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INTERNATIONAL REVIEW

of the Red Cross

Humanitarian debate: Law, policy, action

Engaging armed groups



ICRC

Aim and scope

Established in 1869 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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CONTENTS

Engaging armed groups

- 581 **Editorial**
Vincent Bernard, Editor-in-Chief
- 587 **Interview with David Kilcullen**
Leading expert on counter-insurgency policy

Articles

- 603 **Engaging non-state armed actors in state- and peace-building: options and strategies**
Claudia Hofmann and Ulrich Schneckener
- 623 **Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape**
Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein
- 649 **Participation of armed groups in the development of the law applicable to armed conflicts**
Sophie Rondeau
- 673 **Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call *Deed of Commitment***
Pascal Bongard and Jonathan Somer
- 707 **Between insurgents and government: the International Committee of the Red Cross's action in the Algerian War (1954–1962)**
Françoise Perret and François Bugnion
- 743 **Taking prisoners: reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups**
Deborah Casalin

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- 759 Detention by armed groups: overcoming challenges to humanitarian action**
David Tuck

- 783 Closing the gap: symbolic reparations and armed groups**
Ron Dudai

Selected articles on international humanitarian law

- 809 Enhancing civilian protection from use of explosive weapons in populated areas: building a policy and research agenda**
John Borrie and Maya Brehm

Comments and opinions

- 837 The European Court of Human Rights' *Al-Jedda* judgment: the oversight of international humanitarian law**
Jelena Pejic

Reports and documents

- 853 What's new in law and case law across the world**
Biannual update on national legislation and case law January–June 2011

Books and articles

- 873 Recent acquisitions of the Library & Public Archives, ICRC**

EDITORIAL: ENGAGING ARMED GROUPS

Following on from the previous issue, entitled ‘Understanding armed groups and the applicable law’,¹ this time the *Review* pursues its study of the phenomenon of non-state armed groups by looking at processes of engaging with these actors.

Most wars today pit states against armed groups or groups against each other, and talking with such groups is therefore vital for all those working to promote compliance with the law and to strengthen the protection of conflict victims.² Reaching them, however, involves overcoming material, security-related, legal, and political obstacles. What arguments can be invoked to convince armed groups? How can their adherence to international humanitarian law (IHL) be strengthened when they are themselves outlaws according to domestic law? How can there be engagement with armed groups in an international context in which any dialogue may be perceived as a form of betrayal or complicity? The overarching question that this issue seeks to cover is how to make tangible progress towards convincing armed groups to comply with their obligations under international law.

The phrase ‘engaging armed groups’ can be understood to refer to various forms of interaction: from measures of repression to negotiation but also an entire range of indirect measures relating to the causes of conflict and the environment in which an armed group operates. This issue’s first article recapitulates the various options for engaging armed groups: Claudia Hofmann of Johns Hopkins University and Ulrich Schneekener of Osnabrück University invoke international relations theory to describe the choices available to the different conflict players depending on their approaches, capacities, and objectives. The *Review* then broaches the issue from the respective points of view of states, armed groups, humanitarian practitioners, and victims.

Any discussion of the engagement of armed groups has to take account of the position of their principal adversary: the state. In addition, raising this question ten years after the 11 September 2001 terrorist attacks on the United States means looking back at the lessons learned from the confrontations, in particular in Afghanistan and Iraq, between the US and its allies, on the one hand, and armed groups, on the other, during that period. In 2010, the US State Department broke with its previous policy of complete marginalization of armed groups.³ In June 2011,

almost ten years after the start of the intervention in Afghanistan, the US acknowledged the beginning of a dialogue with the Taliban.⁴

In the field, how states approach the phenomena of armed groups and counter-insurgency has a direct impact on humanitarian action. To examine these questions, the *Review* interviewed David Kilcullen, who has emerged in recent years as one of the most influential authors and military advisers on counter-insurgency activities. Rather than using the term ‘counter-insurgency’, Kilcullen would prefer states to speak of interventions in ‘complex humanitarian emergencies’, so as to underscore the struggle against the causes underlying the phenomenon of armed groups. He gives his views on recent developments relating to armed groups and military tactics but also on some of the humanitarian community’s main concerns: the potential instrumentalization of aid to ‘win hearts and minds’ and the importance of respect for the law by the armed forces engaged in counter-insurgency activities.

Historically, states have been loath to see armed groups as anything but enemies to be destroyed by firepower. Some governments thus deny, prohibit, and even criminalize any form of contact with armed groups, even by humanitarian agents. In the ten years since 11 September 2001, certain countries have enacted legislation penalizing the provision of material support to organizations identified as terrorist, including many armed groups that are parties to non-international armed conflicts. States have a right and even a duty to protect their citizens from acts of terrorism. However, a broad or vague definition of what constitutes such material ‘support’ could, in practice, preclude any interaction with armed groups, including for the purpose of enhancing compliance with the law or assisting the victims. Claude Bruderlein, Dustin Lewis, and Naz K. Modirzadeh of HPCR (the Harvard Program on Humanitarian Policy and Conflict Research) analyse the rules of international law allowing humanitarian players to interact with armed groups and discuss recent developments that risk criminalizing such contact. They also suggest ways in which those players can tackle the new dilemmas posed by anti-terrorist legislation.

- 1 See *International Review of the Red Cross*, Vol. 93, No. 882, June 2011.
- 2 ‘Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups’. Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2010/579, 11 November 2010, para. 52. In the words of the ICRC president, Jakob Kellenberger, ‘to get better compliance with IHL, the ICRC needs to talk to non-State armed groups and that is what we do, worldwide’. Jakob Kellenberger, ‘Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations’, 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, available at: <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-260909.htm> (last visited July 2011).
- 3 The first Quadrennial Diplomatic and Development Review (QDDR) published by the US State Department in December 2010, entitled ‘Leading through civilian power’ insists on the importance of ‘engaging beyond the state’, available at: <http://www.state.gov/documents/organization/153108.pdf> (last visited September 2011).
- 4 See BBC, ‘Robert Gates confirms US–Taliban talks in Afghanistan’, 19 June 2011, available at: <http://www.bbc.co.uk/news/world-south-asia-13830750> (last visited September 2011).

Having looked at the matter from the point of view of states, the issue moves on to two articles that consider the means of strengthening adherence to the law by armed groups. Armed groups generally have no say in the development of the rules by which they are bound. Indeed, states are the authors of the rules of international law in general and of the rules applicable in time of armed conflict in particular. This may well make armed groups less likely to feel that they have a stake in or to respect those rules, when they do not reject them outright.

Many scholars advocate the participation of armed groups in the development and interpretation of the rules. This raises numerous issues both of feasibility and also, again, of the so-called legal or political 'recognition' that this participation might confer. Sophie Rondeau, legal adviser at the Canadian Red Cross, analyses the arguments that speak in favour of such participation. She then presents possible avenues for involving armed groups in the development and interpretation of the rules of IHL.

The many practical and legal difficulties notwithstanding, participation in the development of IHL might be a path to explore in the future. Implementation of existing rules by armed groups is, however, a constant challenge. In its 2008 study, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*,⁵ the International Committee of the Red Cross (ICRC) identified a series of concrete measures that could be taken to strengthen compliance with the law by armed groups: special agreements, unilateral declarations, inclusion of IHL in codes of conduct or in ceasefire or peace agreements, and granting amnesty for mere participation in hostilities. The non-governmental organization Geneva Call has set a tangible example since 2000, encouraging many armed groups from around the world to agree to abide by specific rules of IHL and establishing monitoring, reporting, and verification mechanisms for that purpose. After presenting such mechanisms in general, Pascal Bongard and Jonathan Somer describe the inclusive approach used by Geneva Call in its efforts to have deeds of commitment relating to the prohibition of anti-personnel landmines adopted and respected by armed groups.

The third perspective is that of humanitarian practitioners. Organizations active on the ground must negotiate with all the parties to the conflict to ensure respect for the law and to have access and deliver assistance to the victims on both sides, impartially. Being active in non-international armed conflicts implies, for example, negotiating humanitarian access with armed groups and government forces to visit persons detained by both camps. Developing a meaningful humanitarian operation in the midst of a civil war is an undertaking fraught with danger and

5 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2008, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (last visited September 2011).

difficulty. In 1871, Henry Dunant, the founder of the Red Cross, took it upon himself to organize relief and evacuations during the Paris Commune, which opposed government troops and insurgents. As for the ICRC itself, it has been carrying out humanitarian activities in non-international conflicts for almost a century.⁶

The *Review* has chosen to illustrate that concrete commitment by presenting an operation that is emblematic of the ICRC's work during the period of decolonization. Fifty years after the independence of Algeria, the historians Françoise Perret and François Bugnion (the latter a member of the International Committee) go back over their research on the organization's activities during the conflict,⁷ focusing in particular on the interactions between the ICRC and the Front de Libération Nationale (FLN). In addition to being of historical interest, the painful experiences of that war hold a wealth of lessons for today's conflicts. They influenced ICRC practice in the ensuing years, as well as the wording of the 1977 Protocols Additional to the 1949 Geneva Conventions. Many of the humanitarian issues of the time, such as the treatment of detainees in non-international armed conflicts, are just as topical today.

Indeed, among the questions on which humanitarian players wish to engage armed groups, the protection of persons captured by such groups is one of the most sensitive to tackle from both the legal and the practical angles. Whether for military, political, or other reasons, the capture of prisoners by armed groups is a reality: the case of the Israeli soldier Gilad Shalit, for example, but also more recently that of anonymous Libyan soldiers and civilians taken captive by the National Liberation Army, are emblematic of the phenomenon. Detention by armed groups nevertheless has no basis in domestic or human rights law, and only an implied basis in IHL. While most of the essential rules of IHL, such as the prohibitions of torture and summary execution, can be applied directly by insurgents with a minimum of hierarchical organization, the same cannot be said of certain rules applying to deprivation of liberty, particularly those relating to judicial guarantees, which call for consequential means. The *Review* has chosen to devote two articles to the question of how to enhance the protection of persons detained by armed groups. Deborah Casalin of Coopération Internationale pour le Développement et la Solidarité (CIDSE), starts by exploring the legal options for ensuring that armed

6 The ICRC conducted its first meaningful operation in a non-international armed conflict in 1918, in revolutionary Russia. It also acted the following year in a similar situation: the revolution led by Béla Kun in Hungary. See Jacques Moreillon, 'Le Comité international de la Croix-Rouge et la protection des détenus politiques', in *Revue internationale de la Croix-Rouge*, Vol. 56, No. 671, 1974, pp. 650–661.

7 See Françoise Perret, 'L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie', in *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 917–951; Françoise Perret and François Bugnion, *Histoire du Comité international de la Croix-Rouge. Volume IV: De Budapest à Saigon, 1956–1965*, Georg, Geneva, 2009. Although France treated the war in Algeria as an internal conflict, it must be borne in mind that the Provisional Government of the Algerian Republic acceded to the 1949 Geneva Conventions in June 1960 – thereby underscoring that it saw the conflict as an international war – and that the war ended with the signing of the Evian Accords, which are considered an international treaty. One of the main achievements of the 1974–1977 Diplomatic Conference was to have wars of national liberation placed on an equal footing with international armed conflicts.

groups respect the prohibition of arbitrary detention. She draws parallels with the law of international armed conflicts – which provides prisoner-of-war status for captured combatants and offers the possibility of interning civilians for imperative reasons of security – to call for a broadening of the rules pertaining to the protection of detainees. David Tuck, former adviser at the detention unit of the ICRC Protection Division and currently ICRC legal adviser in Pakistan, presents the challenges inherent in approaching armed groups with a view to improving the conditions of the persons they detain. After presenting the detention-related humanitarian problems and the obstacles lying in the path of humanitarian endeavour, Tuck explores the options open to humanitarian practitioners and describes ICRC practice in this field, including its limits, thus sharing the unique knowhow that the organization has acquired.

Finally, one of the most delicate questions concerning armed groups' relation with the law is their accountability and the possibility for victims of war to obtain reparation for the harm suffered. All too often, victims simply receive no remedy. The question of whether armed groups can provide such remedy has thus far only been considered as a hypothetical one. Ron Dudai, from Queen's University Belfast, demonstrates in his article that there could be circumstances in which armed groups could provide some measures of reparations to their victims. Drawing some parallels with the cases of the ANC in South Africa and the IRA in Northern Ireland, Dudai extrapolates possible avenues for armed groups to engage in the reparation process for victims.

In presenting these contributions, the *Review* hopes to further enhance the understanding of the phenomenon of armed groups, of the applicable law, and of the modes of engagement with them. In the complex reality of non-international armed conflicts, where the support of the civilian population is sometimes the only thing being fought over, it is not unusual for the parties to combine, successively or simultaneously, the carrot and the stick: that is, to use violence but also assistance, to win people's 'hearts and minds'. While human development is no doubt key to the resolution of many conflicts, and while it is obviously desirable to help populations, a moral line is crossed when the parties to the conflict use, divert, or even prevent humanitarian aid for political purposes. In bucking that trend, it remains as crucial as ever constantly to remind the parties to the conflict that they must respect and facilitate the impartial action of humanitarian agencies, even if doing so implies contact with 'the other side', or the enemy.

Protection of the victims of today's armed conflicts requires respect for international humanitarian law, not only by states but also on the part of those who

remain the outcasts of the international system: armed groups. That paramount requirement no doubt obliges us to rethink the way in which we approach them and to continue improving the arsenal of those defending the victims, who in war have no weapon but the law.

Vincent Bernard
Editor-in-Chief



Interview with David Kilcullen*

*David Kilcullen is a leading expert on counter-insurgency policy. He served twenty-four years as a soldier, diplomat, and policy advisor for the Australian and United States governments. He was Special Advisor to the US Secretary of State in 2007–2009 and Senior Advisor to General David Petraeus in Iraq in 2007. He has provided advice at the highest levels of the Bush and Obama administrations, and has worked in peace and stability operations, humanitarian relief, and counter-insurgency environments in the Asia-Pacific region, Middle East, South Asia, and Africa. He is a well-known author, teacher, and consultant, advising the US and allied governments, international organizations, non-governmental organizations, and the private sector. His best-selling books *The Accidental Guerrilla* and *Counterinsurgency* are used worldwide by civilian government officials, policy-makers, and military and development professionals working in unstable and insecure environments. Mr Kilcullen holds a PhD from the University of New South Wales. He is the founder and CEO of the consultancy firm Caerus Associates.*

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How do today's armed conflicts involving armed groups and insurgency differ from counter-insurgency wars in the past, and how have counter-insurgency (COIN) strategies evolved and adapted over the years?

Classical counter-insurgency, designed in the 1950s and 1960s, was something that emerged from the Cold War period. And it was designed as a method of engaging a mass movement, a nationalist liberation movement, or a communist insurgency, in a colonial or post-colonial environment, against the background of superpower

* This interview was conducted in Washington, DC on 7 June 2011 by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*, and Michael Siegrist, Editorial Assistant.

confrontation and nuclear threat. So it's a form of Cold War limited warfare that's associated with agrarian mass movements in what was then called the Third World.

What we've dealt with, particularly in Iraq and Afghanistan, is not that. There, it is a situation that's more akin to traditional resistance warfare because unlike, say, Vietnam, where the insurgency came about in the face of an existing government that was already established and already had control of the territory, in Iraq and Afghanistan the coalition went in there, overthrew the government, created chaos, and *then* tried to set up a new replacement state. And other forces that were already present on the ground started to fight after that. So this is more of a resistance warfare model.

Modern counter-insurgency is affected by this, because in this case they were trying to create a government as well as to suppress an insurgency. They're not just trying to support a government, they're also trying to create one. So it's much more difficult than the traditional counter-insurgency model. But also, there are some features of the modern environment that are very different. Globalized media makes a huge difference, where the insurgent can appeal to a diaspora in real time and generate effects that hamper or cancel out the effects you're generating on the ground. And an environment where there's a much higher degree of international scrutiny, not only media scrutiny but quite proper scrutiny from organizations like the ICRC and others, which along with changes in international norms means that some of the traditional methods of counter-insurgency just aren't acceptable in today's environment.

You know, if you think about the British campaign in Malaya in 1948–1960,¹ which has been suggested by some as a classical example of humane counter-insurgency, the techniques that were actually used would be completely unacceptable now. Collective punishments, twenty-two-hour-a-day curfews, transporting whole populations to completely different parts of the country, putting hundreds of thousands of people in jail or in 'new villages'. You know, the methods that were used in the '50s and '60s are not open to us, nor should they be. So in some ways governments are more restrained than in the classical counter-insurgency era. In other ways the enemy's freer, because they have the ability to leverage different international fora and diaspora populations and so on.

So it's a very different environment in that respect. A final difference is that there is a global or globalized threat from groups like Al Qaeda, so that a government might be fighting, let's say, in the Philippines, or in Indonesia, or in Sri Lanka, or in southern Thailand, against a local group that has a local, specific agenda. Perhaps it's a separatist group, or it's an Islamic insurgency, or perhaps it's really

1 Editor's Note: The British counter-insurgency campaign in Malaya (also known as the 'Malayan emergency') took place during the period 1948–1960 between the British Commonwealth Forces and the Malayan communist guerrilla forces (the Malayan National Liberation Army), who aimed at putting an end to British colonial administration in Malaya. The British campaign in Malaya is better known for the 'Briggs' Plan, according to which the best way to defeat an insurgency was to drive a wedge between the insurgents and their supporters among the population. See e.g. Richard Stubbs, *Hearts and Minds in Guerilla Warfare: The Malayan Emergency, 1948–1960*, Oxford University Press, Singapore, 1989.

ethnic. But then, overlaid on the top of that, you have a more globalized group that cares more about global objectives and is willing to assist these guys, and to manipulate them in a lot of cases. And I think that does change the way that we operate.

Building on that, how have armed groups evolved over time, in your view? Do you see common causes, common reasons for the existence of these insurgencies?

I think that we do certainly see some common causes, and one of them is ethnic separatism. Another one is the reaction against international community involvement in certain parts of the world: for example, in Afghanistan or Iraq. We see traditional ethno-linguistic conflict between social groups within countries, which results in civil wars – Sudan is an example of that – and this can take the form of insurgency. I think we're not seeing the mass-based Maoist-style people's war of the '50s and '60s any more. We're seeing more cell-based, family, or tribal-based groups, that aren't necessarily trying to directly overthrow the government. They may be trying to make an environment ungovernable so that a government pulls back and then they have a free hand to do what they want to do.

There is a growing impression that we have fewer and fewer armed conflicts, and more and more gang violence and urban violence, as in Latin America. Is this also a topic that you see close to your work?

Yes. The methods and techniques used by illegal armed groups of all kinds are very similar, irrespective of their political objectives. So whether you're talking about a gang in the drug business in Latin America, or organized crime in the gun-running or human smuggling business, or whether you're talking about an insurgency or perhaps even a civil war involving tribes, you will see very similar approaches and techniques being used on the part of those illegal armed groups. That's one of the reasons why I believe counter-insurgency isn't a very good concept for the work that the international community is trying to do. I think that the idea of complex humanitarian emergencies is actually a lot closer to the reality on the ground.

You almost never see just one insurgent group fighting an insurgency against the government anymore. What you typically see is a complex, overlapping series of problems, which includes one or more or dozens of armed groups. And the problem is one of stabilizing the environment and helping communities to generate peace at the grassroots level – a bottom-up peace-building process. And that's not a concept that really fits very well with traditional counter-insurgency, which is about defeating an insurgent movement and is a top-down, state-based approach. What you have to do is create an environment where existing conflicts can be dealt with in a non-violent way.

So it is traditional bottom-up peace-building; community-based peace-building. Most of the successes we have had in Iraq and Afghanistan have not been through top-down intervention by the government. They've been through bottom-up peace-building with local communities. And that, I think, is a very

important lesson: not only does the government not always have the answer but, you know, white guys from the other side of the world coming in to fix your problem isn't necessarily the right way to go. What we want to be doing is creating an environment whereby local communities can deal with their own issues, but do it in such a way that it doesn't lead to mass violence.

The expressions 'counter-terrorism' and 'counter-insurgency' are often difficult to distinguish. Can you quickly explain their differences, overlaps, and the relationship between the two?

Insurgent movements typically use terrorism as a tactic, one among several tactics that they use. When we say 'terrorist', it has an important legal connotation that's different from just membership in an insurgent group. I think that's the primary real difference between terrorism and insurgency. I don't like to use those two terms because I think they've become so politicized that they don't really mean anything. But I think you can see a functional distinction between two different types of group. Let's call them type A groups and type B groups.

A type A group involves a relatively small number of people that may have an extreme ideology, perhaps so extreme that the majority of the population are unlikely to ever support it. A group like this can't, and doesn't, rely on the support of a mass population base to get its objectives. What it relies on is using violence to provoke a government response, to highlight its objectives, and to get people to think differently about an issue. So that is what one would consider a terrorist group. Then a type B group is a group which is actually riding a mass social wave. It's responding to widely held grievances and issues within a much broader population base. It may have hundreds of thousands of people in it and it is responding to a mass population base of millions of people.

So, as an example, the Baader-Meinhof Group, the Red Army Faction in Germany, would be a type A group. It had no more than about twenty-five active operators in it. And it didn't rely on support from the general population. In fact, most Germans really couldn't care less about the ideology it was putting forward. It was very extreme, and thus did not have a lot of support. But it managed to survive for thirty years by maintaining a tight network of clandestine cells. The Taliban is an example of the other kind of movement. There are probably 30,000 active fighters, and a population base of probably five million military-aged males in the Pashtun part of Afghanistan and Pakistan. So it's a completely different scale of problem. It uses terrorism. It uses violence against civilians to inflict terror, but it's doing this for a different reason. It's doing it to build control over a population. And that, I think, is the fundamental difference between the two types of group.

Does this confusion on terminology also have political implications?

