various places, most of which took place in the Muslim world.

Is the emergence or re-emergence of religion in conflict dynamics – which can be traced back to 1979 and the Iranian revolution and the start of the counter-insurrection by the mujahideen against the USSR in Afghanistan – still a driving factor in intra-state conflicts?³⁵ From Yemen to Somalia, from the Caucasus to the Near East, and from Indonesia to the Sahel, there is no doubt that a number of

34 Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Touchstone, New York, 1997.

35 See, in particular, Gilles Kepel, *The Revenge of God: The Resurgence of Islam, Christianity and Judaism in the Modern World*, Cambridge, Polity, 1994. Kepel refers, in particular, to 'religions of confusion'.

conflicts are sparked off by armed groups whose claims are partly religious in nature. Does this mean that those conflicts can be described as 'religious'? For many of those movements, religion plays a role that is not very different from that of the Marxist-Leninist ideology throughout most of the twentieth century. In a similar way to that ideology, radical Islamism, regardless of whether it is Shiite or Sunni, is (often) universal in its vocation and therefore, in theory, is associated with struggles that go beyond territorial borders. Most jihadist armed groups have political objectives that do not go beyond seizing power over the area of a conventional state and over an area that is more or less culturally or geographically defined. Unsurprisingly, militant Islamism has a far stronger hold in countries with a weak or even failed state structure, or in ones that find it hard to establish legitimacy (Somalia and Yemen). In addition to its mobilizing nature, radical ideology, regardless of whether it is religious or non-religious, provides moral substance and an organizational strength that is extremely useful to insurrectionist groups. Nonetheless, this radicalism has not really generated the popular support that is vital to insurrectionist groups seeking to overthrow the government in power. Although religion is an element of numerous conflicts, it is only rarely the sole real source of conflict. Again, we are a long way from the anticipated wars of religion.

The threat to the environment was the other major source of our existential fears in the early twenty-first century. It was supposed to lead to new kinds of conflict as a result of population displacement: for example, the competing demands for resources in short supply or the inevitable 'water wars'.³⁶ The threat to the environment does indeed exist, and our current knowledge seems to suggest that the threat is even more serious than might have been imagined ten or twenty ago. At the same time, there is no substantial indication that the consequences of environmental deterioration actually cause conflicts – at least, conflicts that might deteriorate into serious armed fighting. Again, however, things could change rapidly.

Wars of passion

In various places, however, conflicts may be observed that are marked by tensions between people groups whose relations, for various reasons, are based on ongoing animosity fuelled by resentment arising from a distant or more recent conflict history; such situations are defined as inter-ethnic conflicts. Where emotions and passions run high, one observes the only conflicts in which hatred and resentment sometimes ride roughshod over political rationality while the powers that be (which are rarely in control of the situation) exploit those same emotions for political ends. The end of the cold war and the geostrategic thaw that accompanied it

36 Water, which is a potential source of conflict, may also present an opportunity to resolve a conflict. See, for example, Mara Tignino, 'Water, international peace, and security', in *International Review of the Red Cross*, Vol. 92, No. 879, September 2010, pp. 647–674.

led to a number of such conflicts or failed to prevent them from degenerating into a bloodbath. The years 1990 and 2000 witnessed bloodthirsty and bloody wars that caused millions of deaths in Europe and in the former Yugoslavia as well as in Africa.

Some of those conflicts, particularly because of their extreme nature and, with regard to the former Yugoslavia, their proximity to Western Europe, led to special efforts by the international community and are therefore now at an end, are being resolved, or, in the case of the hotbed of fighting in the Great Lakes region, are receding. In this last case, reservations are still the order of the day because the area is still studded with armed – often rival – groups opposed to the central government, especially in the Democratic Republic of the Congo (DRC). Those groups are capable of carrying out atrocities among the civilian populations, and their very presence is a major obstacle to social or economic upturn. From a formal point of view, and before the political conflicts born of the ‘Arab Spring’ in 2011, most notably in Libya until the death of Gaddafi, and Syria (ongoing at the time of publication), Sudan was the only country in which there was a fresh outbreak of violence in 2010; that violence was such that it placed the country alongside Somalia as one of the two most violent countries in Africa. In its 2010 conflict classification, the Heidelberg Institute for International Conflict Research places Somalia and Sudan in the closed circle of countries at war, along with Afghanistan, Iraq, Pakistan and, more surprisingly, Mexico, where the cartel war is said to have caused the death of more than 10,000 people in 2010.³⁷

Those wars of passion have been the direct and indirect cause of an exorbitant number of civilian victims and humanitarian disasters, on a scale not seen since World War II.³⁸ As with failed states – for example, the former Soviet republics – the African conflicts in Rwanda, Sudan, Liberia, and the Congo, to name but a few, were first the outcome of incompetent (and corrupt), tyrannical, or even perverse political governance – often all three at once – and thus combined weak government with political or police violence.³⁹ With regard to the global political map, while democracy (and with it ‘good governance’) has made noteworthy progress in recent decades, at least until 2005 – and even if the causal chain linking the two cannot be taken for granted – many countries in the world are governed badly and ultimately have political regimes that are bound to fail, leading to risks of internal crises and the emergence of armed factions contesting power or a territory.

37 HIIK, ‘Conflict Barometer’, above note 13.

38 The study of international relations follows the tradition of eighteenth-century Enlightenment thinking with, on the one hand, a Kantian vision driven by an ideal and, on the other, a realist vision inspired by the British thinking of Hobbes, Hume, and Locke. The result is a fundamental dichotomy between two traditions that are nonetheless the fruit of a rational comparison of relations between state entities. It was not until recently that the emotional and irrational aspects of international politics, the dangers of which had first been perceived by Jean-Jacques Rousseau with his intuitive genius, had been studied. On this subject, see the brilliant essay by Dominique Moïsi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*, Anchor, New York, 2010.

39 In civil war, a distinction is made between the concept of ‘indirect’ warfare, i.e. in which the violence is perpetrated solely by an armed group, and ‘direct’ warfare, in which the civilians are in collusion with an armed group. See Laia Balcells, ‘Continuation or politics by two means: direct and indirect violence in civil war’, in *Journal of Conflict Resolution*, Vol. 55, No. 3, June 2011, pp. 397–422.

More disconcerting are the figures for the past five years; according to the surveys conducted by Freedom House, there is a decrease in global freedom that seems to worsen each year and is accompanied by a decline in the world's democratic institutions and mechanisms.⁴⁰

Nonetheless, and until we see the final outcome of the 'Arab Spring', a Sudan- or Congo-style crisis does not seem to be likely in the near future. Yet vigilance needs to be maintained: a serious crisis could spread quickly from small, partly extinct, hotbeds of violence, such as in Nigeria, where inter-ethnic (and religious) tensions are smouldering just below the surface, or in Central Asia, and especially in Kirghizstan and Uzbekistan, where the perversity of political borders conceals the ethnic borders between Kirghiz and Uzbek nationals and is set against a backdrop of political manipulation.⁴¹

Powerlessness in the face of war

Surprisingly, especially given the profound changes that have turned our world and our societies upside down over the past twenty years with, notably, a geopolitical realignment that put an end to the centuries-old Western hegemony, the geostrategic assessment of conflicts and of those participating, despite the phenomenon of 'new wars', shows them to be in decline in relation to the size and extent of current changes. Compared with the preceding eras, which were unable to manage their own changes properly, starting with those in the first half of the twentieth century, the bellicosity of the era in which we live is undisputedly far less severe, in terms of temperaments, words, and deeds. However, two things shock us profoundly. The first is the resilience of war, which sometimes assumes its most barbarous form, although after 1945 we swore to do everything we could to eradicate it or at least to mitigate its effects or to keep it under control. The second observation that attracts our attention is the inequality in the face of war; there are protected areas and others that are extremely vulnerable, while the privileged countries are unable to provide any real help to protect the most vulnerable against this scourge. It is that very powerlessness that offends our conscience, which was nurtured by the spirit of Enlightenment and its twofold input of reason and progress.

Although we can be pleased that these 'new wars' have not (yet) really overturned the established order, it is disheartening to note that many long-lasting conflicts have still not been resolved and to see that the international arms trade, including trade in light weapons, is flourishing more than ever. In 2011, the world was armed, and the indicators suggest that the trend is highly unlikely to be reversed in the years ahead: according to the most recent SIPRI data, the global transfer

40 This is the most sustained decline for forty years. *Freedom in the World 2011*, Freedom House, Washington, DC, 2011.

41 The likelihood of civil war breaking out seems greater if a conflict has already taken place within the previous two years. See Michael Bleaney and Arcangelo Dimico, 'How different are the correlates of onset and continuation of civil wars?', in *Journal of Peace Research*, Vol. 48, No. 2, March 2011, pp. 145–155.

of weapons (conventional weapons) increased in volume by 24% in the 2006–2010 period compared with 2001–2005.⁴²

We can perhaps therefore see 2011 as a key date, witnessing the end of a decade marked by a twofold threat that is both burdensome and virtual – transnational terrorism and the spread of nuclear weapons – and that has not ultimately led to anything tangible or fostered the emergence of armed groups that are likely to undermine the geopolitical status quo. Only the two wars, those in Iraq and Afghanistan, caused by the terrorist threat – albeit by political choice rather than by strategic necessity – could in the end provide a scenario similar to that seen after the withdrawal of the USSR from Afghanistan, with the deployment of mujahideen in various countries. To date, nothing has been written in that area and there is nothing to suggest that that history is likely to be repeated.

It may therefore be observed that, on the fringe of new wars, numerous intra-state conflicts today, along with the non-state armed groups taking part in them, are the legacy of old, unresolved, or badly resolved conflicts that have gone on for several decades and continue from one year to the next because the particular circumstances are such that this can occur in places where similar conflicts have long since come to an end. Moreover, the example of Sri Lanka, with the defeat of the Tamil Tigers, recently showed that a government that is prepared to stop at nothing, not even a blood bath, is likely to finish off a guerrilla force, even if it is tenacious and well organized. However, a democratic country such as Colombia, for example, could in no way use such methods, regardless of the stakes. Our judgements must nonetheless be tempered with caution, as new conflicts very often emerge from the ashes of former badly resolved conflicts, which, with the contribution of new elements, may erupt brutally and without warning, sometimes on a far larger scale.

After the end of the golden age of Marxist-Leninist guerrilla forces, are we now witnessing the end of another era, that of ‘transnational terrorism’, which, incidentally, will have declined in operational terms compared with traditional guerrilla forces? That is possible, given that as in every era – that of post-1945 independence having itself given rise to conflicts (1948) that are still ongoing (Near East or India–Pakistan) – the 2000s have produced their share of small jihadist groups that are armed to a greater or lesser extent. Like Al Qaeda in the Islamic Maghreb, these groups will find it difficult to survive but will perhaps do so for some time as a local or regional disruptive force that has no real impact on the political events in areas in which they operate. However, the recent emergence of Maoist or other armed groups – in India or Paraguay, for example – could reverse the trend back towards Marxist-inspired ideologies.

42 See Paul Holtom, Lucie Béraud-Sudreau, Mark Bromley, Pieter D. Wezeman, and Siemon T. Wezeman, *Trends in International Arms Transfers, 2010*, Stockholm, SIPRI Fact Sheet, March 2011, available at: <http://books.sipri.org/files/FS/SIPRIFS1103a.pdf> (lasted visited 11 November 2011).

On a completely different note, the war in the DRC has created an environment that is conducive to anarchy in some parts of the country,⁴³ which are under the control of armed groups that are both dangerous and uncontrollable; it is also difficult to see how they could rapidly disarm and reintegrate their members into a society that is still completely in tatters. This type of conflict could arise elsewhere in an unexpected and surprising manner, and is at present less easy to avoid, control, or resolve rapidly because the international mechanisms for resolving conflicts, whether they are unofficial (the interests of the leading powers) or official (such as those of the UN and other organizations of collective regional security), have not changed appreciably over the past fifteen years, if not longer. The quantity of arms currently on the market, multiplied by the increasing activity of transnational criminal organizations, could contribute further to bolstering the rival factions that might emerge in a war of this kind, where, logically, the degree of violence and destruction of all kinds, including among civilians, would inevitably be very high. The example of the 2011 revolutions suggests that we should be extremely cautious and fairly unassuming about determining the areas where such conflicts could break out in the future. However, by dint of focusing too much on dangers that are apparent but almost virtual, such as those linked to the spread of nuclear weapons, one forgets to examine more closely the invisible dangers that lie in wait and are ready to erupt, catching us totally unawares. During the period of Zaïre's decline at the end of the reign of Mobutu Sese Seko, one certainty was shared by all, the people and the embassies – that the post-Mobutu period was likely to be very unsettled and even violent, like the period following the poorly negotiated independence of 1960. Nonetheless, the only measures adopted in Washington, Paris, or elsewhere were to delay as far as possible the inevitable outcome, with the known disaster in humanitarian terms as the result, as was stressed somewhat cynically by the great theologian Reinhold Niebuhr: 'Perhaps the most significant moral characteristic of a nation is its hypocrisy'.⁴⁴

What seems less likely is a multiplication of the type of anarchy prevalent in some parts of the Horn of Africa, providing a spectacle that is at least surprising and that has involved the upsurge over the past few years of a scourge that was thought to have died out: large-scale piracy. That activity seems to have been gaining a strong foothold in an area where commercial (and pleasure) shipping is risky if not downright dangerous.⁴⁵ According to the International Maritime Bureau, 998 sailors were taken hostage in 2010 in that one region, which nonetheless covers a sizeable area, twice that of Europe.⁴⁶

43 René Lemarchand rightly emphasizes regional interdependence and its impact on violence in the Great Lakes region. See René Lemarchand, *The Dynamics of Violence in Central Africa*, University of Pennsylvania Press, Philadelphia, PA, 2009.

44 Reinhold Niebuhr, *Moral Man and Immoral Society*, Scribner, New York, 1932, p. 95.

45 To put the global threat of piracy in Somalia in perspective, see the interesting article by J. Peter Pham, 'Putting Somali piracy in context', in *Journal of Contemporary African Studies*, Vol. 28, No. 3, July 2010, pp. 325–341.

46 The IMB's data are updated regularly and can be viewed at: <http://www.iccc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited 11 November 2011).

This is one of the rare cases in which the internal instability of a country, Somalia, has repercussions beyond the borders of a state or group of states. Government inability to consolidate its hold on the country is only equal to the inability of the Islamist armed groups to unseat a regime that has its back to the wall. Here, as elsewhere, the rivalry between armed groups – in this case, the al-Shabab and Hizbul Islam militias – helps to weaken the centres of power while nurturing hotbeds of violence. We need to recall that, in Somalia, these movements have attacked not only the central power (the transitional federal government) but also the forces of the African Union; they have moreover become established in other countries, particularly in Uganda, where al-Shabab claimed responsibility for a terrorist attack in 2010. The development of piracy is encouraged by the militia, who see it as a means of acquiring weapons and human reinforcements from outside the country. Population displacements caused by the war and the difficulty of acquiring aid from outside are helping to deepen the humanitarian crisis logically affecting the country.

The case of Somalia must not, however, be allowed to conceal the fact that the long list of armed groups detected throughout the world consists predominantly of small, weak, or virtually non-existent groups whose political weight is insignificant and whose disruptive capacity is limited. Some, such as the Shining Path in Peru, still exist but have long since lost their operational capacities along with their influence. Contrary to the dictates of common sense, the lack or the disappearance of any opportunity to achieve the desired or proclaimed objectives does not prompt the armed groups to lay down arms. Hence the fact that some small groups survive, sometimes for many years, without leadership and without means, almost out of habit, to end up ingloriously as a mere internet interface. The use of the weapon of terrorism, which has grown over the past ten years, is not so much attributable to the fact that many movements are incapable of attacking the regular armed forces directly or indirectly as to the fact that, particularly among jihadist movements, this approach has been in keeping with the times since the global shock caused by the attacks on 11 September 2001. The possible resurgence of Marxist-inspired movements, which tend to operate in rural areas, could prompt, at some future date, a return to conventional guerrilla tactics that are more in keeping with those movements' approach and historical background.

The new age of minorities

Whereas the cold war period was the setting for intra-state conflicts in secondary countries (in a geopolitical sense), today it is the 'emerging' (or, more correctly, 're-emerging') nation-continent, in other words the new major powers of the future, that are more affected by internal wars, mostly in areas seeking their autonomy or independence, stemming from minorities that are sometimes politically oppressed or demographically outnumbered. That applies, of course, to China and India. Those two countries each have a long and complex historical past, major cultural significance, and regimes that range from liberal autocracy to democracy. The

‘shattered empire’ whose potential for conflict in the Soviet Union was quickly perceived by Hélène Carrère d’Encausse,⁴⁷ also has its equivalent in China, especially in Tibet and Sinkiang, where, despite sporadic violence, the central authority seems for the moment to be more or less in control of events.

Since its independence, India has been faced with this kind of violence but the country’s ethnic diversity and political complexity, not to mention its particular geographical characteristics, have led to a situation that is far more complicated than in neighbouring China.⁴⁸ For the moment, there is nothing to indicate that the various fairly large insurrectional movements, of which there are dozens, that are challenging the authority in power in several parts of the country – from Kashmir to the border with Bangladesh – are ready to lay down their weapons. Far from it. Nor is there anything to indicate that the central government is planning to make any sizeable concessions.

Contrary to the current trend involving the spread of militant Islamist groups that are particularly active in urban areas, the most dangerous insurrectional movement in India at present is Maoist in inspiration. Active in 90 of the 636 districts that make up the country, the Naxalite movement (which takes its name from the village of Naxalbari, which was the scene of a peasant revolt) numbers between 15,000 and 20,000 combatants with as many weapons and has a substantial base of sympathizers in a primarily rural area in the centre/north-east of the country.⁴⁹ Whereas in 2009 the conflict between the forces of order and the Naxalites fell just short of the crucial threshold of 1,000 victims, it exceeded it in 2010, with nearly 1,200 deaths recorded. Based in two states, Jharkhand and Chhattisgarh, the Naxalites are successfully extending their operational bases to other areas. In the coming years, this movement, which is a very recent development although its origins date back to the 1960s, is very likely to present Indian governments with substantial problems, particularly as the movement’s leaders, who apply Mao’s principles of guerrilla warfare to the letter, are involved in an extended war that is driven by discontented peasant masses. The seriousness of the situation has not escaped the attention of the Indian government, which recently set up a special force whose task is to tip the balance in favour of the state. The force will have its hands full but it will always be able to draw on the British experience as set forth by C. E. Callwell more than a century ago in his treatise on ‘small wars’.⁵⁰ The particular character of those wars, where the two opposing camps each seek to win the support of the rural people, has frequently placed civilians at the heart of the

47 Hélène Carrère d’Encausse, *L’Empire éclaté*, Flammarion, Paris, 1978.

48 The profound difference between the two political cultures needs to be emphasized, particularly the centralized, secular, and uncontested nature of that in China as opposed to India. See the comparative analysis of the evolution of those societies by Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution*, Farrar, Straus and Giroux, New York, 2011.

49 See, for example, William Magioncalda, ‘A modern insurgency: India’s evolving Naxalite problem’, in *South Asia Monitor*, No. 140, Washington, DC, Center for Strategic and International Studies, 8 April 2010.

50 Charles E. Callwell, *Small Wars: Their Principle and Practice*, Book Jungle, 2009. A particular discovery or rediscovery of the 2000s has been the book by David Galula in which he draws on his own experience in the French army: *Counterinsurgency Warfare: Theory and Practice*, Praeger, Westport, CT, 1964.

fighting, with the inevitable consequences in humanitarian terms.⁵¹ To avoid falling into certain traps, the Indian government would do well to look closely at the history of Colombia over the past forty years.

For the past ten years or so, another large country in the region, Indonesia, has been taking active part in the anti-insurrectional fighting that followed the attacks in Bali in 2002, which claimed more than 200 lives and left as many wounded. Despite its efforts, the Indonesian government was unable to prevent the recent emergence of a new jihadist rebel movement, 'Lintas Tanzim'.⁵² This conflict has been added to a far older one (dating from 1949) between the government and the West Papua liberation movement.

However, Pakistan is where the situation is by far the most volatile, not only from the regional point of view but also from a global perspective. Besides the problem of Afghanistan, which is largely spilling over into the internal and external affairs of the country, and besides the fact that the country has the atomic bomb, the central government is pitted against Islamist groups in a war that has already lasted a decade and has intensified in the past four years; it has already claimed nearly 7,000 victims. Although, as elsewhere, the government is unlikely to fall, as a result of force, into the hands of those groups, the violence of the conflict between the forces of order could further destabilize a country that seems to teeter constantly on the edge of chaos.

Conclusion

In conclusion, following the marked trend in recent years that led to the emergence in numerous countries in Africa, Asia, and the Arabian Peninsula of small militant Islamist groups that have not hesitated to make use of the weapon of terrorism, we may now be witnessing a rebirth of more conventional guerrilla movements, whose operational density is often far greater and whose ultimate consequences in humanitarian terms are far more serious than sporadic attacks, which, although spectacular and abhorrent, cause far fewer victims. As every time period adds a further layer of conflicts of varying degrees of violence to those in preceding periods, we may well be at the dawn of a new era of numerous armed conflicts. Once again, it would be good to ponder seriously the mechanisms capable of preventing or at least curbing those future conflicts, which are highly likely to trigger a new wave of human disasters. As ever, growing economic inequalities and, in particular, the unenviable fate of many minorities throughout the world lie at the heart of the problem. Whereas a region such as Europe, which was for a long time the planet's first conflict zone, seems to have entered into a kind of eternal peace, elsewhere the future of war is not compromised, the same being true of armed

51 In-depth studies show that violence against civilians in the post-cold-war period is explosive, with a succession of high and low cycles. See Kristine Eck and Lisa Hultman, 'One-sided violence against civilians in war', in *Journal of Peace Research*, Vol. 44, No. 2, March 2007, pp. 233–246.

52 International Crisis Group, 'Indonesia: Jihadi surprise in Aceh', in *Asia Report*, No. 189, April 2010.

groups spoiling for a fight and of industrialists and arms dealers keen to supply them – and their opponents – with the means of fighting. For states that no longer have a ‘monopoly’ on the use of force (or even the legitimacy), the technological response, a sort of Holy Grail that is permanently out of reach, is still far from sufficient as a response to the new threats, although, in terms of imagery and weapon precision (notably thanks to drones⁵³), some of the advanced weapons constitute substantial advantages. However, the governments’ intrinsic politico-strategic vulnerability – particularly in democracy, which goes hand in hand with the tactical vulnerability of their armies, even the most sophisticated (the vulnerability, for example, of the army helicopters⁵⁴) – is unable to discourage twenty-first century guerrilla fighters, who are still finding large political and territorial areas where they can exert their hold through the world and on the world. The fear of setting a precedent that would open a new Pandora’s box is also slowing the ardour of the armies with state-of-the-art tools: hence Washington’s decision not to make use of cyber warfare techniques against Colonel Gaddafi in spring 2011.⁵⁵

A mere two hundred years ago, the great Napoleon, having brought Europe to its knees, found himself utterly helpless in the face of a handful of Spanish guerrilla fighters. Whereas the Napoleonic model of classic warfare with its unities of time, space, and place – a long campaign culminating in a major battle and leading to peace treaties – has been left well and truly behind, and whereas the terrorist threat and that of the spread of nuclear weapons seem to be under control, guerrilla warfare, in new forms and following new taxonomic schemes, is very likely to become the most common type of armed conflict in the coming decades, thus underscoring the current trend. And, regardless of form or countenance, the dynamics of guerrilla warfare systematically rely on a fundamental axis that constitutes the conflict’s primary interest, and which eventually becomes its hostage: the people.

53 The reports on the impact of drones, particularly in Pakistan, are circumspect. See ‘L’utilisation de drones au Pakistan n’a pas d’effets sur la guerre’, in *Le Monde*, 26 February 2010, and *The Year of the Drone*, 2011, compiled by The New America Foundation and available at: <http://counterterrorism.newamerica.net/drones#2011> (last visited 11 November 2011).

54 For example, the blowing apart of the US Chinook helicopter in full flight on 6 August 2011, killing thirty-eight victims, most of whom were Navy Seals, was the most murderous incident since the start of the United States’ intervention in Afghanistan.

55 See Eric Schmitt and Thom Shanker, ‘U.S. weighted use of cyberattacks to weaken Libya’, in *New York Times*, 18 October 2011, p. A1.

Armed groups' organizational structure and their strategic options

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Abstract

The organizational structures of armed groups, whether they develop by accident or by design, affect their strategic choices during the conflict and their ability to enter peace agreements. This article explains how frequently encountered structures such as centralized, decentralized, networked, and patronage-based ones affect strategic choices for the organization and its opponents. Only centralized organizations can make use of sophisticated strategies such as 'divide and conquer', 'co-option', and 'hearts and minds', and can engage in successful peace agreements. Centralized armed organizations that do not have a safe haven within the contested territory tend to be very vulnerable, however, which makes peace less attractive to their opponents and explains in part why long-lasting peace agreements between such groups and their opponents are rare.

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Ethnic groups, social classes, peoples, civilizations, religions, and nations do not engage in conflict or strategic interaction – organizations do. When Samuel Huntington tells us that civilizations clash, he is merely informing us that there are organizations (states and non-states alike) that are engaged in conflict across what he believes to be borders of civilizations.¹ When Marxists talk of class revolt, they envision it as instigated by a dedicated organization that mobilizes the toiling masses. As any close observer of civil war will tell you, ethnic groups rarely fight

each other en masse – organizations, which are either *ad hoc* or extensions of existing social structures, use an ethnic agenda to attract some members and wage conflict in their name.

Engaging in armed conflict consists of performing a number of essential operations, such as co-ordination, mobilization, and the manipulation of information, to undermine rivals within a contested territory. Amorphous entities such as civilizations, ethnic groups, or the masses cannot perform such operations – only organizations can do so. To say that a certain conflict pits a politicized group against another is to use shorthand to indicate that organizations that recruit from among those groups, and that claim to represent the interests of members of the group, are engaged in conflict. It is perfectly reasonable to use shorthand, but its use distracts the analyst from focusing on the mechanisms that best explain how conflicts begin, evolve, and conclude. It may also mislead humanitarian workers in the field.

When masses of people take to the street to protest the rule of tyrants, they are either organized or motivated by a combination of social, religious, and political organizations (for example, the Iranian Revolution of 1979) or self-organized through technologies that allow for co-ordination and the processing of information, or both (as with some of the recent revolutions in the Arab world). These revolts have a dynamic that is different from those of armed organizations that I focus on in this article. Non-violent mass revolts aim to bring fissures in the institutions of the state or occupier that would lead to their collapse or withdrawal. Their core strategy fails when those participating in the uprising use arms. When they do use violence, they fall under the category of groups I consider here. Such is the case, for example, of the 2011 popular revolt against the rule of Muammar al-Gaddafi in Libya, where non-violent protests transmuted into a civil war after the government mercilessly clamped down on the opposition.

One way to understand the strategies of armed groups, including their desire and ability to engage in peace negotiations, is to look at what the distribution of power (organizational structure) within them allows them to do. The organizational structures of armed groups, whether they develop by accident or by design, affect their strategic choices and performance during the conflict, as well as their ability to enter peace agreements. Only centralized organizations can make use of sophisticated strategies such as 'divide and conquer', 'co-option', and 'hearts and minds', and can engage in successful peace agreements, if they have a safe haven. Centralized armed organizations that do not have a safe haven within the contested territory tend to be very vulnerable, however, which makes peace less attractive to their opponents and explains in part why long-lasting peace agreements are rare. Decentralized organizations are more resilient than centralized ones in the absence of a safe haven but are incapable of making use of sophisticated strategies or engaging in peace because of the inability of the leadership to enforce

1 Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996.

the necessary discipline on the rank and file and because of other structural limitations that I explain below.

How organizational structures develop

Some organizations are shaped by pre-existing societal ties while others are developed by political entrepreneurs to maximize their organization's probability of success or to achieve personal gains in areas where societal structures are weak. The two patterns generally develop simultaneously in recently politicized societies. Political mobilization takes place along traditional socio-structural lines, where those exist, because they minimize the cost of convincing people to develop new loyalties and patterns of accountability and reduce resistance from those who would lose influence from their development.²

Traditional patterns of authority, such as those typical of tribe and clan, often do not reach into urbanized areas and refugee camps, which provides an opening for entrepreneurial militants to forge new ones based on loyalty to their organizations.³ If society is atomized (lacking well-developed social structures that the government needs to deal with one way or another), as in many previously communist countries, entrepreneurs become essential for the formation of any political organization.⁴ Traditional and entrepreneurial political organizations have major structural differences that give them distinct advantages and disadvantages in different circumstances. Entrepreneurial political organizations are likely to be more centralized, aggressive, and integrated than traditional ones, which often rely on loose patron–client relations and are more reactive to local infringements on their authority but lack a coherent overall strategy. Traditional and *ad hoc* types of

2 David Laitin, *National revivals and violence*, paper presented at the Center for Advanced Study in the Social Sciences of the Juan March Institute, 29 March 1993, p. 14, argues that a dense rural social structure is a necessary condition for nationalist mobilization and strife. Russell Hardin, *Collective Action*, Johns Hopkins University Press, Baltimore, 1982, pp. 31–34, develops the 'by-product theory' that shows how easy it is for non-political organizations to perform political functions not originally intended for them because they have already overcome 'latency'. Historical analyses also support this view: for example, Michael Taylor (ed.), *Rationality and Revolution*, Cambridge University Press, Cambridge, 1988, pp. 81–83; and Perez Zagorin, *Rebels and Rulers, 1500–1660*, Cambridge University Press, Cambridge, 1982, pp. 1–86.

3 By 'traditional', I do not mean to imply a 'stiff cultural system imprisoned in the past', as many wrongly understand the term (so David Apter, *The Political Kingdom in Uganda*, Princeton University Press, Princeton, 1967, pp. 84–107, warns us). I simply call a social structure 'traditional' to indicate that it was well established before the advent of a traumatic event such as colonial or despotic government. It might very well have metamorphosed many times in the centuries preceding the conflict.

4 On this specific point, see John McCarthy and Mayer Zald, *The Trend of Social Movements in America: Professionalization and Resource Mobilization*, General Learning Press, Morristown, NJ, 1973 and their 'Resource mobilization and social movements: a partial theory', in *American Journal of Sociology*, Vol. 82, No. 6, 1977, pp. 1212–1241; Jo Freeman, 'The origins of the women's liberation movement', in *American Journal of Sociology*, Vol. 78, 1972, pp. 792–811; Sara Evans, *Personal Politics*, Knopf, New York, 1979; Craig Jenkins, 'Resource mobilization theory and the study of social movements', in *Annual Review of Sociology*, Vol. 9, 1983, p. 531.

organizations often coexist, but organizations whose structural features best suit the conditions of the conflict ultimately prevail.

The structure of traditional organizations is grounded in the existing social structure and often emulates it, with minor variations that might become amplified with the passage of time. One observer of a meeting of the men in charge of defending a Kosovar village (part of the loose structure of the Kosovo Liberation Army) found them seated in the traditional way: the village elder was flanked by two distinguished figures, the most educated among the villagers (a tradition) and the commander of the armed villagers (the innovation in this case).⁵ The longer the war, the more important the role of the fighters becomes (as opposed to the traditional elders), but the new allegiances are likely to mimic old ones – a phenomenon that is also illustrated by the Afghan shift from clans to clan-like fighting units centred around field commanders during the *jihad* .⁶

Those who engineer *ad hoc* organizations have a greater ability to structure them to maximize their own power within them, while still giving the organization a chance to succeed. This universal trade-off between the power of the organizational entrepreneur and the potential of the organization to succeed explains why so many entrepreneurial revolutionary organizations are similarly structured, even if they differ in every other respect. It is indeed no coincidence that the Islamist Hekmatyar's party in Afghanistan was structured similarly to many Marxist organizations, or that European parties in the first half of the last century engaged in what Maurice Duverger calls 'contagious organization'.⁷

Sometimes organizations in a colonized society try to imitate the structure of their occupiers despite lacking the necessary skills, numbers, and resources. Societal leaders who believe that they can acquire the strength of their occupiers by mimicking their organizational structure generally discover the flaw in their reasoning at great cost, as Charles Callwell, the seasoned British colonial officer and small-war theorist, observed in his discussion of the Russian route of Central Asian resistance during the insurgencies of the early twentieth century.⁸ More extreme examples are provided by armies established by weak non-European leaders in awe of European colonizers at the end of the nineteenth century. The British easily defeated the forces of Urabi Pasha in 1882 in Egypt, and the French did the same to Chinese troops they confronted in 1884–1885. Both forces were ironically organized by their leaders in imitation of how European powers organized their militaries in hopes of providing a deterrent for colonizers and other foes. Their performance pales when compared with that of the traditionally organized Algerians and Afghans in reaction to the same colonizers. Once again, Callwell's

5 *New York Times*, 27 July 1999, A8.

6 Gilles Dorransoro, *Revolution Unending: Afghanistan, 1979 to the Present*, Columbia University Press, New York, 2005.

7 Maurice Duverger, *Political Parties*, Wiley and Sons, New York, 1959, p. 25.

8 Charles Callwell, *Small Wars: Their Principles and Practice*, 2nd edn, EP Publishing, Wakefield, 1976 (first published 1906), pp. 157–158.

extensive experience proves pertinent: 'It is an undoubted fact indeed that the more nearly the enemy approximates in system to the European model, the less marked is the strategical advantage he enjoys'.⁹

Shifting circumstances during conflict impose new trade-offs on members of rival organizations. Sometimes the growing influence of new ideas influences organizational change. For example, Ibn Saud formed the *Ikhwan* (brotherhood) after embracing the purist understanding of Islam of the Wahhabis and there were many ill-fated imitations of Che Guevara's and Fidel Castro's organizational models by other South American revolutionaries.¹⁰ More often, however, change happens because those at the helm of an organization and their rivals within and outside the organization attempt to affect the organization's structure to increase their power within or over it.

Resources are important for individuals wishing to restructure organizations. Duverger tells us that organizations financed by their rank and file are much more decentralized than those that feature a leadership with a monopoly on financial or other essential resources.¹¹ Although this is not always true, those who control the flow of money gain some leverage in modifying organizational structure to increase their influence or to achieve other goals. Sometimes they can completely reshape the organization to maximize their power. And foreign sponsors encourage centralization of structure by giving their aid to the leaders they favour because they recognize that this facilitates their control over the organization. This happened, for example, when Israel decided to channel all aid to southern Sudanese rebels through Joseph Lagu, the Anya Nya leader, who then eliminated all competition in the movement with the help of his newly mustered resources, starting in 1969.¹² Another example is the failed British effort to unify Albanian resistance leaders who detested one another during World War II.¹³ Shifts in power among relevant actors motivate the continuous deal-making and compromises that cause the generally slow, but sometimes brutal, metamorphosis of organizational structures.

9 *Ibid.*

10 See Michael Radu (ed.), *The New Insurgencies: Anticommunist Guerrillas in the Third World*, Transaction Publishers, New Brunswick, NJ, 1990, p. 14, for a discussion of how even rightist and anti-communist revolutionaries study the strategies and tactics of glamorized communist insurgents such as Mao Tse-Tung, Fidel Castro, and Vo Nguyen Giap. See also M. Duverger, above note 7, pp. 25–26, for examples of how European parties imitated the organizational structures of more successful ones. The adoption of the structure *du jour*, even when it is not suitable for the company's situation, is also widespread in the corporate world (Henry Mintzberg, *The Structuring of Organizations*, Prentice-Hall, Englewood Cliffs, NJ, 1979, p. 292).

11 M. Duverger, above note 7, pp. 58–59.

12 Louise M. Pirouet, 'The achievement of peace in Sudan', in *Journal of Eastern African Research and Development*, Vol. 6, No. 1, 1976, p. 208. Alexis Heraclides, 'Janus or Sisypheus? The Southern Problem of the Sudan', in *Journal of Modern African Studies*, Vol. 25, No. 2, 1987, pp. 213–231.

13 Roger Petersen, 'A community-based theory of rebellion', in *European Journal of Sociology*, Vol. 34, No. 1, 1993, p. 179.

Types and performance of organizational structure

In this section I consider six basic organizational structures (ways that power can be distributed within and among organizations): centralized, decentralized, networked, patron–client, multiple, and fragmented. Centralization is the measure of distribution of power over decision-making among the top-tier leadership and second-level or subsequent cadres within the organization. Decision-making deals with formulation of strategy, making appointments, distribution of resources, control of communication, and enforcing discipline. Second-level cadres (e.g. field commanders, village leaders, imams of mosques, heads of associations) can only make such decisions for local matters, while the top leadership can be decisive on both the local and organizational levels. The more control that second-level or subsequent cadres wield over the formulation of local strategy and other decisions, the more decentralized the organization.

The idea of 'networked' organizations (autonomous fluid units without a hierarchical structure) has gained traction as analysts have scrambled to find tools to study transnational militant organizations such as Al Qaeda. In the context of territorial conflicts, however, the concept makes little sense because the ubiquitous existence of a leadership, even when the units are very autonomous, makes the organization similar to other decentralized ones. If the mostly autonomous units have a low exit cost (leaving the organization is not too difficult or costly), then the organization can be modelled as one based on patronage.¹⁴

A patron–client relationship is one of exchange, in which a party (the patron) allocates a resource or is capable of providing a service to another party (the client) who needs it and is ready to exchange temporary loyalty, general support, and assistance for it. It is considerably easier for a client to exit a relationship with a patron than for a regular agent to do the same with his principal. To illustrate this with familiar terms from the corporate world, a client is analogous to a contractor and an agent to an employee. Although some consider patron–client relations to be attributes of some cultures, I consider them to be structural links that can exist within any organization. We encounter them in traditional societies such as Afghanistan and Yemen as well as in the modern American military's heavy reliance on contractors.

The two other dimensions of organization are movement-specific and only applicable to challengers to the powers that be. Some conflicts feature one independent challenger, some multiple independent challengers (two to four organizations), and others a fragmented opposition (five or more organizations). I decided on the cut-off between multiplicity and fragmentation after noticing a different dynamic in qualitative case studies once the number of organizations exceeds four – this is the empirical point of transition from competition with specific rivals to positioning the organization within a nearly atomized

14 See, for example, John Arquilla and David Ronfeldt, *The Advent of Netwar*, RAND, Santa Monica, CA, 1996, and their *Networks and Netwars*, RAND, Santa Monica, CA, 2001.

movement.¹⁵ What makes an organization independent is that its rank and file is bound to its leadership, and no other leadership, as agents or clients. If the incumbent (the government or occupier) has no organized challengers, then opposition is atomized for our purposes. Atomized opposition movements do not produce sustained militant opposition, though they may very well topple regimes through non-violent means.

The safe haven contingency

The contingency that decisively influences how structure affects performance is the organization's control of a territorial safe haven – a portion of the contested territory where an organization's rivals cannot intervene with enough force to disturb its operations. A safe haven is important because each organization in conflict must perform critical operations well, and perform most of them better than the competition, to have a good chance of winning. The way that power is distributed within the organization (i.e. structure) creates incentives that affect how organizational members perform such operations, and the availability of a safe haven (the contingency) affects whether they can achieve the levels of performance their organizational structure permits. The safe haven should be within the contested territory. Havens across the border are rarely safe for long because finicky sponsors may interrupt operations at will or distract the organization from its original goals by making it a tool to project influence in the neighbouring country. Insurgents have a safe haven when the incumbent lacks the ability to fight them effectively in some regions of the country for any number of reasons – for example, loss of foreign aid, divisions within the military, or an underdeveloped state apparatus. Insurgents do not necessarily need a safe haven to win because regimes may collapse and occupiers may withdraw (for example, the Algerian War of Liberation) before they acquire one.

Organizations without a safe haven

The most important goal for organizations that are subject to the constant harassment of rivals is to survive long enough to take advantage of opportunities that may come up in the future.

Centralized organizations without a safe haven

Centralized organizations are very vulnerable in the absence of a safe haven because they rely on close co-ordination among their specialized branches and depend heavily on a few key leaders. Co-ordination can be frequently interrupted by stronger rivals, which makes the non-autonomous organizational components

15 Abdulkader H. Sinno, *Organizations at War in Afghanistan and Beyond*, Cornell University Press, Ithaca, NY, 2010.

ineffective. The organization can also be incapacitated if decapitated, witness the way in which the Kurdistan Workers Party (PKK) was weakened by the capture of Abdullah Ocalan or the Shining Path (Sendero Luminoso, the Communist Party of Peru) by the capture of Abimael Guzmán. Centralized organizations without a territorial safe haven can also be routed through the use of sophisticated strategies that aim to isolate them from potential supporters. This is how the Omani Zhofaris, the Kenyan Mau Mau, and the Malayan Communists, among others, were defeated.¹⁶ Furthermore, centralized organizations are much less capable of mobilizing support than non-centralized ones in the absence of a safe haven because they are less rooted in the social structure and their non-autonomous branches are not as responsive and adaptable to local needs. Centralized organizations are also vulnerable to becoming tools for the projection of the power of their foreign sponsors instead of pursuing their independent goals because their leaders are able to bring the rank and file along with their shifts in strategy. Many Palestinian organizations shrank their way to near oblivion by becoming surrogates of Syria or Iraq in internecine Palestinian conflicts rather than pursuing a sensible agenda and popular policies so that they could grow at the expense of rivals. A foreign sponsor often requests exclusive sponsorship of a centralized organization and consequently manages to have strong leverage over its leader. Even more damaging can be the withdrawal of support by this one sponsor. Many organizations, such as the Sahrawi Polisario in the Western Sahara region of Morocco after the withdrawal of Algerian support, have faltered in this way. A centralized organization without a safe haven will also not be able to use effectively mechanisms otherwise available to it to enforce discipline, such as redundant structures and specialized branches, because they cannot easily be developed under duress and they require co-ordination and intensive communication. Finally, centralized organizations cannot manipulate and move information and knowledge effectively without a safe haven: information needs to travel a long way from where it is produced to where it is needed in such organizations, and its flow can easily be interrupted or intercepted by rivals.

Non-centralized organizations without a safe haven

Non-centralized (decentralized/networked, patronage, multiple) organizations are more resilient than centralized ones in hostile environments because their different components are more autonomous and less dependent on co-ordination. They are not as vulnerable as centralized organizations are to short-cuts such as decapitation or sophisticated strategies that aim to isolate the organization because the rank and file are both fairly independent and well ensconced within the social structure. The leader of a non-centralized organization will risk the noncompliance of its more autonomous rank and file if he tries to transform the organization into the surrogate of a foreign sponsor; the non-centralized organization is therefore less likely

¹⁶ A. H. Sinno, above note 15, ch. 10.

to squander its credibility and support. Some decentralized organizational set-ups (multiple patronage-based organizations) can even result in a strategic lock-up when the insurgent organizational leaders cannot compromise with the powers that be regardless of their desire to do so or pressure from sponsors, because they would lose their rank and file.¹⁷ Multiple organizations might even attract multiple sponsors, thus producing the kind of redundancy that would shield them in the aggregate from an abrupt cessation of support by any one sponsor. Non-centralized organizations are also advantaged in mobilizing support in a hostile environment because their more autonomous cadres are more responsive to local needs and are better able to mete out positive and negative sanctions than the officers of centralized ones. Control and discipline are easier to maintain within smaller and autonomous groups in hostile environments, which gives an advantage to non-centralized organizations enmeshed in intricate social structures. Lastly, information does not need to move far in non-centralized organizations: it is mostly produced and used locally, with little input from the leadership and with little probability of interception by rivals.

Sophisticated incumbents can, however, easily defeat a fragmented insurgent landscape because its different components are the equivalent of tiny vulnerable independent centralized organizations.

Organizations with a safe haven

An organization that can operate in a portion of the contested territory without much interference from rivals needs to take co-ordinated strategic action decisively to eliminate such rivals beyond its safe haven. If it does not, it will allow its rivals to attack it repeatedly and perhaps ultimately to defeat it. It might also lose supporters to organizations that make faster progress and lose aid from sponsors that lose interest.

Centralized organizations with a safe haven

Centralized organizations are much more capable than non-centralized ones of taking the strategic initiative, and they have other advantages once they can operate without the intrusive intervention of rivals. Only centralized organizations can implement complex multi-step strategies that require careful co-ordination, strict discipline, and concentrated decision-making as will be explained below. They become less vulnerable to strategies that aim to isolate them from potential supporters if they acquire a safe haven because they have exclusive control over a portion of the territory, where they can methodically mobilize the population through overlapping structures that police them and provide specialized services. Territorial control also allows taxation of the population and the extraction of resources, both of which reduce the centralized organization's reliance on sponsors

17 A. H. Sinno, above note 15.

who might distract it from its original goals. Redundant structures and specialized branches (e.g. political field officers) also enforce discipline within the ranks. Leaders of the organization can be well protected in a safe haven, thus reducing the likelihood of its decapitation. A centralized organization with a safe haven can also transmit information from where it is produced to where it is needed, can accumulate knowledge, and can centralize training with less fear of serious interruption.

Non-centralized organizations with a safe haven

Non-centralized organizations are incapable of taking the strategic initiative beyond locales abandoned by weakened rivals. They lack the ability effectively to co-ordinate large-scale actions, manipulate information, and enforce discipline among organizational components to do so (in contrast to within those components, at which they excel). Their inability to take the strategic initiative decisively to defeat rivals can give their enemies time to re-establish themselves and further attempt to undermine them. It may also allow new organizations that are more capable of co-ordinated action to form in their areas and recruit their own followers (for example, the Taliban's expansion at the expense of other mujahideen in 1994–1996). They may also lose the financial backing of impatient foreign sponsors with new priorities (e.g. the reduction of US support for the mujahideen after they failed to take Kabul after 1989). Foreign backers might even cease to exist (as with the collapse of the Soviet Union). Resilience, the major advantage of decentralization, is irrelevant for organizations that do not need to worry about constant harassment. The longer they take to centralize, the more likely they are to be defeated by rival organizations that can take the initiative or to fall apart on their own because of changing circumstances.

A highly fragmented insurgent landscape is even less capable than non-centralized organizations of engaging in decisive collective action. Fragmentation has no military advantages, unless it draws sympathetic foreign intervention, as recently happened in Libya.

Survival of the Fittest

Table 1 summarizes the discussion so far. Centralized organizations are generally more effective than non-centralized ones, but they are more vulnerable to the attempts of rivals to disturb their operations because of their dependence on co-ordination among their different specialized branches. An organization (such as the state, an occupier, or a strong insurgent group) that controls a safe haven that protects it from the easy disturbance of its operations by rivals therefore needs to adopt a highly centralized and specialized structure. Organizations that do not have such a space should adopt a non-centralized structure to increase their odds of outlasting their rivals. A safe haven is not essential to win a conflict, but it is essential that an organization organize properly depending on whether it has such a haven. An organization that suddenly gains control of a safe haven

Table 1. How structure and the availability of a safe haven affect organizational survival.

	Centralization	Patronage, multiplicity or decentralization	Fragmentation
Safe haven	Good chance of survival	Poor chance of survival	Poor chance of survival
No safe haven	Poor chance of survival	Good chance of survival	Poor chance of survival

Source: modified from A. H. Sinno, above note 15, p. 88.

needs to transform itself into a more centralized structure or risk dissipating its resources.

The impact of organizational structure on strategic choices

Organizational structure and strategy are closely intertwined. A certain structure can limit the strategic options available to a movement; make the adoption of a certain strategy more or less credible to the organization’s opponents, sponsors, and supporters; limit the ability of the organization to resist its rivals’ strategies; and provide additional incentives to adopt some strategies.

When I say that organizational structure can limit both strategic and tactical options I do not intend to be as stringent as the determinism of social structuralists. I do not mean that there is only one winning strategy and that this strategy is always adopted, as Theda Skocpol saw matters evolving during the Chinese Revolution.¹⁸ I simply mean that the range of strategies that can be initiated and the range of those that can be countered are limited by the structure of the organization. If the top-tier leadership decides to pursue a strategy outside the range that the structure of the organization allows, then one of four things can happen: the leadership is replaced or readjusts its strategy; the rank and file leave in droves; the organization is thoroughly defeated; or a difficult organizational restructuring process takes place. I draw on the metaphor that James DeNardo uses to criticize Skocpol’s strategic determinism to illustrate the different ways in which Skocpol, DeNardo, and I see strategic options.¹⁹ Consider a game of chess, DeNardo tells us, and you soon realize that the structure of the board and the configuration of pieces constrain the players’ choices. Those restrictions do not

18 Theda Skocpol, *States and Social Revolutions*, Cambridge University Press, Cambridge, 1979, p. 252. Skocpol de-emphasized the role of actors and most other structuralists argue that strategy does not even matter.

19 James DeNardo, *Power in Numbers: The Political Strategy of Protest and Rebellion*, Princeton University Press, Princeton, 1985, pp. 29–32.

determine the subsequent course of the game and its outcome, as Skocpol believes social structure determines the outcome of revolutionary action. The metaphor of the chessboard, like all others, has its limitations, but it suffices to illustrate my understanding of restrictions on strategy. Although Skocpol might not consider a chessboard a good metaphor for revolutionary interaction and DeNardo finds it a fine one to illustrate the availability of many alternative strategies, I believe the chessboard could provide a good metaphor if the pieces were tied to one another with threads. The threads represent organizational restrictions that might limit the availability of complex strategies, and each structure can be represented by a different assortment of threads tying different pieces. If the rooks were attached to the queen with threads the length of two squares, then the player would be deprived of a number of strategies that depend on those pieces. The same player would also be limited in evading any of his or her opponent's strategies that aim to eliminate those pieces or that would be inconvenienced by a defence that requires their habitual movement. This is how I envision organizational structure to reduce the range of strategies available to the state and its challengers. In what follows, I discuss the effect of structure on simple strategies (confrontation and accommodation), as well as on three more complex strategies – divide and conquer (rule), 'hearts and minds', and co-option.

Confrontation and accommodation

Strategies of confrontation and accommodation are available for both incumbent organizations (the regime or occupying power) and their challengers. The organizational structures of the parties in conflict can both encourage them to adopt an accommodationist (attempting to reach a settlement) or a conflictual strategy (through attrition or a direct attack to dismantle rival organizations) and also lock them into those tactics.

Centralized organizations with strong hierarchical control are capable of rapidly adjusting their strategies in response to changes in the environment or the strategies of rivals. The ability to switch could be either to the advantage or to the detriment of the organization, because both resilience and flexibility have their distinct virtues. The ability of a centralized organization to adopt an accommodation strategy toward the incumbent (the regime or occupying power) can, however, be impaired by the existence of rival organizations. A multiplicity of organizations encourages the consistent adoption of a confrontational strategy by the challengers because a dissatisfied population is likely to shift its support to the organization that shuns the conciliatory route.²⁰ The resistance organization that fails to understand this dynamic and appeases the incumbent is likely to see its

20 This argument is akin to the one made by the philosopher René Girard in *Violence and the Sacred*, Johns Hopkins University Press, Baltimore, 1977. Martin Kramer, 'Sacrifice and fratricide in Shiite Lebanon', in *Terrorism and Political Violence*, Vol. 3, 1991, pp. 30–47, applies these ideas to the resistance against the Israeli occupation of southern Lebanon.

rivals grow at its expense.²¹ Such was the destiny, for example, of Draža Mihailović's *Chetnik*, as Chalmers Johnson and participants in the conflict tell us.²² According to Vladimir Dedijer, one of Tito companions and the official Yugoslav Communist Party historian, entire *Chetnik* units joined the partisans when they became disgusted with the policy of waiting or refused to accept their leadership's orders to stop attacking the Germans.²³ Another example is the radicalizing effect of ETA (Basque Homeland and Freedom) on other Basque organizations such as the PNV (*Partido Nacionalista Vasco*, or Basque National Party) and many Basque politicians.²⁴ The Chinese Kuomintang, which accommodated the Japanese, was also defeated as its support weakened while Mao's Communists engaged in active resistance.²⁵

Some structures go beyond influencing the adoption of a certain strategy; they lock the organization into this strategy. This occurs when structure creates a set of incentives that make it a dominant personal strategy for each organizational member to persist in the role he plays as part of the overall organizational conflictual strategy. Multiple organizations featuring ties of patronage are particularly prone to create such strategy lock-ups. A prominent example of such a lock-up is the Afghan mujahideen's tenacious resistance to the Soviets in the 1980s.

Afghan *mujahideen* leaders remained firm in their commitment to fight the Soviets even when the United States and Pakistan, their key suppliers and sponsors, pressured them to accept and abide by the Geneva Accords after their ratification. Afghan commanders continued to attack Soviet troops until the last day of their occupation of Afghan soil, in spite of Soviet threats to halt the withdrawal if attacks did not stop and of US and Pakistani pressure on resistance leaders. They also refused to enter into a coalition government with the Kabul regime despite more such pressure. This puzzling inflexibility, which meant that the Afghan resistance parties could not be co-opted or deterred by their enemies nor be manipulated by their powerful sponsors, was a direct consequence of the structure of the resistance.²⁶

Each of the seven Peshawar-based resistance party leaders who considered compromising with the Soviets or their client regime in Kabul had to consider how

21 Uncompromising groups (Hamas in Palestine, Protestant militants in Northern Ireland, supporters of the Zulu chief Mangosuthu Buthelezi in South Africa) might try to derail deals concluded between the incumbent and more moderate groups. They do not always succeed, but their anticipated strategy reduces the incentive for the moderates to compromise and radicalizes all resistance groups. The success of such strategies is generally underestimated because it is hard to recognize cases in which moderate resistance leaders do not even enter negotiations because they realize that excluded groups will derail their efforts through increasing confrontation.

22 Chalmers Johnson, *Peasant Nationalism and Communist Power: The Emergence of Revolutionary China*, Stanford University Press, Stanford, 1962, p. 164.

23 From Dedijer's World War II diary, in *ibid.*, p. 69.

24 David Laitin, *National revivals and violence*, paper presented at the Center for Advanced Study in the Social Sciences of the Juan March Institute, 29 March 1993, p. 26.

25 Gerard Chaliand, *Guerrilla Strategies*, University of California Press, Berkeley, 1982, ch. 2.

26 A. Sinno, above note 15, chs 5 and 6.

such a compromise would be received by his field commanders (his clients). The reason for this was that a party leader's prestige and influence was proportional to the number and strength of commanders whose allegiance he was able to claim. Field commanders had an inherent interest in the continuation of the jihad because their stature, economic interests, and *raison d'être* depended on being needed field commanders. More important, field commanders wanted to preserve local autonomy from the intrusive Kabul regime and its Soviet sponsors, and the perpetuation of the resistance was essential to maintaining it. If a Peshawar-based leader opted for compromise, he was likely to lose the support of field commanders who staunchly disagreed with his policy and would therefore defect to uncompromising parties who were more than happy to welcome them. Agreement among all party leaders jointly to compromise with the Soviets or their client regime in Kabul was virtually impossible because field commanders could choose to become unaffiliated with any party, and even to form their own, if all party leaders simultaneously chose to compromise with the Soviets. This is why no party leader ever compromised with the Soviets, regardless of the cost of the confrontation to the Afghans.²⁷

Decentralization puts more decision-making power in the hands of second-tier cadres, making them more flexible on the local level, unlike their peers in centralized organizations. This local flexibility – the ability to switch strategies – comes at the expense of overall organizational flexibility. Decentralized organizations are held hostage by their most extreme cadres, because the execution of a conflictual act by one segment of the organization is generally viewed by rivals as representing the intentions of the entire organization. The top-tier leadership of the organization will find itself in the awkward position of having to choose between denouncing part of the rank and file or pretending that it supported them all along while hoping that the confrontational strategy will succeed. Unfortunately for them, the same lack of control that dragged them into adopting an overall organizational conflictual strategy is likely to weaken their ability to motivate the nonaggressive segments. The Palestinian Authority under Yasir Arafat was no stranger to this situation as it tried to establish itself in the West Bank and Gaza after the Oslo Agreements.

Divide and conquer

'Divide and conquer' (rule) is a strategy for territorial control initiated by the occupying power or regime in place that consists of dividing the population into interest groups (either horizontal or vertical) with a low probability of achieving their most preferred political outcome (to assume power) but that can achieve an outcome that is better than their worst one (having rival groups in power) by having the occupation apparatus (regime) in power. For example, let us assume

27 For more details and evidence, see A. Sinno, above note 15, ch. 6.

that a number of solidarity groups (e.g. ethnic groups) have the following preferences because of a history of enmity:

1. Direct control of the centre and the resources it confers (be in power)
2. Colonial power (regime) controls government
3. Anarchy/secession (no government)
4. Rival group(s) control(s) government

If $P(1)$ – the probability of outcome number one being achieved – is negligible or its cost is too high, then supporting the colonial power (regime) becomes the dominant strategy for the group. $P(1)$ becomes smaller as the size of the group gets smaller and its distance from the centre of power increases.²⁸

Few writers describe the conditions under which a policy of divide and rule is likely to be successful as eloquently as Alexis de Tocqueville did when he explained why the rule of the Corsican Napoleon was easily accepted:

All parties, indeed, reduced, cold, and weary, longed to rest for a time in a despotism of any kind, provided that it were exercised by a stranger, and weighed upon their rivals as heavily as on themselves. When great political parties begin to cool in their attachments, without softening their antipathies, and at last reach the point of wishing less to succeed than to prevent the success of their adversaries, one must prepare for slavery – the master is near.²⁹

If, however, the occupying power or regime is perceived as wanting to use the resources of government to subvert the group, instead of keeping other groups from doing so at a cost, then the group has no incentive to support it. Anarchy and secession are often too costly and only become appealing alternatives if the rival group controls the centre and uses its resources (such as legitimacy, institutions, financial power) to subvert the group with the above preferences. Secession (de facto self rule) can be a more appealing alternative to occupation (regime) control if it is easy to achieve because of competition among rival groups and the occupying power/regime.

If we relax the assumption of animosity or competition (either historical or stoked by the occupying power or regime) among societal groups, we can expect the different groups to coalesce in an effort to get rid of the occupying power or regime that is in control of resources that could otherwise be shared among them in their entirety.

In brief, ‘divide and conquer’ is more likely to succeed (1) the greater the animosity and fear among societal groups, (2) the smaller the size and greater the

28 The Syrian Alawites are a glaring exception here, but they did become very close to the centre of power by infiltrating the army before they controlled the institutions of the Syrian state. Steve Heydemann, *Authoritarianism in Syria: Institutions and Social Conflict, 1946–1970*, Cornell University Press, Ithaca, NY, 1999.

29 From the two completed chapters of the sequel to the *L’Ancien Régime*, in Alexis de Tocqueville, *Selected Writings on Democracy, Revolution and Society*, ed. John Stone and Stephen Mennel, University of Chicago Press, Chicago, 1980, p. 246.

distance of groups from the centre of power, (3) the more costly secession is for the concerned groups, and (4) the greater the ability of the occupying power/regime to be (or to appear) neutral in the conflict among rival groups.

King Hussein of Jordan skilfully shaped conditions during his reign so that these four factors would allow him to keep his precarious throne through the use of such a strategy. He allowed resentment between Transjordanians and Jordanians of Palestinian descent to fester by giving Transjordanians a monopoly over state employment and allowing – some claim encouraging – the development of Transjordanian nationalist parties that excluded Palestinians from their conceptual construction of Jordan as a nation (factor 1). Transjordanians and Palestinian Jordanians coexist in the larger cities, and secession by any one group would be very difficult and costly, as demonstrated by the civil war of the early 1970s (factors 2 and 3). Finally, Hussein was an outsider (a descendant of the sharif of Mecca, with no family roots in Jordan). Although previously both Transjordanians and Palestinians could have envisioned a better Jordan without him, they ultimately preferred enduring his mild despotism to the rule of extremists from the opposing side after he managed to fan ethnic distrust (factor 4).

Only a centralized organization can execute a divide-and-conquer strategy because of the dexterity and co-ordination required to fan intergroup hatreds (factor 1) and the necessity of projecting a consistent finely tuned image as a neutral party above those hatreds (factor 4). 'Divide and conquer' is not meant to be applied to atomized societies or against a single centralized rival organization for obvious reasons – the latter situation generally invites a hearts-and-minds strategy. The ability of other structures to resist 'divide and conquer' hinges on their ability to affect the four factors that govern its success. Factors 1, 3, and 4 are not clearly affected by structural matters, but factor 2 (the lesser the size and greater the distance of groups from the centre) can be. Multiplicity and decentralization increase the role of this factor. Patronage, on the other hand, could either encourage or discourage it, depending on whether the strategy 'lock-up' is already in place.

Hearts and minds

The British refined and successfully applied the 'hearts-and-minds' strategy in a number of colonial conflicts, particularly in Malaya and in the Mau Mau and the Dhofar revolts.³⁰ This strategy is, in principle, available to government rivals, but it requires extreme centralization and considerable resources, more often attributes of the government or occupier than of its rivals. The strategy consists of:

1. Differentiating among active fighters, passive supporters, genuine neutrals, and government loyalists. This, of course, requires a centralization of the flow of information.

³⁰ The term 'hearts-and-minds' was coined by the British High Commissioner in Malaya, General Gerald Templer. He was appointed in 1952, when things looked bleak for the British, and successfully applied the general guidelines I describe in this section.

2. Geographically, physically, or psychologically isolating those identified as the active challengers from others. This requires a highly co-ordinated and thus centralized military and intelligence operation.³¹
3. Providing positive sanctions (inducements) to potential supporters of rival organizations and protecting them from abuse by undisciplined troops to discourage them from supporting rivals.³²

When those steps are well executed, it becomes much easier to subdue the isolated rebels, who cannot replenish their ranks or rely on external material support. To execute them well can be a considerable challenge, however, particularly if the revolutionaries avoid the fatal mistake of centralizing their structure in response to the regime's efforts. The best structures to counter a hearts-and-minds strategy are traditional ones, preferably based on patron–client ties and featuring an abundance of redundant structures. The density of ties in traditional structures makes it easier to conceal fighters within their own communities and prevent their isolation. Patron–client ties, if both patrons and clients are on the same side, maintain cohesion in the face of a hearts-and-minds strategy. Such ties also make it more costly for the regime to woo either patrons or clients to its side, because the more dependent a member is on a relationship (that is, the more costly it is to leave it in terms of opportunities foregone), the higher the cost will be to sever him from it. Such was the case during the Soviet occupation of Afghanistan, but not during the Huk rebellion, where previous patrons (landlords) and clients (farmers) were on opposite sides after a serious dislocation of their traditional ties. The Philippine government of Ramon Magsaysay followed the hearts-and-minds strategy to the letter under the guidance of Western advisers and was assisted by the clumsy attempt of the Communist Party of the Philippines (PKP) to control and centralize the peasant rebels.³³ The Chinese Communist rebels in Malaya, as many observers have noted, suffered tremendously from their stubborn adoption of a centralized organizational structure inspired by their dogmatic beliefs when faced with the British hearts-and-minds strategy.³⁴ Redundancy, decentralization, and multiplicity are useful because they hinder the collection of information on active militants by the regime: it is easier to fill the name slots in a single rigid organizational chart than in numerous ones in flux.

31 An obvious response to the famous Maoist aphorism that the successful insurgent is one who lives among the people as a fish in water.

32 Some might argue that another necessary ingredient to 'hearts-and-minds' is making plenty of concessions because, after all, the British did commit to withdraw from Malaya and gave it independence. This is not true: no such concessions were made in other cases where this strategy was successfully applied, including the Dhofar and the Huk rebellions. In both cases the government provided positive sanctions (step 3) but very little in terms of political concessions. While not necessary, however, affordable political concessions (especially developing a sense of political participation) would facilitate the government's task within the framework of a hearts-and-minds strategy.

33 Benedict Kerkvliet, *The Huk Rebellion*, University of California Press, Berkeley, 1977.

34 John Bowyer Bell, *On Revolt*, Harvard University Press, Cambridge, MA, 1976, p. 184.

It is worth noting that what American politicians and generals call 'hearts-and-minds' in the context of US wars in Vietnam, Iraq, and Afghanistan is something completely different – a largely ineffectual massive propaganda campaign or effort to gain a population's goodwill by doling out services and resources. The US approach often fails to distinguish effectively between ally and foe while doling out resources and does not methodically isolate US opponents. It is often applied against opponents that are practically impossible to isolate.

Co-option

Selznick defines co-option (or co-optation) as 'the process of absorbing new elements into the leadership or policy-determining structure of an organization as a means of averting threats to its stability or existence'.³⁵ I generalize this definition as follows: co-option is a strategy initiated by a dominant organization or coalition of organizations that consists of offering positive sanctions to other threatening organizations or key individuals within them in return for accepting the norms of interaction desired by the dominant organization or coalition.³⁶

Co-option is a co-operative strategy that can result in a co-optive arrangement that is not self-enforcing: both parties, the co-opter and the co-optee, have to offer something in return for what the other offers for a co-optive arrangement to succeed. The co-opter hopes to reduce risk by co-opting some rival organizations or their leaders. The co-optees could obtain substantial gains from a co-optive arrangement but forfeit their ability to challenge the co-opter outside its institutions. The co-optee's acceptance of the co-optive arrangement might be valuable to the co-opter if it is one of many challengers and can therefore provide a precedent for more important attempts at co-option. A co-optee can also be valuable if it provides two-step leverage over other organizations or groups.³⁷ Co-opting for two-step leverage is a common strategy in colonial situations where the occupying power co-opts a small, highly militarized minority to police the rest of the population. Frisch provides us with a vivid illustration of the use of this strategy by the Israeli government.³⁸ The co-optees in this case are the highly martial Druze citizens of the state of Israel, whose units in the Israeli army are often assigned the task of suppressing Palestinian resistance in the Israeli-occupied territories in

35 Philip Selznick, 'Foundations of the theory of organizations', in *American Sociological Review*, 1948, Vol. 13, Issue 1, p. 34. Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization*, Harper and Row, New York, 1949, provides the classic case study of co-option as strategy. See Michael Saward, *Co-optive Politics and State Legitimacy*, Dartmouth, Aldershot, 1992, for a rare discussion of this important strategy and its general application to international relations and strategic interaction in general. Co-option is widely used in politics but has received too little academic attention.

36 The terms 'co-option' or 'co-optation' are most often used to indicate an outcome. I am only interested in co-option as strategy here. When needed, I refer to the outcome as a co-optive arrangement.

37 See Martin Gargiulo, 'Two-step leverage: managing constraint in organizational politics', in *Administrative Science Quarterly*, Vol. 38, 1993, pp. 1–19, for a stimulating discussion of two-step leverage and indirect co-optive behaviour in organizational politics.

38 Hillel Frisch, 'The Druze minority in the Israeli military: traditionalizing an ethnic policing role', in *Armed Forces and Society*, Vol. 20, 1993, pp. 51–67.

return for favourable treatment for their tiny community. Another form of two-step leverage consists of co-opting the leaders of an organization rather than the entire organization. This kind of co-option is highly cost effective because it is much cheaper to co-opt one or a few individuals than an entire organization. Tribal politics sometimes facilitate personal co-optation because of the loyalty that tribal leaders generally, but not always, command among members of the tribe, whom they can restrain or unleash at will.

Two factors differentiate co-option from alliance (the short-term aggregation of capabilities against a common enemy). First, the co-opter generally offers positive sanctions in the hope of producing a co-optive agreement because the acceptance by a lesser organization of the norms of the hegemonic organization without concessions would be tantamount to defeat. Second, the co-opter must be more powerful than the co-optee, which must necessarily accept the hegemonic stature of the co-opter and the applicability of its norms to their future interaction (for example, that all differences are solved in the parliamentary arena, or the acceptance of the monarch's authority). Either party could defect (not continue to co-opt or be co-opted), sometimes even after a co-optive arrangement is reached or even institutionalized, if incentives change. Institutionalization, however, generally makes the cost of defection higher.

Co-option is costly to the co-opting organization and its leaders. It is costly because positive sanctions need to be offered to the co-opted individual or organization and because power and information need to be shared with them.³⁹ The powers therefore need to assess candidates for co-optive arrangements carefully. An organization makes a good candidate for co-option if it is powerful enough substantially to disturb the operations of the co-opting organization, or is likely to do so in the future, and not powerful enough to take over the organization from within, or capable of eliminating it, and if the cost of co-opting it is less than the cost of fighting it.⁴⁰

Whether it is advantageous or detrimental for an organization to be co-opted depends on the terms of the co-optive agreement (the positive sanctions and the norms adopted), as well as the opportunity cost of forfeiting confrontation. The only kind of co-option that could safely be assumed to have negative consequences for an organization is the co-option of its leaders, not the organization itself – if the leaders are awarded positive sanctions instead of the organization. In addition, early co-optees tend to benefit more than subsequent ones because the regime wants to co-opt the minimum number of rivals necessary to remain in power while lowering the cost of co-option, and it therefore may pay a premium to form a minimum organizational quorum.

Only centralized organizations are likely to adopt and implement co-optive strategies because of the necessity of bringing along the rank and file in

39 On the effect of co-option on power within the co-opting organization, see Jeffrey Pfeffer, *Power in Organizations*, Pitman, Marshfield, MA, 1981, p. 166.

40 Some maintain that organizations other than adversaries can be 'co-opted'. This is a loose use of the term and seems to imply alliance more than co-option.

support of the arrangement, which represents a strategy shift. Vulnerable societal leaders in fragmented societies are easy targets for co-option. It is easier to co-opt a centralized organization whose leadership has more control over organizational strategy than a decentralized one. Decentralized structures are also less likely to be able to enforce the respect of the co-opter's norms on their rank and file, an essential condition for the success of the co-optive arrangement.

A multiplicity of organizations eases the implementation of co-option by the powers that be because of the incentive for each organization to be the first co-optee with the most favourable co-optive arrangement, but it also makes defection more likely if the rank and file defect to non-co-opted challengers. Patronage-based organizations are likely to be immune to co-optive efforts once a lock-up is triggered and to be vulnerable if the co-optive arrangement is concluded before the dynamics for a lock-up are set in motion. Since we are dealing with well-developed conflicts, I assume that patronage-based organizations are likely to resist co-optive offers.

I summarize this discussion of the effect of organizational structure on the ability to both pursue (top half) and resist (bottom half) different strategies in Table 2. A dark square indicates that a structure hinders executing or resisting a strategy while a lightly shaded one indicates that the structure facilitates execution or resistance. Decentralized structures are generally incapable of taking the strategic initiative but can effectively resist complex strategies. Centralized structures generally can take the strategic initiative and execute complex strategies but are less able to counter them. Organizations without a safe haven would benefit from adopting a non-centralized structure, because centralized organizations are not capable of co-ordinating their operations well enough to implement complex strategies effectively in the absence of a safe haven. The non-centralized organization without a safe haven will at least be more capable of fending off its rivals. Once an organization acquires a safe haven, it makes sense for it to centralize to be able to take the strategic initiative in a co-ordinated way beyond its safe haven.

Conclusion: The tragedy of peace-making

Durable compromise settlements are rare. In a statistical study I conducted, I found that of the forty-one conflicts that took place between 1945 and 2001, and that lasted longer than three years, in the Americas, the Middle East, and North Africa, only two experienced a durable settlement (longer than ten years).⁴¹ Perhaps one reason is that durable settlements can only be achieved between (not among) centralized organizational rivals that strongly control their members and are capable of pre-empting the rise of alternative organizations to represent the interests of those who do not favour an agreement. This was the case for the only negotiated settlement from North Africa and the Middle East in the sample. Joseph Lagu had

41 A. Sinno, above note 15, ch. 10.

Table 2. How structure affects the ability of an organization to perform and counter strategies.

	Fragmentation	Centralization	Multiplicity	Decentralization	Patronage
Accommodation and Confrontation	Accommodate only	Both (flexible)	Encourages confrontation	Attrition and accommodation only, low flexibility	Attrition and accommodation only
Divide and conquer	No	Yes	No	No	No
Hearts and minds	No	Yes	No	No	No
Co-optation	No	Yes	NR	Unlikely	Unlikely

↖ ABOVE: ABILITY TO EXECUTE STRATEGY

BELOW: ABILITY TO COUNTER STRATEGY ↗

Confrontation	Nil, unless induces outside intervention	Yes if has safe haven, otherwise not	Depends on availability of safe haven helpful if doesn't have one otherwise, not		
Divide and conquer	NR	Yes, strategy useless versus one centralized organization	Probably weakens ability to counter		Yes in case of widespread lockup
Hearts and minds	NR	No	Both are better than a single centralized organization		The best
Co-optation	Vulnerable to individual co-option	Easier to co-opt than decentralized organization	Easy to co-opt	Harder to co-opt than centralized organization	Yes

Shading code: disadvantageous advantageous No shade = Not Relevant (NR) or not clear

Source: modified from A. H. Sinno, above note 15, p. 58.

to centralize Anya Nya and consolidate his control over its rank and file before negotiating with the government in Khartoum in 1972.⁴²

Centralization, and the ability that it generally confers to control the rank and file, is an important prerequisite for effective negotiation because of the frequent need to rein in spoilers (to use Stephen Stedman's terminology) who disagree with the leadership's conciliatory goals. Spoilers can sabotage negotiations by committing confrontational acts that undermine the perceived sincerity of organizational leaders, who will be blamed for them.⁴³ Centralization also helps in effectively pre-empting the emergence of new rival organizations that are likely to adopt, as their strategy for rapid growth at the expense of the conciliatory organization, an uncompromising line that appeals to those conditioned during years of conflict to believe that negotiation is tantamount to betrayal.⁴⁴

Unfortunately, as I argue above, centralized organizations are only serious contenders in a conflict if they have a safe haven within the contested territory, and most of them do not. Their opponents may therefore not feel the urge to negotiate with them or to make concessions because they may sense that victory would ultimately be theirs. This is the unfortunate reality of peace-making in civil wars: most of the insurgent organizations that can be serious parties to negotiated settlements are precisely the ones that incumbents think are not worth negotiating with.