Absolutely. There are many definitions of terrorism around the world. And, although we have yet to achieve a single comprehensive definition, I tend to go with

the United Nations definition from Security Council Resolution 1566.² But I think most governments like to paint their opponents as terrorists. Most terrorists don't like to be described as terrorists. Most insurgents use terrorism but they try to avoid the opprobrium of being labelled as a terrorist. So it's a very problematic construct, but the most important thing is that the type A group, the Red Army Faction type, is using terrorism to generate a political effect to highlight its issues and to advance its ideology. An insurgent movement is using terror mainly against its own population to generate control over that population. It's almost like an abusive relationship between the insurgent group and the population that it's exploiting. And, in this sense, an insurgent group is little different from an organized crime protection racket, or an urban gang, or a communitarian or sectarian militia in a civil war – all feed off a population group and use terror to enforce support.

What are the differences in engaging these two types of groups?

Because the two groups are very different, the way that you deal with them is very different. In the case of a group like the Red Army Faction, it draws its strength and its freedom of action from the existence of terrorist cells and a clandestine network that links them. So if you want to deal with that group, you really have to destroy that network. And you end up with police work, investigations, work in the courts, and sometimes military activity to go in there, disrupt those cells, and break them up. So in the most basic sense the terrorists are the problem, and if you get rid of the terrorist network, the problem will go away.

In an insurgency environment, that's not the case. The insurgent might be exploiting grievances in the population, but those grievances aren't illegitimate. They're real. Most insurgencies last a generation, and they involve hundreds of thousands of people. You can't motivate that many people for that long around fake issues. The issues are real and usually the aspirations and grievances are legitimate. It's not the aspiration that's the problem. It's the way that the insurgent group is using violence to try to further that aspiration and it's the human toll on the population that are the problem. So you have a completely different challenge. The strength and freedom of action of an insurgent group derive from its ability to manipulate and mobilize a mass population base.

So, very different from the first group, where the centre of gravity is the network itself, the second group's centre of gravity is its ability to manipulate and mobilize a large number of people. So when you counter the type B group, the insurgency, you're trying to break down its ability to manipulate and mobilize the population. And you do that through things like resolving the grievances that have led to the conflict in the first place, creating alternative mechanisms for dispute resolution and to allow a population to deal with these issues without turning to the

2 Editor's Note: United Nations Security Council Resolution 1566 of 2004 defines terrorism as 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act'. See UN Doc. S/RES/1566, 2004, para. 3.

insurgents for support, and separating the insurgents from the population. And most of the military work that you do in a type B counter-insurgency is about trying to separate the insurgency from the population so that you can work with the population to resolve these issues.

So counter-terrorism is very enemy-focused, trying to find and destroy the enemy, because the terrorist is the problem. If you get rid of the terrorists, the problem goes away. In an insurgency environment, the insurgency is a symptom of the problem. It's not the problem. So what you have to do is sequester the insurgents from the population so you can work with the population to resolve the problem.

Yet to counter these insurgency groups, states usually use their armed forces. There the question arises whether or not they are suited to do that, and how the armed forces are trained to work in a context that is not considered to be conventional warfare?

Well, first, let me just give you a statistic. There have been about 464 wars worldwide since the end of the Napoleonic Wars in 1815. Of those, about 386, or 83%, were insurgencies and civil wars. So what the military likes to call 'conventional' warfare is actually a tiny minority of cases. The vast majority of wars are these kinds of conflict. So the militaries of the world have been engaged in this stuff for several hundred years and are actually pretty well suited to dealing with it. It's just that they don't like it very much. That's why they call it 'irregular' warfare. They much prefer the straight army-against-army, open battlefields, flags flying – you know, the march to Baghdad – because it's seen as somehow simpler.

They don't like the messy complicated grey area of dealing with populations and trying to resolve social and political issues. Best-practice counter-insurgency isn't really military. It's a combination of military, police, governance, and reconstruction. It's a fairly complex blend; basically it's like a drug cocktail designed to treat a complex disease. It has a number of different elements to it, but it's a combination of all those things. Classical counter-terrorism is much more of a police and law enforcement role than a military. But a lot of countries around the world use their military for that, too, and the military, whether we like it or not, is in this conflict environment and will probably remain so.

I think it's important for people in the humanitarian community to understand that the US or Western military in these conflicts isn't necessarily building an empire. You know, it's not trying to expand into the humanitarian space. The military's being dragged unwillingly into that space, and most military guys don't want to go there. They want to stick to fighting the bad guys and it's with reluctance that they've been dragged into this area. And they're longing for the day when they can get out of it. But what I would say both to the military and to the humanitarian community is, if you look at the real history of conflict in the last couple of hundred years, it's a fantasy to think that the military will go back to this supposed golden age of war against states. Because that's not how it really works, or ever has worked. Real conflict is complex, messy, civil wars, involving population

groups and non-state actors. That's what the majority of conflicts are about and I think it will just continue to be so.

There is a strong impression that Western armed forces consider 'paramilitary operations' as a way to buy the allegiance of the local population. What is your opinion on that, particularly having in mind the discussion of 'hold vs. build'?

This is actually a controversial issue in counter-insurgency theory. Back in the 1960s, when the theory was first being formulated, one school of thought suggested that bringing economic benefits, in particular, to the population would result in an increase of allegiance for the government and therefore was a thing that militaries should be promoting in order to build support for the government. But there was another school of thought which said no, actually, by bringing economic development, you may or may not be winning people over to the government. But you're also bringing in a lot of resources which the insurgents can now use and you may actually be making it worse.

So these two schools of thought have always co-existed in the counter-insurgency theory. They haven't really been studied effectively (partly because it's so difficult to get into these environments and study this kind of question) until a few years ago. What recent research suggests is that a large amount of uncontrolled spending on development projects can actually have a very significant *destabilizing* effect. And that actually conforms to normal development theory and modernization theory, so it's not a surprise to me that the field research data that we now have shows a very high correlation between a lot of unaccountable development spending and a high level of conflict.

So I think military commanders often tend to shorthand development and humanitarian activity as 'winning hearts and minds'. And that, in fact, is not necessarily best-practice counter-insurgency and has always been a bit of a watering down of some very complicated debates to the level of a slogan that military officers can use in the field. In the work that I do, I tend to discourage the use of the term 'hearts and minds'. And I very strongly discourage the use of the expression 'winning hearts and minds' because, in fact, the way that you gain progress in these environments is not for outsiders to come in and win over the population. It's for us to create the conditions that allow a local community to resolve their own existing conflict in a peaceful way, and that discourage violence but encourage peaceful resolution of conflict at the local level.

Whether they like the international community or not is completely irrelevant to that problem. And, in fact, the less we can intervene the better, because our own presence will disrupt them resolving their issue. So, 'winning over' the population is much less important than creating an environment where the population can resolve its grievances in a way that doesn't create violence and doesn't empower radicals who then further destabilize the environment. In fact, within the counter-insurgency community, many people are extremely wary of the whole concept of 'hearts and minds'.

Even the military commanders that you see in the field will almost never use that term. It's something that dates to Vietnam and the idea of, you know, we go in and we bring a short-term humanitarian benefit to the population, and that supposedly makes them change their mind and support the government instead of supporting insurgents. That's been proven to not be true. So we discourage that very strongly.

A basic idea of counter-insurgency is to drive a wedge between the insurgents and the population. What if, once the population's trust has been established, one fails to sustain it? For example, by either failing to set up and maintain basic services or failing to prevent the armed opposition from returning?

There are two potential ways that it can go wrong in a given district or village. One of them is that the military forces you use to establish security can either be oppressive and create a lot of backlash, or they can leave too early, so the insurgency comes back. And in that case, various people may have identified themselves as supporters of the military and have been willing to work with the government, and they are then targeted for reprisals. The other way that it can go wrong is you can create expectations for programmes which then don't deliver. And that can lead to resentment, which actually ends up empowering the radical group.

I believe that a focus on economic development is generally less productive than a focus on rule of law. In our work, my team tends to see illegal armed groups (and insurgencies are just one example) as *systems of competitive control*. The insurgents are trying to establish control over the population and create a predictable set of rules and sanctions, and that predictability makes the population flock to them.

We have a pretty good amount of field research from the last ten years, which suggests very strongly that populations don't support insurgents because they like their ideology. Rather, they come to like the insurgent's ideology, because the insurgent establishes presence in their area. The leading authority on this is Stathis Kalyvas of Yale University. In his incredibly insightful book *The Logic of Violence in Civil War*³ he looked at a variety of areas and found that in fact support follows presence. Presence doesn't follow support.

We looked at Kalyvas's results and said, why is that? Why does the population support the enemy or support the government based on a strong degree of presence rather than on whether they like them or not? And we realized that, in an insurgency environment, the people are buffeted from all sides by armed groups that are claiming their allegiance and threatening them with violence if they don't deliver that allegiance. And the population is trying to figure out how to be safe. The day-to-day life of a village elder or somebody in an insurgent environment involves a very complicated navigation through a complex, moment-by-moment calculation

3 See Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, New York, 2006.

of what has to be done to remain safe. When you create a predictable system that says 'here are rules to follow, and if you follow these rules, you'll be safe, and if you don't follow the rules there'll be dangers for you', that's very attractive to the population. Because it creates a space which is bounded by rules and allows them to say, 'If I get into this space, or I'm doing what the dominant actor wants me to do, then I'll be safe'.

And so this, effectively, is what we call a 'normative system': a system of rules and sanctions where, if the population follows certain behavioural rules, then they're safe. If they break those rules, there are punishments or sanctions that go along with that. We've found that the more effective an illegal armed group is at establishing that predictability, the more support it gets. It's like the rules of the road. When you drive your car, there are rules of the road that allow you to be safe in a very complicated environment. It's the rules of the road that make you feel safe, not whether or not you like the police. You don't have to like the police to feel safe. It's the rules that make you feel safe.

So if an insurgent group can establish that predictability, people will think: 'Oh, I know how to be safe now. It's to follow their direction.' And this is independent of whether people like the insurgents or support their ideology – that comes later. So what Kalyvas and others have shown is that, if an armed actor establishes presence and establishes rules that are predictable and consistent, then the population will be reassured, and feel safe, and flock to them. So the insurgents are basically trying to create a legal system, right? Because that's what a normative system is: it is a variation of rule of law – or rather, rule-of-law systems are a subset of normative systems.

Theorists have started focusing much more heavily in the last ten years on rule of law in counter-insurgency, because a rule of law is the same thing that the insurgents are trying to establish. It's a set of rules which has predictable consequences and allows the population to feel safe, and helps them know what they need to do in order to be in a safe place. This is not a new idea, and of course it did not originate with me. This is an idea that actually goes back to the 1950s and '60s. If you look closely in the classical counter-insurgency literature, writers like Bernard Fall or Sir Robert Thompson, you can see it there. But it wasn't a big issue, people didn't talk about it as an important issue, and it was lost in translation from the old counter-insurgency doctrines into the new counter-insurgency era.

In Afghanistan, for example, the international community spent millions of dollars at the capital-city level in Kabul building a Supreme Court and training judges and rewriting the legal code and so on, to establish a rule-of-law system. The Taliban came in at the village level with Sharia and their mobile courts, and they established a rule-of-law system within months and gained control of the population while we were still busy turning around in Kabul. So one of the other lessons we've drawn from this is that bottom-up, community-based law, which can be transitional justice, or customary law, applied by traditional courts or religious courts, is as effective and possibly even more effective in the initial stages than central-state structures; particularly in a place like Afghanistan or some parts of

South Asia and Africa where there isn't a strong tradition of central-state presence anyway.

So community-based dispute resolution and mediation systems can be potentially the most important thing in resolving disputes. Creating the environment for that tends to be something militaries don't think about as very important. But our field work in Iraq, Afghanistan, Pakistan, East Timor, and parts of Africa has shown us that it's actually critical. Empowering the elders' committees, empowering the local religious leaders, empowering the local courts, empowering women's networks, strengthening civil society and helping them to get into a position where they can resolve 90% of the disputes – that's been a key issue in minimizing the violence in places like Iraq and Afghanistan.

So in your opinion the rules must come from the community and not be imposed top-down?

Exactly. In fact, it's bad for them to be imposed from the capital city. It's ten times worse for them to be imposed by foreigners. It doesn't work. The community has to own that process; it has to be part of their own solution. The example that I always like to use is Somalia. In 1992, after the collapse of the Siad Barre regime, when the international community got involved in Somalia, in the south of the country, it was very much top-down, international-community-led, in accordance with internationally accepted state-based norms and it's been an almost total failure. In the north, Somaliland, in the same time-frame, the tribes and clans got together and, on their own, began a bottom-up community-based reconciliation process that led to the creation of clan charters, regional constitutions, and the writing of charters for governance, and, over time, the creation of a bottom-up governance system.

And now you look at the northern area of the old Somali republic, Somaliland. It has just gone through its third peaceful transition of power between elected presidents. It has a functioning judiciary, a functioning stock market. It has a police force but no military, which is an interesting choice on their part. And it has a much more stable and responsible government system, but also a much better economic system. This was achieved not through international development projects but just through letting Somalilanders get themselves together in a local bottom-up governance process, whereas in the same time-frame we have made a complete mess of what's gone on in the south.

So to me that's a very important lesson: that the international community doesn't know best; and that large-scale economic development, influx of large amounts of money, isn't always the right answer. And lots of white guys with guns are *certainly* not the right answer. What you want to be doing is creating, with the minimal possible intervention, the conditions under which the people concerned can do bottom-up, community-based reconciliation and peace-building. And that then creates the basis for governance. And governance, once they have that in place, creates the basis for economic development. If outsiders try to do economic development where there's no

governance, you just end up with lots of corruption, which is what we've seen in places like Afghanistan.

How do you see the relations or interactions between the humanitarian and the military actors in these types of situation?

I'd make three points on this. First, there's been some very significant development in this field in the last three or four years with InterAction getting together and producing the Guidelines for Relations Between US Armed Forces and Non-governmental Humanitarian Organizations.⁴ So we now actually have an agreed code of best practice between the military and humanitarian NGOs, which we really haven't had in the past. This is a very significant advance in terms of regulating the relationships here and making sure that people understand expectations.

The second thing is that, in my experience, the military doesn't really understand humanitarian NGOs. It comes in with a very positive attitude to them, but it doesn't really understand what they're trying to do. Humanitarian NGOs are very concerned about the presence of the military, because it destroys humanitarian space where they want to work. So there's an unequal set of issues. The military is a little bit unaware, but generally well disposed. The humanitarian NGOs are perhaps a little unaware of where the military's coming from, but they're not well disposed to the presence of the military, so there's an unequal relationship.

I guess the third point would be, that in some conflicts there is no humanitarian space. If you go in and you try to deliver certain kinds of assistance to a population, that will be seen as a threat by certain kinds of armed groups. And they'll push back against that and try to destroy not only the international community agencies that are getting involved but also the humanitarian NGOs.

At the field implementation level I think there's a lot that the two groups can learn from each other. For example, when the military gets attacked in an area where it's trying to do a project, its normal response is to shoot back, and create guards and patrols, and 'secure' the environment. If an NGO gets attacked, its normal response is to call a meeting with the population and say: 'Look, we were really hoping to deliver this project in your area, but because of this violence, we have to leave now.' And then the population will say: 'Well, hang on. You know, we really want this project. So we'll protect you. We'll create an environment where this doesn't happen again.' And if the NGO's willing to trust that relationship, then they'll stay, and if not they will leave. Either way, violence against a humanitarian

4 InterAction is a group of 500 humanitarian NGOs, which in 2006–2007 drafted a code of conduct for how humanitarian NGOs should interact with the military in conflict zones. This code has now been agreed to by the US military and by all members of InterAction. See 'Guidelines for Relations Between US Armed Forces and Non-Governmental Humanitarian Organizations', available at: <http://www.usip.org/publications/guidelines-relations-between-us-armed-forces-and-nghos-hostile-or-potentially-hostile-envi> (last visited 28 September 2011).

NGO won't create more violence, but violence against the military can often create a cycle of escalation. The difference is community ownership. The community believes that the project's going to benefit the community and so they're willing to protect the NGO so the NGO can deliver the project. So, the community wants the project. The community owns the project.

That's also best practice for the military. If the community wants the military there, and they believe it's bringing a benefit to the community, and they want to see that presence as much as the military does, then you can have that kind of collaborative relationship. But if the military comes in and it's trying to impose its own agenda on the population, and the population doesn't have ownership over that, then the NGO method isn't going to work. In fact you risk the emergence of a police state.

The ICRC engages armed groups and maintains a dialogue with them on a wide range of issues such as access, protection issues, and the respect of humanitarian law. Do you see any value in having a humanitarian actor capable of talking to both sides?

Well, let me answer this in two ways. As a person who works in this space, I think it's incredibly valuable. And I think it's essential that we have the presence of impartial actors who can generate access to all the affected population. Just on humanitarian grounds, I think, that's essential. From the standpoint of military people conducting a counter-insurgency campaign, the issue is twofold. One, humanitarian relief for the population may actually be generating resources that the armed group can manipulate to its own advantage, and to further empower it, and to further manipulate the population. So there are some problems. For example, humanitarian food aid may be taken by gangs, which then control the distribution. The presence of that food aid may actually be creating a lot of violence and oppression of the population. So it's not always the best for the population to be bringing in large amounts of assistance.

The other thing is, you will often find the military saying: 'Well, you guys can get in and talk to the enemy, and what are they thinking?' I think that's problematic, because you're then politicizing and destroying the independence of a group like the ICRC, or even something like the International Organization for Migration, or some of the other groups. And that will ultimately lead to the inability for them to have access to the population, and that can ultimately hurt everybody.

So I think that it's very complicated but I think the key is to have open communication between all the different actors involved in the environment, whether they be NGOs or international organizations, or the military, or the local government – a forum for sharing information so that people actually know what's actually going on, they can create a shared diagnosis of the problem, and are able to act independently on their own judgement but at least know what the facts are that they're dealing with. And that shared diagnosis, to me, is the most important thing.

Is the respect of the law of armed conflict, in your view, an obstacle for counter-insurgency, or is it necessary?

It's necessary. In fact, it's a very important part of doing counter-insurgency effectively because, if you want to win over a population and to convince them that they need to solve their grievances in a peaceful, non-violent way, you're talking about bottom-up rule of law; creating an environment where it's safe for them to engage in unarmed resolution of their disputes. And so all the things that are in the Geneva Conventions, and the Additional Protocols, and the Universal Declaration of Human Rights, and in other international agreements about protection of non-combatant civilians and the treatment of detainees and prisoners of war, all these things create that environment of predictability that allows peaceful resolution to take place.

If you get into arbitrary acts of violence, whether you're an insurgent or a counter-insurgent, what you're doing is directly undermining that. And the insurgent knows that, that's why they do this stuff. That is in fact the tactical purpose of insurgent violence: to create a cycle of terror and revenge that empowers the terrorist and destroys the possibility of peaceful resolution. So it's very strongly in the government's interest, in almost every conflict, to further reinforce and further establish the predictability that comes from rule of law, particularly the international law of armed conflict. I think it's completely false to think that the Geneva Conventions or other provisions of international law shouldn't or don't apply to counter-insurgency. They're actually a really important tool that allows people who want to resolve the conflict, including the government, to further their objectives.

Do you believe that the current legal framework, as it stands now, is adequate to deal with today's situations?

I think that we need to be looking very carefully at our definitions of illegal armed groups. And I think that the way that the concept of the 'responsibility to protect' has evolved over the last ten years or so has meant that the international community's now getting involved in a lot of internal armed conflicts in an area where the UN has a policy document, but there isn't really a lot of legal writing, legal precedent, or a statutory legal framework governing how to operate in that environment.

So you know that, for example, Kosovo was the first international invocation of this responsibility to protect. Traditionally under international law, the character of government is irrelevant in determining its legitimate sovereignty. A government can oppress its own population, it can starve them to death. That's horrible, but technically irrelevant in traditional international law. The only thing that matters in terms of defining the sovereignty of a legitimate government is: do you have full control of your territory and of your population? And if you do, then you have to be treated as a sovereign in the international community.

In the middle of the 1990s, the UN started to move away from that position to say that there are certain acts a government can carry out against its own

population which may allow its sovereignty to be set aside, and the international community then has a right to intervene. This is the responsibility to protect that was initially invoked for Kosovo. The Bush administration then invoked very similar ideas for the invasion of Iraq. The international community is now invoking very similar ideas for the bombing of Libya.⁵ The same ideas probably apply to what the international community did in Sudan and in Somalia.

So they were very different environments where the actual requirements are very different, but the law is vague enough that people have started to apply this idea of responsibility to protect in a very far-reaching way. And I think that international humanitarian organizations tend to regard the responsibility to protect as a good initiative. But I think people also need to see that the militarization of humanitarian space is directly related to that. The fact that the international community now believes that it has the right to intervene militarily in cases of humanitarian abuse, this militarizes humanitarian space. So it's a complex set of problems.

A final question looking into the future: How does what we see in North Africa and the Middle East at the moment affect the course of what you call the 'long war' in your book *The Accidental Guerrilla*?

I think this is a very important question. The last six months have been a terribly bad period for Al Qaeda. And I think, quite apart from Osama Bin Laden being killed, which is probably just the icing on the cake, the real damage to Al Qaeda has been that, for more than a decade, for nearly two decades, they have said to the people of the Arab world, 'You're oppressed by apostate governments. The West is promoting fundamentally oppressive forms of government in your homelands. The only way to throw that off is for us to attack the West with terrorist violence, which will cause the West to pull out, and cause your governments to collapse. And then freedom will reign.' They have had that ideology for twenty years. They've killed thousands upon thousands of Muslims without achieving anything other than violence and chaos.

Now, in the last six months, the unarmed civil society of North African and Middle Eastern countries has achieved more in a few months than these terrorists have achieved in their whole existence. So every day the success of something like the Jasmine Revolution in Tunisia or the events in Egypt gives the lie to violent extremist ideology. The grievance that drove Al Qaeda is evaporating. And the methods that terrorists use have been shown to be much less effective than just organized civil society. So I think that's an incredibly important threat to those groups because it shows that actually their whole ideology is bankrupt.