42 Donald Rothchild and Caroline Hartzell, 'The peace process in the Sudan', in Roy Licklider (ed.), *Stopping the Killing: How Civil Wars End*, New York University Press, New York, 1993, pp. 69–70.

43 Stephen Stedman, 'Spoiler problems in peace processes', in *International Security*, Vol. 22, No. 2, 1997, pp. 5–53.

44 For an illustration from Kosovo of how compromise could be impeded by a lack of centralization, see Chris Hedges, 'Serbs ready for large-scale attacks on Kosovo rebels', *New York Times*, 27 June 1998.

Economic dimensions of armed groups: profiling the financing, costs, and agendas and their implications for mediated engagements

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Abstract

This article introduces the various economic dimensions of armed groups and explores the implications of their engagement through mediation and dialogue. It looks specifically at the financing, operational costs, and economic agendas of armed groups and brings together examples from Angola, Kosovo, Sudan, Colombia, and other places. It emphasizes that information about available financing and operational costs is critical for assessing the financial and operational strength of an armed group. It also highlights the need to understand armed groups in the broader context of their evolution and the changes that organizational and territorial expansions require with

* This article provided a welcome opportunity for the author to synthesize various work streams on the economic dimensions of armed conflict into a single text focusing on armed groups. It draws specifically on Achim Wennmann, *The Political Economy of Peacemaking*, Routledge, London, 2011, and Achim Wennmann, 'Conflict financing and the recurrence of intra-state armed conflict', PhD thesis, University of Geneva and Graduate Institute of International Studies, Geneva, 2007. Other publications of the author on which the article draws are included in the relevant footnotes. The author thanks Jennifer Hazen for comments.

regards to financing strategies. Overall, the economic dimensions of armed groups should be approached with an open mind so that issues such as financing, costs, and economic agendas can be perceived as opportunities, and not necessarily as a problem for peace.

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The economic dimensions of armed conflict have been much written about, but not always understood in their full complexity. Be they natural resources, from coltan to timber, or the greedy economic agendas of ‘warlords’, economic dimensions have been the subject of United Nations proceedings, advocacy initiatives, and scholarly investigation. As they make sense of the financing, costs, and agendas of armed groups, policy, research, and activist communities face similar problems: reliable information on the economic dimensions is hard to come by in messy civil war contexts. The results are broad estimates, a tendency towards inflating the little evidence there is, and significant room for interpretation based on ‘best available information’ in the public domain.

This absence of reliable sources is part of the limitation but also the fascination of studying the economic dimensions of armed conflicts and the armed groups that fight them. Economic dimensions are important in understanding conflict dynamics and can also provide insights for mediators as they prepare mediated engagements. What is more, economic factors can structure the context in which armed groups fight, mobilize support, and build relationships with local populations. This article focuses on the economic dimensions of ‘armed groups’, as opposed to ‘armed conflict’. Fragments of information on the economic dimension of armed groups are often hidden within the literature on the political economy of armed conflict. I therefore propose to bring these fragments together and present an analysis of the economic dimensions of armed groups. The article profiles the financing, mobilization costs and economic agendas of armed groups, and explores what these dimensions imply for the engagement of armed groups through mediation and dialogue.

The article unpacks the economic dimensions of armed groups along four paths: first, it analyses the current state of knowledge about the financing of armed groups. Second, it investigates the mobilization costs of armed groups. These costs capture the funding needed to equip a certain number of people and ensure that they can engage in fighting for a certain amount of time. As I will show, contrasting the mobilization costs with the available funding is critical analytically: knowing how much money an armed group has does not yet allow any conclusions about how well it can translate these resources into battle or organizational success. Other factors for the calculation include the power of the adversary, and the creativity of leadership. Third, the article looks at the way in which armed groups transform over time. In some cases such as the *Fuerzas Armadas Revolucionarias Colombianas* (FARC), the Liberation Tigers of Tamil Eelam (LTTE), the Sudan People’s Liberation Movement/Army (SPLM/A), or the Communist Party of Nepal-Maoist (CPN-M), the controlled territories became ‘*de facto*’ states where these groups

wielded some level of empirical sovereignty.¹ The fourth part links economic agendas of armed groups to mediation and dialogue processes. It inquires how economic dimensions can become an opportunity for a forward-looking transformation of armed groups while strengthening their commitment to participate in a political process. Overall, this article argues that we need to broaden our study of the economic dimensions of armed groups so that we can identify and seize new opportunities for peace-making.

The financing of armed groups

About a decade ago, the issue of conflict financing was catapulted to international attention because a number of African armed groups were financing themselves through natural resources. The term ‘conflict diamonds’ became a symbolic reference for describing the link between greedy warlords, war crimes, and illicit commerce – all themes that have triggered significant political, advocacy, and scholarly efforts, and have also inspired a series of blockbuster movies. While diplomatic and advocacy efforts focused on United Nations responses to Angola, the Democratic Republic of the Congo (DRC), Liberia, and Sierra Leone, there was a separate – but connected – evolution of scholarly debate about the role of natural resources in armed conflict. Some exposed an inevitable causal link, while others invited a case-by-case and contextual analysis.² The intense political, advocacy, and scholarly attention marked the early efforts on conflict financing, and the relationship between natural resources and armed conflict. Over time, perspectives widened and stark claims were qualified, while placing analyses in their historical and local context. The debate whether ‘greed’ or ‘grievance’ would cause armed conflict was laid to rest by describing that they were really just ‘shades of the same problem’.³

1 Empirical sovereignty is associated with the criteria of statehood identified in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States: a permanent population, a defined territory, a government, and the capacity to enter into relations with other state. While *de facto* states may have empirical aspects of sovereignty, they lack juridical sovereignty associated with international recognition because their territory is already part of an existing and recognized state. See Scott Pegg, *International Society and the De Facto State*, Ashgate, Aldershot, 1989, p. 26. Dov Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and the De Facto States*, United States Institute of Peace Press, Washington DC, 2004, p. 16.

2 Paul Collier and Anke Hoeffler, ‘On the economic causes of civil war’, in *Oxford Economic Papers*, Vol. 50, No. 4, 1998, pp. 563–573; Mats Berdal and David M. Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, Lynne Rienner, Boulder, CO, 2000; Karen Ballentine and Jake Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Lynne Rienner, Boulder, CO, 2003; Paul Collier and Nicholas Sambanis (eds), *Understanding Civil War: Evidence and Analysis, Volume 1: Africa*, The World Bank, Washington DC, 2005; Cynthia J. Arnson and I. William Zartman (eds), *Rethinking the Economics of War: The Intersection of Need, Creed, and Greed*, Woodrow Wilson Center Press, Washington, DC, 2005.

3 Ian Bannon, ‘Preface’, in P. Collier and N. Sambanis, above note 2, p. xi.

A historical perspective on financing war

The recent efforts described above are not to downplay the long historical record of scholarship on the matter, as well as the existence of an entire discipline of defence economics, even though the focus is on state armies and inter-state wars.⁴ Common sources of war financing described in the historical work included booty, indemnities, taxes, loans, credits, and the reduction of consumption. Living off the land of the conquered or an area of transit was used to nourish and supply armies until the beginning of the twentieth century, with often significant economic and humanitarian consequences for local populations.⁵ Such 'living off the land' does still take place in some conflict situations today, even though some modern armies have developed significant logistical capabilities to supply troops over great distances.

The financing of war efforts has also been associated with the evolution of the state in Europe, where various rulers set up intricate extraction systems to acquire the resources for state-making, war-making and protection.⁶ Those states that were able to organize their extraction successfully – and spent it wisely – persisted; others – such as the kingdom of Burgundy, which did not – disappeared.⁷ In the scholarly literature on political economy, these types of financing relate to the concepts of the 'roving' and 'stationary' bandit.⁸

The extractive character of state armies stands in contrast to the doctrine of guerrilla warfare, which stresses the symbiotic relationship with local communities. The argument of symbiosis was part of Mao Tse Tung's and Ernesto Che Guevara's work on closed insurgency economies.⁹ These economic strategies, however, have their own humanitarian consequences, as local communities increase their risk of being targeted by counter-insurgency campaigns. Relying only on symbiosis was also insufficient for mobilizing resources to maintain guerrilla activities, which explains why insurgents need to be highly mobile, and move around from community to community while ensuring external support.¹⁰

War in all ages presented such an enormous strain on the resources of states and populations that it fostered financial innovation to the extent that

4 Charles H. Anderton and John R. Carter, *Principles of Conflict Economics: A Primer for Social Scientists*, Cambridge University Press, Cambridge, 2009; Ron Smith, *Military Economics: The Interaction of Power and Money*, Palgrave Macmillan, Basingstoke, 2011.

5 Michael Howard, *War in European History*, Oxford University Press, Oxford, 1976, pp. 85, 98.

6 Charles Tilly, *Coercion, Capital and European States, AD 990–1992*, Blackwell, Oxford, 1992, pp. 74–76, 96.

7 John Keegan, *A History of Warfare*, Pimlico, London, 1993, p. 329.

8 The 'roving bandit' is a predator who loots while sweeping through various territories to accumulate personal riches; the 'stationary bandit' stays in one territory and provides protection to some parts of the population in return for local investments that increase the bandit's wealth. See Mancur Olson, 'Dictatorship, democracy, and development', in *American Political Science Review*, Vol. 87, No. 3, 1993, p. 568.

9 Jean-Christophe Rufin, 'Les économies des guerres dans les conflits internes', in François Jean and Jean-Christophe Rufin (eds), *Économie des guerres civiles*, Hachette, Paris, 1996, pp. 21–23.

10 *Ibid.*

‘financial history cannot escape dealing with war’.¹¹ For instance, between 1515 and 1565, the Habsburg Netherlands were the first to mobilize future revenue for present needs. Given that expenditure for war came in surges, the ability to incur debts made it possible to generate large sums of money quickly.¹² Since then, the relationship between debt and taxes – and whether war should be financed by the present generation through taxation or by future generations through debt – has remained a central political debate surrounding every major armed conflict. In recent years, such debates have occurred in the context of the wars in Afghanistan, Iraq, and Libya. History also suggests that the state’s ability to incur debt and raise taxes makes it one of the most effective strategies to finance armed conflict.

This historical perspective on conflict financing is instructive in the sense that those individuals or groups wanting to organize an armed conflict must overcome some basic mobilization challenges relating to recruitment, control, and financing.¹³ These challenges are similar for state armies, non-state armed groups, and transnational terrorist networks. In a sense, systematic military campaigns must be organized in difficult contexts and environments, which in turn requires a high degree of entrepreneurial skill, street smarts and long working hours from armed groups. In most cases, states have the critical advantage over non-state armed groups of a pre-existing treasury and bureaucracy, as well as the capacity to mobilize future revenue for present needs.

Financing methods of armed groups

Armed groups use a wide variety of financing methods to sustain their military activities as well as the combatants that make up the armed groups. Strategies used by armed groups include, for example, bank robbery, foreign government support, revenue from natural resources, kidnapping, diaspora remittances, and taxes.¹⁴ The kinds of methods used to finance armed groups depend on the opportunities for money-making in the specific territories that an armed group controls, the geo-strategic significance of this territory, and the international political context that shapes the conflict.

For instance, in Nigeria the presence of oil defines incentives for oil theft, kidnapping of oil workers, and support from frustrated communities. In contrast, the political nature of the Israel/Palestine conflict invites often contested foreign government support; while armed groups in Indonesia, Somalia, and Sri Lanka could draw on diaspora remittances and taxation of local communities. Financing

11 Charles P. Kindleberger, *A Financial History of Western Europe*, Oxford University Press, Oxford, 1993, p. 7.

12 James D. Tracy, *A Financial Revolution in the Habsburg Netherlands: Renten and Renteniers in the County of Holland, 1515–1565*, University of California Press, Berkeley, 1985, pp. 218, 221.

13 Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007, pp. 20–21.

14 For an overview of financing methods, see Achim Wennmann, ‘The political economy of conflict financing: a comprehensive approach beyond natural resources’, in *Global Governance*, Vol. 13, No. 3, 2007, pp. 431–436.

efforts also vary between the odd bank robbery of smaller armed groups, and the intricate, state-like fundraising or transfer systems of larger ones.

How well armed groups are able to translate financing into successfully reaching their objective depends on the quality of leadership, as well as the international alliances and support that they can count on. There is also evidence that there is a relationship between the initial endowments of armed groups and the use of armed violence in recruiting practices. Resource-rich armed groups recruit opportunity-minded soldiers with coercive strategies. In contrast, resource-poor groups recruit more activist-minded soldiers with participatory strategies.¹⁵

So far, research on the financing of armed groups has mainly relied on case studies of particular groups, and efforts to establish comparative empirical evidence are in their infancy.¹⁶ While current efforts are good at listing strategies used by specific armed groups, a next step would be to identify which methods are used at what point in time of a conflict, the amount of revenues fundraised, and how – if at all – the available revenue has an impact on the dynamics of the conflict. Such information is of course difficult to generate, but systematic efforts to collect the best available information about the financing of armed groups may be able to provide new insights into the ways that armed groups innovate and transform.

Examples of financing methods and means

One of the best-documented financing infrastructures is that of the *União Nacional para a Independência Total de Angola* (UNITA). For the supply logistics and diamonds trade, a number of transport agents acted autonomously or as government agents within larger networks based on the relationships between UNITA and the Governments of Togo, Burkina Faso, and Zaire.¹⁷ UNITA also maintained representatives abroad who were known to control bank accounts in France, Portugal, Switzerland, Ireland, Belgium, Côte d'Ivoire, and the United Kingdom, as well as in offshore centres, which generated returns from capital investments.¹⁸ Towards the end of the conflict, Jonas Savimbi, UNITA's leader, also held a significant stockpile of diamonds. At this point diamonds became the actual

15 J. Weinstein, above note 13, pp. 20–21, 171–172, 328–329.

16 An exception is the Database of Transnational and Non-state Armed Groups that gathers information about fifty armed groups, including on financing strategies. It was established by the Graduate Institute of International and Development Studies in Geneva and the Program on Humanitarian Policy and Conflict Research at Harvard University. The database can be accessed on request by contacting the Centre on Conflict, Development and Peacebuilding (CCDP) of the Graduate Institute (ccdip@graduateinstitute.ch).

17 Small Arms Survey, *Small Arms Survey 2001: Profiling the Problem*, Oxford University Press, Oxford, 2001, p. 117.

18 United Nations Security Council (UNSC), *Additional Report of the Monitoring Mechanism on Sanctions against UNITA*, UN Doc. S/2002/486, 26 April 2002, para. 199. UNSC, *Supplementary Report of the Monitoring Mechanism on Sanctions Against UNITA*, UN Doc. S/2001/966, 12 October 2001, paras. 234–247.

currency with which UNITA paid for arms, transport services, and political patronage.¹⁹

Kosovo also had an intricate funding system that supplied the resources for parallel government and society institutions between 1989 and 1995. The starting point for the creation of diaspora financing was the knowledge of an estimated USD 3 billion of savings held by the Kosovo Albanian diaspora in their host countries.²⁰ Based on these estimates, it was decided in the early 1990s that a 3% voluntary tax of net income was an acceptable contribution to the survival of Kosovo. The threshold of 3% was set as low as possible but encompassed everyone, as with fiscal politics. The Government in Exile also solicited legal experts to ensure compliance to the laws of the countries in which transactions took place. Not breaking any of the national laws of the countries hosting the Kosovo Albanian diaspora community was paramount to ensuring confidence in the system, and to preventing subversion by the authorities of Yugoslavia. The core problem was transferring the money from Switzerland or Germany to Kosovo. While money could be wired to accounts in Albania, transfers into Kosovo mainly occurred through cash couriers. When the Kosovo Liberation Army (KLA) wrested power from the Government in Exile in 1997 and advocated a militarized resistance strategy, it took over the established structure while shifting from voluntary to enforced contributions over time.²¹

The importance of a careful analysis and of context

The Angola and Kosovo examples illustrate how carefully one has to analyse issues related to conflict financing. Broad, general conclusions and high estimates of the financing available to armed groups should always be approached with a degree of caution and never adopted without understanding the bases from which they have been inferred. The financing of armed groups involves a huge amount of creativity and persistence on the part of their leaders, especially if funding mechanisms have to be covert to avoid being detected by domestic or international law enforcement agencies. Conflict financing is also inherently dynamic, not static. Strategies must be quickly adapted in the face of external threats or to explore new opportunities as they arise. The failure to do so may mean the end of an armed group.

Careful analysis is also required when conflict financing is linked to natural resources such as diamonds, drugs, or timber.²² This can consist of actual

19 Christian Dietrich, 'UNITA's diamond mining and exporting capacity', in Jakkie Cilliers and Christian Dietrich (eds), *Angola's War Economy: The Role of Oil and Diamonds*, Institute for Security Studies, Pretoria, 2000, pp. 275–294.

20 This figure has been based on revenue estimates of Kosovo Albanians living abroad calculated by the Government of Kosovo in Exile.

21 Interview with Naip Zeka, Former Administrator of Financing the Parallel System of Governance in Kosovo, Pristina, 28 July 2005; interview with Isa Mustafa, Former Minister of Finance in Exile, Pristina, 27 July 2005.

22 A. Wennmann, above note 14.

involvement in the extraction or trade of the resource, mere taxation of such extraction or trade, or use of the resource as barter against weapons or war-related services. As the example of Savimbi illustrated above, natural resources are also used to store value, given the difficulty of storing stashes (or pallets) of bills in many conflict areas. Furthermore, natural resources differ in their role in conflict financing depending on their innate or geographical characteristics. For example, ‘concentrated’ resources – such as oil or minerals – require considerable investments and partnerships for exploration. They are therefore more likely to be a financing strategy for state actors, rather than smaller armed groups. The latter may be involved in oil bunkering, but this is distinct from really managing an entire exploration process. In contrast, ‘diffuse’ resources – such as alluvial diamonds – are much more accessible for armed groups owing to their lootable character. They also require much smaller capital investments for their exploration owing to their occurrence on the surface or in riverbeds.

It is also important to understand the context of many conflict zones, which often defines the ease or difficulty of mobilizing financing. Such a context can be a territory controlled by an armed group that is beyond the reach of government control or oversight. Especially lucrative are porous border areas, such as the African Great Lakes region or the Laos–Myanmar–Thailand triangle, which allow for the operation or taxation of cross-border trade.²³ Moreover, depending on the economic or strategic value of that territory, an armed group can have a fairly large pool of willing collaborators – including both state sponsors and different types of commercial actors. These facilitate financing by providing access to international arms, commodity, and financial markets, while advancing particular political and business interests and pocketing a high-risk premium, as the example of UNITA shows.²⁴ This win-win situation can foster a vested interest in maintaining an armed conflict and the conditions that it creates.

The mobilization costs of armed groups

So far, we have just covered one side of the equation of the financing of armed groups: finding the money to pay for the group. The other side is supplied by the mobilization costs: the cost of recruiting and equipping a certain number of belligerents, and maintaining them during weeks, or years, of combat.

23 Mark Duffield, ‘Globalization, transborder trade, and war economies’, in M. Berdal and D. M. Malone, above note 2, pp. 69–90. See also Alexander Ramsbotham and I. William Zartman (eds), *Accord, Paix Sans Frontières: Building Peace Across Borders*, Vol. 22, Conciliation Resources, London, 2011.

24 Peter W. Singer, ‘Corporate warriors: the rise of the privatized military industry and its ramifications for international security’, in *International Security*, Vol. 26, No. 3, 2001, pp. 186–220; David Shearer, *Private Armies and Military Intervention*, International Institute for Strategic Studies, London, 1998.

Calculating mobilization costs

Overall, one can distinguish between the cost to start and the cost to maintain an armed group. Start-up costs mean paying for a battle-ready military force including factors such as weapons, ammunition and other equipment, the logistics to deploy to the battlefield, and – in the case of larger formations – an administrative structure. Maintenance costs capture the cost of sustaining combat, including paying and replacing soldiers and supplying and replacing weapons, ammunition, and other materiel. The main difference between these two dimensions is that the costs to start a conflict are relatively predictable while the cost to maintain a conflict are dynamic depending on the conflict intensity and duration, the rate of replacement for soldiers and materiel, and the inflation of prices for weapons, ammunition, and other items during armed conflict. In this way, the cost to maintain armed conflict is disproportionately higher – and less predictable – than the cost to start a conflict. In Kosovo, for example, prices for AK-47s increased 7.5 times between spring 1997 and spring 1998, and peaked at 16.25 times in autumn 1998.²⁵

Recent advances in small arms research have made it possible to develop an estimation tool for mobilization costs.²⁶ This tool relies on four data points – the cost of weapons, the cost of ammunition, the income per soldier, and the number of soldiers – to perform an estimation of a lowest threshold for the start-up and annual maintenance costs of an armed group. A cost-estimate example using this tool suggests that start-up costs range from USD 67,500 to USD 450,000 per 1,000 soldiers. The maintenance cost of an armed conflict of various degrees of intensity is in the region of USD 2–35 million per 1,000 soldiers per year.²⁷ This cost-estimate example also shows that ammunition is one of the key cost drivers during armed conflict. A three-fold increase in ammunition prices during armed conflict increases the total cost of conflict by about one-third. What is more, paying soldiers salaries is an important fixed cost that raises the barrier to entry.²⁸

These figures underline the fact that conflict financing is not only about the amount of funds available but also about whether these funds can pay for a particular type of military strategy. Whether an armed group decides to use guerrilla tactics or to scale up investments into a conventional capability has significant cost implications. In order to apply a military strategy effectively, armed

25 Black market prices for an AK-47 in Albania increased from USD 40 to USD 300 between spring 1997 and spring 1998, peaking at USD 650 in autumn 1998 before decreasing to USD 125 a year later when the Kosovo conflict terminated. Small Arms Survey, *Small Arms Survey 2002: Counting the Human Cost*, Oxford University Press, Oxford, 2002, p. 69.

26 The estimation tool is fully developed in Achim Wennmann 'Grasping the financing and mobilization cost of armed groups: a new perspective on conflict dynamics', in *Contemporary Security Policy*, Vol. 30, No. 2, 2009, pp. 265–280.

27 The differences in these cost estimates are based on the use of different price ranges. Weapons prices range between USD 40 and USD 250, ammunition prices between USD 0.05 and USD 0.5, and income per soldier between USD 2,000 and USD 10,000 per year. See *ibid.*, pp. 267–271.

28 *Ibid.*

groups must overcome a barrier to entry into an armed conflict and have the money to cover the cost of the military strategy that they decide on to achieve their objectives. Considering the financing and costs of armed groups together proves the assumption wrong that ‘rebel groups more than cover their costs during the conflict’²⁹ and underlines that ‘ten thousand dollars and a satellite phone’ – as Laurent Kabila in the DRC confessed³⁰ – are not necessarily sufficient to organize an armed conflict that goes beyond uncoordinated raids.

Implications for development and humanitarian organizations

Knowledge about these barriers to entry and cost of competition can be particularly useful for development or humanitarian organizations. In many contexts, absolute material scarcity makes humanitarian goods or development assistance extremely valuable. Through robbery of the aid or material (cars, office equipment), or service charges for the distribution of aid, many organizations have faced challenges that they contributed to the financing of armed groups, and to the prolongation of armed conflict.³¹

Development and humanitarian organizations have taken these challenges extremely seriously and have developed significant measures to avoid the misappropriation of aid. These efforts have, for example, included the adoption of do-no-harm or conflict-sensitivity frameworks by major development organizations. The International Committee of the Red Cross, for instance, has taken measures to prevent misappropriation through a series of operational changes, such as maintaining close relationships to recipient communities, and practising a zero-tolerance policy towards any staff members found to have stolen or misappropriated relief goods.³²

A better understanding of the mobilization cost of a specific armed group could help inform these measures in at least two ways. First, it could demonstrate that the amounts of misappropriated aid or stolen material are likely to be insufficient to cover major war-related expenses, and that they would be only a minor source of funding – if not merely related to personal enrichment of specific commanders or soldiers. In this case, knowledge about mobilization costs would help determine the relative importance of stolen or misappropriated aid in financing an armed group. Second, if aid is potentially found to contribute to the funding of an armed group in a specific context, better knowledge about

29 Paul Collier and Anke Hoeffler, ‘Greed and grievance in civil war’, in *Oxford Economic Papers*, Vol. 56, No. 4, 2004, p. 564.

30 See Aidan Hartley, ‘The art of darkness’, in *The Spectator*, 27 January 2001, available at: http://findarticles.com/p/articles/mi_qa3724/is_200101/ai_n8941934/ (last visited 30 September 2011).

31 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace – or War*, Lynne Rienner, Boulder, CO, 1999.

32 ICRC, ‘Amid war and crime: humanitarian aid in high-risk environments – interview with Dominik Stillhart’, 9 April 2010, available at: <http://www.icrc.org/eng/resources/documents/interview/hum-aid-in-high-risk-env-interview-090410.htm> (last visited 15 September 2011).

mobilization costs can help structure the operational planning of development and humanitarian programmes.

Effects on conflict dynamics

The interplay between available funding and mobilization costs provides a new perspective on conflict dynamics. In Angola, for example, UNITA's revenue declined from around USD 500 million in 1997 to USD 80 million in 2000. This drop resulted from government advances into diamond areas and was accompanied by increasing mobilization costs due to multilateral sanctions and longer supply lines.³³ In consequence, it became too expensive and complicated to maintain UNITA's conventional military capability. As a result, UNITA reverted to guerrilla tactics that did not rely on tanks or other conventional military equipment.³⁴ In the long term, UNITA was unable to diversify revenue sources to pay for another conventional military build-up and match the escalation driven by government forces in 2000. The territorial advances of the government's oil-financed military undermined UNITA's centralized structure and heralded its downfall.³⁵

The effect of the revenue/cost interplay on conflict dynamics is also illustrated in Kosovo. The favourable conditions for diaspora financing explained above provided the KLA with sufficient revenue to start the conflict; but it was insufficient to maintain it given the strength of the conventional military capability of Serbia. In consequence, the KLA faced significant financial and military strains at the end of 1998 and was – literally – saved by the North Atlantic Treaty Organization (NATO). NATO escalated the conflict at a cost of an estimated USD 4 billion for air operations only.³⁶ In this case, internationalizing the conflict and finding an external party to pay the bill was an effective strategy towards winning the war.

The effectiveness of financing strategies

The interplay between available funding and costs also provides a new insight into what is an 'effective' source of conflict financing. Effectiveness is understood as the financing method having the capacity to generate enough revenue to pay for the start-up and maintenance of a specific military strategy (i.e. insurgency, conventional land war, air raids, sieges, etc.). Angola is again a case in point: oil provided

33 Alex Vines, 'Angola: forty years of war', in Peter Batchelor and Kees Kingma (eds), *Demilitarisation and Peace-Building in Southern Africa – Volume II: National and Regional Experiences*, Ashgate, Aldershot, 2004, p. 87.

34 Assis Malaquias, 'Angola: how to lose a guerrilla war', in Morten Bøås and Kevin C. Dunn (eds), *African Guerrillas: Raging Against the Machine*, Lynne Rienner, Boulder, CO, 2007, pp. 212–215.

35 Achim Wennmann, 'Conflict financing and the recurrence of intra-state armed conflict', PhD thesis, University of Geneva and Graduate Institute of International Studies, Geneva, 2007, pp. 203–204.

36 Taylor B. Seybolt, 'Major armed conflicts', in *Stockholm International Peace Research Institute Yearbook 2000*, Oxford University Press, Oxford, 2000, p. 32.

government forces with a strategic advantage because it generated more revenue than diamonds. Its revenue base was also less vulnerable to attack, owing to its off-shore location. In contrast, UNITA was unable to establish control over the capital and the state because diamonds did not generate enough revenue to escalate the conflict and match the military prowess of the government.

One can differentiate between three levels of financing in terms of effectiveness. On the first level are resources that are *easy to centralize*, and generate a *high value* and *immediate revenue stream*. These are essentially characteristics associated with oil, diamonds, drugs, and third-party direct financial assistance, and they are important for the start-up or escalation phase when financial requirements are highest. On the second level are resources that provide *constant revenue over time*. These include taxation, parallel economies, and diaspora financing and are useful to cover maintenance costs. On the third level are resources deriving from humanitarian assistance, contributions of individuals, kidnapping, asset transfers from civilians, landing fees, and revenue from portfolio investments. These are less effective strategies of conflict financing because on their own they cannot finance an armed conflict even though they can be important in motivating commanders and troops.

Conflict financing and peace processes

Finally, the financial situation of an armed group can provide information about their attitude towards an evolving peace process.³⁷ If armed groups face revenue constraints, a peace process can relate to a change in tactics because armed violence has become too expensive to maintain. Engaging in a peace process can also mean gaining a tactical pause to regroup, and to find new money in order to continue fighting at some point in the future. If armed groups are relatively revenue-abundant, they can use peace processes to diversify their military strategies by opening a political front, or as a means to realize other political agendas that are not necessarily related to the conflict. Of course, no matter what the financial situation, all parties can engage as a result of a strategically informed choice that armed violence no longer fulfils strategic objectives.

The evolution of conflict economies

An additional element in understanding the economic dimensions of armed groups is to place the financing and mobilization costs within the context of conflict economies. Such a perspective focuses on the transformation of armed groups, and how that relates to the evolution of conflict economies.

37 Achim Wennmann, *The Political Economy of Peacemaking*, Routledge, London, 2011, pp. 30–32.

Types of conflict economy

The understanding of this evolution has rested on the interaction of the type of conflict economy (predation, parasite, extraction) and the military strategy of armed groups (contention, expansion, control).³⁸ The different categories in this evolution include:

- *Predation–Contention*: the conflict economy is predatory and the military strategy is based on contention with government forces. Armed groups operate in areas formally under state control and in order to destabilize the state and raise funds. They conduct hit-and-run attacks such as killings, kidnappings, burglaries, or bank robberies. At this stage, expenditure requirements are small, as the armed group itself is small and operations are relatively small-scale.
- *Parasite–Expansion*: as armed groups grow in size and territorial reach, the conflict economy becomes increasingly parasitical. Operations take place in a particular geographic area in which the group expands control. The military strategy shifts from hit-and-run attacks to low-intensity warfare and to economic strategies to weaken the government. As the formal economy declines and the government loses fiscal revenues, an armed group captures a bigger share of the shadow economy and is strengthened through additional revenues.
- *Extraction–Territorial Control*: insurgents establish control over an area from which the state is excluded. In this area, an armed group becomes the *de facto* government and runs social services, arbitration, and a taxation system. This last generates funding to continue military activities. These areas can ultimately evolve into a ‘*de facto* state’ in which an armed group establishes control over territory and population and creates institutions.

There are certainly wider variations within and between these categories, but armed groups that broadly fit in this evolution include the Sendero Luminoso in Peru, the National People’s Army in the Philippines, the Bougainville rebels in Papua New Guinea, the Khmer Rouge in Cambodia, the Tamil Tigers in Sri Lanka, UNITA in Angola, the CPN–M in Nepal and the FARC in Colombia.³⁹ The evolution also implies that there are different financing strategies for different phases as financial requirements increase.

The FARC is an instructive example of a transformed conflict economy, especially the group’s relationship to drugs. While initially only taxing the trade, by the late 1980s the FARC provided security to local communities in the face of an influx of foreign drug traffickers and profiteers. By providing the conditions that

38 R. Thomas Naylor, *Wages of Crime: Black Markets, Illegal Finance, and the Underworld Economy*, Cornell University Press, Ithaca, NY, 2002, pp. 45–47, 53–54. Achim Wennmann, ‘Conflict economies’, in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, Oxford, 2009, pp. 80–81; James Cockayne, ‘Chapter ten: crime, corruption and violent economies’, in Mats Berdal and Achim Wennmann (eds), *Ending Wars, Consolidating Peace: Economic Dimensions*, Institute for International and Strategic Studies, Adelphi Series, Vol. 50, Nos. 412–413, Routledge, London, 2010, pp. 193–198. The list of categories given here is drawn from these studies.

39 R. T. Naylor, above note 38, pp. 45–47, 53–54.

made a livelihood for local coca farmers possible, the FARC could legitimize itself in the eyes of the local population as a *de facto* state. However, by the end of the 1990s, some leading figures became involved in the drug business, thus undermining its image as a peasant rebellion. While the FARC stayed a movement with political objectives and strategies, its association to drug trafficking complicated peace talks and made the government less willing to give it any form of legitimacy or recognition. Ultimately, the FARC's drug involvement made the conflict a criminal issue that called for a law enforcement approach.⁴⁰

Understanding conflict economies

Understanding the evolution of conflict economies has implications for the way in which we understand armed groups in conflict zones. Those actors that evolve towards a quasi-state build loyalties with local populations by offering job opportunities and protection, as well as some level of local stability. A charismatic leader can increase the level of loyalty at the same time as the cost of rebellion against or defection from the group.⁴¹ Other groups such as the Lord's Resistance Army in Uganda or the Revolutionary United Front in Liberia prey on local populations at the predation–contention level.

What is more, non-state armed groups do not necessarily act *against* the state but merely focus on keeping central authorities *at bay*.⁴² The presence of armed groups may therefore only imply that there is no presence of the state that would make any meaningful difference for the people.⁴³ In these situations 'the performance of traditional state functions ... has been assumed by different gangs, splintering countries into sections of autonomy'.⁴⁴

Understanding these local political and economic dynamics is a crucial element for engaging with armed groups, especially for a forward-looking peace mediation strategy. A context-sensitive perspective on war economies and governance arrangements is an important component of exploring what visions for the future can find traction with armed groups and local populations. Economies in times of war are never just interruptions of what would otherwise be a linear path of economic or political development.⁴⁵ Economies and societies experience significant transformations in times of war, and it is important not to lament that 'nothing' is there, or that all that is there is 'bad'. Rather, the task is to recognize the

40 Claire Metelits, *Inside Insurgency: Violence, Civilians, and Revolutionary Group Behaviour*, New York University Press, New York, 2010, pp. 100–102.

41 Kimberly Zisk Marten, 'Warlordism in a comparative perspective', in *International Security*, Vol. 31, No. 3, 2007, pp. 58 and 72.

42 Philippe Le Billon, *The political economy of war: what relief agencies need to know*, Humanitarian Practice Network, Paper No. 33, Overseas Development Institute, London, 2000, p. 4.

43 William Reno, 'Bottom-up statebuilding?', in Charles T. Call with Vanessa Wyeth (eds), *Building States to Build Peace*, Lynne Rienner, Boulder, CO, 2008, p. 143.

44 John Rapley, 'The new Middle Ages', in *Foreign Affairs*, Vol. 85, No. 3, 2006, p. 95.

45 Christopher Cramer, *Civil War is Not a Stupid Thing: Accounting for Violence in Developing Countries*, Hurst and Company Publishers, London, 2006, p. 197.

strengths of conflict economies – the social capital, the resilience of people, and the levels of existing investments – while addressing issues such as rapacious natural resource exploitation, forced labour, or drug trafficking through negotiated transformation processes. The positive unintended consequences of economic transformations during armed conflict are a much overlooked opportunity to strengthen war-to-peace transitions.

Economic agendas and the engagement of armed groups

There are various scholarly perspectives that locate the motivation for armed violence in grievances, rights, and greed, with the associated stakes of basic needs, identity, and resources.⁴⁶ The underlying assumption behind these approaches is that armed violence is a purposefully applied instrument to achieve specific objectives. This notion contrasts with the view that armed violence is an innate human attribute, which has been central to some of the work on ethnic conflicts. At the political level, for example, armed violence can be used to check or intimidate opposition groups or specific constituencies. At the economic level, armed groups use violence to control state resources, companies, or labour. Violence can also be part of a struggle to gain or maintain access to state resources, or to protect monopolistic control over economic opportunities. At the psychological level, armed violence has been associated with status, personal enrichment, impunity, excitement, and self-aggrandizement.⁴⁷ While violence is never caused by any single attribute alone, the study of economic agendas of armed groups has been located within the political, economic, and psychological functions of armed violence.

Understanding economic functions of violence

In terms of economic agendas in particular, economic functions of violence imply that violence is less used to achieve political goals than the Clauswitzian dictum ‘war is politics by other means’ would assume. Instead, it is used to further economic interests leading to the perpetuation of armed violence as a means to benefit from the conditions that such a conflict generates. In this context, ‘war is not simply a breakdown of a particular system, but a way of creating an alternative system of profit, power and even protection’.⁴⁸

Economic agendas thus have implications for the engagement of armed groups in mediation or dialogue processes. First, belligerents may be less inclined to respond positively to engagement if violence has economic functions. Such violence offers belligerents a way of life that would be impossible for them to achieve in peacetime. This so-called ‘Kalashnikov lifestyle’ translates into

46 I. W. Zartman, ‘Need, creed, and greed in intrastate conflict’, in C. J. Arnsperg and I. W. Zartman, above note 3, p. 262.

47 David Keen, *The Economic Functions of Civil War*, International Institute for Strategic Studies, Adelphi Paper No. 320, Oxford University Press, Oxford, 1998, p. 12.

48 *Ibid.*, p. 11.

commercial and political networks controlled by strongmen. In this way, armed violence is associated by many young adults with a strategy of socio-economic mobility, which provides a strong motivation to sign up to fight.⁴⁹ Since armed violence is profitable and part of a livelihood strategy, belligerents are less susceptible to incentives associated with a ceasefire unless it offers disproportionately higher rewards than the continuation of fighting. These rewards are often difficult to communicate to the fighters – some starting as child soldiers – who have known little else than making money at gunpoint. For them, life without a weapon means a lower social status and less money. A ceasefire would threaten the lifestyle they know.

Some considerations on engaging armed groups and the example of Sudan

The starting point for the engagement of belligerents is therefore not a mutually *hurting* stalemate, but a mutually *profitable* stalemate.⁵⁰ The former has been described as an appropriate moment to table a proposal for a negotiated exit out of the conflict because none of the parties is coming any closer to achieving its goal. The parties realize that the cost of continuing the conflict exceeds the benefits that they are likely to obtain from it.⁵¹ However, experiences of protracted conflicts such as Angola, the DRC, and Sri Lanka suggest that sporadically recurring armed violence or full-scale military manoeuvres serve the purpose of keeping the conflict alive, which in turn ensures economic benefits for the warring parties. These economically motivated stalemates, however, do not hurt the belligerents (while of course civilian populations are clearly affected by the consequences of the stalemate). As a result, the leadership or factions that have been involved in conflict economies are less inclined to engage in a mediation process; or to fully commit if they do decide to engage. Asking for a ceasefire in these circumstances means that the belligerent parties would have to accept an end to hostilities – thereby undermining their financing and profits – without any alternative economic prospects in the future. This is why it is so important to link ceasefires to forward-looking peacemaking strategies so that the belligerents associate the end of fighting with a future benefit (opportunity to benefit from a post-violence order) rather than an immediate loss (the discontinuation of the conflict economy).

In one case, it has been possible to translate economic agendas into pragmatic consensus for engagement. In Sudan, oil has been a central focus of the economic agendas of both the government and the SPLM/A. High levels of armed violence in oil-producing regions prevented the government from fully benefiting

49 William Reno, 'War, markets, and the reconfiguration of West Africa's weak states', in *Comparative Politics*, Vol. 29, No. 4, 1997, p. 496.

50 Achim Wennmann, 'Getting armed groups to the table: peace processes, the political economy of conflict and the mediated state', in *Third World Quarterly*, Vol. 30, No. 6, 2009, pp. 1123–1138.

51 I. William Zartman, *Ripe for Resolution: Conflict and Intervention in Africa*, Oxford University Press, Oxford, 1985, pp. 232–236.

from the revenue potential of the oil wealth because they undermined efforts to attract foreign investors. Some oil companies made the case to all belligerents that the end of fighting and a peace process was the best strategy to ensure sustainable oil production and benefits for all. One company even led informal talks making the case that 'oil represented an incentive for peace in so far as oil activities could not be pursued in a war context'.⁵²

At the same time, oil disproportionately increased the revenue of the government, and thereby changed the military balance between the parties. Not being able to equalize these revenues in the long term, the SPLM/A decided that it had more to gain from negotiations, because it perceived that the continuation of the conflict would end in military defeat. The leader of the SPLM/A, John Garang, even remarked that 'the cost of continuing the war was felt by both sides to be much higher than the cost of stopping the war. So, we stopped the war'.⁵³ The government came to the conclusion that it could not stop the attacks by the SPLM/A indefinitely. Thus, there was a mutual interest in exploring negotiations.

The Sudan example highlights how economic agendas provided a framework for a tactically informed decision to shift the fighting from the battlefield to the negotiation table. In this case negotiations led to a wealth-sharing agreement that resulted in USD 5.4 billion being transferred to Southern Sudan between 2007 and 2009.⁵⁴ However, the Agreement on Wealth Sharing (AWS) only covered what could be called the 'visible' part of Sudan's economy. It did not cover the various parallel or 'invisible' economies that are part of both northern and southern patronage politics related to the oil sector.⁵⁵

Managing these economic dimensions in a responsible manner is a significant challenge when engaging armed groups. Too much pressure on sensitive economic issues – such as financing structures, dealings with commercial actors, and actual levels of revenue – may antagonize armed groups and keep them from the negotiation table. In a sense, these issues may be more effectively handled outside a formal agreement. In the Darfur negotiations in April and May 2006, the final talks about the Darfur Peace Agreement were accompanied by intense informal talks between the parties about the price to pay for the bargain. They agreed on the creation of a compensation fund under the personal control of one of the Darfur negotiators.⁵⁶

52 Christine Batruch, 'Oil and conflict: Lundin Petroleum's experience in Sudan', in Alyson J. K. Bailes and Isabel Frommelt (eds), *Business and Security: Public-Private Sector Relationships in a New Security Environment*, Oxford University Press, Oxford, 2004, pp. 159–160.

53 Voice of America 'Peace agreement will "lead to a new and prosperous Sudan" says rebel leader', 30 May 2004, available at: <http://www.voanews.com/english/news/a-13-a-2004-05-30-11-1-67348442.html> (last visited 5 November 2008).

54 A. Wennmann, above note 37, p. 82.

55 Achim Wennmann, *Wealth sharing beyond 2011: economic issues in Sudan's north-south peace process*, CCDP Working Paper 1, Graduate Institute of International and Development Studies, Geneva, 2009, p. 16.

56 Alex De Waal, *Fixing the political marketplace: how can we make peace without functioning state institutions?*, Fifteenth Christen Michelsen Lecture, Bergen, 15 October 2009, p. 8, available at: <http://www.cmi.no/file/2877> (last visited 14 October 2011).

These examples indicate that transitions out of armed violence require a certain space for informal arrangements that allow the parties to manage complex internal negotiations and transform an armed group's military and political structures. If belligerents are expected to disarm and transform into a political party, the structures created to finance the conflict may become the foundation to enable this transition. As a result, those actors engaging armed groups must find a workable balance between the parties' requests for informality to manage their own internal transformation and external requests for transparency, accountability, and compensation.

Finding this balance is not easy and can only be answered with reference to specific cases. A strategy to bridge these competing demands may be to portray transparency issues as the outcome of a temporally defined transition process – and not as an immediate demand. Insisting on transparency and accountability right from the beginning would be unrealistic if a mediator is intent on building a working relationship with targeted individuals; perhaps it may even jeopardize an entire peace process. Placing economic issues on the agenda means touching on the parties' financing structures, and this can be interpreted as an unacceptable constraint on their mobilization, and result in alienation from a nascent peace process.

Conclusion

The economic dimensions of armed groups should be approached with an open mind so that issues such as financing, costs, and economic agendas can be perceived as opportunities, and not necessarily as a problem for peace. Many aspects related to these economic dimensions are an undeniable fact in conflict areas, and are perceived as a concern by the policy or advocacy communities, especially owing to the humanitarian consequences of different methods of conflict financing. However, to treat the economic dimensions of armed groups as a politically unpalatable issue is unsustainable for fostering a lasting exit from armed conflict. The question therefore arises of how best to address the economic dimensions of armed groups in a nascent peace process.

A first proposition would be to avoid the use of labels such as 'warlord', 'criminal', 'smuggler', or 'drug trafficker' that are often used to characterize armed groups or their leaders. While they may be involved in activities that from an *outsider's* perspective are perceived as such, from an *insider's* perspective whatever an armed group is involved in would be described as a completely normal and legitimate affair. As far as mediation efforts are concerned, one should recall that it is not the task of a mediator or mediating institution to make judgement calls, and the use of the wrong label in the wrong circumstance can destroy years of relationship building. This is partly because of the loss of independence of the mediator that such judgements would imply, and because of the difficulty in finding the conclusive evidence to prove these labels right in messy, information-poor, and rumour-rich civil war contexts.

A second proposition would be to explore the opportunities deriving from transformative negotiations that structure incentives around the economic dimensions of armed groups. Such negotiations would find ways to bridge the demands for immediate change from international actors and the request for informality from armed groups to allow for internal transformations. They must also have a set of direction and rules that define the bounds of what is acceptable in a transition process, and what is not, as well as what sanctions apply for violating formal or informal agreements. Such transitions are necessarily fluid and composed of periodically renegotiated informal deals. They may also involve both the parties and external parties in accepting operating within the context of ambiguity. These may be the best of multiple bad options to transform war economies and armed groups, and may become the precursor to a more structured political process further down the line that reduces ambiguity and fluidity and increases the predictability of interactions.

By way of conclusion, it should also be mentioned that international policy against the financing of armed groups has fundamentally changed in the light of the international efforts to counter the financing of terrorism.⁵⁷ A decade ago, initiatives against rebel financing focused mainly on coercive, legal approaches such as targeted sanctions on commodities, trade, travel, or bank accounts, as well as multi-stakeholder coalitions, such as the Kimberley Process against conflict diamonds.⁵⁸ Efforts against terrorism added another layer onto these initiatives through the development of an unprecedented capacity of regulatory and financial institutions to monitor financial flows.⁵⁹ According to one observer, 'one unintended consequence of the successful implementation of this financial regime was to force would-be terrorists to rely on local, low-cost, underground, and informal methods of financing'.⁶⁰

There are two implications following from this statement. The first is that, if the UNITA or Kosovo Government in Exile were to set up their respective diamond and diaspora financing mechanisms today, they would find that more difficult to do than a decade ago as they might be subjected to targeted sanctions. Thus, the financial regime created against the financing of terrorism can be used to disrupt the financing of armed groups that wish to start up or scale up activities. The terrorism-related financial monitoring infrastructure is therefore likely to affect the ways in which armed groups select their financing methods, transfer mechanisms, and means of capital storage, and may as a result influence the formation and evolution of these groups.

57 The following paragraphs have been inspired by a conversation with Thomas Biersteker and joint work on countering the financing of terrorism.

58 For more information on the Kimberley Process, see http://www.kimberleyprocess.com/home/index_en.html (last visited 15 September 2011).

59 Thomas J. Biersteker and Sue E. Eckert, 'Introduction: the challenge of terrorist financing', in Thomas J. Biersteker and Sue E. Eckert (eds), *Countering the Financing of Terrorism*, Routledge, London, 2008, pp. 2–6.

60 Scott Atran, *Talking to the Enemy: Faith, Brotherhood and the (Un)Making of Terrorists*, HarperCollins, New York, pp. 207–208.

The second implication is that the future financing for armed violence is likely to be sourced from the underground and informal space, thus underlining the need to explore new strategies to act in these spaces. A traditional, state-centric, response would be that these spaces are the domain of law enforcement and police agencies. They have both the infrastructure and the experience to monitor, investigate, and intervene in these contexts. An alternative, or complementary, route may lie in engaging armed groups in forward-looking transformative negotiations. Developing a better understanding of the evolution of armed groups, and issues relating to the financing, costs, and economic agendas, would be a starting point to embark on such war-to-peace transitions.

Reasons why armed groups choose to respect international humanitarian law or not

Olivier Bangerter

Dr. Olivier Bangerter, a graduate in theology of both Lausanne (Masters) and Geneva (PhD) universities, recently joined the Small Arms Survey research project in Geneva as a senior researcher. He had previously worked for the International Committee of the Red Cross (ICRC) since 2001, and was the ICRC's Advisor for Dialogue with Armed Groups from 2008 to 2011. In this capacity he met members and former members of some sixty armed groups around the world.

Abstract

The decision to respect the law – or not – is far from automatic, regardless of whether it is taken by an armed group or a state. Respect for international humanitarian law (IHL) can only be encouraged, and hence improved, if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account. Among the reasons for respecting the law, two considerations weigh particularly heavily for armed groups: their self-image and the military advantage. Among the reasons for non-respect, three are uppermost: the group's objective, the military advantage, and what IHL represents according to the group.

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One afternoon, somewhere in Africa, I was talking to a former high-ranking leader of an armed group. We were discussing the recruitment of minors as combatants by the leader's former comrades, an obvious humanitarian concern for me as a delegate of the International Committee of the Red Cross (ICRC).

I expressed my lack of comprehension: my discussion partner and I both knew that the presence of children in a fighting unit presents the leader with serious command problems, as well as creating other military drawbacks.¹ The man agreed but added: ‘You know, Mister Delegate, in my country we have this saying: if you want to make a large fire, you need lots of wood.’ The implication was clear. Those rebels continue to recruit minors because of a rational choice; in their view, the advantage of having more fighters offsets the disadvantages of having children in their ranks.²

The conversation went on, but this short exchange illustrates a reality of which few people are aware. The rules of international humanitarian law (IHL)³ are discussed not only with outsiders but also within armed groups and particularly by their leadership. Many reasons why they should be respected or not are weighed up, sometimes with great care and sometimes hastily. In the eyes of those who must abide by it on a day-to-day basis, IHL is a matter for discussion; to get them to respect that law, or to respect it better, we need to understand the factors that influence their choices.⁴ Otherwise, the arguments presented in favour of compliance with the rules of IHL may well go unheard.

The goal of this article is to provide an overview of rationale mechanisms that can lead to respect or violations, so that scholars and humanitarian workers – as well as armed groups themselves – can have a better overview of the issues at stake. The article draws on discussions with members or former members of nearly sixty armed groups on four continents, and on roughly one hundred documents published by such groups, particularly their codes of conduct. It also owes a great deal to the seminar organized in October 2010 by the Geneva Academy of International Humanitarian Law and Human Rights on the subject of ‘Armed non-state actors and international norms’; the author chaired the session on the reasons to respect the law on the basis of a very preliminary version of this article.

Discussions on standards of international law in general and IHL in particular have become increasingly prevalent among armed groups over the past ten years. In a number of cases, the discussion has focused not on the law and its applicability but on concepts such as the protection of civilians, implicitly accepting

1 This fact is too frequently overlooked by those who are trying to end the recruitment of children. Although easier to indoctrinate than adults and less aware of danger, children lack discipline and discernment, both necessary qualities during fighting.

2 Interview with the author, August 2009. For their own safety, most persons who provided information on which this article is based remain anonymous.

3 In this article, we will look at the practice of opposition armed groups (rebels, insurgents, etc.) and of pro-government groups (paramilitary groups, self-defence militias, etc.) that are party to a non-international armed conflict where IHL applies, be it in through treaty law or customary law. Some groups actually respect these norms without linking them to any particular conventions and thus achieve the objective of IHL, which is to protect the victims of armed conflict while taking military necessity into account.

4 ‘The “incentives for armed groups to comply with the law should be emphasized”, including the increased likelihood of reciprocal respect for the law by opposing parties’, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 29 May 2009, UN Doc. S/2009/277, para. 41 (emphasis added). This is also the conclusion of Hugo Slim, in his excellent book, *Killing Civilians: Method, Madness and Morality in War*, Hurst and Co., London, 2007.

their relevance whatever their ultimate source.⁵ Mullah Omar, the head of the Afghan Taliban, thus requires his fighters to take every possible precaution to protect the people's lives and property as well as the public infrastructure.⁶ In August 2010 the Taliban also requested that a joint commission of inquiry be set up to shed light on the attacks on civilians in Afghanistan.⁷ In a number of other cases, the law in itself is quoted as the reason and/or guideline for a public commitment; the protection of civilians is thus a key issue in the commitment made in 2008 by the Justice and Equality Movement (JEM) and the Sudan Liberation Movement – Unity (SLM-Unity):

We will do our utmost to guarantee the protection of civilian populations in accordance with the principles of human rights and international humanitarian law. In collaboration with UNICEF, we will adopt measures ensuring protection of children in Darfur. We also affirm the principles of freedom of movement.⁸

Some critics say that this is no more than a public relations exercise. These critics have a point: some groups do indeed use IHL merely as a weapon during a conflict, with a view to conducting 'lawfare'; others have no intention of bringing their practice into line with what they demand from the adversary.⁹

To think in terms of a presumed general guilt 'based' on a few bad but very real examples may, however, be tantamount to focusing on the trees rather than on the forest. As there are armed groups who genuinely want to respect rules of IHL for a number of good reasons, assuming guilt in all cases would be counterproductive with regard to respect for IHL in general, and those who are protected by these norms.

It is an encouraging sign that IHL is being discussed by armed groups. Greater respect for IHL on their part can make a huge difference for people affected by armed conflicts, and the existence of internal debates on the subject opens up perspectives that it would be absurd to ignore. However, we still need to understand

5 The protection of persons who are *hors de combat*, and especially prisoners, has had a lower profile. This may be due to the fact that protection of civilians occupies much more space in international discourse also.

6 Mullah Omar's Eid al-Fitr message, 8 September 2010. A translation is available at: <http://geopolicraticus.wordpress.com/2010/09/08/mullah-mohammad-omars-eid-al-fitr-address-for-2010/> (last visited 20 October 2011).

7 Some observers have doubts about the authenticity of this text, which was nonetheless published on the Taliban's website, available at: http://alemarah-iaa.com/english/index.php?option=com_content&about-civilian-casual&catid=4:statements&Itemid=4, where it is no longer accessible. However, it was mentioned in a report by Jon Boone, 'Taliban call for joint inquiry into civilian Afghan deaths considered', 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 12 October 2011). For a critical assessment of the Taliban use of 'war crimes' language in their statements on civilian casualties and targeting, see Kate Clark's pieces on the Afghan Analysts Network, in particular 'Killing civilians: Taleban and international law', 23 May 2011, available at: <http://aan-afghanistan.com/index.asp?id=1733>, and 'The Lahya: Calling the Taleban to account', July 2011, available at: http://aan-afghanistan.com/uploads/20110704_CKClark_The_Layha.pdf (both last visited 12 October 2011).

8 JEM and SLM-Unity are two opposition groups in Darfur. The full text is available at: <http://www.hdcentre.org/files/110708.pdf> (last visited 12 October 2011).

9 The same could also be said of some states that have ratified the instruments of IHL without changing what they do in the field.

how those debates are being played out. That is what I intend to show in this article, first by discussing reasons invoked to respect IHL and then by highlighting those invoked to disregard it.

The decision to respect the law – or not

The decision to respect the law – or not – is far from automatic, regardless of whether it is taken by an armed group or a state. To be convinced of that, one merely has to look at the reports of a few Truth and Reconciliation Commissions, which provide the best available statistics.¹⁰ Every kind of scenario occurs, from those in which most of the violations are attributed to an insurgent group¹¹ to those in which the vast majority are attributed to a government,¹² with more balanced situations in between.¹³ In two particular cases, different armed groups that were active in the same country at the same time showed very different practice regarding respect for the law: in Sierra Leone, the Armed Forces Revolutionary Council (AFRC) was credited with six times fewer violations than the Revolutionary United Front (RUF);¹⁴ and in Peru the *Movimiento*

10 Most other statistics can be suspected of being flawed for several reasons. First, they may be the work of players who have a stake in the conflict; whatever the actual quality of their work, there is always a risk that such reporting is biased, and especially so during the actual conflict. Second, most reporting done during armed conflict is incomplete because of lack of access to some areas of the country and because victims may refuse to talk. Truth and Reconciliation Commissions are not immune to flaws but present the best possible conditions for reporting on violations: the support of former parties, easy access to places and people, and their aim of reconciliation and not settling scores.

11 The Sierra Leone Truth and Reconciliation Commission attributes 60.5% of the violations committed in the country to the Revolutionary United Front (RUF). *Witness to Truth: Sierra Leone Truth and Reconciliation Commission Report*, Vol. 2, para. 107, available at: <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf> (last visited 12 October 2011).

12 In Guatemala, the *Comisión para el Esclarecimiento Histórico* (CEH) attributes 93% of the violations to the government. *Guatemala: Memory of Silence*, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 82, available at: <http://shr.aas.org/guatemala/ceh/report/english/toc.html> (last visited 12 October 2011). In El Salvador, the Commission attributes a mere 5% of violations to the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), while ‘agents of the State, paramilitary groups allied to them and death squads’ are credited with almost 85%. UN Security Council, Annex, *From Madness to Hope: The 12-year War in El Salvador*, Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1993, available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (last visited 12 October 2011). In Timor Leste, the Timor-Leste Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste*, CAVR) attributes 57.6% of the ‘fatal violations’ to the Indonesian army and police and 32.3% to their local auxiliaries. *Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation* (CAVR), Part 6: ‘The profile of human rights violations in Timor-Leste, 1974 to 1999’, para. 10, available at: <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/06-Profile-of-Violations.pdf> (last visited 12 October 2011). However, it points out that many violations are carried out by several different groups working together; from its statistics, it may be inferred that it considers some 70% of the violations to be attributable directly or indirectly to government forces.

13 In Peru, 54% of the violations are attributed to the Shining Path movement and around 35% to government agents, according to the conclusions of the *Comisión de la Verdad y Reconciliación* (Truth and Reconciliation Commission) in its final report, *Informe Final*, Vol. 1, ch. 3, available in Spanish at: <http://www.cverdad.org.pe/ifinal/index.php> (last visited 12 October 2011), pp. 181–182.

14 9.8%, according to the report of the Sierra Leone Truth and Reconciliation Commission, above note 11, para. 108.

Revolucionario Túpac Amaru (MRTA) committed thirty-six times fewer violations than the Shining Path.¹⁵

Respect for IHL does not depend on the nature of a party but on the decisions that it takes. This article consequently examines the main reasons prompting armed groups to decide to respect IHL – whether in full or in part – or not to do so.¹⁶ Is the question redundant? Armed groups are, like all belligerents, subject to IHL; can they therefore do anything else but accept it?¹⁷ Defining the issue in these terms would be naive at best; even states that have ratified IHL treaties do not always respect them, so why should insurgents do otherwise?

We will consider only those reasons cited by the groups themselves for or against respect for IHL, and not the other causes – at times decisive – of (non-) respect.¹⁸ The latter are frequently organizational and have to do with command and control in particular. Some armed groups do not have structures strong enough to make the behaviour they wish from their fighters truly compulsory. It should not be forgotten that a *laissez-faire* approach may be dictated by circumstances, even if it is often rooted in calculations that are as carefully reasoned as the decision not to respect IHL.¹⁹ As stated by witness DAG-080 at the Special Court for Sierra Leone, ‘however effective the detection and reporting of crimes, if the top man [to whom reports are sent] chooses to ignore it, crimes remain unpunished’.²⁰

Nonetheless, it is vital to understand the rationale leading to respect or non-respect in order to persuade armed groups to comply with the rules. Without that understanding, the arguments presented by humanitarian workers, lawyers, and politicians risk falling on deaf ears. The mere existence of a body of law is not enough to ensure that it is applied; it would be naive to hope that armed groups could be won over by the mere existence of international law. By contrast, other factors seem to carry greater weight, as Michel Veuthey has pointed out:

[The legal mechanisms] of application have met with varying degrees of success. Even where one or other of those mechanisms has worked, we have to acknowledge that their role would have been even more limited if

15 1.5% as opposed to 54%, according to the conclusions of the *Comisión de la Verdad y Reconciliación*, above note 13, para. 34.

16 The measures that they can take to do so have been described in Olivier Bangerter, ‘Measures armed groups can take to improve respect for IHL’, in *Proceedings of the Roundtable on Nonstate Actors and International Humanitarian Law: Organized Armed Groups – A Challenge for the 21st Century*, International Institute of Humanitarian Law, San Remo and Franco Angeli, Milan, 2010, pp. 187–212.

17 The applicability of IHL to armed groups is not a straightforward matter, and the legal constructions that achieve that result are not always transparent. Robin Geiss, ‘Humanitarian law obligations of organized armed groups’, in *ibid.*, pp. 93–101.

18 Examples of other causes of non-respect for IHL include ineffective control mechanisms, policy choices (such as allowing fighters to commandeer whatever they want from the population), choices of weaponry, and weak sanctioning mechanisms.

19 Jeremy Weinstein shows this with regard to the Resistencia Nacional Moçambicana (RENAMO) in his *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007.

20 Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 711, available at: <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx> (last visited 18 October 2011).

other – non-legal – factors had not made the guerrilla forces aware of the need to comply with certain humanitarian limitations... *More than the classic procedures provided for by the international humanitarian instruments, non-legal or paralegal factors help to enforce the application of humanitarian rules and principles* and hence the reality of humanitarian law in guerrilla warfare.²¹

Why decide to respect the law?

‘Because of who we are and how we wish to be perceived’

Self-image is one of the most powerful generators of respect for IHL. It is not only wrong but also counterproductive to consider all members of armed groups as actual or potential war criminals. For those who are ready to respect certain rules because of how they see themselves, failure to appeal to this self-image amounts to a substantial undermining of any efforts to promote the law.²²

Our aim

Most armed groups see their aim – the reason why they are fighting – as beneficial for their country, their ethnic group, and/or the population in general. It therefore seems logical for the protection of that same population to be included in their objectives. The group does not always make this connection, or not immediately, but the fact that IHL serves an objective in line with that of many armed groups is, for them, a most convincing argument.²³

At the second meeting of the signatories of the Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, Dr. Anne Itto, the Deputy Secretary-General of the Sudan People’s Liberation Movement (SPLM), illustrated this point.²⁴ In her view, the SPLM realized at a certain point in its struggle that it could not claim to be fighting on behalf of the people of southern Sudan while doing nothing to protect them, including against its own troops. She went on to state that, for that reason, the

21 Michel Veuthey, *Guérilla et droit humanitaire*, ICRC, Geneva, 1983, pp. 338–339 (emphasis added). For Veuthey, the factors favouring respect for humanitarian law are reciprocity, public opinion, military efficacy, the economy, the return of peace, and ethics (*ibid.*, pp. 339 and 373). Michelle Mack stresses the need for a ‘strategic argumentation’ in favour of respect for the law alongside the use of legal or paralegal instruments, but draws up a slightly different list: military efficacy and discipline, reciprocal respect and mutual interest, reputation, core values, long-term interests, the risk of criminal prosecution, and economic considerations. See Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2003, pp. 30–31.

22 The concept of honour is an example of the way that self-image may be at work. See Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience*, Henry Holt and Company, Inc., New York, 1997.

23 At the tactical level, groups wishing to be involved in peace processes sometimes try to develop a cleaner record among their fighters; such a desire may translate into measures intended to improve respect for IHL but also into purges against people whose past acts of violence are deemed by the movement to have become a problem.

24 Speech by Dr. Itto, Geneva, 15 June 2009, attended by the author.

SPLM made a public commitment to respect IHL and human rights and took measures to that effect.

Reflecting in 2008 on his own practice, the former head of the Ugandan National Resistance Army (NRA), who had become the president of his country, wrote that the leader of a guerrilla force must avoid carrying out actions that are morally bankrupt:

You must never do anything wrong. Therefore, when you select targets, you must select them very carefully. First of all, *you must never attack non-combatants*. Never, never, never, never! You would never have heard that Museveni attacked non-combatants, or that Mandela blew up people drinking in a bar. Why do you bother with people in a bar? People in a bar are not political, they are just merrymakers. Why do you target them? *Targeting people in a bar is bankrupt*. [Hijacking] aircraft is rubbish. The police station, the policeman on duty, [are the targets] not [the policeman] off duty, no. The target must be armed, soft but armed.²⁵

Convictions

The convictions of a group and its members orient the pursuit of their aim. Those convictions may be of traditional, moral, cultural, political, and/or religious origin. They may vary from one group to another or from one unit to another. However, they are factors that a commander cannot afford to neglect. If he wants his subordinates to follow his orders, he has to do things that are compatible with what they will accept.²⁶

Marxist movements claiming to fight for the good of 'the people' frequently have a code of conduct that prohibits a number of acts, such as pillaging in any form, the ill-treatment of civilians and prisoners, and violence against women.²⁷ They supplement such documents with a system of political education for officers and combatants in which those rules are explained against the background of their struggle's aim.²⁸ Groups that do not share the Marxist ideology may also be

25 Yoweri Kaguta Museveni, 'The strategy of protracted people's war: Uganda', in *Military Review*, November–December 2008, p. 7 (emphasis added).

26 The values and convictions of a group or an individual are complex and, as we will see below, may also militate against respect for IHL. When there is a clash between several values that are considered important (e.g. between discipline and the desire for vengeance), the superior's order will be decisive.

27 There are exceptions, such as the Shining Path.

28 Mao Tse-Tung's 'Three main rules of discipline and eight points for attention' were used in this manner in China, Nepal, Colombia, and the Philippines. The RUF in Sierra Leone copied them, without sharing their ideological basis and without teaching them, but this had no impact in the field, which shows that it is not enough for an armed group to copy a good document issued by another group to improve its practice. There are several versions of this text; our basis here is the standard 1947 version issued by the General Headquarters of the Chinese People's Liberation Army, available at: <http://english.peopledaily.com.cn/dengxp/vol2/note/B0060.html> (last visited 12 October 2011). On the interdependence between loyalty and rules in the Chinese civil war, see also Tony Balasevicius, 'Mao Zedong and the People's War', in Emily Spencer (ed.), *The Difficult War: Perspectives on Insurgency and Special Operation Forces*, Dundurn Press, Toronto, 2009, pp. 26–28.

prompted to respect IHL (or some of its principles) by their convictions, regardless of whether they are human, religious, and/or ideological in nature. In a letter addressed to Human Rights Watch, this is how the leader of the Huthi rebel forces, Abd al-Malik al-Huthi, explained the care that his movement pledges to take to protect civilians and stressed the importance of human dignity:

[W]e are very careful with the treatment of civilians, and we treat them humanely in a manner that protects their rights mentioned in international humanitarian law and international human rights law, we do not see any conflict between those principles and our religion that we believe in.²⁹

One important element in the convictions that help to ensure respect for IHL is the recognition of a common humanity shared by the fighter and his or her potential victims.³⁰ That recognition is, of course, made easier when both protagonists belong to the same ethnic group, as is the case for many Burmese armed groups.

Concern for public relations

Avoiding violations of IHL may help to convey a positive image of the group.³¹ During a conflict whose aim and driving force are first and foremost political,³² the possibility of ‘scoring points’ by claiming that they are the ‘good guys’ and – an indispensable corollary – that the enemy are the ‘bad guys’ is not insignificant. Projecting an image of respectability and of ability to keep commitments is a positive signal sent out to the international community about the government or the partner that the group intends to be.³³

A good national and international image by no means guarantees victory but it does still open up more strategic options. A group known for its acts of violence generally foregoes external political and public support as an option for securing victory, becoming wedded to gaining a military victory or at least to attaining such size that it cannot be sidelined in negotiations. It also puts itself at risk of seeing the national public opinion side against it, enhancing its enemy’s support.

29 Letter dated 22 June 2009, cited partially in Human Rights Watch, *All Quiet on the Northern Front? Uninvestigated Laws of War Violations in Yemen’s War with Huthi Rebels*, March 2010, p. 34. The full text can be found at: <http://armiesofliberation.com/archives/2009/09/04/houthi-rebels-pledge-to-comply-with-international-law-regarding-prisoners-and-civilians/> (last visited 12 October 2011), but the translation (from the Arabic) is less clear than the version by Human Rights Watch. At the same site, there is a similar text on people detained by the movement.

30 Hugo Slim and Deborah Mancini-Griffoli, *Interpreting Violence: Anti-civilian Thinking and Practice and How to Argue Against it More Effectively*, Centre for Humanitarian Dialogue, Geneva, 2007, p. 25.

31 To deny that violations have occurred or to attribute them to the enemy may also be part of a public relations strategy; however, the dynamics differ fundamentally from what we are referring to here.

32 At this level, Clausewitz’s well-known observation is still relevant to internal conflicts: ‘war is a mere continuation of policy’. Karl von Clausewitz, *On War*, Book 1, ch. 1, section 24, available at: http://en.wikisource.org/wiki/On_War/Book_I#War_is_a_mere_continuation_of_policy_by_other_means (last visited 12 October 2011).

33 This explains why some groups adopt a different approach when negotiations or a peace agreement are/is pending; the case of RENAMO in Mozambique is particularly illustrative. See J. Weinstein, above note 19, p. 186.

The *Ejército de Liberación Nacional* (National Liberation Army, ELN) unwillingly experienced this in Colombia. In 1998 and 1999, partly to attract the attention of the government, which was concentrating on the *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia, FARC), the group organized several spectacular operations involving hostage-taking. Such *pescas milagrosas* (miraculous hauls of fish) actually had a major impact and attracted a lot of attention, among other things highlighting the army's inability to prevent those operations or to release the captives. However, following the mass kidnapping at kilometre 18,³⁴ the ELN took a very different view of the situation:

It was a total disaster for the ELN. The entire country suffered as a result . . . Colombian society was saturated with kidnappings and our movement found itself under intense pressure, both within the country and from international public opinion. . . . The ELN realized the political force of kidnappings, one that was difficult to bear.³⁵

Compared with self-image, perception by others remains a secondary concern for most armed groups. Only marginal advantages can be gained, for example, from not featuring on or being removed from lists such as those of the United Nations Secretary-General naming parties that make use of child soldiers.³⁶ That is not where the conflict is played out, although no area should be overlooked and the 'moral high ground' may be useful.³⁷

'It is to our advantage'

Beyond perceptions, military interest is another key driving force. Contrary to much of the so-called common wisdom, the worst kind of utilitarian approach – in which every act of violence would be acceptable provided that it serves the cause – does not reflect the position of the majority of armed groups; respect for the law has far more than merely negative effects in terms of military efficacy.

In fact, most of the members of armed groups state with conviction the importance for them of effective respect for the law by their combatants, and back their statements with examples. They mainly elaborate on five issues: morale of their own fighters, support of the people, effective use of military resources, weakening of the enemy, and impact on long-term victory. In their view, decisive advantages can be gained from showing genuine respect for IHL. It may even form an integral part

34 Near Cali, on 17 September 2000, when the ELN kidnapped around fifty people from two restaurants.

35 Interview with the author, October 2010.

36 Fortunately, there are exceptions: owing to their desire to govern and represent their country in the future, some groups, mostly Burmese armed groups, want to avoid being on this list. In a different instance, the mere mention of the International Criminal Court (ICC) case against Thomas Lubanga induced a small armed group in the Central African Republic to change its practice with regard to the recruitment of minors. Interview with Peter Bouckaert, Emergency Director, Human Rights Watch, New York, 12 January 2011.

37 A state that supports an armed group may also demand a certain type of behaviour, and respect (or lack thereof) for IHL may be part of its demands. There is no documentary evidence of such instances.

of a rational and effective use of resources: that is, of the military principle of the economy of forces.

The combatants' morale and discipline

Very few fighters think of themselves as cowards, barely able to attack defenceless people – women, children, elderly people, wounded people, and prisoners. Attacks on people who are considered vulnerable may seriously undermine the morale of the combatants, which is vital to continuing the struggle:

‘More so than most violence, killing and hurting unarmed and harmless civilians is bad for the soul. Despite the bravado and apparent fulfilment of the warrior, most people eventually feel less themselves when they have killed civilians, not more.’³⁸

Regrettably, little study has been made of this aspect. It is nonetheless very real and goes far beyond the mere anecdotal. In the Philippines, Chad, and Sudan, I have heard it mentioned by people who were still involved in armed struggle. Former members of Lebanese, Congolese, and Colombian groups also stressed the importance for an armed group of seeing respect for IHL as a requisite part of their fighters' discipline.

Behind closed doors, those people agreed on the usefulness of IHL as a tool that helps to discipline their troops; similarly, they admitted that too much leeway allowing subordinates to ‘act as they see fit’ ultimately impairs the good performance of units in combat. Two mechanisms seem to go hand in hand. First, the lack of discipline – the natural consequence of violations such as pillaging³⁹ – is detrimental to the group's military performance. Second, the more insidious damage to the morale of the fighters undermines the performance of individuals and small groups. Attacking vulnerable people stands in opposition to values such as courage and the control of force, which are essential to the combatants' self-image.

The support of the people

Mao Tse-Tung said that a guerrilla fighter must move around among the people like a fish in water. Without the support of the people, he will very quickly find himself without resources and exposed to the blows of an enemy that is generally more powerful in military terms:

Many people think it impossible for guerrillas to exist for long in the enemy's rear. Such a belief reveals lack of comprehension of the relationship that should exist between the people and the troops. The former may be likened to water and the latter to the fish who inhabit it. How may it be said that these two

38 H. Slim and D. Mancini-Griffoli, above note 30, p. 26.

39 Pillaging is almost always the outcome of individual initiatives and disperses a unit for a certain time, during which it becomes impossible for the commander to control the group. It therefore renders that unit militarily unusable. Moreover, fighters who have had a taste of that ‘freedom’ become very difficult to lead.

cannot exist together? It is only undisciplined troops who make the people their enemies and who, like the fish out of its native element, cannot live.⁴⁰

In an insurgency, the people are both the underlying reason for and the object of the fighting. To win, it is not enough to dominate the area where they are; their support must also be gained. That support assumes many different forms but includes, in particular, supplying such essential resources as money, recruits, food, and, above all, information and intelligence.

Those resources are vital to any armed group, even for those who have consistent external support. Even in the hypothetical case of a group totally supported by one or more foreign states, such logistical support could be no substitute for locally provided information and shelter.⁴¹ Also, when the group has physical control of a territory, it prefers not to have to use too many of its human resources to keep the people calm.

Treating the local people as well as possible seems to be the most frequently used means of obtaining their loyalty. The combination of such treatment with the local administration of justice seems, moreover, to be the main factor conferring a degree of legitimacy on the armed group.⁴² To put it crudely, it may not be liked but it will be tolerated as long as the people can continue to live in comparative peace.⁴³ Ideological convictions play only a secondary role and may be significantly influenced by good conduct on the part of the combatants.

The most striking example of such dynamics is still that of China between 1945 and 1949. In the conflict between the Kuo Min Tang government and the Communist Party/People's Liberation Army (PLA), the latter gradually gained very large-scale control of the countryside and then of urban centres. One of the key factors was the introduction in the Maoist PLA of the 'Three main rules of discipline and eight points for attention', which prohibit ill-treating (including insulting) the people, pillaging, and extortion, as well as 'taking liberties' with women.⁴⁴ Even groups known for their many serious violations of IHL have taken that aspect into account, as pointed out by the Special Court for Sierra Leone with regard to the RUF:

It is noteworthy that these instances of systematic discipline of fighters for crimes committed against civilians occurred in locations where the RUF had a relatively stable control over that territory and we find that the objective of such actions was [to] secure the loyalty of civilians for the success of their operations.⁴⁵

40 Mao Tse-Tung, *On Guerrilla Warfare*, ch. 6, 'The political problems of guerrilla warfare', available at: <http://www.marxists.org/reference/archive/mao/works/1937/guerrilla-warfare/ch06.htm> (last visited 20 October 2011).

41 It was because he had failed to raise such support that Che Guevara met his death in Bolivia.

42 Klaus Schlichte, *In the Shadows of Violence: The Politics of Armed Groups*, Campus, Frankfurt/New York, 2010, pp. 41, 95–99. More general provision of security also plays a role, most often when the adversary (mostly the government) uses heavy-handed tactics. See Stathis N. Kalyvas, 'The paradox of terrorism in civil war', in *Journal of Ethics*, Vol. 8, 2004, pp. 120–121.

43 If active support is not forthcoming, particularly when the local people support its adversaries for ethnic reasons, an armed group may be content to accept their passivity.

44 See above note 28.

45 *Prosecutor v. Issa Hassan Sesay et al.*, above note 20, para. 707.

The concept that IHL should be respected in order to secure the loyalty of civilians merits our full attention because it is linked to something that generally militates against respect for IHL, namely the group's survival. Experience has shown that armed groups may allow practices that they have previously rejected if they think that their short-term survival is at stake.⁴⁶ When the support of the population is in question, their short- and medium-term survival are both at stake. This is a very effective argument in favour of showing respect for people in general,⁴⁷ as defined by IHL, regardless of whether the people are in a territory under their control or not. It applies all the more when the armed group's resources are very limited, making it even more dependent on what the local people can supply in the medium term.⁴⁸

The risk is even greater in numerous societies that function on the basis of ethnic or tribal solidarity: repeated, unjustified attacks on members of the same clan or tribe will often lead to rapid and massive retaliation. Few armed groups can sustain the long-term antagonism of such powerful players with disproportionate resources in terms of fighters, influence, money, and often weapons. Because Al Qaeda in Iraq failed to understand this, it paid a high price for its attacks on civilians and tribal leaders in Al Anbar province. Conversely, because the various rebel movements in eastern Chad did understand this, they took great care to ensure that their combatants did not attack the local people.⁴⁹

The price to be paid for repeated acts of violence against the people might therefore well be defeat in the short or medium term, and often carries more weight than humanitarian or even ideological considerations.⁵⁰

46 Ann-Kristin Sjöberg has illustrated these mechanisms very well with regard to the use of hostage-taking by groups such as the FARC and the ELN. Ann-Kristin Sjöberg, 'Challengers without responsibility? Exploring reasons for armed non-state actor use and restraint on the use of violence against civilians', PhD thesis, Graduate Institute, University of Geneva, 2010.

47 We will deal with specific categories below.

48 This makes pillaging less attractive to a group with limited resources: in the short term, it enables the group to replenish its supplies but locks it into a trial of strength over any future request. It thus becomes increasingly difficult to obtain fewer and fewer resources, an illustration of the law of diminishing returns.

49 The author obtained this information from former commanders and fighters of the Front de Libération Nationale du Tchad (FROLINAT, 1966–1993), the Front Uni pour le Changement Démocratique (FUC, founded in 2005), and the Union des Forces pour la Démocratie et le Développement (UFDD, founded in 2006). Without knowing each other, they all referred to this factor (interviews with the author, August 2009).

50 This can be illustrated by the case of the Ugandan NRA: 'It was essential for the legitimization and the mobilization of the NRA in the Luwero Triangle for it to impose discipline on its own combatants. The NRA had no permanent sanctuary in inaccessible areas or outside the country to which it could retreat. The NRA's shortage of weapons and its military inferiority, particularly prior to 1985, forced it to make sure that it was tolerated by the people... The NRA could not afford to permit a *laissez-faire* attitude to combatants who treated the civilians in the war zone in the manner of autocratic or even brutal warlords... Because of the NRA's military weakness, the risk of internal conflict and distrust of ordinary combatants, in December 1981 the NRA leadership issued an extensive code of conduct for the NRA which governed the behaviour of the guerrilla fighters towards civilians and within the guerrilla force itself.' Frank Schubert, '“War came to our place”: Eine Sozialgeschichte des Krieges im Luwero-Dreieck, Uganda 1981–1986', PhD thesis, University of Hanover, 2005, pp. 275–276. Schubert refers to the first part of the code on p. 277. The code of conduct is available in Ori Amaza Ondoga, *Museveni's Long March from Guerrilla to Statesman*, Fountain, Kampala, 1998, pp. 246–251.

As another example, several *jihadi/takfiri* groups have had serious problems when it comes to justifying to Muslim public opinion the death of seemingly innocent people, even more so when these are Muslims.

Weakening the enemy

In a conflict, the enemy's total destruction is not necessary if its defeat can be achieved by other, often less costly, means. It has long been acknowledged that an adversary who has no hope of surviving if he surrenders is likely to fight to the death, thus making the commander's task more complicated. It is therefore deemed a more sensible approach to offer an adversary who has been cornered a geographical or symbolic way out.⁵¹

In that context, a policy of treating enemy prisoners with respect and systematically granting quarter may have both a humanitarian and a military impact, thus affecting the enemy's morale. According to Mao Tse-Tung, not treating members of an enemy force properly strengthens rather than undermines it:

We further our mission of destroying the enemy by propagandizing his troops, by treating his captured soldiers with consideration, and by caring for those of his wounded who fall into our hands. If we fail in these respects, we strengthen the solidarity of our enemy.⁵²

A soldier in the government armed forces or a member of an enemy armed group will have fewer scruples about surrendering if he knows that he risks no more than a propaganda session and the loss of his military effects.⁵³ The use of more severe punishment by his own superiors in the event of this kind of 'desertion' might dissuade him, but will be resented as depriving fighters of an easy way out and will ultimately damage the cohesion of the unit or the entire army. However, if a soldier knows that, if captured, he will be held for years in the jungle in appalling conditions, tortured for information, and/or killed, he will hold out as long as possible, probably doing damage to the armed group that it cannot afford.

The long-term impact

The human suffering and material damage caused by any conflict are far greater when the protection granted by IHL is not respected, and their impact is felt over the long term. Even potentially lawful acts such as the destruction of basic facilities and installations deemed to be legitimate targets⁵⁴ may exact an exorbitant price in the

In 1993, the organization Islamic Jihad in Egypt saw public opinion turn against it following the death of a little girl, Shayma Abdel-Halim, in one of its operations.

51 This brings to mind ch. 7 of Sun Tzu (544–496 BC), *The Art of War*, one of the classics of strategic literature.

52 Mao Tse-Tung, above note 40.

53 These sessions and the way to treat prisoners are dealt with several times in the operational orders reconstituted by Pasang (Nanda Kishor Pun), in *Red Strides of the History: Significant Military Raids of the People's War*, Kathmandu, 2008.

54 In accordance with the rules of customary law determined by the ICRC's study Rule 8, '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.' See J.-M. Henckaerts, 'Study on Customary International Humanitarian Law', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 198.

long term, as the armed group is deprived of the use of that same infrastructure. At a different level, the FARC for a long time used anti-personnel mines to ensure security of their units at night, but as they failed to remove them in the morning and ‘forgot’ where they were, they endangered their own fighters.

For groups that claim to fight for the good of a particular – especially an ethnic – community, the sustained well-being of that community in the future is a factor to be taken into account. It is an argument against recruiting children as combatants, for, although it may be in the group’s short-term interest to involve as many people as possible without paying too much attention to their age, the long-term impact on the communities may be huge. As they have learned no other trade than warfare and find it difficult to fit into a society that functions differently from a military unit, former child soldiers may place a heavy burden on the well-being of the very community they were previously defending.

Respect for IHL also has a delayed impact when it comes to the conclusion of peace. Conflicts are generally conducted with an objective, which inevitably takes the form of peace.⁵⁵ The conclusion and subsequent maintenance of peace are rendered more complex by the memory of atrocities carried out by the parties.⁵⁶ First, the negotiators have often been victims themselves through targeting of their family or of their ethnic group; second, they are often under pressure from their constituency not to forget the violations and therefore to be seen to be ‘firm’ with the enemy. The more equally matched the two sides are, the more heavily the atrocities committed by them will weigh against the conclusion of peace. It is true that the greater an armed group’s military advantage is, the less effective those factors will be. However, even in the case of a total military victory, it will be necessary to deal with popular resentment, which will be a serious problem for the new regime.

Inciting the adversary to reciprocate

The treatment of prisoners is the area on which positive reciprocity has the greatest effect. Some armed groups have found that their adversary can be influenced by the way in which they treat their prisoners. If they treat enemies in their hands well, this may lead to improved treatment of their own members in enemy hands. The enemy’s desire to ensure that its own combatants continue to be well treated and the fear of repercussions on public opinion stemming from disparity of treatment have sometimes enabled that objective to be achieved.

Albeit rare, that situation has occurred – for instance, in Colombia and Nepal. The ELN and the People’s Liberation Army of the Maoist Communist Party

55 The saying that ‘men make war because they have a different idea of peace’ takes on its full meaning in this context. The phrase may stem originally from the philosopher Aristotle, who stated that ‘We make war so that we may live in peace’, Aristotle, *Nicomachean Ethics*, Book 10, 1177b5–6.

56 As recognized by the Libyan National Transitional Council (NTC) in several of its declarations on IHL; see e.g. its statement of 21 August 2011: ‘The guidelines further demonstrate the NTC’s commitment to do its best to ensure that those fighting in its name, through adherence to the principles of international humanitarian law, minimize the harm to the Libyan people. *This will facilitate the effective reconciliation and reconstruction of our nation once the fighting ends.*’ Available at: <http://ntclibyaus.files.wordpress.com/2011/08/ntc-ps-laws2.pdf> (last visited 12 October 2011), emphasis added.

of Nepal (CPN-M) explain their efforts regarding the treatment of soldiers who have fallen into their hands by their concern to bring about changes – or to maintain an acceptable status quo – on the part of the armed forces.⁵⁷ In at least one case, reciprocity has also far exceeded the provisions of IHL. In Colombia, a soldier in the Colombian armed forces who had been captured by a FARC front was treated with consideration and released shortly afterwards. When he saw one of his captors ‘hanging around’ in the town some time later, he did not denounce him, apparently because, in a way, he wanted to thank him for the treatment that he himself had received. That behaviour, which goes far beyond the requirements of the law, convinced the local FARC commander that if he treated his prisoners well that might well be reciprocated by the enemy.⁵⁸

‘Because of what IHL is’

IHL has its universal, customary, and ‘civilized’ character in its favour: all states have ratified the Geneva Conventions and since 1949 not one of them has withdrawn its ratification. This indicates more than a mere general consensus and endows IHL with considerable moral force. Numerous armed groups have made a unilateral public declaration in which they pledge to respect that law in full or in part,⁵⁹ and others have taken similar steps in the context of agreements with their adversary.⁶⁰ This gives IHL, at least in its fundamental provisions such as Article 3 common to the four 1949 Geneva Conventions, or Article 48 of 1977 Additional Protocol I, the character of truly customary law.

Those rising in rebellion against a state are unlikely to consider that the ratification of a treaty by that state is binding upon them, but they may be sensitive to the influence of the community of armed players for whom the law of armed conflicts is a reference to be upheld. IHL is thus often seen as the expression of what is acceptable in the world.

Moreover, IHL is also the crystallization of previous, traditional practices. It may therefore be seen as a simple extension of the rules to which a society has already agreed. One example is the Somali code of warfare known as *Biri ma Geido*

57 Interview with David Tuck (ICRC), October 2010.

58 Interview with the author, October 2010.

59 Those declarations may have a legal form and refer to the applicable texts and legal provisions, or be far more general; published codes of conduct have the same effect. Some striking examples are UNITA (Angola), SWAPO (Namibia), ANC (South Africa), Mai Mai (Democratic Republic of the Congo, RDC), JEM, SLA-Unity (Sudan), CGSB, FARC, ELN (Colombia), FMLN (Salvador), CPN-M (Nepal), CPP-NPA-NDFP (Philippines), LTTE (Sri Lanka), PLO (Palestine), PKK (Turkey), and Huthis (Yemen). That may also lead to a kind of peer pressure being put on a group wanting to do things well.

60 The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) between the government of the Philippines and the National Democratic Front of the Philippines (1998) is the best-known agreement still in use that refers to IHL in its entirety. There are also numerous examples of agreements that focus on the protection of civilians, such as the 2009 agreement between the government of the Philippines and the Moro Islamic Liberation Front (MILF) and the 2002 agreement between the government of Sudan and the SPLM. The indirect agreements between Israel and Hezbollah (July agreement of 1993, April agreement of 1996) are a special case, as they apply to the territory of two states.

(literally, ‘spared from the spear’), an oral tradition that defines the categories of people to be protected, in particular women, children, the elderly, the sick, guests, and delegates who are there to negotiate peace.⁶¹

Why decide not to respect the law?

‘Because of who we are’

The group’s aims

One of the greatest challenges to respect for IHL is the fact that some groups exist to carry out acts that are in themselves violations of IHL. The extreme is represented by groups whose aim is, or becomes, to commit genocide, such as Serb extremist militias in Bosnia⁶² and the Interahamwe and Impuzamugambi in Rwanda.⁶³

Other groups are simply prepared to go to any lengths to ward off what they perceive as a threat. Many pro-governmental groups are thus formed to oppose an insurgency with means that the government security forces do not use themselves. One example is the paramilitary groups in Colombia; it is estimated that between 1990 and 2000 they were responsible for 35% of all violations of IHL, but only for 1% of combat operations.⁶⁴

It is not by chance that one of the first well-organized paramilitary groups was called ‘Death to the Kidnappers’ (*Muerte a los Secuestradores* – MAS) ... Fidel and Carlos Castaño also formed a group called ‘Death to the Revolutionaries of the Northeast’ (*Muerte a Revolucionarios del Nordeste*).⁶⁵

61 *Spared from the Spear: Traditional Somali Behaviour in Warfare*, ICRC delegation in Somalia, ICRC, 1998.

62 For example, a witness reported having heard Vojislav Šešelj, the former leader of the Serbian Radical Party (SRS) and of a Serbian paramilitary militia in the early 1990s, tell him that the aim of the war was to drive the Bosnians out of the Greater Serbian territory: “‘Brothers, Chetniks, Chetnik brothers,” he literally says – had said, “The time has come for us to give the balijas tit for tat.” I will explain. “Balija” is a derogatory word for Muslims. You’ve probably had the opportunity to hear this word before in prior testimonies. “The Drina, the River Drina ... is the backbone of the Serbian state. Every foot of land inhabited by Serbs is Serbian land. Let’s rise up, Chetnik brothers, especially you from across the Drina. You are the bravest.” ... “let us show the balijas, the Turks and the Muslims,” he said all of those words in one context, “the green transversal, the direction to the east [Turkey]. That’s where their place is.”” International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Vojislav Šešelj*, Transcript of the session on 4 February 2009, available at: <http://www.icty.org/x/cases/seselj/trans/en/090204ED.htm> (last visited 12 October 2011), p. 13994, lines 7–18.

63 The International Criminal Tribunal for Rwanda (ICTR) shed light on the systematic, planned nature of the atrocities perpetrated by the Interahamwe on civilians. See e.g. ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgement, 6 December 1999, ICTR-96-3, paras. 368–371, available at: <http://www.unictur.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> (last visited 12 October 2011).

64 A. Sjöberg, above note 46, p. 238.

65 *Ibid.*, above note 27, p. 241 (emphasis added).

The rhetorical language used by groups that seek to justify their exactions by claiming to have a noble aim is always the same: the community – however it is defined – is supposedly in serious danger that threatens its very survival. In that case, normally unacceptable acts become the only rational and even moral choice. The ultimate nature of the threat justifies everything, from widespread massacres ('let's kill them before they kill us') to the systematic recruitment of children ('they will have no future if we are defeated'). In an official press release sent to the Sierra Leone Broadcasting Service on 18 June 1997, the RUF openly admitted that it committed atrocities but justified them by a noble aim, which in its view could only be achieved by committing violations, including mass amputations:

The atrocities that occurred must not be taken in the context of a personal vendetta. They were the result of the rottenness of a system, which could not be uprooted except by brutal means. We did not take to the bush because we wanted to be barbarians, not because we wanted to be inhuman, but because we wanted to state our humanhood to a society so deep that *had the RUF not emerged, we wonder if we would not have still been under the yoke of that wretched regime*. In the process of *cleaning the system*, however, we have wronged the great majority of our countrymen.⁶⁶

When a group defines objectives that in themselves contravene IHL, its choice of methods that do not comply with the standards of that body of law is not surprising. This makes it very difficult to argue in favour of the law, and even more so when such arguments do not stem from the people whom the group claims to protect.

Lack of knowledge and understanding of IHL

Despite the prevalence of an IHL-related discourse among armed groups, one wonders to what extent the content of the law really is known. I have had a fair number of opportunities to hear statements that suggest that some of the violations are the result of a lack of in-depth knowledge, concealed beneath a veneer of basic notions. Some define 250 kg bombs used by the enemy as 'weapons of mass destruction, which are prohibited under IHL', thus justifying their own reprisals.⁶⁷ Others consider that using aircraft against foot soldiers is a lack of respect for the principle of proportionality and thus constitutes a war crime. And, while others know that it is their duty not to kill enemies who surrender, they do not know that it

66 Sierra Leone Truth and Reconciliation Commission, above note 11, Appendix 5: 'Amputations in the Sierra Leone Conflict', p. 17.

67 Weapons of mass destruction normally refer to nuclear, bacteriological, or chemical weapons. While they are not forbidden *per se*, the use of nuclear weapons would most certainly violate the principle of distinction. In addition, international conventions outlaw biological and chemical weapons. See, for instance, the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare; Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.

is just as necessary to give them appropriate medical care after they have been taken captive.⁶⁸ In view of such examples, it is questionable how far knowledge of the content of IHL by many commanders and fighters really extends beyond some basic notions.

Fairly few groups have access to lawyers who are well versed in IHL; in most cases, their knowledge derives from hearsay and reading matter of varying quality. It likewise comes as no surprise to find that a commander who was a teacher has heard about the existence of international law but has not grasped its subtleties. Such relative lack of knowledge is characteristic of many of those whose task is to enforce the law, and not only among armed groups.⁶⁹ Ignorance of the workings of international justice is equally prevalent, which casts some doubt on the dissuasive impact often attributed to international tribunals such as the International Criminal Court (ICC).

Allegiance to other laws

IHL is not the only body of law that governs warfare. Moral, religious, and/or traditional codes may also have the allegiance of armed groups. Most societies, especially traditional societies, also establish their own limits for what is or is not permissible during war. These rules may be in agreement with those of international law; they may also contradict them.⁷⁰ When that is the case, violations of IHL may be deemed justified on the basis of that other body of law. Pillaging and the kidnapping and enslavement of civilians observed during the civil war in southern Sudan were carried out by horsemen who came largely but not solely from Arab tribes whose traditional law of war considers such practices to be normal.

The *Pashtunwali*, a non-written ethical code of the Pashtuns in Afghanistan and Pakistan, is another example of the ambivalence of traditional rules. On the one hand, it obliges the Pashtun to give shelter to anyone who asks for it and to protect that person even at personal cost to himself or his possessions (*nanawatai*, ‘sanctuary’),⁷¹ and a guest must be provided for and protected at all costs (*melmastia*, ‘hospitality’).⁷² On the other hand, it obliges the Pashtun to take revenge for any offence or insult, most frequently by shedding the blood of the offender or of one of his close relatives (*badal*, ‘justice’). In a conflict, *melmastia* – and less so *nanawatai*, which sets conditions difficult to fulfil in the heat of battle – may well play in favour of a decent treatment of prisoners, but this may also

68 Various interviews with the author in 2009 and 2010; this reflects the situation in groups on three continents.

69 Ignorance is not a legally valid defence; it is, however, a major cause of violations, particularly in the complex sphere of the conduct of hostilities.

70 The codes to which I refer are never completely contrary to IHL but contain rules that are compatible with that law as well as provisions that are incompatible with it.

71 A request for protection must usually be accompanied by repentance on the part of the person making the request for a crime that he has committed, thus calling a halt to any form of vengeance.

72 Though surprising to many, the fact remains that prisoners are sometimes referred to as ‘guest’ in Afghanistan, and treated as such.

be counterbalanced by the requirement of *badal* if the prisoner has previously done something that deserves revenge.⁷³

'Not respecting the law helps us to win'

Military advantage

Disregard for the rules of IHL may have a number of short-term military advantages. To give some examples, perfidy may make it possible to attack a target that is too well defended for the group to do so otherwise. Protected property (places of worship, hospitals) may be used as a military position because the enemy will be reluctant to attack it, especially if the international media are keeping a close eye on the conflict.⁷⁴ Giving no quarter may help to shatter the resistance of a unit by creating a climate of terror. Pillaging may considerably facilitate a column's logistics. For a number of commanders of armed groups, freedom of action takes precedence over any other consideration. However, it must be recalled that, in all those cases, the military advantage of not respecting IHL is short-term and rapidly dwindles as soon as the enemy comes up with counter-measures.

One area in which the military advantage of non-respect for the law is well documented is the use of children to perform military tasks. Despite their drawbacks, children are fairly easy to recruit,⁷⁵ generally respond better to indoctrination than adults, and require less food and lower salaries, thus costing less; furthermore, they are able to use modern weapons such as assault rifles, and are often somehow protected by the reluctance of adults – and, to an even greater extent, professional soldiers – to harm children.⁷⁶ Their disadvantages in terms of discipline and command (quality) are barely relevant when the armed group's objective is simply to have a large number of combatants: that is, boots on the ground. Numbers play a vital role when it comes to controlling a territory, operating on several fronts and applying pressure in order to gain a seat at the negotiating table. Another advantage has to do with children's relative lack of visibility when reconnoitring an enemy position. In Uganda, for example, '[NRA] teenage soldiers played a significant role in the capture of Kampala. Dressed in tattered clothes, they walked freely around the enemy positions in the capital to gather information.'⁷⁷

73 The *Pashtunwali* is not the only element in Afghanistan and Pakistan that influences the treatment of prisoners; Islam plays a major part as well. For a survey of people's attitudes towards prisoners, see *People on War: Country Report Afghanistan*, ICRC, Geneva, 1999, pp. 22–26.

74 A high price in terms of reputation may have to be paid for a badly led attack: for instance when a mosque used by insurgents was destroyed on 13 April 2004 by the US army during the first battle of Fallujah.

75 It should be borne in mind that, in most cases, the recruitment of child soldiers is not the outcome of kidnapping, despite the experience in Liberia, Sierra Leone, or northern Uganda. Villages and camps for refugees/displaced persons are places where it is often easier to recruit sizeable numbers of children rather than adult men, who may already be taking part in the fighting, in the town looking for work, in exile, or dead.

76 Peter W. Singer, 'Western militaries confront child soldiers threat', in *Jane's Intelligence Review*, Vol. 17, No. 1, 2005, pp. 8–13, available at: http://www.brookings.edu/articles/2005/01humanrights_singer.aspx (last visited 12 October 2011).

77 Mohamed Amin, 'Uganda's children at war', in *Africa Now*, No. 60, April 1986, p. 8.

Asymmetry: key issue or good excuse?

In non-international armed conflicts, asymmetry is often used to ‘explain’ why a party has to break the common rules. The adversary is said to have such advantages that the only way to counter them is to adopt tactics that entail violating the law. Insurgents view their enemy as having far superior military resources and being able to deploy all the state’s services to put down the insurgency.

One means of countering the adversary’s military advantage is to hide within the population;⁷⁸ this may lead to use of the population as a human shield or to perfidy. Unsure whether they are facing a combatant or not, the enemy may hesitate to use their fire power or, conversely, may use it indiscriminately. In either case, the insurgent wins, either by inhibiting the enemy at tactical level or by placing them in the role of a war criminal.

Asymmetry of resources is even more decisive than that of military means. For example, if insurgents base their discourse on the people’s grievances over access to land, the government may initiate an agrarian reform through its Ministry of Agriculture; it may also make use of its Ministry of Health to conduct programmes designed to benefit the inhabitants of a village supporting the insurgency. It thereby prevents the insurgents from saying that the government takes no interest in the people.⁷⁹ To guard against this, the insurgents have to break the link between the people and their government as quickly as possible and therefore attack at the lowest administrative levels:⁸⁰

All means are used to increase control in the rural areas, to cause general discontent and to discredit the government for the purpose of trying to break

78 While adding certain conditions, IHL recognizes in Article 44(3) of Additional Protocol I that ‘there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot . . . distinguish himself [from the civilian population]’. That provision only concerns international armed conflicts and wars of national liberation; it shows, however, that the issue had already been understood in 1977.

79 See Robert Thompson, *Defeating Communist Insurgency*, Hailer Publishing, St Petersburg, FL, 2005 (first published 1966), p. 55 : ‘The government must have an overall plan. This plan must cover not just the security measures and military operations. It must include *all political, social, economic, administrative, police, and other measures which have a bearing on the insurgency*’ (emphasis added). More recently, in Afghanistan, members of Operation Enduring Freedom and the ISAF have regularly stated that the key to defeating (a military term) the Taliban is education. See e.g. on the ISAF website in 2010, John T. Stamm, ‘Panjshiris put education first’, available at: <http://www.isaf.nato.int/article/news/panjshiris-put-education-first.html> (last visited 16 November 2011): “‘This program serves as an inspiration. Panjshiris understand that education is the key to a more promising future,’ said U.S. Army Lt. Col. Eric W. Hommel, Panjshir Provincial Reconstruction Team commander. “They know that education equals opportunity, and opportunity leads to prosperity and stability. *This is how Afghans will defeat the Taliban, by combating ignorance through education*” (emphasis added).

80 Y. K. Museveni, above note 25, p. 8, states that, although this result must be obtained, it should be done without killing civilians; the thing to do, therefore, is to: ‘scare away government administrators – don’t kill civilians! Civilians should not be killed if they are not armed – even if they are for the government – you scare them away, [tell them] “Don’t come back here. If we find you here again, you’ll see.” The fellow will just run away. You don’t have to kill. And that, by the way, is also part of building the prestige of the revolutionary movement. Because the word goes around, “These people are not killers! They could have killed me. They captured me. I was in their control but they told me to go away.” It’s very, very important. . . . You want these people, the administrators, to leave the area so that the government has no control there. That’s what you are interested in. You are not interested in killing them, just scare them away.’

the links between the government and the people. It is essential for the communists to eliminate or neutralize potential opponents. There will be a spate of murders of village and hamlet officials, labour foremen and any other prominent citizens to whom the local population might look for leadership. The communists are normally careful, however, not to murder a popular person before he has been discredited.⁸¹

Although it would appear irrefutable, the asymmetry argument has two fundamental flaws: first, IHL – and particularly the Additional Protocols – was established at a time when asymmetrical warfare was the norm. It is not without significance that the Diplomatic Conference of 1974–1977 took place just after the end of the Vietnam War, for the states that took part in the conflict attended the negotiations and were able to raise their concerns during the debates. It might therefore be wondered why IHL as it stands today would not meet the challenge. Moreover, that argument is used just as much by certain armed groups as by certain government forces. If asymmetry really justified every infringement of the law, it would work in one direction only.⁸²

Terror to control the people

One of the paradoxes of several modern conflicts is that armed groups attack the very people on whose behalf they claim to be fighting. The example of the Lord's Resistance Army (LRA) in Uganda, which claimed victims primarily among the Acholi from which it stemmed, is not an isolated one. The same phenomenon was observed on at least three continents in the course of the twentieth century: 'More Greeks were killed by EOKA [the National Organization of Cypriot Fighters] than British soldiers, more Arabs than Jews in the Arab rebellion of 1936–1939, more Africans than white people by the Mau Mau [in Kenya, 1952–1960].'⁸³

Treating the local people decently is not the only way of ensuring their active support or their passivity. A number of groups have found that terror has similar effects. If the group manages to give the impression that every incidence of disobedience and even the slightest wish to oppose will result in swift and terrible punishment, a group of people under its control or influence is likely to submit.⁸⁴ The experience of the Colombian paramilitary fighters tends to confirm this hypothesis. They used killing and forced displacement to subdue possible FARC or ELN sympathizers and their other adversaries. When questioned after the events, a number of them were still convinced that the use of violence was an effective means of obtaining greater co-operation from civilians.⁸⁵

81 R. Thompson, above note 79, p. 24.

82 Asymmetry actually works both ways, which is often forgotten. See Y. K. Museveni, above note 25, p. 6: 'The strategy of a Protracted People's War hinges on two factors. You realize that, strategically, you are strong and the enemy is weak; however, tactically, you are weak and the enemy is strong.'

83 Walter Laqueur, *Guerrilla Warfare: A Historical and Critical Study*, Transaction, New Brunswick, NJ, 1998, p. 401.

84 At least in the short term.

85 A. Sjöberg, above note 46, pp. 262–263.

The experience of Charles Taylor, the head of the National Patriotic Front of Liberia (NPFL), is similar. Although he was known to have been responsible for a large number of war crimes, he was nonetheless democratically elected as president of his country in 1997 with 75% of the votes. During the campaign, his unofficial slogan – taken up in a song – was: ‘He killed my Ma, he killed my Pa, but I’ll vote for him [because I want peace]’. The fact that he won despite openly proclaiming his intentions is a good illustration of the terror that he continued to induce. Many other examples of the use of terror to control the population can be given.⁸⁶

Blind terror fortunately has few advantages. It tends, in fact, to prompt the people and the members of their elites to engage in self-defence or to support the government, which becomes the only possible source of protection. Al Anbar has already been mentioned above; one of the factors that made it easier for the Sunni tribes to change sides and oppose Al Qaeda in Iraq was a series of gruesome indiscriminate attacks in which explosives and tanks full of chlorine gas were used. In carrying out those attacks, the organization crossed a line between cowing people into submission and rousing them to action, something that it should have avoided for its own good.⁸⁷

Reaching the enemy through the people

It has become commonplace to say that the people are often the prize in so-called asymmetrical conflicts. In that context, a party may consider that it is in its interest to influence the whereabouts of those people. Apart from the extreme of ‘ethnic cleansing’, this view is quite widespread: forced displacements can be used as a strategic tool to force either the ‘undesirables’ to flee to the enemy or the ‘desirables’ to remain in or move to the area controlled by the armed group. This method is based on two premises: first, and particularly when the conflict has an ethnic dimension, it is thought that the adversary will fight less vigorously for an area if it is depopulated of that adversary’s own people; second, if a peace agreement is pending, displacing supporters of the government – or one’s own – may pave the way for electoral victories. Furthermore, the morale of the enemy combatants will be

86 See R. Thompson, above note 79, p. 25: ‘This policy of wholesale murder has a further purpose, which can only be described as selective terrorism designed to keep the local population completely cowed . . . When, during the insurgency period, retribution is coupled with terror, acts are committed whose brutality is hardly credible in a law-abiding western society. On one occasion in Quang Ngai Province, when the Viet Cong regained control over a village which had been in government hands for some time, they seized the headman and his family, disembowelled his wife in front of him, hacked off his children’s arms and legs and then emasculated him’.

87 Those dynamics are not new. In reflecting on the communist uprising in Malaysia, Thompson (*ibid.*) distinguished between blind terror and selective terror: ‘Communists are, however, careful not to undertake general terror against the population as a whole, except in rare instances for a specific purpose, such as the complete destruction of a village (Simpang Tiga in Malaya was an example). Where this has occurred – as in Malaya, when for a period buses were shot up and grenades thrown in cinemas, acts resulting in indiscriminate deaths amongst the local population – the error of these tactics was soon realized. If continued beyond a certain point, general terror may drive the people to support the government. Terror is more effective when selective’.

undermined if they know that the insurgents regularly attack their communities while they themselves are on duty in another part of the town or country.

One last way of reaching the enemy through the population is to use violations to convey messages directly or indirectly to the enemy or to attract media attention in the hope that such action will be translated into international pressure. The RUF gave an extreme example of this in its mass use of forced amputations among civilians:

In conversation, Gabriel Mani allegedly told Sahr Sandi that the SLA [Sierra-Leonan Army]/RUF made a joint decision in the jungle around Koinadugu in late 1997/early 1998 that they should conduct amputations. According to Mani, the SLA/RUF felt they were not getting enough international recognition and they pointed to how much international coverage the amputations were getting as compared to other aspects of the war. . . . In fact, one interviewee told me, 'When we started cutting hands, hardly a day BBC would not talk about us [*sic*].'⁸⁸

Groups held hostage by their own fighters

In his book entitled *Inside Rebellion*, Jeremy Weinstein has shed light on the direct impact of the quality of the people recruited by an armed group on respect for IHL. Weinstein states that if the group mainly recruits people whom he qualifies as 'opportunists', namely people who are motivated primarily by their own short-term interests, the group will be unable to impose any discipline (which may include rules regarding respect for civilians) on them: 'The profile of recruits . . . conditions the choices rebel leaders make about how to manage and control behaviour within the organization and to govern non-combatant populations'.⁸⁹

The inevitable nature that Weinstein attributes to those dynamics has not been demonstrated, although they have been observed in a number of conflicts throughout history. A belligerent force short of funds may strike an unspoken deal with its fighters: they will fight on its behalf in exchange for permission to help themselves to the people's property – war has to feed war. Those dynamics are often at work when the group has a tribal base because the moral codes of tribal societies are generally very permissive with regard to pillaging.⁹⁰ A deal of this kind ensures that there will be a large number of fighters, even if it produces units with dubious cohesion. When the motivation of many fighters is solely personal, the group's leadership may often be unable to impose standards because fighters may simply walk out on them if they are dissatisfied. The organization finds itself held hostage

88 Sierra Leone Truth and Reconciliation Commission, above note 11, Appendix 5, p. 17, para. 91. The identification of the SLA is probably an error on the part of the witness, who appears to have confused the SLA with the AFRC.

89 J. Weinstein, above note 19, p. 300.

90 For the Arabs fighting with Lawrence of Arabia, plunder was part of their traditions and therefore motivations, which ensured that the uprising was never short of combatants but also caused great fluctuation in numbers. The effectiveness of that uprising against the Turks presages the appeal of that method for many contemporary groups.

by its rank and file, which makes it very difficult to implement any measure aimed at disciplining behaviour. If the choice is between safeguarding their own lives and providing better treatment for the people, most groups choose their own survival.

Atrocities as a political and propaganda lever

An armed conflict is not solely a military affair; the political dimension is essential in victory. Atrocities committed ‘at the right moment’ may carry political weight, which makes them interesting far beyond the military value of those acts (which is sometimes weak, and often nil). They may confer a media – and hence political – stature on a group that far exceeds its actual strength in the field. It may then trade that off against political concessions from the government. In extreme cases, atrocities may attract sufficient attention and concern from international mediators to ensure that comparatively weak groups are given a place at the negotiating table.

The LRA, which drew attention to itself by committing regular and massive violations against civilians, is a well-documented example of this kind of reasoning. The atrocities that it committed in Uganda have often been wrongly described by observers as random or meaningless because they were carried out on people on whose behalf the group claimed to be fighting. The reality is far more complex and far more frightening:

Through attacks on civilians the LRA has been able to remain a relevant threat to the government throughout the war. As one former commander who used to have close connections to Kony [the head of the LRA] said: ‘This is guerrilla warfare . . . When time comes for military action [the LRA] can plan to do something which can spoil the name of the government or which can show that [the LRA] are still there in the bush.’⁹¹ . . . The horror inflicted by such accounts of killing rage is intended to maximise the tactical power held by the group or as former commanders argued, ‘to show that we are still very strong’. The indiscriminate use of violence allows the group to be seen as a threat while only staging few attacks and as such to remain an important player in national politics.⁹²

Launching attacks on the local people demonstrates the inability of government forces to protect them and thus strikes at the government’s legitimacy in their eyes.⁹³ Paradoxically, the only refuge will then be the armed group, the

91 Denying a group any importance and any legitimacy may force it to adopt this strategy, a fact that governments wishing to qualify all armed opposition as ‘criminals’ and/or ‘terrorists’ tend to forget.

92 Kasper Thams Olsen, *Violence against Civilians in Civil War: Understanding Atrocities by the Lord’s Resistance Army in Northern Uganda*, Conflict Research Group, Working Paper No. 8, Ghent, 2007, pp. 4–5. The author sheds light on other dynamics of those violations, which make the atrocities committed by the LRA more complex for an external observer.

93 The same applies to a conflict between armed groups. It is important to note that there are also cases in which a party to a conflict commits atrocities in the guise of its adversary; some armed groups have behaved in a similar manner. A documented example is provided by the attack on Guheng Sa-e, headman of a village in southern Thailand: having resisted his attackers, he discovered that two of them – whom he had killed – wore police and army uniforms. He interpreted this as follows: ‘I think they planned to let the

perpetrator of those same attacks. Such a strategy of chaos was observed in Iraq following the 2003 invasion. (Potential) popular support for the US administration and then for the new Iraqi government was seriously undermined by insurgent attacks on the infrastructure and the people; this contributed to making the very perpetrators of those attacks a viable political alternative in the eyes of a proportion of their victims.⁹⁴ Similar calculations have enabled a fair number of groups to strengthen their short- and medium-term political position; the final defeat of the LRA in Uganda shows, however, that they are not flawless.

‘We have nothing (left) to lose’

Terrorist lists, national legislation, and international justice

Taking a solely repressive approach to armed groups amounts to encouraging them to violate the law. With no alternative for their own protection other than a military victory or a stalemate leading to a political compromise, they will tend to ignore any reasons they might have for respecting the rules of IHL.

The repression of war crimes is all too frequently seen solely as a ‘stick’, rather than as a ‘stick-and-carrot’ approach. The threat – for example, that of being brought before the ICC – will be far more effective if it is tied to a potential benefit. The Swiss Criminal Code is one of those all too rare texts with such a dual approach.⁹⁵ While criminalizing the financing of terrorism by imposing a fine and/or a prison sentence of up to five years, it states that raising such funds cannot be punished ‘if the financing is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts’.⁹⁶ This gives an armed group wanting to raise funds in such a prosperous country a serious reason to consider respecting IHL better.

At present, once a group or an individual has been labelled as belonging to the ‘bad guys’, they have hardly any alternative. For example, the mechanisms to remove an organization from a terrorist list or to offer an amnesty in national courts for mere participation in hostilities (that is, participation without committing war crimes) are rarely transparent and often end up radicalizing groups that have

Thai authorities take the blame for what happened that night. If they succeeded [in killing me], my death would easily turn moderate people here against government officials’. Quoted in Human Rights Watch, *No One Is Safe: Insurgent Attacks on Civilians in Thailand’s Southern Border Provinces*, Human Rights Watch, 2007, p. 60.

94 See *US Army Counterinsurgency Field Manual*, FM 3-24, September 2006, pp. 1–9, para. 1–43: In the eyes of some, a government that cannot protect its people forfeits the right to rule. Legitimacy is accorded to the element that can provide security, as citizens seek to ally with groups that can guarantee their safety.

95 Swiss Criminal Code of 21 December 1937 (status as of 1 October 2011), SR 311.0, Article 260 *quinquies*, in force since 1 October 2003, available at: http://www.admin.ch/ch/e/rs/c311_0.html (last visited 12 October 2011).

96 *Ibid.*, para. 4. Paragraph 3 is another safeguard clause: ‘The act does not constitute the financing of a terrorist offence if it is carried out with a view to establishing or re-establishing a democratic regime or a state governed by the rule of law or with a view to exercising or safeguarding human rights’.

nothing more to lose: 'If you are on a terrorist list without any mechanism to de-list you, you are cornered into terrorism'.⁹⁷

It is understandable that governments or intergovernmental organizations may wish to criminalize behaviour – or tactics – that violate IHL. That is necessary.⁹⁸ However, simply criminalizing all opposition groups or pro-governmental groups is counterproductive. It risks radicalizing groups that had no *a priori* intention of systematically violating IHL. The aim is, of course, not to promote the opposite extreme and to suggest that any group that uses weapons on a state's territory should be formally recognized (including as a belligerent) regardless of its size, geographical influence, or activity. Recognizing belligerent status is one extreme, which is only very rarely desirable for a government because of the perceived associated political cost of any sort of recognition given to an armed group, a potential loss of face at the internal and international levels.⁹⁹ Between the two extremes there is plenty of scope for encouraging armed groups to keep to or to return to the narrow path of IHL, and the lists of terrorist organizations generally have the opposite effect on such groups, if they have any effect at all.

Massive unconditional state support

Jeremy Weinstein points out that external support for an insurgent group will raise the level of violence. In his analysis of the case of the Resistencia Nacional Moçambicana (RENAMO) in Mozambique, he shows that having large quantities of resources allowed the group first to emerge in the late 1970s as the only true challenger of the government, and then to take no interest in how its combatants behaved towards the local people. The massive support given to the group, first by Rhodesia and then by South Africa, enabled it to disregard whether there would be advantages in having the people co-operate with it out of conviction, thus eliminating a potential reason to treat them better.¹⁰⁰

97 Conversation between the author and the foreign secretary of a Burmese armed group, Geneva, 8 December 2010. That group does not feature on the US, European, British, Indian, Russian, Canadian, or Australian lists of terrorists. The remark is therefore not a *pro domo* plea.

98 In recent years, states and the media have used the word 'terrorists' systematically. Far from clarifying the matter, it has helped to cloud the debate and hamper research on insurgencies, to the detriment of response strategies. See Isabelle Duyvesteyn, *Non-state Actors and the Resort to Violence: Terrorism and Insurgency Strategies Compared*, Harvard Program on Humanitarian Policy and Conflict Research, 2007, available at: http://www.tagsproject.org/_data/global/images/Duyvesteyn.pdf (last visited 12 October 2011). Going beyond labels, acts intended to spread terror are prohibited under IHL. That takes us beyond the adage according to which one man's liberation fighter is another man's terrorist.

99 Albeit real, this cost is often overestimated. The Philippine and Sudanese governments, for instance, signed commitments regarding respect for IHL with some of their adversaries (the NDFP and the SPLM respectively) but continued to fight; their signature did not bring about a magic change of status that would confer 'legitimacy' on an armed group. Legitimacy is more aptly derived from a peace agreement or from recognition of the group as the legitimate representative of its cause by international organizations such as the Arab League and the United Nations (as with the Palestinian Liberation Organization (PLO), in 1974 and 1975 respectively), or by states, as with the Libyan NTC in 2011.

100 J. Weinstein, above note 19, pp. 309–310, 331–332, 342.

Those remarks can be applied to a number of other conflicts: if external support is massive but is not tied to a certain type of behaviour, one of the basic motivations for respecting IHL – the need to ensure the people's support – ceases to be relevant.

The role of revenge

One of the prime motivations behind any active decision to violate IHL is the view that those violations are merely a response, deemed inevitable or legitimate, to violations committed by the enemy.¹⁰¹ Such reprisals, which might be qualified as negative reciprocity, are one of the most powerful driving forces behind the spiral of violence set in motion in many conflicts, some lasting for decades or even centuries.¹⁰²

One example was given by the Chechen commander Shamil Bassaiev, who gained notoriety through various incidents of mass hostage-taking, namely in a hospital (Boudiennovsk in 1995), a theatre (Moscow in 2002), and a school (Beslan in 2004).¹⁰³ In an interview at the end of 2004, he explained his attitude to the laws of war:

It wasn't we who broke the rules first, but Russia... Now you give me an example from the two wars of where Russians ever observed international law in relations to even one Chechen who fell into their hands... [My attitude] changed after I pulled two theatre tickets for an evening performance from the pocket of a pilot we had killed. Five minutes earlier, at 15:30, he had carpet-bombed a village where in one cellar alone 17 women and children had perished, and at 19:00 on the same day he was going to the theatre. He had flown from the town of Eysk in the Krasnodar region, hundreds of kilometres away from us. An interesting war, isn't it? In the morning, you slaughter women and children and, in the evening, you go to the theatre with friends.¹⁰⁴

When combatants think – rightly or wrongly – that their adversary is not respecting the law of war and is attacking defenceless people with impunity, it is not surprising if they seek revenge.¹⁰⁵ Even if, in legal terms, violations of IHL by one

101 This reasoning can also be applied by people and groups who consider IHL as a good thing. A Hamas representative told Human Rights Watch, 'If you ask us to comply [with IHL], that is not difficult. Islamic teachings support the Geneva Conventions. They are accepted. When it comes to the other side, if they don't abide, we cannot be obliged to them'. Quoted by Joe Stork, 'Civilian protection and Middle Eastern armed groups', in Human Rights Watch, *World Report 2010*, New York, 2010, p. 38.

102 Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The roots of behaviour in war: understanding and preventing IHL violations', in *International Review of the Red Cross*, Vol. 86, No. 853, 2004, pp. 189–206.

103 Under IHL, taking hostages is prohibited, and civilians – especially children and the wounded and sick – are protected.

104 Interview on 31 October 2004 at the Chechenpress agency. It has since been removed from the website; the author has a copy.

105 There are many examples, including among lesser known groups. In an interview, Nawabzada Bramdagh Bugti, head of the Baloch Republican Party, justified the killings of teachers by Balochi insurgents: 'I do not understand why the Pakistani authorities and the media shout only when one Punjabi teacher or barber is killed. Why not a single word is uttered when Baloch towns after towns are bombarded by the

party do not relieve the other of its obligations,¹⁰⁶ it is not difficult to understand their wish to avenge their families and comrades. When no international mechanism seems able or willing to put an end to violations by a state, the members of an armed group see even fewer reasons not to act in their own defence. To explain his cynical doubts about the laws of war, one leader defined IHL as ‘a law made by states and violated by the same’.¹⁰⁷

Moreover, communities that identify with the armed group are never neutral in such thinking; on the contrary, they often push for revenge. That places an armed group in a difficult situation, since it often depends on – or desires – the support of its constituency and may find itself forced to choose between the latter and respect for IHL. A situation of that kind is rarely reported but is a frequent occurrence: former leaders of the Kosovo Liberation Army (KLA), the FARC and the ELN (Colombia), and Burmese movements have all shared with the author that they have faced that challenge.

Because of what IHL is

IHL is sometimes rejected because of what it is or what it is perceived to be. The list of the causes of such rejection is long and varied: for Africans or Asians, IHL may be seen as the creation of the West;¹⁰⁸ for combatants, it may seem to be the ravings of lawyers in court devoid of any connection with reality; among communists, the protection granted to civilians will be seen by some as a means of exonerating the middle classes from the rightful revenge of the proletariat.¹⁰⁹ However, the idea that armed groups have an issue with IHL because they have not contributed to its formulation and cannot ratify it seems wrong if we consider their discourse. Nowadays this idea is consistently articulated by armed groups only in Colombia, and even there the reality is quite complex.¹¹⁰ For instance, the FARC have often

Pakistani authorities? I have said it many times: target killings are a justified reaction of the Baloch against the policies of the Punjabi army’. Interview by Malik Siraj Akbar, available at: <http://gmcmisssing.wordpress.com/2009/09/10/if-i-compromise-on-baloch-movement-my-followers-will-kill-replace-and-forget-me-says-bramdagh-bugti/> (last visited 12 October 2011).

106 The parties to a non-international armed conflict are not entitled to carry out reprisals. According to Rule 148 of the rules of customary law identified in the ICRC’s study, ‘Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited’. See J.-M. Henckaerts, above note 54, p. 211.

107 Remark made to an ICRC delegate in the author’s presence, 2009.

108 Hamas provides an example of the possibly defining influence of culture on the choice to respect IHL or not: on 17 March 2007, Ismail Haniya affirmed in front of the Palestinian Legislative Council that Hamas was committed to respecting ‘international law and international humanitarian law insofar as they conform with our character, customs and original traditions’. Text of the National Unity Government programme delivered by the then Prime Minister Ismail Haniya as quoted in the *Report of the High Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 7/1*, presented at the Eighth Session of the Human Rights Council, 6 June 2008, A/HRC/8/17, para. 6.

109 All these perceptions are worth being discussed and challenged but this is not the appropriate place to do so.

110 There are older examples, especially the FNL (National Front for the Liberation of South Vietnam, better known as the Viet Cong) in South Vietnam (1965) and to a more limited extent the FMLN in El Salvador. The attitude of Pancho Villa when reading a pamphlet on the rules of the Hague Convention would be the

held such a stance but at the same time have stated – sometimes in the same documents – that they incorporate into their own rules (and therefore accept) basic notions of IHL.¹¹¹ No attempt has been made here to draw up an exhaustive list of reasons inherent to IHL that could cause an armed group not to accept this body of law as such, but a study of the subject would suffer if the standpoint of certain Salafis were omitted.¹¹²

In 2007, Dokku Umarov, who was then president of the Chechen independence movement, announced that movement's transformation into the Caucasus Emirate; in his declaration, he attacked all forms of international law:

Allah the Most High warns us in the Qur'an that he will not forgive *shirk* – associating companions with Him – but He can forgive anything less grave than that, if He wills. Muslims must be afraid of it always, throughout their entire life. Therefore we, Mujahideen, reject any laws, rules and establishments that do not come from Allah... It means that I, the Amir of Mujahideen in Caucasus, reject everything associated with *Taghut* (idolatry). I reject all *kafir* [infidels'] laws established in the world.¹¹³

In 2009, in a similar vein, he was even clearer, rejecting every law that derives from an international agreement. He describes such law as that of infidels and idolaters, and therefore not binding on him:

And if by those laws which we did not write, by the laws which were written by *Taghut* for itself, by *kuffar* [infidels] for themselves, by those laws which we did not agree with and didn't sign, if we are forbidden to kill those citizens, who are so called peaceful citizens, who provide for the army, for the FSB by their taxes, by their silence, who support that army by their approving silence, if those

archetype of such reasoning: 'What is this Hague Conference? Was there a representative of Mexico there? Was there a representative of the Constitutionals there?' All these examples are quoted by M. Veuthey, above note 21, pp. 24–25. This reluctance to accept IHL as a law not negotiated by armed groups seems quite logical to Western people with a legal training, but is only rarely maintained by today's armed groups. Those who have issues with IHL as such have different reasons.

111 The booklet *Beligerancia* mentions both elements within a few pages. See FARC, *Beligerancia*, 2000, pp. 2 and 10, available on various websites, including http://www.abpnnoticias.com/boletin_temporal/contenido/libros/Beligerancia_FARC-EP.pdf (last visited 12 October 2011).

112 I use this term for armed radical Islamic groups although it is a form of shorthand: not all Salafis encourage the use of violence and, among those who do, the attitude to attacks on civilians varies, to say the least. For instance, the leaders of the Libyan Islamic Fighting Group (LIFG) published – from their prison – *Corrective Studies in Understanding Jihad, Accountability and the Judgment of People*, whose content sets it apart from the ideology generally attributed to such groups: 'There are ethics and morals to jihad, among which are: that the jihad is for the sake of Allah, and the proscription of killing women, children, the elderly, monks, wage earners (employees), messengers (ambassadors), merchants and the like. Also among the ethics and morals of jihad is the proscription of treachery, the obligation to keep promises, the obligation of kindness to prisoners of war, the proscription of the mutilation of the dead and the proscription of hiding spoils from the leader. Adherence to these ethics is what distinguishes the jihad of Muslims from the wars of other nations that do not give any weight to ethics'. See Mohammed Ali Musawi (transl.), *A Selected Translation of the LIFG Recantation Document*, Quilliam, 2009, p. 18.

113 The statement was made on 20 November 2007 and is quoted here from the official English translation. Kavkazcenter.com, 'The official version of Amir Dokka's statement of declaration of the Caucasian Emirate', 22 November 2007, available at: <http://kavkazcenter.com/eng/content/2007/11/22/9107.shtml> (last visited 12 October 2011).

people are considered civilians, then I don't know, by what criteria it is judged.¹¹⁴

IHL is questioned by many radical Islamic groups on the basis of its human, and hence contingent, character. A recent example was given by Shaykh Adil al-Abbab in the magazine *Inspire*, published in English by Al Qaeda in the Arabian Peninsula:

Classifying the people into civilians and military is not the way our jurists divided people and is not derived from the Book of Allah and *sunnah* [the practice of the Prophet Mohammad]. Instead it is a new classification and unfortunately many of those who speak in the name of religion started using this false classification and used it to base on it rulings.¹¹⁵

Different definitions

An important cause of violations is rooted in non-legal interpretations of the terms of IHL. In particular, the concepts of 'child' and 'civilian' may be used in good faith, but in ways contrary to their IHL meaning, which takes us back to the lack of knowledge identified above.

Setting the age limit for recruitment at 15 or 18¹¹⁶ may be a problem in a context where the age of majority is perceived as disputed matter. It may be judged to be appropriate in the West, but ill-suited to the local social realities, which may be religious, customary, or simply pragmatic in nature. For example, a representative of a Yemeni armed group told me that, according to his tradition, a boy becomes a man at the age of 13, while former commanders of the FARC and the ELN in Colombia have pointed out that, in their mountains, a 16-year-old boy or girl often has a paid job and may already be married, conferring on him or her the maturity required to take part in the fighting.¹¹⁷

The concept of 'civilians' also has a degree of ambiguity in practice.¹¹⁸ That ambiguity gives rise to complex questions for decision-makers, especially about concepts such as direct participation in hostilities. Many armed groups that deliberately attack civilians (as defined by IHL) do so not because they want to attack civilians but because their definition of protected persons is different. On paper, they may be willing to accept that civilians must not be attacked, but who is a

114 The original text was taken from a video published on 25 April 2009. For the transcription in English see Kavkazcenter.com, 'Emir Dokka Abu Usman: "this year will be our offensive year"', 17 May 2009, available at: <http://kavkazcenter.com/eng/content/2009/05/17/10700.shtml> (last visited 12 October 2011).

115 See *Inspire*, No. 4, Winter 2010, p. 20. Shaykh Adil al-Abbab adds that the non-believer may be killed because of his lack of belief, although there are 'temporary' exceptions.

116 In this regard there is no uniformity in international law, although the most recent texts tend towards 18 years of age. In particular, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, of 25 May 2000, states that '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' (Art. 4, para. 1).

117 Interviews with the author, 2009 and 2010.

118 This topic has been discussed by H. Slim, above note 4, pp. 183–211 and 266–274.

civilian? Without their realizing it, their definitions may be at odds with IHL, with consequences that are at times dramatic.

Despite the emphasis in Maoist doctrine on respect for the 'people', a group adhering to that ideology may exclude one section of the civilian population from the 'people' whom they set out to protect, claiming that those excluded do not belong to the 'people' but to the 'enemies of the people' or 'class enemies'. For similar reasons, the Sendero Luminoso (Shining Path) movement in Peru held soldiers prisoner (or released them) while at the same time executing their captured officers.

Other groups have adopted a Manichean view of the world, in which everyone who is not under their control is an enemy. In RUF ideology 'civilians were required and expected to bear the costs of the revolution, for instance by providing food and labour. Consequently, those civilians who resisted the RUF were enemies.'¹¹⁹ These different definitions often explain why groups say that they respect the rules when in fact they regularly violate them.¹²⁰ Bad faith, however, may also play a significant role.

Conclusion

Respect for IHL can only be encouraged – and hence improved – if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account. Otherwise discussions will achieve nothing:

In a dialogue about civilians, it is not enough to repeat over and over again the standard chant that 'killing civilians is wrong because it is against the law and it is against the law because it is wrong'. This circular reasoning – which sums up the intellectual basis of most popular pro-civilian reasoning today – is obviously not enough of an argument to challenge and convince committed anti-civilian ideologues.¹²¹

In order to pursue a successful line of argument, one must know the context, the setting, the organization, and so forth of the armed groups. Each one is different. Recognizing the diversity of the armed groups also means recognizing the diversity of the reasons that prompt them to respect the rules of IHL – or not.¹²² Not only do those elements differ in nature; armed groups consider several of them and take their decision according to the level of importance that they attribute to each

119 See *Prosecutor v. Issa Hassan Sesay et al.*, above note 20, para 709.

120 I have given only two examples. Reference could also be made to the definition of the terms 'humanitarian', 'prisoner' and 'hostage', 'legitimate military target', etc.

121 H. Slim and D. Mancini-Griffoli, above note 30, p. 24.

122 Despite the variety of armed groups, reasons to respect or disrespect are not unlimited. Indeed, there exists 'a deep structure to human conflicts that is masked by observable cultural variation'. See Roger V. Gould, *Collision of Wills: How Ambiguity About Social Ranks Breeds Conflict*, Chicago University Press, Chicago, 2003, p. 101, quoted and amplified by Stathis N. Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, New York, 2006, p. 9.

one. It would thus be futile to develop a line of argument based solely on the advantage of treating people well. On the one hand, there are other reasons for choosing to respect the law; on the other hand, armed groups vary widely and some have chosen methods and strategies that marginalize the appeal of such a choice:

Rebel groups emerge from diverse starting points. The conventional view that insurgency implies a dependence on civilian populations for the resources needed to build an organization does not hold up to closer scrutiny . . . There is no single model of rebel organization or one optimal path to victory.¹²³

There is a fundamental opposition between the short-term and the long-term view. A group that looks no further ahead than a few months will be more inclined to justify violations, particularly when it considers its very survival to be at stake. A lack of strategic vision will have a similar effect: a group whose manner of fighting is determined by the conflict itself rather than by its ultimate objective will have far greater interest in violating the law, since a fair number of reasons for respecting it are geared to a medium- to long-term impact.¹²⁴

Among the reasons for respecting the law, two considerations weigh particularly heavily for armed groups: their self-image and the military advantage. Among the reasons for non-respect, three are uppermost: the group's objective, the military advantage, and what IHL is. The relative importance assigned to one or the other varies according to the group, which leads to a high number of combinations. It is unfortunately impossible to define *the* formula that would enable every armed group to be persuaded of the need to respect IHL, but effective persuasion will likewise be impossible without an understanding of the reasons why a particular group would be inclined to respect or to violate the law.

123 See J. Weinstein, above note 19, p. 339.

124 Interview with the author, 2010.

UNDERSTANDING ARMED GROUPS AND THE APPLICABLE LAW

Photo Gallery

This selection of photos aims to illustrate the activities and characteristics of armed groups across different historical and geographical contexts. It was compiled by the Review with the support of the ICRC Library and Archives services.

ARMED GROUPS: NOT A NEW PHENOMENON

American Civil War, 1861–1865. Soldier giving a wounded man a drink

States' histories are often marked by violent rebellion. The American Civil War is considered one of the most violent times in US history, with estimated losses of more than 600,000 men. The war saw the eleven 'Confederate' (Southern states) militarily opposed to the twenty-five states supporting the federal government, in an attempt to secede. It was also during this war that Francis Lieber produced the 'Instructions for the Government of Armies of the United States in the Field', best known as the Lieber Code, and one of the first codifications of the customary law of war.



V-P-HIST-01389-34 © Photothèque ICRC (DR)

Spanish Civil War, 1936–1939. Near San Sebastian. Loyalist militiamen in the field at an advanced post

The Spanish Civil War, which lasted from 1936 to 1939, saw armed groups fighting on both sides, with the support of foreign states. It ended with the rebel Nationalists overthrowing the Republican Government.



V-P-HIST-02221-12A © (none)

COMPOSITION AND ORGANIZATION OF ARMED GROUPS

Colombia. Mountains in the Valle del Cauca region, between Santander de Quilichao and Popayan, 2010. The daily life of a FARC-EP (Revolutionary Armed Forces of Columbia) combatant

Just like men and boys, women and girls also join armed groups and often take part in the fighting. Their experiences, as well as their potential role for promoting compliance with international humanitarian law, are subject to contemporary research and analysis. The Fuerzas Armadas Revolucionarias de Colombia – Ejército del



V-P-CO-E-01952 © ICRC/Boris Hegar

Pueblo (FARC-EP), is one of the biggest and most well-known armed groups currently operating in Colombia. The non-international armed conflict between FARC and the government armed forces is one of the longest-running in modern history, and continues to take a heavy toll on the country's civilian population.

Sri Lanka. Jaffna, 1994. Liberation Tigers of Tamil Eelam female combatants

Armed groups can be very well structured and organized. The conflict between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan government forces took place between 1983 and 2009, when the government of Sri Lanka declared victory over the LTTE. The high level of organization of the LTTE has been acknowledged, with the group operating both military and political wings, holding control over territory throughout the armed conflict, instituting courts and passing local legislation, disposing of great weapon capacity (including ships and aircraft), and organizing regular training for its recruits, many of whom were women.



V-P-LK-D-00020-0 © ICRC/Cyril Le Tourneur

FALSE APPEARANCES

Liberia. Monrovia, 2003. Government soldiers manning a checkpoint outside the town

One often associates the image of government armed forces with uniforms, tight organization, and training. Armed groups, in contrast, are commonly perceived as disorganized bandits. Yet states also commit violations of international humanitarian law, and sometimes also employ militias. The case of the conflict in Liberia demonstrates that



V-P-LR-E-00078 © ICRC/Teun Anthony Voeten

appearances may be misleading. The civil war in Liberia was a complex, multi-actor, two-stage war (1989–1996 and 1999–2003) that claimed the lives of more than 200,000 people and displaced a million more into refugee camps in neighbouring countries. In the second stage of the war, the Liberians United for

Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) opposed the government of Charles Taylor. Throughout the conflict, President Taylor mobilized a number of Liberian militia groups, such as the National Patriotic Front of Liberia (NPFL), and provided significant support to the armed opposition group Revolutionary United Front (RUF) inside Sierra Leone.

TRADITIONAL WARRIORS

Côte d'Ivoire. Bouake, 2003. Young members of a special unit of the MPCJ (Le Mouvement patriotique de Côte d'Ivoire) rebel movement called 'Warriors of the Light' during training

Armed groups often draw their support from local constituencies. For instance, traditional warriors' and hunters' groups have commonly been involved in fighting in West Africa and the Democratic Republic of the Congo. The MPCJ unit shown in this photo is composed of about 1,000 young soldiers, most of them Dozos, traditional hunters from the north of the country believed to possess magical powers.



© Reuters Photographer/Reuters

TRAINING

Somalia. Hilwaye, 2006. Somalia Islamic Court combatant training camp

Armed groups also undergo military training. Just as in any military unit, commanders try to enforce discipline among their troops. The conflict in Somalia, which began in 1991 and is still ongoing, has passed through several stages of intensity and duration, and various levels of external involvement. In its current stage, the conflict involves a multitude of actors, including Islamist insurgents, clan-based armed groups, criminal gangs, the Somali military, and a number of external actors. In this fragmented environment, the training of different armed groups often takes a rudimentary form. Even in such conditions, training of members of armed groups can and should include knowledge of international humanitarian law.



V-P-SO-E-00211 © ICRC/Benoit Schaeffer

ABILITY TO DETAIN

Sudan. Southern Sudan, 1998. A rebel guards captured Sudanese soldiers

In non-international armed conflict, captured fighters do not benefit from a 'prisoner of war' status. Domestic law also does not grant armed groups the right to detain. In practice, however, detention by armed groups does take place. The photo shows a Southern Sudan People's Liberation Army (SPLA) soldier standing next to captured Sudan government



© Reuters Photographer/Reuters

soldiers shortly before their release in Jigomoni, southern Sudan. Before the creation of the new state of South Sudan, the SPLA was an armed group with significant

capability and training, which – like many other armed groups – captured and detained government soldiers.

ARMED GROUPS' FUNDING STRATEGY

Afghanistan. Kabul, 2007. Afghan Interior Ministry officials and police watch a pile of seized drugs burning on the outskirts of Kabul

Armed groups have various methods of funding their enterprise, including revenue from exploitation of natural resources, drug trade, and hostage-taking. Afghanistan is known for its rich poppy harvest, which accounts for the majority of the world's opium production and provides financing to numerous armed actors. Understanding an armed group's funding strategy is key to successful engagement.



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CHILD SOLDIERS

Lebanon. Beirut, 1976. Young armed militiamen

Armed groups are often responsible for the recruitment of child soldiers. Although child recruitment tends to be associated with conflicts in Africa, this phenomenon also takes place in other parts of the world. Ongoing fighting and insecurity make children vulnerable to repeated recruitment. The civil war in Lebanon (1975–1991) was a devastating multi-layered conflict with significant external involvement, notably from Israel and Syria. The war involved several armed groups representing Lebanon's political and religious denominations.



V-P-LB-D-00005-13 © ICRC/Jean-Jacques Kurz

Fifteen years of conflict caused massive loss of human life and property, triggered multiple waves of displacement, and left a once-prosperous economy in shambles.

LIGHT WEAPONS

Sierra Leone. Giema, Kailahun district, 1996. Young combatants of the Revolutionary United Front

Light automatic weapons are the most common weapons in use among armed groups. For the Revolutionary United Front (RUF), one of the most infamous of the West African militias, the emblematic weapon was the machete. The RUF is known for the atrocities committed during the armed conflict in Sierra



V-P-SL-N-00016-10A © ICRC/John Spaul

Leone between 1991 and 2002, including hacking off the hands and arms of thousands of Sierra Leoneans, and the recruitment of child soldiers. The financing strategy of this armed group was largely based on the diamond trade.

TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Switzerland. Geneva, 10 June 1977. Signature of the Additional Protocols to the Geneva Conventions of 12 August 1949

The twentieth century witnessed significant developments in the legal protection of victims of non-international armed conflicts. One landmark was the adoption in 1977 of Additional Protocol II to the Geneva Conventions. It still remains the case that treaty law of non-international armed



V-P-CER-N-00025-18 © ICRC/G  rard Leblanc

conflict is much less elaborate than the law of international armed conflicts.

HUMANITARIAN CONSEQUENCES: LIBYA 2011

Libya. Misrata, 2011. Combatants move in on buildings

The conflict between the National Transition Council of Libya (NTC) and the Libyan armed forces (and forces loyal to Colonel Gaddafi) began in February 2011. This conflict saw the involvement of a multitude of armed actors, including mercenaries, paramilitaries, and state armed forces (under the aegis of NATO). The anti-Gaddafi protest movement following the uprisings in Tunisia and Egypt quickly transformed into an organized entity capable of planning and co-ordinating attacks, having an identifiable structure, and controlling certain parts of the territory. The NTC is also the most recent example of an armed group having adopted and publicized its own code of conduct.



V-P-LYE-00121 © ICRC/André Lüthi



V-P-LYE-00161 © ICRC/André Lüthi

Libya. Misrata, 2011. Tripoli Street after heavy fighting has taken place

Destruction of property and infrastructure is a common humanitarian consequence of armed conflict. The recent conflict in Libya demonstrates the extent to which destruction of property impacts on livelihoods and post-conflict recovery.



V-P-LY-E-00079 © ICRC/ELMAZI, Herbi

Chad. Faya-Largeau, 2011. Chadian nationals fleeing Libya arrive by truck

As the Libyan example shows, the displacement of populations as the result of ongoing fighting is a grave humanitarian consequence of armed conflict. Often the urgency of the moment causes people to leave with few or no supplies. Relocation can prove perilous and families can be dispersed. The return can be delayed because of damage to property and infrastructure, or lack of finances.



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International law: armed groups in a state-centric system

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Abstract

What is the position of non-state armed groups in public international law, a system conceived for and by states? This article considers the question, mainly in the light of jus ad bellum and jus in bello. It shows that, while armed groups essentially trigger the application of jus ad bellum, they are not themselves endowed with a right to peace. Jus in bello confers rights and obligations on armed groups, but in the context of an unequal relationship with the state. This inequality before the law is strikingly illustrated by the regulation of detention practised by armed groups in non-international armed conflicts. Despite the significant role that they play in modern-day conflicts, armed groups constitute an ‘anomaly’ in a legal system that continues to be state-centric.

.....

Armed conflicts involving the participation of an armed group are a phenomenon of remarkable significance in comparison to inter-state armed conflicts. They occur more frequently and apparently antedate inter-state armed conflicts in history.¹ International law, which is anchored in a changing world and intended to regulate life in a global society,² was long uninterested in such conflicts,³ essentially because they are governed by the domestic legislation of states rather than by international law.⁴ International law is considered a branch of law open to development,⁵ but the developments introduced are first and foremost in the interest of states. The latter have recognized no common higher authority.⁶ The international legal order

* I am deeply indebted to Professor Marco Sassòli for his reading and comments on the earlier version of several parts of this article.

presents the state as the entity without which it cannot exist.⁷ The state has a firm grip on international law: ‘Contemporary international law is clearly the work of states; every last word conforms to their wishes. States jealously safeguard their constitutional attribute of independent sovereignty and thereby affirm their monopoly over both national and international matters’.⁸ They are described in several ways for that purpose: as the law’s primary,⁹ or principal and original subjects.¹⁰ They make and unmake international law.¹¹ On the face of it, therefore, all entities but the state fall outside the scope of international law.

The development of international law has led to its increasingly broad application in areas considered to be of internal concern to the state. Despite the fact that it is intended to regulate the external affairs of states with each other, it is gradually encroaching on what are in principle internal matters. International law’s claim to extend to internal spheres takes little account of what is traditionally considered an area under the exclusive remit of the state, according to the long-standing and classic separation between what falls to states and what lies outside their jurisdiction. Indeed, ‘international law has always been pulled between respect

- 1 Georges Abi-Saab, ‘Conflits armés non internationaux’, in *Le droit international humanitaire en devenir*, Martinus Nijhoff Publishers, Dordrecht/Boston, 1988, p. 252.
- 2 Boutros Boutros-Ghali, ‘Le droit international à la recherche de ses valeurs: paix, développement, démocratie’, in *Recueil des Cours de l’Académie de Droit International de La Haye*, Vol. 286, 2000, p. 17.
- 3 The United Nations Secretary-General explains this by the fact that the state occupies almost all of the international stage. In addition, the United Nations dealt almost from the outset exclusively with interactions between member states. Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, pp. 14–15.
- 4 This is evident, for example, in the following texts: Convention concerning the Duties and Rights of States in the event of Civil Strife, of 20 February 1928, *League of Nations Treaty Series*, Vol. CXXXIV, 1932–1933, pp. 45 ff; Protocol (signed by the Plenipotentiaries on various dates between May and December 1957, in accordance with Article 11 of the Protocol) to the Convention concerning the Duties and Rights of States in the event of Civil Strife, *United Nations Treaty Series*, Vol. 284, 1957–1958, pp. 201 ff.
- 5 Michelet’s comment – ‘Those who look no further than the present, what is current, will not understand the present’ – is justified when it comes to international law, which, more than any other branch of law, is ‘inseparable from its past because it is essentially constantly changing’. See Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit international public*, 8th edition, Librairie Générale de Droit et de Jurisprudence, Paris, 2009, p. 51 (ICRC translation).
- 6 Agnès Lejbowicz, *Philosophie du droit international: L’impossible capture de l’humanité*, PUF, Paris, 1999, p. 15.
- 7 According to Christian Dominicé, for example, ‘to say that the individual does not have the status of subject of the law in international public law is not to curb development or progress but simply to note the fundamental structure of the international legal order, which, for as long as it exists, will be based on the juxtaposition of sovereign states.’ Christian Dominicé, ‘L’émergence de l’individu en droit international public’, in *Soixante ans de relations internationales: Contrastes et parallèles, 1927–1987, Annales d’études internationales*, Vol. 16, 1987–1988, p. 16 (ICRC translation).
- 8 A. Lejbowicz, above note 6, p. 292 (ICRC translation).
- 9 Emmanuel Decaux, ‘La contribution des organisations non gouvernementales à l’élaboration des règles du droit international des droits de l’Homme’, in Gérard Cohen-Jonathan and Jean-François Flauss (eds), *Les organisations non gouvernementales et le droit international des droits de l’Homme*, Bruylant, Brussels, 2005, p. 24.
- 10 A. Lejbowicz, above note 6, p. 277 (ICRC translation).
- 11 Joe Verhoeven, ‘The normative and quasi-normative activities of international organizations’, in René-Jean Dupuy, *A Handbook on International Organizations*, 2nd edition, Hague Academy of International Law, Dordrecht/Boston/London, 1998, p. 413; Clémentine Olivier, ‘Les organisations non gouvernementales et la répression pénale internationale’, in G. Cohen-Jonathan and J.-F. Flauss, above note 9, p. 123.

for sovereignty and the requirements of international rules ... Its history can be viewed through the prism of the constant give-and-take between internalization and internationalization'.¹² It is in this context that the question of the application of international law to armed groups and their operations arises.

Armed groups are made up of individuals over whom the state on the territory of which they operate wishes to maintain special control thanks to its internal laws. As such, armed groups do not benefit from the same status as government forces. In internal law, or in the language of the public authorities, the members of armed groups simply refuse to obey the law; they are bandits under ordinary law, terrorists, stateless persons who can be punished for the mere fact of having taken up arms. In international law, no instrument places insurgents on an equal footing with government troops. Armed groups therefore have relatively low status in international law, when it applies. Historically, tangible progress in incorporating situations of internal strife into international law has been incremental. It is true that armed groups, which are more often than not opposed to government forces, are not ordinary non-state entities. The fact that international law has been 'uninterested' in them is not just due to their non-state character. Armed groups are the enemy of the state, which holds the upper hand when it comes to the development of international law.