The killing of Osama Bin Laden has meant that they've now turned inward to try and figure out how to deal with their own problems. So I think it's unlikely that Al Qaeda is going to be able to engage in a constructive way in this new environment. I think they could go in one of two directions. Some groups will say,

5 Editor's Note: Here and in the final answer it should be remembered that this interview was conducted before the cessation of hostilities in Libya.

'The future is in unarmed civil society, organized protests, and we'll go in that direction.' We're seeing some groups that were formerly aligned with Al Qaeda start to move in that more political direction. From my standpoint, that's fine. If you want to engage in unarmed action in order to resolve your dispute, that's fine. You know, that's politics and there's nothing wrong with that, as long as you renounce violence. Other groups will say, 'We've been shut out of this. We need to hijack the process with more violence against the population.' So I think we're likely to see some groups going to an even more extreme agenda.

In general, though, today Al Qaeda's even more of a marginal movement. It was always a marginal movement, but it's even more marginalized now. Some groups will tend to apply much more horrendous violence in order to try to get back in the game. I think that's ultimately a losing fight. They've been shown to be bankrupt by what's happened in the last six months and I think that that's going to continue.

The other, less positive effect of what's happened is that we now have a lot of new insurgent conflicts across the Middle East. Libya is one. Yemen is even worse than it was. Syria now is basically heading from a popular uprising toward an insurgency. So that this underlines the point that I made earlier in the discussion, which is that we like to think of World War II as normal and these kinds of conflicts as abnormal. But actually the vast majority of conflicts are civil wars and insurgencies.

Some people say, 'We shouldn't get good at counter-insurgency, because that's just going to encourage governments to do these kinds of conflicts, and that's going to make them more common.' The sad truth is, these conflicts are already the most common form of conflict. They're not going away. They've been around for thousands of years. They've been the dominant form of conflict on the planet for at least the last two hundred years.

We can choose to ignore that, and we will just end up making horrendous mistakes and doing more damage; or we can accept the reality that we are going to be working together – humanitarian organizations, governments, police, civil community, and the military – in these very complex situations, and that that's actually normal and we need to engage with that and try to figure out how to work through it.

Engaging non-state armed actors in state- and peace-building: options and strategies

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Abstract

Armed actors dominate contemporary conflict environments dramatically. Their degree of dispersion, influence, and effect on international politics make it necessary to establish strategies for interaction with them. This article makes a contribution by assessing particular strategies and their suitability and applicability with regard to specific actors. First, it delineates options for dealing with armed actors based on three perspectives from international relations theory: realist, institutionalist, and constructivist. Second, it matches these perspectives to the capabilities of international

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actors. Finally, it offers an assessment of the difficulties that arise from the plurality of forms of armed actors, as well as of external actors.



Armed actors of different types shape the situation during and after armed conflict in manifold ways. On the one hand, they are often perceived as responsible for violence against unarmed civilians in breach of international humanitarian law, as well as for the establishment of criminal and informal economies. On the other hand, they are often the expression of social problems because they see themselves as representatives of distinct interests and may build on broad support within communities. Non-state armed actors, such as rebel groups, militias, organizations led by warlords, and criminal networks, often bear the potential to disturb, undermine, or completely truncate processes of peace- and state-building, leading violence to flare up again. Additionally, international actors, such as humanitarian aid workers, representatives of governments, and peacekeepers, are often affected by this violence in their work.

Considering the degree of dispersion of non-state armed actors, their potential influence and their effects on international politics, and learning about the possibilities and chances of success of strategies and concepts regarding an interaction with them, appears crucial. This article aims to provide a general framework about possible strategies for actors in international politics to deal with armed actors. It offers first assessments of the prerequisites of specific strategies, as well as of the suitability and applicability of strategies for particular actors. It does so by reviewing existing strategies for countering and otherwise engaging non-state armed actors (realist, institutionalist, and constructivist) and introducing options for ‘spoiler management’ with reference to specific types of armed actor. From this framework, the article draws conclusions about which international actors (states, international organizations, and non-governmental organizations (NGOs)) are most likely to apply which option with regard to non-state armed actors. The article closes with an assessment of the problems and difficulties that arise from the plurality of approaches and options.

Non-state armed actors in peace-building and state-building processes

A definition of non-state armed actors has proven difficult owing to their many types and characteristics. Generally speaking, non-state armed groups are defined as distinctive organizations that are (i) willing and capable to use violence for pursuing their objectives and (ii) not integrated into formalized state institutions such as regular armies, presidential guards, police, or special forces. They, therefore, (iii) possess a certain degree of autonomy with regard to politics, military operations, resources, and infrastructure. They may, however, be supported or instrumentalized by state actors either secretly or openly, as happens often with militias,

paramilitaries, mercenaries, or private military companies. Moreover, there may also be state officials or state agencies directly or indirectly involved in the activities of non-state armed actors – sometimes for ideological reasons (e.g. secret support for rebels), sometimes because of personal interests (such as political career, corruption, family or clan ties, clientelism, and profit). Nevertheless, despite close relationships with state actors, these groups can still be seen as non-state actors since they are not under full state control. On the contrary, they may be attractive for some government agencies precisely because of their non-state character.

International efforts in peace-building and state-building challenge the position of most of these non-state armed actors in the conflict by aiming at strengthening or reconstructing state structures and institutions. While peace-building works towards the resolution of violent conflict and the establishment of a sustainable peace in general, state-building specifically focuses on the construction of a functioning state. Accordingly, peace-building is often followed by state-building efforts in a process of intervention by external actors. In each of these processes, non-state armed actors usually become a factor that needs to be addressed to succeed. However, the aim to construct capable state structures would, on the whole, limit non-state armed actors' room for manoeuvre and opportunities to pursue their political and/or economic agendas.¹ Some groups would face disarmament and, eventually, disbandment. Others would probably be forced to transform themselves and become political forces or integrate into official state structures, while criminals, mercenaries, or marauders would simply risk economic profits and face measures under law enforcement. International peace-building and state-building efforts therefore pose a danger to these actors, who in consequence are more likely to challenge than to support any steps that would strengthen or re-establish the state's monopoly on the use of force. Such behaviour can be observed in almost every international intervention, ranging widely from Bosnia and Kosovo to Somalia, Haiti, Afghanistan, and the Democratic Republic of the Congo.

Accordingly, engaging non-state armed actors has posed a distinct challenge to international peace-building and state-building efforts. On the one hand, peace-building and state-building activities have to be implemented against the vested interests of armed actors in order to achieve positive results in the long run. On the other hand, progress regarding a secure environment is often only possible if at least the most powerful of the non-state armed actors involved can be included in a political process that grants them some kind of political influence (for example, posts in an interim government) and/or economic and financial privileges, which may in turn undermine the whole process of state-building.

In other words, non-state armed actors are part of the problem in today's conflicts as much as they must sometimes be part of the solution.² The international

1 While engagement of armed actors may take place at any time and involve the strategies discussed below, the need to engage armed groups is more pressing in peace-building and state-building efforts, which form the focus of this article.

2 For case studies, see Robert Ricigliano (ed.), *Choosing to Engage Armed Groups and Peace Processes*, Accord, No. 16, Conciliation Resources, London, 2005; Clem McCartney, *Engaging armed groups in peace processes: reflections for practice and policy from Colombia and the Philippines*, Conciliation Resources

community, however, faces several problems in the attempt to engage and involve non-state armed actors. Particularly with regard to already established para-state structures by warlords, rebels, big men, or militias, it has been questioned whether it is possible to use these structures as temporary solutions and building blocks for reconstructing statehood, or whether this would simply increase the risk of strengthening and legitimizing armed actors so that the establishment of the state's monopoly on the use of force becomes even less likely. In other words, those actors who, in theory, have the greatest potential for state-building and security governance are also the ones who can mobilize the greatest spoiling power. Additionally, such a course of action runs the risk of sending the wrong message ('violence pays') by devoting too much attention or by granting privileges to non-state armed actors who have already benefited from war and shadow economies. This may not only trigger increasing demands by such actors but also seriously harm the credibility and legitimacy of external actors vis-à-vis the general public ('moral hazard' problem).³ Finally, the task of external peace-building and state-building becomes even more difficult if an actor has been or is involved in gross human rights violations, if an actor becomes transnationalized and can exploit opportunities across borders, or if an actor is characterized by a loose network structure where central decision-making can no longer be assured. All these factors may make deals by international mediators or facilitators with these actors difficult.

Options for dealing with non-state armed actors

Clearly, there are no satisfying solutions to these issues. In the light of past experience, context-specific, flexible arrangements in dealing with non-state armed actors will always be necessary. However, more broadly speaking, the international community in principle has a number of options at its disposal. One prominent attempt to systematize strategies for dealing with non-state armed actors is Stedman's contribution, which distinguished three so-called spoiler management strategies: positive propositions or inducements to counter demands made by non-state armed actors; socialization in order to bring about situational or even normative changes of behaviour; and arbitrary measures to weaken armed actors or force them to accept certain terms.⁴ A study conducted by the German Development Institute (*Deutsches Institut für Entwicklungspolitik*, DIE) identified avoidance of engagement, disregard/observation/involuntary engagement, apolitical action or equidistance, exclusion, and co-operation as possible courses of action for

Policy Paper, Conciliation Resources, London, 2006; Edward Newman and Oliver Richmond (eds), *Challenges to Peacebuilding: Managing Spoilers During Conflict Resolution*, United Nations University Press, Tokyo, 2006.

3 Alan Kuperman, 'The moral hazard of humanitarian intervention: lessons from the Balkans', in *International Studies Quarterly*, Vol. 52, 2008, pp. 49–80.

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

development agencies specifically when dealing with non-state armed actors.⁵ Under closer scrutiny, however, these approaches lack theoretical substantiation and do not cover the complete range of options available.

The benefit of using international relations theory in this context is that different camps and strategic orientations in dealing with armed actors can be better structured and understood.⁶ Each of these approaches is linked to particular paradigms and worldviews, which explicitly or implicitly carry with them assumptions about the character of the underlying conflict, as well as about the nature and the typical behaviour of armed actors when they are confronted with particular situations, means, and actions. Realist approaches ultimately focus on elimination of, suppression of, and control over non-state armed actors in order to force them to adapt to a new situation; institutionalist approaches aim at changes of interests and policies of these actors; constructivist approaches concentrate on a change in norms (such as non-violence) and in the self-conception (identity) of the respective actor. Thus, the approaches not only differ regarding strategies and instruments but also show different underlying assumptions with respect to learning processes of armed actors, ranging from pure adaptation to changes of preferences to changes of identity.

Accordingly, the approaches base themselves on different mechanisms and result in different degrees of behavioural change, which are summarized in [Table 1](#). The realist approach mainly rests on the application of force and the use of leverage, which may precipitate a behavioural change only as long as force is applied. Under continuous pressure from the outside, non-state armed actors may change their policies but usually inherent preferences will remain unchanged and their positions may even become hardened. The institutional approach focuses on bargaining as its key mechanism, which may achieve a sustainable result but relies heavily on the respective actor to remain a part of the bargaining system. Only the incessant application of an institutional setting offers enough incentives and guidance to change first policies and later possibly preferences. Constructivists rest their efforts

5 Jörn Grävingholt, Claudia Hofmann, and Stephan Klingebiel, *Development Cooperation and Non-state Armed Groups*, German Development Institute, Bonn, 2007, p. 8: 'The options open to development actors for engagement with NSAGs [non-state armed groups] can be roughly categorized as follows: avoidance of engagement: development policy consciously or unconsciously avoids countries, regions or situations in which NSAGs are involved. Disregard/observation/involuntary engagement: development policy is present in situations involving NSAGs, but takes no notice of them or tries not to become involved by resorting to "non-behaviour" or to behaviour geared solely to observation. Apolitical action/equidistance: development policy endeavours to make development-related and sometimes even conflict-related contributions, but they are deliberately kept apolitical. Exclusion: development policy supports the exclusion of NSAGs. Cooperation: development policy involves NSAGs directly in different ways. This may consist in direct account being taken of them in measures and dialogue fora or in their acting as cooperation partners.'

6 International relations theory looks at international relations from a theoretical, academic perspective. It aims at building a conceptual framework for analysing, conceptualizing, and structuring international relations. Realism specifically focuses on the importance of statism, survival, and self-help. Institutionalism believes instead in the power of institutions to shape actor preferences (by use of incentives and the redistribution of power, as well as cultural changes). Constructivism argues that international relations are socially constructed by their members and that these structures influence their members and their behaviour.

Table 1. Approaches for dealing with non-state armed actors.⁷

Approach	Key mechanism	Behavioural change based on
Realist	Use of force/leverage (Counter-insurgency)	Adaptation
Institutionalist	Bargaining (Conflict management)	Adaptation; Policy/preference change
Constructivist	Persuasion (Norm diffusion)	Adaptation; Policy/preference change; Identity change

on persuasion, which may not easily lead to results but if a behavioural change occurs it will – in theory – be sustainable, as the motivation to maintain conform behaviour may over time be internalized by the actor. The literature accounts for an array of approaches that may roughly be assigned to these different tendencies.⁷

Realist approaches: the use of force and leverage

The realist perspective emphasizes the role of ‘power’ and ‘countervailing power’, and focuses on repressive means in order to put pressure on armed groups. The overall objective is to combat, to eliminate, to deter, to contain, and to marginalize armed actors.

1. Coercion

International actors may use coercive measures, including the use of force and coercive diplomacy.⁸ Typical instruments are military or police operations aimed at fighting or arresting members of armed actors, the deployment of international troops in order to stabilize a post-war situation, and the implementation of international sanctions (such as arms embargoes, no-fly zones, economic sanctions, freezing of foreign assets, travel sanctions, or war criminal tribunals), which could harm the interests of at least some non-state armed actors, in particular paramilitaries, rebel leaders, warlords, and clan chiefs. This approach is often accompanied by law enforcement measures at national and/or international level.

7 See also Ulrich Schneckener, ‘Dealing with armed non-state actors in state- and peace-building: types and strategies’, in Wolfgang Benedek, Christopher Daase, and Petrus Van Dyne (eds), *Transnational Terrorism, Organised Crime and Peace-building*, Palgrave, Basingstoke, 2010, pp. 229–248; Ulrich Schneckener, ‘Fragile statehood, armed non-state actors and security governance’, in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance*, Lit Verlag, Berlin, 2006, pp. 23–41.

8 On coercive diplomacy in general, see in particular Robert J. Art and Patrick M. Cronin (eds), *United States and Coercive Diplomacy*, United States Institute of Peace Press, Washington, DC, 2003; Alexander George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War*, United Institute of Peace Press, Washington, DC, 1991.

Examples of the latter are the activities of the International Criminal Court and other international criminal tribunals.⁹

2. *Control and containment*

This strategy aims at systematically controlling and containing the activities of non-state armed actors, thereby reducing their freedom to manoeuvre and communicate. The object is to maintain a certain status quo and to put these actors under strict surveillance (by using police and intelligence measures). This is particularly effective with actors who are concentrated in a certain territory that can be cut off (for example, through the use of fences and checkpoints) from the rest of the country.

3. *Marginalization and isolation*

This approach is concerned with reducing the political and ideological influence of armed actors. The idea is to marginalize their worldviews and demands in public discourse and to isolate them – politically as well as physically – from actual or potential followers and their constituencies. For this scenario, a broad consensus is needed among political elites and societal groups not to deal with these actors and not to react to their violent provocations, but to continue an agreed political process. This approach works particularly well for weak or already weakened actors such as smaller rebel groups, terrorists, or marauders.

4. *Enforcing splits and internal rivalry*

Another option aims to fragment and divide armed actors between more moderate forces and hardliners. This can be achieved by different means, be it the threat of using force indiscriminately, by offering secret deals to some key figures, or by inviting factions in a political process that would encourage them to leave their group or to transform it into a political movement. Such a strategy can, however, result in the establishment of radical fringe and splinter groups, which may be even more extreme than the former unified group. These fragmentation processes can often be observed with rebel or terrorist groups, for example when the Kato group split from the Moro Islamic Liberation Front (MILF) in the Philippines, or when the Islamic Courts Union (ICU) in Somalia splintered into numerous factions after 2006, one of which being the militant Al-Shabaab.

9 For instance, the International Criminal Court (ICC) has issued warrants of arrest against five leading members of the rebel-style Lord's Resistance Army (LRA) in Uganda, including its commander-in-chief, Joseph Kony, in 2005, as well as various warrants of arrest against leaders of armed groups in the Democratic Republic of the Congo. See ICC, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Case No. ICC-02/04-01/05, 'Warrant of arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005', 27 September 2005; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 'Warrant of arrest (under seal)', 10 February 2006; ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Case No. ICC-01/04-01/07, 'Warrant of arrest (under seal)', 2 July 2007.

5. Bribery and blackmail

Members of armed actors may be corrupted in certain ways: they may be forced or induced to co-operate or silenced through the offering of material incentives, such as economic resources or well-paid posts. In some cases, this may also involve attempts to blackmail or to intimidate leaders (for instance through threatening family members) in order to make them more likely to accept money or other offers. This strategy is politically and normatively questionable; however, in some cases it is indispensable for getting a peace process started in the first place. In particular, profit-driven actors, such as warlords and criminals, have often been receptive to such a strategy. A recent example of this strategy in practice is the December 2001 Bonn Agreement for Afghanistan, where a regime change was agreed upon in exchange for handing over considerable power to factional leaders who were perceived to be on the ‘right side’ of the war on terror.¹⁰

Most of these approaches involve a mixture of sticks and carrots, occasionally including deals with the actor, with the leadership, or with some key members in order to alter their behaviour to conform, at least in the short term. Therefore, in most instances, these strategies are not used exclusively but in combination. For example, the concept of counter-insurgency combines some of these approaches in order not only to fight against rebels or other actors but also to cut off the links between an armed actor and its (potential) constituency or supporters among the population.¹¹ Yet the focus remains mainly on coercive measures backed by (material) incentives, which reflect the underlying premises that most leaders of armed actors – despite their political rhetoric – are not driven by ideals but by narrowly defined, selfish interests. For realists, the bottom line reads as follows: if one is able to put enough pressure on them and/or offer them some profits, these people will ultimately comply.

Institutionalist approaches: the power of bargaining

At the heart of institutionalist approaches are processes of bargaining aimed at the establishment of procedures, rules, and institutional settings that acknowledge the preferences and interests of all conflict parties and allow for some kind of peaceful co-existence (conflict management). Examples are ceasefires, confidence-building measures, and peace agreements, as well as mechanisms for conflict settlement and arbitration. In general, these arrangements need to be implemented, guaranteed, and controlled internationally. Two different approaches – which do not exclude each other – aim to achieve such arrangements.

10 Jonathan Goodhand and Mark Sedra, ‘Bribes or bargains? Peace conditionalities and “post-conflict” reconstruction in Afghanistan’, in *International Peacekeeping*, Vol. 14, No. 1, 2007, p. 41.

11 On counter-insurgency, see in particular David Galula, *Counterinsurgency Warfare: Theory and Practice*, Praeger, Westport, CT, 2006; Bruce Hoffman, *Insurgency and Counterinsurgency in Iraq*, RAND, Santa Monica, CA, 2004; US Army & Marine Corps, *Counterinsurgency Field Manual*, University of Chicago Press, Chicago, 2007.

1. Mediation and negotiation

Using this approach, external actors primarily work to foster a negotiation process among different parties, including non-state armed actors, in order to find a political settlement.¹² As facilitators or mediators, they will try to urge armed actors to refrain from the use of force and to abandon maximalist political demands. For that purpose, informal contacts, multi-track diplomacy and extensive pre-negotiations are often necessary, in particular when direct contact between the conflicting parties (for example a local government and a rebel group) is unlikely. In such a process, pros and cons of possible solutions usually have to be weighed, incentives and disincentives (such as possible sanctions) have to be taken into account, and a compromise acceptable to all sides has to be found. Arguing and bargaining methods (including cost-benefit analysis) often need to be combined in order to achieve such an outcome. These approaches imply a long-term engagement, since mediation may still be necessary during the implementation of agreements. This scenario applies mainly to actors with a political agenda who are strongly tied to a defined constituency such as tribes, clans, ethnic groups, and political parties.

2. Co-optation and integration

Here the basic idea is that non-state armed actors, and in particular their respective leaderships, can be co-opted and slowly integrated into a political setting, for example by distributing resources and sharing political responsibility. This approach therefore implies a certain degree of informal or formal power-sharing, be it at national or local level, which would involve leaders of armed groups in day-to-day politics.¹³ In other words, the attempt would be to give them a role to play, which might then change their attitudes and preferences. This strategy is sometimes based on a formal agreement, brokered by outsiders, but it is often pursued by efforts of building alliances and coalitions among different local groups. A good illustration is the attempt to gradually integrate Afghan warlords into the newly established political system, not least by offering them positions such as governors or ministers, but also by granting them a certain political status quo. Similar processes can be observed in various African societies with regard to clan chiefs, big men, or certain militia groups.

In contrast to the realist version, the starting point here is that many non-state armed actors are indeed driven by certain grievances and political demands, which can be addressed through negotiations and/or other means. Even if the

12 Ricigliano, above note 2; Jacob Bercovitch (ed.), *Studies in International Mediation*, Palgrave Macmillan, Basingstoke, 2002.

13 Caroline A. Hartzell and Matthew Hoddie, *Crafting Peace: Power-sharing Institutions and the Negotiated Settlement of Civil Wars*, Pennsylvania State University Press, University Park, PA, 2007; International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law*, ICRC, Geneva, 2003; Anna K. Jarstad, 'Power-sharing: former enemies in joint government', in Anna K. Jarstad and Timothy Sisk (eds), *From War to Democracy: Dilemmas of Peacebuilding*, Cambridge University Press, Cambridge, 2008, pp. 105–133; Ian O'Flynn and David Russel (eds), *Power Sharing: New Challenges for Divided Societies*, Pluto Books, London, 2005.

leadership is corrupt and greedy, in many instances they must show some kind of political programme or agenda in order to find followers and supporters in local communities. In other words, even the most selfish leaders are under pressure to deliver – and therefore may be receptive to incentives and guarantees, assured by institutional arrangements.

Constructivist approaches: the power of persuasion

In general, constructivist approaches emphasize the central role of arguing and persuasion, as well as processes of norm diffusion. Their ultimate aim is to persuade armed actors to accept, respect, and eventually internalize norms, thereby fostering long-term transformation processes that involve not only conformity of behaviour for tactical reasons but also a genuine and sustainable change of the actors' policies and self-conception (identity change).

1. Processes of socialization

By involving non-state armed actors in processes and institutions, this approach claims that, over time, chances will increase that (potential) spoilers will be successively socialized into accepting certain norms and rules of the game.¹⁴ Armed actors will undergo processes of collective learning, which will alter strategies and, eventually, their self-conception. This medium- to long-term strategy may work best for those armed actors with clear political ambitions who have to address long-term expectations of their constituencies and develop an interest in improving their local as well as international image.

2. Naming and shaming

The attempt here is to organize social pressure and to campaign publicly, at the national and the international level, against certain practices of non-state armed actors in order to harm their legitimacy within and outside their (actual or potential) constituencies. The aim is usually to persuade them to accept and respect certain agreements and norms, in particular norms of humanitarian international law, and to foster them by refraining from certain violent methods (such as terrorist acts) and from using particular means (for example landmines or child soldiers). Such campaigns are often conducted by international NGOs. Again, this approach may be useful in cases involving actors who need moral and material support from abroad.

3. Reconciliation and transitional justice

These processes are more institutionalized, and often preceded by an agreement between conflict parties that lays down the provisions and details of a process in

¹⁴ Claudia Hofmann, 'Engaging Non-state armed groups in humanitarian action', in *International Peacekeeping*, Vol. 13, No. 3, 2006, pp. 396–409.

which a recent, violent past will be addressed, including the handling of war crimes and war criminals.¹⁵ They present a framework for armed actors to accept basic norms and critically reflect their self-image and their actions. Reconciliation processes encompass, *inter alia*, empathy for victims, the confession of guilt, and public remorse. Common tools for reconciliation processes and transitional justice are truth and reconciliation commissions and criminal tribunals, which may be linked with amnesty provisions for leaders and members of armed groups if they participate in the investigation of war crimes and human rights violations, regret their past actions believably, and want to change their behaviour. On the one hand, such amnesty provisions are normatively highly contested because they may contradict the demands for justice by the victims and thus endanger the reconciliation process. On the other hand, as part of an agreement, they may serve as an incentive to end violence and to refrain from using violence in the future.

The underlying assumption of constructivist approaches is that non-state armed actors can be affected by norms and arguments because many of them are concerned with their public image, their moral authority (*vis-à-vis* their enemies), and their sources of legitimacy. Indeed, a number of leaders refer in their public statements to general norms and thereby also try to argue their case from a normative perspective. So, as constructivists would ask, why not take them seriously and engage them in debates about norms and standards?

The politics of external actors: who is doing what?

The above-mentioned approaches offer different methods for dealing with armed actors based on different assumptions, mechanisms, and instruments. Generally, the realist approach mainly addresses the costs of an engagement with armed actors, focusing on how to diminish their influence and spoiling potential quickly and effectively. Arguably, the other two approaches – institutionalism and constructivism – are more occupied with a longer-term perspective that incorporates armed actors into the existing international system, hoping that they can, over time, be co-opted and socialized into conformity. While, in their own logic, each approach attempts to increase the cost of deviant behaviour as well as the benefits of behavioural change for armed actors, they employ very different means and methods based on different actor capacities and capabilities to achieve this aim. For instance, state actors will be more likely to be able to use coercive measures or bribery and blackmail when attempting to influence the behaviour of armed actors, international organizations will be able to use their political leverage, and NGOs will focus on mechanisms that do not require massive resources and political authority.

15 David Bloomfield, Teresa Barns, and Luc Huyse (eds), *Reconciliation after Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2003; Susanne Buckley-Zistel, *Transitional Justice als Weg zu Frieden und Sicherheit: Möglichkeiten und Grenzen*, SFB-Governance Working Paper Series, No. 15, SFB 700, Berlin, 2008.

NGOs may, however, be able to pursue a longer-term approach of socialization, while international organizations and state actors often have to present ‘results’ much faster, in order to respond to political pressure. As a result, it is more likely and more obvious for external actors engaging in local conflicts to prefer one approach over another, depending on their objectives, resources, and capacities. Overall, international organizations appear to have the instruments of all three approaches at their disposal (benefiting from their independent status as well as from the capacities of states as their primary members), whereas states generally appear to focus on realist and institutionalist approaches. The capacities of NGOs appear to be the most restricted in this context, making use of constructivist approaches alone, owing to the nature of their organization and status.

International organizations and multilateral fora

International organizations such as the United Nations (UN), including its special agencies, and regional organizations such as the European Union (EU) and the African Union (AU), as well as multilateral fora (for instance the G8 or G20), make use – at least in theory – of the most comprehensive range of options to handle (potential) spoilers in international politics. More precisely, with regard to realist approaches, international organizations have the capability to build alliances and coalitions among their member states that allows them, in many cases, to take direct action and physically intervene in a conflict.¹⁶ For example, they may do so by invoking resolutions that allow for the use of force by member states to achieve a certain aim (coercion). The most recent instance for such action was the UN’s authorization of its member states to ‘take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’ and the approval of a no-fly zone over Libya,¹⁷ prompting military engagement by NATO countries against Muammar al-Gaddafi’s forces and facilities. The same resolution also calls for the enforcement of an arms embargo, a ban on flights, and an assets freeze.

In the same way, international organizations may also play a crucial role in preparing, drafting, and implementing multilateral strategies vis-à-vis non-state armed actors in zones of conflict, particularly with regard to the use of sanctions, peacekeeping, and peace enforcement operations. A case in point is the imposition of travel bans and assets freezes by the UN on several high-ranking members of a number of non-state armed groups in the Democratic Republic of the Congo.¹⁸ These restrictive and coercive measures are designed to preserve peace and

16 At the same time, in their actions and capabilities they often depend upon the political will and consent of their member states. This is particularly the case with the use of (military) force, since the UN and other multilateral organizations have to rely on decisions taken by the member states.

17 See UN Security Council, ‘The situation in Libya’, UN Doc. S/RES/1973 (2011), 17 March 2011.

18 See UN Security Council, ‘The situation concerning the Democratic Republic of the Congo’, UN Doc. S/RES/1596 (2005), 3 May 2005; UN Doc. S/RES/1896 (2009), 30 November 2009; UN Doc. S/RES/1952 (2010), 29 November 2010.

strengthen international security, if there is a threat to the peace, a breach of the peace, or an act of aggression.

The institutionalist approach relies heavily on the standing that international organizations hold in international politics. The organizations often assume the role of negotiator or mediator in a multi-level environment, for example through UN and EU Special Representatives, Special Envoys, or other specific arbitration mechanisms. In this role, they may call on all parties involved in a conflict or crisis – state actors as well as non-state armed actors – to commit to and enforce a peace process or a political settlement, as well as to monitor such settlements. The purposeful distribution of incentives and disincentives also allows international organizations to apply some leverage in negotiations with non-state armed actors, either by punishing them (for example, through economic sanctions or naming and shaming) or by rewarding them for conforming behaviour and engagement in a peace process (for example, by supporting an actor transformation through development aid, capacity-building programmes, disarmament, demobilization and reintegration (DDR) programmes, security sector reform, and so on). International organizations may also decide to offer a share of the political responsibility for certain issues, going as far as integrating armed actors into post-conflict governance, for example through power-sharing agreements such as the ones designed for Sudan (2005),¹⁹ Zimbabwe (2008),²⁰ and Kenya (2008).²¹ International institutions are thus particularly useful in offering a platform for rapprochement between governments and armed opposition.

With regard to constructivist methods, international organizations have the capacity to influence international politics through the establishment of procedures, rules, and institutional settings that serve two particular purposes: they promote new international norms among members, and they aim to guide their behaviour. One example of this approach is the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (also Anti-Personnel Mine Ban Convention or Ottawa Treaty) that bans the use of anti-personnel landmines by states – establishing an internationally recognized norm against the use of specific types of landmine – and promotes this ban through specific measures, such as assistance for mine clearance and destruction, and review conferences in 2004 and 2009.²² Another example is the 1979 Convention on the Elimination of all Forms of Discrimination against Women, supported by the UN Security Council Resolutions 1820 (2008) and 1888

19 The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, available at: <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> (last visited 18 December 2011).

20 Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations, available at: <http://allafrica.com/stories/200809151361.html> (last visited 18 December 2011).

21 Agreement on the Principles of Partnership of the Coalition Government, available at: <http://www.csmonitor.com/World/Africa/2008/0229/p25s01-woaf.html> (last visited 18 December 2011).

22 Currently, 159 states are subject to the regulations of the Ottawa Treaty. Information available at: <http://www.apminebanconvention.org/> (last visited 18 December 2011).

(2009).²³ Such rules and regulations target the actors' behaviour on the basis of incentives and rewards, and hope to alter their self-conception and identity to sustain peaceful means in the long run. Through this capacity, international organizations effectively possess the capability to act as international norm entrepreneurs, promoting certain normative choices while discouraging and potentially sanctioning others. When addressing non-state armed actors, constructivist methods make an effort to regulate their behaviour in the same manner by setting guidelines and frameworks for appropriate behaviour. The most recent examples address the situations in Côte d'Ivoire, Western Sahara, and Sudan.²⁴ Exemplarily, under threat of targeted measures, these UN resolutions call for adherence to the rough diamonds embargo, to the ceasefire, and to human rights (particularly with regard to sexual exploitation and abuse); they call for the holding of parliamentary elections, implementation of the peace process, and the holding of substantial negotiations; and they urge non-state armed actors to end violence and lay down their arms immediately.

Governments and state actors

State actors seem to be most likely to employ realist and institutionalist approaches when dealing with non-state armed actors in international politics. The availability of the necessary resources to states makes these approaches an obvious option. States often possess the required authority and resources (material as well as human) to be able to conduct operations relying on force or the credible threat of force against armed actors, being able either to disrupt the actions of non-state armed actors or to defeat them altogether. For this purpose, governments have not only some form of military and enforcement units at their disposal but also usually multiple intelligence services, which open up an array of possible measures against non-state armed actors. Intervening governments may obtain important information that can be used as leverage against non-state armed actors. Non-compliance may lead to the enforcement of targeted sanctions through states, as seen in Darfur, Sudan (2006) and many other states, as well as to targeted attacks on non-state actors, as seen in Sierra Leone (particularly between 1999 and 2002). In extreme cases, intervening governments may decide to employ full military means, ranging from the enforcement of no-fly zones – see, for example, in northern Iraq between 1991 and 1998 – to a comprehensive military strike – as employed in Kosovo (1999), Afghanistan (2001), and Iraq (2003). The danger that arises from relying on a realist approach is that non-state armed actors may be pushed further into spoiling and violent behaviour because they face an enemy that already uses force against them. This may coerce non-state armed actors into defending

23 UN Security Council, 'Women and peace and security', UN Doc. S/RES/1820 (2008), 19 June 2008, and UN Doc. S/RES/1888 (2009), 30 September 2009.

24 See UN Security Council resolutions concerning the situation in Côte d'Ivoire, UN Doc. S/RES/1980 (2011), 28 April 2011; Western Sahara, UN Doc. S/RES/1979(2011), 27 April 2011; and Sudan, UN Doc. S/RES/1978 (2011), 27 April 2011.

themselves and retaliating (see, for instance, Hezbollah on multiple occasions).²⁵ The lack of constructive communication between the two parties may reinforce a circle of violence and lead to more extremism.

For this reason, state actors may also use their institutional status and the institutional channels at their disposal to create public discourse and to put pressure on other stakeholders involved. These channels may comprise multilateral international organizations such as the UN, the EU, and the AU, economic forums, or ad hoc alliances. Co-operation with other states and organizations opens up a whole range of possible courses of action, such as negotiations, mediations, and facilitations by 'honest brokers'. A coalition of states may act as a 'group of friends' or 'contact group', engaging in conflict management and conflict mediation in specific cases. States with a strategic interest in a particular conflict may take the lead in arguing and bargaining processes, as for example the US, the EU, the UN, and Russia (the 'Quartet') in the Middle East peace process, which may then result in some form of co-operative agreement, such as the Road Map for Peace of 2003.²⁶ Or they may choose to apply more coercive measures such as favouring one party over another and thus increasing pressure on the other party (see, for instance, the US support of Fatah over Hamas in the Middle East). Donor conferences, as employed in Kosovo and Afghanistan, may set additional incentives for conflict actors to change their behaviour and comply with international demands. However, institutional channels may also be used to strengthen a military engagement: if negotiations fail, intervening governments may resort to force either through multilateral co-operation (for example, through the UN and the EU – as done in the peacekeeping missions in the Democratic Republic of the Congo (MONUSCO), Haiti (MINUSTAH), East-Timor (UNMIT), Kosovo (UNMIK), Lebanon (UNIFIL), and others) or through ad hoc military coalitions, such as the US-led coalitions in Afghanistan and Iraq.

Non-governmental organizations (NGOs)

International NGOs' approaches towards non-state armed actors in intra-state conflicts mainly rest on constructivist approaches because NGOs usually lack the capacities to employ serious leverage and effective bargaining attempts. Their goals for an engagement of armed actors may also differ distinctly from those of states. NGOs tend to focus primarily on the humanitarian objective of decreasing violence. However, international NGOs are able to support mediation and negotiation processes with non-state armed actors at high and medium levels – for example, through the facilitation of talks, informal pre-negotiations, and the preparation of non-papers – and in some cases even conduct mediations themselves. In these instances, they largely rely on argument and persuasion in order to bring the parties

25 See, for example, the July 2006 cross-border raid by Hezbollah, kidnapping and murdering Israeli soldiers, leading up to the 2006 Lebanon War. The Hezbollah leader, Hassan Nasrallah, in a speech in July 2008 acknowledged that he had ordered the raid to pressure Israel to release numerous prisoners.

26 The Road Map for Peace, available at: http://news.bbc.co.uk/2/hi/middle_east/2989783.stm (last visited 18 December 2011).

to conflict to the table and, eventually, to an agreement (see, for example, the Carter Center or the Centre for Humanitarian Dialogue).²⁷

Generally, NGOs have a strong capacity to influence public opinion (often with the use of the media), to educate and raise awareness about certain issues, to lobby political decision-makers, and to engage with diplomatically unacknowledged actors, such as non-state armed actors, without implying a political shift in their favour. What is more, NGOs' long-term engagement in relevant fields often grants them a certain amount of trust even from non-state armed actors. They benefit from their reputation as neutral and independent actors even if this perception is not necessarily shared by all. This puts them into a position to act as a facilitator for specific issues. For example, the International Committee of the Red Cross (ICRC) engages non-state armed actors in the application of international humanitarian law;²⁸ the Cluster Munitions Coalition (CMC) was a key actor in the preparation of the Dublin Conference on Cluster Munitions in May 2008; and the Centre for Humanitarian Dialogue regularly supports global intra-state mediation efforts by providing thematic and technical assistance. NGOs are in the fairly unique position of being able to communicate with non-state armed actors independently of political circumstances, focusing on specific issues rather than on entire peace processes, and trying to persuade them of the utility of specific international norms and rules (such as international humanitarian law), as well as of the lack of utility of violence and particular means of war to achieve their aims. For instance, NGOs such as Geneva Call and the Coalition to Stop the Use of Child Soldiers approach non-state armed actors purposefully in order to provide a platform for armed actors to adhere to international norms, in this case the bans on landmines and child soldiers. The arguments that NGOs employ strategically in order to persuade armed actors focus on the benefits of adherence to specific norms and the costs of violations. They comprise, *inter alia*, the improvement of their reputation, the better treatment of prisoners on the principle of reciprocity, the preservation of resources and military interests (for example, through discipline and a functioning command structure), and the danger of prosecution (for example, through criminal tribunals or the International Criminal Court).

In their interaction with armed actors, international NGOs focus heavily on the transmission of information and knowledge, including technical knowledge, and aim to persuade armed actors with arguments that speak to their particular position in conflict (the empathic approach). In other words, they explain to armed actors what they are supposed to do (and why) and, furthermore, lay out concrete methods for the implementation of the norms in question. This flexible but principle-oriented approach is one of the strengths of NGOs because it can be adjusted to the situation of the individual non-state armed actor. The decision on whether and

27 Carter Center: <http://www.cartercenter.org/index.html> (last visited December 2011), and Centre for Humanitarian Dialogue: <http://www.hdcentre.org/> (last visited December 2011).

28 For ICRC's work in this particular field, see Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, 2008, available at: <http://www.icrc.org/eng/resources/documents/publication/p0923.htm> (last visited 18 December 2011).

which norms are adopted by armed actors is not a precondition for further dialogue but the result of a long-term process.²⁹

The only leverage that these NGOs are perceived to have in their interaction with armed actors is their influence on public opinion, locally as well as internationally. They can create public pressure on non-compliant actors by employing naming and shaming techniques, which may, however, also have repercussions on the relationship between the NGO and the armed actor, which is why these techniques are seldom used. To offer incentives and disincentives to armed actors, NGOs by and large remain dependent on other actors, such as international organizations and states, to provide the required resources and political pressure. Moreover, the engagement of NGOs in political issues may also result in a worsening of the relationship between non-state armed actors and the international community.

Conclusion

Engagement with non-state armed actors is dependent on various factors. To begin with, these groups differ widely in kind, displaying different forms of appearance, aims, and underlying motivations. They may seek to change the existing status quo or be a distant agency of the ruling party; they may seek territorial dominance or simply any dominance; they may use physical and psychological violence for different reasons; and they may be predominantly ideology-oriented or profit-driven – or a combination thereof. Concurrently, external actors, depending on their character and abilities, display different means when engaging non-state armed actors. While states largely rely on realist and institutionalist approaches (with force, leverage, and bargaining as the main mechanisms), international organizations may revert to realist, institutionalist, and/or constructivist approaches, using the institutional framework for medium- and long-term strategies and falling back on their member states to carry out realist approaches. In contrast, international NGOs are capable of applying constructivist approaches, building on their civil base and also benefiting from an elaborate institutional network.

The resulting web of variables that describe an engagement with non-state armed actors suggests the following key problems:

- Internal armed conflicts or non-state conflicts usually involve more than one non-state armed actor. Multiple actors often exist in parallel to each other and are often treated differently by their local government – some are being utilized, some are supported, some are even deliberately set up by governments (see

29 See also Claudia Hofmann and Ulrich Schneckener, 'NGOs and nonstate armed actors: improving compliance with international norms', in *United States Institute of Peace Special Report*, No. 284, July 2011; Claudia Hofmann and Ulrich Schneckener, 'Verhaltensänderung durch Normdiffusion? Die Ansätze von IKRK und Geneva Call im Umgang mit bewaffneten Gruppen', in *Die Friedens-Warte (Journal of International Peace and Organization)*, Vol. 85, No. 4, 2010, pp. 73–98.

militias), while others, such as rebels or warlords, are combated. This results in distinctly different forms of non-state armed actors.

- At the same time, in many conflicts we also deal with a plurality of external actors, who apply, whether intentionally or unintentionally, different approaches. In theory, these approaches may complement each other. In practice, however, they exist in parallel, pursuing different goals, prioritizing different means, and competing against each other. The problem is also complicated by the fact that external actors do not exchange information about their own strategies vis-à-vis armed actors, which in the field may lead to a number of unintended effects.
- Owing to this situation, non-state armed actors are often in a position to play actors off against each other and use their different strategies and lack of communication with each other to the advantage of the non-state actors. Moreover, local actors are aware that time is usually on their side, since external actors will not stay forever but need to leave the country because of limited resources and pressure from the public at home. Against this background, non-state armed actors may misuse offers by international organizations or NGOs to avoid or deal with external pressure or external coercion. For example, they may accept participation in a peace process led by an international organization to bypass legal prosecution or economic or military sanctions. In this way, different strategies may neutralize each other – the pressure built up through realist approaches may be annulled by insincere commitments by the non-state armed actor. For example, such criticism has been voiced recently regarding the Afghanistan Peace and Reintegration Program (APRP), which works towards winning over loyalties of Taliban fighters to the government. Many observers fear that much of the money invested in ex-combatants simply disappears back into the Taliban machinery.³⁰
- In general, external actors often lack knowledge about the non-state armed actors with whom they are dealing and about the range of options that they may have at their disposal in that particular case. In particular, governments are often unwilling or unable to reflect all possible strategies. Instead, they tend to choose an approach that they may have most experience with, are most familiar with, or are most capable of applying, but they are not flexible enough to adapt their position to, for example, a transformation of the non-state armed actor during the conflict. This has often resulted in the expansion of counter-insurgency efforts beyond their original goals, owing to a previous failure to reach the set goals (the ‘mission creep’ problem, demonstrated in Afghanistan and Iraq). At the same time, abandoning the mission in favour of official peace negotiations is often seen as giving in and awarding the use of violence by non-state actors.

30 Julius Cavendish, ‘Luring fighters away from the Taliban: why an Afghan plan is floundering’, in *Time World*, 27 September 2011, available at: <http://www.time.com/time/world/article/0,8599,2094897,00.html> (last visited 18 December 2011).

Here, international organizations or NGOs need to come in. However, they frequently lack the political backing of the international community (despite resolutions at the UN) and are not able to grant required security measures or deliver the necessary resources.