International law relating to armed conflicts – within which armed groups operate – has two main areas: the body of rules relating to the use of force, *jus ad bellum*, and the rules applicable in an armed conflict, *jus in bello*. This article endeavours to situate armed groups in international law from the point of view of these two main bodies of law. We can already say, unsurprisingly, that neither was conceived for armed groups or in the light of their existence. The various dimensions of *jus ad bellum* remain marked by that initial reality, whereas *jus in bello* presents a different picture. Still, questions such as the deprivation of liberty highlight the law's shortcomings with regard to armed groups.

Use of force

The right to use armed force in domestic law

There is no *jus ad bellum* that specifically applies to international law governing non-international armed conflicts (NIACs). As a result, the regulation of the use of force falls to the domestic law of states, which therefore serves as a kind of *jus ad bellum*.¹³ Yet, insurrections are prohibited under domestic law; thus the insurgents will in principle stand in violation of the law. The situation is the same as that between states, but more clear cut. Compared to conflicts between states, there is no

12 B. Boutros-Ghali, above note 2, p. 19 (ICRC translation).

13 Marco Sassòli, 'Ius ad bellum and ius in bello – the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?', in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 257.

subjective equality between the parties before *jus ad bellum*.¹⁴ In conflicts between states, each state believes that it is in the right and that the other state, the enemy, has violated the law. In domestic law, the situation is less subjective: the law is on the side of the government forces. The armed group's armed operations are conducted within a state; the group is therefore governed by domestic law. In principle, domestic law reserves the use of armed force for government forces.¹⁵ An armed struggle against government forces is therefore by definition a violation of domestic law. This does not preclude the application of international humanitarian law (IHL), which, in turn, works to safeguard the right of the authorities in power to repress the mere fact of having rebelled.¹⁶ Some historical texts nevertheless provide for a right of insurgency.¹⁷ One example is this provision of the 1793 French Declaration of the Rights of Man and the Citizen: 'When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties'.¹⁸ This is a remarkable provision, one that is akin at first glance to the texts adopted in revolutionary processes. However, since the aim of any authority is to keep itself in power, such provisions are rarely implemented in the legal, rather than political or ideological, sense. Any uprising, except when the authorities are manifestly powerless, is met with the repression that it is deemed to deserve.

The right to use force in international law

The prohibition of the use of armed force set out in contemporary international law only concerns states in their relations with each other. It does not concern situations arising within the borders of a state.¹⁹ Thus, the use of force by states on their own

14 François Bugnion, 'Just wars, wars of aggression and international humanitarian law', in *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 523–546; M. Sassòli, above note 13, p. 242.

15 'As the monopoly on the use of force for State organs is inherent in the very concept of the Westphalian State, we may assume that the national legislation of all States prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except State organs acting in said capacity, anyone else.' M. Sassòli, above note 13, p. 255.

16 Additional Protocol II, Art. 6, para. 5.

17 In current constitutional law, certain basic laws provide that citizens have the right to bear arms. Such is the case of the Constitution of Argentina, Article 21 of which provides that Argentine citizens must take up arms to defend the Constitution. In the *Tablada* case, the insurgents invoked this provision, *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Report of 18 November 1997, para. 7, available at: <http://www.cidh.oas.org/annualrep/97eng/Argentina1137.htm> (last visited 6 October 2011).

18 Art. 35.

19 Robert Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix*, Helbing & Lichtenhahn, Basel/Geneva/Munich, Bruylant, Brussels, 2009, p. 247; Victor-Yves Ghebali, 'Remarques politico-historiques sur l'étiologie des guerres civiles', in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *L'ordre juridique international: Un système en quête d'équité et d'universalité. Liber amicorum Georges Abi-saab*, M. Nijhoff, The Hague, 2001, pp. 464, 476; Luigi Condorelli, 'Conclusions', in Jean-François Flaus (ed.), *Nouvelles frontières du droit international humanitaire*, Proceedings of the colloquium of 12 April 2002, University of Lausanne Institute of International Law, Nemesis/Bruylant, Brussels, 2003, p. 178; Mohammed Bedjaoui, 'Le droit humanitaire à l'ère des ruptures des consensus nationaux et internationaux', in *La guerre aujourd'hui, défi humanitaire: Rapport à la Commission indépendante sur les questions humanitaires internationales*, Bernard-Levrault, Geneva, 1986, p. 40.

territory is not prohibited by the international law relating to recourse to force. IHL, for its part, does not deny states the right to fight those rising up against their authority. That is not its purpose. The causes of the fighting and the grounds for using armed force are of no concern in *jus in bello*. Indeed, it would appear to be in the law's interest to remain aloof from those questions, because conflating them would undermine respect for the law and even its existence. Certain provisions of IHL are phrased in such a way that it can be said that the law leaves the door open to repression of the activities of armed groups. The first such provision – the conclusion of Article 3 common to the 1949 Geneva Conventions – is relatively subtle and reads as follows: 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.²⁰ The relevant section of the commentary on this provision states that:

the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means – including arms ...²¹

The commentary is thus more explicit than the treaty text. The second provision is explicit about its intent. According to Article 3 of Additional Protocol II, nothing in the Protocol may be invoked to infringe 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'.²² The Statute of the International Criminal Court (Rome Statute) echoes this sentiment.²³

Armed groups are not prohibited under international law from using force against other armed groups or against the government authorities.²⁴ This statement follows from the general observation that traditional international law, which is profoundly state-centric in ideology, made no provision, in whatever shape or form, for NIACs.²⁵ Under *jus contra bellum*, the prohibition to have recourse to force set out in the Charter of the United Nations only concerns international relations. Two comments come to mind here. The first tends to reinforce the idea of a right of insurrection. A national liberation movement (NLM) defending a people against a colonial power may take up arms in pursuit of its cause.²⁶ Other instances in which

20 1949 Geneva Conventions, Common Art. 3, para. 4.

21 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, p. 44.

22 Additional Protocol II, Art. 3, para. 1.

23 International Criminal Court (ICC), Rome Statute, Art. 8, para. 3.

24 R. Kolb, above note 19, p. 247.

25 Alessandro Migliazza, 'L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme', in *Recueil des Cours de l'Académie de Droit International*, Vol. 137, 1972, p. 211.

26 The exceptions to the prohibition to use force in international relations are: 'individual and collective self-defence, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination ...'. Marco Sassòli, 'Collective security operations and international humanitarian law', in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-state Actors*, 25 and 26 October 2002,

the right to ‘external’ self-determination is expressed by the use of armed force are subject to dispute.²⁷ The second remark does not entirely contradict the first. Generally speaking, the Charter of the United Nations does not explicitly condemn NIACs:²⁸ it specifically prohibits the use of force in international relations alone. However, Security Council practice with regard to military intervention in internal situations casts another light on the right of insurrection. The Security Council has on several occasions decided to intervene militarily in a situation of internal conflict.²⁹ Is this because non-state armed groups may not have the right to rebel or the state to repress them? The intervention may be prompted by the need to prevent violations of humanitarian rules. In that case, the endeavour to respect *jus in bello* is a means of ensuring respect for a kind of *jus contra bellum*. The intervention may, in addition, be prompted by the effect that NIAC has on international peace. The Security Council’s intervention would thus be justified by its desire to maintain international peace by preserving the internal peace of states. It could then be said that the right of insurrection or to repress an insurrection exists insofar as its enjoyment does not affect *jus in bello* to the point of compromising international peace. This interpretation seems more to the point than that which consists in saying that the Security Council intervenes in NIACs because they are unlawful. For example, the Security Council has intervened in states (such as Haiti and Sierra Leone) in order to restore democracy, yet it cannot be said that democracy is a universal norm of international law.

What belligerents can call on the intervention of a third state? The classic reply – outside the time-honoured context of recognition of belligerency – is: the states. They are allowed to call on external military aid. Armed groups are denied this right.³⁰ This was the position adopted by the International Court of Justice in the case *Military and Paramilitary Activities in and against Nicaragua*.³¹ It is authoritative, even though other ideas exist, such as that which allows no military intervention in ‘direct support of one of the parties to the conflict’.³² Article 3, paragraph 1 of Additional Protocol II does not contradict the Court’s position. It prohibits foreign intervention in NIACs against the party called on to defend the state’s sovereignty, but it says nothing that would prohibit the government authorities from inviting a state to repress an armed group.³³ Nor is such an invitation prohibited by the Charter of the United Nations. However, can a state call

Collegium special edition, No. 27, Spring 2003, p. 79, available at: http://www.coleurope.eu/template.asp?pagename=pub_collegium (last visited 6 October 2011).

27 International Court of Justice (ICJ), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, paras. 82–83, available at: <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 16 January 2012).

28 A. Migliazza, above note 25, p. 213.

29 For example, Somalia in 1992, Rwanda in 1994, Haiti in 1994.

30 R. Kolb, above note 19, pp. 326–329.

31 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, para. 246.

32 Mohamed Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes*, Librairie Générale de Droit et de Jurisprudence, Paris, 1974, p. 214.

33 Antonio Cassese, ‘Le respect des normes humanitaires dans les conflits armés non internationaux’, in *La guerre aujourd’hui, défi humanitaire*, above note 19, p. 145.

on an allied state in the fight against an NLM in the context of a war of national liberation? The answer is probably no, because such an intervention, while lawful within the meaning of Article 2, paragraph 4 of the Charter, nevertheless violates the *erga omnes* right of a people to self-determination.³⁴

Collective armed action

The system of collective security devised after World War II did not take account of non-state entities. Reality on the ground has obliged both the Security Council and regional arrangements and agencies to consider the situations created by the action of such entities in general and by armed groups in particular. Indeed, in an improvement over the earlier position, the single state-centric purpose of the system of collective security has been replaced by two purposes: peace between states and peace within the state. Peace within the state encompasses peace from the acts of both harmful internal non-state entities and harmful external non-state entities (such as terrorist groups). The High-level Panel on Threats, Challenges and Change shares this view, concluding that there exists a wide range of elements that, according to it, constitute a threat to international peace and security and that are inter-state in origin and above all internal to states:³⁵ 'Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security'.³⁶ This is an exceedingly broad view of the threat to international peace and security. It is state-centric in that it is very generous towards states, placing them in an 'unassailable' class, with international peace and security predicated on their absolute calm.

In the main, coercive military action by international organizations in situations of NIAC has been directed at armed groups. In the case of Liberia in particular, the argument that the states of the sub-region (acting through the insurgents) had attacked Liberia was invoked to lend credibility to the decision to apply the 1981 ECOWAS (Economic Community of West African States) Protocol relating to Mutual Assistance of Defence.³⁷ In reality, however, the sub-regional

34 'In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . ; it is one of the essential principles of contemporary international law'. ICJ, *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, para. 29.

35 ● Economic and social threats, including poverty, infectious disease and environmental degradation
● Inter-state conflict
● Internal conflict, including civil war, genocide and other large-scale atrocities
● Nuclear, radiological, chemical and biological weapons
● Terrorism
● Transnational organized crime

A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, United Nations, 2004, p. 2, available at: <http://www.un.org/secureworld/report2.pdf> (last visited 6 October 2011).

36 *Ibid.*

37 Olivier Corten and François Dubuisson, 'L'hypothèse d'une règle émergente fondant une intervention militaire sur une "autorisation implicite" du Conseil de Sécurité', in *Revue Générale de Droit International Public*, 2000, p. 897.

forces (ECOWAS Monitoring Group, or ECOMOG) were chiefly preoccupied by armed groups. In Sierra Leone, ECOWAS itself justified the transformation of its peace-keeping operation into coercive action by the need for its forces to defend themselves in the face of attacks by armed groups.³⁸

As far as collective armed action is concerned, international law gives no 'legal weight' to armed groups. It deals with armed groups, not to regulate their activities, but to fight them, to calm the situations they create, or to manage the consequences of their disruptive existence. The right of the state to dispatch armed forces in the name of the United Nations or of regional bodies further weakens the position of armed groups should they contest the law governing collective action with the state. The intervention of other states, and later NATO, in Libya in 2011 is too recent to draw any final conclusions, but its implementation tends to call this statement into question. Indeed, although the intervention air forces backed the Libyan insurgency, to which the individual countries dispatched military advisers, the relevant resolutions of the United Nations Security Council, in particular resolution 1973 (2011) of 17 March 2011, had a more humanitarian bent, namely to protect the civilian population. The resolution's sponsors provided that the Security Council, acting under Chapter VII of the Charter of the United Nations,

[a]uthorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory...³⁹

and '[d]ecides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians'.⁴⁰ The authorization was not against the Libyan insurgents, but nor was it given, at least in the letter of the resolution, to support them. The insurgents were in favour of international action, bringing to mind the Kosovo Liberation Army (UCK) in Serbia and Montenegro and the intervention of NATO forces in 1999 (in that case, the Security Council had not authorized NATO action).

Individual military action

Self-defence against action by armed groups

Individual armed action for the most part confirms what has been said above. Historically, whether before or after the right to use armed force was limited, self-defence or anything resembling it has not in principle concerned the action of

38 *Ibid.*, pp. 898–899.

39 UNSC Res. 1973, 17 March 2011, para. 4.

40 *Ibid.*, para. 6.

individuals through which the state's responsibility could not be discerned.⁴¹ It is on this basis that the view that acts by non-state entities, such as terrorist groups, are basically in self-defence has been vigorously combated. The reaction of the United States of America and its allies in Afghanistan after the terrorist attacks of 11 September 2001 has often been seen as lacking a valid self-defence argument,⁴² unless the attacks are considered to have been perpetrated by Afghanistan.⁴³ From the general perspective of non-state entities, it has been argued that there can be no aggression without the involvement of a state. Self-defence having 'clearly been conceived as an exception to the prohibition to use force in relations between states', it cannot be invoked to justify the use of force against individual perpetrators of crimes.⁴⁴ According to Maurice Kamto,

whether the scope of the prohibition to use force can be extended to the activities of unofficial non-state entities has sparked a lively debate among scholars, who have reviewed the doctrine since the terrorist attacks of 11 September 2001 against the United States. The question is easy to answer if one assumes that the entities in question and their armed activities have no connection with a state: it seems fairly clear, in fact, both in view of the inter-state nature of the Charter and the tenor of Article 2, paragraph 4, that the rule prohibiting the use of force does not extend to non-state actors. It is impossible, without misconstruing the language, to speak of armed aggression in such a case, or, consequently, to invoke and exercise the right of self-defence within the meaning of Article 51 of the Charter; there is no need for lengthy discourse on the matter.⁴⁵

Kamto goes on to say that the issue of whether the right to use force extends to non-state entities boils down to the nature of their ties with the state and the degree of control that the state has over the entities when they carry out their military operations. In short, a link is required to transform the unlawful activities of non-state actors into state action.⁴⁶ Thus, an armed group acting on its own, or any other non-state actor, is unable to commit an act of aggression. That position has not been refuted by the International Court of Justice, which is adamant that the acts of non-state entities must be attributed to a state before there can be any talk of armed aggression (and hence self-defence). Reaffirming the position that it took in the *Nicaragua* case, the Court recalls in *Legal Consequences of*

41 Jean-Pierre Cot, Alain Pellet, and Mathias Forteau (eds), *La Charte des Nations Unies. Commentaire article par article*, 3rd edition, Économica, Paris, 2005, p. 1330.

42 Olivier Corten and François Dubuisson, 'Opération "liberté immuable": une extension abusive du concept de légitime défense', in *Revue Générale de Droit International Public*, 2002, pp. 64, 70.

43 Éric David, 'Sécurité collective et lutte contre le terrorisme: guerre ou légitime défense?', in *Les métamorphoses de la sécurité collective. Droit, pratique et enjeux stratégiques*, A. Pedone, Paris, 2005, p. 145.

44 Luigi Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international?', in *Revue Générale de Droit International Public*, 2001, pp. 838–839 (ICRC translation).

45 Maurice Kamto, *L'agression en droit international*, A. Pedone, Paris, 2010, pp. 145–146 (ICRC translation).

46 *Ibid.*, pp. 146–147.

the Construction of a Wall that there is a right of self-defence when one state commits an act of armed aggression against another.⁴⁷ The problem is that when the Court interprets the scope of Article 51 of the Charter at the same time it modifies its criteria:⁴⁸ Article 51 does not stipulate that armed aggression must be the act of a state.

The Rome Statute opted for a classic position on aggression. The Review Conference of the Rome Statute adopted a resolution in Kampala on 11 June 2010 by which it amended the Statute to include a definition of the crime of aggression. The resolution provides that the following text is to be inserted as Article 8 bis of the Statute:

1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .⁴⁹

Regardless of whether there is a declaration of war, acts of aggression are those defined (as such) by United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. Thus, the individual ‘author’ of the aggression must have used the state machinery to deploy the force incriminated. This is an anachronistic view. Four main states that have cases pending before the International Criminal Court (cases relating to crimes of war and crimes against humanity), namely the Democratic Republic of the Congo, Uganda, the Central African Republic, and Sudan, have at least one thing in common: armed groups from outside their borders carried out operations on their respective territories. The judgment of the International Court of Justice of 19 December 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* deals for the most part with mutual accusations of aggression, in particular on the part of armed groups based elsewhere or aided by the enemy. Jean-Pierre Bemba, former leader of an armed group in the Democratic Republic of the Congo, is being tried by the International Criminal Court for acts committed, not in his country, but in the Central African Republic. At the time, it is true, his armed group was fighting alongside the official government of the Central African Republic, but the alliances

47 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 31, para. 195.

48 This view was criticized by Judge Rosalyn Higgins in her separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, Separate Opinion of Judge Higgins, paras. 32–34, available at: <http://www.icj-cij.org/docket/files/131/1680.pdf> (last visited 6 October 2011). Judge Higgins had criticized a similar position by the Court in the *Nicaragua* judgment. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, pp. 250–251.

49 Annex 1 to RC/Res. 6, of 11 June 2010, *Official Records*, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, ICC, The Hague, 2010.

could easily have been another way round. Relations between Sudan and Chad, in particular, have frequently deteriorated in the wake of action by 'foreign' armed groups or armed groups operating from abroad. All this could have prompted the Assembly of States Parties to innovate when it came to the definition of aggression used by the Court. It could have stipulated that the members of an armed group conducting activities comparable to those constituting aggression, by using the armed group's apparatus, were liable to prosecution by the Court. This supposes that the armed group is able to carry out an act of aggression.

Africa after the 1990s and post-9/11 has another view of the question of aggression. The African Union Non-Aggression and Common Defence Pact of 31 January 2005 includes 'the provision of any support to armed groups' in its definition of aggression.⁵⁰ It re-examines the position of the International Court of Justice in the *Nicaragua* judgment, wherein the Court stated that assistance to rebels in the form of the provision of arms or logistical aid was not an act of aggression. The Pact facilitates indirect aggression by giving greater weight than the Court to support to armed groups by foreign states.⁵¹ The Pact is also interesting in that it goes further than the UN General Assembly resolution 3314 to stipulate that invading or attacking the territory of a state with armed forces constitutes aggression.⁵² In contrast, the UNGA resolution is more restrictive when it says that the invasion or attack of a state's territory must be carried out by the armed forces of another state to be an act of aggression.⁵³ Thus the Pact, in the absence of other details, leaves it to be understood that the invading or attacking armed forces can also belong to an entity other than the state, notably armed groups.⁵⁴ The act of aggression is thus no longer indirect but rather a 'private act' perpetrated solely by

50 African Union Non-Aggression and Common Defence Pact of 31 January 2005, Article 1.c.viii: 'The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity: ... (viii) the sending by, or on behalf of a Member State or the provision of any support to armed groups, mercenaries, and other organized trans-national criminal groups which may carry out hostile acts against a Member State ...'.

51 Raphaël van Steenberghe, 'Le Pacte de non-agression et de défense commune de l'Union africaine: entre unilatéralisme et responsabilité collective', in *Revue Générale de Droit International Public*, 2009, p. 136.

52 African Union Pact, above note 50, Art. 1.c.ii: 'The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity: ... (ii) the invasion or attack by armed forces against the territory of a Member State, or military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a Member State or part thereof ...'.

53 UNGA Res. 3314 (XXIX), 14 December 1974, Art. 3, para. a.

54 In fact, and in keeping with the general definition of aggression used, the following acts by armed groups are also considered as acts of aggression: use of armed force against a member state; bombardment of the territory or the use of any weapon against the territory of a member state; blockade of the ports, coasts, or airspace of a member state; attack on the land, sea, or air forces, or marine and fleets of a member state; acts of espionage that could be used for military aggression against a member state; technological assistance of any kind; intelligence and training provided to another state for the same purpose; encouragement of, support for, harbouring of, or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a member state. Under the Pact, the following types of aggression are the preserve of states: use of the armed forces of a member state that are within the territory of another member state with the agreement of the latter, in contravention of the conditions provided for in the Pact; and the action of a member state in allowing its territory to be used by another member state for perpetrating an act of aggression against a third state.

the armed group.⁵⁵ One final element of the African Union Pact worth noting is the definition of threat of aggression. The concept is defined as ‘any harmful conduct or statement by a State, group of States, organization of States, or non-State actor(s) which though falling short of a declaration of war, might lead to an act of aggression’.⁵⁶

Armed groups’ right to peace

Do armed groups have a right to peace? If foreign forces have not been invited by the official government, then their operations are an act of aggression in respect of that government (unless they are acting on the authorization of the UN Security Council). We are best advised to affirm that it is the state that has the right to self-defence in the face of such forces. Armed groups fighting such forces could be compared to resistance groups but do not appear to have the right to self-defence. If the foreign armed forces are acting on the invitation of the official government, armed groups have no right of self-defence, since they have no right against aggression. In the recent case of the conflict between Russia and Georgia, the Independent International Fact-finding Mission on the Conflict in Georgia reviewed the use of force between the Georgian government and the forces of the separatist province of South Ossetia. While acknowledging that South Ossetia continued to be part of Georgia, the Mission concluded that international law prohibited the use of armed force between Georgia and South Ossetia and that military activities against the separatist province gave rise to a self-defence operation for its benefit.⁵⁷ That position does not hold up to scrutiny. It implies what the Charter does not say. It cannot be assumed that the use of force is prohibited between a government and an entity that remains a part of the state concerned (unless that entity is an NLM). To cite specific agreements between the parties (to the conflict) not to have recourse to force and make the connection to the Charter, as the Mission did, lends itself fairly easily to criticism. The special agreements cannot be deemed to have the same status as the Charter of the United Nations, otherwise the many peace agreements between belligerents in NIACs would all be on an equal footing with the Charter. Since self-defence supposes a prior act of aggression, the implication is that the entity enjoying that right benefits from a minimum of sovereignty (conversely, there is no need to be sovereign to attack). Yet a separatist province is not sovereign.

If the armed group in question is an NLM defending a people against a colonial power, the right of that group to self-defence would seem to be on more solid ground. Here, the intervention of foreign states may be construed as violating the right to self-determination. Colonized peoples have the right to use armed force for the purpose of defending their right to self-determination. Logically, therefore,

⁵⁵ R. van Steenberghe, above note 51, p. 139.

⁵⁶ African Union Pact, above note 50, Art. 1, para. w.

⁵⁷ International Independent Fact-finding Mission on the Conflict in Georgia, *Report*, Vol. II, 2009, pp. 229 ff, available at: <http://www.ceiig.ch/Report.html> (last visited 17 January 2012).

the operations of the NLMs representing such peoples are legitimate acts of self-defence carried out in response to the action of foreign states that are duty bound not to prevent them from achieving self-determination.⁵⁸ This idea has not, however, garnered unanimous support. For example, Antonio Cassese, who wrote a commentary on the article of the Charter relating to self-defence (Article 51) appears to disagree. He recounts the lengthy struggle of developing countries (aided by the East European states) for recognition within the United Nations that colonial peoples or those oppressed by a foreign power have the right to use force under Article 51 of the Charter. He considered that their struggle was in vain. The sole outcome was to confer on NLMs the right to use armed force, a right derived from the principle of self-determination, but not a right under Article 51 of the Charter.⁵⁹ His position distinguishes between the right to use armed force and the right of self-defence, which apparently ranks higher. It can nevertheless be supposed that, in international law, an entity that has the right to use armed force is entitled to act in self-defence if attacked. In addition, Cassese's views appear to relate more to the relationship between the NLM and the colonial power concerned, for the developing world struggle mentioned above was no less than to reclaim the right to self-defence against the colonial power, which was already clearly present in the territory of the peoples concerned. If we look again at the situation of an NLM confronted by foreign armed forces 'assisting' the colonial power, it would be hard not to consider that the movement is exercising the right to self-defence.

Conclusions on the use of armed force

The attacks of 11 September 2001 in the United States rekindled discussion of the possibility of acting in self-defence in response to an operation by a non-state entity. The discussion naturally included the specific activities of armed groups. International law does not seem to have a fixed position on the matter, the African regional texts recognizing armed groups as potential triggers of self-defence operations. As for the question of whether armed groups are entitled to a right of self-defence, the reply should be affirmative for NLMs fighting the allies of colonial powers. However, such conflicts no longer appear to arise with any frequency.

Armed groups basically trigger the application of *jus ad bellum*. In general, they are not themselves endowed with a right to peace. In limited instances, when they take the form of NLMs, they are entitled to use armed force on behalf of peoples aspiring to independence from colonial domination. Armed groups have a more explicit place in situations of *jus contra bellum* (thus clearly a right against the use of force) and are set apart from international *jus ad bellum* (which refers to the

58 'Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'. UNGA Res. 2625 (XXV), 24 October 1970.

59 J.-P. Cot, A. Pellet, and M. Forteau, above note 41, pp. 1356–1357.

‘mere’ regulation of recourse to armed force). However, cross-border armed groups appear to be upsetting traditional assumptions. In all cases, *jus ad bellum* is profoundly ‘anti-armed group’.

Law of armed conflicts (*jus in bello*) and related aspects

Is the law of armed conflicts favourable to armed groups?

The existence of international humanitarian rules applicable to situations in which armed groups participate could not always be taken for granted. Armed groups – simple collections of individuals with no military function assigned by the state authorities – were outside the scope of international law, as were the conflicts opposing them to the state. Yet the relations of all states vis-à-vis an aggressor are similar to those between the state and armed groups: they are basically relationships of rejection.⁶⁰

IHL is applicable in situations in which a non-state entity is participating only when that entity is of a certain importance. It applies in principle only in the context of an armed conflict, and the existence of an NIAC is also predicated on the importance of the enemy opposing the government forces. But the importance of a belligerent is only examined in the case of non-state entities; it is hardly a matter of concern to international law whether a state, no matter what its importance (surface area, population, military strength, etc.), can wage war. That ability to take up arms (which is different from the right, strictly limited by contemporary international law, to wage war) is inherent in the quality of statehood⁶¹ and not in the quality of a mere group of individuals.

One objective of the promoters of IHL is to attain a uniform system of protection for individuals in all situations of armed conflict.⁶² The law of international armed conflicts (IACs) is neither perfect nor complete; rather, it is a body of rules that is meant to evolve as required by the contingencies of the moment. It is nevertheless the model that serves as a reference. The law of NIACs is developing in such a way as increasingly to resemble the law of IACs. Many scholars have written that the trend is strong and the goal in sight,⁶³ or about the urgency of the task.⁶⁴ The study conducted by the International Committee of the Red Cross

60 See Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, A. Pedone, Paris, 1970, p. 127.

61 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 60, in which it is presumed that the government armed forces are sufficiently organized.

62 Konstantin Obradovic, ‘Les mécanismes d’enquête et de constatation des violations du droit humanitaire: quelques suggestions sur les possibilités d’améliorer leur fonctionnement’, in *La guerre aujourd’hui, défi humanitaire*, above note 19, p. 190.

63 Éric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, esp. p. 132.

64 James G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict’, in *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 344 ff.

(ICRC) of customary IHL indicates that the line between IACs and NIACs is on the verge of disappearing.⁶⁵ The time has not yet come, however, when IHL can be applied in the same manner in IACs and NIACs. There remains a difference in the rules that can be applied, and that difference can be felt as soon as the discussion turns to the threshold of applicability of the law. Indeed, for humanitarian law to be applicable in an NIAC, a number of criteria must be met, in particular the level of violence; no such criteria apply to armed conflicts between states.⁶⁶

States choose to expand the material scope of application of inter-state agreements to situations involving armed groups. They can also expand the personal scope of application by clearly stipulating rights and obligations for armed groups. Even in IHL, where the largest international law concessions have been made to armed groups (in the sense that their status has been raised), states have still generally⁶⁷ opted to differentiate between the law applicable in armed conflicts between states and that applicable in armed conflicts involving armed groups.⁶⁸ The tendency to close the gap between the legal systems applicable in the two types of armed conflict is more clearly expressed in customary law or jurisprudence, which lies outside specific sphere of nation-states, than in new international treaties.⁶⁹

The inequality between the state and armed groups is omnipresent in international law. For a start, legal personality does not exist *ex nihilo*. The fact that an entity other than the state has such a personality is because the states have so agreed.⁷⁰ Thus, such an entity has no more than a derived legal personality.⁷¹ And if the entity in question is an armed group, then it would seem to owe its promotion to the very entity that is usually its enemy. Since international law is historically an inter-state type of law, it is between states that the law's principal and general rules are usually decided. This is not to ignore the influence that non-state entities can have,⁷² in particular during the negotiation or

65 É. David, above note 63, p. 132: 'of 161 rules, [the study] identifies only 17 that are only relevant in international armed conflicts, 7 that apply in international armed conflicts or internal armed conflicts, and 137 that are applicable in both types of conflict' (ICRC translation).

66 '[I]nternational armed conflicts are much more straightforward because no specific level of armed violence between States is required. As soon as there is any armed violence between States, as soon as the first shot is fired, there is armed conflict, international humanitarian law applies and the States involved have an interest in its application'. Jean-Marie Henckaerts, 'Binding armed opposition groups through humanitarian treaty law and customary law', in *Proceedings of the Bruges Colloquium*, above note 26, p. 129.

67 Except in the case of an armed conflict in which an NLM is participating.

68 J.-M. Henckaerts, above note 66, p. 123.

69 The Rome Statute must nevertheless be mentioned here, for it broadens the range of acts likely to be committed by an armed group and prosecuted by the International Criminal Court. This is not as ideal as it might seem at first sight, however, given the Statute's limited field of application and the repressive nature of the institution thus created (it is naturally easier for states to punish the greatest number of acts possible by armed groups than to give them more rights under international law).

70 On this point, see Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?*, 2nd edition, ICRC, Geneva, 2005, Vol. I, p. 266.

71 Christian Walter, 'Subjects of international law', in *Max Planck Institute Encyclopedia of Public International Law*, Heidelberg and Oxford University Press, May 2007, para. 26.

72 François Rubio, 'Perspectives historiques de l'impact des acteurs non étatiques sur la rédaction des traités internationaux', in Rafâa Ben Achour and Slim Laghmani (eds), *Acteurs non étatiques et droit international*, A. Pedone, Paris, 2007, pp. 63–78.

codification⁷³ of rules (such as the conferences on statelessness held in Geneva in 1959 and in New York in 1961).⁷⁴ Specific examples are the NLMs that took part in the preparatory work for the 1977 Protocols Additional to the 1949 Geneva Conventions.⁷⁵ However, while states have occasionally agreed to stipulate rights and obligations for armed groups, they are reluctant to associate those groups in the establishment of international rules. Treaty-based rules are, with few exceptions, drawn up in the absence of armed groups.⁷⁶ Because of their deep-seated fear, states at times see the participation of armed groups in the ‘creation’ or establishment of rules governing their conduct as granting such groups a status that the states do not wish to confer.⁷⁷ No international treaty is submitted for accession or ratification to armed groups, yet armed groups are bound to uphold the treaties ratified by the states to which they ‘belong’. Conversely, the non-ratification of treaties by such states prevents armed groups from being bound by them even if such is their wish. In this regard, armed groups depend in all regards on what states want.

Some international treaties – Additional Protocol I of 1977⁷⁸ and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects⁷⁹ – allow armed groups with a special status, namely NLMs,

73 Markus Wagner, ‘Non-state actors’, *Max Planck Institute Encyclopedia of Public International Law*, above note 71, paras. 18 and 21.

74 Hatem M’rad, ‘La participation des acteurs non étatiques aux conférences internationales’, in R. Ben Achour and S. Laghmani (eds), above note 72, pp. 79–99.

75 These comprised the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Angola National Liberation Front (FNLA), the Mozambique Liberation Front (FRELIMO), the Palestine Liberation Organization (PLO), the Panafricanist Congress (PAC), the People’s Movement for the Liberation of Angola (MPLA), the Seychelles People’s United Party (SPUP), the South West Africa People’s Organization (SWAPO), the Zimbabwe African National Union (ZANU), and the Zimbabwe African People’s Union (ZAPU). See Marco Sassòli, ‘Legal mechanisms to improve compliance with international humanitarian law by armed groups’, in *Proceedings of the Bruges Colloquium: Improving Compliance with International Humanitarian Law, 11–12 September 2003*, *Collegium* special edition, No. 30, Winter 2004, p. 98.

76 NLMs were invited to attend the negotiations of the 1977 Additional Protocols as observers. See J.-M. Henckaerts, above note 66, p. 127.

77 Working group chaired by Anthony Rogers, ‘Améliorer le respect du DIH pendant les conflits armés non internationaux: une responsabilité globale’, in *Collegium*, above note 75, p. 132, available at: http://www.coleurope.eu/template.asp?pagename=pub_collegium (last visited 17 January 2012).

78 ‘Article 96 – Treaty relations upon entry into force of this Protocol: ... 3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.’

79 ‘Article 7 – Treaty relations upon entry into force of this Convention: ... 4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I

to make a unilateral declaration by which they undertake to abide by the provisions concerned. In this context, are such declarations unilateral acts or are they part of treaty-based law? For example, the following has been said of the declaration allowed under Additional Protocol I:

The effect of this declaration is to trigger the application of the Geneva Conventions and Additional Protocol I in the armed conflict in question. As we can see, this is a new form of undertaking in treaty law, by unilateral declaration, yes, but with synallagmatic effects, because the effects, as concerns relations in international humanitarian law between the High Contracting Party and the authority, are identical, for the entire duration of the conflict, to those arising from an accession or ratification.⁸⁰

Unilateral declarations made by NLMs are hard to classify among unilateral acts, if only because of the reciprocal effects that they give rise to. Would Additional Protocol I be applicable between a High Contracting Party and an NLM if the movement had not made the declaration? According to the wording of Article 96,⁸¹ the effects are set in motion (and the national liberation movement bound on the same terms as the state) only once the depositary has received the unilateral declaration. In other words, so long as the declaration has not been received, the Geneva Conventions and Additional Protocol I do not apply between the movement and the High Contracting Party. This gives the declaration a 'law of treaties' aspect: it is acceptance of an agreement (signature or ratification, as the case may be) that burdens the state with the rights and obligations it sets out. On this point, Additional Protocol I falls short of Common Article 3, which has the advantage of being automatically applicable to any NIAC. But are we in the realm of the law of treaties? The wording of the title of Article 96 – 'Treaty relations upon entry into force of this Protocol' – points to a treaty-type functioning. A movement's unilateral declaration is unrelated to the Protocol's entry into force, and is therefore not a ratification. Nor is it appropriate to speak of accession. Accession enables the treaty concerned to enter into force between the acceding entity and the states that are or will be party to it. The movement's unilateral declaration is only effective between the movement and the High Contracting Party concerned by the movement's

in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects: (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect; (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict. The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.'

80 Denise Plattner, 'La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé', in *Revue Belge de Droit International*, Vol. 18, 1984–1985, p. 299 (ICRC translation).

81 Above note 78.

demands. This is not how treaties usually function; rather, it appears to be a new type of special agreement. The special agreements provided for in Common Article 3 allow the parties to the conflict to go further than Common Article 3, which applies automatically, without special agreements. By the same token, Common Article 3 applies to the armed conflict between the movement and the state concerned even if the movement has made no unilateral declaration. However, unilateral declarations can serve to go further than Common Article 3, by making the entire body of IHL relating to IACs applicable. They are a form of consent that reinforces an ‘intention’ or a ‘disposition’ of the High Contracting Party that has been pending since its accession to Additional Protocol I. The declaration is not self-sufficient, as are classic unilateral acts; rather it is programmed and has attributed legal effects. It can be assimilated to an ‘*acte-condition*’.⁸² (i.e. a means of obtaining access to existing provisions) rather than to a crucible of substantive rules.

The fact that armed groups have had little say in forming the rules of international law has had at least one effect in terms of international responsibility. The doctrine makes a distinction between primary rules and secondary rules. The former lay the foundations for conduct, while the latter govern the consequences of violations of the former. Primary rules and secondary rules are expressions used between states. They can, in theory, also be used when an armed group is involved in a situation. However, given that in general the sources of law are drafted by states, with regard to armed groups the primary rules can be said to be those imposed on the armed group, and the secondary rules those governing the consequences of violations of the rules imposed. The imposition of rules does not mean that the party on which they are imposed does not have rights thereunder, but simply that it has usually not had a voice in their construction. Since armed groups have rights in international law, logically any violation of those rights implies an obligation of reparation towards the armed group.⁸³ This can be termed ‘received responsibility’. Conversely, an armed group violating rights can be expected to make reparation. This can be termed ‘responsibility owed’. This follows logically from the application of the law, and would normally be expected in all situations in which armed groups are active but is more credible in situations in which the armed group is a major player – that is, it has existed over an extended period, it has effective and prolonged control over a part of a state’s territory, and it has an almost quasi-state dimension (in particular NLMs). Armed groups have no sovereignty (over territory, resources, or other aspects) that might have been violated, and no citizens. They appear to have no internal affairs that can be interfered with. Their weight in fact or in law (for NLMs) could be a deciding factor when it comes to the existence of responsibility,

82 Georges Abi-Saab, ‘Les sources du droit international: essai de déconstruction’, in *Le droit international dans un monde en mutation. Liber Amicorum en hommage au Professeur Eduardo Jiménez de Aréchaga*, Vol. I, Fundación, Montevideo, 1994, pp. 38–39.

83 See ICJ, *Case concerning the Factory at Chorzów (claim for indemnity, merits)*, Judgment, 13 September 1928, Series A, No. 17, p. 29, available at: http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf (last visited 6 October 2011).

especially 'responsibility owed'. Indeed, it would be difficult to speak, for example, of reparation for an insignificant armed group, even if, in theory, such reparation was due. In short, armed groups are not supposed to exist, and their *de facto* existence does not always make up for their *de jure* non-existence, especially when they are owed something.

IHL may have qualified the struggles of NLMs as IACs; nevertheless, it has not done away with the differences between such movements and government forces. This brings us to a shortcoming or defect in the status conferred on armed groups under IHL. Armed conflicts involving NLMs are not conducted in the same conditions as classic IACs. In the latter case, the conflict is between states. Starting with Additional Protocol I, the treaties of IHL on IACs apply in conflicts between a state and a people⁸⁴ represented by an NLM. But a people is neither a state nor a liberation movement. The legal tie binding the state to its citizens – nationality – does not exist with respect to the NLM, which, moreover, does not have its own territory. As a result, the responses provided in IHL for the treatment of nationals of the other party to the conflict, occupation, or invasion (such as *levées en masse*) are legally inoperative here. In addition, the national liberation movement may be fighting for the people, but the people are not the movement. Thus, the movement is no different from any other armed group; its members pose the same problems of definition as the members of armed groups. As for any armed group (in respect of the population in the area where it is present), it cannot be said that the entire people represented by the movement⁸⁵ has membership in the armed group. For example, there have been cases in which persons belonging to the peoples in conflict have joined the enemy.⁸⁶ In addition, the guerrilla tactics often used by NLMs are simply a method of combat (which government forces also sometimes use). They create a symbiosis, or give an impression of symbiosis, between the movement and the population, but that does not make every individual in the population a member of the movement.⁸⁷

We can therefore say that members of NLMs, to which the ICRC, in its guidelines on direct participation in hostilities, pays scant attention, are defined in

84 Richard R. Baxter, 'The duties of combatants and the conduct of hostilities (Law of The Hague)', in Henry Dunant Institute and UNESCO (eds), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, The Hague, 1988.

85 IHL forges a link of legitimacy between an armed group, the NLM, and the population of a territory by speaking of 'the authority representing a people', as it does in Additional Protocol I, Art. 96, para. 3.

86 For example, some Algerians allied themselves with France against the FLN (Front de libération nationale) during the war in Algeria (1954–1962). They served as back-up troops recruited by the French Army and are usually referred to as 'harkis'.

87 Fatsah Ougergouz, 'Guerres de libération nationale en droit humanitaire: quelques clarifications', in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, p. 346: 'As to the representative nature of the NLM, it is most resoundingly proven by the very terms of the struggle. Its asymmetrical nature implies that both the individual combatant . . . and the people as a whole have a "superior motivation". In a war of national liberation, the hostilities can be pursued, even at a very low level of intensity, only if the combatant is totally immersed in the population; the support of the people (or more specifically of the people at war) for the NLM can therefore be interpreted as a clear manifestation of the latter's ability to represent the people' (ICRC translation).

the same way as the members of armed groups in general. Because domestic law does not define what constitutes the member of an armed group, not even in the case of an NLM, contrary to most members of government armed forces, it is best not to use it as an example of the means of identifying such members. This view is not in line with existing law, and the status of members of an NLM should be determined on the same basis as that of members of government armed forces. This argument may strike the reader as strange, but it is not as outlandish as it might seem. The ICRC guidelines on participation in hostilities claim that membership in irregular state armed forces, such as militias and volunteer or paramilitary groups, is generally not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-state parties to the conflict.⁸⁸ Unless we maintain that NLMs have a functional internal law that clearly defines their members (easily achieved for a major movement that already manages a territory), it is tempting to declare that their members will also be identified using a functional criterion. Again, the argument steps back from the letter of current law. That being said, an individual taking up arms as a member of an NLM is a combatant in the eyes of the law, but that denomination is not attributed to those who fight as members of ordinary armed groups.⁸⁹

Deprivation of liberty

General considerations

In NIACs, domestic legislation is in direct competition with international law. Such conflicts are internal situations in which internal law is applicable but which are for the most part regulated by international law. Because the 'law' is internal, it is on the side of the government troops, who – unlike the armed groups violating the domestic order – draw their authority from the government lawfully or legitimately holding power over the territory. However, to distinguish between what government forces and armed groups can do is to undermine the spirit of IHL, which is based on the principle of equal treatment of the belligerents.⁹⁰ Our aim is not to defend that point of view, but rather to use it as a starting point to bring clarity to the discussion.

In the IHL of IACs, owing to the mere fact that there is a conflict, regardless of any international crimes that may be committed, deprivation of liberty (of prisoners of war and civilian internees) is not a punishment if punishment requires a prior fault. In the context of an NIAC, however, deprivation of liberty is often tantamount to punishment, in that it is the government that detains individuals on

88 ICRC, 'Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law', in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, p. 1001.

89 Jean-François Queguiner, *Le principe de la distinction dans la conduite des hostilités. Un principe traditionnel confronté à des défis actuels*, University of Geneva, Graduate Institute of International Studies, Geneva, 2006, p. 339.

90 See, in this issue, the debate between Professors Shany and Sassòli on the question of equality of the belligerents, and the comments on their discussion by Professor Provost.

the grounds that taking up arms is in itself an act leading to punishment. For persons in the hands of armed groups, the overriding fear is that they will be subject to private justice.⁹¹ The unstructured nature of recent NIACs, which have seen the concept of the group and its characteristics (such as its organized, disciplined, and hierarchical nature) crumble, has resulted in the extreme subjectivization of the rules governing deprivation of liberty.

The question whether it is lawful to detain someone is grounded in the very 'right' of the parties to an armed conflict to deprive anyone of liberty, especially during an NIAC. It arises before the issue of the capture itself and the implementation of a detention regime. IHL is silent on this point, and we shall endeavour to explain why. Any discussion of lawfulness would no doubt have resulted in blockages: it is theoretically difficult to have states accept the idea that armed groups can act lawfully after having taken up arms. Furthermore, raising the point might well call into question the theoretical equality of the parties to the conflict under IHL, on the one hand, and result in a move away from what is essential – ensuring that persons deprived of their liberty are treated properly – on the other. By skirting the debate on lawfulness, IHL is acting out of a sense of legal pragmatism, taking account only of the inevitable *de facto* or even preferable situation:⁹² the state of deprivation of liberty. The people in the hands of the parties to a conflict benefit from the rules of protection, no matter which party holds them. This is why the law stipulates, for example, that the expression 'those who are responsible for the internment or the detention'⁹³ relates to persons who are *de facto* responsible for camps, prisons, or any other places of detention, independently of any recognized legal authority.⁹⁴

In keeping with this pragmatic point of view, and in order to ensure that the parties to the conflict remain equal before the law, even if they are less concerned here than the persons being detained, IHL makes a number of weighty assumptions. We can start with the following example. When IHL provides that the death penalty is not to be pronounced on children who were under the age of 18 years at the time of an offence for which they have been convicted,⁹⁵ or on pregnant women or mothers of young children, even if they have been sentenced to death for offences related to the conflict,⁹⁶ it considers from the outset that even armed groups can try people and sentence them to death. Then there is the rule stipulating that no sentence is to be passed and no penalty executed on a person found guilty of an

91 It being understood that the parties to an NIAC can nonetheless decide to apply the rules of IHL applicable to persons deprived of their freedom in IACs.

92 Preferable, for example, to the elimination pure and simple of persons who should be detained, in keeping with either a 'take-no-prisoners' attitude or another attitude dictated by the circumstances.

93 The expression used in Additional Protocol II, Art. 5, para. 2.

94 'In fact, some experts have argued that it is unlikely that a court could be 'regularly constituted' under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula 'which was accepted without opposition'. See Yves Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 4600, p. 1398.

95 Additional Protocol II, Art. 6, para. 4.

96 *Ibid.*

offence related to an armed conflict⁹⁷ except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality both for the initial trial and for the appeal. Through this rule, IHL turns a blind eye to the institutional, legal, and judicial shortcomings of armed groups. Additional Protocol II speaks of a ‘court offering the essential guarantees of independence and impartiality’. Common Article 3, for its part, requires a ‘regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’.⁹⁸ Implementation of these provisions, cited here as examples, is contingent on means that armed groups usually do not have (legal and judicial means, not to mention territorial control⁹⁹). The pragmatism of IHL leaves hope for a satisfactory result without being overly concerned about the means used to achieve that result.

The right to deprive of liberty

Despite the efforts made to regulate all aspects of NIACs by means of international law, the fact is that such conflicts remain subject to the internal law of the state. Under that law, the members of armed groups are individuals punishable for the mere fact of having taken up arms. Even if they are not qualified as bandits, terrorists, renegades, or traitors, they are not considered as equal to the members of the government armed forces (whose operations are covered by the law). The government, in internal law, is the authority controlling the apparatus that limits or denies the liberty of persons on the territory for valid reasons. The government armed forces can, with the government’s blessing, be a part of that apparatus with respect to the members of armed groups.

For its part, international law does not pull in the opposite direction. IHL is silent on the subject¹⁰⁰ – in itself an indication that government armed forces have the right to detain people. Indeed, humanitarian law not only accepts the fact of established deprivation of liberty, it also does not oblige the government in power to release persons detained for reasons relating to the conflict once the conflict has ended¹⁰¹ (at least not in principle¹⁰²), whereas the ICRC proposal for

97 *Ibid.*, para. 2.

98 Akin to the concept of a competent, impartial, independent tribunal established by law (as required, for example, by Article 14 of the International Covenant on Civil and Political Rights (ICCPR)). See Y. Sandoz, C. Swinarski, and B. Zimmermann, above note 94.

99 It is usually best not to overstress the criterion of territorial control. If the provisions of Additional Protocol II are applied to deprivation of liberty, the armed group should be of some consequence, given that the Protocol itself stipulates that it applies only in intense NIACs.

100 For an identical but more nuanced position (because it refers rather to a lack of clarity), see 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, p. 618.

101 Article 6 of Additional Protocol II, in particular paragraph 5, stipulates no obligation but requires the authorities to endeavour to grant the broadest possible amnesty.

102 The ICRC study on customary law claims that persons deprived of their liberty in relation to an NIAC must be released as soon as the reasons for their detention cease to exist. It nevertheless goes on to say that the persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed. Jean-Marie Henckaerts and Louise

Additional Protocol II stipulated the obligation of release at the end of the armed conflict.¹⁰³ General international law, underpinned by the spirit of neutrality in principle in NIACs, does not affect the right of the government of a state to detain someone. But that right is inferred from the cardinal principle of public international law, which is state sovereignty, more specifically territorial and individual sovereignty.

Unlike government forces, which have domestic law on their side, benefit from recognition under international law, through the government, and have the right to deprive people of their liberty on the national territory (for valid reasons), armed groups, in particular when it comes to restricting liberty, function on the fringes of the law. There is in principle nothing that gives individuals the right to detain people representing the public authority (members of the government armed forces), or people belonging to other private groups (members of enemy armed groups), or people not participating in the conflict, for security reasons (since the concept of security is related here to peace within the state, which the armed groups do not represent). When it comes to deprivation of liberty, armed groups have only the obligation to protect the persons whom they actually hold. They do not even have the right to remove from active hostilities a person belonging to the enemy camp.

Without actually saying so, IHL hints at two exceptions to the above. These are cases in which the parties concerned agree to the application in the conflict of the IHL of IACs.¹⁰⁴ That possibility gives the NIAC the legal appearance of an IAC in which the parties have the right to deprive of their liberty the members of the enemy armed forces and to release them without charge at the end of the conflict. Thus, by the mutual consent of the parties to the conflict, the armed group is also given the right to deprive persons of liberty. It is furthermore said, and therein lies the second exception, that 'once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4A(2),¹⁰⁵ the spirit of Article 3 certainly requires that members of the insurgent forces should not be treated as common criminals'.¹⁰⁶ If the members of armed groups can obtain prisoner-of-war status and everything inherent in it, then by application of the

Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Cambridge University Press, Cambridge, 2009, pp. 451 ff.

103 See René-Jean Wilhelm, 'Problèmes relatifs à la protection de la personne humaine par le droit international des conflits armés ne présentant pas un caractère international', in *Recueil des Cours de l'Académie de Droit International*, Vol. 137, 1972, pp. 393 ff.

104 'The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. 1949 Geneva Conventions, Common Art. 3.

105 Third Geneva Convention, Art. 4: 'A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: . . . (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war'.

106 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 40.

principle of reciprocity, they must conduct themselves as though they were holding prisoners of war who are enemy troops. There is a certain logic to this. However, the validity of the initial statement remains in doubt. Does the fact that the insurgents have abided by the conditions set out in Article 4A(2) of the Third Geneva Convention automatically give them prisoner-of-war status? There is no treaty provision allowing us to assert this. What is more, it is highly optimistic to state that the parties to the conflict will change the status of those whom they capture without an agreement, whether tacit or express. On the other hand, such a change of status may be dictated by the fear of unfavourable reciprocal treatment of their own members by the enemy.

The right to deprive of liberty without a trial

At the risk of repeating ourselves, positive IHL is a set of humanitarian rules that ‘does not limit in any way a State’s essential right to suppress an insurrection’¹⁰⁷ and leaves intact ‘its powers of trial and sentence . . . its right to appraise aggravating or attenuating circumstances’.¹⁰⁸ In fact, there is in the theory of this body of law no obligation to try persons deprived of their liberty. IHL is not interested in the reasons for the detention, in the grounds or validity for depriving someone of liberty; it is content to require a regularly constituted tribunal or a tribunal offering the essential guarantees of independence and impartiality for prosecution, sentencing, and execution with respect to criminal offences relating to the armed conflict.¹⁰⁹ This single requirement has, in theory, at least the following implication. The members of the armed group have, as a minimum, committed acts that are reprehensible under domestic law by the mere fact of belonging to the group (rebellion, killings, criminal conspiracy, etc.). Those who have been deprived of their liberty (in connection with the armed conflict) are theoretically not entitled to a tribunal with the requisite qualities (a sort of right to a judge) on the basis of IHL alone. In an anti-humanitarian spirit, it simply suffices to start no proceedings against the members of the armed group for them to continue to be deprived of their liberty in the absence of any obligation to bring them before a judge. They will nevertheless have to be released as soon as the reasons for which they were detained cease to exist, meaning at the latest at the end of the armed conflict, according to what is said to be a customary rule.¹¹⁰ If the government intends to prolong their detention, it is obliged to prosecute them. Indeed, those against whom criminal proceedings are pending or those lawfully convicted and serving a sentence may continue to be detained beyond the end of the armed conflict¹¹¹ if it is the

107 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 56.

108 *Ibid.*

109 M. Sassòli and L. M. Olson, above note 100, p. 618.

110 See J.-M. Henckaerts and L. Doswald-Beck, above note 102, pp. 453 ff.

111 *Ibid.*, pp. 551 ff.

pre-existing government that won the day.¹¹² This would appear to be the theory in IHL. The law thus appears to be fairly permissive in prohibiting only 'summary justice'.¹¹³ In short, as concerns the subject at hand, IHL seems to depend more on the ability to qualify the various situations being governed. This is due to the absence of a clear stance on the issue, the purely humanitarian nature of this branch of the law, and states' decision not to encroach on their '*domaine réservé*'.

However, the ICRC study on customary law claims that arbitrary deprivation of liberty is prohibited in both IACs and NIACs.¹¹⁴ If any distinction can be made between the practice of IHL and that of human rights, the prohibition would seem to be based more on state human rights practice than on IHL. In all events, the study, which details state practice as 'recorded' in military manuals, gives wide resonance to a practice based on human rights law (international human rights texts, domestic laws that were also the first texts in history to enshrine human rights). It can be said that beyond the prohibition of 'summary justice', which is covered by IHL, the prohibition of arbitrary deprivation of liberty tends to be a matter of human rights law.¹¹⁵ Human rights law contains rules of relevance to the arbitrary deprivation of liberty, and the ICRC study tends to refer to them¹¹⁶ without necessarily being clear as to the nature (human rights law or humanitarian law) of the rule concerned.

To put it more clearly, the IHL of IACs and human rights law contain various rules on the subject. The question is whether these rules can be called into play, and which one in particular. First, however, let us consider what each body contains in the way of rules. The rules of the former relate in particular to resident civilians who are citizens of the enemy state and to civilians in occupied territories. Civilians who are citizens of the enemy state, for example, can only be interned if the security of the power in whose hands the civilians find themselves makes it absolutely necessary to do so.¹¹⁷ Additional Protocol I requires that the persons concerned be informed without delay, in a language that they understand, of the reasons why that measure has been taken.¹¹⁸ A court or administrative board must consider the decision to intern each person concerned as soon as possible, and, if the internment is maintained, reconsider it periodically (every six months). The Protecting Power must be notified of any major decisions relating to the internment,¹¹⁹ which must end with the minimum delay possible and in any event as soon as the circumstances justifying the internment have ceased to exist.¹²⁰

112 If the armed group is victorious, it seems unlikely that any of its members will continue to be detained.

113 R.-J. Wilhelm, above note 103, esp. p. 391.

114 Deprivation of liberty may be arbitrary if committed without respect for the grounds for detention and procedures set out in international law. See J.-M. Henckaerts and L. Doswald-Beck, above note 102, pp. 344 ff.

115 M. Sassòli and L. M. Olson, above note 100, p. 618.

116 *Ibid.*

117 Fourth Geneva Convention, Art. 42. The case of civilians interned in occupied territory for imperative security reasons is set out in Article 78 of the Fourth Geneva Convention, with procedures that are on the whole similar to those for the internment of civilians who are citizens of the enemy state.

118 Additional Protocol I, Art. 75, para. 3.

119 Fourth Geneva Convention, Art. 43.

120 Additional Protocol I, Art. 75, para. 3.

Prisoners of war, for their part, may see their detention prolonged with no particular procedure being undertaken until the end of active hostilities,¹²¹ unless they are released earlier for health reasons¹²² or on other grounds, such as the good will of the Detaining Power.¹²³

Human rights law, for its part, provides that the deprivation of liberty must be lawful. In this regard, the International Covenant on Civil and Political Rights (ICCPR), a universal treaty, sets forth the general idea according to which every individual has the right to liberty and security of person. Arbitrary arrest and detention are therefore prohibited; no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested must be informed, at the time of the arrest, of the reasons for it, and promptly informed of any charges against them. Anyone deprived of liberty on a criminal charge must be brought promptly before a judge, and must be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention. Anyone who has been the victim of unlawful arrest or detention is entitled to compensation.¹²⁴ The African Charter on Human and Peoples' Rights, a regional treaty, also stipulates that every individual has the right to liberty and to security of person, and that no one may be deprived of their liberty except for reasons and on conditions previously laid down by law.¹²⁵ In particular, no one may be arbitrarily arrested or detained.¹²⁶

Other, non-binding texts are in the same vein. Examples are the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹²⁷ (Principles 2, 10, and 32¹²⁸) and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)¹²⁹ (points 25 to 27¹³⁰).

121 Third Geneva Convention, Art. 118.

122 *Ibid.*, Art. 109.

123 IHL does not make it obligatory to take prisoners of war and detain them until the end of the hostilities. A party to the conflict can therefore decide to allow the prisoners of war to leave because, for example, the detaining armed forces are needed elsewhere or no longer have the material means of detaining prisoners of war. The main idea underlying all this is that one cannot get rid of prisoners of war by killing them.

124 ICCPR, Art. 9.

125 African Charter on Human and Peoples' Rights, Art. 6.

126 See also Article 5 of the European Convention on Human Rights, of 4 November 1950, or Article 7 of the American Convention on Human Rights, of 22 November 1969.

127 Adopted by United Nations General Assembly resolution 43/173 of 9 December 1988.

128 Principle 2: 'Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.' Principle 10: 'Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.' Principle 32: '1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.'

129 Resolution adopted at the 32nd ordinary session of the African Commission on Human and Peoples' Rights, 23 October 2002, Banjul, Gambia.

130 'B. Safeguards during the Pre-trial Process. States should: ... 25. Ensure that all detained persons are informed immediately of the reasons for their detention. 26. Ensure that all persons arrested are promptly informed of any charges against them. 27. Ensure that all persons deprived of their liberty are brought

We shall now turn to the use of rules other than those of the IHL of NIACs pertaining to the question of the lawfulness of depriving someone of their liberty. We shall generally limit our discussion, with regard to human rights law, to the universal binding rules of the ICCPR; the African Charter is considered only secondarily.

The IHL of IACs is less detailed than human rights law, but the latter is weakened by the absence of specific deadlines (for appeals, for example) and by the fact that it allows derogations. As concerns the possibility to derogate from human rights law, NIACs are accepted,¹³¹ almost without demur,¹³² as one of the worst situations imperilling the very existence of a nation. In the context of such a conflict, the government authorities can therefore decide to derogate from human rights law except for rights with respect to which there may be no derogation (the hard core). Article 4 of the ICCPR does not classify the rights cited above (from the Covenant) as rights from which there may be no derogation. The African Charter does not, for its part, contain a hard core of human rights, at least not expressly.¹³³ It has been pointed out that, logically, by remaining silent, the African states intended to avoid a new treaty-based rule on the subject while reserving the right to invoke the rule existing in general international law.¹³⁴ Thus, if treaty-based law is strictly construed, the entire question of the lawfulness of deprivation of liberty could be the object of a derogation on the part of the government authorities in a NIAC. People could be detained without regard for the specific grounds required for such a measure, and would be unable to contest the decision to detain them before a judge.

Does the right to derogate from human rights rules on the lawfulness of deprivation of liberty exist outside the treaties? According to the Human Rights Committee, the list set out in Article 4 of the ICCPR is not exhaustive. It holds that the category of peremptory norms extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2. States parties may in no circumstances invoke Article 4 of the ICCPR as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial, including the presumption of

promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice. . . .’

131 Frédéric Sudre, *Droit international et européen des droits de l'homme*, 5th edition, Presses Universitaires de France, Paris, 2001, pp. 165–166.

132 It can in fact be asked whether NIACs do not call into question almost exclusively the existence of the governing classes and political regimes in place rather than the existence of the nation. In the case of several recent conflicts in Africa, it was *inter alia* to combat the imminent demise of the nation that certain citizens launched an armed conflict. Examples are Rwanda, Côte d'Ivoire, and Sudan.

133 Keba M'Baye does not entirely agree, but sees a hard core of African human rights (Articles 2 to 7 of the African Charter) in the peremptory form of the wording. See Keba M'Baye, *Les droits de l'homme en Afrique*, Pedone, Paris, 1992, pp. 167 ff.

134 Fatsah Ouguerouz, 'La charte africaine des droits de l'homme et des peuples. Historique, portée juridique et contribution à la protection des droits de l'homme en Afrique', Dissertation, University of Geneva, Graduate Institute of International Studies, Geneva, 1991, p. 305.

innocence.¹³⁵ The Inter-American Court of Human Rights, which is not universal, adopted more or less the same position in its advisory opinion of 30 January 1987, when it ruled that the clause of derogation did not authorize the suspension of the requisite judicial guarantees, such as *habeas corpus*.¹³⁶ Thus, although under the letter of the law Article 9 of the ICCPR may be subject to derogation in some cases, in practice it would seem that its scope as an article from which derogations are permitted is limited (in particular with regard to *habeas corpus*). This corrected aspect of human rights, added to the fact that its provisions are fairly detailed (except for the above-mentioned absence of a deadline, contrary to IHL), is an argument in favour of the application of human rights rules as *lex specialis* in terms of the law of IACs. There is also an argument against the use by analogy of the provisions of the law of IACs. The main conventions on the two types of conflict (international and non-international) having been negotiated during the same periods of time, if states had wanted there to be a similarity in the provisions on the lawfulness of deprivation of liberty, it would have sufficed for them to ‘transpose’ the relevant provisions in the case of NIACs, at least the provisions that had been watered down. Moreover – and this is another argument in favour of the application of human rights rules – human rights law applies at all times, both in international and non-international conflicts.

The above paragraphs suffice to show that the human rights of a member of an armed group in the hands of government forces, notably the right to be brought before a judge or a similar body, must be respected.

Would we reach a different conclusion if it were the armed group depriving someone of their liberty? The most logical reasoning is that, if the deprivation of liberty is groundless, it is not necessary to gauge whether armed groups can hold persons without trial. They must release the people whom they detain. We can take the discussion one step further, however, by abstracting in spirit and on the basis of the observation that there exists a *de facto* situation of deprivation of liberty. We can essentially transpose what we have already said with regard to deprivation of liberty by government forces. There is no reason for one of the parties to the conflict to be bound by the rules governing the lawfulness of deprivation of liberty and the other not, when *jus in bello* advocates the equality of the belligerents. In view of prior developments, the point is to ensure respect for human rights by armed groups detaining people. Given the private-entity nature of armed groups, various

135 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 187, available at: [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) (last visited 17 January 2012).

136 Inter-American Court of Human Rights, *Habeas Corpus* in Emergency Situations (Arts. 27(2), 25(1), and 7(6) American Convention on Human Rights), Advisory Opinion OC-8-87 of 30 January 1987 (Requested by the Inter-American Commission on Human Rights), in *International Legal Materials*, No. 2, 1988, p. 512. The American Convention on Human Rights, for its part, is silent and prohibits the right of derogation only in respect of the following rights (Art. 27): the right to juridical personality (Art. 3), the right to life (Art. 4), the right to humane treatment (Art. 5), freedom from slavery (Art. 6), freedom from *ex post facto* laws (Art. 9), freedom of conscience and religion (Art. 12), the rights of the family (Art. 17), the right to a name (Art. 18), the rights of the child (Art. 19), the right to nationality (Art. 20), and the right to participate in government (Art. 23). It is also prohibited to suspend the judicial guarantees essential for the protection of these rights.

questions may arise with regard to the difficulty of applying human rights.¹³⁷ The first is general and relates to the armed group's submission to human rights law. Classic human rights doctrine maintains that human rights law is binding only on states, and that human rights standards cannot be applied to acts committed by private individuals or groups.¹³⁸ This position is gradually evolving, making it possible to evoke other difficulties. The second difficulty is practical in nature. It relates to the legitimate doubt about the availability of a court, substantive rules, or procedural law within the armed group. Armed groups that have lasted a certain time, that have had prolonged control over territory, and that intend to resemble a form of state can work to remove that doubt. In other cases, the doubt will subsist. Generally speaking, however, it will remain necessary to strive to interpret the concept of lawfulness.

Concluding remarks on deprivation of liberty

In the context of NIACs, the deprivation of liberty is one of the best fields for highlighting the inequality of the parties to the conflict in international law. That inequality can be felt in the two main branches of law relative to the subject: IHL and international human rights law.

And yet, when it comes to IHL, the starting point is that the belligerents are equal in law.¹³⁹ Were this not to be the case – were the law not, as a minimum, to raise the non-state party to the conflict to a certain rank – it would be utopian to hope for any compliance with humanitarian law. Here one speaks about equality in terms of rights and duties, and not in terms of the effect on status in general.¹⁴⁰ Deprivation of liberty is a field that tangibly restricts the extension of the scope of the law of IACs to armed conflicts that are non-international in character. It reflects, in short, the tendency to multiply both the rights and the obligations of parties to NIACs. By increasing the rights and obligations of both parties at the same time (in the interests of equality), the risk is that the armed group will be rendered incapable of discharging all its obligations. It can legitimately be asked, for example, whether it is wise to transpose all the rules of law on prisoners of war to persons deprived of liberty in NIACs. Do the armed groups operating in such situations have the means of applying all the rules relating to prisoners of war? The answer is no. Furthermore, IHL, despite its laudable intentions to humanize armed conflicts, does not ignore the need to maintain a certain difference between government troops and armed groups. Shielding the members of armed groups from any charges arising from the armed conflict – in the same way as prisoners of war are – is tantamount to legalizing armed action against the state authorities and, in principle, to granting those unhappy with the state the right to take up arms, a question on which IHL has opted to remain silent. It is therefore preferable for the scope of the law of IACs to be

137 M. Sassòli and L. M. Olson, above note 100, pp. 622 ff.

138 Daniel O'Donnell, 'Trends in the application of international humanitarian law by United Nations human rights mechanisms', in *International Review of the Red Cross*, No. 324, 1998, pp. 481–504.

139 E. David, above note 63, p. 613.

140 1949 Geneva Conventions, Common Article 3, final sentence.

extended via the consent of the parties to the conflict. In fact, the reality of NIACs is that they are not entirely free of domestic law. Making certain aspects of such conflicts subject to international law (notably treatment of persons, in the narrow sense) does not affect the very essence of this type of conflict, which remains internal.

International human rights law, for its part, is not predicated on the principle of the belligerents' equality. It takes no account of armed groups, not even when dealing with the case of an NIAC.¹⁴¹ In omitting armed groups, international human rights law does not promote the belligerents' equality. On the contrary, without actually saying so, it tips the scales in favour of armed groups in that it stipulates clear obligations only for government forces.

Conclusion

No armed group, whether it is an ordinary armed group or one rising up to emancipate a people, exists in international law on its mere say-so. It exists because, and especially in the light of, its ability to fundamentally challenge the established public order. An armed group exists at the earliest at the start of an armed conflict in which it has a stake. It is fleeting in nature compared to the state, and always seems to take international law by surprise. The law, in turn, remains aloof from the subject, especially since, in general, armed groups are not desired or wanted (unlike international organizations, for example, which have 'an international right'). Unlike other entities, such as the state and the international organizations, armed groups should not exist; in other words, their existence is not usual in international law. Armed groups are born to disturb order, in the physical and legal sense. Their *de facto* existence and the far reach of their actions in the modern world do not suffice to do away with the idea that there is something abnormal about their existence. The main obstacle is the state, which continues to dominate international law, even though it has been dealt practical setbacks, both peacefully (by individuals, civil society, various schools of thought and philosophy) and by violence (terrorists or armed groups).

141 The point is illustrated by the following example relating to deprivation of liberty: 'Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority'. Principle 1, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council resolution 1989/65 of 24 May 1989.

DEBATE



Should the obligations of states and armed groups under international humanitarian law really be equal?

Marco Sassòli and Yuval Shany

By introducing a new 'debate' section, the Review hopes to contribute to the reflection on current ethical, legal, or practical controversies around humanitarian issues. This section will expose readers to the key arguments concerning a particular contemporary question of humanitarian law or humanitarian action.

*For this first debate, the Review asked two members of its Editorial Board, **Professor Marco Sassòli** and **Professor Yuval Shany**, to debate on the topic of equality of states and armed groups under international humanitarian law. **Professor René Provost** comments on this debate, adding a third dimension to the discussion.*

The crucial question is whether it is realistic to apply the current legal regime to non-state armed groups. How can armed groups, with sometimes very limited means and low levels of organization, meet the same obligations as states? What are the incentives for armed groups to respect rules that their opponents have enacted? Why

should they respect any rules when the very fact of taking arms against the state already makes them ‘outlaws’?

All participants in this discussion share an aspiration to ensure better legal protection for all those affected by armed conflicts. Professors Sassòli and Shany have agreed to present two ‘radically’ opposed stances, Professor Sassòli maintaining that equality should be reconsidered and replaced by a sliding scale of obligations, and Professor Shany rebutting this assertion. Professor Provost then reflects on the stances put forward by the two debaters and invites us to revisit the very notion of equality of belligerents.

The debaters have simplified their complex legal reasoning for the sake of clarity and brevity. Readers of the Review should bear in mind that the debaters actual legal positions are more nuanced than they may appear in this debate.

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Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?

Marco Sassòli*

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* Marco Sassòli would like to thank Ms Lindsey Cameron, LLM, doctoral candidate at the University of Geneva, for her thoughtful comments and for revising this text.

When asked whether states (and therefore the government armed forces that represent them) and non-state armed groups have, or should have, equal obligations under international humanitarian law (IHL), its defenders are faced with a dilemma in their desire to increase respect for victims of armed conflict. On the one hand, the dogma that all parties to an armed conflict are equal before IHL (hereafter referred to as ‘the dogma’) is a cardinal principle of that body of law and there are good theoretical reasons – and even more compelling practical ones – to apply it equally in non-international armed conflicts (NIACs).¹ On the other hand, it is legitimate to question whether this is realistic. This is a highly relevant concern: unrealistic rules do not protect anyone but rather tend to undermine the willingness to respect even the realistic rules of IHL. Both armed groups and governments are equally in a dilemma. Government forces understandably want their enemies to respect the same rules as those by which they are bound. On the other hand, any idea that an armed group (which governments invariably classify as being composed of criminals, if not ‘terrorists’) could be equal to a sovereign state in any respect is heresy for governments obsessed by their Westphalian concept of state sovereignty. As for armed groups themselves, they may appreciate the idea of having the same rights as their opponents, but most of them are much less willing – and to a certain extent even unable – to respect the same obligations. I do see and understand the risks of abandoning the dogma and I admit that it is not easy to agree upon the rules that bind armed groups if they are not equally bound. Nevertheless, I will argue here in favour of abandoning the dogma, in order to launch a debate, which I am grateful that the *Review* is hosting.

In international armed conflicts (IACs), the dogma results from the necessary separation between *ius ad bellum* (which has today turned into *ius contra bellum*, the law prohibiting the use of force in international relations) and *ius in bello* (the law regulating how such force may be used). From time to time, especially when they are convinced that they have a particularly noble cause, states attempt to question this separation, but they have accepted it in treaty rules. From a practical point of view, without it respect for humanitarian law could not be obtained, since – at least between the belligerents – it is always controversial which of them is resorting to force in conformity with the *ius ad bellum* and which violates the *ius contra bellum*. From a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *ius contra bellum* committed by ‘their’ party.

For IHL of NIACs, the dogma is less uncontroversial. Certainly common Article 3 to the Geneva Conventions explicitly prescribes that ‘each Party’ to such a conflict has to respect its provisions. Protocol II is deliberately silent on the issue. The extensive corpus of customary rules found by the International Committee of the Red Cross Study on Customary International Humanitarian Law (ICRC Study

1 I myself wrote elsewhere: ‘[I]f IHL did not respect the principle of the equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected’. Marco Sassòli, Antoine Bouvier, and Anne Quintin, *How Does Law Protect in War?*, 3rd edn, ICRC, Geneva, 2011, p. 347.

on Customary IHL) to apply to NIACs is exclusively based upon state practice. But why should armed groups be bound by rules created by the practice and *opinio iuris* of their enemies? In addition, technically no international *ius ad bellum* exists in NIACs, since such conflicts are neither justified nor prohibited by international law. *Ius contra bellum* for NIACs consists of national legislation. The monopoly on the use of force for state organs is inherent to the very concept of the Westphalian state. The national legislation of all states bars anyone except state organs acting in that capacity to engage in an armed conflict against anyone. IHL does not oblige states to adopt internal laws that treat members of rebel forces and members of governmental forces equally. In domestic law, governments and armed groups are profoundly unequal and such domestic laws do not violate IHL.² Does this inherent inequality of belligerents in NIACs leave room for the equal application of humanitarian law?

Even for IHL itself, the question arises whether it is realistic to treat equally such profoundly unequal entities as states and armed groups. When looking at the reality in the field, most armed groups are perceived – rightly or wrongly – as ignoring IHL, both in the sense of not knowing it and also in the sense of deliberately conducting hostilities in a way contrary to its basic principles, such as the principle of distinction. Many armed groups indeed consider that their only chance to overcome militarily and technologically incomparably stronger governmental forces is to attack ‘soft targets’, namely civilians and the morale of the civilian population, in the hope that they will withdraw their support for the government. The militarily weaker ‘outlaw’ does not respect the law, but rather sees the resort to violations such as terrorist attacks or acts of perfidy as his only chance of avoiding total defeat. To outlaw armed groups and label them as ‘terrorist’ is sometimes a self-fulfilling prophecy. In addition, humanitarian players in the field report that, even with some well-organized armed groups that control territory, it may be possible to have a dialogue about humanitarian problems or access to war victims, but not about the respect of substantive legal rules by those groups. For many humanitarian organizations, the security of their own staff and the acceptance of their activities is such an overriding concern that a dialogue about violations committed by those groups is seen as too risky. Of course, non-governmental organizations (NGOs) such as Geneva Call have been able to obtain and monitor commitments to respect rules on some well-defined issues, such as the use of anti-personnel landmines or of child soldiers. Nevertheless, it is much more difficult to obtain from certain groups a renunciation of the practice of resorting to suicide attacks directed against civilians, hostage-taking or the use of human shields as a usual method of warfare.