To sum up, external actors dealing with non-state armed actors need to be aware of the existing range of approaches, used by the different actors, as well as of their pros and cons. In a particular case, they need to know who can do what and when, in order to develop a joint effort vis-à-vis armed actors. Some governments and international peace operations have already attempted to incorporate international NGOs into their engagement strategies (particularly counter-insurgency strategies), recognizing the contribution that NGOs can make, based on their unique skills. However, as a general rule, NGOs are uncomfortable with participating in these types of operations. Some even refuse to communicate with the military for fear of losing their comparative advantages, in particular their credibility vis-à-vis the local population. Much of the resulting debate on this issue in both camps has focused on whether NGOs should or should not co-operate with military counter-insurgents and peace operations. For a more productive approach, however, scholars and practitioners should focus on finding middle ground that would allow realist, institutionalist, and constructivist approaches to work independently of each other but with a fundamental understanding about each other's methods. At the same time, actors need to reflect on the changing nature of these armed actors during and in the aftermath of a conflict to apply the appropriate mix of strategies. This, however, requires a much more nuanced understanding of the characteristics, dynamics, and opportunity structures under which those different armed actors act.

Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape

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Abstract

This article identifies two countervailing sets of norms – one promoting humanitarian engagement with non-state armed groups (NSAGs) in armed conflict in order to protect populations in need, and the other prohibiting such engagement with listed ‘terrorist’ groups in order to protect security – and discusses how this conflict of norms might affect the capacity of humanitarian organizations to deliver life-saving assistance in areas under the control of one of these groups. Rooted in international humanitarian law (IHL), the first set of norms provides a basis for humanitarian

* The authors wish to thank Elizabeth Holland and Brian Itami. This paper is based on an HPCR Working Paper, available at: <http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement> (last visited 04 December 2011). Since July 2010, HPCR has led a research and policy project on the impact of counter-terrorism laws and policies on humanitarian action. This project, ‘Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement’, has benefited from the thoughtful reflections of the Working Group on Criminalizing Humanitarian Engagement. Any errors are those of the authors.

engagement with NSAGs in non-international armed conflict for the purpose of assisting populations under their control and promoting compliance with the rules of IHL. The second set of rules attempts to curtail financial and other forms of material support, including technical training and co-ordination, to listed ‘terrorist’ organizations, some of which may qualify as NSAGs under IHL. The article highlights counter-terrorism regulations developed by the United States and the United Nations Security Council, though other states and multilateral bodies have similar regulations. The article concludes by sketching ways in which humanitarian organizations might respond to the identified tensions.

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‘Material support’ is a valuable resource by definition. Such support frees up other resources within the [terrorist] organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.¹ (Chief Justice Roberts)

In recent months, many working in the humanitarian profession have contemplated the image of an aid worker standing before a criminal court, accused of providing support for terrorism while conducting legitimate humanitarian activities. This article explores how that image came about, and how life-saving and impartial humanitarian assistance may be legally construed as providing unlawful benefits to non-state armed groups (NSAGs)² listed as ‘terrorist’ organizations.

Humanitarian assistance delivered in times of armed conflict and its corollary – the autonomous negotiation between independent humanitarian organizations and *all* parties to conflict – have often come under pressure from security and political demands. International humanitarian law (IHL) has sought to balance the security interests of the parties to an armed conflict with the humanitarian interest of ensuring that life-saving goods and services reach civilians and others *hors de combat* even in the midst of fighting.³

For the past decade, a quiet development has altered this balance. The promulgation by states of domestic criminal laws prohibiting material support to listed terrorist entities, and multilateral laws and policies creating a corresponding global counter-terrorism regime, present serious but little-discussed concerns for those engaged in the provision of life-saving humanitarian assistance in armed

1 Chief Justice Roberts, United States Supreme Court, writing on behalf of the majority, US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (internal citations omitted).

2 This article uses the term ‘non-state armed groups’ as a general reference for non-state entities that engage in hostilities or that perpetrate acts of terrorism (or both). The use of this term is not meant to qualify the legal status of any of the non-state entities identified in this article. Acts of terrorism can be perpetrated during an armed conflict or outside of an armed conflict. This article does not take a position on whether any specific ‘terrorist’ group (as designated by states or multilateral bodies in their counter-terrorism regulations) constitutes an organized armed group for purposes of IHL.

3 See, e.g., Geneva Convention III (GC III), Art. 9; Geneva Convention IV (GC IV), Arts. 10 and 23; Additional Protocol I (AP I), Art. 70; Additional Protocol II (AP II), Art. 18.

conflicts involving certain NSAGs. The interaction between long-standing norms of IHL providing modest but clear protection for the work of impartial, independent humanitarian organizations and these domestic laws, donor policies, and multi-lateral norms is yet to be fully understood. This article seeks to explore contradictions between various state commitments, and to reflect briefly on the potential responses of the humanitarian community to the dilemmas posed by the counter-terrorism framework.

This article proceeds in three sections. The first section provides an overview of IHL provisions pertaining to humanitarian engagement in situations of non-international armed conflict (NIAC). In addition to laying out the IHL terrain regulating humanitarian engagement with NSAGs, this section outlines relevant developments in international law and multilateral policy building upon IHL and strengthening humanitarian claims for access and autonomous negotiation with NSAGs for the purpose of assisting and protecting vulnerable populations. The second section discusses recent developments concerning material-support-of-terrorism laws in the United States, particularly the recent case of *Holder v. Humanitarian Law Project (Holder v. HLP)*.⁴ In addition, this section explores US administrative laws and donor policies imposing counter-terrorism-based restrictions on various forms of support to listed terrorist groups or individuals. It draws connections between US material-support laws and several key UN Security Council resolutions on global counter-terrorism. The final main section provides an explanatory framework for understanding what might motivate governments to take contradictory approaches to humanitarian engagement with NSAGs, and then sketches a number of possible ways in which the humanitarian community might respond to the legal and policy tensions discussed in the article. The conclusion highlights the fact that, despite this tension, neither the humanitarian imperative of assisting populations in need of life-saving relief nor the security imperative of preventing resources to be unduly transferred to listed 'terrorist' organizations will be going away any time soon. Beyond the conceptual nature of this tension, states in a dialogue with humanitarian organizations might attempt to establish procedures, principles, and practices that would facilitate co-ordinated planning and execution of humanitarian operations in these situations.

International humanitarian law bases for humanitarian engagement with non-state armed groups

This section sketches the mission of humanitarian organizations and how IHL provides clear, although limited, bases for such organizations to engage with NSAGs in NIAC. It aims to outline the set of norms underlying humanitarian engagement with NSAGs so that those norms may be juxtaposed

4 US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

with the counter-terrorism-based laws and policies explored in detail in the second section. In outlining the bases for humanitarian engagement with NSAGs under broadly accepted interpretations of IHL, this section does not enter into the discussion on the status and content of a ‘right’ (if any) to provide or receive humanitarian assistance in armed conflict.⁵

The mission of humanitarian organizations

The core and distinctive mission of humanitarian organizations is to provide life-saving assistance to populations in need in times of armed conflict. To deliver this assistance, humanitarian organizations must, operationally and under law, seek the consent of the relevant party or parties.⁶ Practically speaking, in a NIAC where a population is under the control of an NSAG, humanitarian organizations must negotiate their access with the NSAG and, in most cases, seek the NSAG’s cooperation in order to ensure the safety and integrity of an organization’s operations. While by definition the purpose of humanitarian assistance is limited to provide life-saving relief for the population, NSAGs may derive direct or indirect benefits from this interaction.

- 5 See, e.g., Heike Speiker, ‘The right to give and receive humanitarian assistance’, in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Springer-Verlag, Berlin, 2011, pp. 7–18; Yoram Dinstein, ‘The right to humanitarian assistance’, in *Naval War College Review*, Vol. 53, No. 4, 2000, pp. 77–92; Ruth Abril Stoffels, ‘Legal regulation of humanitarian assistance in armed conflict: achievements and gaps’, in *International Review of the Red Cross*, Vol. 86, No. 855, 2004, pp. 515–546; Rebecca Barber, ‘Facilitating humanitarian assistance in international humanitarian and human rights law’, in *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 383–391.
- 6 The content and extent of the obligation to seek the consent of the relevant party or parties may be discerned by reference to the treaty provisions and customary law standards applicable to a specific situation. IHL treaty provisions pertaining to humanitarian access in international armed conflicts (including situations of occupation) include, among others, GC IV, Arts. 10, 11, 23, 30, 59, and 63; AP I, Art. 70(1). Such provisions in NIACs include Article 3 Common to the Geneva Conventions (‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’); AP II, Art. 18. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, ‘Rule 55’, pp. 196–197 (finding a rule of customary international law such that: ‘[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’). Regarding NIACs, AP II has a higher threshold of application than Common Article 3: AP II, Art. 1(1). AP II states that humanitarian organizations must obtain the consent of the High Contracting Party concerned: AP II, Art. 18(2). The ICRC’s *Commentary* on the provision states that, ‘In principle the “High Contracting Party concerned” means the government in power. In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay’. 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*, ICRC, Geneva, 1987, para. 4884. The *Commentary* further states that the state-consent requirement in Article 18(2) of AP II ‘does not in any way reduce the ICRC’s right of initiative’ laid down in Common Article 3; as a result, ‘the ICRC continues to be entitled to offer its services to each party’. *Ibid.*, paras. 4891–4892.

International humanitarian law bases for engagement with NSAGs

IHL provides solid bases for humanitarian engagement with NSAGs in NIACs.⁷ It does so, for example, in terms of offering humanitarian services (and by implication co-ordinating and delivering such services),⁸ as well as caring for the wounded and sick.⁹ The UN Security Council has reaffirmed these bases in at least two ways. First, the Council has increasingly called attention to the importance of ‘all parties’ to conflict in agreeing to and facilitating humanitarian relief operations, implying that NSAGs should co-operate with humanitarian organizations in the delivery of assistance.¹⁰ Second, the Council has requested humanitarian organizations’

7 Because NSAGs fulfilling certain criteria may be parties to NIACs only, this article focuses on IHL provisions applicable to that type of conflict. For an overview of IHL pertaining to humanitarian access in both international armed conflicts (including situations of occupation) and non-international armed conflicts, see, e.g., H. Speiker, above note 5, pp. 7–18.

8 Common Article 3; AP II, Art. 18. According to the ICRC, states may not regard an offer of humanitarian relief during an NIAC as an unfriendly act. Sandoz *et al.*, above note 6, p. 41; see also International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 242, stating generally that: ‘There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law’.

While parties may impose certain conditions on relief actions, these conditions cannot intentionally inhibit the delivery of humanitarian assistance to the population, even behind enemy lines. See Sandoz *et al.*, above note 6, paras. 4887 and 4888, stating that: ‘The [relief] actions would have to strictly comply with any conditions that might be imposed (examples: arrangement of transits in accordance with a precise timetable and itinerary, checking on convoys)’, but emphasizing that: ‘Once relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys’.

9 See, e.g., Common Article 3(2): ‘The wounded and sick shall be collected and cared for’; AP II, Arts. 7, 8, 9(1): ‘Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission’; 10(1): ‘Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom’; and 18(1): ‘Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked’.

10 See, e.g., UN Security Council Res. 1964, 22 December 2010, concerning the situation in Somalia (the Council ‘Calls on all parties and armed groups to take appropriate steps to ensure the safety and security of humanitarian personnel and supplies, and demands that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across the country’); UNSC Res. 1923, 25 May 2010, para. 22, concerning the situation in Chad, the Central African Republic, and Sudan (the Council ‘Reaffirms the obligation of all parties to implement fully the rules and principles of international humanitarian law, particularly those regarding the protection of humanitarian personnel, and furthermore requests all the parties involved to provide humanitarian personnel with immediate, free and unimpeded access to all persons in need of assistance, in accordance with applicable international law’); UNSC Res. 1894, 11 November 2009, para. 14 (concerning its thematic area of ‘Protection of civilians’, the Council ‘Stresses the importance for all parties to armed conflict to cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict’). In addition to demanding that all parties to armed conflict adhere to their obligations under IHL, the Security Council has also demonstrated a tendency to urge all parties, including NSAGs, to ensure that the civilian population is protected and that the population’s needs are met. See, e.g., UNSC Res. 1894, 11 November 2009, para. 1 (the Council ‘Demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law,

support and co-operation in monitoring and reporting on violations by NSAGs and states' armed forces listed by the Secretary-General.¹¹ In other words, the Council has stated not only that NSAGs should engage with humanitarian organizations in order to ensure the provision of life-saving assistance but also that humanitarian organizations should engage with NSAGs as a means to prevent specific violations of IHL, particularly those against women and children. A conflict of norms arises between these provisions of IHL and UN Security Council decisions underlying humanitarian assistance, on the one hand, and criminal laws prohibiting the provision of material support or resources to listed 'terrorist' groups, on the other.

Counter-terrorism laws and policies limiting engagement with certain armed groups

While a range of states have enacted domestic laws and instituted policies similar to those developed by the United States, this article focuses on US criminal law and administrative counter-terrorism regulations, as well as related UN Security Council resolutions, for three reasons. First, since the *Holder v. HLP* Supreme Court decision, the US has the most well-articulated material-support jurisprudence, which may provide guidance on the calculus used by many states to limit or criminalize support to listed terrorist entities (including in, but certainly not limited to, situations of armed conflict). Second, since the 11 September 2001 terrorist attacks on the United States, the US has widely been seen as providing global leadership and intellectual innovation in the development and enforcement of domestic and international counter-terror regimes, often in the face of strident criticism. Third, while the UN Security Council resolutions discussed in this article are the result of multilateral negotiation and consensus, it is broadly recognized that the powerful and far-reaching resolutions on counter-terrorism were and continue to be deeply influenced by US approaches.¹² As such, current and future

as well as to implement all relevant decisions of the Security Council and in this regard, *urges* them to take all required measures to respect and protect the civilian population and meet its basic needs'); UNSC Res. 1417, 14 June 2002, para. 5 (concerning the situation in the Democratic Republic of the Congo, the Council '*calls on* the de facto authorities in regions affected to ensure the protection of civilians and the rule of law'); UNSC Res. 1564, 18 September 2004, preamble (concerning the situation in Sudan, the Council stressed that 'the Sudanese rebel groups, particularly the Justice and Equality Movement and the Sudanese Liberation Army/Movement, must also take all necessary steps to respect international humanitarian law and human rights law'). See generally Aristotle Constantinides, 'Human rights obligations and accountability of armed opposition groups: the practice of the UN Security Council', in *Human Rights and International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 89–110.

11 UNSC Res. 1612, 26 July 2005; UNSC Res. 1882, 4 August 2009; UNSC Res. 1960, 16 December 2010.

12 The role of the UN Security Council in formulating multilateral counter-terrorism policy should not be underestimated. In discussing why so many countries adopted similar counter-terrorism laws after 9/11, Kim Lane Scheppele has identified the change as 'radiat[ing] out from the U.N. Security Council'. Kim Lane Scheppele, 'The international standardization of national security law', in *Journal of National Security Law and Policy*, Vol. 4, 2010, p. 439.

developments of US counter-terrorism norms affecting humanitarian engagement merit close attention, not only in their broad extra-territorial reach but also insofar as they may influence multilateral frameworks and other domestic jurisdictions.¹³

United States counter-terrorism regime

The US counter-terrorism legal and policy regime, at least to the extent that it may affect humanitarianism, is comprised of statutes, executive orders, immigration and removal provisions, and administrative regulations, each of which is briefly outlined below.

Prohibitions on providing material support or resources

US federal law prohibits knowingly providing ‘material support or resources’ to foreign terrorist organizations (FTOs).¹⁴ For purposes of the statute, ‘material support or resources’ includes any property (tangible or intangible) or service (including lodging, training,¹⁵ expert advice or assistance,¹⁶ communications equipment, facilities, personnel,¹⁷ or transportation).

The only explicit exceptions to the prohibition under the federal statute pertain to the provision of medicine and religious materials. This provision is narrower than the exemption in an earlier version of a similar statute, which at the time exempted ‘humanitarian assistance to persons not directly involved in such

- 13 The domestic law in other states, such as Australia, also has the capacity to affect humanitarian engagement with NSAGs. See, e.g., Criminal Code Act 12 of 1995, as amended, c. 102.1–102.8 (Australia). See generally Sara Pantuliano, Kate Mackintosh, and Samir Elhawary, with Vicki Metcalfe, ‘Counter-terrorism and humanitarian action: tensions, impact and ways forward’, in *HPG Policy Brief* 43, October 2011, pp. 2–5, available at: <http://www.odi.org.uk/resources/docs/7347.pdf> (last visited 4 December 2011); Harvard Program on Humanitarian Policy and Conflict Research, ‘Humanitarian action under scrutiny: criminalizing humanitarian engagement’, HPCR Working Paper, February 2011, pp. 23–25, available at: <http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement> (last visited 4 December 2011); Kristina Thorne, ‘Terror lists and humanitarian assistance’, in *Humanitarian Exchange Magazine*, Issue 37, March 2007, available at: <http://www.odihpn.org/report.asp?id=2874> (last visited 24 January 2012).
- 14 18 U.S.C. para. 2339B(a)(1); para. 2339B(g)(4); see also 18 U.S.C. para. 2339A(b)(1). As of September 2011, the Secretary of State had designated forty-nine organizations as FTOs; the list is available at: <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited 4 December 2011). US federal law also prohibits providing material support or resources to ‘terrorists’: 18 U.S.C. para. 2339A.
- 15 18 U.S.C. para. 2339A(b)(2), defined as ‘instruction or teaching designed to impart a specific skill, as opposed to general knowledge’.
- 16 18 U.S.C. para. 2339A(b)(3), defined as ‘advice or assistance derived from scientific, technical, or other specialized knowledge’.
- 17 According to the statute, ‘No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.’ 18 U.S.C. para. 2339B(h).

violations'.¹⁸ The currently applicable exemption for 'medicine' does not appear to encompass anything other than medicine itself and therefore seems to exclude all other activities (such as medical treatment or technical training) and resources (such as medical supplies or equipment) associated with the provision of medical assistance.¹⁹ While the statute provides a limited basis on which humanitarian organizations may apply to the government to be exempted from prosecution, the grounds for granting such an exemption are narrow.²⁰

Criminal liability arises from both the objective element of the crime (the so-called *actus reus* – that is, committing a prohibited, or omitting a required, act) and the subjective element (the so-called *mens rea* – having a specified level of knowledge or intent, or both, concerning the act). In terms of material support, the offender need not have intended to further the terrorist aims of the group to violate the statute. Rather, it is sufficient under the statute that the person providing material support has *knowledge* either that the organization is an FTO (that is, the organization is designated as such by the Secretary of State in accordance with US law) or that the organization has engaged or engages in terrorism or terrorist activity.²¹ The statute prohibits providing, attempting to provide, or conspiring to provide material support or resources to such organizations. A violation of the statute may entail a fine or imprisonment of up to fifteen years, or both. If the death of any person results, the violator 'may be imprisoned for any term of years or for life'.²² The US may exercise jurisdiction over an individual, even if he or she is not a US national, who violates (or aids, abets, or conspires with an individual who violates) the statute and who is later 'brought into or found in the [US], even if the conduct required for the offense occurs outside [the US]'.²³ In effect, this provision means that the personnel of an organization headquartered outside the US and made up entirely of non-US staff, with operations completely outside the US, could be subject to US criminal jurisdiction if they find themselves in the US.

18 18 U.S.C. para. 2339A (1994 edition); 110 Stat. 1214 title III, subtitle B sec. 323, 24 April 1996.

19 The House Conference Report accompanying the original legislation stated that medicine 'should be understood to be limited to the medicine itself, and does not include the vast array of medical supplies'. 5 H.Rept. 104–383, section 103, 1995. See also Ahilan T. Arulanantham, *Testimony at Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary*, 10 May 2005, arguing that: '[t]o prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such goods which are not "medicine" but nonetheless serve an absolutely critical medical function'.

20 'No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General'. 18 U.S.C. para. 2339B(j). However, the statute provides that the 'Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity'. 18 U.S.C. para. 2339B(j).

21 'Terrorism' as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, and 'terrorist activity' as defined in section 212(a)(3)(B) of the Immigration and Nationality Act.

22 18 U.S.C. para. 2339B(a)(1).

23 18 U.S.C. para. 2339B(d)(1)(C).

In June 2010, in *Holder v. HLP*, the US Supreme Court upheld the constitutionality of the statute that prohibits knowingly providing ‘material support or resources’ to designated FTOs. The case arose as a pre-enforcement challenge brought by two organizations and six individuals seeking a ruling as to whether the three activities that the plaintiffs wanted to engage in would violate the statute, and, if so, whether the statute as applied to those proposed activities would contravene the US Constitution. In short, the Humanitarian Law Project (HLP) and others wanted to engage in three proposed activities, but could not for fear of prosecution under the statute. Those three activities were: training members of the Kurdistan Worker’s Party (PKK) to use international law to resolve disputes; teaching PKK members how to petition various representative bodies such as the United Nations for relief; and engaging in political advocacy on behalf of Kurds living in Turkey or Tamils living in Sri Lanka. The HLP argued that certain constitutional protections – including freedom of speech and association, and due process of law (which prohibits overly vague criminal laws) – precluded the government from enforcing the statute against the HLP’s proposed activities.²⁴

The litigation leading to the Supreme Court’s judgment in *Holder v. HLP* spent many years making its way through US courts.²⁵ In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, a section of which defines the crime of providing material support or resources to terrorists.²⁶ In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, which amended the section prohibiting material support to terrorists and added a section prohibiting the provision of material support or resources to FTOs.²⁷ Combined, these federal criminal statutes set out the crimes of providing ‘material support or resources’ to terrorists and foreign terrorist groups, and enumerate the broad set of activities seen as providing benefit to these groups. Both sections were amended by the post-9/11 USA PATRIOT Act of 2001 (which increased the penalties for committing ‘material support’ crimes and added ‘expert advice or assistance’ to the list of prohibited forms of support), and by the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, which amended and clarified definitions within the two sections.²⁸ After a lower-court decision voided language in the statute for vagueness, the government appealed the decision, and the Supreme Court accepted the case. In

24 *Holder v. HLP*, Opening Brief for Humanitarian Law Project, et al., pp. 17–21.