One may object that this bleak picture equally applies to many governmental armed forces actually conducting armed conflicts. Few of them may claim to be champions of the respect of IHL. The degree and extent of disrespect is

2 As will be shown in the contribution by Zakaria Daboné in this issue, in branches of international law other than IHL, states (the main subjects of international law) and armed groups (their enemies) are similarly fundamentally unequal.

nevertheless greater for most armed groups than for most governmental forces. In addition, and more importantly, this seems to be due not only to a lack of willingness but also, in respect of certain rules, to a lack of ability. Furthermore, while it is lawful for governmental forces to target the commanders of an armed group, eliminating them exacerbates the inability of the group to comply with many rules, as the commanders are often the only ones capable of ensuring compliance by their subordinates.

NIACs are by definition fought at least as much by armed groups as by governmental armed forces. If the applicable law takes only the needs, difficulties, and aspirations of the latter into account, while it claims to apply to both, it will be less realistic and effective. If governmental forces and armed groups are equal, we would have to check for every rule whether an armed group having the necessary will was able to comply with the rule found, without necessarily losing the conflict. This applies not only to existing, claimed, and newly suggested rules of IHL but also to any interpretation. States undertake this reality check for themselves, as they are the legislators. For armed groups, such a reality check is not done. If certain rules are not realistic for armed groups and we nevertheless claim that they apply to them, this will not only result in the violation of such rules; it will also undermine the credibility and protecting effect of *other* rules with which an armed group *is* able to comply.

Five examples may illustrate this doubt about the realism of certain legal developments, if the same rules apply to both sides. First, the current tendency of international criminal tribunals, the ICRC, and scholars to bring the law of NIACs closer to that of IACs, mainly via alleged customary rules, may also have the negative side effect that armed groups are claimed to be bound by rules that only states are truly able to comply with – and that were made for states in conflicts between themselves. I will mention below the prohibition of arbitrary detention as an example. Second, the increasing integration of human rights standards into IHL may lead to a similar result. Third, the combination of the minimum age of 18 and a large concept of (prohibited) involvement of children with armed groups results in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the whole population, on whose behalf they (claim to) fight. Fourth, the usual definition of pillage – for example, that which is suggested by those who fight against businesses pillaging natural resources in conflict areas – turns out to be discriminatory against armed groups because it includes any appropriation without the consent of the owner. As the owner is not defined in international law, it is considered to be defined by domestic law. Under the latter, however, the owner is, in most countries, the government. This means that armed groups commit the war crime of pillage when they continue an existing exploitation of natural resources in a territory that they control, perhaps even the territory of the people for whom they fight, even if they use the proceeds for the benefit of the local population, or to continue their fight for that people. Fifth, the development of concepts such as command responsibility by international criminal tribunals and human rights NGOs may lead to unrealistic requirements addressed to leaders of armed groups, neglecting the organization of armed groups

(who are often obliged to act clandestinely), which is fundamentally different from that of states.

In my view, these questions deserve serious analysis, preferably involving practitioners (in our case, members of armed groups as much as soldiers), which may lead us to abandon the axiom of the equality of belligerents in NIACs.

The breathtaking discovery of customary rules applicable in NIACs, which parallel rules of treaty law applicable in IACs, and the willingness of the ICRC to consult states on the possibility of developing the treaty law, in particular that applicable to NIACs,³ is certainly to be applauded from the perspective of the all too many victims of violence and arbitrariness in NIACs worldwide. In addition, the more the set of rules applicable in IACs and NIACs become similar, the more the theoretically thorny and politically delicate question of the classification of certain armed conflicts (in particular mixed ones) becomes moot. It may also be true that governmental forces would be perfectly able to respect the same rules in both categories of armed conflicts. Many armed groups, on the other hand, could not possibly respect the full range of rules applicable in IACs.

This could lead us to apply a sliding scale of obligations to them. The better organized an armed group is and the more stable the control over territory it has, the more similar the rules applicable would be to the full IHL of IACs. In the Spanish civil war, for example, both sides could have respected nearly all those rules, because both sides controlled and administered territory and fought mainly through regular armies. On the other hand, while control over territory by an armed group is not indispensable for IHL of NIACs to apply, one cannot imagine how a group forced to hide on government-controlled territory could implement many of the positive obligations foreseen by IHL. One may object that many of those obligations only arise if a party undertakes certain activities. Thus, every armed group is materially able to respect the customary prohibition of arbitrary detention – interpreted by the ICRC Study on Customary IHL as encompassing the need that the basis for any internment must be previously established by law – simply by not detaining anyone. However, such a requirement is unrealistic and is likely to lead to summary executions of enemies who surrender.

Which rules can and therefore must be respected in which circumstances would obviously have to be laid down in detail. This cannot depend on the ability of a given armed group to respect certain rules, but must be determined generally (for certain categories of armed groups) and *in abstracto*, and it must preserve a humanitarian minimum. Otherwise, a weak armed group would be allowed, for instance, deliberately to target civilians if this constitutes its only realistic means of weakening the government.

Such a sliding scale of obligations would not be revolutionary. The threshold of application of Additional Protocol II, which is much higher than that of Article 3 common to the Conventions, already results in such a sliding scale. This

3 See Jakob Kellenberger, President of the ICRC, 'Strengthening legal protection for victims of armed conflicts: States' consultations and ways forward', 12 May 2011, available at: <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-2011-05-12.htm> (last visited 15 May 2011).

high threshold is often regretted, but perhaps it is realistic for armed groups. Indeed, only armed groups that control territory (which is one of the conditions for the Protocol, but not for Article 3, to apply) may be able to respect certain rules of the Protocol.

To apply such a sliding scale to both sides would be absurd. On the contrary, the weaker their enemies are, the easier it is for governmental forces to respect IHL. Therefore, we must consider abandoning the fiction of the equality of belligerents and require full respect of customary and conventional rules of IHL from the government, while demanding respect only according to their ability from their enemies. This corresponds to the real expectations of contemporary governmental forces fighting armed groups. Which ISAF soldier expects (in the sense that he foresees) that the Taliban will respect the same rules that his commander requires him to respect? To inform governments and their soldiers that their enemies are not bound by the same rules also reduces the risk of violations committed under the title of reciprocity for the enemy's perceived violations. While violating IHL on the basis of reciprocity is widely outlawed, it continues to provide an argument and an excuse for many violations – and may lead to a competition in barbarism in many armed conflicts.

In conclusion, a caveat: the importance of abandoning the equality of the belligerents should not be overstated. Most human suffering in NIACs does not result from disregard of those rules that some non-state armed groups may have objective difficulties to respect. It results from violations – by both sides – of those rules that every human being can respect in every situation: not to rape, not to torture, not to kill those who are in the power of the enemy or are powerless. To adapt some rules to what a party can actually deliver would simply deprive it of an easy excuse to reject the entire regime. The equality of belligerents is a fiction in NIACs. Fictions undermine IHL. Because this body of law applies to an (undesirable) reality, it must deal with the humanitarian consequences of that reality, and it must take reality into account in all its rules and principles if it wants to be able to maintain a real impact.



A rebuttal to Marco Sassòli

Yuval Shany*

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Professor Marco Sassòli's call for re-examination of the existing IHL 'dogma' that adheres to the principle of belligerent equality in asymmetric conflicts involving state and non-state actors is certainly thought-provoking (if not provocative) in nature. There is little question that IHL suffers from chronic compliance problems in NIACs involving strong states on the one hand and weak militant groups with limited capabilities on the other; it is also clear that compliance problems are closely tied to questions of capacity and military rationale (that is, that parties that stand to suffer military disadvantage if they are to comply with IHL norms may be more inclined to violate IHL). These compliance problems might be exacerbated by the ideological leanings of some non-state actors who reject the moral values underpinning IHL, and by the fact that IHL norms have become more demanding over the years: the higher the normative bar is set in NIACs (as a result of the diffusion of IHL norms governing IACs to non-international conflict settings and the complementary role of international human rights law and international criminal law therein), the greater the compliance gap – that is, the gap between the norms and the manner in which non-state actors are able and willing to conduct themselves. Sassòli is thus correct in criticizing normative overreaching as counter-productive to IHL compliance.

Still, one has to be careful not to throw out the baby with the bathwater. Doing away with the principle of belligerent equality may open a 'Pandora's box'

* Yuval Shany would like to thank Mr Yahli Shereshevsky and Professor Gabriella Blum for their useful comments on an earlier draft.

that could threaten the legitimacy and effectiveness of IHL, and might lead to lower – not greater – compliance with its norms. First, strongly linking the scope of IHL obligations to organizational capacities and military rationales, as proposed by Sassòli, represents a dangerous concession to practical contingencies, which may decrease the incentive for compliance and put in question the applicability of IHL to changing battlefield conditions. While it is sensible to create some degree of correlation between the conduct expectations that IHL norms convey and the capabilities of any particular set of belligerents, one ought to recall that the overriding *raison d'être* of IHL is not full compliance with its norms but rather the protection of humanitarian values (high compliance rates being the means to an end, not an end in themselves). While a capacity-based sliding scale of obligations would minimize the number of violations, it would not incentivize parties to improve their compliance capacities in a manner that would lead to improved humanitarian protections. On the contrary, under the scheme proposed by Sassòli, parties would have a strong disincentive to invest in capacity-building (such as establishing prison camps or acquiring more discriminating weapons) as this would not only divert scarce resources from their military operations but would also subject such operations to new legal restrictions. Furthermore, if capacity is indeed a controlling factor in determining the scope of IHL obligations, then it is difficult to see why this rationale would not apply to asymmetric inter-state conflicts involving developed and developing countries. Thus, pegging the scope of obligations to the capacity to comply may generate an unfortunate 'race to the bottom', resulting in considerable erosion of humanitarian protections in many, if not most, armed conflicts.

In the same vein, Sassòli's position that it is 'unrealistic' to expect non-state actors to comply with IHL obligations (such as the principle of distinction) that would put them at a military disadvantage appears to assign too much weight to military considerations, at the expense of IHL's humanitarian mission, which limits the space left to *raison d'état* in designing and executing military operations. Accepting that parties to armed conflict – both states and non-states – may prioritize winning over complying with IHL may deal a severe blow to the image of IHL as a non-negotiable body of side-constraints that limits the belligerent parties' available military options. So, instead of requiring belligerents to channel the violence that they apply to lawful forms of conduct and to develop suitable military strategies and capacities to that effect, we would end up acquiescing to fighting tactics that are an anathema to humanitarian values. Furthermore, once the principle of belligerent equality is sacrificed in favour of military expediency, it would be hard not to allow for similar military necessity concessions in other conflict settings. Here too, once an exception to the principle of belligerent equality is allowed in some cases, the legitimacy of insisting upon its application in other cases is compromised.

Second, retreating from the principle of belligerent equality may delegitimize IHL in the eyes of key constituencies within state parties involved in asymmetric conflicts, and reduce the incentive of those states to comply with their IHL undertakings. Of course, states involved in asymmetric conflicts already complain about the erosion of the belligerent equality principle that results from the poor record of compliance of non-state actors with their IHL obligations,

the evisceration of the institution of belligerent reprisals, and the operational disadvantages attendant on compliance with IHL when fighting irregular forces that operate from the midst of a civilian population. In addition, states' compliance records are often subject to closer scrutiny and collective enforcement efforts than their non-state counterparts. Nevertheless, the principle of belligerent equality and the certain promise – however symbolic – of reciprocal compliance that it conveys plays a useful role in facilitating state compliance. The principle, or the myth, of belligerent equality symbolizes the link between IHL and notions of chivalry, professionalism, 'fair play', and justice, which serve as part of the historic building blocks of IHL's legitimacy in the eyes of combatants and the general public. It also serves as an important explanation for the willingness of states to extend the application of IHL to NIACs (as is revealed by the *travaux préparatoires* and official commentaries dealing with Common Article 3 of the Geneva Conventions, Article 43 of Additional Protocol I and Article 1 of Additional Protocol II). Note that, even under conditions of lopsided compliance, state parties may still deem it beneficial to comply with their IHL obligations, as it may help them to maintain the high moral ground vis-à-vis their non-state and law-violating opponents. Upsetting the existing compliance–legitimacy equilibrium through requiring states to meet higher legal standards, without the benefit of reciprocity or the legitimacy dividend associated with demonstrating a superior record of compliance, could deprive states of an important incentive to comply and might lead them to try to evade their IHL obligations altogether (for example, by denying the applicability of IHL, or characterizing key IHL norms as 'arcane').

Consequently, I would advise against doing away with the belligerent equality dogma, as such a move could prove to improve compliance by some non-state actors only marginally, but also invite other belligerents – state and non-state entities – to challenge the legitimacy and applicability of important IHL principles. Renouncing the principle may thus generate more harm than good. Still, Sassòli is correct in observing that IHL standards should be realistic and not out of touch with battlefield conditions and material capacities. So how can one reconcile the dogma with the real gaps in military needs and capacities that are a feature of asymmetric conflicts? I would propose three possible avenues of accommodation to address this conundrum: acceptance of a 'common but differentiated responsibilities' framework for some IHL standards,⁴ the supplementing of IHL by human rights law, and nuanced enforcement strategies that take into account the aforementioned capacity gaps. Jointly and separately, these accommodating techniques accept the need for some sliding scale of obligations (or expectations of compliance), without giving up on the belligerent equality principle as a whole.

First, one can argue that IHL already contains different standards for belligerents as far as standards such as the need to adopt 'feasible precautions' to prevent or reduce collateral damage (Article 57 of Additional Protocol I), 'feasible measures' to prevent or suppress breaches (Article 86 of Additional Protocol I), or

4 For a discussion, see Gabriella Blum, 'On a Differential Law of War', in *Harvard International Law Journal*, Vol. 52, No. 1, 2011, p. 163.

‘all possible measures’ to search for the dead and the wounded (Article 8 of Additional Protocol II) are concerned. Since what is feasible or possible is context-dependent and capacity-related, it is fair to assume that the armed forces of a rich belligerent state would be held to a higher level of expectations than a ragtag non-state militia. Hence, Professor Gabriella Blum of Harvard is correct in observing that IHL, like international environmental law, may include a doctrine of ‘common but differentiated responsibilities’ (CDR), allowing for certain differences in the actual obligations imposed on the belligerent parties. For example, she argues that: ‘A common-but-differentiated principle of proportionality and the duty to take precautions in attack might impose substantially higher degrees of responsibility on richer or more technologically advanced countries than on poorer ones’.⁵

Note, however, that the CDR approach presented here is simultaneously broader and narrower in scope than the approach advocated by Sassòli. It is broader in that it does not apply exclusively to NIACs; instead it is claimed that the doctrine is an inherent part of IHL, which applies across the board to all conflicts between disparate armed forces. It is narrower in that it does not encompass most IHL rules but only a number of context-dependent standards. Hence, its adverse impact on core humanitarian values is limited. At a deeper level, one can maintain that a CDR approach does not represent a challenge to the principle of belligerent equality; rather, it is an application of that principle: substantive equality requires us to treat differently placed legal subjects in a differentiated manner.

The second accommodating measure that I would propose involves the supplementing of IHL standards by norms derived from international human rights law. Sassòli is correct in advising us against normative overreaching – that is, foisting upon the parties to NIACs obligations (and international criminal law standards) that they cannot conceivably implement now or in the foreseeable future. It is less clear, however, whether there really is a need to supplement the minimal IHL obligations that bind all parties with additional IHL norms that would apply only to the state party to the conflict (in violation of the belligerent equality principle). A better approach might be to retain *inter partes* the principle of belligerent equality – which, as explained before, is a feature that confers legitimacy upon IHL norms and may promote compliance on the part of the conflicting parties with their mutual IHL obligations – and to address additional aspects of state conduct that may infringe upon humanitarian values through the application of standards derived from international human rights law (to the extent that they are applicable to the circumstances at hand). Unlike IHL, human rights law is not based on a notion of equality or reciprocity; hence its lopsided application (assuming that non-state actors are subject to fewer human rights obligations than states) raises fewer doctrinal objections than those raised by a departure from the principle of belligerent equality in IHL. Since human rights law is not invested with the reciprocity-based ‘baggage’ that accompanies IHL norms, it constitutes a better legal area for developing asymmetric obligations than the latter body of law.

5 *Ibid.*, p. 194.

Moreover, the introduction of human rights law can be understood as a corrective measure that offsets some of the inequality attendant on the status of belligerents in an NIAC. As Sassòli notes, the non-state party to the conflict is subject to the criminal law of the state in whose territory it operates; thus conduct by militia members that may not violate IHL could nonetheless entail individual criminal responsibility under domestic law. Holding states to international human rights norms similarly introduces external legal standards, which may at times be more demanding than IHL standards. In this manner, the principle of belligerent equality is preserved, not violated: both parties are subject to the same IHL norms (attenuated by the aforementioned CDR principle), and both parties are also subject to additional legal standards derived from non-IHL sources.

The final accommodation measure that I propose to consider can be found in the field of enforcement. Even if we reject Sassòli's suggestion that different IHL obligations would apply for states and non-state actors, we may still consider the practical utility of applying different enforcement resources to address state and non-state violations. It may certainly be the case that, in some conflict situations, enforcing IHL norms against states represents a more cost-effective strategy for third-party enforcement agencies, given the numerous leverages that can be employed against states (but are inapplicable to non-state actors). Furthermore, the international community may at times – though not necessarily all of the time – adopt less tolerant positions vis-à-vis legal infractions by one of its established members than by an outlaw group with shakier law-applying institutions (in the same way that domestic law enforcers may prefer to invest more time and energy in investigating corruption at high levels than at low levels of government). In such cases, selective enforcement may be viewed as a corrective measure, which somewhat offsets the elevated status of states over non-state actors in international life and the superior influence that the former have on IHL law-making. In any event, selective enforcement (which raises its own host of legitimacy and effectiveness problems) does not openly challenge the principle or myth of belligerent equality. Furthermore, as long as an 'acoustic separation' can be maintained between actual and potential norm-enforcement actions, it is possible to convey to all parties involved in the conflict expectations of full and equal compliance.

In sum, the principle of belligerent equality plays a useful role in legitimating IHL and in encouraging compliance with its norms. While Sassòli is right in cautioning against normative overreaching and expecting non-state actors to deliver more than they can, the capacity gaps between states and non-state actors can be better addressed through applying the principle of CDR in some areas of IHL, utilizing human rights law standards to hold the state party to more demanding norms of conduct, and engaging, where necessary, in selective enforcement of IHL. Jointly and separately these corrective strategies offer a more promising avenue for addressing gaps than an outright renunciation of the principle of belligerent equality.



The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany

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Marco Sassòli's argument that the equality of obligations of states and non-state armed groups under IHL should be abandoned and, even more clearly, Yuval Shany's claim that it must be retained are both grounded in a premise that such an equality presently obtains under international law. I am tempted to start by expressing strong doubt as to whether this is an accurate portrayal of the current state of the laws of war. As Sassòli correctly notes, there has been a tendency for international criminal tribunals in their decisions gradually to chip away at the distinction between the legal regime applicable to IACs and the one designed for NIACs. That jurisprudence, presented as a depiction of customary law by these tribunals, has, to a significant extent, been entrenched in the Statute of the International Criminal Court (ICC), now ratified by well over half of all states. Two observations can be made in this respect: first, the expansion of criminal accountability for war crimes committed in the context of an NIAC seems to have grown organically from the mandates of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively); as such, it reflects the procedural logic of the penal process much more than a thoughtful and broad-based analysis of the contemporary reality of civil wars as experienced by all sides, and the appropriate norms that can govern that reality under international law. The second, related observation is that the depiction of the laws of war

applicable to NIACs found in the jurisprudence of international tribunals and the ICC Statute corresponds to a formalistic and positivist construction of law that stands removed from the practices and views of the legal agents whose behaviour we seek to regulate – in this case, that of insurgent fighters. In other words, there is a significant case to be made that this view meaningfully corresponds to ‘the law’ only within The Hague city limits, but not much beyond. This in fact echoes Sassòli’s call for IHL to contain rules that are realistic: that is, ones that reflect, to some extent at least, the interests of the non-state groups, although he makes that point as part of an argument for jettisoning the principle of equality of belligerents, whereas I would raise it as evidence that no such principle exists today in relation to internal armed conflicts.

Beyond the discussion of whether the formal equality of belligerents under IHL should be abandoned or found not to exist (a debate that may be taken as overly theoretical), how should we react to the question posed by the editors of this journal, namely ‘Should the obligations of states and armed groups under international humanitarian law really be equal?’ If we adopt a purely humanitarian standpoint, then it should make no difference whatsoever to the victims of an armed conflict whether the violations they suffer are imputable to a state or to a non-state armed group; what is central is whether their fundamental interests as human beings, as recognized under IHL, have been denied. This perspective on the laws of war, endorsed by Shany in his response, seems mostly to have held sway in the analysis of the international criminal tribunals, aligned with the protection of individuals under international human rights law. This goes hand in hand with a move to increase reliance on international human rights standards in situations of armed conflict, especially internal conflict. According to this vision of humanitarian law, a principle of equality of belligerents appears not only compatible but actually required. If, however, we take humanitarian law to represent an attempt to reconcile the strategic interests of belligerents with a degree of protection for the victims of war – an aspiration that is quite distinct from that at the root of human rights standards – then the picture becomes more muddled, calling for a modulated regime in which some concessions must be made to all legitimate interests.⁶ One of those legitimate interests is the aspiration to win the war, reflecting the dissociation of the regulation of the conduct of war under *ius in bello* and the eventual illegality of the use of force according to *ius ad bellum*. According to this model, we come to see that the relative positions – and hence strategic interests – of each side to an NIAC are not identical. It is even possible that the interests of individual victims may not be constant in their relation with a state Party to a conflict on the one hand, and an insurgent group on the other. For instance, individuals may have distinct claims related to social and economic interests when dealing with a state as compared to a rebel group. Once the fluctuating nature of the interests at stake is accepted, then a principle of formal equality of belligerents, whereby the same rules simply apply to all, becomes

6 I explore this at length in René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002.

more difficult to imagine as a foundational component of IHL applicable to civil wars.

Up to this point, the discussion has mainly concerned NIACs, but we could indeed, on a similar basis, raise a challenge to the justified nature of a principle of equality for IACs. First, situations in which non-state armed groups take part in an international conflict, following the model of partisan action during the Second World War, give rise to some of the same objections that have already been identified in the context of an internal conflict between a state and an insurgent group or among various non-state actors. Second, and much more radically, it could be argued that the theoretical sovereign equality of all states under international law rarely translates into equality of arms in the field. A *realpolitik* reason for this is that states tend to shy away from military solutions to their disputes with other states that are militarily their equal. On the whole, with the occasional counter-example, conflicts tend to involve powerful states and weaker neighbours. If we take the example of the military campaign of the United States against Iraq as a case study, it is easy to see that the United States' technological advantage and superior firepower placed it in a position that was very different from that of Iraq. It has been argued that the open-textured nature of some humanitarian norms, articulating obligations on the basis of the information available at the time of decision (e.g. from satellite surveillance, loitering drones, etc.) or the availability of alternate weapons (e.g. 'smart' weapons, automated weapons systems, etc.) or tactics (radio jamming, disinformation, etc.) to achieve a similar military advantage, means that, in the way in which these norms are applied, they translate into much more onerous duties for a country such as the United States than they did for Iraq. As noted by Shany, this is relevant to the interpretation and application in specific circumstances of a number of context-dependent standards.

Arguments may be made that this is unfair, amounting to a legal tactic wielded by the weaker party, but to such arguments can be opposed the fact that the rules of the laws of war will typically legitimize the tactics of the powerful parties and invalidate those of very weak ones. Beyond the simple interpretation and application of uniform standards, the emergence in other fields of international law in the last few decades of 'common but differentiated responsibilities' has introduced the notion that a regime may be fair and sound despite the fact that it formally imposes on participating states obligations that vary in their nature or degree. The same could be done for IHL applicable to armed conflicts among states, thus doing away with a requirement of formal equality.

A second line of enquiry flowing from the question put to us by the editors of the *Review* concerns the concept of equality operating not only in this question but more broadly in the doctrine analysing IHL. Equality as it emerges from the ways in which it is invoked in discussions of the laws of war evokes an idea of equality as necessarily grounded in sameness. Basically, belligerents can be equal if they are the same, which of course raises some eyebrows – and questions – when we ask whether a principle of equality obtains between state forces and insurgent groups during an NIAC. Indeed, in looking at the Geneva Conventions and Protocols as well as at customary law, it does seem that the applicability of the laws

of war turns to some degree on the insurgent's ability to remake itself as a proto-state or government-in-waiting hoping to replace the administration currently controlling the state. We see traces of this in the idea that rebels must control part of the national territory and be equipped with structures of command and institutions enabling them to apply humanitarian law. The notion of equality that this recalls is the one first advanced by liberal feminist legal scholars in the 1970s, essentially arguing that if women were treated like men then justice would be achieved. Later, critical feminists savaged this idea, mocking the suggestion that turning women into men was really the solution to the denial of equality for women. Women, they noted, simply *are* different from men, and so the solution must be one of acknowledging these differences and arriving at a regime that reflects a diversity of gender rather than imposing a male model as the necessary reference point and structuring concept. We find something of a similar trend in the discussion of the principle of equality under IHL: however much we might push to make non-state armed groups more like states, having courts with due process and so on, in the end they are *not* states at all. But equality does not necessarily entail turning women into men or insurgent groups into states: we can abandon a claim to sameness without jettisoning the idea of equality. What this brings us to is a conclusion that there can be a principle of substantive equality that infuses humanitarian law even if the obligations of different types of actors are not identical.

Importantly, a shift from formal to substantive equality in humanitarian law applicable to internal conflicts does not necessarily deny the reciprocal nature of such obligations. The much-maligned notion of reciprocity has often been reduced merely to an excuse handed to one side of the conflict to justify its own unwillingness to comply with humanitarian standards. A deeper study of the phenomenon suggests not only that it has not been 'widely outlawed', as suggested by Sassòli, but also that it retains a critical function in the creation and application of humanitarian norms, a finding not necessarily contested by Sassòli. The danger here is to define reciprocity as merely tit-for-tat, meaning that belligerents' obligations must be the same (formal equality) and that the binding nature of any obligation is dependent upon compliance by the other side. On the other hand, we do not need to cling to a model of sameness of obligations in order to retain the benefit of reciprocity as a tool to induce compliance, as suggested by Shany. At the same time, we must reject an impoverished idea of reciprocity and reclaim the notion as capturing a broader normative dynamic whereby the obligations of all participants in a legal regime are interconnected. Under such a model, insurgents and the state may be held to distinct obligations but compliance by one side is nevertheless taken as drawing compliance from the other. Ultimately, this opens the door to adopting rules on insurgent warfare that reflect the legitimate interest of non-state armed groups without having to abandon the normative *acquis* found in Common Article 3, Protocol II and customary law applicable to governmental armed forces.⁷

⁷ See René Provost, 'Asymmetrical reciprocity and compliance with the laws of war', in SSRN eLibrary, 14 January 2010, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427437, forthcoming in

A final consideration turns to the manner in which a re-think of the idea of the equality of belligerents can take place, given the reality of international relations and the state-centred nature of the international legal regime. It is simply no answer at all to argue that states, or international tribunals created by states, have concluded the existence of certain duties for insurgents in the context of a civil war. What is fascinating about the laws of war for someone interested in the nature of legal discourse is the fact that we seek to capture behaviour and direct decision-making in a context in which a sense of community seems absent and no standard legal institutions can intervene (tribunals come in, after all, after the fact). The force of the law must be explained in some way beyond a reference to state sovereignty. Legal pluralism offers a number of insights in this context, finding law to exist in parallel and intersecting spheres beyond the state. Legal norms arise whenever communities of practices can be found, linking actors on the basis of shared interests or practices. What this suggests is that a process for articulating norms relevant and meaningful for insurgents must be centred on the practices of these agents. Thus an ICRC study on customary law that excludes the legal impact of non-states' practice is devoid of much significance for non-state actors.

We can instead move towards the identification of a code for insurgents, which can be the pendant of state duties under the laws of war by way of a process that directly and exclusively involves non-state armed groups, and no state at all. In this respect, let us consider the work of Geneva Call, an NGO based in Switzerland working to entice non-state armed groups to commit to stop using landmines and child soldiers. Since 2000, Geneva Call has managed to induce more than three dozen non-state groups engaged in armed conflicts in Asia and Africa to sign a 'deed of commitment' whereby they renounce the use of landmines. Although the work of the organization finds inspiration in the 1997 Ottawa Convention banning anti-personnel landmines,⁸ its activities are not part of the regime directed at states, and indeed most insurgent groups who have signed the deed of commitment operate in the territory of a state that has not ratified the Ottawa Convention. What is striking about this approach is not the engagement with rebel groups *per se*, which is something that the ICRC has been doing for many years as part of its dissemination campaign. The novelty lies in the normative dimension of the endeavour, in seeking to trigger the type of normative commitment that Robert Cover identified as essential to give meaning to any legal standard.⁹ It is not altogether clear whether Geneva Call considers its deed of commitment to be legally binding on the rebels, although the very label and formal signing ceremony unambiguously signal a ritualistic invocation of the force and majesty of the law. I would suggest that, in agreeing to live by certain humanitarian norms, whether such agreement is expressed in the formal signing of a deed of commitment or simply in the oral undertaking of a rebel leader, non-state

Benjamin Perrin (ed.), *Modern Warfare: Militias, Private Militaries, Humanitarian Organizations and the Law*, UBC Press, Vancouver, Spring 2012.

8 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 ILM 1507 (1997, entered into force 1 March 1999) (Ottawa Convention).

9 Robert Cover, 'Nomos and Narrative', in *Harvard Law Review*, Vol. 97, No. 4, 1983.

actors are creating IHL in a fashion that is as real and possibly as effective as states ratifying an international treaty on the same matter. All contribute in an asymmetrical but interrelated way to the creation of a community of practice that can attest to shared understandings of the acceptable limits of war.

The applicability of international humanitarian law to organized armed groups

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Abstract

While it is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups, it is less clear why that is so and how the binding force of IHL on organized armed groups is to be construed. A number of explanations for that binding force have been offered. The present contribution critically examines five such explanations, namely that organized armed groups are bound via the state on whose territory they operate; that organized armed groups are bound because their members are bound by IHL as individuals; that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise de facto governmental functions; that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.

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It is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups – that is, those armed groups that are sufficiently

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organized to render them a party to an armed conflict.¹ Both conventional and customary IHL make it abundantly clear that IHL applies to ‘each party’ to a non-international armed conflict (NIAC),² and that ‘each party to the conflict must respect and ensure respect for international humanitarian law’.³ However, the question *why* that is so and *how* the binding force of IHL on organized armed groups is to be construed remains controversial.

At first sight, an analysis of that question might be dismissed as being a purely academic exercise. When the law makes it so clear that the law applies, what purpose does it serve to ask why and how? Yet to leave the question unanswered entails a number of practically tangible consequences. The failure to argue convincingly why and how the law applies to organized armed groups will hinder effective strategies to engage them in the quest to ensure better compliance with IHL. If humanitarian organizations were challenged by an organized armed group on the question why the latter should conform with IHL, but such organizations were unable to provide a convincing response, the promotion and strengthening of IHL would be seriously hampered. Another very practical reason why the question needs answering is that different answers will have different implications as to which rules of IHL apply – and which do not – and, in turn, will determine what conduct will entail the collective responsibility of the organized armed group in question, as well as the individual responsibility of its members.⁴ A determination of why – and which – rules of IHL apply to an organized armed group will also have a direct bearing on reciprocity on several levels. For instance, if it were to follow from a certain construction of the binding force of IHL on organized armed groups that the latter are only bound by customary IHL,⁵ the further question would arise of

- 1 The International Criminal Tribunal for the former Yugoslavia (ICTY) has identified several indicative factors for an armed group to be considered ‘organized’, including the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; its ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords. For an elaboration of the required degree of organization, see e.g. ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. ICTY-IT-04-82-T, Judgment (Trial Chamber), 10 June 2008, paras. 194–205.
- 2 Common Article 3 to the Four 1949 Geneva Conventions. See also Additional Protocol II, Art. 1(1), which assumes that binding force inasmuch as it ‘develops and supplements Article 3 common to the Geneva Conventions . . . without modifying its existing conditions of application’, albeit with the caveat that Additional Protocol II only applies to a specific type of organized armed groups, namely those that meet the high threshold of exercising control over territory sufficient to enable them to carry out sustained and concerted military operations and to implement the Protocol.
- 3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 139, applicable in both international armed conflicts and NIACs.
- 4 While a legal regime for the collective responsibility of organized armed groups remains amorphous, there are clear indications in the practice of both states and inter-governmental organizations, as well as of non-governmental organizations, that organized armed groups can be held accountable *qua* collective entities. See generally, Jann K. Kleffner, ‘The collective accountability of organised armed groups for system crimes’, in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 238–269.
- 5 For a discussion of that construction see below, pp. 454–456.

whether a state that is an adverse party to an NIAC remains bound by its obligations under international humanitarian treaty law that may go beyond, or depart from, customary IHL.

These reasons suggest a need for a critical analysis of the different explanations why and how IHL is binding on organized armed groups. The most commonly advanced arguments, which we will be addressing in the following sections, are that organized armed groups are bound via the state on whose territory they operate; that organized armed groups are bound because their members are bound by IHL as individuals; that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise *de facto* governmental functions; that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.

Before proceeding with the analysis of these different explanations, however, the following clarification is in order: the purpose of the present contribution is not to take position as to whether one or other argument is 'better' than the others. Rather, my interest is more modestly limited to submitting each of the explanations to scrutiny and to exposing their respective strengths and weaknesses.

Binding force via the state: the doctrine of legislative jurisdiction

A first explanation of why and how IHL binds organized armed groups, referred to by some as the majority view,⁶ holds that IHL applies to them because the 'parent' state has accepted a given rule of IHL. According to this construction, the capacity of a state to legislate for all its nationals entails the right of the state to impose upon them obligations that originate from international law, even if those individuals take up arms to fight that state or (an)other organized armed group(s) within it.⁷ In particular, the doctrine of legislative jurisdiction has been put forward to explain the binding nature of conventional IHL. However, a similar line of reasoning could be employed to conceptualize the binding force of customary IHL.

The main strength of this doctrine lies in the fact that it supplies a reason why organized armed groups are bound by all rules of IHL that the territorial state has consented to, despite the fact that the organized armed groups themselves may not have consented to them.⁸ It provides the basis for full parity between those rights and obligations under IHL that the state has accepted, on the one hand, and those that are applicable to organized armed groups, on the other hand. A further strength is that the construct is fully compatible with other areas of international law, through which states grant rights to, or impose obligations on, individuals and other legal persons. When a state consents to a given rule of international law that,

6 Lindsay Moir, *The Law of Internal Armed Conflict*, Oxford University Press, Oxford, 2002, pp. 53–54, with references to Pictet, Baxter, Schindler, Elder, Greenspan, and Draper as authors taking that view.

7 For a recent defence of the doctrine of legislative jurisdiction, see Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, 2006, pp. 381–393.

8 *Ibid.*, p. 382.

for instance, criminalizes a given conduct, the consent of individuals who may be subject to criminal prosecution on the basis of that rule is generally considered to be irrelevant. The same holds true for rights under international law, which states can grant to individuals by accepting a given treaty as binding or by not persistently objecting to a rule of customary international law, regardless of the position taken by individuals who are to benefit from such rights.

However, the lack of consent to rules of IHL by organized armed groups also results in important limitations regarding their propensity to accept the binding force of IHL on the basis of the doctrine. After all, it does not come as a surprise when an organized armed group rejects an explanation that draws on the fact that the very state against whom that organized armed group is fighting has accepted a given rule of IHL.⁹ Indeed, the very fact that an organized armed group is a party to an armed conflict against the central government of a state suggests very strongly that it does not recognize even the most basic laws of that state, which seek to perpetuate that central government's monopoly on the use of force by criminalizing any challenge to that monopoly. The equation of members of an organized armed group with 'ordinary citizens', who can reasonably be assumed to be at least receptive to the suggestion that they are bound by the legal rules that the state has accepted or issued, appears to be somewhat strained, if not entirely neglecting the reality of organized armed groups as challengers to the monopoly of force that states arrogate for themselves. To reason via the state, as the doctrine of legislative jurisdiction does, thus bears the danger of undermining rather than strengthening the acceptance of IHL by organized armed groups.

Another argument advanced against the doctrine of legislative jurisdiction is that it fails to distinguish between the binding force of IHL on organized armed groups as a matter of international law and its binding force under domestic law.¹⁰ This counter-argument rests on the assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and the subjects of that rule (in this case, individuals who make up an organized armed group) are therefore bound by a rule of domestic, rather than international, law. In other words, the nature of the rule changes, with the consequence that the doctrine of legislative jurisdiction fails to account for the binding force of IHL on organized armed groups as a matter of *international* law.¹¹ Following this line of reasoning further, it is argued that it is by no means certain that a state will take the necessary legislative measures to render rules of international law applicable in the domestic legal order. Organized armed groups would not incur any obligations in the absence of the necessary implementing legislation.¹²

9 For a pertinent example, see the assertion of the National Liberation Front in Vietnam in the 1960s that 'it was not bound by the international treaties to which others beside itself subscribed', in ICRC, 'External activities: Viet Nam', in *International Review of the Red Cross*, Fifth Year, No. 57, 1965, p. 636.

10 Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, 1981, p. 429.

11 *Ibid.*

12 Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Sir Hersch Lauterpacht Memorial Lectures, Grotius Publications, Cambridge, 1987, p. 39.

This counter-argument is open to two objections, one relating to the conclusion that is being reached, the other to the underlying assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and the individuals who make up an organized armed group will therefore be bound by a rule of domestic, rather than international, law.

First, the conclusion that an organized armed group would not incur any obligations in the absence of the necessary implementing legislation only holds true in a dualist conception of the relationship between international and domestic law, which is of course not the only possible conception. As the regulation of the relationship between international and domestic law is a matter to be decided freely by each state, some accept (certain categories of) rules of international law to be directly applicable in their domestic legal order, while others require such rules to be transformed into rules of domestic law. Indeed, in addition to the two classical approaches to the relationship between international and domestic law – monism and dualism – several other approaches and techniques exist.¹³ While a detailed discussion of these approaches is beyond the purview of the present article, suffice it to say that dualism is not the only one. The conclusion that organized armed groups do not incur any obligations in the absence of the necessary implementing legislation would only be reached when states adopt a dualist approach, whereas members of organized armed groups may incur obligations under IHL when a monist approach is adopted.

Secondly, the assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and that the individuals who make up an organized armed group will be bound by a rule of domestic rather than international law, is by no means self-evident. Much as other areas of international law (such as international human rights law and international criminal law) create rights and/or obligations of individuals directly under international law,¹⁴ so does IHL. Non-transformation of a rule that creates such rights or obligations under international law may have the consequence of forestalling its domestic application in a state that has opted for a dualist approach to the relationship between international and domestic law. As a result, an individual who seeks to invoke a human right before a domestic court may be barred from doing so, or a domestic court may find itself barred from exercising its jurisdiction over someone accused of an international crime. However, such consequences for purposes of domestic proceedings do not affect the fact that the individual in question is the bearer of rights and obligations on the international plane. Indeed, such an individual may nevertheless be able to invoke an international right in an international forum, such as a human rights body, or may be prosecuted before an international criminal tribunal for violating the obligations that international law imposes on him or her. The same applies in the

13 On the relationship between international and national law, see, among others, Janne Nijman and André Nollkaemper, *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford, 2007, 380 pp.

14 Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928, PCIJ, Series B, No. 15, p. 18.

context of IHL: whether or not an individual is bound as a matter of domestic law has no bearing on the binding force of rules of IHL as a matter of international law.¹⁵ Thus, the ‘capacity to legislate for all nationals’, which is the centrepiece of the doctrine of legislative jurisdiction, should not be understood narrowly to refer exclusively to legislation through the adoption of rules of domestic law. Rather, the capacity to legislate also refers to the competence of states to accept rights and obligations under IHL for their nationals on the international plane.

The fact that the foregoing argument against the doctrine of legislative jurisdiction is thus not entirely convincing is not to suggest, however, that the doctrine of legislative jurisdiction is unproblematic in other respects. Besides its likely failure to improve compliance by organized armed groups, to which we have already alluded, the doctrine suffers from a number of defects. The first of these is that the doctrine rests on the argument that ‘the government is competent to legislate for all its *nationals*’.¹⁶ Thus understood, the doctrine would be better called more precisely the doctrine of *active nationality* legislative jurisdiction, as opposed to other jurisdictional bases such as territory or passive nationality, inasmuch as it limits the reach of the rules of IHL to the nationals of the consenting state. In so doing, it fails to explain why IHL treaty rules are binding in a situation in which an organized armed group is (also) composed of foreign nationals from a state that has not ratified the respective treaty. That may not be of particular practical relevance in the case of Common Article 3, as the Geneva Conventions have been ratified by all states. But it remains relevant in the context of Additional Protocol II and other, less widely ratified treaties, such as the Anti-Mines Protocol to the 1980 Convention on Certain Conventional Weapons¹⁷ and the 1954 Hague Convention on Cultural Property and its Second Protocol.¹⁸

More importantly, however, such a doctrine of active nationality legislative jurisdiction is severely limited if considered in the light of recent developments relating to the concept of ‘nationality’. According to the International Criminal Tribunal for the former Yugoslavia, the concept of nationality cannot be reduced to an exercise in formalism, in particular in armed conflicts with ethnic, religious, or similar connotations that are today the rule rather than the exception: its substantive dimension, namely the allegiance of a given individual (or lack thereof) to a given state or government, also needs to be considered.¹⁹ Put differently, individuals with allegiance to states or entities other than the state whose nationals they are as a

15 S. Sivakumaran, above note 7, pp. 384–385.

16 *Ibid.*, p. 381, emphasis added. S. Sivakumaran further recounts the opinion expressed by the Greek delegate at the Diplomatic Conference of 1974–1977 that also ties the binding nature of IHL on organized armed groups to the fact that their members ‘were obviously nationals of some State, and were thereby bound by the obligations undertaken by the latter’, *ibid.*

17 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention on Certain Conventional Weapons as amended on 3 May 1996).

18 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

19 See ICTY, *The Prosecutor v. Tadić*, Decision (Appeals Chamber), 15 July 1999, para. 166.

matter of formality should not be considered nationals of the former state as a matter of substance. If one transposed such an understanding of 'nationality' to the doctrine of active nationality legislative jurisdiction, it would mean that that jurisdiction does not extend to members of organized armed groups because they should not be considered 'nationals' of the state against whom they are fighting. After all, being a member of an organized armed group involved in a NIAC against the state is the quintessential expression of a lack of allegiance to that state.

While the foregoing suggests that the explanatory value of the doctrine of legislative jurisdiction would be very limited if one were to rely on active nationality as a basis for that legislative jurisdiction, this would be different if one were to proceed on the basis of territorial jurisdiction. Indeed, some have taken the view that the binding nature of IHL on members of organized armed groups stems from the fact that an international rule accepted by a state is binding on all those 'within the *national territory* of that State',²⁰ rather than the fact that they are nationals of that state. This approach would not be open to the same objection as the doctrine of active nationality legislative jurisdiction, since the competence of states to legislate vis-à-vis everyone within their territory is independent of any allegiance.

Nevertheless, the doctrine of legislative jurisdiction as a whole – whether in the form of active nationality legislative jurisdiction or territorial legislative jurisdiction – suffers from another, fundamental conceptual defect, inasmuch as it derives the binding force of IHL on organized armed groups as collective entities from the binding force on *individual members*. This construct deserves separate analysis in the subsequent section, because its explanatory potential goes beyond the doctrine of legislative jurisdiction with its focus on conventional IHL. In contrast, the reasoning via individuals is based on the assertion that organized armed groups are bound because their members are bound as individuals by both conventional and customary IHL.

Binding force via the individual

The binding force of IHL on individuals has been recognized for a long time. Since individuals are punished for war crimes it is clear that they bear duties that flow directly from IHL.²¹ Such duties apply to all individuals, whether they possess the

20 Sylvie Junod, in Claude Pilloud, Jean Pictet, Yves Sandoz, and Christophe Swinarski, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1345, para. 4444, emphasis added. See also the statement of the delegate of the USSR at the Diplomatic Conference of 1974–1977, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977)*, CDDH/III/SR.32, Vol. XIV, p. 314, para. 22 ('Any international instrument signed by a Government was binding on all those within its territory').

21 Christopher Greenwood, 'Historical development and legal basis', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, p. 39, para. 134. For an example epitomizing the long history of war crimes prosecutions, see the Henfield's case, 11 F. Cas. 1099 (C. C. D. Pa. 1793) (No. 6,360), reproduced in Jordan J. Paust, et al. (eds), *International Criminal Law: Cases and Materials*, 2nd edition, Carolina Academic Press, Durham, NC, 2000, pp. 232–238.

formal status of combatants in an international armed conflict as members of the armed forces of a party to such an armed conflict, whether they are members of armed forces in a NIAC, or whether they are civilians.²² And yet, IHL clearly distinguishes between two addressees, namely parties to an armed conflict (i.e. the collective entities of states and organized armed groups),²³ on the one hand, and individuals, on the other hand. Indeed, it is the *collective* nature of political violence and the *organization* of a group of individuals engaged in such violence that elevates a given situation to an armed conflict. Parties to an armed conflict are not merely the sum of all its members, who act as atomized individuals. Rather, organized armed groups (just as states parties to an armed conflict) are identifiable entities, with political objectives (broadly conceived) that they pursue by violent means. They possess an organized military force and an authority responsible for its acts,²⁴ whereas the individual member concerned acts on behalf of an organized armed group. The rudimentary nature of the legal framework governing the collective accountability of organized armed groups, including the uncertainty surrounding the attribution of acts of an individual to an organized armed group,²⁵ should not distract from the fact that the individual member is engaged in the violence as part of a collective entity. Just as the violation of IHL by an individual may simultaneously entail both his or her individual criminal responsibility and the responsibility of a state to whom his or her acts or omissions can be attributed,²⁶ so the acts of such an individual may entail both his or her individual criminal responsibility and the accountability of an organized armed group. This is not to

22 For combatants, see e.g. the Nuremberg Judgment against members of the German Wehrmacht and Kriegsmarine Wilhelm Keitel, Karl Dönitz, Erich Raeder, and Alfred Jodl, all convicted for war crimes in World War II, International Military Tribunal (Nuremberg), *The Trial of German Major War Criminals*, Judgment, 1 October 1946; Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 22 August 1946 to 1 October 1946, pp. 492–493, 508–510, 511–512, 516–517. For members of organized armed groups in an NIAC, see e.g. Special Court for Sierra Leone, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, and Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008. For civilians, see e.g. British Military Court for the Trial of War Criminals, *Trial of Erich Heyer and Six Others* (The Essen Lynching Case), Essen, 18–19 and 21–22 December 1945, *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, Vol. I, London, HMSO, 1947, Case No. 8, pp. 88–92.

23 See Common Article 3 to the Geneva Conventions and J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 139. The same assumption seems to underlie Article 10 of the International Law Commission's Articles on State Responsibility, which attributes conduct of an insurrectional movement (rather than its composite individuals) to a state: see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 117, para. 4 (which makes a clear distinction between conduct of the movement as such and conduct of individual members of the movement acting in their own capacity).

24 See Jean Pictet, (ed.), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Geneva, 1952, p. 49, referring to the two criteria of possessing an organized military force and an authority responsible for its acts among several others, which can serve to indicate the existence of a NIAC in the sense of Common Article 3. For an elaboration of the required degree of organization, see e.g. ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, above note 1, paras. 194–205.

25 For a discussion, see J. Kleffner, above note 4, pp. 257–264.

26 See generally, André Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law', in *International and Comparative Law Quarterly*, Vol. 52, 2003, pp. 615–640.

suggest that only members of a party to an armed conflict can commit violations of IHL. What it does suggest, however, is that organized armed groups as such bear duties under IHL independent from the duties of individuals.

This is also clear from a closer look at the rules of IHL. For instance, when Common Article 3 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’²⁷ and Article 6 of the Additional Protocol II further specifies standards for criminal prosecutions, these rules imply that, in order to be compliant with IHL in adjudicating cases, parties to an armed conflict (including organized armed groups) must install judicial mechanisms that satisfy the mentioned requirements. To do so is not the concern of individual members but of the organized armed group as a whole. In similar vein, the obligation in Additional Protocol II to provide for the education of children in keeping with the wishes of their parents or those responsible for their care²⁸ requires the organized armed group – on a collective level – to take the necessary measures within the territory under its control.²⁹ The rules regulating the internment and detention of persons deprived of their liberty stipulated in Article 5 of the Additional Protocol II³⁰ are likewise in the main directed towards the detaining authority as such, and not (only) to individual members of that authority.³¹ In light of the foregoing, it is not convincing to construe the binding force of IHL on organized armed groups by reference to its binding force on individuals. That explanation negates the fact that the organized armed group as such is an addressee of distinct obligations under IHL that are independent and separate from those of individuals.

Binding force because of the exercise of *de facto* governmental functions

The third explanation of the binding force of IHL on organized armed groups draws on the exercise of *de facto* governmental functions by such groups. As Jean Pictet puts it: ‘[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’.³² This approach finds support in the principle of effectiveness³³ as an element of both statehood and the recognition of governments.³⁴ It is also consistent

27 Common Article 3(1)(d).

28 Additional Protocol II, Art. 4(3)(a).

29 C. Pilloud, *et al.*, above note 20, pp. 1377–1378, especially para. 4546.

30 Additional Protocol II, Art. 5.

31 C. Pilloud, *et al.*, above note 20, p. 1384, paras. 4573–4574.

32 Jean Pictet (ed.), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 37. See also L. Moir, above note 6, p. 55.

33 Roger Pinto, ‘Les règles du droit international concernant la guerre civile’, in *Recueil des cours*, Vol. 114, 1965-I, p. 528.

34 Volker Epping, ‘Völkerrechtssubjekte’, in K. Ipsen (ed.), *Völkerrecht*, 5th edition, C.H. Beck, Munich, 2004, p. 63, para. 10; Volker Epping, ‘Der Staat im Völkerrecht’, in *ibid.*, p. 273, para. 40.

with the law of state responsibility, inasmuch as that law equates acts committed by an organized armed group that proves successful in its quest to become the new government of an existing state or to establish a new state, with conduct of that existing or new state.³⁵

Such an approach certainly shifts the focus away from the binding force of IHL on the individual to the collective entity of the organized armed group. It thereby responds to the weaknesses of the line of argument explained in the previous section. To construe the binding force because of the exercise of *de facto* governmental functions also takes an important step towards understanding organized armed groups as autonomous actors that are distinct from states.³⁶ Indeed, nowhere is this clearer than in the law of state responsibility, which acknowledges that the conduct of an insurrectional movement is *not* attributable to the state if the movement is unsuccessful. The rules on the responsibility of states for internationally wrongful acts thus make clear that the structures, organization, and conduct of such a movement are independent of those of the state.³⁷ In furtherance of recognizing this autonomy of organized armed groups, the *de facto* governmental functions argument draws on the factual element of the exercise of governmental functions by an organized armed group, and its aspiration to become the next government of an existing state or the new government of a newly independent state.

At the same time, it is readily apparent that to construe the binding force of IHL on organized armed groups in this way does not disconnect it from the binding force of IHL on the state concerned. The origin of that binding force remains the fact that the state that the organized armed group strives to represent has accepted a given rule of IHL. This acceptance manifests itself in the fact that the state has expressed its consent to be bound by the treaty in question, or in the fact that the state has contributed to the formation of a given rule of customary IHL, or at least that it has not acted as a persistent objector to the customary rule in question. In this way, the *de facto* governmental functions argument remains a state-centric model of explaining the binding force of IHL on organized armed groups. The possibility cannot therefore be entirely excluded that an organized armed group might raise an argument similar to the one in response to the doctrine of legislative jurisdiction, namely that the organized armed group rejects the binding force of those rules that have been accepted by the very state against which the group is fighting. However, there are two important differences.

First, in contrast to the doctrine of legislative jurisdiction, which flows top-down, the argument that organized armed groups are bound because they exercise

35 Articles 10(1) and (2) of the Articles on Responsibility of States for Internationally Wrongful Acts (2001), UNGA Resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4. For a discussion of the theoretical basis for state responsibility in the case of an organized armed group being successful in establishing a new state, see Patrick Dumberry, 'New state responsibility for internationally wrongful acts by an insurrectional movement', in *European Journal of International Law*, Vol. 17, 2006, pp. 605–621.

36 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 15.

37 J. Crawford, above note 23, p. 117, para. 4.

de facto governmental functions proceeds bottom-up. Rather than starting with the state against whom an organized armed group is fighting, it begins with the independent capacity of organized armed groups to act and their aspirations to become the state and replace the current government. Given that organized armed groups that have these aspirations can reasonably be expected to be concerned about their legitimacy in the eyes of other states and the international community at large, they may be susceptible to the argument that they should comply with those rules that are considered to be part and parcel of appearing legitimate. And these rules certainly include 'elementary considerations of humanity'³⁸ as reflected in IHL.

A second important difference is that the doctrine of legislative jurisdiction is primarily retrospective, inasmuch as it places at its centre the fact that the state concerned has accepted the rules of IHL *in the past*. The *de facto* governmental functions argument instead focuses on the *present* factual circumstances and the position to which an organized armed group aspires in the *future*. In so doing, it makes it more difficult for an organized armed group to reject the binding force of IHL than in the case of the doctrine of legislative jurisdiction, because it calls for the organized armed group to recognize its independent responsibilities as an entity that resembles a government and aspires to represent the state in the future.

Notwithstanding the aforementioned merits, however, the *de facto* governmental functions argument is open to a number of objections. To contemplate a situation in which an organized armed group exercises *de facto* governmental functions implies at least a relatively stable control over part of a state's territory and/or control over persons, in addition to the existence of organs of the organized armed group that replace those of the state in the exercise of public power. Such a situation is likely to resemble closely situations where the high threshold for the applicability of Additional Protocol II is met, which requires that organized armed groups 'exercise such control over a part of [a state's] territory as to enable them to carry out sustained and concerted military operations and to implement [the Second Additional] Protocol'.³⁹ As is well known, not many of today's NIACs reach that threshold. When that threshold is not reached, the *de facto* governmental functions argument fails to explain why organized armed groups are bound by IHL.⁴⁰

Turning from the factual question of whether or not an organized armed group exercises governmental functions to the issue of the aspirations of organized armed groups, another weakness of the argument flows from the fact that it is by no means certain that all organized armed groups do in fact want to become the next government of a state. Indeed, it has been shown that parties to an armed conflict may at times have an interest *not* to end an armed conflict and become the new government, but instead thrive on the general insecurity in the region where they operate, because that insecurity enables them to retain access to economic

38 International Court of Justice, *Corfu Channel Case*, Merits, Judgment, 9 April 1949, ICJ Reports 1949, p. 22, para. 215.

39 See Additional Protocol II, Art. 1(1).

40 In this vein, see also L. Zegveld, above note 36, p. 15.

resources.⁴¹ In these and other cases where organized armed groups do not (aspire to) become the new government, the *de facto* governmental functions argument fails to convince.

In sum, the argument's strengths are restricted to a limited type of organized armed groups, and cannot explain why all organized armed groups may be presumed to be bound by IHL.

Binding force by virtue of customary IHL: organized armed groups as international legal persons

A further explanation that is occasionally offered for why IHL applies to organized armed groups is that they are bound by customary IHL because of the international legal personality that they possess. The Darfur Commission of Inquiry put it in the following terms: '[A]ll insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts'.⁴²

This explanation bears several strengths compared to those already mentioned. As far as the doctrine of legislative jurisdiction is concerned, the international legal personality argument does not flow via the state against which a given organized armed group is fighting. At the same time, it needs to be acknowledged that the argument does not entirely detach the construction of the binding force of IHL on organized armed group from states. The explanation suffers from a weakness that closely resembles the weakness of the *de facto* governmental functions argument, inasmuch as both base themselves on the fact that *states* retain the legislative competence, to some extent shared with international organizations, to create customary IHL through their practice and *opinio juris*. Indeed, the International Committee of the Red Cross (ICRC)'s customary IHL study acknowledges that the practice of organized armed groups 'does not constitute State practice as such' and that the 'legal significance [of the practice of organized armed groups] is unclear'.⁴³ As long as organized armed groups are thus excluded from the process of customary IHL formation, the binding force is still 'imposed' upon them and their sense of ownership of those rules is still weakened. Nevertheless, by construing the binding force of IHL on the basis of international legal personality and customary international law, one avoids the argument that they are bound only through the state against whom they fight. Instead, it is the international community of states at large that binds them. Customary IHL may thus be seen by them to embody a more universal claim to adherence and may make it more difficult (although not impossible) for an organized armed group to reject that claim.

41 Herfried Münkler, *Die neuen Kriege*, Rowohlt Verlag, Reinbeck, 2002, pp. 159–173.

42 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 172, available at: http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (last visited 15 June 2011).

43 J.-M. Henckaerts and L. Doswald-Beck, above note 3, p. xxxvi.

Another strength of the explanation that organized armed groups are bound by customary IHL by virtue of their international legal personality is that it takes due account of their collective dimension. It thus does not suffer from the same weakness as the explanation that reasons from the binding nature of IHL on individuals.

However, the idea of construing the binding force of IHL on the basis of the international legal personality bestowed upon organized armed groups is also subject to a number of challenges. First, it cannot provide a basis for the purported binding force of conventional IHL on organized armed groups, irrespective of the latter's consent. In failing to do so, and to the extent that the customary law of NIACs lags behind treaty law,⁴⁴ the explanation hence entails some consequences that are prone to create serious challenges to compliance with conventional IHL. While, as a matter of law, non-acceptance of conventional IHL obligations by an organized armed group would not free the state that has ratified a given IHL treaty from the obligations it has thus accepted as binding,⁴⁵ such an inequality before the law would be problematic from the viewpoint of reciprocity as a crucial factor promoting compliance, as a matter of fact.⁴⁶

A second possible objection to the construction of the binding nature of IHL on organized armed groups on the basis of the international legal personality, which states may reasonably be expected to raise, is that such international legal personality, even if limited, would bestow legitimacy on organized armed groups. Indeed, this concern was raised during the negotiations of the Geneva Conventions, in relation to Common Article 3, which ultimately led to the inclusion of the provision that its application 'shall not affect the legal status of the Parties to the conflict'.⁴⁷ More recent developments in IHL-making confirm that these concerns of states persist.⁴⁸ That objection is, however, not convincing because it confuses personality with legitimacy. The fact that a given entity enjoys certain rights under international law and is subject to certain obligations does not necessarily confer legitimacy on that entity. Indeed, even states as the undisputed and only primary subjects of international law are not necessarily legitimate. Those that are illegitimate – for instance because they commit widespread and systematic human rights violations against their own population – nevertheless retain their international legal personality. Conversely, organized armed groups do not automatically lack legitimacy, but that question is divorced from the question of whether they are endowed with international legal personality.

44 An example is the obligation to record the placement of landmines as envisaged in Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 10 October 1980, Arts. 1(2) and 9, if compared to customary IHL as identified by the ICRC (see J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 82 and Summary of the Rule, pp. 284–285).

45 Cf. J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 140.

46 See on this point, L. Moir, above note 6, pp. 86, 107–108.

47 J. Pictet, above note 24, pp. 44, 60.

48 See e.g. CCW, above note 44, Art. 1(6), as amended according to the Amendment adopted on 21 December 2001.

Notwithstanding that the aforementioned possible objection fails to convince, the construction of the binding nature of IHL on organized armed groups via the international legal personality of those groups nevertheless suffers from an important logical defect, namely the circularity in construing international legal personality according to the mainstream doctrine. That circularity is epitomized in the mantra that international legal personality is determined on the basis of an entity's possessing rights and obligations under international law,⁴⁹ while the determination of such rights and obligations draws on the issue of whether the addressee of those rights and obligations possesses international legal personality. In the present context, organized armed groups were thus regarded as international legal persons because they possess rights and obligations under IHL, whereas they are seen to possess these rights and obligations because they are international legal persons. *Certum est quia impossibile est!*⁵⁰

Binding force by virtue of consent by organized armed groups

All of the aforementioned explanations are based on the assumption that IHL is being imposed upon organized armed groups regardless of their own will or even against their own will. In stark contrast, another basis for asserting that organized armed groups are bound is that they have expressed their consent to be bound by a relevant rule. Indeed, IHL occasionally reflects a consent-based approach to the binding force of IHL as much as it seems to suggest at other times that such consent is irrelevant. On the one hand, Common Article 3 categorically declares that 'each Party to the conflict shall be bound to apply, as a minimum' the substantive obligations in sections 1 and 2. The consent, or absence thereof, of an organized armed group is considered immaterial. On the other hand, Common Article 3 encourages the parties to a NIAC to conclude 'special agreements' through which all or part of the other provisions of the Geneva Conventions are brought into force. In addition, it is by no means exceptional that organized armed groups unilaterally declare their acceptance of rules of IHL, for instance in the form of 'Deeds of Commitment' made under the auspices of *Geneva Call* to ban anti-personnel mines and to further the protection of children from the effects of armed conflict.⁵¹ And national liberation movements – a distinct sub-species of organized armed groups that has gained express recognition and regulation in Additional Protocol I⁵² – only become subject to the rules of that protocol if they express their consent to be bound.⁵³

49 International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, pp. 174, 178.

50 'It is certain, because it is impossible' [translation from Latin].

51 See generally <http://www.genevacall.org/> (last visited 15 June 2011) and the list of signatories of Deeds of Commitment available at: <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm> (last visited 15 June 2011).

52 See Additional Protocol I, Art. 1(4).

53 See Additional Protocol I, Art. 96(3).

The multiple distinct bases for the binding force of IHL vis-à-vis organized armed groups are also reflected in some of the instances at which international bodies have expressed their view on the matter. Besides drawing on the international legal personality of organized armed groups, the Darfur Commission of Inquiry, for instance, added that

implied acceptance of general international principles and rules on humanitarian law . . . by rebel groups . . . can be inferred from the provisions of some of the Agreements [between the government of Sudan and the organized armed groups SLM/A and the JEM]. . . . In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law.⁵⁴

In other words, the Darfur Commission of Inquiry combined the argument that IHL is being imposed upon organized armed groups by virtue of their international legal personality with the argument that organized armed groups are bound because they have consented to the rules in question.

It is at times asserted that, in the realm of conventional IHL, support for the argument that organized armed groups are bound if and when they consent to IHL can be found in the *pacta tertiis* rule as embodied in the Vienna Convention on the Law of Treaties.⁵⁵ According to that rule, '[a] treaty does not create either obligations or rights for a third State without its consent'.⁵⁶ As an exception to the same rule, '[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.⁵⁷ As far as rights for a third state that flow from a treaty are concerned, an exception applies

if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.⁵⁸

An analogous application of that regime to the relation between states and organized armed groups as parties to a NIAC would mean that organized armed groups would only be bound by conventional IHL if they express their consent to the obligations – and do not reject the rights – embodied therein.⁵⁹

54 Report of the International Commission of Inquiry on Darfur, above note 42, paras. 173–174.

55 See A. Cassese, above note 10, pp. 423–430.

56 Vienna Convention on the Law of Treaties, entered into force 27 January 1980, 1155 UNTS 331, 8 ILM 679, Art. 34.

57 *Ibid.*, Art. 35.

58 *Ibid.*, Art. 36.

59 A. Cassese, above note 10, p. 428.

However, to base the requirement for consent to rules of IHL of an organized armed group on the regime governing rights and obligations of third states as embodied in the law of treaties is open to a number of challenges. It is at least debatable whether and to what extent that regime, designed to govern the relation between states, can be transposed to the relationship between states and organized armed groups.⁶⁰ One also fails to see why such an extension would have to stop with organized armed groups. Could it not be argued that the same analogy has to be drawn with respect to individuals, for instance? That, however, would have the consequence that their bearing rights (for instance under international human rights and humanitarian law) and obligations (under international humanitarian and international criminal law) would be subject to the requirement that they assent thereto, either expressly (as far as obligations are concerned) or implicitly (as far as rights are concerned). That consequence, in turn, is clearly incompatible with the widely accepted view that the consent of individuals is not required.⁶¹ In sum, the law of treaties pertaining to *pacta tertiis* does not provide a convincing argument that the consent of organized armed groups is required in order for conventional IHL to be applicable to them.

In addition, to require consent would also have consequences that might be seen to militate against it as a basis for the binding nature of IHL on organized armed groups. On a very practical level, it may at times be difficult to establish who in a given organized armed group is competent to express the consent of that group to be bound. This is especially relevant with respect to more amorphous or heterogeneous armed groups or in the situation where different factions of an organized armed group split up because of internal differences or shifting alliances.⁶²

A further consequence of requiring consent is that it raises the issue of reciprocity in an even more fundamental way than that observed when we considered the international legal personality of organized armed groups and customary IHL as a possible explanation for the binding force of IHL.⁶³ For, if consent of the organized armed group is required, the question looms large whether the law applicable in a given NIAC is limited to those rules that *both* parties have accepted, thus mirroring the law of international armed conflict,⁶⁴ or whether the relationship between states and organized armed groups has to be conceptualized in such a way that reciprocity is not required as a matter of law, in which case

60 In this vein, see also S. Sivakumaran, above note 7, p. 377.

61 See, for example, the express stipulation in the Geneva Conventions that protected persons may not renounce their rights: GC I, Art. 7; GC II, Art. 7; GC III, Art. 7; GC IV, Art. 8.

62 In that respect, the ICTY has developed, as one factor for determining whether the degree of organization of an armed group meets the required threshold for it to be an organized armed group in the sense of IHL, its *ability* to speak with one voice (see e.g. *The Prosecutor v. Boškoski and Tarčulovski*, above note 1, para. 203). However, the Tribunal emphasized that this factor, together with others, is *indicative* and is taken into account, rather than being determinative and in itself ‘essential to establish whether the “organization” criterion is fulfilled’ (*ibid.*, para. 198).

63 See above notes 45 and 46 and accompanying text.

64 See Common Article 2 to the Geneva Conventions, according to which the conventions apply to all cases of declared war or of any other armed conflict which may arise ‘between two or more of the High Contracting Parties’. See also Additional Protocol I, Art. 1(3).

reciprocity as a matter of fact would however remain as an important factor inducing compliance by the parties to the armed conflict.

However, the most fundamental consequence of requiring consent is that, taken to its logical conclusion, such a requirement would mean that no rule of conventional IHL applies to an organized armed group that has failed to accept being bound by the rule in question. Yet that consequence needs to be put into perspective. An outright, complete rejection of all rules and principles of IHL by an organized armed group is the exception rather than the rule. The wealth of 'other practice' collected in the ICRC customary IHL study⁶⁵ and other ICRC documentation⁶⁶ exemplifies the fact that organized armed groups have expressed their acceptance of rules of IHL on numerous occasions. Similarly, no less than forty-one organized armed groups have expressed their acceptance of rules in the area of anti-personnel mines and child soldiers by signing 'Deeds of Commitment' under the auspices of *Geneva Call* since 2001.⁶⁷ Admittedly, there is no automatic acceptance, and an organized armed group *may* reject all rules of IHL. However, in such a case one has to reflect realistically on the measure of success that can reasonably be expected from arguments that would seek to impose IHL rules and principles through other explanations. It appears plausible that the more promising strategy in such a situation is to concentrate efforts on gradually increasing the acceptance of the rules of IHL by such an organized armed group. A similar approach would stand to reason in the more likely situation where an organized armed group decides to express its consent only selectively to some of the rules of IHL applicable in NIACs. This would entail the result that not all the rules of IHL would apply whose applicability can be construed through reliance on some of the abovementioned explanations, most notably the doctrine of legislative jurisdiction. Here, the pull of compliance emanating from the express acceptance of some of the rules of IHL by an organized armed group may very well be undermined by arguments that dismiss such consent as irrelevant in pursuit of the aim of imposing on an organized armed group even those rules of IHL that it expressly rejects. In fact, it is this pull of compliance that is the most significant strength of a consent-based construct of the binding nature of IHL on organized armed groups.⁶⁸ If an organized armed group takes ownership of the process of acceptance, the norms of IHL will be endowed with a greater degree of legitimacy from the perspective of the group in question. That legitimacy in turn makes a process of norm-internalization into the practice of an organized armed group more likely.⁶⁹ Of course, the express

65 J.-M. Henckaerts and L. Doswald-Beck (eds), above note 3, *Vol. II: Practice*, Parts 1 and 2.

66 See e.g. ICRC, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2008, pp. 17–18, 20.

67 See above note 51.

68 See further, Marco Sassoli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law', in *International Humanitarian Legal Studies* 1, 2010, pp. 5–51, 29–32.

69 For the parallel argument that legitimacy of a norm furthers its compliance by states, see, in particular, Thomas M. Franck, 'Legitimacy in the international legal system', in *American Journal of International Law*, Vol. 82, No. 4, 1988, pp. 709–710; Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, New York 1990; Thomas M. Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995, pp. 25–46.

commitment to a given rule of IHL is as little *guarantee* of actual compliance as it is when states accept a given rule. However, it makes it more difficult for an organized armed group to reject a given rule as binding and facilitates follow-up action to address violations of the law, and provides a basis for disseminating the law and for processes of engagement and relationship-building by humanitarian organizations, such as the ICRC.⁷⁰ Furthermore, to allow an organized armed group to consent or to withhold consent to a given rule of IHL also bears the potential for the group to identify those rules that it considers to be realistic for it.⁷¹

Concluding observations

Whether it is an advisable choice to rely on any one, or indeed more than one, of the explanations why and how IHL is applicable to organized armed groups will very much depend on the context in which the issue of that applicability arises. Institutions that have to face alleged violations by (members of) organized armed groups retrospectively, such as international criminal tribunals, are faced with the challenge of applying a body of law that clearly presupposes that primary norms of IHL that a given state (or, as far as customary IHL is concerned, the community of states) has accepted, translate into secondary norms that govern the individual responsibility of members of organized armed groups. The natural choice of such bodies can hence reasonably be expected to be an explanation that provides the basis for that applicability: the doctrine of legislative jurisdiction. Indeed, beyond international criminal tribunals, that doctrine avoids the discomfiting consequences of many of the other explanations, namely the result that not all of the IHL accepted by a given state may be applicable in an armed conflict between itself and an organized armed group.

On the other hand, institutions and organizations that are less concerned with effecting retrospective sanctions, but instead pursue as their primary objective the improvement of compliance with IHL by an organized armed group in an ongoing armed conflict, will in all likelihood be more inclined to engage organized armed groups directly. In that engagement, they may be better advised to rely on the exercise of *de facto* governmental functions, the international legal personality of a given organized armed group, and its consent, as a basis for the applicability of IHL.

What remains is that none of the explanations for the binding force of IHL on organized armed groups is without its weaknesses. That imperfection epitomizes the fact that IHL remains deeply engrained in a state-centric paradigm of norm generation and acceptance. While significant developments have taken place in the regulation of NIACs, organized armed groups remain largely excluded from these developments. Admittedly, their inclusion into the process of

⁷⁰ See ICRC, above note 66, p. 27.

⁷¹ In this vein, see M. Sassòli, above note 68, pp. 20–21.

articulating norms bears a number of risks and will not be a quick fix to all the challenges that we face in the realm of compliance with IHL. However, the reality – in military as much as in humanitarian terms – of organized armed groups suggests that they need to be understood as executors of a law that is also their own.

Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war

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Abstract

Armed groups frequently issue ad hoc commitments that contain a law of armed conflict component. These commitments detail the obligation of the relevant armed group to abide by international humanitarian law, the Geneva Conventions, or particular rules set out in the commitment. They commit the group to abide by international standards, sometimes exceed international standards, or in certain respects violate international standards. Although these commitments are often overlooked, they offer certain lessons for the law of armed conflict. This article considers the commitments of armed groups with respect to two specific areas of the law that are either of contested interpretation or seemingly inapplicable to non-international armed conflicts, namely the identification of legitimate targets and the prisoners of war regime.

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The law of armed conflict forms part of public international law. Accordingly, the materials that comprise the core of public international law – treaties, custom, and judicial decisions – also comprise the core of the law of armed conflict. For these reasons, when reference is made to the law of armed conflict, the materials that instinctively spring to mind include the 1949 Geneva Conventions and 1977 Additional Protocols, the Customary International Humanitarian Law study concluded under the auspices of the International Committee of the Red Cross (ICRC),¹ and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). Likewise, in both public international law and the law of armed conflict, the actors that are the most prominent in terms of the creation and development of the law are states and state-empowered bodies such as international courts and tribunals.²

Yet, in non-international armed conflicts in particular, a whole host of other materials purport to regulate the conflict, some of which emanate from armed groups. These materials frequently have a law of armed conflict component, containing as they do explicit or implicit reference to concepts associated with international humanitarian law (IHL) or international human rights law. Alternatively, they may concern related issues, such as the environment or internally displaced persons. These materials tend to be overlooked as they emanate from non-state actors and do not comprise part of the fabric of international law. They may also prove difficult to locate. Nonetheless, their potential importance cannot be overstated. They provide an indication as to the views of armed groups on humanitarian norms and they comprise a useful entry point for engaging with armed groups on humanitarian issues. The mere existence of these materials does not, of course, mean that the groups that issue them will comply with the law. Commitments and compliance are linked, but the former does not always lead to the latter. Nonetheless, commitments of armed groups do constitute a further means by which the law of armed conflict may be implemented and enforced.