25 *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, C.D.Cal. (1998); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 9th Cir. (2000); *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, C.D.Cal. (2004); *Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902, 9th Cir. (2004); *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, C.D.Cal. (2005); *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 9th Cir. (2009); *Humanitarian Law Project v. Holder*, 130 S. Ct. 48, (2009); US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

26 18 U.S.C. para. 2339A.

27 18 U.S.C. para. 2339B.

28 For an excellent summary of the statute and its legislative history, see Charles Doyle, *Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B*, Congressional Research Service, 19 July 2010, available at: <http://www.fas.org/sgp/crs/natsec/R41333.pdf> (last visited 4 December 2011). The Center for Constitutional Rights, which litigated the case, hosts a collection of pleadings and decisions pertaining to the case, including all the case documents referenced in this section, available at: <http://ccrjustice.org/holder-v-humanitarian-law-project> (last visited 4 December 2011).

short, the Court was asked to consider the claim that the statute was unconstitutional because it was either too vague or too broad in relation to the HLP's proposed activities.

In its opening brief to the Supreme Court, the HLP argued that the First Amendment to the US Constitution (which states that 'Congress shall make no law ... abridging the freedom of speech') protected their intended activities, which they characterized as pure political speech; that the material-support statute was unfairly vague; that portions of the statute impermissibly criminalized pure speech and discriminated on the basis of content; and that the statutory provisions at stake violated the constitutionally enshrined freedom to associate.²⁹ The HLP asserted that the Court could avoid addressing constitutional questions by interpreting the statute to require proof of intent to further an FTO's unlawful ends.³⁰

The government's arguments relied largely on the specificity included in the IRTPA, which amended the existing statute in regard to the terms 'knowingly', 'service', 'training', 'expert advice or assistance', and 'personnel'. The government argued that the statute is not void for vagueness just because the application of the terms 'training', 'expert advice or assistance', 'personnel', or 'service' may be difficult to define in some circumstances. Rather, the government stated, '[v]agueness lies not in occasional uncertainty about whether an incriminating fact has been proved, but in fundamental indeterminacy about what that fact is'.³¹ The government highlighted the difference between membership in a designated terrorist group or independent promotion of the political goals of the group – which were not prohibited by the statute – and the act of 'giving material support to facilitate terrorism', for which there was no constitutionally protected right.³² The government stated that the petitioners 'may join the PKK and LTTE, gather with those groups' members, and discuss subjects of mutual interest'.³³ According to the government's viewpoint, the material-support statute regulated activity when the petitioner wanted to 'do more than engage in discussion with terrorist groups'.³⁴

Multiple organizations submitted *amicus curiae* ('friend of the court') briefs to the Supreme Court. One *amicus* brief brought by a collection of non-governmental organizations (NGOs) mentioned that the statute could deleteriously affect the delivery of humanitarian aid. Foregrounding the discussion by declaring that the '[p]rovision of humanitarian aid often requires working with and providing

29 *Holder v. HLP*, Opening Brief for Humanitarian Law Project, et al., pp. 17–21.

30 *Ibid.*, pp. 21–22.

31 *Holder v. HLP*, Brief for the Government (respondents), p. 14.

32 *Holder v. HLP*, Reply Brief for the Government (respondents), p. 38, citing *Humanitarian Law Project v. Reno*, 205 F.3d, 1130, 1133, 9th Cir. (2000). In its Opening Brief, the Government – citing a Supreme Court decision explaining that 'peaceable assembly for lawful discussion cannot be made a crime' – argued that the material-support statute at issue 'is fully consistent with this principle: it does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.' Opening Brief for the Government (respondents), p. 61, citing *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

33 *Holder v. HLP*, Reply Brief for the Government (respondents), p. 39.

34 *Ibid.*

expert advice and technical assistance to local actors', the organizations stressed that, when providing such aid, they 'adhere strictly to certain universal principles of humanitarian assistance. These principles require all providers of aid to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not'.³⁵ Nonetheless, the organizations noted, 'in the context of war zones, particularly in geographic areas controlled or dominated by designated groups, some form of engagement with these groups, their members, or their supporters is sometimes inevitable'.³⁶ The organizations argued that, when providing instructions or guidance to local groups to further humanitarian aid operations, they were engaging in First Amendment-protected activity. At the same time, the organizations observed that the material-support statute does 'not clearly delineate the space available for *amici* to conduct on-the-ground humanitarian aid activities', and gave examples pertaining to Sri Lanka.³⁷

The US's obligations under international law were not raised or addressed by the plaintiffs, the government, or the Court.³⁸ Potentially to the surprise of individuals trained in legal systems in which international law is automatically incorporated into domestic law or in which international law provides a stand-alone basis for individuals to bring legal challenges against domestic laws, in the US litigators rarely rely solely on international law to challenge federal statutes. Rather, US lawyers frame their legal challenges in terms of constitutional rights.³⁹ Partly as a result, the Supreme Court does not assess the US's compliance with its international legal obligations with the frequency with which some other countries' highest courts assess their respective governments' compliance with international law. It is not clear at the time of writing how the US government would view the material-support statute in light of its IHL or international human rights law obligations.⁴⁰

35 *Holder v. HLP*, Brief of *Amicus Curiae* of the Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, the Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation in Support of Humanitarian Law Project, *et al.*, 23 November 2009, pp. 25–26.

36 *Ibid.*, p. 26.

37 *Ibid.*, pp. 26–27.

38 The dissent referred to the Geneva Conventions in relation to what type of 'relief' was meant by the plaintiffs' proposal to 'teach PKK members how to petition various representative bodies such as the United Nations for relief' (internal citations omitted; emphasis added in the dissent). US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2739 (2010).

39 An overview, with an emphasis on criminal procedure, of how – and the extent to which – various systems incorporate international legal norms into their domestic legal orders is available in Chrisje Brants and Stijn Franken, 'The protection of fundamental human rights in criminal process: general report', in *Utrecht Law Review*, Vol. 5, October 2009, pp. 7, 14–16.

40 For discussions about the compatibility of the US's IHL obligations with its domestic counter-terrorism laws, see Justin A. Fraterman, 'Criminalizing humanitarian relief: are US material support for terrorism laws compatible with international humanitarian law?', January 2011, available at: <http://ssrn.com/abstract=1750963> (last visited 4 December 2011); Elizabeth Holland, '*Holder v. Humanitarian Law Project* and the potential to cripple humanitarian assistance in armed conflict', June 2011, available at: <http://ssrn.com/abstract=1939008> (last visited 4 December 2011); Jennifer R. White, 'IEEPA's override authority: potential for a violation of the Geneva Conventions' right to access for humanitarian organizations?', in *Michigan Law Review*, Vol. 104, No. 8, 2006, pp. 2019–2055.

In a 6–3 ruling, the majority of the Supreme Court upheld the constitutionality of the statute. The Court used a broad conception of fungibility rooted in congressional findings – namely that, while some FTOs engage in political and humanitarian activities, such organizations ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct’.⁴¹ The Court noted that ‘Congress has avoided any restriction on independent advocacy’, which would have been prohibited, ‘or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups’.⁴² Three justices dissented, stating that at a minimum the government should have to show that the ‘defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims’.⁴³

Executive Order 13224

President George W. Bush issued Executive Order 13224 (EO 13224) on 23 September 2001.⁴⁴ The Department of the Treasury’s Office of Foreign Assets Control (OFAC) administers the Order, which allows government authorities to designate and block (that is, freeze) the assets of individuals and entities that, among other things, ‘assist in, sponsor, or provide financial, material, or technological support for . . . or other services to or in support of’ certain acts of terrorism or designated terrorists or terrorist groups, or that are ‘otherwise associated with’ designated terrorists or terrorist groups.⁴⁵ OFAC places the designated person or entity on its list of ‘Specially Designated Nationals’ (SDNs) and identifies them as ‘Specially Designated Global Terrorists’ (SDGT). With limited exceptions, all property and interests in property of designated parties in the US are frozen, as are transactions by US persons or within the US in such property or interests in property, including making a contribution of services for the benefit of designated parties. EO 13224 prohibits donations by US persons to designated parties of articles intended to relieve human suffering, such as food, clothing, and medicine.⁴⁶ OFAC may grant general or specific licenses to organizations to engage in certain forms of activity otherwise prohibited under EO 13224, yet it is difficult to discern from publicly available information the extent to which humanitarian organizations have successfully obtained such licenses.

Through an amendment in the USA PATRIOT Act, the government may impose all the blocking effects of a designation – including freezing the party’s assets and criminalizing its transactions – without actually designating the party as an

41 US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2710, 2724, 2729 (2010).

42 *Ibid.*, at 2711.

43 *Ibid.*, at 2740.

44 Pursuant to the authorities of the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code.

45 EO 13224, sections 1(c)–(d).

46 EO 13224, section 4; see also 50 U.S.C. para. 1702(b)(2).

SDGT.⁴⁷ To impose all the freezing effects, the government needs only to assert that it has opened an investigation into designating the entity.

OFAC has listed several thousand organizations and numerous individuals, most of whom are non-US parties, under EO 13224.⁴⁸ US organizations subject to EO 13224, which have a stronger constitutional basis to challenge the Order, have brought legal actions against the imposition of sanctions without a warrant based on probable cause and fair notice of the charges,⁴⁹ as well as against the timing and process of a designation.⁵⁰ These challenges have not, thus far, made reference to the provisions of IHL discussed in the previous section.

Immigration and removal provisions

In addition to being subject to criminal and civil proceedings, non-US individuals who provide material support to certain NSAGs may be denied admission to, or deported from, the US. In this way, counter-terrorism laws, in conjunction with immigration and removal provisions, may affect humanitarian relief personnel attempting to visit, reside in, or immigrate to the US.⁵¹ For example, an alien may be denied admission to, or deported from, the US for,

commit[ting] an act that the individual . . . reasonably should [have] know[n] provides material support to . . . a designated organization . . . or . . . a non-designated terrorist organization or a member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.⁵²

Given the lack of publicly available records of most immigration proceedings, as well as the possibility that the threat of this provision could be utilized to dissuade individuals from pursuing immigration or asylum claims, the extent or degree to

47 Section 106 of the USA PATRIOT Act amended the IEEPA by adding the phrase 'block during the pendency of an investigation' after the word 'investigate' in 50 U.S.C. para. 1702 (a)(1)(B).

48 The list of parties subject to EO 13224 are on OFAC's website, available at: <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited 4 December 2011).

49 *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp.2d 857 (N.D. Ohio 2009).

50 *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, Civil No. 07-1155-KI, 2009 WL 3756363 (D. Or. Nov. 5, 2009); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 585 F.Supp. 2d 1233 (D. Or. 2008).

51 A commentator recently raised related concerns regarding the scope of these provisions in the context of relief efforts in Libya: 'any non-citizens who work for humanitarian agencies – such as my colleagues on our emergency response team from Ireland, Australia, France, and Canada – could be barred from entering or returning to the U.S. for providing "material support" to a "terrorist group". Even U.S. citizens could face prosecution on these grounds'. Anne Richards, 'On the Libyan border: helping freedom fighters or terrorists?', *The Hill's Congress Blog*, 28 March 2011, available at: <http://thehill.com/blogs/congress-blog/foreign-policy/152143-on-the-libyan-border-helping-freedom-fighters-or-terrorists> (last visited 4 December 2011).

52 Immigration and Nationality Act, para. 212(a)(3)(B)(iv); 8 U.S.C. para. 1182(a)(3)(B)(iv). See generally Michael John Garcia and Ruth Ellen Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, Congressional Research Service, 12 January 2010, available at: <http://www.fas.org/spp/crs/homsec/RL32564.pdf> (last visited 4 December 2011).

which this provision has been utilized in the immigration context is unknown. In any event, aside from the impact on humanitarian engagement highlighted elsewhere in this article, those working on refugee, asylum, and resettlement issues must also be increasingly aware of the relationship between the counter-terrorism framework and the international and domestic norms protecting asylum seekers and refugees.⁵³

Administrative regulations

In order to ensure that funds are not diverted to proscribed terrorist organizations, '[a]ll NGOs applying for grants from USAID [United States Agency for International Development] are required to certify, before award of the grant will be made, that they do not provide material support to terrorists'.⁵⁴ Such certifications require the recipients of USAID funding to attest they have not provided (within ten years) and will not provide material support or resources to FTOs, to SDNs or SDGTs, or to individuals or entities designated by the UN Security Council's sanctions committee established under Security Council Resolution 1267.⁵⁵ In addition to reviewing those lists, USAID recipients must certify that they will take into account public information that is 'either reasonably available to the applicant . . . or that, from the totality of the facts and circumstances . . . the applicant should be aware of an individual or entity's terrorist ties'.⁵⁶ More detailed vetting procedures are reportedly required for NGOs applying for USAID grants to areas such as the West Bank, Gaza, Somalia, Afghanistan, and Yemen.⁵⁷

These USAID certifications expressly do not extend to

furnishing USAID funds or USAID-financed commodities to the ultimate beneficiaries of USAID assistance . . . unless the Recipient has reason to believe that one or more of the beneficiaries commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.⁵⁸

53 See, e.g., Steven H. Schulman, 'Victimized twice: asylum seekers and the material-support bar', in *Catholic University Law Review*, Vol. 59, No. 4, 2009–2010, p. 949; Human Rights First, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, November 2009, available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf> (last visited 4 December 2011).

54 Statement issued by USAID to the Congressional Research Service on 5 February 2009. Jim Zanotti, *U.S. Foreign Aid to the Palestinians*, Congressional Research Service, 13 January 2011, p. 7, available at: <http://www.fas.org/sgp/crs/mideast/RS22967.pdf> (last visited 24 January 2012).

55 USAID, 'AAPD 04–14: Certification regarding Terrorist Financing Implement E.O. 13224 (Revision 2)', *Acquisition & Assistance Policy Directive*, 24 September 2004, p. 3, available at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_14.pdf (last visited 4 December 2011).

56 *Ibid.*, p. 4.

57 Testimony of Dr Rajiv Shah, USAID Administrator, Senate Appropriations Subcommittee, 12 April 2010, available at: http://kirk.senate.gov/?p=press_release&id=137 (last visited 4 December 2011).

58 USAID, 'AAPD 04–14', above note 55, para. d of the certification.

As with the material-support statute and EO 13224, relatively little is currently known about the ultimate depth of these certifications in terms of their impact on end-user beneficiaries of humanitarian goods.

Multilateral counter-terrorism regimes

Security Council Resolution 1267 (1999) et seq. and Security Council Resolution 1373 (2001) et seq.

Acting under the authority of Chapter VII of the UN Charter, the UN Security Council has created two counter-terrorism regimes with the capacity to affect humanitarian engagement with NSAGs, one of which is focused on the Taliban and Al Qaeda, while the other is not specific to a particular group. It is hard to overstate the normative power of resolutions decided under the Council's Chapter VII authority. UN member states are obliged to accept them and carry them out, including, where necessary, by enacting domestic laws.⁵⁹ Extensive bureaucracies have been built to enforce both regimes. While neither counter-terrorism regime instituted by the Security Council under review here may yet function to regulate humanitarian action in all UN member states in the same manner and with the same clarity as the US material-support law, the language of both resolutions – and especially Resolution 1373 – can clearly be utilized by states, particularly host states, wishing to restrict humanitarian organizations' access to and engagement with NSAGs.

Resolutions 1267 (1999) *et seq.* require all UN member states to freeze the funds and other financial assets of individuals and entities designated by a sanctions committee, as well as to prevent the entry or transit through their territories of designated individuals.⁶⁰ As of March 2011, the Consolidated List included 395 individuals and 92 entities and other groups associated with the Taliban or Al Qaeda.⁶¹ Resolutions 1373 (2001) *et seq.* require all UN member states to '[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts', as well as to prohibit their nationals and individuals in their territories from making economic or financial resources or services, among other things, available for the benefit of individuals or entities involved in certain terrorist acts.⁶² Resolution 1373 further obliges all UN member states to '[c]riminalize the willful provision . . . , by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be

59 UN Charter, Art. 25. See also UN Charter, Art. 103.

60 UNSC Res. 1267, 15 October 1999; UNSC Res. 1333, 19 December 2000; UNSC Res. 1390, 28 January 2002; UNSC Res. 1455, 17 January 2003; UNSC Res. 1526, 30 January 2004; UNSC Res. 1617, 29 July 2005; UNSC Res. 1735, 22 December 2006; UNSC Res. 1822, 30 June 2008; and UNSC Res. 1904, 17 December 2009.

61 The Consolidated List is available at: <http://www.un.org/sc/committees/1267/consolist.shtml> (last visited 4 December 2011).

62 UNSC Res. 1373, 28 September 2001, paras. 1(d) and 2(a). UNSC Res. 1456, 20 January 2003; UNSC Res. 1535, 26 March 2004; UNSC Res. 1624, 14 September 2005; UNSC Res. 1787, 10 December 2007; UNSC Res. 1805, 20 March 2008; and UNSC Res. 1963, 20 December 2010.

used, or in the knowledge that they are to be used, in order to carry out terrorist acts’, and to ‘[e]nsure that any person who participates ... in supporting terrorist acts is brought to justice’.⁶³ Domestic and international legal challenges to the implementation of the 1267 and 1373 regimes have been brought in courts in the European Community, the US, the United Kingdom, Italy, Switzerland, Pakistan, Turkey, and Canada, as well as in the Human Rights Committee.⁶⁴ Thus far, these challenges have focused on the due process concerns pertaining to the mechanisms for listing and de-listing, not on humanitarian engagement concerns as such.

Understanding government approaches, discerning the impact on humanitarian organizations, and exploring possible humanitarian responses

The two normative trajectories described above – one rooted in IHL recognizing the importance of humanitarian engagement with NSAGs in NIACs, and the other aiming to prohibit the provision of material support to ‘terrorist’ groups – seem to evince a clear contradiction. For many, this raises questions: what are the ultimate goals of governments promulgating such opposing normative frameworks? How can humanitarian organizations better understand the approaches taken by governments, particularly those deeply involved in the global humanitarian project as donors and policy innovators? This section briefly explores potential explanations that might assist in interpreting states’ behaviours regarding these countervailing norms. The section then discusses what impacts these differing norms might have on humanitarian organizations, and how humanitarian organizations might respond to them.

Understanding government approaches

This subsection briefly identifies four potential explanations of states’ behaviours that, on the one hand, recognize the importance of humanitarian engagement with NSAGs in NIAC, and, on the other hand, curtail such engagement through counter-terrorism laws and policies.

63 UNSC Res. 1373, paras. 1(b) and 2(e).

64 See generally Antonios Tzanakopoulos, ‘United Nations sanctions in domestic courts: from interpretation to defiance in *Abdelrazik v. Canada*’, in *Journal of International Criminal Justice*, Vol. 8, No. 1, 2010, pp. 249–251; Yvonne Terlingen, ‘The United States and the UN’s targeted sanctions of suspected terrorists: what role for human rights?’, in *Ethics & International Affairs*, Vol. 24, No. 2, 2010, pp. 131–142. The UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights has stated that Resolution 1373’s ‘continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. Resolution 1373 (2001) goes beyond the powers conferred upon the Security Council and continues to pose risks to the protection of a number of international human rights standards’. Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN General Assembly, A/65/258, 6 August 2010, para. 69.

Total prohibition

The first possible explanation sees the ultimate goal of the state in this regard as *total prohibition* of any benefit to, assistance for, or co-ordination with listed NSAGs, even if that prohibition risks the loss of humanitarian services to civilian populations or the disbanding of major humanitarian operations in territories controlled by listed NSAGs. This explanation is reflected, for example, in a broad 2001 call by the then US Secretary of Defense to end all ‘support’ benefitting ‘terrorists’.⁶⁵

The ‘total prohibition’ understanding sees the state as coherent and strategic in its thinking. The state is making a clear choice to favour security interests over humanitarian principles or humanitarian rationales for engagement with NSAGs. In this mode, states may even see humanitarian organizations as naïve ‘soft spots’ in counter-terrorism efforts, unthinkingly and unknowingly providing succour and political legitimacy to dangerous militant groups.

Mitigation

The second possible explanation for these countervailing regulatory trajectories is that states seek mitigation of benefits to NSAGs. Under this model, states wish to utilize domestic laws and international and donor policies to rein in humanitarian actors’ interactions with NSAGs because they wish to limit the threats that this interaction presents to security by making humanitarian organizations more accountable. This explanation holds that, rather than being contradictory, the two trajectories are meant to signal that humanitarian organizations will be held responsible, if they do not take certain prescribed steps, for their engagement with listed NSAGs. The ‘mitigation’ explanation is reflected, for example, in the monitoring-and-reporting requirements imposed by the UN Security Council in the limited humanitarian-assistance carve-out for Somalia in Resolution 1916.⁶⁶

A policy of ‘mitigation’ may be rational for individual states, and may indeed serve as part of a coherent approach to making humanitarian organizations more accountable. Yet it may be impossible for any global humanitarian actor to satisfy all of the mitigation and accountability standards of various individual donors, states, and multilateral agencies.

Fragmentation

A third explanation suggests a lack of integration of internal policies, with some state organs supporting counter-terrorism measures as a priority and others promoting humanitarian action. In some ways the opposite of prohibition of

65 Donald Rumsfeld, Transcript, Department of Defense News Briefing, 18 September 2001, available at: http://replay.web.archive.org/20041118041827/http://www.defense.gov/transcripts/2001/t09182001_t0918sda.html (last visited 4 December 2011).

66 UNSC Res. 1916, 19 March 2010, paras. 4, 5, and 11; see also UNSC Res. 1972, 17 March 2011.

engagement with NSAGs, ‘fragmentation’ holds that the seemingly incoherent and confusing nature of these trajectories is just that: incoherent and confusing. The ‘fragmentation’ model proposes that states lack internal consistency, with counter-terrorism and humanitarianism competing for normative supremacy. The uncertainty resulting from fragmentation may be intentional or unintentional, but this model holds that there is no overarching state policy to be identified. As an example, when certain data regarding the tremendous scope of US funding for humanitarian assistance⁶⁷ are read next to the material-support statute,⁶⁸ it would appear that the various branches (and sub-branches) of the US government are not necessarily acting in concert.