This article analyses the substance of armed groups' commitments from the perspective of the law of armed conflict. It sets out a typology of commitments of armed groups and considers instances in which the commitments are consistent with the standards set by the law of armed conflict and instances in which they depart from that law. Departure from existing standards includes instances in which commitments fall short of required standards as well as instances in which commitments go above and beyond required standards. The latter are particularly instructive in light of a certain view that exists, namely that armed groups are (only) violators of the law. The article then turns to two particular areas: identification of legitimate targets and prisoner of war status and treatment. The first is controversial in its interpretation, while the second does not apply to non-international armed conflicts as a matter of law. Accordingly, both these subjects constitute a useful lens

1 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 vols, ICRC/Cambridge University Press, Cambridge, 2005.

2 See generally, Anthea Roberts and Sandesh Sivakumaran, 'Law-making by non-state actors: engaging armed groups in the creation of international humanitarian law', in *Yale Journal of International Law*, Vol. 37 (forthcoming).

through which to explore the commitments of armed groups. In relation to the former, the views of armed groups provide an additional perspective on the debate; with regard to the latter, their views indicate that, in particular instances, the commitment may be in advance of the law.

A typology of commitments

The commitments of armed groups can be loosely divided into four categories: unilateral declarations, *ad hoc* agreements, codes of conduct and internal regulations, and legislation. To these four categories, three others can be added, namely responses to reports of fact-finding missions, press releases and *ad hoc* statements, and expressions of motivations for taking up arms.³ Although the latter three categories do not constitute commitments as such, they remain important for ascertaining the views of armed groups and engaging with them on humanitarian norms.

Commitments

Unilateral declarations

Unilateral declarations usually take the form of commitments to abide by international humanitarian law, the Geneva Conventions, or other specific rules.⁴ One set of unilateral commitments that take a more or less standard form are the Deeds of Commitment on anti-personnel mines concluded under the auspices of Geneva Call.⁵ Unilateral declarations are issued more frequently on an *ad hoc* basis. For example, the Kurdistan Workers' Party (PKK) stated:

In its conflict with the Turkish state forces, the PKK undertakes to respect the Geneva Conventions of 1949 and the First Protocol of 1977 regarding the conduct of hostilities and the protection of the victims of war and to treat those obligations as having the force of law within its own forces and the areas within its control.⁶

Unilateral declarations may also be issued in relation to particular norms. For example, the Justice and Equality Movement (JEM) and Sudan Liberation Movement–Unity (SLM–Unity), both of Darfur, committed to specific norms of international humanitarian law:

We will do our utmost to guarantee the protection of civilian populations in accordance with the principles of human rights and international humanitarian

3 This part develops the discussion in Sandesh Sivakumaran, 'Re-envisioning the international law of internal armed conflict', in *European Journal of International Law*, Vol. 22, 2011, pp. 261–262.

4 See below, 'Equivalence with the law of armed conflict'.

5 On Geneva Call, see <http://www.genevacall.org/> (last visited 27 September 2011).

6 'PKK Statement to the United Nations', 24 January 1995.

law. In collaboration with UNICEF, we will adopt measures ensuring protection of children in Darfur. We also affirm the principles of freedom of movement.

We reaffirm our commitment to refrain from targeting or forcibly displacing civilian populations, destroying civilian infrastructure, recruiting children for military operations, and to hold to account perpetrators of acts of rape and other forms of gender based violence. We recognize that placing military assets and personnel in close proximity to civilian areas increases the risk that civilians will be caught up in hostilities or even targeted. We will therefore continue our policy of maintaining a proper physical separation between our armed forces and the civilian population. We also continue to commit to curtailing the militarization of IDP/refugee camps.

We reaffirm our commitment to clearly instructing our personnel on the ground regarding their obligations under human rights and international humanitarian law.⁷

Unilateral declarations of adherence to Additional Protocol I purportedly pursuant to Article 96(3) of that Protocol have also been issued.⁸

Ad hoc agreements

Bilateral agreements are not infrequently concluded between armed groups and states with which those armed groups are in conflict. These agreements may relate to the law of armed conflict or to specific issues of that law. Such *ad hoc* agreements include special agreements envisaged by Common Article 3, which calls upon parties to the conflict ‘to bring into force, by means of special agreements, all or part of the other provisions of the [particular] Convention’, but are broader than such agreements alone. They include agreements on human rights, such as the San José Agreement between the Government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN),⁹ as well as ceasefire and peace agreements that contain a law of armed conflict component. *Ad hoc* agreements are also concluded between armed groups and UN entities or humanitarian agencies, usually on issues relating to humanitarian assistance.¹⁰ Tripartite agreements are concluded on occasion, between the state, the non-state armed group, and a UN entity.¹¹

7 ‘Statement by the Opposition Movements [JEM and SLM–Unity]’, undated (published on 11 July 2008), available at: <http://www.hdcentre.org/projects/sudan> (last visited 27 September 2011).

8 See e.g. National Democratic Front of the Philippines, ‘Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977’, addressed to the Swiss Federal Council, 5 July 1996; National Democratic Front of the Philippines, ‘Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977’, addressed to the ICRC, 5 July 1996.

9 ‘Agreement on Human Rights’, annexed to UN Doc. A/44/971-S/21541, 16 August 1990.

10 See e.g. Sudan People’s Liberation Movement–United/Operation Lifeline Sudan, ‘Agreement on ground rules’, May 1996.

11 See e.g. ‘Memorandum of Understanding between the Government of Sudan, the Sudan Peoples Liberation Movement and the United Nations regarding United Nations Mine Action Support to Sudan’, 19 September 2002.

Codes of conduct and internal regulations

Just as states draw up military manuals, non-state armed groups draw up codes of conduct.¹² These codes of conduct, along with other internal regulations, regulate the behaviour of members of the group in their relations both with other members and with persons external to the group. Codes of conduct and internal regulations do not relate solely to issues of the law of armed conflict. Indeed, some codes and regulations do not relate to the law of armed conflict at all.¹³ Others do so implicitly, containing rules that have an equivalent in the law.¹⁴ Perhaps the classic codes of conduct and internal regulations are those of the Chinese People's Liberation Army (CPLA) issued by Mao Tse Tung originally in 1928. The CPLA's Three Main Rules of Discipline and Eight Points of Attention have been adopted by several unrelated armed groups in the period since they were issued, including the Revolutionary United Front (RUF) of Sierra Leone, the National Democratic Front of the Philippines (NDFP), and the National Resistance Army (NRA) of Uganda.¹⁵ The Taliban of Afghanistan has also issued a code of conduct, most recently in 2010.¹⁶

Legislation

Again, just as states enact legislation, so too do armed groups. The state in which the conflict is taking place will probably challenge the characterization of the materials as 'legislation' and will contest its binding nature. Nonetheless, for the armed group and for individuals living in territory under its control, this legislation will prove important. Legislation is enacted particularly by armed groups that exercise control over territory or which constitute *de facto* states. Such groups tend to have detailed penal codes that apply to the territory under their control.¹⁷ Other groups enact constitutions or issue other sorts of legislation.¹⁸ As with codes of conduct, much of this material fails to refer to the law of armed conflict by name, but much concerns concepts that are the subject of the law of armed conflict. Other legislation does refer to matters of the law of armed conflict by name or concerns human rights issues or the protection of displaced persons.¹⁹ Legislation differs from codes of conduct and

12 See e.g. in this issue, 'Collection of codes of conduct for armed groups'.

13 See e.g. Kosovo Liberation Army, *Interim Regulations on the Organization of Internal Affairs in the Army*, Prishtina, 1998.

14 See below, 'Equivalence with the law of armed conflict'.

15 Special Court for Sierra Leone (SCSL), *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 705; 'Basic rules of the New People's Army', Principle IV, Point 3, reproduced in National Democratic Front of the Philippines (NDFP), *Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977*, NDFP Human Rights Monitoring Committee Booklet No. 6, pp. 85–90; NRA Code of Conduct, reproduced in Ori Amaza, *Museveni's Long March from Guerrilla to Statesman*, Fountain Publishers, Kampala, 1998, Appendix 3.

16 Reproduced and translated as an annex to Muhammad Munir, 'The *Layha* for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law', in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 103–120.

17 See e.g. Communist Party of Nepal-Maoist, 'Public Legal Code 2060 (2003/2004)'.

18 See e.g. Liberation Tigers of Tamil Eelam, 'Tamil Eelam Child Protection Act' (Act No. 3 of 2006).

19 See e.g. *Ejército Zapatista de Liberación Nacional*, 'Revolutionary Women's Law'.

internal regulations in that it is enacted in order to regulate the conduct of persons residing in the area in question, rather than governing the behaviour of members of the armed group alone.

Each of these forms of commitment is considered rare, exceptional, and unlikely to be issued. However, the practice reveals an altogether different picture. One of the unfortunate points is that these commitments tend to be difficult to find, not least because of the lack of a centralized repository for them.

Other important materials

Three further categories of material are important, even though they do not always consist of commitments in the formal legal sense of the term. These materials give an indication of the views of armed groups on the law and may set out the group's position on a particular point. Accordingly, they remain important.

Responses to reports of fact-finding missions

Armed groups sometimes respond to reports of UN Special Rapporteurs or reports of human rights organizations, challenging particular facts or interpretations of the law.²⁰ They should be encouraged to enter into conversations with the relevant body, particularly where the response does not take the form of an outright and unreasoned denial. This creates points of entry within the group for discussion on related norms and aids increased knowledge on their part.

Press releases and ad hoc statements

Many non-state armed groups maintain websites. These contain, *inter alia*, press releases and other statements setting out the position of the groups on various issues relating to the law of armed conflict. Unilateral declarations and commitments may also be found on the groups' websites. *Ad hoc* statements on the law may also be issued through other organizations.²¹

Expressions of motivations for taking up arms

Armed groups may also set out the reason as to why they have taken up arms. Not infrequently such reasons include human rights violations taking place in the state in question and ongoing discrimination. Accordingly, following on from these explanations, it is not at all unusual for armed groups to state that the future state will respect human rights and international law. For example, during the 2011

20 See e.g. NDFP, Letter to UN Secretary-General Ban Ki Moon on children in armed conflict, 24 November 2008; 'KNU [Karen National Union] Press Statement on Report of UNSG', 27 April 2009; 'Report of the Panel of Experts established pursuant to Resolution 1591 (2005) concerning the Sudan Issued 2 October 2009: A Response from JEM [Justice and Equality Movement]', 16 November 2009.

21 See e.g. 'Statement of the Opposition Movements [JEM and Sudan Liberation Movement–Unity (SLM–Unity)]', above note 7.

violence in Libya, the National Transitional Council issued a statement in which it provided that:

The interim national council will be guided by the following in our continuing march to freedom, through espousing the principles of political democracy. We recognise without reservation our obligation to:

...

8. Build a democratic Libya whose international and regional relationships will be based upon:
 - a. The embodiment of democratic values and institutions which respects its neighbours, builds partnerships and recognises the independence and sovereignty of other nations. The state will also seek to enhance regional integration and international co-operation through its participation with members of the international community in achieving international peace and security.
 - b. A state which will uphold the values of international justice, citizenship, the respect of international humanitarian law and human rights declarations, as well as condemning authoritarian and despotic regimes. The interests and rights of foreign nationals and companies will be protected. Immigration, residency and citizenship will be managed by government institutions, respecting the principles and rights of political asylum and public liberties.
 - c. A state which will join the international community in rejecting and denouncing racism, discrimination and terrorism while strongly supporting peace, democracy and freedom.²²

These expressions of motivations constitute important 'hooks' on which to engage the armed group. For example, if an armed group commits violations of the law, it could usefully be reminded of the reason why it is fighting, namely to stand up against violations in the first place.

Commitments of armed groups

Having set out the various forms that commitments of armed groups take, the next section considers how such commitments compare with the standards imposed by the law of armed conflict.

Equivalence with the law of armed conflict

Many commitments of armed groups reference IHL, the law of armed conflict, the Geneva Conventions, or specific rules, by name. These commitments, whether unilateral declarations, bilateral agreements, or of a different form, are necessarily equivalent to that which is required by the law, given that they act as a *renvoi* to the

22 See e.g. National Transitional Council, 'A vision of a democratic Libya', 29 March 2011.

law. Commitments of this sort have been made by many an armed group. For example, in 1988, the Liberation Tigers of Tamil Eelam (LTTE), which fought against the Government of Sri Lanka, indicated that it had ‘transmitted our notice of acceptance of the Geneva Conventions I–IV of 1949 and the Protocols Additional I and II to the Geneva Conventions to United Nations Headquarters and to the International Committee of the Red Cross’.²³ In 1991, the NDFP ‘declare[d] its adherence to international humanitarian law, especially Article 3 common to the Geneva Conventions as well as Protocol II additional to said conventions, in the conduct of the armed conflict in the Philippines’.²⁴ Most recently, during the 2011 armed conflict in Libya, the National Transitional Council declared that it ‘would like to reiterate that its policies strictly adhere to the “Geneva Convention relative to the treatment of Prisoners of War”’.²⁵

Commitments to respect international law are also contained in bilateral agreements concluded between warring parties. The Abidjan Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF) provides a useful example of this tendency. That agreement provided that ‘[t]he Parties undertake to respect the principles and rules of international humanitarian law’.²⁶ Such commitments may prove important should the peace agreement fail, as was the case with the Abidjan peace agreement itself, or should fighting recommence following the conclusion of a ceasefire agreement. The RUF would later draw on this aspect of the Agreement, commenting that both the Government and the RUF ‘had committed themselves to . . . full respect for human rights and humanitarian laws’.²⁷

Other declarations are less concrete, but still refer to the law of armed conflict. For example, in 1980, the *União Nacional para a Independência Total de Angola* (UNITA) declared that it ‘renews its commitment to the Geneva Conventions and subscribes to the fundamental rules of international law applicable in armed conflicts’.²⁸ Quite which rules UNITA was committing to abide by is unclear, given the lack of formal category of the ‘fundamental rules of international law applicable in armed conflicts’. Nevertheless, the commitment acts as a *renvoi* to international law.

These types of commitments are useful in light of their exact equivalence to the law. The armed group commits to exactly what it is that the law requires through a *renvoi* to the law. However, very real disadvantages are also inherent. When the

23 Letter from Vellupillai Prabhakaran, Leader, Liberation Tigers of Tamil Eelam, to Members and Observers, United Nations Commission on Human Rights, Forty-fourth session, 24 February 1988. See also Letter from Velummylum Manoharan, Representative, LTTE International Secretariat, to Honourable Judges of the US Court of Appeal District of Colombia Circuit (undated), reproduced in the *Sunday Times* (Sri Lanka), 16 November 1997.

24 NDFP ‘Declaration of adherence to international humanitarian law’, 15 August 1991, reproduced in NDFP, above note 15, Annex D, p. 98.

25 National Transitional Council, ‘The treatment of detainees and prisoners’, 25 March 2011.

26 Abidjan Peace Agreement, 30 November 1996, Article 21. See also the Preamble to the Agreement.

27 ‘Lasting peace in Sierra Leone: the Revolutionary United Front Sierra Leone (RUF/SL) perspective and vision’, undated.

28 Declaration by UNITA, 25 July 1980, reproduced in *International Review of the Red Cross*, Vol. 20, No. 219, 1980, p. 320.

armed group commits to abiding by ‘international humanitarian law’, it may not be familiar with the content of ‘international humanitarian law’. It may not be aware that it includes the Geneva Conventions and Additional Protocols, various weapons treaties, rules relating to cultural property, and so forth. Furthermore, the armed group may not have the capacity to abide by all the rules of IHL even if it were willing to do so.²⁹

Accordingly, there are advantages in armed groups committing to the *substance* of particular rules rather than simply referring to the legal terminology used to describe those rules. Commitments to the substance of particular rules may prove more beneficial given that all parties concerned have a clear understanding as to the nature and content of a particular commitment. These commitments may be equivalent to that contained in the law of armed conflict, albeit expressed in a different manner. For example, the 2010 *Layha for the Mujahideen* provides that ‘[t]he 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’.³⁰ This is akin to the IHL obligation to take all feasible precautions.³¹ The CPLA’s Three Main Rules of Discipline provided: ‘[d]on’t take a single needle or piece of thread from the masses’, while its Eight Points of Attention contained the following injunctions: ‘[d]on’t hit or swear at people’, ‘[d]on’t damage crops’, ‘[d]on’t take liberties with women’, and ‘[d]on’t ill-treat captives’.³² The parallels between these injunctions and obligations laid down by international humanitarian law – the principle of humane treatment, and the prohibitions on inhuman treatment, outrages upon personal dignity, pillage, and sexual violence – are evident.

Beyond the law of armed conflict

The ‘substance approach’ also suffers from certain disadvantages. When commitments of armed groups do not refer to particular categories of rules, along the lines set out above, but describe the conduct that is prohibited, there is a danger that the commitment may depart from existing standards. This is not inherently a bad thing, for in such instances, the commitment of the armed group may go above and beyond existing standards, offering greater protection to civilians and other persons and entities caught up in the conflict than does the law of armed conflict.

For example, a 2009 agreement between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) commits the parties to ‘avoid[ing] acts that would cause collateral damage to civilians’.³³ This goes beyond the

29 See Marco Sassoli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 32.

30 *Layha for the Mujahideen*, 2010, above note 16, Rule 65.

31 Additional Protocol I, Art. 57; J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, Rule 15.

32 See, for analysis, He Xiaodong, ‘The Chinese humanitarian heritage and the dissemination and of and education in international humanitarian law in the Chinese People’s Liberation Army’, in *International Review of the Red Cross*, Vol. 83, No. 841, 2001, pp. 141–153.

33 ‘Agreement on the Civilian Protection Component of the International Monitoring Team’, 27 October 2009, Art. 1(a).

requirement of international humanitarian law, which, in its rule on disproportionate attacks, balances the expected injury to civilians and damage to civilian objects with the concrete and direct military advantage anticipated, and prohibits only such attacks in which the former would be 'excessive'.³⁴ Another area in which the Government of the Philippines and the MILF have committed to standards beyond that required by the existing law is the commitment of the parties to 'safely return evacuees to their place of origin, provide all the necessary financial/material and technical assistance to start a new life, as well as allow them to be awarded reparations for their properties lost or destroyed by reason of the conflict'.³⁵ This provision should be compared with the relevant rules of customary international law, which relate more narrowly to the right to return and to the respect for the property of displaced persons.³⁶

Armed groups may also prove 'ahead of the curve', committing to act or not to act in a particular manner, such actions being required by international law only at a later point in time. For example, the NDFP has indicated that it prohibited the recruitment of children under the age of 18 years into its armed forces 'since 1988, ahead of the Convention on the Rights of the Child'. It has also noted that its position in this regard 'is far more advanced than the standard set by the Geneva Conventions'.³⁷ It will be recalled that common Article 3 is silent on the question of the recruitment of children into armed forces or armed groups, while Additional Protocol II adopts the standard of 15 years of age.³⁸ In respect of a different area of the law, in 1995, the RUF 'appeal[ed] to the United Nations Security Council to seize itself of the grave matter of the spread of small arms and the planting of anti-personnel mines'. It noted that '[t]he constant use of heavy artillery and cluster bombs ha[s] devastated the countryside'.³⁹ It would take until 2008 for a Convention on Cluster Munitions to be adopted, while, at the time of writing, the conventional regulation of small arms remains under consideration. Also in the realm of weapons, in 1988, the FMLN indicated it was abiding by the Mines Protocol to the Convention on Certain Conventional Weapons, setting out the situations in which it was using mines and the associated precautions it was taking.⁴⁰ Yet, at the time in question, the Protocol was limited to international armed conflicts alone, its scope of application being extended to non-international armed conflicts only in 1996.

It may be said that commitments of armed groups are political in nature, used as a tactic in the conflict, or made to enhance their reputation, all without any intention of complying with them. With respect to certain commitments made by certain groups, this may well be true. For example, the call on the part of the RUF to

34 Additional Protocol I, Art. 51(5)(b); J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, Rule 14.

35 'Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front', 22 June 2001, Art. B3.

36 Cf. J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, Rules 132 and 133.

37 NDFP, *NDFP's Defense of the Rights of the Filipino Child*, Publication of the NDFP Human Rights Monitoring Committee, 2005, p. 9.

38 Additional Protocol II, Art. 4(3)(c).

39 'Footpaths to democracy: toward a new Sierra Leone', 1995.

40 FMLN, *The Legitimacy of Our Methods of Struggle*, Inkworks Press, Berkeley, 1988, pp. 10–14.

regulate small arms and cluster munitions was probably made just as much for tactical reasons as it was for concern over the environment. Furthermore, despite the commitments to respect IHL on the part of the RUF and the LTTE, violations of that law were commonplace.⁴¹ However, the fact that parties to conflicts make commitments for a variety of reasons is as true for states as it is for armed groups.⁴² Furthermore, the fact that certain commitments may be made for disingenuous reasons cannot be used to tarnish all commitments. Accordingly, commitments of armed groups remain important.

Below the law of armed conflict

This is not to suggest that commitments of armed groups invariably meet, or exceed, international standards. In respect of certain norms, commitments fall below existing standards and this is a very real danger with the 'substance approach'. The following examples usefully illustrate the point.

The 2010 *Layha for the Mujahideen* provides:

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 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 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.⁴³

These provisions clearly depart from international humanitarian law, in particular the principle of humane treatment, and the rules relating to the treatment of detainees.⁴⁴

41 See e.g. SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, above note 15; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011.

42 See Olivier Bangerter, 'Disseminating and implementing international humanitarian law within organized armed groups: measures armed groups can take to improve respect for international humanitarian law', in International Institute of Humanitarian Law, *Non-state Actors and International Humanitarian Law: Organized Armed Groups: A Challenge for the Twenty-first Century*, FrancoAngeli, Milano, 2010, pp. 187, 192, and 196.

43 *Layha for the Mujahideen*, above note 16, Rules 11 and 12.

44 Common Article 3; Additional Protocol II, Arts 4 and 5; Additional Protocol I, Art. 75.

An associated issue is that of the taking of hostages. It is well known that IHL prohibits the taking of hostages.⁴⁵ For its part, the *Ejército de Liberación Nacional* (ELN) of Colombia has committed to IHL.⁴⁶ However, it has defined the taking of hostages in such a manner as to allow certain actions that the law of armed conflict would consider to constitute the taking of hostages. Thus, the ELN has stated that it is ‘permissible to recover war taxes, and to detain persons who refuse to pay them as a form of pressure in order to obtain payment. These detentions cannot be considered “hostage-taking”, because we never use these persons as shields during hostilities’.⁴⁷

Practice in relation to particular norms

In the two sections that follow, the commitments and practice of armed groups are considered in relation to two areas of the law that are controversial in their interpretation or seemingly inapplicable in their application to non-international armed conflicts, namely the identification of legitimate targets and the prisoners of war regime.

Identification of legitimate targets

One area in which a considerable divergence of opinion exists is that of the identification of legitimate targets. One of the most fundamental rules of the law of armed conflict is that civilians may not be made the object of attack.⁴⁸ It is accepted that the prohibition on the targeting of civilians does not extend to civilians for such time as they take a direct part in hostilities.⁴⁹ However, there is considerable disagreement as to what this phrase actually means.⁵⁰ Members of the state armed forces are not protected from attack. Greater debate surrounds the question of when members of the armed group may be attacked.⁵¹ However, even the most restrictive view holds that members of the armed group may be attacked for such time as they take a direct part in hostilities. Several armed groups have expressed their own views on this point, usually taking a position that falls below that of any of the mainstream views of the law of armed conflict. Nonetheless, these views need to be considered.

45 Common Article 3; Additional Protocol II, Art. 4; Additional Protocol I, Art. 75; J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, Rule 96.

46 See *Ejército de Liberación, Declaración sobre el Derecho Internacional Humanitario*, 15 July 1995.

47 Nicolás Rodríguez Bautista, *Qué es humanizar el conflicto colombiano?*, 1 May 1996, quoted in Pierre Gassmann, ‘Colombia: persuading belligerents to comply with international norms’, in Simon Chesterman (ed.), *Civilians in War*, Lynne Rienner Publishers, London, 2001, p. 73.

48 Additional Protocol I, Art. 51(2); Additional Protocol II, Art. 13; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, above note 1, Rule 1.

49 Additional Protocol I, Art. 51(3); Additional Protocol II, Art. 13(3).

50 See, in particular, ICRC, ‘Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 872, 2008, pp. 991–1042. But see, for critical views of the ICRC interpretive guidance, the contributions to the symposium in *New York University Journal of International Law and Politics*, Vol. 42, 2010, pp. 637–769.

51 ICRC, above note 50; *New York University Journal of International Law and Politics*, above note 50.

The PKK has indicated that it:

regards the following groups as part of the Turkish security forces and, therefore, as legitimate targets of attack:

- members of the Turkish armed forces;
- members of the Turkish contra-guerrilla forces;
- members of the Turkish Intelligence Service (MIT);
- members of the Turkish gendarmerie;
- village guards.

The PKK does not regard civil servants as members of the security forces, unless they come within one of the above categories.⁵²

Along largely similar lines, the NDFP has indicated that it:

regards as legitimate targets of military attack the units, personnel and facilities belonging to the following:

- 1 The Armed Forces of the Philippines;
- 2 The Philippine National Police;
- 3 The paramilitary forces; and
- 4 The intelligence personnel of the foregoing.⁵³

The NDFP has also indicated that '[c]ivil servants of the GRP [Government of the Republic of the Philippines] are not subject to military attack, unless in specific cases they belong to any of the four abovestated categories'.⁵⁴

These statements reflect the position of the law of armed conflict in certain respects, considering as they do members of the armed forces and the paramilitary forces to be 'legitimate targets of military attack'. The clarifications surrounding civil servants are useful in light of the fact that, in some conflicts, any representative of the state is considered to be a legitimate target. More difficulty surrounds the gendarmerie or national police. In general terms, members of the police force are considered civilians.⁵⁵ However, in some states, the police may be associated with the armed forces, or may be attached to the armed forces in times of armed conflict.⁵⁶ Accordingly, much will turn on the specificities of the state in question and on the facts. The NDFP's limitation of intelligence personnel to the intelligence personnel of the listed categories is to be welcomed as not considering all intelligence personnel to be legitimate objects of attack. For example, intelligence personnel who are tasked with activities entirely unrelated to the conflict could not be considered legitimate targets of attack, although, in practice, differentiation along these lines may prove difficult. However, the NDFP's limitation is eroded almost

52 'PKK Statement to the United Nations', above note 6.

53 NDFP, 'Declaration of Undertaking', above note 8.

54 *Ibid.*

55 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General', 25 January 2005, para. 422.

56 See J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, p. 17.

entirely with its interpretation of ‘intelligence personnel’ as including ‘casual Government informers, such as peasants who answer when asked by [government] soldiers to identify local CPP [Communist Party of the Philippines] members or someone who calls the police when faced with NPA [New People’s Army] extortion’.⁵⁷ This is extremely broad and certainly inconsistent with international standards.

For its part, the Kosovo Liberation Army (KLA) took the view that ‘all Serbian forces, whether the police, the military, or armed civilians, are our enemy’.⁵⁸ On the one hand, reference to armed civilians could be taken to mean civilians taking a direct part in hostilities. On the other hand, it could be overly inclusive. Civilians who bear arms to defend themselves, or to prevent looting and the like, would not be considered to be taking a direct part in hostilities.⁵⁹ The ambiguity surrounding certain terms and certain commitments is thus also potentially problematic.

The Sudan People’s Liberation Movement/Army (SPLM/A) indicated in 1984 that the following individuals and entities are ‘declared enemies of the people and therefore target of the SPLA/SPLM’:

- a) The incumbent administration of Jaafer Mohammed Nimeiri, its appendages and supporting institutions.
- b) Any subsequent reactionary administration that may emerge while the revolutionary war is still being waged.
- c) Any individual or group of individuals directly or indirectly cooperating with the autocratic regime in Khartoum in order to sustain or consolidate its rule and to undermine the objectives and efforts of the People’s Revolution.
- d) Any individual or group of individuals who wage counter-revolutionary war against the SPLA/SPLM or who circulate any subversive literature, verbally or in written form against the SPLA/SPLM with the intent to discredit it or turn public opinion against it.
- e) Persons acting as agents or spies for the Sudan Government.
- f) Armed bandits that operate to rob ordinary citizens, rape their women or commit any other crime against them, their movable or immovable properties or any other property of the People’s revolution.
- g) Individuals or groups of people who propagate or advocate ideas, ideologies or philosophies or organize societies and organizations inside the country or abroad, that tend to uphold or perpetuate the oppression of

57 ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston’, UN Doc. A/HRC/8/3/Add.2, 16 April 2008, para. 31.

58 Interview with Jakup Krasniqi, spokesman of the Kosovo Liberation Army, published in *Koha Ditore*, 12 July 1998 (translated from Albanian), Exhibit P00328 in International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008.

59 International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008, paras. 2238–9; ‘Report of the International Commission of Inquiry on Darfur’, above note 55, para. 292.

the people or their exploitation by the Khartoum regime or by any other system of similar nature.⁶⁰

Just as with the other mentioned armed groups, the SPLM/A considered a much broader section of society to be legitimate targets of attack. In particular, objects of potential attack include 'individuals directly or indirectly cooperating with' the government and persons who advocate ideas that perpetuate the oppression. This widens matters considerably and, again, falls short of international standards.

Despite their considerable variance with the law of armed conflict, these statements remain important because they set out, in concrete terms, the position of groups on the identification of (in their view) legitimate targets. It is revealing that the positions adopted by a number of groups are largely similar, all of which extend the objects that they see as potentially constituting a legitimate target. The statements demonstrate that there is a considerable disparity between what some armed groups consider legitimate targets and who or what the law does not consider the subject of protection. They also indicate that there remains much work to be done in this area of the law.

The prisoners of war regime

Combatant immunity, by which individuals are not prosecuted 'merely' for taking part in hostilities, and the prisoners of war regime are limited to the law of international armed conflict. No treaty provision applicable to non-international armed conflict mentions either concept. At the Diplomatic Conference of 1949, an attempt to introduce a rule prohibiting prosecution for taking part in a non-international armed conflict did not succeed.⁶¹ At the Diplomatic Conference of 1974–1977, a proposal to introduce prisoner of war status into the law of non-international armed conflict similarly failed.⁶² At the level of customary international law, this is one of the few areas of real difference between international and non-international armed conflicts,⁶³ and among commentators there is near-unanimity that this is the exclusive domain of the law of international armed conflict.⁶⁴

60 SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 29(1)(c), quoted in J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. II, pp. 126–127.

61 *Final Record of the Diplomatic Conference of Geneva of 1949: Volume II Section B*, Federal Political Department, Berne, 1963, p. 44 (Norway), p. 49 (UK), and p. 322 (Norway). For criticism, see *Volume II Section B*, p. 50 (Burma) and p. 99 (Denmark).

62 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Volume 5*, Federal Political Department, Berne, 1978, p. 91, para. 6 (Norway); *Volume 8*, p. 359, para. 15 (Sweden); *Volume 5*, p. 187, paras. 20–21 (Bangladesh). For criticism, see *Volume 8*, p. 293, para. 41 (Burundi).

63 See J.-M. Henckaerts and L. Doswald-Beck, above note 1, Vol. I, Rules 106–108.

64 See e.g. 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*, International Committee of the Red Cross, Geneva, 1987, p. 1332; Waldermar Solf, 'The status of combatants in non-international armed conflicts under domestic law and transnational practice', in *American University Law Review*, Vol. 33, No. 53, 1983, pp. 57–59; Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 2000, p. 318; Dieter Fleck, 'The law of non-international armed conflicts', in

Armed group commitments and practice

Commitments of armed groups present a more nuanced picture. During the US civil war, a bilateral agreement was concluded between General Dix of the Union forces and General Hill of the Confederate forces, confirming the applicability of the prisoners of war regime to the US civil war, with its detailed provisions on the exchange and release of prisoners of war.⁶⁵ Too much cannot be read into this practice given that it concerned a situation of belligerency. However, during the Spanish civil war, the rebels declared themselves ‘ready to observe and respect the Geneva Convention concerning the war wounded, the sick and the prisoners’.⁶⁶ Indeed, they went as far as declaring that they ‘respect[ed] and caus[ed] to be respected, with the utmost scrupulousness, the laws and customs of warfare’.⁶⁷

Some years later, during the Algerian war of independence, the Front de Libération Nationale (FLN) indicated its willingness to apply the provisions of the Geneva Conventions from an early stage of the conflict. In a letter to the ICRC, dated 23 February 1956, the FLN indicated its willingness to apply the Conventions to all ‘prisonniers de guerre français’ taken by the FLN ‘sous réserve de réciprocité de la part du Gouvernement de la République Française’.⁶⁸ Throughout the conflict, the FLN insisted ‘that it had conferred upon captured French soldiers the status of prisoners of war’,⁶⁹ and internal FLN regulations contained detailed rules on the law of war in general and the treatment of prisoners of war in particular.⁷⁰

During the attempted secession of Biafra from Nigeria, the Biafran authorities ‘acknowledged, as a minimum, the applicability of the customary law relating to prisoners of war’,⁷¹ and ‘assured the ICRC that they were prepared to observe the provisions of the [Geneva] Conventions’.⁷² A Declaration of the Biafran authorities ‘pledg[ed] to respect civilian populations, give the ICRC facilities for the delivery of humanitarian assistance and organize the exchange of prisoners of

Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, p. 627.

65 The ‘Dix-Hill Cartel’ for the General Exchange of Prisoners of War entered into between the Union and Confederate Armies, 22 July 1862, reproduced in H.S. Levie (ed.), *Documents on Prisoners of War*, *International Law Studies*, Vol. 60, 1979, p. 34.

66 Frédéric Sordet, ‘The Geneva Conventions and civil war’, in *Revue internationale de la Croix-Rouge, Supplément*, Vol. 3, 1950, p. 140.

67 As cited in Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, Macmillan, New York, 1939, p. 597.

68 ‘Lettre de la délégation algérienne au Caire à David de Traz’, 23 février 1956, quoted in Françoise Perret, ‘L’action du Comité international de la Croix-Rouge pendant la guerre d’Algérie (1954–1962)’, in *International Review of the Red Cross*, Vol. 86, 2004, p. 926.

69 Arnold Fraleigh, ‘The Algerian revolution as a case study in international law’, in Richard Falk (ed.), *The International Law of Civil War*, Johns Hopkins University Press, Baltimore, 1971, p. 196.

70 See Mohammed Bedjaoui, *Law and the Algerian Revolution*, International Association of Democratic Lawyers, Brussels, 1961, p. 215, n. 17; A. Fraleigh, above note 69, pp. 179 and 196.

71 Allan Rosas, *The Legal Status of Prisoners of War*, Suomalainen Tiedekatemia, Helsinki, 1976, p. 196.

72 ‘External activities’, in *International Review of the Red Cross*, Vol. 7, 1967, p. 536.

war'.⁷³ However, little information is available on the actual treatment of captured soldiers by Biafran entities.

These four situations are by no means exhaustive. Eritrean rebel groups ran 'formally organized prisoner of war camps' during the secession from Ethiopia.⁷⁴ In El Salvador, the FMLN declared that it had 'taken concrete measures to ... guarantee respect for the government troops ... that are under its control as prisoners of war'. It also argued that it 'treat[ed] prisoners of war well even though the Government forces do not do the same'.⁷⁵ In Turkey, the PKK indicated that it 'will treat captured members of the Turkish security forces as prisoners of war'.⁷⁶ Most recently, in Libya in 2011, as indicated above, the National Transitional Council declared that it 'would like to reiterate that its policies strictly adhere to the "Geneva Convention relative to the treatment of Prisoners of War"'.⁷⁷

Thus, despite the absence of provisions on this point in the law of non-international armed conflict, certain conflicts have seen armed groups declaring that they will treat captured members of the state armed forces as prisoners of war, although the precise extent to which there was compliance with the relevant rules is open to question. This is not infrequently done through a commitment on the part of the armed group to apply the Third Geneva Convention relative to the Treatment of Prisoners of War.

State commitments and practice

It may be said that members of armed groups would be the primary beneficiaries were the prisoners of war regime to apply to non-international armed conflicts. Accordingly, armed groups will afford treatment as prisoners of war to captured soldiers in the hope that they themselves will be treated as prisoners of war if they are captured. It is thus important to consider the *ad hoc* commitments of states and state practice on prisoners of war in non-international armed conflicts. Here, too, the position is interesting.

During the US civil war, an order of General Grant provided that '[p]ersons acting as *guerrillas* without organization and without uniform to distinguish them from private citizens are not entitled to the treatment of prisoners of war when caught, and will not receive such treatment'.⁷⁸ The order, dated 3 July 1862 and predating the Dix–Hill agreement by a few weeks, suggested that those persons acting as part of an army – organized and wearing uniforms – were entitled to treatment as prisoners of war. The Lieber Code of 24 April 1863 confirmed the point, with its numerous detailed rules on prisoners of war.⁷⁹

73 Cited in Churchill Ewumbue-Monono, 'Respect for international humanitarian law by armed non-state actors in Africa', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 907.

74 See Hilaire McCoubrey, *International Humanitarian Law*, Dartmouth, Aldershot, 1990, p. 175.

75 FMLN, above note 40, pp. 6–7.

76 'PKK Statement to the United Nations', above note 6.

77 National Transitional Council, 'The treatment of detainees and prisoners', 25 March 2011.

78 *Official Records of the War of the Rebellion*, Series 1, Volume 17, Part 2, p. 69.

79 'Instructions for the government of armies of the United States in the field', 24 April 1863, Section III.

During the Spanish civil war, the central government committed in a declaration to the ICRC *inter alia* to co-operate in the setting up of a prisoner of war information agency.⁸⁰ This commitment was made two weeks prior to the commitment of the rebels. The central government later announced that 4,000 prisoners would be ‘treated in accordance with the military code providing for the handling of prisoners of war’.⁸¹

During the Algerian war of independence, France initially tried and executed captured FLN fighters. However, ‘on 19 March 1958 General Salan, Commander-in-Chief of the French forces in Algeria, ordered that special camps be set up for NLA [National Liberation Army, the armed wing of the FLN] combatants captured while bearing weapons openly’.⁸² France made clear that these individuals were not being considered prisoners of war but their treatment was to be akin to that of prisoners of war.⁸³ The relevant order provided that ‘the prisoners were to be treated “in as liberal a manner as possible, and that this should be made known”’. It continued: ‘[p]roposals for bringing captives before the courts should be systematically avoided, except in the case of those who have committed atrocities or who demonstrate a degree of fanaticism likely to prejudice a favourable evolution in the general state of mind’.⁸⁴ Captured fighters were transferred from the ordinary prisons in which they were housed to these special camps. For some time at least, captured FLN fighters were not prosecuted solely for taking part in the conflict.⁸⁵ A letter from the French military command in Algeria to the French Ministry of Justice dated November 1959 provided that:

les rebelles pris les armes à la main, qui ne sont coupables d’aucun crime terroriste avant leur incorporation dans un groupe rebelle, ne sont pas poursuivis, mais internés dans des camps militaires. Ils sont ainsi assimilés aux membres d’une armée ennemie.⁸⁶

In the view of the ICRC, prisoners detained in these special camps received treatment ‘closely related to that of the prisoner-of-war camps’.⁸⁷

80 For the text of the declaration, see F. Siordet, above note 66, pp. 139–140.

81 Norman J. Padelford, ‘International law and the Spanish civil war’, in *American Journal of International Law*, Vol. 31, 1937, p. 226, citing a report in the *New York Times* of 10 August 1936. See also Ann Van Wynen Thomas and A. J. Thomas, ‘International legal aspects of the civil war in Spain, 1936–39’, in R. Falk, above note 69, p. 122.

82 François Bugnion, ‘*Jus ad bellum, jus in bello* and non-international armed conflicts’, in *Yearbook of International Humanitarian Law*, Vol. 6, pp. 167–198.

83 A. Rosas, above note 71, p. 149.

84 F. Bugnion, above note 82.

85 A. Fraleigh, above note 69, p. 196; A. Rosas, above note 71, p. 149.

86 Letter of November 1959, quoted in Michel Veuthey, ‘La guérilla: le problème du traitement des prisonniers’, in *Annales d’Études Internationales*, Vol. 3, 1972, p. 130. The English text that appears in M. Bedjaoui, above note 70, p. 149, reads in the relevant part: ‘rebels captured with guns in their hands, guiltless of any crimes of terrorism before joining a rebel group, are not prosecuted but are interned in military camps. They are treated as members of an enemy army’.

87 ICRC, *The ICRC and the Algerian Conflict*, ICRC, Geneva, 1962, cited in A. Rosas, above note 71, p. 149.

During the attempted secession of Biafra, the Federal Government of Nigeria issued an Operational Code of Conduct for the Nigerian Army. This Code included a number of instructions on the conduct of the conflict, including the provision that '[s]oldiers who surrender will not be killed. They are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honour'.⁸⁸ Despite the conflict ending with a clear 'winner', the government did not prosecute members of the Biafran forces, instead releasing all captured prisoners.⁸⁹

A more recent example in which the prisoners of war regime was applied took place during the conflicts in the former Yugoslavia. The 22 May 1992 Agreement between representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Party of Democratic Action, and the President of the Croatian Democratic Community committed the parties to respect and ensure respect for Common Article 3 of the Geneva Conventions and brought into force other provisions of IHL. The provision relating to captured combatants provided that '[c]aptured combatants shall enjoy the treatment provided for by the Third Geneva Convention' relative to the treatment of prisoners of war.⁹⁰

While the practice is certainly not such as to argue that there is a rule of customary international law that requires captured fighters to be granted prisoner of war status, or even to be treated as prisoners of war, the position is more nuanced than the law of non-international armed conflict suggests. States may not be willing to declare in advance, through the law, that they will act in this manner. However, in practice, in certain large-scale non-international armed conflicts, captured fighters have indeed been treated as prisoners of wars or have benefitted from some form of combatant immunity. Much of the practice pre-dates the 'war on terror' and it may be that state classification of the armed groups against which they fight as 'terrorists' will affect the treatment of captured fighters in this regard. In many respects, it is too early to reach a definitive conclusion. However, it is interesting to note that the United Kingdom *Manual of the Law of Armed Conflict* recommends that, 'while detained in military custody, persons who have taken a direct part in hostilities should be given the same treatment as if they were prisoners of war' and that '[w]herever possible, treatment equivalent to that accorded to prisoners of war should be given'.⁹¹

88 'Operational Code of Conduct for the Nigerian Army', July 1967, para. 4(e), reproduced in A. H. M. Kirk-Greene, *Crisis and Conflict in Nigeria: A Documentary Sourcebook 1966-1969: Volume I*, Oxford University Press, London, 1971, pp. 455-456.

89 'Note from the Nigerian Minister of Defence to the ICRC delegation in Lagos, 14 May 1970, ICRC Archives, file 219 (186); ICRC Annual Report 1970, 10', cited in F. Bugnion, above note 82.

90 Agreement No. 1 of 22 May 1992, para. 2.4, reproduced in Marco Sassoli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 2006, p. 1765.

91 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, pp. 398 and 390.

Conclusion

Commitments of armed groups are important. Particularly in light of the fact that armed groups cannot sign and ratify the grand multilateral treaties of the law of armed conflict, commitments provide armed groups with an opportunity to commit to the law. They allow engagement with the armed group on humanitarian norms in general and the norms to which they have committed in particular. Although, in some instances, armed groups may commit to norms that go below existing legal standards, the fact that the position has been set out in advance and in writing means that the international community can engage with them on the required standards. Nonetheless, it may prove difficult to get the group to move away from an existing commitment, even if it falls below international standards. In other instances, armed groups commit to standards that go above and beyond those required by the law of armed conflict, and this is to be welcomed. Commitments of armed groups, and indeed states, can also add nuance to the law. Even in areas in which the law is clear, the practice may suggest that the picture is altogether more complex. The law and practice relating to prisoners of war is one such instance. In sum, *ad hoc* commitments form a useful addition to the traditional materials of treaties, customary international law, and judicial decisions, and are deserving of greater consideration than is currently afforded to them.

A collection of codes of conduct issued by armed groups*

Foreword

This issue of the International Review of the Red Cross addresses the importance of understanding armed groups and the norms by which they are bound. One way of gaining insight into armed groups and engaging with them on improving respect for the law is to examine the rules and decisions that they choose to adopt.

In 2008, the International Committee of the Red Cross (ICRC) published a study on increasing the respect for international humanitarian law (IHL) in non-international armed conflicts.¹ The study identified codes of conduct as one of the legal tools to improve compliance of armed groups with IHL.² While they do not guarantee respect for the law, codes of conduct provide an important glimpse into the ideological and organizational structure of an armed group, its chain of command, and the rights and obligations that the hierarchy of the armed group chooses to bestow on its members. Furthermore, codes of conduct can provide a basis upon which legal representations can be made and accountability required regarding norms of IHL.³

Several authors in this edition of the Review discuss the importance of codes of conducts for understanding and engaging with armed groups.⁴ The Review has thus decided to include a collection⁵ of codes of conduct, or relevant extracts thereof.⁶ All materials in this collection are publicly available.⁷ They originate from various geographic areas and time periods – from China in 1947 to Libya in 2011 – and provide an insight into different armed groups' views of and appreciation of humanitarian norms.⁸ The publication of these codes of conduct does not in any way imply endorsement by the Review of the content of these documents.

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* This selection is based on the ICRC collection compiled by Olivier Bangerter, former ICRC Advisor for Dialogue with Armed Groups. The present selection was assembled and introduced by Nelleke van Amstel, ICRC Unit for Relations with Arms Carriers.

What constitutes a ‘code of conduct’?

The term ‘code of conduct’ is hereby used to refer to documents that, albeit different in length and form, contain at their core lists of rules and responsibilities that armed groups’ hierarchies set out for their members. These rules aim to regulate both the members’ internal behaviour and their relations outside the group. As one author in this edition of the *Review* remarks, rules contained in a code of conduct may repeat existing obligations of international humanitarian law (IHL), fall short of it, or extend beyond it.⁹ Codes of conduct rarely specify whether a particular rule is derived from a certain branch of law – such as IHL or human rights law – or whether they stem from other ethical or social norms. The content of these documents demonstrates the *acceptance* of the included norms, rather than their concrete foundations in law.

Codes of conduct are not the only documents that include behavioural norms adopted by armed groups: agreements between parties to a non-international armed conflict (NIAC), unilateral declarations, and statements are examples of other such documents. The present collection, however, focuses on codes of conduct in order to shed light on this relatively little explored category of documents.¹⁰

The legal significance of codes of conduct

The choice of an armed group to adopt a code of conduct including rules of IHL does not affect the applicability of IHL to an armed group involved in an NIAC. As a party to the conflict, the said group will be bound by the relevant rules of NIAC (Common Article 3 to the Geneva Conventions, customary IHL, and Additional Protocol II, where applicable), regardless of the content of its own code of conduct.

1 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, February 2008.

2 Other tools mentioned in the study include special agreements, unilateral declarations, and inclusion of humanitarian law in ceasefire or peace agreements (*ibid.*).

3 *Ibid.*, p. 16.

4 In particular, see Sandesh Sivakumaran, ‘Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate targets and prisoners of war’, and Olivier Bangerter, ‘Reasons why armed groups choose to respect international humanitarian law or not’, in the present issue.

5 A broader collection of documents relating to issues of IHL (including unilateral declarations, deeds of commitment, codes of conduct, special agreements, and memoranda of understanding) will soon be made available online by Geneva Call (see <http://www.genevacall.org> (last visited 16 December 2011)).

6 Codes of conduct are often introduced by political statements, which have not been reproduced here.

7 The present collection is in no way exhaustive, owing largely to the fact that not many codes of conduct are publicly available or disseminated.

8 Additionally, for the code of conduct of the Taliban, see the annex to Muhammad Munir, ‘The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law’, in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 103.

9 See S. Sivakumaran, above note 4.

10 The ELN and FARC declarations of behavioural norms are exceptionally included in the present collection because they serve the purpose of codes of conduct.

Furthermore, the adoption of codes of conduct should not be assumed to guarantee compliance with IHL by armed groups. As previously discussed, such an adoption presents one way for armed groups to indicate their willingness to be bound by a norm in an international legal environment that does not allow them to sign or ratify treaties.

While the practice of organized armed groups may contain evidence of the acceptance of certain rules in NIAC, the ICRC Customary Law Study has considered the legal significance of such practice to be unclear.¹¹ It has been argued that the practice of armed groups (through their acts or omissions) should also be considered as contributing to the formation of customary rules on NIAC.¹² At present, it is uncertain to what extent this role would be accepted by states or international courts and tribunals.

Codes of conduct as tools for respecting the law

The potential of codes of conduct to increase respect for the law cannot be overlooked. As described in the ICRC Study, 'codes of conduct that are consistent with IHL provide a concrete mechanism for persons to respect the law'.¹³ First, codes of conduct have the advantage of being short and simple texts. If integrated properly, IHL rules can be stated in a way that is easy to understand and to be followed by members of the armed group. Complex legal texts are unlikely to capture the attention of fighters.

Second, discussions on, and the drafting of, codes of conduct may cause groups to reflect on IHL and on their behaviour in comparison to it. In some cases, the inclusion of norms of IHL in codes of conduct may mean that the leadership of an armed group expresses its willingness to recognize IHL as the applicable law. Even when an armed group chooses to do so purely for reasons of propaganda, the passing of a code of conduct can represent a first step towards the group's improved 'ownership' of rules originally created by states, and towards ensuring respect for the mentioned provisions of IHL.¹⁴

Acceptance of a code of conduct containing IHL norms may lead to further preventative steps within the group, such as the dissemination of the code

11 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, Cambridge, 2005, p. xxxvi.

12 See Marco Sassòli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law', in *International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 20–26; 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, 2007, pp. 661–662; Sandesh Sivakumaran, 'Binding armed opposition groups', in *International & Comparative Law Quarterly*, Vol. 55, No. 369, 2006, pp. 374–375; Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Oxford University Press, New York, 2006, pp. 28–29.

13 See M. Mack, above note 1, p. 22.

14 See Geneva Academy of International Humanitarian Law and Human Rights (ADH), 'Rules of engagement: protecting civilians through dialogue with armed non-state actors', October 2011, p. 6, available at: <http://www.adh-geneva.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf> (last visited 6 December 2011).

itself or the instruction and training of the members in its rules. It is to be hoped that a better overall knowledge of the rules of IHL will induce better compliance with IHL.

Finally, the potential of these instruments lies in the reality that armed actors who commit violations in NIACs are not acting completely autonomously. They are usually part of a hierarchical structure, and their actions depend, at least in part, on orders and rules passed on by the hierarchy. As an expression of such rules, codes of conduct can be a powerful tool for compliance. In many instances, the perceived deterrent value of punishment for violations of rules stipulated by the group itself may be greater than the threat of international prosecution for violations of IHL.

Codes of conduct as tools for humanitarian actors

External actors such as humanitarian workers and academics can benefit from studying the adoption of codes of conduct by armed groups. These documents can provide an entry point for substantive dialogue on the law, and a basis for engaging armed groups in addressing violations.¹⁵ Additionally, the content of these documents can reveal the views of armed groups on humanitarian standards. As will be discussed later in this issue with regard to, for example, rules on the treatment of prisoners, the practice of armed groups as reflected in their codes and agreements with other parties can highlight their equivalence to or disparity with IHL.¹⁶ The rules chosen to be included and the discussions surrounding the adoption of these documents can provide further insight into the reasons why armed groups decide to respect, or not, certain rules.¹⁷

15 See Olivier Bangerter, 'Disseminating and implementing international humanitarian law within organized armed groups: measures armed groups can take to improve respect for international humanitarian law', in International Institute of Humanitarian Law, *Non-state Actors and International Humanitarian Law: Organized Armed Groups – A Challenge for the Twenty-first Century*, FrancoAngeli, Milano, 2010, pp. 187, 192, 196; see also M. Sassòli, above note 12.

16 See S. Sivakumaran, above note 4.

17 See O. Bangerter, above note 4.

CODES OF CONDUCT

Workers' and Peasants' Red Army / People's Liberation Army (PLA) – China

The PLA was first formed in 1927 as the Red Army. With the founding of the People's Republic of China in 1949, the PLA became the national armed forces.

The 'Three Main Rules of Discipline and the Eight Points for Attention' were drawn up by Mao Zedong and others during the Second Revolutionary Civil War (1927–37). Although at times different units had varying versions, in 1947 a standard version was issued and is now the principal set of disciplinary regulations and basic code of conduct for every member of the PLA.

Three Main Rules of Discipline:

1. Obey orders in all your actions.
2. Do not take a single needle or piece of thread from the masses.
3. Turn in everything captured.

Eight Points for Attention:

1. Speak politely.
2. Pay fairly for what you buy.
3. Return everything you borrow.
4. Pay for anything you damage.
5. Do not hit or swear at people.
6. Do not damage crops.
7. Do not take liberties with women.
8. Do not maltreat captives.

In 1928, four policies for the lenient treatment of captives were also laid down. They were:

1. Do not hit, swear at, kill, or maltreat captives.
2. Do not search captives' pockets.
3. Give medical treatment to wounded captives.
4. Let captives stay or set them free at their own will.

These rules were later developed into Five Policies for Lenient Treatment of Captives:

1. Do not kill or injure captives.
2. Do not hit, swear at, maltreat, or insult captives.
3. Do not confiscate the private property of captives.
4. Give medical treatment to sick and wounded captives.
5. Set the captives free.

In 1937, three main principles for political work were put forward; among them was a mandate to give lenient treatment to captives. In October 1947, Mao Zedong said in the *Manifesto* of the CPLA that ‘our army will not kill nor insult any of the Guomindang soldiers and officers who have laid down their arms. We will collect those who are willing to stay and repatriate those who are willing to leave’.¹⁸

New People’s Army (NPA) – Philippines

The New People’s Army was formed in 1969. Their ‘Basic Rules’ were issued in the same year and also include the ‘Three Rules and Eight Principles’, following the example of the Chinese PLA.¹⁹

PRINCIPLE IV – Discipline

Point 1. The discipline of all officers and men of the New People’s Army is a conscious discipline guided by Marxism-Leninism-Mao Zedong Thought, the Communist Party of the Philippines and the organizational principle of democratic centralism. The Party committees in the army shall see to it that the line, policies and decisions of the Party are implemented by the military command at all levels.

Point 2. The New People’s Army adheres to the following discipline:

- a. An individual is subordinate to the whole army;
- b. The minority is subordinate to the majority;
- c. The lower level is subordinate to the higher level;
- d. All members are subordinate to the Military Commission and the Central Committee.

18 Reproduced in He Xiaodong, ‘The Chinese humanitarian heritage and the dissemination of and education in international humanitarian law in the Chinese People’s Liberation Army’, in *International Review of the Red Cross*, Vol. 83, No. 841, pp. 141–153.

19 Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, Annex C – Basic Rules of the New People’s Army, pp. 90–91.

Point 3. All officers and men are prohibited from committing the slightest damage against the interest of the masses and they are always subject to the Three Main Rules of Discipline and the Eight Points of Attention of Comrade Mao Zedong so as to always advance their revolutionary integrity.

- A. The Three Main Rules of Discipline are:
 - 1) Obey orders in all actions.
 - 2) Do not take even a single needle or thread from the masses.
 - 3) Turn over everything confiscated to the proper body.
- B. The Eight Points of Attention are:
 - 1) Be polite in speech.
 - 2) Pay all purchases with the appropriate amount.
 - 3) Return everything borrowed.
 - 4) Compensate all damages.
 - 5) Do not hurt or curse anybody.
 - 6) Do not destroy the people's crops.
 - 7) Do not take liberties with women.
 - 8) Do not be cruel to captives.

Point 4. All officers are strictly prohibited from using bourgeois and feudal ways in dealing with the fighters and the masses.

Point 5. All officers and men are strictly prohibited from gambling and drunkenness.

Point 6. The Party committee in the army in the appropriate level or the military court that can be created by it shall conduct the trial and shall decide on the cases filed against officers and men at the level where the error or crime was committed. The following penalties shall be meted out based on the gravity of the crime:

- a. Strong warning
- b. Strong warning and transfer to another area of work
- c. Demotion
- d. Suspension
- e. Expulsion
- f. Expulsion and death

Point 7. In all types of penalties, except for expulsion, and expulsion and death, the erring individual or group shall be re-educated for a definite period of time and shall also apologize to the aggrieved party in public.

Point 8. The most severe punishment of expulsion and death shall be imposed on those proven to have committed treachery, capitulation, abandonment of post, espionage, sabotage, mutiny, incitement to rebellion, murder, theft, rape, arson and severe malversation of people's funds.

Point 9. All cases shall be thoroughly investigated and all accused shall be given a just trial.

National Liberation Army (ELN) – Colombia

The National Liberation Army (*Ejército de Liberación Nacional*, ELN) came into existence in 1964 and is still active in Colombia. The exact date of this code of conduct is unknown.

Code of war²⁰

...

Respect for the civilian population

Civilians shall not be used as human shields during combat.

When the enemy takes civilians hostage in its movements, efforts shall be made to avoid harming them during attacks on enemy forces.

Military operations shall be carried out against enemy forces in such a way as to avoid indiscriminate attacks.

Efforts shall be made to avoid damage to civilian property and installations resulting from military operations and to make reparations where possible.

The civilian population shall be informed of the location of mined areas.

No acts shall be undertaken with the sole purpose of spreading terror among the population.

There shall be no forced displacement of the civilian population from combat zones.

Those under the age of 15 shall not be recruited into the permanent military force. They may be involved in revolutionary activities other than participation in hostilities.

Individuals who join paramilitary groups and their possessions shall cease to be seen as civilians and civilian property.

The organization holds certain persons captive for political reasons, with the aim of making their demands known. Such persons shall be treated with due respect and their families shall be informed of their situation.

Limits on the methods and means of warfare

When carrying out acts of sabotage, our forces shall not target installations more useful to the community than the enemy.

²⁰ Published in David Arce Rojas, *Petróleo y Derecho Internacional Humanitario*, Pontificia Universidad Javeriana, Santa Fe de Bogotá, 1998, pp. 143–147.

Acts of sabotage shall, as far as possible, avoid causing environmental damage.

Religious sites, cultural objects, and installations containing dangerous forces such as dams or nuclear material shall not be attacked.

Poisonous gases shall not be used and water supplies shall not be poisoned.

In combat zones, vehicles and facilities bearing the Red Cross emblem shall be respected. It is forbidden for our forces to use this emblem to mislead the enemy.

Our commanders shall prevent looting and pillaging once the enemy surrenders its position. They shall arrange for the retrieval of objects needed by our forces.

Dignified treatment of prisoners

It is prohibited to kill or injure an adversary who has surrendered or is hors de combat.

Prisoners of war shall be treated humanely and receive medical assistance. Their belongings shall be confiscated.

Information about the rank and name of those captured shall be made public.

Efforts shall be made to hand prisoners over to the Red Cross after a brief period of captivity.

Neither mercenaries nor spies shall be granted the protection guaranteed to prisoners of war. They shall be treated humanely.

Executions

The death penalty shall be applied to those responsible for war crimes.

Those accused of war crimes shall be guaranteed due process.

Minors, pregnant women, and mothers with young children shall not be sentenced to death.

Executions shall be carried out in such a way as to avoid unnecessary suffering.

Efforts shall be made to inform family members of the location of the remains.

War taxes

To fund the war of liberation and help to establish popular power, the ELN imposes war taxes and social taxes, the latter used to promote development in the areas under its influence.

These taxes and other demands made shall be focused on transnational companies with local monopolies and individuals who have made themselves rich through corruption and violating the people's interests. They shall also be imposed on those who collaborate unconditionally with the armed forces of the government and paramilitary forces.

Capital invested in development in areas under guerrilla influence shall be respected and these areas shall be subject to a contribution stipulated by common agreement.

Through its governing bodies the ELN takes responsibility for the rational, collective use of the resources generated from the collection of these taxes, which shall be centralized under the authority of the National Directorate.

In order to pressurize them into paying these taxes and meeting other demands, the ELN shall temporarily hold captive individuals representing the aforementioned sectors. The latter shall be immediately released once the amount demanded by the ELN has been paid.

Captives shall be treated humanely and their families kept informed of their situation.

The ELN shall try to avoid holding pregnant women, minors, elderly people, and those in delicate health in captivity.

As part of its policy of categorically disassociating itself from the drug-trafficking mafia, the ELN shall not impose any kind of taxes or demands on this sector for their activities. The ELN shall not permit the growing of crops, creation of laboratories, or building of landing strips related to this sector in the areas under its control. The trade in drugs shall also be banned.

Revolutionary Armed Forces of Colombia, People's Army (FARC-EP) and ELN – Colombia²¹

The message below containing rules of conduct was signed and sent to their militants by the FARC Secretary of Central Staff and by the ELN Central Command in 2009.

Rules of conduct with the masses

In the belief that we should embody new men and women, setting a revolutionary example to our people while behaving in an unassuming way, in order to rally them to our cause, the commanders of the Simon Bolivar Guerilla Coordinating Board [Coordinadora Guerrillera Simón Bolívar, CGSB], gathered at its first 'Jacobo Arenas' summit, call upon Bolivarian combatants to abide by the following rules of conduct with the masses.

1. Our daily behaviour, and the purpose underlying our activities, should be borne in the people's interests.

21 Source: annex to a message from both organizations to their militants, November 2009, available at: <http://redbarrio.wordpress.com/2009/12/22/farc-y-eln-detienen-la-confrontacion-entre-las-dos-fuerzas/> (last visited 30 September 2011).

2. We should respect the political, philosophical, and religious ideas and attitudes of the population, and in particular the culture and autonomy of indigenous communities and other ethnic minorities.
3. We should not prevent people from exercising their right to vote, nor force people to vote.
4. The safety of working people and their homes and property should be taken into account when planning and executing political and military activities, and in our daily movements.
5. We should respect the various measures taken by collaborators to keep their links to us secret.
6. Care should be taken to maintain internal discipline when working with the masses, in order to protect innocent people and those friendly to our cause, ensuring that our mistakes or failures do not make them a target of terrorism and hatred at the hands of the official army and its paramilitary forces.
7. Wherever and whenever the masses are under attack from the official army and its paramilitary forces, subjected to bombardment and the destruction of their property, we must actively denounce and counter these terrorist activities so that the people feel supported by us.
8. Murder and any kind of proven outrages committed against the population should be seen as a crime.
9. We should not impose on the masses. We should try to ensure that they see our weapons as their own.
10. Accusations made by communities about attacks by combatants and other individuals should be investigated exhaustively with input from the community.
11. Leaders and combatants should study and comply with the rules of international humanitarian law that are applicable to our revolutionary war.
12. If it should prove necessary to detain a militant or supporter of a sister organization for alleged or proven wrongdoing, the case and, if possible, the individual should be handed over to the said organization.
13. Our founding principle in all circumstances is respect for the right to life.
14. Leaders and combatants should bear in mind that executions may only be carried out for very serious crimes committed by enemies of the people and with the express authorization in each case of each organization's senior governing body. In all such cases, evidence must be examined and decisions taken collectively. The leadership must produce a written record setting out the evidence.
15. Alcoholism, drug addiction, theft, and dishonesty are counterrevolutionary vices that damage people's trust in us.
16. We must avoid abusing people's trust and generosity. We must not demand goods and property for our personal gain.

National Redemption Army (NRA) – Uganda

The National Redemption Army was founded in 1981 and became the national armed forces of Uganda in 1986.

The National Resistance Army Code of Conduct²²

[abridged]

A. Dealing with the Public

1. Never abuse, insult, shout at or beat any member of the public.
2. Never take anything in the form of money or property from any members of the public, not even somebody's sweet bananas or sugar-cane on the grounds that it's mere sugar-cane, without paying for the same.
3. Pay promptly for anything you take and in cash.
4. Never kill any member of the public or any captured prisoners, as the guns should only be reserved for armed enemies or opponents.
5. Return anything you borrow from the public.
6. Offer help to the members of the public who may be in the territory of your unit.
7. Offer medical treatment to the members of the public who may be in the territory of your unit.
8. Never develop illegitimate relations with any woman because there are no women as such waiting for passing soldiers yet many women are wives, or daughters of somebody somewhere. Any illegitimate relationship is bound to harm our good relations with the public.
9. There should be no consumption of alcohol until the end of the war. Drunken soldiers are bound to misuse the guns which are given to them for the defence of the people.

B. Relationships among the Soldiers

1. The lower echelons of the army must obey the higher ones and the higher echelons must respect the lower ones.
2. In decision making, we should use a method of democratic centralism where there is democratic participation as well as central control.

22 Reprint with permission from Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, New York, 2007, pp. 371–374. The complete document is printed in Ondoga Ori Amaza, *Museveni's Long March from Guerrilla to Statesman*, Fountain, Kampala, 1998, pp. 246–251. The exact date of signing is unknown.

3. Every officer, cadre or militant must strive to master military science in order to gain more capability so that we are in a position to defend the people more efficiently.
4. The following tendencies can be injurious to the cohesion of the army and are prohibited:
 - a) Quest for cheap popularity: on the part of officers or cadres by tolerating of wrongs in order to be popular with soldiers.
 - b) Liberalism: which entails weak leadership and tolerating of wrongs and mistakes. In case of liberalism, the person in authority knows what is right and what is wrong, but due to weak leadership, he does not stand firmly on the side of right.
 - c) Intrigue and double talk: this can cause artificial confusion even when there is no objective basis for confusion.
5. The following methods should be used in correcting mistakes within the army:
 - a) Open criticism of mistakes instead of subterranean grumbling which is favoured by reactionaries.
 - b) The holding of regular meetings at which all complaints are heard and settled.
 - c) A distinction should always be made between errors due to indiscipline, corruption or subversion and treatment of each should be different.
6. All commanders should ensure that all soldiers, depending on particular circumstances, should at any one particular time either be fighting, studying military science or undertaking self-improvement in academic work, taking part in recreational activities, or resting. There should be no idleness whatsoever which breeds mischief.
7. Political education should be mandatory every day so that the cadres and militants can understand the reasons for the war as well as the dynamics of the world we live in. 'Conscious discipline is better than mechanical discipline'.
8. Formation of cliques in the army is not allowed, at the same time the principle of compartmentalization should be strictly adhered to and understood. We should adhere to the principle of the 'need to know' and avoid the mistake of soliciting information for its own sake. The strategy of the NRA and the regular tactics should be known to all officers, cadres, and combatants. But operational matters should be known to those who need to know.
9.
 - (i) There shall be a High Command consisting of the Commander-in-Chief, who shall be Chairman, and eight other members to be appointed by the Commander-in-Chief.
 - (ii) All members of the High Command shall be members of the Army Council.
 - (iii) The High Command shall perform such functions as may be conferred upon it by any law in force in Uganda; or as the President may direct.

10. (i) There shall be a General Court-Martial, which shall be the supreme trial organ under this Code.
- (ii) This General Court-Martial shall consist of:
 - a) a Chairman;
 - b) two senior officers;
 - c) two junior officers;
 - d) one Political Commissar; and
 - e) one non-commissioned officer.
11. (i) There shall be a Unit Disciplinary Committee for each Army Unit which shall consist of:
 - a) the Second in Command who shall be the Chairman;
 - b) the Administration Officer of the Unit;
 - c) the Political Commissar of the Unit;
 - d) the Regimental Sergeant-Major or Company Sergeant-Major of the Unit;
 - e) two junior officers;
 - f) one private.
- (ii) The Unit Disciplinary Committee shall have powers to try all combatants below the rank of Provisional Junior Officer II for all offences except the following:
 - a) murder;
 - b) manslaughter;
 - c) robbery;
 - d) rape;
 - e) treason;
 - f) terrorism;
 - g) disobedience of lawful orders resulting in loss of life.
- (iii) A Unit Disciplinary Committee may refer any case in which its opinion is of a particularly complex nature to the General Court-Martial.

Revolutionary United Front (RUF) – Sierra Leone

The RUF was involved in the conflict in Sierra Leone from 1991 until 2002. The 'Eight Codes of Conduct' govern the RUF fighters' interactions with civilians.

The Codes provided in part:

- To speak politely to masses.
- To pay fairly for all [that] you buy.
- To return everything that you borrow.
- To pay for everything that you demand or damage.
- Do not damage crops.
- Do not take liberty from women.
- Do not ill-treat captives.
- Do not hate or swear [*sic*] people.²³

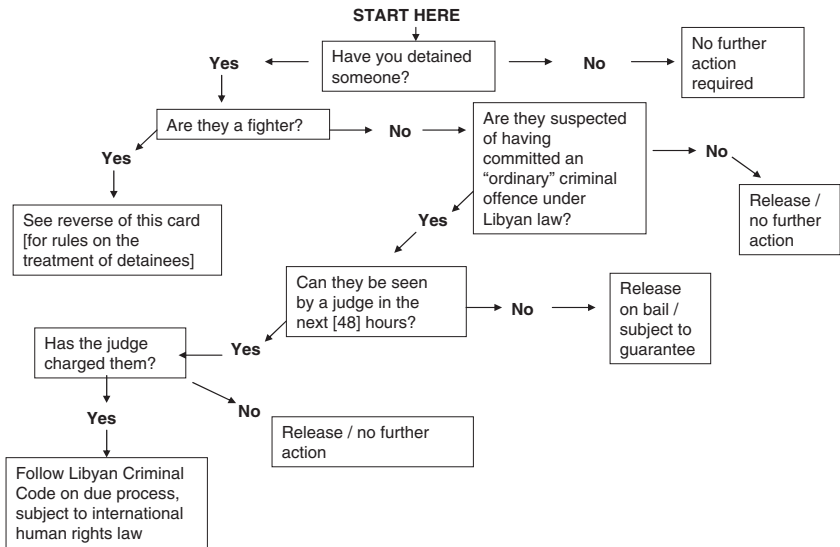
National Transition Council (NTC) – Libya

The National Transition Council was formed in February 2011, with the National Liberation Army as their military arm. At the time of writing, the NTC is in the process of forming a government, and the National Liberation Army is expected to become the national armed forces. The documents below are a set of guidelines issued by the NTC.²⁴

23 Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, available at: <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx> (last visited 24 October 2011).

24 Source: text adapted from slides available at: <http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt> (last visited 30 September 2011).

Procedure on detaining or capturing people



Rules on the treatment of detainees

Detainees must receive humane treatment AT ALL TIMES, from the moment of capture. DO respect detainees and protect them from harm

Humane Treatment:

- **DO NOT** use any form of physical, sexual or mental violence against any detainee. No form of torture or intimidation is allowed.
- **DO NOT** subject detainees to humiliating or degrading treatment such as displaying them in a publicly humiliating fashion.
- **DO NOT** take revenge on detainees.
- **DO NOT** hold individuals answerable for acts for which they are not personally responsible.
- **DO NOT** remove personal property from the detainees unless this is for security reasons. If any property is removed, a receipt must be provided to the detainee.
- **DO NOT** obey an order to carry out any of these prohibited acts. That order is unlawful.
- **REPORT ANY INCIDENTS OF INHUMANE TREATMENT TO A SUPERIOR OFFICER**

1. Give immediate medical treatment/first aid to anyone who needs it. There is a duty to search for, collect, and aid the injured and wounded from the battlefield of both sides. The dead must also be collected, treated with respect, and buried.

→ **Medical treatment:**

- Necessary and additional medical treatment should be available and accessible.
- Attempt to identify the dead. If this is not possible, then record (and if possible, photograph) the personal possessions with which the body is buried. This is to help with subsequent attempts to identify the person. Records of the dead and the location of their burial should be sent to the ICRC.

2. Take detainees to a safe place of detention

→ **Detention Centres must:**

- Be located away from the battlefield, be healthy and hygienic
- Be segregated according to gender and age (children (people under 18 years of age) must not be held with adults) and criminal offenders must be held separately
- Provide sufficient food, water, clothing and medical treatment to ensure the health of the detainees

3. Once at a place of detention follow these steps:

→ **Capture Card:**

a: Provide any further necessary medical treatment.

- This is necessary to safeguard you from war crimes charges (enforced disappearance of detainees)

b: A capture card must be made and a copy sent to the ICRC

- Any change in the detainee's place of detention and/or date of release must be recorded and notified to the ICRC

c: Interrogate if necessary. HUMANE TREATMENT must be observed at ALL times

→

- Captured fighters have no obligation to give any information beyond name, rank (if military), date of birth and identification number.

Interrogation:

- Any physical or mental coercion is prohibited to obtain statements. Detainees must not be subjected to violence or intimidation of any kind.

Rules on targeting and the use of violence

- ONLY target Qadhafi forces and others using force against you. Permissible targets include fighters, buildings, facilities and means of transportation being used or could be used for a military purpose.
- DO NOT allow persons who are less than 18 years of age to fight, even if they have volunteered to do so.
- AVOID as far as possible any effect on civilians of an attack against Qadhafi forces.
- DO NOT target fighters who are surrendering or are no longer fighting.
- DO NOT target civilians or places where there are only civilians.
- DO NOT target medical personnel, facilities, transports or equipment. These may be searched if you need to verify they are genuine, but REMEMBER that medical personnel are allowed by law to carry small arms to protect their patients.
- DO NOT target religious personnel.
- DO NOT target UN/ICRC/Red Crescent personnel or facilities.
- DO NOT harm cultural, educational and religious buildings and historic sites unless Qadhafi forces are using them for hostile purposes, and such harm is absolutely necessary.
- ONLY use the Red Crescent symbol to indicate medical personnel, facilities and transport and under direction of the competent authorities.

REMEMBER!
FIGHT ONLY FIGHTERS.
ATTACK ONLY MILITARY
TARGETS. SPARE CIVILIANS.

Protections of detainees

Summary of requirements to be observed by the detaining authority

Detainees are entitled to:

- Adequate medical care
- Access to exercise
- Freedom to practice their religion
- Family contact
- Food and water sufficient for good health
- Safe and adequate housing
- Adequate sanitary facilities
- A procedure to register complaints regarding conditions of their captivity (see following card)
- An independent agent to monitor compliance with these guidelines

The detaining authority must ensure detainees are not subjected to:

- Any acts of violence, intimidation, or humiliation
- Cruel, inhumane, humiliating, or degrading treatment
- Slave labour
- Dangerous work (for example, mine clearing)
- Any work which assists your military effort

SPECIAL PROVISIONS FOR WOMEN

- Female prisoners **MUST** have separate accommodation under female supervision
- Female prisoners may be searched **ONLY** by females
- Female prisoners **MUST** be especially protected against sexual violence

SPECIAL PROVISIONS FOR CHILDREN (PEOPLE UNDER 18 YEARS OF AGE)

- Children **MUST** have accommodation apart from adults unless with their families
- Children **MUST** have food, hygiene and medical care suited to their age
- Children **MUST** be able to continue their schooling

REMEMBER!

THE PURPOSE OF DETENTION IS NOT TO PUNISH BUT TO
PREVENT FROM FIGHTING

Source – adapted from: http://ehl.redcross.org/curriculum/module5/downloads/M5_Exp5C_re1.pdf

Procedure in the case of suspected breaches of the rules set out in these guidelines

Anyone who wishes to complain about a suspected violation of these rules, and in particular the mistreatment of detainees or the use of fighters who are less than 18 years of age, should be told the name and contact details of the person who has been designated to deal with complaints.

The complaints will be made in confidence. The person providing the information will be informed before being called as a witness.

Complaints must be investigated promptly, thoroughly, and in an impartial manner by an independent body.

SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

Confronting *Duch*: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia

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Abstract

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is unique because it is the first international criminal tribunal to allow victims of alleged crimes to act as civil parties at trial. This means that victims can have a role at the ECCC beyond being called as witnesses. After presenting the history of victim participation in

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national and international war crimes trials, this article examines how civil party participation shaped the trial proceedings at the ECCC, and how the civil parties viewed their interactions with the court. It concludes by reflecting on the positive and negative aspects of civil party participation in the Duch trial, and what implications such participation may have for future trials at the ECCC and other international criminal courts.

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To keep you is no gain, to destroy you is no loss.

(Khmer Rouge slogan)

The older you become, the more the history of the genocide comes back to you in an insidious way, a bit like poison that has been distilled into your body bit by bit. The only way to relieve things is to testify.

(Rithy Panh, Cambodian film director and screenwriter)

On 18 August 2009, the trial of Kaing Guek Eav (alias ‘Duch’) was in full swing in the courtroom of the Extraordinary Chambers in the Courts of Cambodia (ECCC) when a 52-year-old farmer named Neth Phally asked the presiding judge if he could show the court a photograph of his brother who had died at ‘S-21’, the notorious Tuol Sleng detention centre. Between 1975 and 1979, the accused, a former maths teacher turned Khmer Rouge revolutionary, had overseen the torture and execution of more than 12,000 people in his capacity as the prison’s head.

With the judge’s approval, Neth Phally carefully took out an 8-by-11-inch photograph of a young man with black, short-cropped hair and held it upright on the witness table in front of him. ‘I would like to show a photo of my brother’, he said. ‘[I]t is like he is sitting here . . . next to me . . . I believe that my brother will be at peace, having learned that justice is achieved through this court’. Phally leaned forward and turned to speak directly to his brother’s image: ‘The soul of you [will] be here with me and in the photo forever so that I can pay homage to you and dedicate . . . offerings . . . to you. I [will] never find [your] dead body . . . [so] this photo . . . represents the ashes and body of you’.¹

It was itself an extraordinary moment, rarely seen in the courtrooms of international criminal tribunals, where judges seldom, if ever, let victims or witnesses tell their stories for their own sake, and often admonish those who stray from reporting facts.

Three months after Neth Phally testified in Phnom Penh, we travelled to his farm in Kampong Cham province where he lives with his mother, his wife, and their

1 Extraordinary Chambers in the Courts of Cambodia (ECCC), *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007-ECCC/TC, available at: <http://www.eccc.gov.kh/en/case/topic/1> (last visited 1 September 2011). See also Neth Phally’s testimony on ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav ‘Duch’*, Case File No. 001/18-07-2007-ECCC/TC, 18 August 2009, Trial Day 60, pp. 109–110, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E1_64.1_TR001_20090818_Final_EN_Pub.pdf (last visited 7 September 2011).

teenage daughter. Phally took us to a small shrine he had recently built at the back of the house. Hanging above the altar, surrounded by incense sticks and a painting of the Buddha, was the portrait of his brother. 'What had led him to show the photograph in the courtroom?' we asked. 'There were many reasons', he replied.

To begin with, I wanted to show Duch my brother so he would know I was not accusing him for no reason. I also wanted my brother to see the man who was responsible for his suffering. You see when my brother was taken to Tuol Sleng he was blindfolded and couldn't see anyone. But in the courtroom I could show him the accused... I felt this would help release his soul from wandering and help him find peace so he could be reborn again.²

Neth Phally was one of ninety Cambodians and foreigners who participated in the *Duch* trial as 'civil parties' (in French, '*parties civiles*'). Of these, twenty-two testified in court about their imprisonment at S-21 or about the loss of one or more of their relatives there.³ To be accepted by the court as a civil party, each of the ninety had to show evidence of a 'physical, material or psychological' injury as a 'direct consequence' of the offences alleged in Duch's indictment.⁴ Unlike regular witnesses, they testified without taking an oath, could participate at various stages of the trial proceedings, and could comment in court upon the awarding of any reparations.⁵

Established in 2006 after prolonged negotiations between the Cambodian government and the United Nations, the ECCC⁶ is a national court with the mandate to try senior leaders and those most responsible for genocide, crimes against humanity, serious war crimes, and other crimes under Cambodian law that

2 Interview with Neth Phally, Kampong Cham province, 13 November 2009.

3 There were ninety-four civil party applicants at the initial hearing of the *Duch* trial in February 2009. During the investigation phase, twenty-eight were accepted as civil parties. During the trial, four of the remaining sixty-six applicants were rejected or withdrew their application. The sixty-two that were left had a provisional civil party status throughout the trial. Twenty-four of the sixty-two were ultimately denied civil party status at the judgment. Out of the pool of accepted and provisional civil parties, twenty-two were selected by the judges to testify at trial from a list submitted by the civil party lawyers. Decisions on civil parties' acceptance are detailed in Case 001, ECCC Trial Chamber, Judgment: see ECCC, Case File No. 001/18-7-2007/ECCC/TC, paras. 637–638, Judgment (Trial Chamber), 26 July 2010, available at: <http://www.eccc.gov.kh/en/documents/court/judgement-case-001> (last visited 7 September 2011).

4 ECCC, Internal Rules (revision 3), as revised on 6 March 2009, Rule 23(2). All revisions of the ECCC Internal Rules are available at: <http://www.eccc.gov.kh/en/document/legal/internal-rules> (last visited 7 September 2011).

5 *Ibid.*, e.g. Rules 23(6), 23(11), 24(2).

6 The ECCC consists of a Pre-trial Chamber, Trial Chamber, and Supreme Court Chamber. The Pre-trial and Trial Chambers are composed of five judges (three Cambodian and two international), while the Supreme Court Chamber contains seven judges (four Cambodian and three international). Every decision requires a 'super-majority', meaning an affirmative vote of at least four out of five judges in the Pre-trial and Trial Chambers, and at least five out of seven judges in the Supreme Court Chamber. A Cambodian and an international head the offices of the Co-Investigating Judges and Co-Prosecutors, while each accused is represented by at least two defence lawyers, one Cambodian and one foreign. See Law on The Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, 27 October 2004, Arts. 9, 14, 16, 20, 23. See also ECCC, Internal Rules, above note 4, Rule 22(1) and Rule 22(2), available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited 7 September 2011).

were committed during the Khmer Rouge era, which lasted from 17 April 1975 to 6 January 1979.⁷ At least 1.7 million people, fully one quarter of the population, were killed or died from some combination of starvation, exhaustion from slave labour, malnutrition, torture, or untreated diseases during the regime.⁸ The Court includes both national and international judges and staff, and has the authority to apply national and international laws. The *Duch* trial (Case 001) was its first case. Its second case (Case 002), which began in 2011, features three former Khmer Rouge leaders – Ieng Sary (Deputy Prime Minister and Foreign Minister), Khieu Samphan (Head of State), and Nuon Chea (Deputy Secretary of the Communist Party of Kampuchea).⁹ In November 2011, the Trial Chamber ruled that the fourth defendant, Ieng Thirith (Minister of Social Affairs and Action), was unfit to stand trial and that the proceedings against her should be stayed.¹⁰ The Co-Prosecutors responded by filing an appeal to prevent her release from detention.¹¹ A third and fourth case (Cases 003 and 004) are still before the Co-Investigating Judges.¹²

One of the ECCC's most innovative steps was the inclusion of civil parties in its proceedings. For the first time in an international criminal trial, victims of mass atrocity were included as civil parties, rather than as mere witnesses.¹³ During the *Duch* trial, all of the civil parties testified openly and publicly in the courtroom without the use of protective measures, such as image and voice distortion. One civil party, a French citizen of Cambodian descent, testified from France via a teleconference video.

7 Law on the Establishment of Extraordinary Chambers, above note 6, Arts. 1, 3, 4, 5, 6, 7, 8.

8 Estimations of the number of deaths vary. See Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, Praeger Publishers, Westport, CT, 2005, pp. 107–128.

9 The Trial Chamber held the Initial Hearing in Case 002 on 27–30 June 2011. See, ECCC Public Affairs, 'Trial Chamber announces agenda for Case 002 initial hearing', press release, 16 June 2011, available at: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20Press%20Release%20-%20002%20Initial%20Hearing%20Agenda.pdf> (last visited 7 September 2011).

10 See ECCC, Decision on Ieng Thirith's Fitness to Stand Trial, Case File No. 002/19-9-2007/ECCC/TC (Trial Chamber), 17 November 2010, available at: <http://www.eccc.gov.kh/en/document/court/decision-ieng-thirith039s-fitness-stand-trial> (last visited 27 November 2011).

11 See ECCC, [Corrected 1] Immediate Appeal Against Trial Chamber Decision to Order the Release of Accused Ieng Thirith, Co-Prosecutors, Case File No. 002/19-9-2007/ECCC/TC, 18 November 2011, available at: <http://www.eccc.gov.kh/en/document/court/corrected-1-immediate-appeal-against-trial-chamber-decision-order-release-accused-ien> (last visited 5 December 2011).

12 The investigation in Cases 003 and 004 have been controversial and have involved several exchanges between the Co-Investigating Judges and the International Co-Prosecutor. See statements by the parties available on the ECCC website at: <http://www.eccc.gov.kh/en/case/topic/286> and <http://www.eccc.gov.kh/en/case/topic/98> (last visited 27 November 2011). The international Co-Investigating Judge resigned on 9 October 2011. See ECCC Public Affairs, 'Press Release by the International Co-Investigating Judge', 10 October 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge> (last visited 27 November 2011).

13 Civil parties have since been included in other criminal tribunals, including the International Criminal Court (ICC) and the Special Tribunal for Lebanon, although the full extent of participatory rights differs from court to court. See, e.g., ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, 'Decision on Victims' Participation: Public', paras. 93–95 (Trial Chamber I), 18 January, 2008; Rome Statute, Art. 68; ICC, Rules of Procedure and Evidence, Rule 85; Statute of the Special Tribunal for Lebanon, Art. 17; Special Tribunal for Lebanon, Rules of Procedure and Evidence, 10 November 2010, Rule 86.

During the proceedings, the civil parties spoke freely to the media about their testimonies and the trial process. They also brought moments of great intensity and emotion to the trial, as did the accused, a remarkably complex character who appeared, as one trial observer put it, 'intelligent, endowed with exceptional memory, well versed in human psychology and displaying great physical and mental resistance'.¹⁴ Duch and his attorneys (and, occasionally, the judges) sparred with some of the civil parties, challenging their identities and the truthfulness of their testimonies. This, in turn, brought forceful remonstrations from the civil party lawyers. Chaos never prevailed, but there were moments when it appeared that the proceedings would spiral out of control.

In this article, we examine how civil party participation in the *Duch* trial shaped the trial proceedings, and how the civil parties viewed their interactions with the ECCC. International tribunals are increasingly embracing the notion of victim participation.¹⁵ However, little research has been conducted into the impact of such participation, either on the administration of justice or on the participants themselves.

As a first step toward remedying this oversight, we studied the transcripts of the Duch trial and, in late 2009, interviewed twenty-one of the twenty-two civil parties who had testified. In August 2010, soon after the verdict was announced, we spoke with seventeen of the twenty-one civil parties whom we had interviewed eight months earlier. In our interviews we probed the meaning that the civil parties had derived from the experience of testifying. What motivated them to testify and what was it like to appear before the accused? What did they think of the behaviour of the judges, prosecutors, and defence attorneys? Was the process fair, the verdict just, and the sentence appropriate? We supplemented their responses with interviews with current and former members of the Cambodia court – judges, prosecutors, and administrators – as well as lawyers, psychologists, and human rights workers who interacted with the civil parties on a regular basis.

By grounding this article in a review of trial transcripts and the views and opinions of a relatively small number of individuals, we run the risk of formulating general conclusions from a limited data set. But our aim is not to provide an overarching theory about the effects of international criminal trials on individual survivors. Instead we intend to explore the process by which a group of direct and indirect victims of the crimes committed at Tuol Sleng prison engaged in an international criminal tribunal and how their experience of testifying affected their lives and their quest for justice.

To set a context for this discussion, we begin with a brief account of the history of victim participation in national and international war crimes trials and the civil law tradition out of which it emerges. We conclude by reflecting on the positive and negative aspects of civil party participation in the *Duch* trial, and what

14 See Thierry Cruvellier, 'Cambodia: reflections on the *Duch* trial', in *Crimes of War Project*, 26 July 2010, available at: <http://www.crimesofwar.org/commentary/regions/cambodia-reflections-on-the-duch-trial/> (last visited 1 September 2011).

15 *Ibid.*

implications our findings may have for future trials at the ECCC, the ICC, and other domestic and international war crimes tribunals.

Civil party participation in war crimes trials

Victim participation in criminal trials is not a novel phenomenon, but historically it has been more typical in countries with civil law traditions than in those with common law traditions. This distinction is important. The common law system, which is practised in the United Kingdom, the United States, and most former and current Commonwealth countries, tends to focus on the adversarial nature of criminal proceedings: the prosecution and the defence make their cases to the jury and the judge acts mainly as a referee, mediating the process and helping the jury fulfil its fact-finding function. The role of victims in most common law systems is largely limited to that of being a witness. As witnesses, victims can only speak if called on by the prosecution (or defence) and can only answer questions that are posed to them. In some common law countries, such as the United States, victims may also be allowed to provide ‘impact statements’ during the sentencing phase to make the court aware of facts that could contribute to determining an appropriate sentence.

By contrast, in inquisitorial courts within the civil law system – a system that is predominately utilized by national courts in continental Europe, most of Latin America, many parts of Africa and Asia, and recent adopters of Western legal traditions (for example, Japan) – one or more investigating judges generally supervise the compilation of a dossier (which can include a wider range of evidence than is permitted in common law courts), to which the accused must respond at trial. Curran writes:

the judge has great latitude to bring in any matter that might recreate the past and shed some light on events only indirectly related to the matters at hand, and particularly aspects that might shed light on the moral character and psychological outlook of the perpetrator within the context in which he or she acted.¹⁶

Unlike the relatively passive role of the common law judge, the inquisitorial judge actively controls the trial’s direction and questions witnesses. In such systems, victims may institute proceedings or seek compensation by applying to join the criminal prosecution as a civil petitioner (*constitution de partie civile*). Victims may also benefit from legal representation, present evidence, cross-examine witnesses, and make closing statements.¹⁷

Recent international tribunals have had to decide which of these two models to adopt – common law or inquisitorial civil law – or whether to create a

16 Vivian Grosswald Curran, ‘Globalization, legal transnationalization and crimes against humanity: the Lipietz case’, in *American Journal of Comparative Law*, Vol. 56, Spring 2008, p. 376.

17 See Charles P. Trumbull IV, ‘The victims of victim participation in international criminal proceedings’, in *Michigan Journal of International Law*, Vol. 29, Summer 2008, p. 778.

hybrid of the two. Because of this, empirical research is desperately needed to help practitioners better understand the impact of each model on victims and the implementation of justice more generally.

Civil party participation in World War II trials

Little, if anything, is known about the experiences of victims who have testified before international war crimes tribunals. A review of English-language scholarship covering the hundreds of war crimes trials that followed World War II reveals not a single empirical study of victims and their perceptions of the trial process.¹⁸ It is tempting to dismiss this omission as scholarly lack of interest or oversight. But it seems more likely that the experiences of victims were overlooked in the post-World War II years because they did not factor into the larger public debates at the time, especially in Germany and Japan, where the very legitimacy of the trials was hotly contested.¹⁹ The French sociologist Annette Wieviorka suggests that this paucity can be attributed, in part, to the reluctance of many Holocaust survivors in the years immediately following World War II to speak publicly about the atrocities that they experienced.²⁰ And, unlike today, there were few formal support systems for survivors actively encouraging them to speak publicly about past abuses.

It was not until the trial of the SS officer Adolf Eichmann that a forum was created for victims to share their memories of the Holocaust with the world. The Eichmann trial, according to Wieviorka, marked the advent of an 'era of testimony' for victims of mass atrocities that continues to this day.²¹ She points to the pedagogical and commemorative role that victim-witnesses played in having, in the words of the prosecutor, Attorney-General Gideon Hausner, lit 'a spark in the frigid chamber which we know as history'.²² But not all observers of the Eichmann proceedings thought these new functions for war crimes trials were necessarily a good thing.

In *Eichmann in Jerusalem*, the writer and philosopher Hannah Arendt betrays her impatience with the 'endless sessions' of survivor testimonies. The victims' speeches occupied half the court's agenda and, at times, 'degenerated into a bloody show, "a rudderless ship tossed about on the waves"', where 'witness followed witness and horror was piled upon horror'.²³ She argues that, while every

18 Neither of the two major bibliographies on war crimes trials immediately following World War II contains any references to studies of victims and witnesses. See Norman E. Tutorow (ed.), *War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book*, Greenwood Press, New York, 1986; Inge S. Neumann (ed.), *European War Crimes Trials: A Bibliography*, Greenwood Press, New York, 1951.

19 The Allied Forces were more interested in vilifying the German and Japanese leaders in the eyes of their own people than in creating a forum for victims to tell their stories. See, for example, Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992.

20 See Annette Wieviorka, *L'Ère du témoin*, Plon, Paris, 1998.

21 *Ibid.*, p. 97.

22 *Ibid.*

23 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 1977, pp. 8–9.

effort must be made to vindicate the suffering of victims during war crimes proceedings, it must not be forgotten that

a trial resembles a play in that both begin and end with the doer, not with the victim . . . In the center of a trial can only be the one who did – in this respect, he is like the hero in the play – and if he suffers, he must suffer for what he has done, not for what he has caused others to suffer.²⁴

Thus, vindicating victims must be subordinated to the demands of a fair trial, one in which it is the accused who plays protagonist.

In recent decades, France has received the most attention for its use of victim participation in three prominent trials of alleged Nazi war criminals and sympathizers.²⁵ Klaus Barbie (head of the Gestapo in Lyon), Paul Touvier (leader of a Vichy-run paramilitary group), and Maurice Papon (a police official in the Prefecture of Bordeaux) were the first such defendants to find themselves subject to French justice. In the 1987 Barbie case, the court defined the term ‘victim’ fairly broadly, thereby establishing an expansive foundation for civil party participation in subsequent trials. In the words of one set of commentators, victims included ‘not only the direct objects of systematic racial or religious persecution, but also those who opposed such persecution by any means. Thus, [even] Resistance members, as soldiers fighting Nazism . . . could be deemed victims of crimes against humanity.’²⁶

The 1994 Touvier trial, held just outside Paris, similarly embraced a broad definition of ‘victim’, becoming notable for its extensive civil party participation. By the end of the trial, Touvier and his attorneys had faced not only the public prosecutor but also a bevy of thirty-four civil party lawyers representing between fifty and eighty victims and victim groups. As with the Eichmann trial, this remarkable level of victim participation resulted in sharp criticism, the trial quickly descending into what some have described as ‘an extraordinary spectacle’.²⁷

The third trial was that of Maurice Papon, who was convicted in 1998 for his role in ordering the arrest and deportation of 1,690 Jews to extermination camps during the Nazi occupation of France.²⁸ At least one commentator has suggested that Papon would never have been prosecuted *but for* civil party involvement:

[His] nearly 40 years of service at the highest levels of the French civil service subsequent to the war . . . would appear to have demonstrated that his reputation had been rehabilitated significantly if not completely in the higher

²⁴ *Ibid.*, p. 261.

²⁵ See Thierry Cruvellier, ‘Civil party participation and representation: a few other experiments at a glimpse’, International Center for Transitional Justice, 2009, which provides an overview of civil party participation in domestic war crimes proceedings in several countries.

²⁶ Michael E. Tigar, Susan C. Casey, Isabelle Giordani, and Sivakumaren Mardemootoo, ‘Paul Touvier and the crime against humanity’, in *Texas International Law Journal*, Vol. 30, 1995, p. 295 (discussing the history of the Barbie case and its influence on Touvier’s subsequent trial).

²⁷ *Ibid.*, p. 299.

²⁸ Whitney R. Harris, ‘A world of peace and justice under the rule of law: from Nuremberg to the International Criminal Court’, in *Washington University Global Studies Law Review*, Vol. 6, 2007, pp. 689 and 697. See also Richard H. Weisberg, ‘The risks of adjudicating Vichy’, in *Roger Williams University Law Review*, Vol. 5, 1999, p. 127.

circles of French society. It was the insistent efforts by his fellow citizens whose families had suffered due to Papon's actions that countered that process of rehabilitation to finally force the case to come forward.²⁹

Another commentator has noted the crucial role that civil parties played in extending liability for Papon's actions to France itself: the Papon case was 'the first to hold the French state directly liable [to victims] for acts of the Vichy government'.³⁰ Still, the trial was not without controversy. Many of the civil parties had nothing to say about Maurice Papon himself and failed to draw any direct link between the fate of their family members and the actions of the former Vichy bureaucrat.³¹

Victim participation in recent international criminal tribunals

Since the early 1990s, a number of national and international victims rights and human rights organizations have lobbied to ensure that victims' participatory rights would be embedded in the founding documents of the ICC and other international criminal tribunals. This movement, though viewed with scepticism in some legal circles, was fuelled by four factors that had emerged over several decades.³²

Victims' rights movement

The first factor dates back to the rise of a victims' rights movement in Great Britain, New Zealand, and several other common law countries in the 1960s. Legislators in these countries enacted a series of laws to protect and compensate crime victims, especially victims of rape and child abuse.³³ Over the next three decades, the existence of such laws, coupled with new research on the psychological effects of trauma,³⁴ would help to generate a second wave of legislation aimed at providing victim-witnesses with specific rights in criminal proceedings. In 1990, lobbying efforts in the United States led to the adoption of a victims' bill of rights, which instructs federal prosecutors and law enforcement officers that victims of crime should be regarded as *active and engaged participants in* – not merely *auxiliaries*

29 Benjamin G. Davis, 'Refluat stercus: a citizen's view of criminal prosecution in U.S. domestic courts of high-level U.S. civilian authority and military generals for torture and cruel, inhuman or degrading treatment', in *Saint John's Journal of Legal Commentary*, Vol. 23, 2008, p. 544.

30 See V. Grosswald Curran, above note 16, p. 373.

31 See Nancy Wood, 'The Papon trial in an "era of testimony"', in Richard J. Golsan (ed.), *The Papon Affair: Memory and Justice on Trial*, Routledge, New York, 2000, p. 97.

32 See C. P. Trumbull IV, above note 17, p. 778; and Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, Philadelphia, PA, 2005, pp. 17–32.

33 In common law countries, New Zealand adopted the first victim's compensation law in 1963, followed by England in 1964. See William Doerner and Steven Lab, *Victimology*, 2nd edition, Anderson, Cincinnati, OH, 1988, p. 18. See also Joanna Shapland, Jon Willmore, and Peter Duff, *Victims in the Criminal Justice System*, Gower, Aldershot, Hampshire, 1985, p. 175.

34 See, e.g., Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror*, Basic Books, New York, 1992.

to – the criminal justice system.³⁵ The bill of rights requires that victims be kept informed about the progress of their case, be treated in a dignified manner, and be reasonably protected from the accused.³⁶ In the United Kingdom, the Victims' Charter, enacted in 1996, provides victims with a number of services throughout the criminal process and requires the prosecutor to consider the victim's views when deciding whether to prosecute.³⁷ Similar legislation was adopted by the Council of Europe at the beginning of the twenty-first century.³⁸

UN initiatives

The second contributing factor was the impetus behind several UN initiatives designed to address the plight of crime victims at the international level. One of the most significant initiatives was the *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, adopted by the UN General Assembly in 1985.³⁹ Hailed as an international Magna Carta for crime victims, the declaration sets out basic principles of justice, including the right of victims to have access to the judicial process and receive prompt redress for the harms they have suffered. Six years later, Theo van Boven, then UN Special Rapporteur on the prevention of discrimination and protection of minorities, created a set of basic principles to guide the provision of reparations to victims of human rights violations.⁴⁰ The 'van Boven Principles', as they are commonly called, guided the victim-centred approach ultimately adopted by the drafters of the ICC's Rome Statute.⁴¹

Case law of regional human rights courts

The third contributing factor has been three decades of case law, developed by treaty-based regional human rights courts that have interpreted human rights conventions as conferring legal standing on victims. Some recent decisions by the

35 See the *Crime Control Act of 1990* (42 U.S.C. §§ 10606–10607) and the *Victims' Rights Clarification Act of 1977* (18 U.S.C. § 3510).

36 In 2004, Congress passed the *Crime Victims' Rights Act* (18 U.S.C. § 3771), which guaranteed victims the right to 'reasonably be heard at any public proceeding in the district court involving release, plea, sentencing, or parole proceedings'.

37 Craig Bradley (ed.), *Criminal Procedure: A Worldwide Study*, 2nd edition, Carolina Academic Press, Durham, NC, 2007, p. 45.

38 See Council of Europe, *Council Framework Decision of 15 March 2001 on the Standing of Victims of Crime in Criminal Proceedings* (2001/220/JHA) OJ, L82, 22 March 2001, and Commission of the European Communities, *Council Directive on Compensation to Crime Victims*, European Commission, Brussels, 2002, p. 562.

39 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly Resolution 40/34 of 29 November 1985, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm> (last visited 25 August 2010).

40 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by UN General Assembly Resolution 60/147 of 16 December 2005.

41 See Theo van Boven, 'The position of the victim in the Statute of the International Criminal Court', in H. von Hebel, J. G. Lammers, and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Memory of Adriaan Bos*, T.M.C. Asser Press, The Hague, 1999, p. 81.

European Court of Human Rights (ECHR), for example, specify that victims have a right to be kept informed of trial proceedings, provided with information about the investigation and trial, and allowed access to relevant documents to ensure meaningful participation.⁴² The ECHR stopped short of granting victims participatory rights in criminal proceedings, but the court has supported a principle later enshrined in the Rome Statute, namely that victims should have significant access to the criminal justice process and receive compensation for their suffering.⁴³

Criticisms of international criminal tribunals

The fourth factor contributing to the rise of victims' rights has been response to the criticisms lodged – rightly or wrongly – against the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for their failure to consider victims' needs. For example, neither tribunal provides victims with the right to apply for reparations or participate in proceedings beyond testifying as witnesses. Critics argue that these omissions essentially objectify victims and turn them into mere instruments for securing convictions.⁴⁴

Victim participation at the International Criminal Court

Unlike the statutes underlying the tribunals for Rwanda and the former Yugoslavia, the Rome Statute of the International Criminal Court (ICC), adopted in 1998, gives victims an innovative role as witnesses, courtroom participants, and reparations beneficiaries.⁴⁵ The Rome Statute provides victims with extensive procedural rights, including the right to be heard by judicial authorities regarding the decision to authorize an investigation, the admissibility of a case, and issues that affect their personal interests, so long as the presentation is done 'in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.⁴⁶ As such, the Statute recognizes that the ICC has 'not only a punitive but also a restorative function', reflecting the 'growing international consensus that participation and reparations play an important role in achieving justice for victims'.⁴⁷

Victim participation provisions have caused significant dissension among jurists, activists, and scholars, who often split along common law versus civil law

42 Raquel Aldana-Pindell, 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes', in *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 5, 2002, pp. 1419–1422, 1434–1436.

43 *Ibid.*, pp. 1419–1422.

44 C. P. Trumbull IV, above note 17, p. 788.

45 Most victims participate in court proceedings through legal representatives, but in the ICC's first trial three victim-participants addressed the Court directly. See Eric Stover, Camille Crittenden, Alexa Koenig, Victor Peskin, and Tracey Gurd, 'The impact of the Rome Statute system on victims and affected communities', paper delivered at the Review Conference of the Rome Statute, International Criminal Court, Kampala, Uganda, 30 May 2010 (RC/ST/V/INF.4).

46 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, Art. 68.

47 See ICC, *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45, 10 November 2009, Introduction, para. 3.

lines. On one side are those who argue that by providing victims with expansive participatory rights the ICC and other international tribunals will help restore victims' dignity, contribute to their 'healing' and rehabilitation, and bring to light facts and evidence that may not otherwise emerge.⁴⁸ On the opposing side are those who fear that such participatory rights will run roughshod over a defendant's right to a fair trial; prolong proceedings, thus increasing the cost of prosecution; hinder the prosecutor's ability to conduct a focused investigation; and provide legal recognition to certain categories of victims and not others, thereby limiting any access to justice. On the last point, one commentator argues that the cost for 'unrecognized victims' will be extensive as '[c]rimes falling within the ICC's jurisdiction may involve hundreds of thousands of victims, most of whom will not be legally recognized by the Court'.⁴⁹

Civil party participation at the Extraordinary Chambers in the Courts of Cambodia

While victim participation had occurred in national war crimes trials in France and a few other countries, the *Duch* trial in the ECCC marked the first time that an international tribunal had afforded victims the opportunity of joining the proceedings as civil parties. The ECCC's founding document⁵⁰ contained no provision for victim participation, but the Court's Internal Rules, adopted two years later, included a right for direct participation in court proceedings similar to that in the ICC's Rome Statute.⁵¹ However, while the ICC allows victims to participate in proceedings, the ECCC refers to some victims not as participants but as *parties civiles*, or 'civil parties'.⁵² A civil party is an actual party to the criminal proceedings and thus shares many of the same procedural rights as the defence and prosecution. Civil parties are permitted, through their lawyers, to address the court from the commencement of the proceeding – unlike witnesses, who only address the court at trial. Civil parties are usually able to question witnesses, experts, and the accused. Finally, the Court's Internal Rules specify that the purpose of the civil parties is twofold: to support the prosecution and to secure collective and moral reparations,⁵³

48 For an overview of the arguments commonly put *for* and *against* victim participation in international criminal tribunals, see C. P. Trumbull IV, above note 17, pp. 802–805.

49 *Ibid.*, p. 811; for arguments against victim participation in international trials see pp. 805–818.

50 *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea*, 17 March 2003, approved by General Assembly Resolution 57/228 B, 22 May 2003, Annex.

51 See James P. Bair, 'From the numbers who died to those who survived: victim participation in the Extraordinary Chambers in the Courts of Cambodia', in *Harvard Law Review*, Vol. 31, 2009, pp. 507–508, 520; see also ECCC, Internal Rules, above note 4, Rules 23(1), 23(3), 23(7), 23(8).

52 See Jenia Iontcheva Turner, 'Decision on civil party participation in provisional detention appeals', in David J. Bederman (ed.), 'International decision', in *American Journal of International Law*, Vol. 103, No. 1, 2009, pp. 116–118; see also ECCC, Internal Rules, above note 4, Rules 23(1), 23(2), 23(3), 23(4), 23(5), 23(6).

53 ECCC, Internal Rules, above note 4, Rule 23(1).

which eliminates the need for individual compensation for the potentially overwhelming number of people victimized by the Khmer Rouge.

The ECCC draws a clear distinction between ‘victims’ who are complainants and victims who are ‘civil parties’. Both categories can participate in ECCC proceedings, but the scope of their role differs. A complainant is a person who suffered, witnessed, or is aware of any crimes committed under the Khmer Rouge and chooses to submit a complaint to the Co-Prosecutors. The Co-Prosecutors, in turn, may use this information to shape their investigations.⁵⁴ A civil party is someone who was directly affected by one or more factual situations under investigation by the Court.⁵⁵ Whereas a complainant’s role is limited to bringing to the Co-Prosecutor’s attention crimes under the regime, civil parties are active participants in every step of the judicial proceedings. The Chamber can later withdraw an individual’s civil party status if it believes sufficient doubt has been raised about his or her status as either a direct victim or a relative or dependent of a victim.⁵⁶

During Case 001, it was not the ECCC’s under-resourced Victims Unit, established to assist victims file complaints and civil party applications,⁵⁷ but Cambodian human rights organizations⁵⁸ and civil party lawyers who led the effort to inform the Cambodian public about civil party participation at the ECCC, find legal representatives for the civil parties, and develop a system for managing the applications.⁵⁹ Human rights groups undertook these projects with very limited guidance or assistance from the ECCC. In the end, these organizations became involved in nearly every aspect of the civil party process: informing victims of their

54 *Ibid.*, Rules 49(2), 49(4).

55 At the time of the first trial, civil party applications were made to the Office of the Co-Investigating Judges (OCIJ) or the Trial Chamber and not to the Co-Prosecutors: see ECCC, Internal Rules, above note 4, Rules 23(3), 23(4). Since February 2010, civil party applications have been received by OCIJ only; see ECCC, Internal Rules (revision 5), as amended 9 February 2010, Rule 23 *bis* (2), Rule 23 *bis* (3). Situations under investigation are defined by facts presented by the Co-Prosecutors in Introductory or Supplementary Submissions: see ECCC, Internal Rules, above note 4, Rules 53(1), 55(2).

56 See for example, ECCC, Case File No. 001/18-7-2007/ECCC/TC, above note 3, paras. 639–649.

57 ECCC, Internal Rules, above note 4, Rule 12. Since February 2010, the Victims Unit has been renamed the Victims Support Section: see ECCC, Internal Rules (revision 5), above note 55, Rule 12.

58 Five Cambodian groups – the Documentation Center of Cambodia (DC-CAM); the Cambodia Human Rights and Development Organization (ADHOC); the Khmer Institute for Democracy (KID); the Center for Social Development/Center for Justice and Reconciliation (CSD/CJR), whose focus would later be on the second Khmer Rouge case, Case 002; and the Khmer Kampuchea Krom Human Rights Association (KKKHRA) – took the lead in distributing and helping applicants fill in the forms. Two legal aid groups – the Cambodian Defender Project (CDP) and Legal Aid of Cambodia (LAC) – headed up the task of retaining lawyers for the civil parties, while the Cambodian Human Rights Action Committee (CHRAC), an umbrella organization for local human rights and aid groups, developed a database to track victim complaints and civil party applications.

59 The German Development Service (DED), Civil Peace Services (ZFD), and the French and the British embassies, for example, played an essential role in supporting these legal assistance projects. See DED/GIZ, Projects, Civil Peace Service, available at: <http://kambodscha.ded.de/en/projects/civil-peace-service.html>; ambassade de France à Phnom Penh, la France au Cambodge, ‘Soutien de la France à l’association “Avocats sans frontières”’, available at: <http://www.ambafrance-kh.org/spip.php?article1247>; and British Embassy in Phnom Penh, Working with Cambodia, Khmer Rouge Tribunal, available at: <http://ukincambodia.fco.gov.uk/en/about-us/working-with-cambodia/khmer-rouge-tribunal/> (all websites last visited 7 September 2011).

rights; holding group meetings to answer questions; helping applicants fill in the requisite forms (a process that could often take hours and, in some cases, days);⁶⁰ compiling and entering information from the forms into a database; sending the forms to the ECCC; and following up with the civil party applicants. The important role that the non-governmental organizations (NGOs) played is borne out by the interviews that we conducted: all of the civil parties said that their primary connection to the court was not through the Victims Unit but through their lawyers and local NGOs.

In November 2008, the German Foreign Office awarded the ECCC a grant of 1.5 million Euros to bolster the court's victim support services.⁶¹ One of the Court's most important victim-related initiatives was to contract with the Transcultural Psychosocial Organization (TPO), a local mental health organization, to provide psychological support to civil parties, including a national hotline. TPO staff also offer civil parties support and counselling inside and outside the courtroom and, if summoned by the presiding judge, sit next to anyone who becomes agitated or overly emotional on the witness stand.⁶²

Civil party participants and their experiences

What has been the experience of civil parties who have testified at the ECCC? In November and December 2009, we interviewed twenty-one of the twenty-two civil parties who testified in the *Duch* trial.⁶³ Of these, seventeen were Cambodian citizens, three were French citizens (two of whom were of Cambodian descent), and one was a citizen of New Zealand. Eleven of the participants were male and ten were female. The youngest was 33 years old and the oldest was 79; most respondents were in their fifties. All but one of the interviews took place in Cambodia; the exception was a phone interview from Phnom Penh with a civil party living in New Zealand. The interviews were conducted at the close of the trial but *before* the announcement of the verdict. After the Chamber announced its judgment on 26 July 2010, we asked seventeen of the twenty-one civil parties to whom we had spoken in late 2009 about their views of the verdict.

Coming forward to testify

Most of the respondents we interviewed said that they had not fully thought through how becoming a civil party would affect them. Some entered the process

60 Practice direction, including the application form, can be downloaded from the ECCC website, available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/PD_Victims_Participation_rev1_En.pdf (last visited 6 September 2011).

61 See ECCC, Public Affairs, 'ECCC issues media alert on signing ceremony of German contribution', 6 November 2008.

62 TPO also offers individual and group therapy sessions to civil parties: see *ECCC Court Report*, Issue 12, Phnom Penh, February 2010, p. 10.

63 One of the twenty-two civil parties was in the hospital and unable to receive visitors.

with some reluctance, largely because they feared speaking publicly about painful memories that had burrowed deep into their psyches for decades. One respondent, a 54-year-old businessman whose brother perished in Tuol Sleng, put it this way: 'I do not like being under the spotlight, to be forced to talk about myself, to speak in front of other people. I consider suffering to be personal and discreet'.⁶⁴

Some respondents had never previously revealed to their spouses or children how they had been treated in prison. 'I had kept my whole story a secret', one person said. 'My wife knew I had been a prisoner, but, for 30 years, I never specified exactly where I had been detained and what I had experienced'.⁶⁵ The former prisoner's wife would learn these details as she sat with her children watching her husband testify on television.

Tuol Sleng survivor Chin Met said that her initial reluctance to testify was tethered to a life of secrecy in which keeping quiet or revealing as little as possible had helped her survive. She told the court that her father and mother had died when she was young and that she had been sent to a village in Khampong Thom to live with her grandparents.⁶⁶ One day Khmer Rouge soldiers came to her village, and she was pressed into service. Later, her superiors discovered an incriminating photograph of her father, who had been a Sihanouk government official, in her possessions. Chin Met was arrested and sent to Tuol Sleng, where she was processed, and then transferred to the re-education camp at Prey Sar. Unaware of her fate, her family held a death ceremony for her.

After her release, Chin Met survived by selling items that she scavenged from a garbage heap. Following the fall of the Khmer Rouge regime, she returned to her village, where she said nothing of her time in captivity, fearing that her family and community would shun her. 'I just wanted to hide it', she said. But that changed in 2003, when she received a copy of her file from Tuol Sleng prison. 'At that time I didn't realize I was a S-21 survivor. . . . I was trying to forget about the past'.⁶⁷ Four years later, a group of her neighbours visited Tuol Sleng and discovered two photographs of her on display at the museum in the former prison. 'I was given two photographs', she recalled, 'and I was asked whether [they were] real photos of myself.' I said: 'Yes, but I don't want to anything else about that because I [don't] want to recall all my suffering'.⁶⁸

As one of the only female survivors of Tuol Sleng, Chin Met was an invaluable asset to the court. A local NGO provided counselling for her and directed

64 Interview, 24 November 2009.

65 Interview, 26 November 2009.

66 See ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav 'Duch'*, Case File No. 001/18-07-2007-ECCC/TC, 8 July 2009, Trial Day 41, pp. 42–103, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9CDuch%E2%80%9D-trial-trial-day-41> (last visited 7 July 2011).

67 Interview with Chin Met, 14 November 2009.

68 See Trial Day 41, above note 66, p. 93.

her to the ECCC’s victim unit.⁶⁹ ‘Later I received a phone call to meet with lawyers [from *Avocats Sans Frontières*],’ she recalled.

Their office was on the other side of the river in an area of the city I didn’t know very well. So I thought: ‘Oh dear, I’m going to get myself into more trouble.’ ... The night before the meeting I couldn’t sleep. The next morning I took a *tuk tuk* and the lawyers reimbursed me. They explained how the civil party process worked and then let me tell my story. They were encouraging, and asked if I felt strong enough to testify. They really showed me the way.⁷⁰

Motivation to testify

Just after World War II, George Orwell wrote a short essay on war crimes trials titled ‘Revenge is sour’. In it, he argued that the

whole idea of revenge and punishment is a childish day-dream. Properly speaking, there is no such thing as revenge. Revenge is an act which you want to commit when you are powerless and because you are powerless: as soon as the sense of impotence is removed, the desire evaporates also.⁷¹

Revenge is also potentially self-defeating, if not for the avenger then potentially for future generations of his or her family. As a Chinese proverb warns, ‘If you seek revenge, dig two graves.’

Under Duch’s command, interrogators at Tuol Sleng – which means ‘hill of poisonous trees’ in the Khmer language – committed unspeakable atrocities, including the pulling of fingernails, holding victims’ heads under water, and bleeding prisoners to death. The vast majority of prisoners were eventually executed and buried in mass graves. Given these horrible crimes, one would think that Duch’s victims would have expressed strong desires for revenge. Yet only one civil party explicitly said that she would kill Duch if given the chance. While none of those whom we interviewed said that they would ever forgive Duch for his crimes,⁷² most expressed one or more of four motivations for testifying: a need to know more about what had happened to themselves and their loved ones, a desire to pursue ‘justice’, a need to tell their story, and a need to educate the world about the Khmer Rouge regime.

69 See Center for Social Development, ‘CSD discovers only woman survivor of Tuol Sleng’, Press Release, 1 August 2007.

70 Interview with Chin Met, above note 67.

71 Quoted in George Parker, ‘Trials’, in *New Yorker*, 5 January 2004, p. 5.

72 The vast majority of respondents in two, earlier, studies of ICTY victim-witnesses also said that they could never forgive those responsible for their own suffering or the suffering of family members. See E. Stover, above note 32, pp. 75–76. See also Gabriela Mischkowski and Gorana Mlinarevic, ‘... And That it Does Not Happen to Anyone Anywhere in the World’: *The Trouble with Rape Trials – Views of Witnesses, Prosecutors, and Judges on Prosecuting Sexualised Violence during the War in the Former Yugoslavia*, *Medica Mondiale*, December 2009, p. 53, available at: http://www.medicamondiale.org/fileadmin/content/07_Infothek/Gerechtigkeit/medica_mondiale_Zeuginnenstudie_englisch_dezember_2009.pdf (last visited 19 December 2011).

The need to know

First and foremost, civil parties wanted to confront Duch in the courtroom and force him to divulge details about the treatment of their deceased relatives, and accept responsibility for his crimes. Ou Savrith echoed the sentiments of other civil parties:

I wanted to know what exactly happened inside of S-21, to find out how prisoners were interrogated and tortured. I wanted to know what my brother suffered, to live what he had experienced. This was my way of helping to alleviate his suffering.⁷³

Another respondent put it this way: 'Of all of my family I am the only survivor. So I wanted Duch to tell me what exactly had happened to my family. Who gave the orders to arrest them. And who ordered them to be killed'.⁷⁴ Many wanted Duch to tell them where the remains of their loved ones had been interred so that they could gather soil from the spot and perform a proper death ceremony at their homes. Some had already created shrines in anticipation of receiving some tangible evidence of their relative's burial.

This palpable need for details about a loved one's fate – however painful – reverberates in families of the disappeared around the world, regardless of cultural or political context.⁷⁵ Unlike those known to have died and been mourned, the disappeared remain alive for those left behind. When forensic excavations of mass graves begin, family members will remain at the burial sites for days and weeks, hoping to learn some new and tangible fact about the fate of their missing relatives. The Harvard psychiatrist Richard Mollica writes, 'In many cultures the disappeared are seen as souls trapped in a shadow world between the living and the dead, endlessly searching for a peaceful death. Until they are found, they cannot escape their anguish and pain'.⁷⁶

For many civil parties in the *Duch* case, Tuol Sleng represents a tomb frozen in time that possesses both the spiritual and the physical remnants (in this case, files and photographs) of those who suffered and died there. Just like the many relatives who placed their hope in the forensic teams exhuming the remains of the disappeared in Guatemala and Bosnia, many civil parties believe that the ECCC can help them find some trace in the remnants of Tuol Sleng, bringing them closer to their disappeared relatives and, in some cases, setting their loved ones free from a world of limbo, as Neth Phally did when he displayed the photo of his deceased brother in the courtroom.

Ten of the fourteen civil parties whose family members had perished at S-21, including all of those living outside Cambodia, said that the opportunity to

73 Interview with Ou Savrith, 24 November 2009.

74 Interview, 17 November 2009.

75 See Christopher Joyce and Eric Stover, *Witnesses from the Grave: The Stories Bones Tell*, Little, Brown & Company, Boston, MA, 1991.

76 Richard F. Mollica, *Healing Invisible Wounds: Paths to Hope and Recovery in a Violent World*, Vanderbilt University Press, Nashville, TN, 2006, p. 78.

confront Duch in the courtroom represented a pivotal moment in their quest to uncover the truth about the fate of their loved ones. Martine Lefevre, whose husband perished in Tuol Sleng, recalled that ‘I believed one day there would be a court. I knew a group of lawyers and organizations would rise up and make sure those crimes would not go unpunished. And I was right’. In the fall of 2008, Lefevre discovered through a friend of her daughter that *Avocats Sans Frontières* was accepting civil party applications. ‘Suddenly, I thought, my God, everything is possible. I hadn’t climbed a step, I had ascended a temple!’⁷⁷

Lefevre and her daughter, Ouk Neary, like other civil parties whom we interviewed, described being ‘compelled’ or ‘driven’ to uncover the truth about their deceased loved ones. ‘I spent my entire life trying to come closer to the truth, the truth which the accused thinks he owns and of which I was deprived’, Ouk Neary told the court. ‘I wanted to know what my history was, I wanted to know what the truth was and this quest I undertook on my own ...’.⁷⁸

Ouk Neary’s first memory of her father, Ouk Ket, was learning of his death in 1979 when she was only 4 years old. Two years earlier, the Cambodian foreign services had recalled Ouk Ket, a diplomat in the Cambodian Embassy in Senegal, to Phnom Penh. He died in Tuol Sleng prison five months later, while his family was in France. In 1991, Neary, then 16, travelled to Phnom Penh with her mother and older brother and visited Tuol Sleng. Walking through the detention cells in the oppressive heat, they eventually arrived at a series of open rooms, their walls lined with portraits of prisoners who had been tortured and executed. They looked in vain for a photograph of Ouk Ket. Two weeks later, they returned to the prison and gained access to the room where the archives were stored. Leafing through the files, they uncovered a folder marked ‘December 1977’ and found Ouk Ket’s name on a list of 301 people designated for execution. ‘That day’, Ouk Neary told the court, ‘is the day when a drop of poison came to me, and I have never since ... stopped trying to find out what happened [to my father]’.⁷⁹

The quest for justice

When asked about their motivations for testifying, all of the civil parties mentioned, often repeatedly, their desire to obtain justice for themselves, their families, and their deceased relatives. For the most part, they grounded their need to testify in personal and intrinsic terms rather than in feeling a responsibility to perform a universal good for all Cambodians or all humanity, although such sentiments were not completely absent. The artist Bou Meng, who survived his captivity in Tuol Sleng but lost his wife, said that he testified for ‘my benefit and that of my wife ... and I wanted Duch to accept responsibility for our

⁷⁷ Interview with Martine Lefevre, 25 November 2009.

⁷⁸ See Trial Day 41, above note 66, p. 66.

⁷⁹ *Ibid.*, p. 57.

suffering'.⁸⁰ A fellow S-21 survivor, Chum Mey, told the court that, after receiving the summons to testify,

I was so excited, so happy. I was so clear in my mind that I would testify to shed light before this Chamber, to tell the truth. I felt so relieved . . . my mind was so disturbed. . . . I wanted to get it out of my chest.⁸¹

Chum Neou said that she testified on behalf of her husband, who had perished at Tuol Sleng, and her seven-month-old son, who had died of starvation while she and her child were detained in a Khmer Rouge 're-education' camp and a branch of S-21. Today Chum Neou lives in a rural Cambodian house on stilts, in a town two hours' drive from Phnom Penh. She has lived there for nearly thirty years but rarely talks about her time in prison or the time that she spent as a Khmer Rouge cadre,⁸² at least to strangers. The walls of her home bear numerous photographs of herself throughout her life but none of her family members.

When the war ended, Chum Neou returned to her village, only to find herself shunned because she had voluntarily joined the Khmer Rouge. Neou told the court:

My mother was so furious when I met her. She said [it was] because of me that her husband had died and this [was] a great pain inflicted on me . . . I [also] knelt down before my aunt to ask her forgiveness for the loss of her husband, but she would not accept it and she was my blood relative. And here I am before the Chamber and I cannot accept the apology made by the accused. . . . just one word of apology by the accused in the Chamber cannot be accepted . . . I lodged a complaint [before this court] to be a responsible person on behalf of my relatives who were victims of the crimes of that regime, to prove that I am not a member of the Khmer Rouge and I am responsible and that I am loyal to the nation. And that I felt betrayed by that group.⁸³

The need to tell one's story

In his memoirs of the Holocaust, Primo Levi frequently suggests that bearing witness to mass atrocity is both an act of narration – a trajectory of cause and

⁸⁰ Interview with Bou Meng, 15 November 2009.

⁸¹ See ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav 'Duch'*, Case File No. 001/18-07-2007-ECCC/TC, 30 June 2009, Trial Day 36, pp. 66–67, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9Cduch%E2%80%9D-trial-trial-day-36> (last visited 7 July 2011).

⁸² In addition to non-Khmer Rouge, S-21 held a large number, slightly over 78%, of those Khmer Rouge cadres who were accused of being spies or traitors. They came from either a Democratic Kampuchea government office or a military unit. See ECCC, Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning their Rule 66 Final Submission Regarding Kaing Guek Eav alias 'Duch', OCP, 18 July 2008, Criminal Case File 002/14-08-2006/ECCC/OCP, para. 81, available at: http://www.eccc.gov.kh/sites/default/files/documents/court/doc/Rule_54_Public_Information_re_Final_Submission.pdf (last visited 8 September 2011). For detailed explanations of S-21 prisoners, see David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison*, University of California Press, Berkeley, CA, 1999, pp. 41–76.

⁸³ See ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav 'Duch'*, Case File No. 001/18-07-2007-ECCC/TC, 24 August 2009, Trial Day 63, pp. 42–43, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9Cduch%E2%80%9D-trial-trial-day-63> (last visited 7 July 2011).

effect – and a form of survivorship.⁸⁴ Similarly, the psychoanalyst Dori Laub argues that survivors need not ‘only to survive so they can tell their story’; they also need ‘to tell their story in order to survive. There is, in each survivor, an imperative need to *tell* and thus come to *know* one’s story’.⁸⁵ In Laub’s view, survivors need both time and the presence of two listeners – an external listener who acknowledges the reality of the survivor’s lived experience, and an internal listener and agency of the self, who helps comprehend what one has witnessed.

Laub’s notion of an external listener and an internal listener resonated in the reasons that respondents gave for wanting to testify before the ECCC. While they wished to confront Duch about specific details regarding their internment or loss of a family member and, through the court process, obtain justice, they also wanted their testimonies to be acts of *acknowledgement* and *remembrance* – and, at least in the case of Chum Neou, of familial contrition.

In a similar way to Neth Phally’s presentation of his brother’s photograph in the courtroom, all but two civil parties wanted to preserve the memory of their deceased relatives in the court record and in the minds of those listening to their testimonies. Referring to his deceased family members, Chum Sirath said:

Who could have told their story, if not me? Those stories have to be told to the court so there will be memory and people will not be forgotten. We know where the mass graves are, but we are unable to attach names to the bones. And if those names are not mentioned in court, we will have no memory. That is why it is my duty to testify.⁸⁶

Martine Lefeuvre described her testimony as ‘an act of liberation’:

Finally I was going to be able to tell my family’s story and especially Ket’s story, to give him back his dignity . . . to bring him out of the shadows. . . . I took Ket out of his cell where he was rotting and brought him back among us, among the living.⁸⁷

As she entered the courtroom, she realized what a ‘great honour’ it was to testify, she said. ‘I am not a religious person, but I told myself, “Ket is here, his spirit is here”’.⁸⁸

Antonya Tioulong, whose sister and brother-in-law perished in Tuol Sleng, echoed this sentiment:

It was important for me to confront Duch. It was important to tell him that he hurt us, not only the people he killed, but us. And it was important to testify for my sister, to have her . . . being alive again, at least in spirit.⁸⁹

84 See Primo Levi, *If This is a Man – The Truce*, Penguin Books, London, 1979.

85 Dori Laub, ‘An event without a witness: truth, testimony and survival’, in Shoshana Felman and Dori Laub, *Testimony: Crisis of Witnessing in Literature, Psychoanalysis, and History*, Routledge, London, 1992, p. 78.

86 Interview with Chum Sirath, 17 November 2009.

87 Interview with Martine Lefeuvre, above note 77.

88 *Ibid.*

89 Interview with Antonya Tioulong, 24 November 2009.

The need to educate the world

Finally, the majority of the respondents (twelve out of twenty-one) emphasized the educative value that their testimonies might have both for Cambodians and the world at large. 'It is important for our children to know about the past so it does not repeat itself', said one respondent, whose brother was executed at Tuol Sleng. Chum Mey, a Tuol Sleng survivor called the court 'a big achievement... that other countries could learn from' and hoped that his testimony had contributed to that effort.⁹⁰

The trial

During the *Duch* trial, the ECCC grappled with nearly every aspect of the civil party process – from the purpose and admissibility of civil parties to how best to define the role of their attorneys. As the trial got underway, the court seemed at times like a rudderless ship trying to make its way through uncharted waters. On several occasions, civil party lawyers took to their feet to oppose the prosecution directly or push for their own theory of the case, which bogged down the proceedings.⁹¹ In the meantime, the defence counsel argued that the civil party lawyers, who were eight strong, were acting as substitute 'prosecutors' and thus threatening 'equality of arms'⁹² – the principle, considered an essential element of a fair trial, that the prosecution and the defence should have procedural equality.⁹³ Finally, the Chamber ruled that, while civil parties had the right to support or assist the prosecution, this did not confer on them 'a general right of equal participation with the Co-Prosecutors'.⁹⁴

Throughout Case 001, the judges adopted such a restrictive interpretation of civil party participation that it appeared at times as if they were unwilling to recognize the civil parties as actual parties. Civil parties requested, and were denied, the opportunity to make an opening statement; to submit an opinion as to Duch's request to be released from provisional detention; to respond to the Co-Prosecutor's

90 Interview with Chum Mey, 17 November 2009.

91 Michelle Staggs Kelsall *et al.*, *Lessons Learned from the Duch Trial. A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia*, Asian International Justice Initiative's KRT Monitoring Group, December 2009, p. 28, available at: http://www.ocf.berkeley.edu/~changmin/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf (last visited 19 December 2011).

92 It quickly became clear that civil party lawyers, many with nominal funding or operating *pro bono*, had extremely limited resources. This does not excuse but may help to explain their lack of co-ordination and preparation.

93 KRT Trial Monitor, Reports No. 7 (week ending 31 May 2009), No. 9 (week ending 21 June 2009), and No. 21 (week ending 21 September 2009).

94 ECCC, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case File 001/18-07-2007/ECCC/TC (Trial Chamber), 9 October 2009, para. 25, available at: http://www.eccc.gov.kh/sites/default/files/documents/court/doc/E72_3_EN.pdf (last visited 6 September 2011).

opening statement; to make a submission on sentencing; to question the accused on his character; and to pose questions to his character witnesses.⁹⁵

Perhaps the most difficult moment took place midway through the trial, when the defence challenged the admissibility of civil parties who testified based on lack of sufficient evidence of their status as former Tuol Sleng prisoners or as relatives of prisoners who had perished there.⁹⁶ As civil parties struggled to share their stories, the presiding judge, the defence, and the accused picked apart details in their testimonies. Much of the controversy centred on the civil parties' identities or on whether they were detained at Tuol Sleng, as opposed to one of the dozens of other detention centres operated by the Khmer Rouge. During the Khmer Rouge regime, it was not uncommon for someone to adopt a 'revolutionary name', often similar to but slightly different from their given name – a phenomenon that the civil parties tried to explain but that the judges found difficult to understand. The case of Ly Hor was especially problematic. The presiding judge questioned him extensively, resulting in several inconsistencies in his testimony and much confusion. This led a foreign judge to criticize Ly Hor's preparation and admonish his lawyer, who admitted that he had relied on a translation from an intermediary organization and failed to communicate with Ly Hor directly. At the end of Ly Hor's testimony, Duch accused him of lying about his identity, claiming that the real Ly Hor had been killed.⁹⁷

It soon became clear to everyone that the civil parties needed better preparation. Several civil party lawyers had not expected their clients to be examined and cross-examined like witnesses, and thus were unprepared for the scrutiny. Further, the detailed questions necessary to vet the parties' identities ignored the potential trauma of having one's identity challenged, the likelihood of a faulty memory after thirty years, and the sheer difficulty of explaining clearly what had occurred in such a nightmarish situation. Fortunately, the next week of civil party testimony was much improved – at least from a procedural perspective – as civil party lawyers presented all identity documents prior to each testimony, and most testifiers simply read a statement from the stand.

Preparing to testify

Because testifying in a criminal court often means confronting the alleged perpetrator and reliving the crime, there is always the danger that disturbing memories and sensations will overwhelm a civil party or witness. Psychologists call this phenomenon *psychophysiologic reactivity*: when describing past traumatic episodes survivors often react physically as well as psychologically. Physical reactions may include sweating, trembling, and heart palpitations.⁹⁸

95 See M. S. Kelsall *et al.*, above note 91, p. 32.

96 *Ibid.*, pp. 29–30.

97 ECCC, Transcript of Trial Proceedings – Kaing Guek Eav 'Duch', Case File No. 001/18-07-2007-ECCCC/TC, 6 July 2009, Trial Day 39, pp. 82–87, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9CDuch%E2%80%9D-trial-trial-day-39> (last visited 6 September 2011).

98 See Robert J. McNally, *Remembering Trauma*, Harvard University Press, Cambridge, MA, 2003, p. 106.

If we were ever prompted to design a system for exacerbating pre-existing emotional and psychological suffering,⁹⁹ we could not do better than a court of law. Indeed, the mental health needs of victims of war crimes, as the psychiatrist Judith Herman writes, are often diametrically opposed to the requirements of legal proceedings. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures which they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them (at least in common law trials) to respond to a set of 'yes' or 'no' questions that break down any personal attempt to construct a coherent and meaningful narrative.¹⁰⁰

Yet, as difficult as testifying might be, it does not mean that civil parties or witnesses necessarily become traumatized by their court experience or consider it a negative experience. As a recent survey of the extant empirical literature suggests, there is little evidence that truth-telling mechanisms, including war crimes tribunals in post-war settings, either 'dramatically harm[s] individuals... [or] ease their emotional and psychological suffering'.¹⁰¹ The effects may be quite individual and varied. We simply do not know.

What we do know is that many victims and witnesses, when asked to testify about war crimes, have expressed trepidation about their own safety and the safety of their families, as well as about their own ability to withstand the rigours of recalling painful memories in a public setting.¹⁰² Such concerns, however, are not uniform and often vary depending on the cultural, political, and security dynamics of the post-conflict setting. The civil parties whom we interviewed in Cambodia, for example, expressed few serious concerns about their physical safety, largely because they felt that Cambodia was finally at peace. Only one respondent was concerned that Duch's family members might seek revenge.

That said, many were concerned about how they would perform in the courtroom, especially when relating traumatic events and feelings, and, ultimately, how the judges and audience would perceive their testimonies. Respondents described a range of physical and emotional symptoms, including a perceived rise in blood pressure, sweaty palms and feet, trembling hands, and alternate feelings of terror and lightness immediately before entering the courtroom. 'I was so anxious', Ouk Neary said. 'I was shaking and I never shake. My hands were trembling, so

99 Multiple studies suggest that the psychological effects of traumatic exposure during the Khmer Rouge periods have been profound, including a high prevalence of post-traumatic stress disorder (PTSD), somatic symptoms, and disability among the survivors. See Jeffrey Sonis, *et al.*, 'Probable posttraumatic stress disorder and disability in Cambodia: associations with perceived justice, desire for revenge, and attitudes towards the Khmer Rouge trials', in *Journal of the American Medical Association*, Vol. 302, No. 5, 2009, p. 527.

100 Judith Lewis Herman, 'Justice from the victims' perspective', in *Violence Against Women*, Vol. 11, No. 5, 2005, p. 574.

101 David Mendeloff, 'Trauma and vengeance: assessing the psychological and emotional effects of post-conflict justice', in *Human Rights Quarterly*, Vol. 31, No. 3, 2009, p. 593.

102 See E. Stover, above note 32, pp. 74–75.

I knitted my fingers together and told myself, “Okay, your hands don’t move anymore”’.¹⁰³

Ou Savrith admitted that, although he was accustomed to speaking at large business gatherings, he was besieged with ‘performance anxiety’ before he stepped into the courtroom:

I kept thinking: ‘Will others be interested in what I say? In what I think? What I have suffered?’ You know, we, Cambodians are not comfortable expressing ourselves. We keep our feelings to ourselves. . . . I don’t want to bother or frustrate people because I believe suffering is individual. So I was afraid that I would not know what to say in the face of millions of deaths, not only my brother’s death, and that what I said would not be interesting or important to people. Testifying before a court needs dignity; you need to be clear and understandable, and I was scared I might just collapse.¹⁰⁴

Martine Lefeuvre describes how she coped with her courtroom appearance:

I knew as the first civil party to testify that week, I was going through a ‘test of fire’. Really, my heart was about to explode. When I got to the witness stand, the first thing I did was bow to the public as Ket was my tie to Cambodia, and this was important for me. Then I paid my respect to the court which was finally there for us. I told myself, ‘I’ll occupy this place. It is small, maybe a square metre, but it is going to be my place. I will get comfortable. This is my place’. . . . My [lawyer?] told me to speak slowly. And I am grateful not to have been interrupted. This was very, very important because Ket’s story had to be told without interruption.¹⁰⁵

Confronting Duch

Once in the courtroom civil parties were seated in the witness box facing the judges, with their backs to the public gallery. To their left were the civil party lawyers and national and international prosecutors; the two defence lawyers, flanked by assistants, were to their right, as was the accused, who sat no more than two metres away from the civil parties. By turning slightly to their right, civil parties could look directly at the accused.

‘I knew if I had ever encountered Duch, we would have probably fought’, one respondent said later. ‘But my lawyer and the NGOs told me to hold my temper, so that is what I did’.¹⁰⁶ Another respondent told us: ‘I grew angry when I saw the accused. He knew my cousin. He accompanied him to the airport when he left the country to study abroad’.¹⁰⁷ When the respondent’s cousin returned to Cambodia, Duch allegedly arrested him and later ordered his execution.

¹⁰³ Interview with Ouk Neary, 25 November 2009.

¹⁰⁴ Interview with Ou Savrith, above note 73.

¹⁰⁵ Interview with Martine Lefeuvre, above note 77.

¹⁰⁶ Interview, 15 November 2009.

¹⁰⁷ Interview, 13 November 2009.

But not all civil parties were as restrained in the courtroom as those two. For example, Chum Mey, a survivor of S-21, lashed out at Duch, just after describing being subjected to electric shocks and repeated beatings. 'So I would like to tell this to Duch', Chum Mey said as he turned toward the accused, '... Duch did not beat me personally, directly, otherwise he would not have the day to see the sunlight. I just would like to be frank.'¹⁰⁸ In a prompt response, the presiding judge rebuffed the Tuol Sleng survivor for being abusive and insulting in a courtroom setting.¹⁰⁹

Several respondents described 'locking eyes' with Duch before or during their testimonies. Some said that they did it as a means of showing their resolve or expressing their unwillingness to forgive him. Others, like Robert Hamill, said they felt that the accused was trying to intimidate them:

I looked across the courtroom and Duch was staring at me. I stared back and we made contact for a good ten seconds. I didn't show any expression, and neither did he. Finally, he broke away. Now when I look back on that moment, I think how incredibly rude it was because in any culture but especially [Cambodian] culture you don't look people in the eye that way. And it just said so much about how this guy, who had done these terrible atrocities to my brother and all those people, was still prepared to look me in the eye and stand his ground. It made me wonder just how remorseful he really was.¹¹⁰

'Duch is like that', Ouk Neary said, referring to his manner of confronting his accusers in the courtroom. 'He is always trying to see what is true in what you say and when you have made a mistake.' Of her days in court prior to testifying, Neary said:

I observed Duch [but] I didn't want him to look at me. I didn't want him to touch me with his look. ... It is not that I didn't have any courage to face him. It was that I was feeling respect for my Dad as he would not have liked this guy to have touched me with his eyes.¹¹¹

In describing their testimonies, the respondents became most animated when recalling the moments when Duch apologized and asked forgiveness for his crimes. The former prison commander's first admission that he was responsible for atrocities at S-21 took place in the afternoon of 31 March 2009, the second day of the proceedings. 'I would like to ... emphasize that I am responsible for the crimes committed at S-21, especially the tortures and execution of the people there', he said. He also asked his victims to 'leave an open window for me to seek forgiveness'.¹¹²

Addressing the court, he said that he had feared for his own life and did not dare to think of challenging his superiors: 'it was the life and death situation of me,

108 See Trial Day 36, above note 81, p. 12.

109 *Ibid.*, pp. 12–14.

110 Interview with Robert Hamill, conducted via telephone, 25 November 2009.

111 Interview with Ouk Neary, above note 103.

112 See ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav 'Duch'*, Case File No. 001/18-07-2007-ECCC/TC, 31 March 2009, Trial Day 2, pp. 67–68, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%99Duch%E2%80%99D-trial-trial-day-2> (last visited 7 July 2011).

myself, and my family as a whole’, he said. ‘As the person who was in charge of S-21, I never attempt to find other alternatives other than obeying the orders, although I know that obeying the order meant that the lives of numerous people would be perished.’ He had an affinity with survivors of the Khmer Rouge, he said, and claimed that he felt remorse and shame ‘in the eyes of people who are victims and those who lost loved ones during the regime, and including my families who lost members of the family also’.¹¹³

A few civil parties suggested that Duch’s apparent co-operation and truth-telling would offer some of the historical clarification that many Cambodians were seeking, but none felt that his apology was sincere. ‘Duch’s apology just comes from his lips, not from his heart’, said Nam Mon. ‘It’s a total masquerade’, Ouk Neary added.

You can see when he refers to himself as the chief of S-21, he is proud of it as if he is the S-21 employee of the month. He may say he is responsible, but never says for what. He never says, ‘I have killed 17,000 persons’.

When asked if she accepted his ‘apology’ at the end of her testimony, she bristled: ‘In his way, he said I want to bow down in front of you. He said it but he didn’t do it’. According to Ouk Neary, whose father had perished at Tuol Sleng, it was as if he were saying, “You are like all those orphans whose parents died, nothing special, you are not the only one.” Well, I understood the double-meaning of his sentences’.¹¹⁴

Before testifying, one respondent asked his three children if he should accept Duch’s apology; they all said ‘no’. On the witness stand, he read a statement from his niece, who was four years old when her father perished at Tuol Sleng. She, too, refused to forgive Duch and explained why:

to grant forgiveness comes down to saying that finally no serious crime was committed. To grant forgiveness boils down to admitting that the atrocities committed do not touch us deeply. To grant forgiveness would mean to feel pity, but how can anyone feel pity for a man who has taken away so many lives? Did he have any pity for the women, the children, and the men he caused to be assassinated?¹¹⁵

Before testifying, Hav Sophea had wanted Duch to apologize for the death of her father. But she found what he said in the courtroom deeply disappointing:

When I saw the accused I felt quite tense, but after we both spoke and he accepted responsibility for the death of my father, it helped me release my tension. But then, in the end, he said he wasn’t sure if I was my father’s daughter. That really upset me. Why did he have to say that?¹¹⁶

113 *Ibid.*, p. 69.

114 Interview with Ouk Neary, above note 103.

115 See ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav ‘Duch’*, Case File No. 001/18-07-2007-ECCC/TC, 20 August 2009, Trial Day 62, p. 63, available at: <http://www.eccc.gov.kh/en/documents/court/transcript-proceedings-%E2%80%9Cduch%E2%80%9D-trial-trial-day-62> (last visited 7 July 2011).

116 Interview with Hav Sophea, 13 November 2009.

In a similar vein, Antonya Tioulong found Duch's questioning of whether or not her sister was ever detained at S-21 very upsetting:

What I really wanted to know was what Duch did to my sister. At first he said he didn't know she was at S-21. Then, a few moments later, he said he heard her voice. So which one is it? He knew? Or he didn't know? This made me really angry. I controlled myself because I didn't want to cause an incident in the courtroom. But I had a lot of anger. And I told him that I would never forgive him.¹¹⁷

Several civil parties characterized Duch's admissions of guilt and responsibility as Janus-faced acts of contrition aimed at gaining the sympathy of the judges, especially the foreign ones. Chum Sirath explained what he saw as Duch's psychological and strategic objectives:

When Duch speaks of forgiveness, he repeatedly says he is responsible for all those crimes as only one member of the Communist Party of Kampuchea [CPK]. It is his way of always diverting responsibility. It is as if he is saying: 'I am one of a million members of the CPK therefore I bear a millionth of the responsibility'. When he addresses individuals who he feels inferior to, he flatters them. But when it comes to the civil parties he considers beneath him, he crushes them. But he does this in a very subtle way. Here and there he accepts certain things the civil parties say as the truth, while still managing to sow doubt about their veracity.¹¹⁸

The experience of testifying

Human rights advocates have argued that victims who speak publicly about their ordeals in criminal trials or before truth commissions often experience catharsis, which, in turn, can lead to healing and closure.¹¹⁹ But psychoanalysts and psychologists take a more critical view of the idea of a quick, cathartic cure as a result of testifying.¹²⁰ For example, one respondent told us that he felt elated after his testimony but it took only a matter of hours for the feeling to pass:

After the testimony, when the microphone was switched off, I felt happy. It was like being relieved of a big weight. I was feeling light. My head was free. I was happy. During those two hours, I thought that [my suffering] was over. But, as I found out later that wasn't the case at all. Still I will remember those two hours for the rest of my life.¹²¹

117 Interview with Antonya Tioulong, above note 89.

118 Interview with Chum Sirath, above note 86.

119 See, e.g., Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and social repair: rethinking the contribution of justice to reconciliation', in *Human Rights Quarterly*, Vol. 24, No. 3, 2002, pp. 592–593.

120 *Ibid.*, pp. 593–594.

121 Interview, 24 November 2009.

The majority (seventeen out of twenty-one) of the civil parties whom we interviewed characterized their court experiences as largely positive, the remaining four saying that it was a mixed experience. Most said they left the courtroom in a highly charged emotional state. But, beyond that, the respondents described a variety of reactions and shifting emotions during and immediately after their courtroom experience. These accounts affirm earlier studies of victim-witnesses who have testified in war crimes trials,¹²² and suggest that the act of giving testimony either as a victim-witness or as a civil party is a multifaceted experience, fraught with unexpected challenges and emotional swings, rather than one that is wholly cathartic.