Under the ‘fragmentation’ theory, states would be seen as internally divided and lacking in proper channels of communication within their own government agencies. In this understanding, it may be that the state, writ large, is not fully aware of the functional impact of its counter-terrorism laws and policies on international aid and assistance. Indeed, the state may lack a grand strategy of how the two trajectories should be harmonized. Of course, it may be that counter-terrorism laws and policies reflect states’ desire to keep multiple political and security objectives in play, and that this approach to foreign policy may allow states to keep humanitarian actors in a defensive posture.

Co-optation

The final explanation for the behaviour of states is co-optation. Rather than seeking to engage in a ‘course correction’ by making humanitarian organizations more accountable, or rather than wishing to limit what they see as the excesses of humanitarian willingness to bend to the wishes of armed actors, states instead see the two countervailing trajectories as a basis for ‘co-optation’ of humanitarianism into the security and political objectives of the state. This perspective sees humanitarian organizations as providing key intelligence to security actors, as well as direct military relief efforts.⁶⁹

67 Global Humanitarian Assistance, ‘United States: country profile’, available at: <http://www.globalhumanitarianassistance.org/countryprofile/united-states> (last visited 4 December 2011): ‘The United States is the largest humanitarian donor, providing over US\$4 billion in humanitarian aid in both 2008 and 2009. Sudan has been the top recipient of the United States’ humanitarian aid each year since 2004, receiving US \$674 million in 2008. The United States provides the majority of its humanitarian aid as food aid – over US\$2 billion in 2008, the largest single share of which (US\$538 million) went to Ethiopia. The United States provides a relatively high share of its overall aid budget in the form of humanitarian assistance – over 16% in 2008.’

68 18 U.S.C. para. 2339B(a)(1): ‘Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.’

69 See, e.g., Robert Burns, ‘Envoy laments weak US knowledge about Taliban’, Associated Press, 7 April 2009, available at: http://seattletimes.nwsourc.com/html/nationworld/2008961176_apusafghanistan.html (last visited 24 January 2012): ‘[Richard] Holbrooke said the U.S. would “concentrate on [the information deficit in Afghanistan], partly through the intelligence structure” and partly through private aid groups that provide humanitarian and other services in Afghanistan. He estimated that 90 percent of U.S. knowledge about Afghanistan lies with aid groups.’ See also US Embassy, Islamabad, ‘U.S. troops reach

In a 'co-optation' approach, governments may be seen as responding to the diversion of humanitarian assistance and the potential legitimization of terrorist groups, not by engaging in regulation to mitigate this harmful effect but rather by structuring regulation so that humanitarian organizations are increasingly incorporated into the aid, reconstruction, and national security agenda of the state. This approach sees humanitarianism and the access of the humanitarian community to the 'hearts and minds' of the civilian population as central to contemporary counter-insurgency and counter-terrorism efforts.

Potential impacts for humanitarian organizations and possible responses

This subsection explores the question of how the complex web of laws and policies discussed above might affect humanitarian organizations and their work in situations of NIAC, and then identifies a few potential ways in which humanitarian organizations might respond to these impacts.

It is, of course, impossible to determine with certainty the likelihood of actual prosecutions against humanitarian organizations or their staff. Combined, the counter-terrorism laws discussed here and the interpretations of these laws by the relevant government body (whether it be the US Supreme Court, the Department of Justice, OFAC, or USAID) create a threat to a large array of activities that are, nonetheless, often sanctioned, encouraged, planned, and funded by the same government. Donor governments may maintain this posture – as informal, tenuous, and implicit as it may be – so long as they do not perceive the concerned FTOs as presenting insuperable threats to the state's security or its political interests. States might (retroactively) invoke their criminal laws or other sanctions against humanitarian organizations, however, if this balance tips in favour of perceived security.

Even assuming the continued trend of non-prosecution of international humanitarian organizations continues, what are the other potential impacts of these laws and policies beyond criminal liability? Despite the absence of sufficient empirical or case-based studies on the effect of these criminal and regulatory laws on the humanitarian field, a number of possible impacts bear consideration by the humanitarian profession as a whole.

First, it may be that the presence and indeed expansion of laws criminalizing material support (including training and expert assistance) to listed entities will begin to affect governments' funding choices. That is, where governments become aware that their humanitarian aid funding will be used in a state whose territory is partially or totally controlled by a listed group, those governments may determine that there is no way to continue this funding without

flood relief milestone, deliver 25 million pounds of aid', United States Central Command, 23 November 2010, available at: <http://www.centcom.mil/pakistan-flood/u-s-troops-reach-flood-relief-milestone-deliver-25-million-pounds-of-aid> (last visited 4 December 2011), stating that 'U.S. military aircraft supporting Pakistan's flood relief efforts achieved another humanitarian milestone Sunday, delivering 25 million pounds of relief supplies since Aug. 5, when U.S. military relief flight operations in Pakistan began.'

risking the support ultimately falling into the terrorists' hands. There is some indication that this has already occurred, for example in the case of Somalia, where a designated group (namely al-Shabaab, which is listed at both the US and international levels) controls much of the territory.⁷⁰

Second, one of the most vexing and complex impacts of the laws and policies discussed here may be virtually impossible to measure and weigh against the benefits of such legislation for counter-terror purposes: the chilling effect. This occurs when organizations, faced with the risk of criminal sanction or intimidated by increasingly strict administrative procedures required for projects carried out in areas where listed groups are active,⁷¹ may simply decide to cut back on or halt their projects before any action is taken against them. Anecdotally, there is some evidence of organizations ceasing training activities, diminishing the scope of their proposals for government funding in emergency contexts, or reconsidering priorities where they sense a high risk of liability.⁷² Because of the confusing and contradictory nature of these laws and policies, a significant risk of the chilling effect is that humanitarian organizations will limit *themselves* far beyond the actual limits of the law. The organizations may choose to take a conservative approach, which is thus less beneficial to civilian populations in need, in order to salvage their most critical programmes. Given the current general sense that staff from certain countries or certain faith groups are at higher risk of scrutiny or criminal liability, organizations may selectively limit their partner organizations, their staff, or their co-operation, in order to limit their exposure.

Possible humanitarian responses

In reviewing the provisions of IHL relevant to the work of independent, impartial humanitarian organizations in situations of NIAC, it is clear that the space for credible organizations to engage with *all* parties to the conflict, and especially those that control access to vulnerable populations, is central to the notion of neutral humanitarianism. Indeed, in an armed conflict setting, where humanitarian assistance may be the only reliable source of life-saving food, clean water, medical care, shelter, and clothing for civilians behind enemy lines, the capacity of humanitarian organizations to negotiate directly with parties to the conflict (without the suspicion that they represent the foreign policy goals of other parties

70 Jeffrey Gettleman, 'U.N. officials assail U.S. on limiting Somali aid', in *New York Times*, 18 February 2010, p. 8, reporting that in 2009 'the American government provided less than half of what it did in 2008 for Somalia aid operations partly because United Nations agencies and private aid groups refused to sign an agreement to police the distribution of aid more closely, contending that it would make deliveries nearly impossible'.

71 Such as the anti-terror certifications, described above in the section on 'Administrative regulations'.

72 The UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights noted during a press conference that there was a feeling within the humanitarian field that Resolution 1267 had a 'chilling effect' on humanitarian aid, owing to the risk that charity aid would be identified as indirectly funding terrorist organizations. UN Department of Public Information, 'Press Conference by Special Rapporteur on Protecting Human Rights While Countering Terrorism', 26 October 2010, available at: http://www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm (last visited 4 December 2011).

to the conflict)⁷³ is one of the most crucial tools for these organizations to maintain their neutral posture and to serve those in need. This space for engagement and protected autonomy to deal with even the most unsavoury leaders in order to offer basic services to the civilian population is at the crux of IHL's modest recognition of the role and responsibility of humanitarian organizations in alleviating suffering.

Scholars have noted that IHL does not create a 'right of humanitarian access' or an unlimited mandate for humanitarian organizations to carry out any activities they wish at any time and in any manner they choose.⁷⁴ Yet, at the very least, IHL applicable in NIACs recognizes that impartial humanitarian organizations may *of their own volition* offer their services to the parties to the conflict.⁷⁵ Indeed, with the adoption of Common Article 3 more than sixty years ago, parties to NIACs 'can no longer look upon it [such an offer of humanitarian services] as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict'.⁷⁶ It is this assumption that the counter-terrorism model turns on its head.

If the types of impact identified above are seen as largely affecting projects and programmes, humanitarian organizations may develop a range of strategic and tactical responses, ranging from conceding (partial) incorporation into security and political approaches to (selectively) ending relationships with certain donors to (temporarily) ceasing activities in certain NIACs such as those in Pakistan and Afghanistan.⁷⁷ However, in reacting to the more existential threat cutting to the core of humanitarianism – that is, the autonomy to engage directly with all parties to an armed conflict and offer services for the benefit of the civilian population – humanitarian organizations may develop responses at the underlying normative level, as discussed below.

Developing new norms to regulate humanitarian engagement with NSAGs

If the tensions between humanitarian law and policy, on the one hand, and counter-terrorism law and policy, on the other, are as fundamental as highlighted here, the humanitarian community may determine that the only way out of the impasse is to focus on the creation of new national or international norms clearly delineating the role, means, and methods of humanitarian organizations engaging with NSAGs in situations of NIAC. These norms might come in the form of a new treaty on NIAC, or some other international declaration of principled humanitarianism to be codified in national laws. In previous moments of IHL innovation and development, humanitarian restraints on state military and security interests have prevailed in

73 As mentioned in note 8 above, according to the ICRC offers of humanitarian relief in NIAC may not be regarded as unfriendly acts.

74 See, e.g., Y. Dinstein, above note 5.

75 Common Article 3. See above notes 6 and 8, and the corresponding text.

76 Sandoz *et al.*, above note 6, p. 41.

77 Harvard Program on Humanitarian Policy and Conflict Research, above note 13, pp. 27–37.

treaty texts. Yet the moral basis upon which leading humanitarian organizations participated in these earlier high moments of IHL law-making and interpretation may today be insufficient to sustain the legal reaffirmation of independent interactions with NSAGs. When internal conflicts are framed as efforts to combat terrorism, such interactions, however benevolent in intent, may be seen as creating unacceptable risks for states' political and security goals.

Developing new policy avenues to facilitate negotiation of access with NSAGs

If the terms of engagement with NSAGs cannot be developed in an open and formal dialogue with states, the terms may need to be elaborated by the organizations themselves as professional standards against which the activities of the organizations can be assessed. Unlike the option of developing norms and focusing on positive law, this policy-oriented approach is likely to involve ad hoc agreements with states and military representatives within a variety of contexts, and may be far more difficult to co-ordinate across the humanitarian profession. Some have argued that the policy-oriented solution to the dilemmas raised in this article might involve (additional) self-regulation on the part of humanitarian organizations, an effort to respond to the counter-terrorism requirements by demonstrating the capacity and willingness of humanitarian organizations to regulate their own engagements with NSAGs with an eye to limiting any benefits that might reach listed groups. Some organizations have reacted negatively to suggestions of 'enhanced' due diligence and self-regulation, or other attempts by the humanitarian community to impose collective limitations on its engagements with NSAGs. Large humanitarian NGOs and UN agencies may be willing to accept increasingly stringent restrictions on their engagements from specific donors or host states (for example, the USAID regulations discussed above, or the requirements placed on NGOs by host states such as Pakistan, Sudan, or Sri Lanka). Such arrangements might be preferable to a wholesale standardization of the regulations concerning humanitarian engagement with NSAGs, including the establishment of professional standards and accountability procedures that would expose sensitive information to external scrutiny.

'Opting out'

Humanitarian organizations might also conclude that neither the development of new norms nor the promulgation of system-wide standards is plausible in light of political or other limitations. For those organizations that base their reputation, their capacity to negotiate with NSAGs, and their relationship with beneficiaries on their commitment to humanitarian principles, the counter-terrorism-related laws and regulations discussed above might be perceived as particularly damaging and as posing too high a risk. These organizations might choose to 'opt out' of emergency humanitarian operations that fall within the web of counter-terrorism laws: namely, those humanitarian engagements that involve the negotiation and delivery of

life-saving goods and services to territories under the control of listed NSAGs. Such organizations might remain in countries experiencing internal conflict but refrain from any operations that would put them into contact with such groups. While recognizing that this would result in reduced services to populations under the control of listed groups, these humanitarian organizations may nonetheless choose 'opting out' of engagement with listed NSAGs as a lesser-of-two-evils approach to their work on the ground.

Staying below the radar

Another potential response from the humanitarian community might be to attempt to avoid detection by counter-terrorism agencies. While recognizing the applicability of criminal statutes and restrictive donor regulations to their operations, these organizations might try to obfuscate their engagement with NSAGs (for example, by renting cars from private companies rather than paying taxes to listed NSAGs, or by disguising technical trainings as informal meetings with the community). Other organizations might simply not disclose information about interactions with listed NSAGs to donors and authorities, or even between field offices and headquarters, in violation of applicable laws and donor agreements. Such 'don't ask, don't tell' approaches might be quietly accepted or even encouraged by donor representatives who attempt to maintain plausible deniability regarding the specific relationship between their grantees and listed NSAGs, thereby helping to ensure that substantial humanitarian aid funding is still able to be delivered in targeted areas where NSAGs operate. This approach might extend status quo engagements for the short term but can create significant future liabilities. Unlike 'opting out', the 'staying below the radar' response may maintain the primary humanitarian imperative while undermining other core professional principles in terms of transparency, accountability, and co-ordination. Such an approach may invite increased interference from NSAGs, who may be able to exert additional influence on the conditions of humanitarian assistance when they are aware that organizations are seeking to operate in a less-than-transparent manner.

'Opting in'

A final approach that some within the humanitarian community might consider in light of the risks discussed here constitutes 'opting in' to integrated models of relief and protection activities, under the leadership of political and security actors. While humanitarian organizations might thereby lose significant independence and autonomy in their prospective engagements with listed NSAGs, this approach might allow for more overall space for interacting with NSAGs (albeit in a far more constrained and monitored context), as well as increased scope for delivery of goods and services. In such a model, even states with very restrictive material-support laws might choose to permit otherwise unlawful engagements and activities benefiting listed groups, determining that the oversight and scrutiny of the work of humanitarian organizations can allow for some support to fall into the hands of

listed NSAGs. Especially for a government that maintains substantial aid budgets while also promulgating stringent material-support laws, integrating humanitarian organizations into political and security schemes might be an appealing way of maintaining both support for vulnerable populations and the government's international reputation as a donor state. Under this model, states would probably permit a small group of 'vetted' humanitarian organizations to carry out assistance operations, including engagement with listed NSAGs, perhaps relying on the most elite and long-standing organizations to carry out the bulk of approved projects. For humanitarian organizations, this approach would have the benefit of minimizing legal liabilities and unpredictability, as well as allowing the maintenance of some engagements with listed NSAGs, but at the cost of being subject to political and security decisions beyond their control regarding the scope and operational independence of their work in specific conflict situations. In addition, NSAGs and beneficiaries might increasingly call into question the independence and neutrality of humanitarian organizations that 'opt in' to donor states' security schemes in these ways.

Questions about this approach may be seen in the current heated debate within the humanitarian establishment regarding how to understand the potential carve-out of exemptions and licensing schemes.⁷⁸ Some within the humanitarian community see it as the best and safest short-term strategy to minimize liability and risk, and to indicate to donors that they take seriously the threat of misappropriation of funds to terrorist entities. Others worry that the introduction of these schemes into humanitarian negotiations will create a two-tiered system – operations for which exemptions are granted and operations for which exemptions are not granted (regardless of the underlying IHL and international normative frameworks but with significant potential consequences in terms of domestic legal liability).

Conclusion

In many ways, the web of laws and policies discussed in this article seems paralysing for humanitarian actors: an impossible regulatory framework in which success or compliance in one arena is likely to raise risks and liabilities in another. Nonetheless, billions of dollars of humanitarian funding continue to flow to humanitarian organizations, nearly all of which have operations in countries where listed NSAGs control or operate from part of the territory. States continue to uphold principles of humanitarian access and assistance in the UN Security Council, the General Assembly, and other forums. And donors continue to encourage humanitarian organizations to act in a transparent, accountable manner. As such, it is unlikely that humanitarianism, as a professional field and as a set of legal and normative

78 These are frameworks that allow humanitarian organizations to apply for discrete, context-specific exemptions to criminal or regulatory laws in order to carry out operations in areas where listed groups control territory, or where there is a high likelihood of having to engage with listed NSAGs.

principles, will disappear under the weight of the counter-terrorism agenda. Yet the contradictions described here will almost certainly have a significant impact over time on the development of humanitarian practices and policies. The balancing of these contradictory norms will require expanded negotiation skills and a thorough legal understanding on the part of humanitarian professionals, both at the stage of planning operations at headquarters and at the stage of implementing programmes in the field.

Participation of armed groups in the development of the law applicable to armed conflicts

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Abstract

The topic of participation of armed groups in the development of legal instruments binding them is particularly important and needs to be addressed urgently. Many scholars and organizations have advocated recently for the participation of armed groups in the development of legal instruments binding them, with a view to ensuring their adhesion to the law. However, practical and legal considerations seem to make this participation extremely difficult in practice. Creative solutions have to be found. After reviewing five main reasons why armed groups should be involved in the advancement of the law governing armed conflicts, this article offers a brief overview of selected means by which armed groups should be engaged in the creation of future norms, as well as in the interpretation and contextualization of existing norms.

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A myriad of reasons peripheral to the legal sphere are offered to justify the absence of armed groups in the development of the law applicable to armed conflicts. The assertions that armed groups undermine the state's authority by putting it in a position of inferiority and weakness, or that their influence on the territory and the population constitutes a tacit recognition of their importance and consequently gives them a green light to proceed with their actions despite violations of universal

norms, are all based on one misleading premise: if states ignore armed groups threatening their sovereignty, they will just disappear. This ‘ostrich-like behaviour’¹ of states toward armed groups is in line with the Westphalian international order of discarding armed groups all together because, simply put, they are not states and only states can claim to be subjects of public international law.²

In this article, I will try to evaluate the added value provided by the participation of armed groups in the development of legal norms applicable to armed conflicts by identifying reasons why armed groups should be involved. I will then examine the means and mechanisms that would allow armed groups to participate in the development of such law, in the creation of future norms as well as in the interpretation and contextualization of existing norms.

When discussing the possibility and the opportunity of armed groups to take part in the development of the law applicable to armed conflicts, it is important to first define the entities and subjects examined. Indeed, even though all parties to non-international armed conflicts, whether state actors or armed groups, are bound by the relevant rules of international humanitarian law (IHL), the term ‘armed groups’ is not itself defined in treaty law. ‘Parties’ to an armed conflict indeed vary widely in character. Organized armed groups, in particular, are extremely diverse, as explained by the International Committee of the Red Cross (ICRC):

They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate humanitarian law.³

For the purpose of this article, I will align myself with this broad description of ‘organized armed groups’; to this end, the expressions ‘armed groups’ and ‘non-state armed groups’ will be used interchangeably. It should also be noted that, although transnational armed groups⁴ or private military

1 Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 50.

2 The international legal order set out in the Peace of Westphalia in the seventeenth century rests on three main pillars: the state as the subject of law, state sovereignty, and reciprocity. Contra: the Peace of Westphalia did not put an end to multi-layered authority in Europe, but simply constituted a case of redistribution of authority within the Holy Roman Empire. See Stéphane Beaulac, ‘The Westphalian model in defining international law: challenging the myth’, in *Australian Journal of Law History*, Vol. 7, 2004, p. 181.

3 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, February 2008, p. 11, available at: <http://www.icrc.org/eng/resources/documents/publication/p0923.htm> (last visited 11 April 2011).

4 See, in particular, on the issue of transnational groups, Marco Sassòli, *Transnational armed groups and international humanitarian law*, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 6, Winter 2006, available at: <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (last visited 24 February 2012). See also Anne-Marie La Rosa and Carolin Würzner, ‘Armed groups, sanctions and the implementation of international humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, p. 328.

companies⁵ could be considered specific forms of armed groups, this article will not focus on the potential linkage of such armed groups to a state. First, the ICRC's description meets the general requirements of the definition of 'non-state armed groups' as proposed by the United Nations' Office for the Coordination of Humanitarian Affairs (OCHA) in its Manual on Humanitarian Negotiations with Armed Groups.⁶ Second, many state-centric enforcement mechanisms found in IHL, human rights law, or public international law are already in place; although the question of the efficiency and relevance of those mechanisms is very much worth addressing, that is not the purpose of this article.⁷ I will focus on the armed groups themselves, and explore the means at their disposal to engage in a legal order that has not involved them in its inception but has made them accountable for its violations.

Furthermore, reference to 'the law applicable to armed conflicts' should be interpreted liberally, as to include not only international humanitarian treaty law applicable to non-international armed conflict (with the different thresholds set by Common Article 3 of the Four Geneva Conventions and Additional Protocol II) but also customary law, soft law, and even some public international law and human rights law rules. Not all those bodies of law will be addressed in this article, but specifics will be provided throughout the text to distinguish the nature of the legal body referred to, when necessary. Finally, this article explores ways to engage non-state actors in law-making in a broad sense: systematically limiting the analysis to treaty law would impede finding creative solutions to curtail the practical and legal hurdles that are currently making this participation so difficult.