Civil parties described a range of feelings as they left the courtroom. Some said that they felt ‘disappointed’ for having failed to recount important details or not having enough time to tell their story. Bou Meng, an S-21 survivor said:

Testifying helped me release some anger. But I failed to tell the court how I had lost my career as a painter because of my treatment at S-21. I wanted to tell the court that I am now disabled, that my sight and hearing have deteriorated greatly. But the court didn’t ask me what the torture did to my body.¹²³

Neth Phally put it this way:

When I left the courtroom my feelings had been eased, and I left hopeful that the court would provide justice for my brother. But I also felt dissatisfied that I was unable to tell my whole story. One hour is not enough time.¹²⁴

Hav Sophea said that, as she left the courtroom, she felt something was missing:

I wasn’t angry or disappointed with the court, I just felt I missed the opportunity to tell my whole story. I had wanted to tell the accused: ‘If I was not my father’s daughter, why would I have come? I would not have wasted my time doing this’.¹²⁵

Four of the twenty-one civil parties whom we interviewed found testifying very difficult, largely because it meant recalling painful events. Chum Neou, who lost both her husband and child during the Khmer Rouge period, characterized her time in the courtroom as bittersweet; at one point she became so distraught a TPO social worker was asked to sit with her in the witness stand. She said:

It was important to tell my story, to tell about my life after hiding it for thirty years [but] it was very difficult, too. How could I explain my tremendous sadness and suffering to the court? My first hearing took place, and then I had to wait three days before I could continue. It was difficult. During those three

122 See E. Stover, above note 32, pp. 87–90; G. Mischkowski and G. Mlinarevic, above note 72, p. 59.

123 Interview with Bou Meng, above note 80.

124 Interview with Neth Phally, above note 2.

125 Interview with Hav Sophea, above note 116.

days, I tried to keep all the stories straight in my head so I could recount them accurately for the court.¹²⁶

Chin Met said the court treated her respectfully, but that the process of recalling a past she had buried was gut-wrenching:

The whole story I have tried to forget just came back to me. The lawyers and the non-governmental organizations keep asking me the same questions again and again, and it always brings back the sadness. . . . It is like a healed wound that is being picked at by a stick. When I walked out of the court, I did not feel I got any benefit from it. Only the court got some benefits.¹²⁷

Several civil parties derived great satisfaction from testifying. The most demonstrative was Chum Mey, President of the Victims Association of Democratic Kampuchea (Ksem Ksan), an organization comprised in part of victims of the Khmer Rouge. Several days a week, Chum Mey works as a guide at Tuol Sleng, where he leads tour groups around the grounds of the former prison. He said,

Before entering the courtroom I felt tense in my chest. But after I talked to the judges and related my story, I felt like all of this tenseness was released. Like right now when I tell my story to visitors to Tuol Sleng, I can control myself. I don't cry like I used to. Before I testified, I kept thinking I should probably see a psychiatrist, but after I testified I realized my feelings had become normal.¹²⁸

A victim's response to the stress of testifying can, of course, fall anywhere on a continuum from the traumatic to the pleasurable, but how the victim internalizes that stress will largely depend on his or her perception of the trial's outcome and the extent to which it validated his or her participation in it.¹²⁹

A sense of justice

Since the mid-1970s, social psychologists have surveyed people around the world who have participated in judicial proceedings and various forms of arbitration to understand what it is about such processes that leads participants to consider them fair or unfair, and ultimately to accept or reject the outcome. Almost universally, these studies have concluded that the manner in which a trial is conducted and the extent to which participants have a 'voice' in the proceedings are major influences – though not the only ones – on satisfaction that justice was done.¹³⁰

126 Interview with Chum Neou, 12 November 2009.

127 Interview with Chin Met, above note 67.

128 Interview with Chum Mey, above note 90.

129 R. J. McNally, above note 98, pp. 98–99.

130 See, e.g., John W. Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis*, Lawrence Erlbaum Associates, Inc., Hillsdale, NJ, 1975; Edgar Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice*, Plenum, New York, 1988; Edgar Allan Lind, Ruth Kanfer, and P. Christopher Earley, 'Voice, control, and procedural justice', in *Journal of Personality and Social Psychology*, Vol. 59, No. 5, 1990, pp. 952–959; Robert J. Maccoun, 'Voice, control, and belonging: the double-edged sword of procedural fairness', in *Annual Review of Law and Social Science*, Vol. 1, 2005, pp. 171–201; David De

According to these studies, individuals define a ‘fair process’ as one that is based largely on three criteria: *benevolence* – the degree to which they perceive that the authorities care about them and their experiences; *neutrality* – the extent to which they have been able to talk about their experiences in a neutral and unbiased forum; and *respect* – the extent to which they have been treated in a professional and dignified manner. ‘Judgments about “how hard” the authorities tried to be fair emerged as the key overall factor in assessing procedural justice’, writes the social psychologist Tom Tyler.¹³¹ In effect, those involved in judicial processes are looking for signs that they can trust the authorities.¹³² For this reason, showing the utmost respect to witnesses and civil parties in the courtroom is a key component for building trust in a court’s authority and legitimacy.

The civil parties whom we interviewed tended to express the most dissatisfaction with the ECCC when they perceived that either the judges or defence attorneys were failing to respect their interests, were showing favouritism to the accused, or were adopting measures that restricted their role and the role of their lawyers in the courtroom. This was particularly evident near the end of the trial when a group of twenty-eight civil parties, including many of those whom we interviewed, boycotted the proceedings for a week.¹³³ The incident arose when the Chamber determined that the civil party lawyers would not be permitted to question the accused or witnesses called by the defence to testify about Duch’s character, nor make submissions on sentencing. What particularly irked the civil parties was the Chamber’s determination that their role as civil party participants did not confer on them ‘a general right of equal participation’ with the prosecution, nor ‘transfer them into additional prosecutors’.¹³⁴

A sense of fairness

Despite these setbacks, only one of the respondents felt that the trial proceedings were unfair, and even his criticisms focused more on

Cremer and Constantine Sedlikides, ‘Self-uncertainty and responsiveness to procedural justice’, in *Journal of Experimental Social Psychology*, Vol. 41, 2005, pp. 157–173.

131 Tom R. Tyler, ‘What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures’, in *Law and Society Review*, Vol. 22, No. 1, 1988, p. 129.

132 See Bernard Barber, *The Logic and Limits of Trust*, Rutgers University Press, New Brunswick, NJ, 1983; and Tom R. Tyler, ‘When does procedural justice matter in organizational settings?’, in Roy J. Lewicki, Blair H. Sheppard, and Max H. Bazerman (eds), *Research on Negotiation in Organizations*, Vol. 1, JAI Press, Greenwich, CT, Vol. 1, pp. 7–23.

133 See ‘Letter of civil parties in Case 001 to the President of the Trial Chamber’, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E166.1_FR.pdf (last visited 7 September 2011). The letter was in response to the Trial Chamber’s oral decisions on civil party lawyers to make submissions on sentencing and questioning of the accused, experts, and witnesses testifying on character: see ECCC, Transcript of Trial Proceedings – *Kaing Guek Eav ‘Duch’*, Case File No. 001/18-07-2007-ECCC/TC, 27 August 2009, Trial Day 66, pp. 42 and 74FN, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E1_70.1_TR001_20090827_Final_EN_Pub.pdf (last visited 7 September 2011). See also KRT Trial Monitor, Report No. 20 (week ending 4 September 2009), p. 2.

134 Decision on Civil Party Co-Lawyers’ Joint Request, above note 94, para 25.

what he perceived as the incompetence of the prosecutors than any bias. 'Still', he said,

it was necessary to have such a court, to show the leaders that there is no impunity . . . and for the victims to impart a feeling that we have done our duty toward our missing loved ones. And, for the country, for the people, so they will see that impunity is not there all the time.¹³⁵

Most civil parties whom we interviewed (fifteen out of twenty-one) said that the trial had been fair. 'I felt respected by the court', Neth Phally said,¹³⁶ while another respondent, who had been grilled about his identity by the judges and defence, characterized the proceedings as 'very fair' and said 'full rights' were provided to everyone.¹³⁷ Robert Hamill, whose brother died at S-21 agreed. He added that it was his 'understanding that there was a negative response from one or two judges to the idea of hearing civil parties. Because of that, I wanted . . . to show that I appreciated the opportunity that they allowed us to participate'.¹³⁸ Another respondent, echoing the sentiments of others, felt that the international presence in the court helped to keep the proceedings impartial.¹³⁹

Our interviews suggest that, overall, the civil parties found the trial process to be fair, although they did express dissatisfaction with certain decisions and procedures imposed on their legal counsel by the court. First and foremost among these was the perceived inequality of means and resources provided to the defence and to the civil party lawyers. Antonya Tiouloung said,

I am very grateful to have been selected to testify in this trial. But I do believe there has been a great imbalance between the defence and civil parties. During the closing arguments, for example, the defence received seven hours to present [its] case while the civil parties only received five and a half hours.¹⁴⁰

Reparations

Reparations for large-scale violations of human rights may be material or symbolic, or a combination of the two.¹⁴¹ Material reparations stem from the compensatory theory of justice: wrongdoers should not only pay victims for their injuries and losses, but the compensation should be proportional to the injury or loss inflicted.¹⁴² Symbolic reparations emphasize the significance of official acknowledgement of wrongdoing and the need to pay respect to survivors or those who have died. Reparations can be one-off financial payment to individual victims, or collective processes such as public memorials, days of remembrance, parks, renaming streets

135 Personal interview conducted by authors on 24 November 2009.

136 Interview with Neth Phally, above note 2.

137 Interview, 22 November 2009.

138 Interview with Robert Hamill, above note 110.

139 Interview, 17 November 2009.

140 Interview with Antonya Tiouloung, above note 89.

141 See Pablo de Greiff (ed.), *The Handbook on Reparations*, Oxford University Press, New York, 2006.

142 See, e.g., John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, MA, 1971.

or schools, preserving repressive sites and burial grounds as museums, and other ways of creating public memory. They can include state educational reform, the rewriting of historical accounts, education in human rights and tolerance, and public apologies from governmental authorities.¹⁴³

The principle of reparations is well recognized in Cambodian law.¹⁴⁴ Indeed, most Cambodians favour some form of reparations for victims of the Khmer Rouge. In a 2008 survey of 1,000 Cambodians, 88% said that reparations should be provided to victims, while 68% said that they should be provided to the community as a whole. Over half (53%) said that reparations should be in a form that affects the daily lives of Cambodians, including social services (20%), infrastructure development (15%), economic development programmes (12%), housing and land (5%), and provision of livestock, food, and agricultural tools (1%).¹⁴⁵

The right to claim reparations did not feature in the ECCC's founding statute, but it is reflected in the Internal Rules, which provide that the Chamber may award collective and moral – but not individual financial – reparations to civil parties, which 'shall be awarded against, and be borne by convicted persons'.¹⁴⁶ The Internal Rules further clarify that such reparations may include ordering a convicted person 'to publish the judgment in any appropriate news or other media', to 'fund any non-profit activity or service that is intended for the benefit of victims', or 'other appropriate and comparable forms of reparation'.¹⁴⁷

Civil party lawyers in the *Duch* case recommended that the court award their clients and the Cambodian people 'a range of reparations that roughly fall under the headings of outreach and dissemination of information and apology, medical care including psychological and physical care, educational programs, and memorialization of victims'.¹⁴⁸ Our interviews with civil parties revealed a wide range of opinions regarding reparations. Several respondents, while recognizing the symbolic importance of reparations, questioned whether compensation of any kind could truly contribute to individual and social repair after so many years. 'How do you put a number on suffering?', asked one respondent. 'The fact of having testified is already moral reparation. Getting answers, knowing what happened. ... The

143 See Naomi Roht-Arriaza, 'Reparations in the aftermath of repression and mass violence', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 121–139.

144 Article 14 of the Code of Criminal Procedure for the Kingdom of Cambodia provides that 'An injury can be compensated by paying damages, by giving back to the victim the property that has been lost or by restoring damaged or destroyed property to its original state'.

145 Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, and Eric Stover, *So We Will Never Forget: A Population-based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, University of California, Berkeley, CA, January 2009, pp. 43–44.

146 ECCC, Internal Rules, above note 4, Rule 23(11).

147 *Ibid.*, Rule 23 (12).

148 See ECCC, Case File 001/18-07-2007/ECCC/TC, Civil Parties Co-Lawyers' Joint Submission on Reparations (Trial Chamber) 14 September 2009, para. 11, available at: <http://www.eccc.gov.kh/en/documents/court/civil-parties-co-lawyers-joint-submission-reparations> (last visited 7 July 2011).

concept of reparation, it seems to me, is out of place. Reparation? How can we be repaired? This is not possible'.¹⁴⁹

Others believed that they should receive individual material reparations, especially in the form of medical and psychosocial care, or a fund to enable them to hold a Buddhist ceremony to honour the memory of those loved ones who had perished at S-21. Civil parties spoke of reparations in the same terms as they did their court testimonies: namely, as a form of official recognition and acknowledgement of their suffering, and that of the Cambodian people.

Overall experience

In a Yugoslav victim-witness study, the vast majority of respondents said that they felt it was their 'moral duty to bear witness on behalf of their deceased family members and neighbors', and that they regarded their time on the witness stand as an opportunity to discharge that obligation, as well as an 'opportunity to confront their tormentors'.¹⁵⁰ In many cases, if these overarching needs were realized and witnesses felt that they had been treated respectfully, they were generally willing to overlook trial inequities or difficult moments (a withering cross-examination, for example) that arose during their interaction with the court.

When reflecting on their overall experience the civil parties whom we interviewed provided four general observations. First, the vast majority of respondents said testifying had been the most important part of their overall experience of being a civil party. Hav Sophea, echoing the sentiments of many of her counterparts, said:

The most important moment in the whole process was being able to testify, to be able to be there in the courtroom and to tell my story. It was a privilege that I was allowed to testify and that I was able to express the feelings of other victims of the Khmer Rouge time.¹⁵¹

Second, many said that their experience as a civil party had been transformative for them and, in some cases, for their families. Robert Hamill spoke of how his testimony had helped his sister and the family of a friend who had perished with Hamill's brother at Tuol Sleng cope with their losses.¹⁵² Ouk Neary also found the experience transformative: 'I would never have imagined I would be able to speak. I was very surprised by what I did . . . I grew up and became mature because of the whole process. Now I have my eyes wide open'.¹⁵³

After testifying, Neary went alone to Tuol Sleng before her return trip to France. 'I went to my father's cell and knelt on one knee and I talked to my Dad for five minutes', she recalled. 'Finally, I rose and said, "Okay, Dad, let's go. You can't stay here any more, and neither can I"'. Neary said that the visit was to set both her

149 Interview, 17 November 2009.

150 See E. Stover, above note 32, p. 112.

151 Interview with Hav Sophea, above note 116.

152 Interview with Robert Hamill, above note 110.

153 Interview with Ouk Neary, above note 103.

and her father free. ‘In my mind I had been in S-21 for more than thirty years and I wanted to get out’, she said. ‘Because I didn’t know the truth [for all those years], I was in the cell with my Dad. And now it was time to be free’.¹⁵⁴ Ouk Neary’s mother, Martine Lefeuvre, summed up her own experience this way: ‘It [was] a beginning of reparation, something turned. I felt that people understood our family’s suffering. . . . And now I don’t want our family to return to its solitude, its nonexistence like it was since 1977’.¹⁵⁵

Third, many civil parties noted with approval how the overall trial experience had introduced them to others who had suffered. Martine Lefeuvre said:

The group of civil parties were able to talk to one another. [We] had an affinity, even without knowing one other. We listened to the stories of others because some of us have the same lawyers. For others we also heard their stories in the group, and it created solidarity, kindness, empathy – that is one of the things I really liked about the process.¹⁵⁶

Chum Sirath put it this way:

Meeting other civil parties creates friendships. For example, for me, personally, I couldn’t talk about my suffering . . . but meeting with other civil parties it allows me to talk about it. . . . We’ve built friendships. And now we take care of each other. . . . There is a kind of self-help between victims . . . and perhaps it helps to keep alive the memory of our family and . . . help to prevent the return of such crimes.¹⁵⁷

As the Duch trial progressed it became evident that many of the civil parties had formed strong, supportive bonds. In September 2009, weeks after the civil party boycott, a group of civil parties from both Cases 001 and 002 decided to form the Victims Association of Democratic Kampuchea (or Ksem Ksan Association), one of the first victims’ associations in Cambodia.¹⁵⁸

Fourth and finally, most of the civil parties whom we interviewed felt that their motivation to bear witness on behalf of their deceased family members had been realized through the trial process. Some said that the actual experience of testifying far exceeded their initial expectations and, if given the chance, they would encourage others to testify. A few said that they had wanted Duch to admit to having ordered the execution of a family member, and when he failed to do so they felt that their mission had not been fulfilled. Such misgivings, however, did not undermine their general feelings of satisfaction.

¹⁵⁴ *Ibid.*

¹⁵⁵ Interview with Martine Lefeuvre, above note 77.

¹⁵⁶ *Ibid.*

¹⁵⁷ Interview with Chum Sirath, above note 86.

¹⁵⁸ More information about the Ksem Ksan Association can be found at: <http://ksemksan.org/index.php?nav=home&lang=en> (last visited 7 July 2011).

The verdict

On the morning of 26 July 2010, hundreds of Cambodians travelled to the court to hear the ECCC's verdict.¹⁵⁹ After the judges filed into the chambers and took their seats, the Court president and presiding judge, Nil Nonn, pronounced Duch 'individually criminally responsible' for crimes against humanity and grave breaches of the Geneva Conventions of 1949.¹⁶⁰ He then addressed the admissibility of the civil party applicants and read out the names of sixty-six of the ninety who had applied. Twenty-four had been rejected, including some who had testified, 'because the Chamber [was] not satisfied ... that the ... Civil Parties were victims of crimes committed by Kaing Guek Eav at S-21 or S-24'.¹⁶¹ Civil Parties failed to establish that their lost relatives were victims of crimes for which Kaing Guek Eav was convicted¹⁶² or failed to prove a close kinship or bond of affection or dependency on victims of S-21 or S-24.¹⁶³ The president went on to say that reparations would be limited to the inclusion in the judgment of the names of the sixty-six accepted civil parties and the name of any family member who might have been harmed at S-21, as well as a compilation and publication of all statements of apology made by the accused, which would be posted on the ECCC website.¹⁶⁴ Other requests such as individual monetary awards, a national commemoration day, construction of pagodas, preservation of archives, and access to medical care and education were considered outside the competence of the Court or lacking specificity.¹⁶⁵

Next, the presiding judge announced that the accused would be sentenced to thirty-five years' imprisonment, which would be reduced to nineteen years, owing to time already served and to compensate for a period of illegal detention by a Cambodian military court.¹⁶⁶ Immediately after the verdict, the victims' association issued a prepared statement in which it spoke approvingly of Duch's conviction but criticized the relatively light sentence, the Court's rejection of twenty-four civil parties, and the lack of tangible reparations. Three weeks after the verdict, the Co-Prosecutors filed a notice of appeal requesting 'the Supreme Court Chamber ... increase the term of imprisonment against Duch'.¹⁶⁷ Duch appealed his conviction¹⁶⁸

159 One of the authors – Mychelle Balthazard – attended the verdict.

160 See Case 001, Judgment, above note 3, para. 568.

161 *Ibid.*, para. 647.

162 *Ibid.*, para. 648.

163 *Ibid.*, para. 649.

164 *Ibid.*, paras. 667–675, 683.

165 *Ibid.*, paras. 652–658.

166 *Ibid.*, paras. 679–681. The prosecution had asked for a forty-year sentence *after* taking into consideration mitigating factors and Duch's earlier illegal detention.

167 See Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia, 16 August 2010, available at: <http://www.eccc.gov.kh/en/articles/statement-co-prosecutors> (last visited 7 July 2011).

168 See ECCC, Notice of Appeal, by the Co-Lawyers for Kaing Guek Eav Alias Duch against the Trial Chamber Judgment of 26 July 2010, 24 August 2010, 001/18-07-2007-ECCC/TC, available at: <http://www.eccc.gov.kh/en/document/court/notice-appeal-co-lawyers-kaing-guek-eav-alias-duch-against-trial-chamber-judgement-26> (last visited 7 September 2011). See also Associated Press, 'Former Khmer Rouge chief appeals against conviction', 15 August 2010.

and many civil parties appealed their rejection.¹⁶⁹ The Supreme Court will pronounce its judgment on this issue in February 2012.¹⁷⁰

Over the ensuing days, local and international media ran numerous stories focusing on the civil parties' distress.¹⁷¹ Some journalists even portrayed the sentence as a threat to the development of the rule of law in Cambodia. The ECCC had been seen as playing an important role in helping rebuild trust in a Cambodian legal system that had been decimated thirty years earlier, but, at least in the eyes of these journalists and commentators, that role was now compromised by the lightness of the sentence compared to the enormity of the crimes.¹⁷²

In the meantime, the TPO reported that it had received distressed phone calls from several civil parties whose status was denied by the Trial Chamber. Some callers expressed shame and guilt for having failed their deceased loved ones. 'I had promised to my ancestors to seek justice for my relatives who died at S-21', said one caller, 'but I cannot . . . I am not good enough'. Another said: 'I don't want to go out of my house because I do not want to tell my neighbours that I was rejected as a civil party. It is for me a major loss of face!'¹⁷³ After a meeting of civil parties immediately following the verdict, the TPO reported that many participants 'expressed strong feelings of anger, sadness, disappointment, injustice, and helplessness'¹⁷⁴ at both the sentence and the Court's rejection of twenty-four civil parties.¹⁷⁵

169 See ECCC, Group 1 – Civil parties' co-lawyers immediate appeal of civil party status determinations from the final judgment, 24 August 2010, 001/18-07-2007-ECCC/SC, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E188_10_EN_CPG1.pdf; ECCC, Co-lawyers for civil parties group 2: Appeal against rejection of civil party applicants in the judgment, 22 October 2010, 001/18-07-2007-ECCC/SC, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F11_EN.pdf (last visited 7 September 2011); ECCC, Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, 5 October 2010, 001/18-07-2007-ECCC/OCIJ, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/F9_EN.pdf (last visited 7 September 2011). The appeal hearings against the Trial Chamber's judgment were held on 28–30 March 2011. See ECCC, Transcripts of Appeal Proceedings – *Kaing Guek Eav 'Duch'*, 001/18-07-2007-ECCC/SC, available at: <http://www.eccc.gov.kh/en/indicted-person/66/transcript>. At the time of writing, the Supreme Court Chamber's decisions on the appeals were still pending.

170 See ECCC, Case File No. 001/18-07-2007-ECCC/SC, Order Scheduling Pronouncement of Appeal Judgment (Supreme Court) 17 November 2011, available at: <http://www.eccc.gov.kh/en/document/court/order-scheduling-pronouncement-appeal-judgment> (last visited 27 November 2011).

171 See, e.g., Guy de Launey, 'Tears and disbelief at Duch verdict', *BBC News*, 26 July 2010, available at: <http://www.bbc.co.uk/news/world-asia-pacific-10763409> (last visited 20 December 2011).

172 *Ibid.* See also, e.g., Robin McDowell, 'For most Cambodians, "justice" has little meaning', in *Associated Press*, 8 August 2010, available at: <http://www.guardian.co.uk/world/feedarticle/9211885> (last visited 20 December 2011).

173 Authors' personal communication with staff members at the TPO, 6 September 2010.

174 See Transcultural Psychosocial Organization, *Report on TPO's After-Verdict Intervention with Case 001 Civil Parties*, 27 July 2010, pp. 2–3.

175 As of 21 November 2011, 3,866 people were recognized as civil parties in Case 002. Earlier, the Office of the Co-Investigating Judges had rejected 1,846 civil party applications – nearly half of the 3,988 applications in the case. See, *ECCC Court Report*, Issue 29, Phnom Penh, September 2010, p. 4. On 24 June 2011, the Pre-Trial Chamber granted civil party status to 1,728 Case 002 civil party applicants who were previously rejected as inadmissible. See ECCC Public Affairs, 'Pre-Trial Chamber overturns previous rejections of 98% of appealing civil party applicants in Case 002', Press Release, 24 June 2011, available at: <http://www.eccc.gov.kh/en/articles/pre-trial-chamber-overturns-previous-rejection-98-appealing-civil-party-applicants-case-002> (last visited 20 December 2011). The Pre-Trial Chamber's decision can be downloaded at: <http://www.eccc.gov.kh/en/document/court/decision-appeals-against-orders-co-investigating-judges-admissibility-civil-party-app> (last visited 20 December 2011). See also Fédération

Civil parties' reactions to the verdict

In the weeks following the verdict, we spoke with seventeen of the twenty-one civil parties whom we had interviewed in late 2009. The purpose was twofold: to inquire whether they felt the verdict was just and whether it had affected their overall experience as a civil party. In this regard, it is helpful to keep in mind that people commonly equate the hierarchical gravity of crimes – especially those involving thousands and tens of thousands of deaths – to the number of years that perpetrators have to serve in prison. But, as profoundly disappointing as a lenient sentence may be to victims, as evidenced below, it does not necessarily mean that the sentence will permanently tarnish their perception of the court and their own experience as a witness or civil party.¹⁷⁶

Most of the civil parties whom we interviewed after the verdict felt that the sentence was unacceptably low and many hoped that an appellate court would eventually redress what one characterized as '50% justice'. 'All civil parties are unhappy', said Chum Mey. 'Thirty-five years is a lenient sentence. Duch killed a lot of people. He does not deserve such [leniency]'.¹⁷⁷ Despite considerable disappointment (and some anger) about the sentence, none of the seventeen civil parties whom we interviewed at this point felt that the trial itself was unfair. For Martine Lefevre, the verdict brought freedom: 'The verdict has liberated me. It has liberated Ket and [given] him back his dignity. I feel as if I have sprouted wings'.¹⁷⁸ Van Nath, a survivor of S-21 and a witness (not a civil party), said that he accepted

the *Duch* verdict because the court did not decide immediately. It spent many years investigating this case, and before handing it down the court described Duch's mistakes. It is fair. And it is like a life sentence for him because Duch is 67 years old already. So I do not think he can serve all these years in prison because his health is not so good as well.¹⁷⁹

Although dissatisfied with the sentence and other elements of the verdict, Anthonya Tioulong emphasized that the judgment as a whole

is important because it recognizes that Duch is guilty of crimes against humanity and war crimes. It also recognizes the extreme cruelty endured by the victims [at S21] and Duch's individual responsibility. Finally, the judgment acknowledges that his remorse was partial. It is just and [the] truth.¹⁸⁰

Internationale des Droits de l'Homme-ADHOC-the Center for Justice and Accountability, 'The Extraordinary Chambers in the Courts of Cambodia (ECCC). Opening of the trial in Case 002: expectations of victims from here and abroad', Press Kit, 21 November 2011, p. 5, available at: http://www.fidh.org/IMG/pdf/dpcambodgedec2011_final.pdf (last visited 20 December 2011).

176 See E. Stover, above note 32, pp. 131–136.

177 Interview with Chum Mey, 6 August 2010.

178 Interview with Martine Lefevre, 28 July 2010.

179 May Tithara and Sebastian Strangio, 'A mixed reaction to judgment day: the trial ends, but not the debate', in *Phnom Penh Post*, 27 July 2010, Verdict section, p. 4.

180 Interview with Anthonya Tioulong, 31 July 2010.

Chum Sirath believed that the guilty verdict would help to dispel the belief of many Cambodians, that ‘Khmers could never kill Khmers’, and that such killings had to have been manipulated by a foreign power. ‘The journalists focus on the sentence . . . but they have forgotten a crucial point’, he said.

It is the first time that a court of law has recognized that crimes committed during the Khmer Rouge regime were committed by Khmers. It is not possible to accuse others anymore; the crimes were committed by Khmers. No one can deny it. This recognition is a big step forward.¹⁸¹

Ou Savrith said:

What was important was that Duch was recognized as guilty of the crimes he committed. For victims the number of years he spends in prison can never be enough. Now the verdict is part of history, it is a face, a gesture. A sentence of thirty or forty years or life does not matter. To ask for more is not justice, it is revenge. Justice is not perfect but I do not want to ask for more and spoil what we got.¹⁸²

While disappointed by the lenient sentence that Duch received, many civil parties, including one who was ultimately denied that status, said they still considered their overall experiences as a civil party to be positive. ‘[Duch] should be in prison until he dies’, one respondent said. ‘But my experience as [a] civil party has been very good. I got to listen [to the proceedings], and talk about my experience. That made me [feel] better’.¹⁸³

After the verdict, Ou Savrith placed some soil and a picture of his brother in an urn and performed a Buddhist ceremony at a pagoda. ‘Since the verdict I feel better’, he said.

I feel the cycle is finished. I did the most I could for my brother . . . I feel more serene now . . . It is difficult to explain but I feel his soul is still at S-21 so I hope the ceremony can help him be reincarnated.

As for his experience as a civil party, Ou Savrith said he had no regrets. ‘I had to do it’, he said. ‘My brother is no longer anonymous. I am pleased that people know him now and that I had a chance to talk about him . . . It was difficult but I had to do it. Now I can move on’.¹⁸⁴

Conclusion

In this article, we set out to examine how civil parties who testified in the *Duch* trial viewed their interaction with the ECCC, and what implications their participation in the proceedings and its effects might have for future trials at the

181 Interview with Chum Sirath, 10 August 2010.

182 Interview with Ou Savrith, conducted via telephone, 24 August 2010.

183 Interview, 27 July 2010.

184 Interview with Ou Savrith, above note 182.

ECCC, the ICC, and other domestic and international war crimes tribunals. So what have we learned?

First, testifying in war crimes trials can *potentially* be a positive experience for civil parties so long as the process is largely perceived as safe, respectful, and dignified. Among the civil parties whom we interviewed, most mentioned both a positive experience and the fairness of the process. Yet, even when those conditions exist, civil parties can lose faith in a court if they believe that a sentence is too lenient or if they feel that a court has failed to provide reparations commensurate with the gravity of the crimes. While the civil parties whom we interviewed were clearly angered by specific procedures and rulings, especially the lenient sentence given to Duch, they still believed that their participation in the proceedings was meaningful and that justice was rendered.

They characterized their participation in the *Duch* trial, though at times unnerving and frustrating, as positive. They spoke of their obligation to testify in personal terms, grounded in a duty to confront Duch and to bear witness for those who had perished in S-21. Many said that their appearance in the courtroom helped to restore the dignity of their deceased loved ones and to complete their spiritual journeys as Buddhists.

That said, a considerable number of civil parties seemed deeply disappointed with the Trial Chamber's reduction of Duch's thirty-five-year sentence to nineteen years, the narrow reparations award, and the rejection of twenty-four civil parties. Some expressed frustration that they or others were rejected because of an inability to generate evidence of victimization in a format that the court could recognize, owing to the destruction of documents by the Khmer Rouge regime. The destruction of documents and a lack of documentation generally are not phenomena unique to the Khmer Rouge context; rather, this is a problem that frequently arises with mass atrocities.¹⁸⁵ The inability of many victims to obtain the kind of documentary evidence that tribunals require suggests that it is critical for courts to modify their standards in some cases, especially if reparations are moral and collective rather than individual financial awards. Alternatively, if the easing of such requirements threatens the defendant's right to a fair trial, it is imperative for courts, lawyers, and NGOs to explain carefully and clearly to applicants, the media, and the general public what rejection as a civil party means: specifically, that the required standards of evidence could not be met, usually through no fault of the applicant, and that such applicants, and perhaps many others, have often been victimized. It may also be critical to develop avenues other than the court proper for victims' status to be recognized and for victims to tell their stories. The potential for collective reparations becomes an essential counterpart to this ability to bear witness. For example, reparations in the form of a day of remembrance can become

185 The ICC has grappled with this issue. For general information about how victims can apply to participate in ICC proceedings, see Office of the Public Counsel for Victims, International Criminal Court, *Representing Victims Before the International Criminal Court: A Manual for Legal Representatives*, Ipskamp Drukkers B.V., Enschede, 2010.

an alternative expression of support for victims and a condemnation of the accused that may substitute for a chance to speak in court.

There are signs that the ECCC has recognized some of the structural problems that have plagued victim participation in Case 001. In early 2010, the Court modified three major components of its Rules: the criteria for civil party admissibility, the vetting process, and the structure for legal representation.¹⁸⁶ The admissibility criteria are now more specific, stating that civil party applicants should be clearly identified and able to demonstrate that their injuries are directly linked to at least one of the crimes alleged against the accused.¹⁸⁷ This clarification reduces interpretation on admissibility of civil parties and provides advance parameters for applicants to follow, potentially diminishing rejections. In addition, the Office of the Co-Investigating Judges is now responsible for vetting all civil parties prior to trial. Finally, in an effort to limit the number of civil party lawyers in the courtroom, the ECCC has decided that two Co-lead Counsel (one international and one Cambodian) will represent all of the civil parties during the actual proceedings. The Co-lead Counsel will be hired and paid for by the ECCC, and assisted by specialized civil party lawyers who will represent various sub-groups and interests and serve as the link between their clients and the Co-lead Counsel.¹⁸⁸

While rectifying these structural problems could go a long way toward improving civil party participation at the ECCC, much more needs to be done to educate witnesses, civil parties, and, indeed, the general population about the Court's limitations, as well as its rules and procedures (most of which are quite alien to Cambodians). Of utmost importance, especially during the pre-trial and trial phases, is the need to keep civil parties and witnesses informed about developments in the proceedings. As the criminologist Jo-Anne Weemers writes:

Information and notification... send a message to victims that they are not forgotten and they recognize their interest in the case... Victims who are informed of their rights and notified of developments in their case tend to be more satisfied with the justice system and feel that they are treated fairly.¹⁸⁹

Conversely, a lack of information and transparency can send the opposite message to victims and witnesses. This has already happened in Case 003 at the ECCC. On 24 October 2011, Rowan Downing and Katinka Lahuis, two international judges in a pre-trial chamber that rules on disputes while a case is still under investigation, issued a minority decision listing a string of questionable actions by Co-Investigating Judges Siegfried Blunt and You Bunleng. Blunt and You jointly headed the Office of the Co-Investigating Judges prior to Blunt's resignation on 9 October. Downing and Lahuis said that Blunt and You had backdated documents, inexplicably refused to recognize civil party lawyers, prevented civil

186 ECCC, Internal Rules (revision 5), above note 55, Rule 12 *ter*, Rule 23 *bis*, Rule 23 *ter* (1).

187 *Ibid.*, Rule 23 *bis* (1).

188 *Ibid.*, Rule 12 *ter*, Rule 23 *bis* (2), Rule 23 *bis* (3).

189 This finding has been confirmed in numerous studies. For a general review of these studies, see Jo-Anne Weemers, 'Victims' rights and the International Criminal Court: perceptions within the court regarding the victims' right to participate', in *Leiden Journal of International Law*, Vol. 23, 2010, p. 641.

party lawyers from accessing case files despite repeated requests, and, in doing so, had 'deprived some civil party applicants... of the fundamental right to legal representation'.¹⁹⁰

Our second finding is that the civil parties' generally positive attitudes about the *Duch* trial process may not be echoed in future ECCC or ICC cases. Why is this? To begin with, memories of wartime atrocities, like all memories, are both personal and local; they consist of specific places and actors and moments in time embedded in the psyche of individual victims and witnesses. The *Duch* trial complemented these elements. It featured: (1) a single defendant who, early in the proceedings, expressed remorse for his crimes; (2) a 'crime scene' confined to a specific location – namely, the grounds of the S-21 detention centre (and the related facility known as S-24); and (3) the participation of ninety civil parties, twenty-two of whom testified largely because they viewed Duch as the individual most directly responsible for the death of their loved ones. Their desire – denied for nearly thirty years – to confront Duch and discover the truth drew them *towards* and *into* the judicial process. Once inside the system, they were able, for the most part, to fulfil their personal and spiritual obligations to obtain some modicum of justice for their loved ones and themselves.

In comparison, Case 002 involves (1) three senior Khmer Rouge leaders who have refused to talk; (2) a 'crime scene' that covers diverse locations throughout Cambodia; and (3) a group of nearly 4,000 civil parties who will be confronting aging defendants with no (or, at best, very little) knowledge of the local circumstances surrounding the deaths of the civil parties' loved ones. As a result, what the civil parties take away from their participation in Case 002 may be more formulaic and less individualized, and therefore less transformative. To test this hypothesis, it will be important to conduct a similar interview study of civil parties once the verdict has been rendered in Case 002.

Our findings in the *Duch* trial may have implications for 'victim participation' at the International Criminal Court and the level of satisfaction that victim participants have as a result of their association with the court. The ICC Strategy in Relation to Victims, a court-wide document that addresses victim-related issues, notes that:

by providing victims with an opportunity...to be part of the justice process and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and *view it as relevant to their day to day existence rather than as remote, technical and irrelevant*.¹⁹¹

190 See ECCC, Case No. 003/07-09-2009-ECCC/OCIJ (PEC 02), Public (Redacted Version): Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Opinion of Judges Lahuis and Downing, para. 7, available at: <http://www.eccc.gov.kh/en/document/court/considerations-pre-trial-chamber-regarding-appeal-against-order-admissibility-civil-p> (last visited 2 December 2011).

191 International Criminal Court, Report of the Court on the Strategy in Relation to Victims ('ICC Strategy in Relation to Victims'), ICC-ASP/8/45, 10 November 2009, para. 46, emphasis added.

Our findings suggest that ICC victim participants may not have the same ‘transformative experience’ as the civil parties in the *Duch* trial for several reasons. First, the vast majority of ICC ‘victim participants’ will never set foot in the courtroom in The Hague and thus will only be able to experience the trial vicariously through their legal representatives or the media. Second, many victims who wish to participate in ICC proceedings have found the application process ‘slow’ and ‘remote’.¹⁹² Redress, a victim support organization that has studied the victim participation process at the ICC, reports that many victims view the court as ‘out of touch and overly bureaucratic with its numerous lengthy forms and requirements. These forms all require significant amounts of time to complete, in circumstances where victims are eking [out] a living’.¹⁹³ Finally, since the ICC is primarily concerned with crimes committed by high-ranking accused, victim participants are most likely to appear in cases involving government leaders, such as Sudan’s president Omar Al-Bashir or Libya’s former leader Muammar al-Gaddafi, who were physically removed from the actual crime scenes. Many victims – especially those who survived massacres or years of torture in captivity – may find these proceedings too formulaic and failing to produce a ‘sense of personal justice’ that comes from actually confronting the person most directly responsible for your (or a loved one’s) suffering. Of course, such observations are purely hypothetical; interview surveys will need to be conducted with ICC victim participants to probe the meaning that they have derived from the experience of testifying or participation.

Our third finding is that civil party lawyers and local NGO activists, through their outreach and support services to victims, can provide vital assistance to international criminal courts. Indeed, we found that Cambodian NGO activists and civil party lawyers, especially those with an in-country presence, filled a huge void in the *Duch* trial by providing legal, emotional, and psychosocial support to victims. With limited funding, these activists and lawyers mobilized networks throughout Cambodia to encourage civil party participation at the Court, and did their best to ensure that those who entered the system understood its laws and procedures.¹⁹⁴ Our interviews suggest that the attention that the TPO and other NGOs and lawyers paid to the informational, psychological, and cultural needs of civil parties positively influenced their views of the tribunal.

Though the first trial has ended, these NGOs and lawyers continue in their mission: they are maintaining contact with many of the civil parties who were rejected and/or dissatisfied with the outcome of the *Duch* trial to provide social and

192 Victims’ Rights Working Group, ‘The impact of the Rome Statute on victims and affected communities’, 22 March 2010, p. 15, available at: http://www.vrwg.org/VRWG_DOC/2010_Apr_VRWG_Impact_of_ICC_on_victims.pdf (last visited 4 September 2011).

193 See Redress, ‘Victims’ central role in fulfilling the ICC’s mandate’, November 2009, p. 6, available at: <http://www.redress.org/downloads/publications/ASP%208%20Paper%20FINAL%20Nov%202009.pdf> (last visited 4 September 2011).

194 In our view, staff in a few of these organizations also did a disservice to civil parties by encouraging them to call for individual reparations when it was clear that the ECCC had already decided that it would only rule on ‘collective and moral reparations’. Our interviews suggest that such encouragement created unrealistic expectations on the part of some civil parties.

psychological support, and to ensure that any lingering or appeals-related questions are answered. Their involvement may be just as crucial in Case 002, which has nearly 4,000 accepted civil parties, and may ultimately shape the Court's long-term legacy. It is in the best interests of international tribunals to engage local NGOs in outreach efforts to victims, and to maintain clear and consistent communication with them before, during, and after the trial process. It may even behove courts to formalize their relationship with such NGOs and facilitate the creation of an official or unofficial network of local organizations to meet the needs of victim participants.

Fourth, if the ECCC and other international criminal tribunals grant victims the right to participate in proceedings, they must develop clear, comprehensive, and consistent procedures *early on in the life of the court* to define, encourage, and manage that participation without impeding the rights of the accused. During the *Duch* trial, civil party participation often appeared as if it was a work-in-progress rather than a process guided by well-honed rules and procedures. At various points in the proceedings, the ECCC would grapple with several significant issues relating to implementing this novel mechanism, including how best to define the exact purpose of civil party participation and the role that civil party lawyers would play in the proceedings. Moreover, outside the courtroom, it was not the ECCC but Cambodian human rights workers and civil party lawyers who guided and supported civil parties through the various phases of the trial.

Providing victims with the right to participate implies an obligation not to create false hopes or place victims in situations where their physical or psychological safety may be at risk. This requires defining the exact purpose of victim participation *before* the first case commences and developing clear procedures for victim participation. Of particular importance is the need to make it clear to victim participants from the outset that their application may not be accepted, or, if accepted, that they may not be selected to testify. Finally, courts should not embrace victim participation unless they are able and willing to provide adequate funding and manpower to process applications in a timely manner and maintain consistent communication with applicants throughout the process.

Finally, as the world community increasingly turns to international criminal justice as a response to mass violence, we must re-examine how we think about and interact with victims who participate in court proceedings. We should consider whether or not victim participation beyond that of 'the victim as witness' is always in the best interests of victims or justice. Our interviews with civil parties and key informants suggest that participation in the *Duch* trial *was* meaningful for the victims and helped to inform and humanize the proceedings. And no trial observer – at least that we are aware of – has put forward a credible case suggesting that civil party participation impinged on the defendant's right to a fair trial, which has long been considered one of the greatest risks of such participation. However, what distinguished this group of victims was the fact that they were able to testify in court. In Case 002, with 3,866 victims designated as civil parties, it is likely that only a very small percentage will ever appear in the courtroom. What then will participation mean for the vast majority who do not testify or even attend a hearing? Will they still derive some meaning from the process? This remains an empirical

question worth clarifying. Moreover, it is not a forgone conclusion that civil party participation will proceed smoothly in Case 002. For example, Patricia Wald, a former judge with the ICTY, has warned that national leaders who are brought to trial for serious international crimes may use the trial chamber to threaten witnesses and foment nationalist fervour.¹⁹⁵ The ECCC's second trial, which features four defendants, faces a heightened potential for the politicization of the proceedings and the possibility that defendants will attempt to dominate the trial at the expense of victims.

All of this suggests that it is unwise to valorise expanded participatory rights for victims without being mindful of the possible pitfalls. Some of the most threatening are re-victimizing civil parties, recognizing some victims at the exclusion of others, creating multiple and potentially conflicting prosecutorial strategies (with some strategies endorsed only by the prosecutor and others by the civil parties), adding more bureaucracy, impeding the defendant's right to a fair trial, failing to provide civil parties with access to hearings and logistical support, and increasing both the cost and length of trials. It also suggests that international courts and NGOs might want to explore mechanisms for victims to tell their story in a setting other than the trial and develop alternatives for involving participants.

Victim participation is still in its infancy, and there is a critical need to develop common standards, at both a practical and a legal/normative level, to guide international criminal tribunals and to maximize the potential for justice. Ultimately, our research suggests that meeting victims' needs and ensuring meaningful and productive participation requires a clear and orchestrated effort – something that courts may not be able to accomplish on their own.

195 Patricia M. Wald, 'Tyrants on trial: keeping order in the courtroom', Open Society Institute, September 2009, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/tyrants_20090911/tyrants_20090911.pdf (last visited 20 December 2011).

REPORTS AND DOCUMENTS

International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty

Policy adopted by the Assembly Council of the ICRC on 9 June 2011

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Preamble

Action against torture and cruel, inhuman or degrading treatment is a key focus in the ICRC's work on behalf of persons deprived of their liberty.

On the basis of its profound conviction that such practices are absolutely unacceptable, the ICRC implements a global response the primary objective of which is to ensure protection and assistance for victims and contribute to their rehabilitation, and help to establish and/or strengthen a normative, institutional and ethical environment conducive to the prevention of this phenomenon.

Accordingly, the ICRC relies on its own experience, on its in-depth knowledge of this practice, on its privileged access to victims and on its confidential bilateral dialogue with the authorities and other actors. It also knows that it can rely on the normative, institutional and ethical developments that have taken place in recent years with regard to these issues.

Aware of the immense challenge that action against torture and cruel, inhuman or degrading treatment represents and of its importance for present and future victims and for their families, communities and societies, the ICRC seeks to reaffirm clearly and publicly the scope and depth of its commitment to its work in this sphere.

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Horror, anger, sadness or compassion are some of the feelings experienced by anyone who comes face to face with a victim of torture and cruel, inhuman or degrading treatment.

These feelings and what they show about the unacceptable nature of those practices to a large extent form the basis of the commitment of the International Committee of the Red Cross (ICRC) to eliminate torture and cruel, inhuman or degrading treatment. They should always be borne in mind.

Ill-treatment¹ constitutes an intolerable outrage upon human dignity. It is not just the victims of torture and cruel, inhuman or degrading treatment who feel the long-term impact, physically and psychologically, of the suffering and the denial of their humanity that has been inflicted upon them: their families feel this impact too. Moreover, ill-treatment has the potential to destroy the social ties that underpin a community or a society. Finally, it is a flagrant violation of international humanitarian law and international human rights law.

Consequently, the ICRC is deeply convinced that acts of torture and cruel, inhuman or degrading treatment must be absolutely prohibited and cannot be justified or tolerated for any reasons whatsoever, whether political, economic, security-related, cultural or religious.

The absolute prohibition on ill-treatment is repeatedly challenged in both word and deed, so that the fight against it requires constant vigilance.

Those in favour of abolishing torture and cruel, inhuman or degrading treatment have always had to resist a variety of challenges to the absolute nature of the prohibition or some of its consequences. The same old arguments are put forward again and again concerning the effectiveness of these practices, the imminent or actual danger against which they are necessary, social pressure in their favour, different sensibilities between cultures, etc.

Even more fundamentally, we know from history that no country or community is ever entirely safe from the emergence or persistence of these practices. The sad reality is that torture and cruel, inhuman or degrading treatment endure the world over, even though the prohibition of them has been established in the relevant international and regional norms.

Faced with these challenges and being deeply convinced that nothing can justify outrages upon human dignity, the ICRC has developed a global response aimed at preventing and eliminating such practices.

The ultimate aim of the ICRC's engagement in the battle against torture and cruel, inhuman or degrading treatment is to work on behalf of the victims,

1 In the context of its action against torture and cruel, inhuman or degrading treatment, the ICRC uses the following definitions: **Torture** consists of (1) severe pain or suffering, whether physical or mental, inflicted (2) for such purposes as obtaining information or a confession, exerting pressure, intimidation or humiliation. **Cruel or inhuman** (synonymous terms) **treatment** consists of acts which cause serious mental pain or suffering, or which constitute a serious outrage upon individual dignity. Unlike torture, these acts do not need to be committed for a specific purpose. Finally, humiliating or **degrading** (synonymous terms) **treatment** consists of acts which involve real and serious humiliation or a serious outrage upon human dignity, and whose intensity is such that any reasonable person would feel outraged. The expression **ill-treatment** is not a legal term, but it covers all the above-mentioned acts.

who are the focus of its concern, in order to reduce their suffering and restore their human dignity.

This policy document presents in detail the range of measures taken by the ICRC against torture and cruel, inhuman or degrading treatment. These responses are developed within the framework of the ICRC's work in places of detention (Section 1). They are based on knowledge and analysis of individual and collective parameters and detention regimes which are implicated in the emergence, persistence or development of such practices (Section 2). The basic objective of these responses is to protect, assist and rehabilitate the victims of these wrongful acts (Section 3). The ICRC therefore engages in operational dialogue with the authorities and other relevant actors² in order to remind them of their obligations with regard to the prohibition of torture and other cruel, inhuman or degrading treatment, and also to support them in reinforcing or establishing a national or local environment conducive to the prevention of such practices (Section 4). Finally, the ICRC positions itself as a major actor in this field (Section 5).

Preliminary section: Scope and normative framework

1. Scope

At present, the scope of the prohibition of torture and cruel, inhuman or degrading treatment is particularly broad, and aims to protect all individuals against various outrages upon human dignity, both in situations where people are deprived of their liberty and where this is not the case.

First, in situations where people are not deprived of their liberty, certain forms of discrimination, limited access to medical care, illegal destruction of homes, or sexual assault committed in connection with military or police operations, constitute outrages upon individual dignity, and may therefore be described as cruel, inhuman or degrading treatment, or even as torture.

Second, in situations where people are deprived of their liberty, physical conditions of detention, violent acts committed by the authorities or other detainees, the practice of holding a person in custody for an indefinite period or without charge, and certain interrogation methods may all constitute torture or cruel, inhuman or degrading treatment.

In view of such diversity, and in order to present a consistent and relevant operational approach, this policy paper covers the ICRC's responses to outrages upon the human dignity or physical or mental integrity of persons deprived of their liberty³ committed by the authorities or other actors.

2 In line with the ICRC's Protection Policy, the expression 'authorities and other actors' used in a generic sense covers all authorities (State entities, international peace-keepers, and non-State actors, such as traditional groups and clans) and armed groups.

3 Deprivation of liberty refers to a person's situation from the moment he is arrested or captured until he is released. He may be released immediately after arrest or capture or later, after serving a prison sentence or after the detaining authorities decide to release him.

This paper presents the ICRC's responses to various aspects of the phenomenon of ill-treatment, with specific reference to the following: conditions of arrest, capture and transfer to a place of deprivation of liberty; interrogation methods; the use of force by the authorities for the purpose of restoring order in places of detention; disciplinary measures; the detention conditions, the detention regime, and the behaviour of guards; and corporal punishment inflicted as part of a criminal penalty.

2. Normative framework

The profound conviction underlying the ICRC's work that torture and cruel, inhuman or degrading treatment are unacceptable is strengthened by the provisions of international humanitarian law, of international human rights law (both universal and regional), and of international criminal law, under which the prohibition of torture and other forms of cruel, inhuman or degrading treatment is absolute: there is no room for exceptions to this obligation under any circumstances.⁴ Such provisions are also incorporated in many national legal systems.

International humanitarian law

The Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977 contain a number of provisions that absolutely prohibit torture, cruel or inhuman treatment, and outrages upon individual dignity.

Thus, torture is prohibited by Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75.2 (a) and (e) of Additional Protocol I and Article 4.2 (a) and (h) of Additional Protocol II. In international armed conflict, torture constitutes a grave breach under Articles 50, 51, 130 and 147 of these Conventions, respectively. Under Article 85 of Additional Protocol I, these breaches constitute war crimes. In non-international armed conflict, they are considered serious violations.

Moreover, Article 3 common to the Geneva Conventions, Article 75.2 (b) and (e) of Additional Protocol I and Article 4.2 (a) and (h) of Additional Protocol II prohibit 'outrages upon personal dignity, in particular humiliating and degrading treatment'. In international armed conflict, these acts constitute grave breaches. In non-international armed conflict, they constitute serious violations.

Finally, the prohibition of torture, on cruel or inhuman treatment and on outrages upon personal dignity, in particular humiliating and degrading treatment, is recognized as a customary rule in the ICRC's study *Customary International*

4 See the International Covenant on Civil and Political Rights, Article 4; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 15; the American Convention on Human Rights, Article 27; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2(2); and the Arab Charter on Human Rights, Article 4(b).

Humanitarian Law (Rule 90) and by the International Criminal Tribunal for the former Yugoslavia.

International human rights law, both universal and regional

The prohibition of torture and on cruel, inhuman or degrading treatment is also to be found in international human rights law, both universal and regional.

Thus, the Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 5.2), the African Charter on Human and Peoples' Rights (Article 5) and the Arab Charter on Human Rights (Article 8) contain provisions on this prohibition.

International criminal law

Finally, the Rome Statute of the International Criminal Court defines torture and cruel, inhuman or degrading treatment as war crimes under Article 8 (2)(a)(ii), (iii) and (xxi) and (c)(i) and (ii), and as crimes against humanity under Article 7 (1)(f) and (k).

National law

In accordance with the above-mentioned international obligations, provisions concerning the prohibition of torture and cruel, inhuman or degrading treatment also exist in national legislation.

Specifically, national constitutions and other fundamental texts, criminal law (substantive or procedural), as well as civil law and administrative law, reflect or should reflect these international obligations, and so play their part in fully implementing the prohibition of, and prevention of, torture and cruel, inhuman or degrading treatment.

Section 1: The ICRC's work in places of detention

The ICRC's privileged access to persons deprived of their liberty gives its work its specific character and relevance, and is of great benefit to victims of ill-treatment.

More specifically, access to persons deprived of their liberty and the possibility of interviewing them without witnesses are prerequisites for the ICRC's action regarding torture and cruel, inhuman or degrading treatment and give its work relevance and vigour. Such access is essential to enable the ICRC to see, understand and analyse ill-treatment and respond to it.

Consequently, in order to develop a bilateral and confidential dialogue with the authorities on issues relating to the treatment of persons deprived of their liberty, the ICRC seeks to have access to these persons according to standard procedures.

This access to detainees and the possibility of speaking to them in private are fundamental since they ensure that the individual remains the focus of the ICRC's work as the beneficiary of its services. Above all, this access allows the ICRC to register detainees and monitor their individual status throughout their period of detention, and this can contribute to their protection.

Furthermore, this access allows the ICRC to gain information on the sequence of events involved, treatment received and suffering caused, and also to understand and analyse the detention regime. From this point of view, the interview without witnesses is an especially precious tool.

Finally, this access enables the ICRC to establish a dialogue with the authorities in charge of places of detention and thus gain a deeper awareness of their working conditions and understand their role.

Section 2: Analysis of the practice of torture and cruel, inhuman or degrading treatment

The ICRC's work on behalf of persons deprived of their liberty does not just consist of regular visits to places of detention. In order to be relevant and effective, that work must be underpinned by an analysis and understanding of several elements relating to the factors that generate the practice of ill-treatment, to the detention regime, and to the specific nature of the perpetrators and the authorities concerned.

1. Analysis of the parameters which encourage or explain the emergence, existence or persistence of torture and cruel, inhuman or degrading treatment

Ill-treatment is a complex phenomenon that is the product of various individual, collective and institutional factors.

Firstly, it is the result of individual factors, mainly the mentality and personal characteristics of the perpetrators and the victims of ill-treatment, namely age, sex, religion, health, etc. Secondly, it stems from collective factors, which at national level may be social, political, legal or socio-economic. Finally, it is the product of institutional factors, which relate to the organization of places of detention, the level of training given to staff, the existence of internal or external control mechanisms, or disciplinary procedures applicable to staff.

The ICRC therefore makes a point of gaining knowledge of and analysing these various individual and collective factors in order to devise the most appropriate, relevant and effective response for present and future victims.

2. Analysis of the regimes at the places of detention it visits and their consequences for the treatment of persons deprived of their liberty

The detention regime directly influences the treatment of persons deprived of their liberty. In a prison, for example, elements such as confinement in a single cell or in a dormitory, access to health services, ways of communicating with other detainees and contact with the outside world may, depending on the individual, cause suffering that can be described as ill-treatment and that the authorities may use to create additional trauma.

Hence, by using various sources of first-hand information, including the detainees themselves and the detaining authorities, the ICRC can gain knowledge of the detention regimes at the places it visits. In this way it can understand not only the rules and procedures governing the regime but also the authorities' purpose in depriving persons of their liberty. Moreover, this knowledge enables the ICRC to carry out individual assessments of the effects of the detention regime on detainees and, where appropriate, draw the attention of the authorities concerned to the suffering caused.

3. Analysis of the dynamics typically affecting perpetrators of ill-treatment and the authorities for whom they work

The ICRC takes into consideration not only the torturer directly responsible for committing acts of ill-treatment but also all the other people directly or indirectly involved, particularly in order to understand how such acts could have been committed in a specific place.

For that purpose, the ICRC identifies not only the officials responsible for managing a place of detention, but also all persons who did nothing to prevent acts of ill-treatment or ordered them to be committed.

Such persons, whether members of law-enforcement services or acting on their behalf, and members of non-State groups, whether or not present on the premises, who knew or should have known that such acts would be committed, are responsible for them, if not *de jure*, at least *de facto*.

Within a single context, the ICRC may have to deal with different scenarios. The perpetrators may be completely unaware of the absolute prohibition of ill-treatment, or they may be consciously ignoring it because of specific orders, or profound conviction, or real or perceived social pressure, or out of self-interest. Regardless of these factors and of whether the perpetrators are law-enforcement officials or members of an armed group, their behaviour is affected by the level of training they have received for their role: they may have been well trained or, on the contrary, their training may have been limited, inadequate or non-existent.

The authorities and other actors, whether answerable to executive, judicial or legislative bodies or to a *de facto* power, ultimately bear the political and/or legal responsibility for ill-treatment practised on territory under their control. They therefore play a crucial role with regard to ending these practices, and it is vital for the ICRC to talk to them.

Again, as in the case of those perpetrating ill-treatment, the ICRC has to deal with different scenarios concerning the authorities. The latter may have ordered, tolerated or encouraged such practices or, conversely, may have given orders or clear indications that these practices were absolutely prohibited. Apart from that, regardless of whether such orders were implicit or explicit, they may or may not have been heard or complied with, owing, for example, to organizational problems in the country, to a lack of authority or to the inability to control the staff concerned.

Section 3: Protecting, assisting and rehabilitating victims of torture and cruel, inhuman or degrading treatment

A victim of ill-treatment may be extremely vulnerable and distressed and be both physically and psychologically shattered. The ICRC acts to reduce the effects of such suffering and, in the short and medium term, to restore the victim's human dignity. By their presence, ICRC delegates endeavour to lend victims a listening ear and provide them with support and assistance. In view of the effects of ill-treatment on mental health and its psycho-social impact, the ICRC seeks to be involved in the psychological, medical and social rehabilitation of persons who have been especially affected.

1. The ICRC strives to restore the human dignity of victims of torture and cruel, inhuman or degrading treatment

To the ICRC, the practice of visiting persons deprived of their liberty constitutes a unique opportunity to bring them some ordinary human kindness. Of equal importance, however, is the opportunity it affords to obtain information and a deeper understanding of detention conditions, thereby enriching its dialogue with the detaining authorities.

In the closed world of detention, and even more so in the horribly dehumanized world of ill-treatment, victims often cease to be seen as human beings at all, and even their basic needs are intentionally ignored. Victims of ill-treatment therefore have a profound need to be seen as human beings again.

In its work, the ICRC remains constantly aware of the fact that ill-treatment destroys the humanity of its victims.

This awareness translates in the first instance into attentiveness and a special kind of empathy. A victim may be comforted and restored to a sense of his status as a human being by simple gestures. Active listening is also important. The time ICRC delegates spend with victims of ill-treatment and their attention to what is said and the stories told are all ways of acknowledging that humanity.

Similarly, providing clothes or hygiene items can also be part of the process of restoring a sense of human dignity.

The attentive concern of ICRC doctors, whose presence is essential in working with torture victims, is part of the same approach. In their professional

capacity, the doctors play a special part by listening to victims, by examining them, and finally by reassuring them while providing objective information on the physical effects of the treatment they have endured. They must also check that the necessary medical care is being provided and that medical ethics are being respected.

Finally, restoring family ties is also part of the work of helping individuals recover their sense of dignity and humanity. Victims of ill-treatment are often cut off from their families. When people are detained in non-governmental premises, or are subject to emergency legislation that restricts or even prohibits contact with the outside world, or are simply isolated so that the pressure on them is greater, being able to reconnect with their emotional and family environment becomes exceptionally significant. Receiving news from family members, being able to send them news, and especially receiving visits from them are all hopeful signs, and proof that there is life beyond detention.

However, the ICRC would be unable to provide prolonged individual assistance without engaging in a meaningful operational dialogue with the authorities on the problem of ill-treatment. It would be unacceptable for a situation to develop in which the ICRC's assistance was perceived as some form of complicity with the authorities, insofar as it enabled them to conceal these practices and their effects wholly or in part.

2. The ICRC seeks to engage, mostly in partnership with other actors, in the rehabilitation of victims of torture and cruel, inhuman or degrading treatment

Humane concern is, of course, vital, but the fact remains that torture and cruel, inhuman or degrading treatment affects its victims profoundly, and such concern alone is insufficient to achieve the physical, psychological and social rehabilitation of these people.

Furthermore, in most cases, the impact of ill-treatment on people's physical and mental health lasts beyond the period of detention.

Accordingly, in the broader context of its work on behalf of victims of armed conflict and other situations of violence, the ICRC has begun to be involved in the rehabilitation of people who have been victims of torture and cruel, inhuman or degrading treatment. Its action takes place during and, especially, after the period of detention.

While bearing in mind that States are primarily responsible for victim rehabilitation, the ICRC's initiatives – which so far have been on a limited scale – essentially take place in partnership with other actors specialized in this field.

The ICRC endeavours to develop projects with reception centres for victims of ill-treatment run by NGOs, or with National Red Cross or Red Crescent Societies, or with independent doctors or hospital doctors, depending on operational opportunities and victims' needs.

Assistance activities beyond the period of detention can also contribute to the rehabilitation of people who, directly or indirectly, are victims of torture and cruel, inhuman or degrading treatment, namely family, friends and the community.

This involvement is a response to a dual concern, namely for the individual and for the community.

At the individual level, victims who have been seriously injured by ill-treatment may need medical, psychological and social assistance so that they can return as soon as possible to the life they knew before the ill-treatment. Without such individual support, some victims are unable to resume a normal emotional, professional or social life, with obvious consequences not just for themselves but also for their relatives and communities.

At the community level, the practice of torture and cruel, inhuman or degrading treatment has consequences for society as a whole. The silence which surrounds this practice, and is often imposed, is equally difficult for the victim's next-of-kin and his/her community to bear. Individual rehabilitation has the additional effect of healing some of the collective wounds caused by this practice and restoring dignity to the communities affected.

These rehabilitation programmes must also be seen in the context of the broader purpose of preventing the recurrence of such practices. Thus, *de facto* or *de jure* recognition of victim status and, even more important, psychosocial support of the victims and their relatives often make it possible to break cycles of revenge or repetition which sometimes affect victims and their communities.

Section 4: Dialogue with perpetrators and the authorities for whom they work, aimed at ending and preventing torture and cruel, inhuman or degrading treatment

The ICRC believes that nothing can justify the use of torture and cruel, inhuman or degrading treatment, whatever the social, economic, cultural, religious or political environment. There is no room for understanding or tolerance of these practices, and the ICRC's ultimate goal is therefore to eliminate them completely.

In its dialogue with perpetrators and the authorities for whom they work, the ICRC therefore always reminds them that ill-treatment is absolutely prohibited.

The organization may also offer support to the perpetrators of these acts and the competent authorities if they acknowledge that the problem exists and/or want to take action to prevent it, with the aim of setting up a detention system that respects human dignity and of helping to establish or strengthen an environment conducive to the prevention of torture and cruel, inhuman or degrading treatment.

1. The ICRC takes measures to assert the absolute prohibition of torture and cruel, inhuman or degrading treatment, and to remind the perpetrators of ill-treatment and the authorities for whom they work of their obligations concerning the implementation of this prohibition

For the purpose of eliminating ill-treatment and within the framework of the confidential bilateral dialogue which it always seeks to establish with the detaining authorities, the ICRC emphasizes that torture and cruel, inhuman or degrading treatment are absolutely prohibited and calls for them to be stopped.

Even if this confidential bilateral dialogue is unable to have an impact on the treatment of persons deprived of their liberty, the ICRC can make use of other modes of action under ICRC policy, as described in the paper entitled 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting person in situations of violence'.⁵

Furthermore, as well as emphasizing the existence of an official ban, the ICRC stresses to those concerned the nature of their obligations to implement the ban. Thus, for example, the ICRC focuses on the establishment of supervisory mechanisms, on the importance of effective penalties for the perpetration of these acts, on the training of staff, and on recognition of the inadmissibility of proof obtained by torture.

The ICRC sets out to engage in a direct and frank dialogue with perpetrators, the authorities for whom they work and other actors, and to make them aware of the individual, social and even international consequences of such misdeeds, whether they are ordered, encouraged, tolerated or simply ignored.

2. Within the framework of its operational dialogue, the ICRC seeks to support the authorities in drawing up rules and procedures of a kind to improve professional practices affecting the treatment of persons deprived of their liberty

The occurrence and persistence of torture and cruel, inhuman or degrading treatment sometimes stem from poor professional practices in the treatment of persons deprived of their liberty. Non-existent or inadequate training for police or prison personnel or a lack of clear procedures are all factors that contribute to the practice of ill-treatment.

Hence, the ICRC has developed an operational dialogue with perpetrators and the authorities for whom they work with regard to other aspects of detention, particularly the structure of the prison system (e.g. organizational issues, norms applied, and general or sectoral management issues, especially health, infrastructure and procurement). Likewise, the ICRC endeavours to go beyond

5 For further details of this policy, see the *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400.

emphasizing the fact of prohibition and its related obligations, and support the authorities in establishing or strengthening a framework in which professional practices can be improved.

There is no question of the ICRC, as a humanitarian organization, approving any specific practices or suggesting practices to perpetrators and/or their authorities that would meet the requirements of respect for the dignity or the physical and mental integrity of persons deprived of their liberty.

Such an approach can be morally uncomfortable, and the ICRC will adopt it only in situations where perpetrators and the authorities for whom they work acknowledge that these problems exist and/or want to act to put an end to them.

Accordingly, the ICRC will encourage perpetrators and the authorities for whom they work to introduce or strengthen professional practices that respect human dignity.

Together with the authorities, the ICRC will ensure that the professional practices of relevant staff are in line with the requirements arising from the prohibition of torture and cruel, inhuman or degrading treatment with respect to issues such as: methods to be used to obtain information during an investigation; management of discipline and security in places of detention; establishing detention conditions that are respectful of human dignity; the importance that detainees attach to understanding their detention process; and the use of force during arrest or transfer.

The ICRC may thus be able to support the authorities in establishing specific measures, means and mechanisms that encourage compliance with the absolute prohibition of torture and other forms of ill-treatment, through policy (the set of standard principles that guide weapon-bearers at the strategic, operational and tactical levels), education, training, equipment and, finally, penalties.

Also as part of its efforts to prevent ill-treatment, the ICRC may contemplate offering perpetrators and the authorities for whom they work the opportunity to engage in bilateral cooperation with some of their peers with whom the ICRC has already established a working relationship.

3. The ICRC supports the authorities and other actors in establishing or strengthening an environment conducive to the prevention of torture and cruel, inhuman or degrading treatment

Where authorities and other actors acknowledge that such practices occur and show a real desire to put an end to them, the ICRC goes beyond emphasizing the existence of the prohibition and the obligations that arise from it. It encourages the desire for change, and works with the authorities and other actors to set up a normative, institutional and moral environment in which these practices can be stopped and prevented from recurring.

More specifically, it is important to obtain clear and indeed public commitments from the executive authorities in favour of the absolute prohibition of torture and cruel, inhuman or degrading treatment. For the ICRC and for other actors combating ill-treatment, such commitments are invaluable tools that can be

used to draw the attention of the authorities to their responsibilities concerning implementation. Moreover, such statements can be used in talks with persons responsible for ill-treatment, who can be urged to respect these commitments.

Furthermore, the ICRC draws the attention of the judicial authorities to their responsibility to implement the absolute prohibition of torture and cruel, inhuman or degrading treatment, and especially to the fact that information obtained under torture is inadmissible, that perpetrators of such acts are liable to prosecution and criminal sentences, and that victims and their rights must be recognized.

Finally, the ICRC encourages the legislative authorities to ratify and implement the relevant international instruments, and contributes to the adoption of legislation and the establishment of institutions promoting the prevention of ill-treatment.

4. The ICRC endeavours at national level, together with all members of civil society, to promote and strengthen a normative, institutional and ethical environment conducive to the prevention of torture and cruel, inhuman or degrading treatment

Although individual attitudes play a crucial part when torture and other forms of ill-treatment occur, these practices develop fully only if the normative, institutional and especially ethical environments are conducive to it. The ICRC may therefore also strive to mobilize national actors at different levels of civil society and in the political sphere in order to sway opinion, encourage progress, and influence the relevant legislation.

Firstly, on the normative level, the ICRC engages in a dialogue with national actors on the establishment and/or improvement of a normative framework concerning the prohibition of torture and cruel, inhuman or degrading treatment. This means considering the ratification of relevant international conventions, both universal and regional, and their implementation. In addition to ensuring that a prohibition is written into the constitution, it is even more important that legislative, regulatory or disciplinary safeguards be in place, to give substance to the absolute prohibition of torture and cruel, inhuman or degrading treatment.

Next, on the institutional level, the ICRC is certain that the existence of internal monitoring mechanisms, such as supervision by superiors, committees on professional ethics, and of external mechanisms, such as non-governmental organizations (NGOs), the bar [association of lawyers] and a national human rights commission, helps to prevent torture and cruel, inhuman or degrading treatment. Hence the ICRC may decide, in full transparency with regard to the authorities, to support the process of establishing or strengthening these supervisory mechanisms. Furthermore, while observing the requirements arising from the confidentiality of its work and following criteria relating in particular to the independence and professionalism of these other actors, the ICRC may work with the latter, especially with a view to optimizing available means and resources.

Finally, implementation of the absolute prohibition of torture and cruel, inhuman or degrading treatment is primarily dependent on moral conviction. The requisite normative and institutional environments are of no use if the conviction that ill-treatment can never be justified under any circumstances is not firmly anchored in a country or a community. The conviction is a fragile one, however, and constantly requires protection and, even more importantly, reinforcement.

The ICRC therefore strives to reinforce the absolute prohibition of torture and cruel, inhuman or degrading treatment, and positions itself accordingly at the national and local levels, in particular by drawing attention to the grave consequences of such practices for society and the individual.

Section 5: The positioning of the ICRC as a major actor in the global fight against torture and cruel, inhuman or degrading treatment

Recognition of the absolute prohibition of torture and cruel, inhuman or degrading treatment is fragile, and its fragility in many countries has become apparent in the early years of the twenty-first century in relation to the fight against international terrorism. Relativistic arguments have been revived, including in public debate, attempting to justify and even demand the use of ill-treatment, for the sake of preserving security and order. The entire normative, institutional and ethical environment relating to the fight against torture and cruel, inhuman or degrading treatment is therefore undermined.

It is important to be aware of this difficult reality, and of its consequences for the treatment of persons deprived of their liberty worldwide. The ICRC has the strength that comes from its profound conviction that the dignity of the individual takes precedence over any other concern, and as an organization it therefore can and should act as a point of reference in this field, swayed neither by naivety nor weakness.

The ICRC complements its context-specific operational responses by seeking to act at the global level to promote a stronger normative, institutional and ethical environment conducive to the prevention of torture and cruel, inhuman and degrading treatment. It endeavours to influence the debate, thereby affecting both the decision-makers and public opinion.

1. The ICRC endeavours to strengthen the international legal frameworks, both universal and regional, relating to the absolute prohibition of torture and cruel, inhuman or degrading treatment

Although the international norms, both universal and regional, relating to the absolute prohibition of torture and cruel, inhuman or degrading treatment are well established (see Preliminary section), the ICRC nevertheless strives to ensure that those norms are observed and promoted, and also to develop them, particularly at regional level.

As the ICRC is convinced of the importance of such norms, it supports and participates in processes that may lead to the adoption of such provisions.

In order to defend the norms, scope and obligations relating to the prohibition of torture and other forms of ill-treatment, the ICRC uses its usual channels to resist challenges to the prohibition and to emphasize publicly the absolute nature of the prohibition and related legal obligations.

2. The ICRC helps strengthen international and regional institutional actors engaged in the prevention of torture and cruel, inhuman or degrading treatment

The ICRC is convinced of the importance of the contribution of a number of major international and regional institutional actors towards achieving a total prohibition of torture and cruel, inhuman or degrading treatment.

The ICRC establishes regular working relationships with them, while duly observing the requirements arising from the confidentiality of its work, and acting in accordance with criteria relating in particular to the independence and professionalism of these mechanisms. Such relationships can, for example, eventually strengthen their operational capacities, especially as regards the methodology of their visits to persons deprived of their liberty. Such a dialogue also enables the ICRC to learn from the approaches developed by these other actors.

3. The ICRC strives to reinforce the attitude that torture and cruel, inhuman or degrading treatment are morally unacceptable

The ICRC also endeavours to help establish an environment conducive to strengthening the absolute nature of the prohibition of torture and cruel, inhuman or degrading treatment.

The ICRC is strongly convinced that zero tolerance of ill-treatment must be based first and foremost on the ethical and moral convictions held by each individual and each community or society concerning the unacceptable nature of such acts, and more generally the fundamental importance of protecting human dignity.

Conversely, if those convictions are not firmly held, legal norms and monitoring mechanisms are useless for the purpose of preventing such acts.

The ICRC therefore acts publicly to ensure that the arguments relating to the unacceptable nature of such outrages on human dignity, the individual consequences for victims of such misdeeds and the consequences for society as a whole are heard once again in such a way as to influence public opinion and all the relevant actors on the international scene.

4. The ICRC relies on public communication to promote its work and to position itself within the public sphere

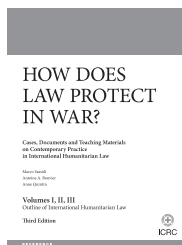
Depending on operational needs, the ICRC may decide to use public communication tools to influence public opinion or its own contacts in support of all its

initiatives aimed at putting an end to torture and cruel, inhuman or degrading treatment. These tools are used with due respect for the requirements arising from the confidentiality of the work of the ICRC.

Public communication is also used to ensure that the credibility of the ICRC's action to end torture and cruel, inhuman or degrading treatment is maintained in the minds of priority audiences.

BOOKS AND ARTICLES

New Edition



The International Committee of the Red Cross (ICRC) has expanded and updated its core reference work on contemporary practice in International Humanitarian Law (IHL):

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Part III provides advice, recommendations and a series of course outlines for professors interested in setting up courses on IHL or in introducing its study into their teaching.

The whole content of the books, as well as extra documents, are available on a CD enclosed.

With this work, the authors hope to encourage practice-related teaching of IHL in universities worldwide and to provide experts in the field with a reliable reference work on contemporary practice.

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3 volumes, 1 CD: CHF 70 (55 €). **To order a copy: www.icrc.org/eng/shop.**

BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

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