- 5 The International Code of Conduct for Private Security Service Providers (resulting from an active collaboration of members of the private security industry with the Swiss Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces, and the Geneva Academy of International Humanitarian Law and Human Rights) has recently been developed. It lays down international industry norms and standards for the provision of private security services. More information on this initiative is available at: <http://www.icoc-ppsp.org/> (last visited 26 April 2011).
- 6 See Gerard McHugh and Manuel Bessler, 'Humanitarian negotiations with armed groups: a manual for practitioners', OCHA, United Nations, January 2006, p. 6, available at: <http://ochaonline.un.org/humanitariannegotiations/index.htm> (last visited 19 April 2011); 'groups that: have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate'.
- 7 For an overview of some enforcement mechanisms set up for states to address violations of the law applicable to armed conflicts (through the lens of a potential individual right to reparation), see Sophie Rondeau, 'Violations du droit international humanitaire et réparation: la place de la victime individuelle', March 2008, available at: <http://www.archipel.uqam.ca/1277/1/M10305.pdf> (last visited 18 April 2011). See also more generally Marco Sassòli, 'State responsibility for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 84, No. 846, 2002, pp. 401–433; Frits Kalshoven, 'State responsibility for warlike acts of the armed forces', in *Constitutional Law Quarterly*, Vol. 40, No. 1, 1991, p. 827; Emanuela-Chiara Gillard, 'Reparations for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 529; Riccardo Pissillo Mazzeschi, 'Reparation claims by individuals for state breaches of humanitarian law and human rights: an overview', in *Journal of International and Comparative Law*, Vol. 1, 2003, p. 339.

Why should armed groups participate in the development of the law applicable to armed conflicts?

A wide array of stakeholders would benefit from the participation of armed groups in the development of rules of IHL. It will be argued in the next pages that such participation is not only in the interest of the international community as a whole, but is also part of a normal evolution of the international legal order and IHL. Furthermore, such participation would address the needs of both the armed groups themselves and of the victims of violations of IHL.

Because it is in the interest of the international community

In a recent report to the United Nations Security Council on the protection of civilians in armed conflict, the Secretary-General identified ‘enhancing compliance by non-state armed groups’ as one of the five core challenges that the Security Council needs to address.⁸ The focus is therefore not on condemning the actions, but on entering into a dialogue with the groups. The Secretary-General made it clear that the ‘name and shame’ mechanism by which the Security Council systematically condemns violations committed by armed groups, demands compliance, and applies targeted measures against leadership⁹ is a means of last resort. When engagement fails and proves futile, only then can sanctions enter the picture.¹⁰

In a 2010 report, the Secretary-General provided an update on progress made in responding to the core challenges, and discussed the need to reach out to armed groups, although very diverse in their motivations and conduct. He re-stated that: ‘Improved compliance with IHL and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups’.¹¹ The report went on to mention that engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, Sudan, Uganda, and Yemen, but it did not specify the nature of the engagement. Even without those specifications, the international community, through its official political organ that is the United Nations, is recognizing the need to engage with armed groups in order to make a ‘tangible difference’ in the protection of victims.¹²

8 Report of the United Nations Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2009/277, 29 May 2009, paras. 38–47. Interestingly, the first core challenge mentioned is ‘enhancing compliance with international humanitarian law in the conduct of hostilities’. One could consider that enhancing compliance by non-state armed groups is a sub-category of the former: it nevertheless seems to be geared more towards engaging member states, United Nations actors, and international and non-governmental organizations in the issue of explosive weapons.

9 *Ibid.*, para. 37.

10 *Ibid.*, para. 46.

11 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2010/579, 11 November 2010, para. 52.

12 *Ibid.*, para. 3.

Because the international legal order needs it

Armed groups, as non-state actors that compose the ‘invisible layer’ of public international law,¹³ are not only challenging the way war is waged today: their interaction (or lack thereof) with state structures, sheds light on the flaws and the gaps in a state-centric international legal order. Without going as far as endorsing post-Westphalian logic, where the nation-state has lost its usefulness,¹⁴ one needs to acknowledge that the state-centric model has substantially evolved.

Different indexes such as the Global Peace Index,¹⁵ the Failed States Index,¹⁶ the State Fragility Index,¹⁷ and the United Nations’ Human Development Index¹⁸ are all showing that non-state armed groups are more and more present and active in the waging of war.¹⁹ This assessment is not sufficient in itself to totally undermine the relevance of the Westphalian model in the twenty-first century. Indeed, threats posed by armed groups, although real and very challenging, are not necessarily meeting the threshold of disrupting the international legal order, but have merely created regional ripples.²⁰ Still, it cannot be disputed that the increasing threats posed by armed groups seriously challenge the traditional conception of such order. Lavoisier’s formulation, ‘*Rien ne se perd, rien ne se crée, tout se transforme*’ speaks volumes about the fact that states are losing ground.²¹ If states

- 13 This is the conception of public international law as composed of two layers: ‘a traditional layer consisting of the law regulating the co-ordination and the co-operation between the members of the international society... States... and a new layer consisting of the constitutional and administrative law of the international community of 6.5 billion human beings’. Marco Sassòli and Antoine Bouvier, *How does Law Protect in War?* 2nd edn, ICRC, Geneva, 2006, pp. 89–90.
- 14 On the post-Westphalian world order, see Edward Newman, ‘Failed states and international order: constructing a post-Westphalian world’, in *Contemporary Security Policy*, Vol. 30, No. 3, December 2009, p. 425, available at: <http://www.contemporarysecuritypolicy.org/assets/CSP-30-3-Newman.pdf> (last visited 11 April 2011); Russell D. Howard, ‘Post-Westphalian realities: incorporating transnational-non state actors and weapons of mass destruction into the international relations curriculum’, February 2007, p. 5, available at: http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/0/5/9/pages180592/p180592-1.php (last visited 11 April 2011); Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective*, Transnational Publishers, New York, 1999; Stephen D. Krasner, ‘Rethinking the sovereign state model’, in *Review of International Studies*, Vol. 27, No. 5, December 2001, p. 17; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, Princeton, 1999. See also Allen Buchanan, criticizing John Rawls for basing his theory of justice on Westphalian assumptions that are no longer applicable: Allen Buchanan, ‘Rawls’s law of peoples: rules for a vanished Westphalian world’, in *Ethics*, 2000, Vol. 110, No. 4, pp. 697–721. For a proposition on a reconciliatory ‘new regionalism’ approach, see Cristóbal Kay, *Globalisation, Competitiveness and Human Security*, Frank Cass & Co., London, 1997, p. 84.
- 15 A complete list of the twenty-four peace indicators used by the Global Peace Index is available at: <http://www.visionofhumanity.org/gpi-data/#/2010/CONF> (last visited 11 April 2011).
- 16 A list of the indicators that may be included in the Failed States Index is available at: <http://www.fundforpeace.org/global/?q=fsi> (last visited 5 January 2012).
- 17 A detailed explanation of the State Fragility Index and Matrix in 2009 is available at: <http://www.systempeace.org/SFI/matrix2009c.pdf> (last visited 11 April 2011).
- 18 Further information on the United Nations’ Human Development Index is available at: <http://hdr.undp.org/en/statistics/hdi> (last visited 11 April 2011).
- 19 For a thorough analysis of the interplay of those indexes and their respective limitations in regard to the qualification of a state as ‘weak’, ‘failing’, or ‘failed’, see E. Newman, above note 14.
- 20 *Ibid.*, p. 433.
- 21 ‘Nothing is lost, nothing is created, all is transformed’ (free translation). Antoine Lavoisier, *Traité élémentaire de chimie*, 1864 edn (first published 1789), p. 101, available at: <http://www.lavoisier.cnrs.fr/ice/>

are failing, something or someone else is filling the gap. Without going into a critical analysis of the existing international relations paradigms, approaches, and theories, which is beyond the scope of this article, it is safe to say that the three major schools of thought in this domain – realism, liberalism, and constructivism – are all challenged, although at different levels, by the role and the place of armed groups in the international legal order.²²

Because the law needs it

Inclusion of armed groups in the development of legal instruments binding them could limit the possibility of excuses offered by such groups to justify their disregard of humanitarian law obligations. It would indeed, to a certain extent, ensure their adhesion to the law and generate greater compliance. In that sense, it would limit the potential violations of IHL and strengthen self-enforcement, hence limiting the need to put forward ‘external’ implementation mechanisms. In order to encourage self-enforcement by non-state armed groups, which is one of the mechanisms available to keep humanitarian law realistic and relevant, it is not just education that needs to take place; ownership of the rules of humanitarian law also needs to be fostered.²³

One of the key ideas behind the reinforcement of ownership is that it feeds into something positive and builds on a culture of compliance. Looking at positive experiences such as the one achieved by Geneva Call,²⁴ I optimistically believe that ownership of the rules of humanitarian law by armed groups is attainable through mechanisms outside the traditional state-centric model of the international legal order, which we will briefly examine later in this article. Indeed, the potential of compliance by armed groups with humanitarian rules is enhanced when reciprocal adherence, based on the possibility for the said armed groups to use their judgment and their reasoning to decide if and how they will be bound by rules, is nurtured.

Because armed groups need it

Recent research (discussed below) quoted by the United Nations’ Secretary-General identified the primary incentive for compliance with international norms to protect

[ice_page_detail.php?lang=fr&type=text&bdd=lavosier&table=Lavoisier&bookId=89&typeofbookDes=&pageOrder=101&facsimile=off&search=no](#) (last visited 11 April 2011).

- 22 For general information on the subject, see the International Relations Theory Knowledge Base available at: <http://www.irtheory.com/know.htm> (last visited 20 April 2011). For the application of different international relations approaches to engagement with armed groups see, Claudia Hofmann and Ulrich Schneckener, ‘Engaging non-state armed actors: options and strategies for engagement’, in this issue.
- 23 For a study on the ownership of humanitarian norms by armed non-state actors, see Geneva Academy of International Humanitarian Law and Human Rights, ‘*Rules of engagement: protecting civilians through dialogue with armed non-state actors*’, available at: <http://www.adh-geneva.ch/docs/publications/Policy%20studies/Rules-of-Engagement-EN.pdf> (last visited 5 January 2012).
- 24 Geneva Call is a ‘neutral and impartial humanitarian organization dedicated to engaging armed non-state actors towards compliance with the norms of international humanitarian law and human rights law. The organization focuses on non-state actors that operate outside effective state control.’ More information is available at: <http://www.genevacall.org/home.htm> (last visited 27 April 2011).

civilians as appearing to be the group's own self-interest, which has military, political, and legal aspects.²⁵ As further stated in the said research, the military arguments for compliance comprise both an element of reciprocity and strategic choices. The political arguments for compliance centre on the desire of many armed non-state actors, and/or the causes they may espouse, to be recognized as legitimate. Armed groups do not benefit from being classified as 'outlaws'. If they were to take part in the development of the rules governing armed hostilities, it would be much harder for the state to consider itself free of any obligation and consequently to apply the most violent measures of repression.²⁶

Furthermore, the legal arguments for compliance are primarily the avoidance of international criminal sanction and other coercive measures, such as arms embargoes, travel bans, and asset freezes. The legal validity of such arguments could be discussed, as was done in the article by René Provost in the previous issue of the *Review*, through the concept of asymmetrical reciprocity and compliance with the laws of war, for instance.²⁷ Beyond that, however, we need to acknowledge and appreciate these arguments as a factual statement of the views of some armed groups waging war these days. From a humanitarian perspective (discussed in the next section), non-state armed groups already have something to gain by answering the 'imperative call of civilization'²⁸ and complying with the law applicable to armed conflicts. If they are involved in the development of such norms, it will psychologically be even easier for individuals to accept them; and it will also increase ownership of the rules governing the way in which war is waged as a whole, and not only of the rules that they helped to create.

Because the victims need it

There are important humanitarian arguments for compliance by armed groups with humanitarian law that relate to the desire of certain armed groups to respect human dignity. This desire should not be underestimated, and may allow for opportunities to go beyond actual international obligations and hold such groups to standards that

25 See UN Doc. S/2010/579, above note 11, para. 54, quoting the Geneva Academy of International Humanitarian Law and Human Rights, 'Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts: summary of initial research and discussions during an expert workshop in Geneva in March 2010', September 2010, p. 4, available at: <http://www.adh-geneva.ch/docs/reports/armednonstateactors.pdf> (last visited 1 May 2011).

26 François Bugnion, 'Jus ad bellum, jus in bello and non-international armed conflicts', in *Yearbook of International Humanitarian Law*, Vol. 6, 2003, pp. 167–198, available at: http://www.icrc.org/eng/assets/files/other/jus_ad_bellum_jus_in_bello_and_non-international_armed_conflictsang.pdf (last visited 19 April 2011).

27 See René Provost, 'The move to substantive equality in international humanitarian law: rejoinder to Marco Sassòli and Yuval Shany', in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 437–442.

28 Remarks and Proposals submitted by the International Committee of the Red Cross, Geneva, February 1949, p. 25, as reported in Jean Pictet (ed.), *The Geneva Conventions of August 12 1949: Commentaries*, ICRC, Geneva, 1958, p. 31, available at: <http://www.icrc.org/ihl.nsf/COM/365-570004?OpenDocument> (last visited 14 April 2011).

provide a higher level of protection for civilians than those strictly demanded by international law.²⁹

The genuine desire of some armed groups to behave in a humanitarian way should not be undervalued; indeed, just as with the utmost importance of unilateral application of some key humanitarian norms, it cannot be overstated. For a few core rules that speak directly to the heart of humanity, we can set aside the treaties, the negotiations, and even history, leaving us only with our common sense to honestly recognize their necessity for any human being, in any situation, especially in armed conflicts. What is referred to as ‘the universally recognized imperative call of civilization’ in the ICRC Commentaries to Common Article 1 of the Geneva Conventions also applies to those standard common-sense rules prohibiting the killing of the powerless and the exercise of violence in the form of rape, torture, and mutilation.³⁰ Indeed, when a party to an armed conflict, be it a state or a non-state actor, prevents violations of such a rule, it does so ‘as much because of the respect one has for it oneself as because of the respect for it which one expects from one’s opponent, and perhaps even more for the former reason than for the latter’.³¹

Nonetheless, humanitarian motivation does not exist in a vacuum, especially with respect to armed groups waging war for purposes that they consider to be just and valid. Involving these armed groups in the development of the rules of armed conflict would nurture and cultivate their desire to respect human dignity and achieve an acceptable balance between self-interest and ‘the respect one has for it oneself’. Indeed, such involvement would reinforce the idea behind the distinction between *jus ad bellum* and *jus in bello*, which ‘addresses the reality of a conflict without considering the reasons for or legality of resorting to force’.³²

Furthermore, from the victims’ perspective, engaging with all parties – state and non-state actors alike – involved in the armed conflict increases the likelihood of getting commitments from all of them to respect the limits within which they agree to wage war. Victims of violations of humanitarian norms need to be saved from harm and their perpetrators need to be accountable, independently of which side commits the violations; thus, the protection of victims could increase with the number of commitments.

With non-state actors, the humanitarian argument toward the respect of humanitarian law needs to be fostered and encouraged at all times and every step of the way. If ‘humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict’,³³ it should also be noted that a close and permanent dialogue with non-state parties to a conflict begins with their

29 See UN Doc. S/2010/579, above note 11, para. 54. See also Geneva Academy, above note 25, p. 5.

30 See J. Pictet, above note 28.

31 *Ibid.*

32 See ICRC, ‘IHL and other legal regimes: jus ad bellum and jus in bello’, 2010, available at: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm> (last visited 5 January 2012).

33 Frédéric Maurice, ‘Humanitarian Ambition’, in *International Review of the Red Cross*, Vol. 32, No. 289, 1992, p. 371, as quoted in M. Sassòli and A. Bouvier, above note 13, p. 84.

involvement in the development of the rules governing armed conflicts. Victims will be the principal beneficiaries of such a process.

How should armed groups participate in the development of the law applicable to armed conflicts?

In public international law, there is a disconnect between law-making and application of the law. If, for IHL to apply to an armed group, the latter need to be operating *de facto* in the context of an armed conflict (meeting one of the thresholds set up either in the Geneva Conventions or the Additional Protocols), such a requirement is not necessarily needed to participate in the development of the legal norms applicable to such conflict. As a matter of fact, there is no explicit framework around the participation of non-state armed groups in international humanitarian law-making, because non-state entities are systemically hindered from taking part in law-making *per se*.³⁴ Even though some headway has been made on broadening the definition of subjects of international law beyond states depending on 'the needs of the community',³⁵ the statist doctrine embodied in the Statute of the International Court of Justice (ICJ)³⁶ in regard to sources of international public law is still quite dominant in practice.³⁷ As mentioned by Anthea Roberts and Sandesh Sivakumaran, '[a] link has not generally been made between recognizing non-state entities as having rights, duties and enforcement capacities under international law, on the one hand, and their being able to play a role in international law-making, on the other hand'.³⁸ *A fortiori*, when the non-state entity is an armed group, the likelihood of controversy is even higher than when discussing 'state empowered bodies',³⁹ such as the United Nations Security Council or the International Criminal Tribunal for the Former Yugoslavia.

34 For an analysis of the challenges to the traditional doctrine of sources position on the creation of international law by modern positivists and process theorists, see Anthea Roberts and Sandesh Sivakumaran, 'Hybrid sources of law: armed groups and the creation of international humanitarian law', in *Yale Journal of International Law*, Vol. 37, 2011, section I.C.

35 See International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, p. 178. See also Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928 (Ser. B), No. 15, p. 17: 'Legal persons may bear a broad range of rights and obligations under international law'.

36 Statute of the International Court of Justice, 26 June 1945, Art. 38(1).

37 It should be noted that the state-centric approach has been challenged in doctrine. See e.g. Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Academy of European Law/European University Institute/Oxford University Press, Oxford, 2006, available at: <http://graduateinstitute.ch/faculty/clapham/NSAlecture/HR%20obligations%20of%20non-State%20actors.pdf> (last visited 1 May 2011); Robert McCorquodale, 'The individual and the international legal system', in Malcolm D. Evans (ed.), *International Law*, 2nd edn, Oxford University Press, Oxford, 2006, p. 309; Robert McCorquodale, 'An inclusive international legal system', in *Leiden Journal of International Law*, Vol. 17, 2004, pp. 477–504.

38 A. Roberts and S. Sivakumaran, above note 34, section I.C.

39 This expression is used in A. Roberts and S. Sivakumaran, above note 34, section II.A.2, to describe international bodies created by two or more states and granted authority to make decisions or take actions, such as developing, interpreting, applying, and enforcing international law.

With those considerations in mind, the next pages will be devoted to identifying different ways in which armed groups can be involved in the development of norms governing armed conflicts. In my view, there is already an immense potential in the interpretation and contextualization of existing norms, so a few options in this direction will be examined. First, however, I will look at the possibility of armed groups taking part in the creation of future norms of IHL.

Looking ahead: feeding into the creation of future norms

The fact that formal law-making is still dominated by statist doctrine makes it extremely difficult to involve armed groups as formal participants in the drafting of multilateral treaties. The over-politicization of the treaty-making process, the practical difficulties and potential criminal implications of reaching out to armed groups considered illegal,⁴⁰ the possible enhancement of the status of the armed groups – against the will of the state – from a common criminal to an ‘equal’ interlocutor, the inappropriate legitimizing of armed groups, and the downgrading of humanitarian law protections (by amendment of the law to reflect actual practices that constitute infringement upon humanitarian norms) are just a few potential difficulties identified in recent contributions to the doctrine on the subject.⁴¹ Even beyond those obstacles, the lack of a common denominator across all armed groups makes identifying which groups to involve seem insurmountable: ‘It would be almost impossible to reach agreement over which groups should be invited to participate in the respective diplomatic conferences drafting those treaties’.⁴²

That being said, history tells us a less pessimistic story. Armed groups *did* sit at the negotiation table when key treaties of humanitarian law were drafted. Eleven national liberation movements, including the Palestinian Liberation Organization (PLO) and the Southwest African Peoples Organization (SWAPO), took part, as observers, in the negotiations of the two Additional Protocols to the Geneva Conventions.⁴³ Furthermore, it is documented that some armed groups, such as guerrillas in Colombia, the Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador, and the National Liberal Front in Vietnam, although they supported humanitarian standards in theory, did not accept international

40 M. Sassòli, above note 1, p. 22.

41 A. Roberts and S. Sivakumaran, above note 34, section III. B.

42 M. Sassòli, above note 1, p. 22. See also Jean-Marie Henckaerts, ‘Binding armed opposition groups through humanitarian treaty law and customary law’, in *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-state Actors*, 25 and 26 October 2002, Vol. 27, *Collegium No. 123*, Spring 2003, p. 128.

43 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentaries to the Additional Protocols of June 8 1977 to the Geneva Conventions of 1949*, ICRC, Geneva, 1987, ‘General introduction’, p. xxix, available at: <http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument> (last visited 1 May 2011): ‘All States which were Parties to the Geneva Conventions or Members of the United Nations were invited to attend, in all numbering 155 nations. The number of those participating in the Conference varied from 107 to 124 in the various sessions. In addition, 11 national liberation movements and 51 intergovernmental or non-governmental organizations participated as observers, so that the total number of delegates fluctuated around 700.’

humanitarian treaty law applicable to the conflict they were waging since it was not negotiated directly with them.⁴⁴ Legally speaking, such an argument, which instrumentalizes the law, will never justify violations of humanitarian rules by armed groups since the rules bind all parties to the conflict, whether they agree or not. Nevertheless, the added value of gathering the input of all interested stakeholders, beyond just the states, in the creation of new rules of humanitarian law lies not only in making this body of law more realistic but also in adding a psychological incentive, and limiting the possibility for an armed group to justify violations by invoking their absence at the negotiation table.

For those reasons, I will briefly look into the hybrid treaties ('hybrid' meaning that non-states armed groups are involved) as a source suggested by Roberts and Sivakumaran to 'allow for constructive engagement with armed groups in the creation of international humanitarian standards without treating them as akin to states or downgrading important legal standards'.⁴⁵

Armed groups playing an active role in the conclusion of hybrid treaties?

Roberts and Sivakumaran put forward two possibilities in regard to the role of armed groups in future treaty negotiation: a direct role or an indirect role. In my view, the indirect role intersects with the work of armed groups together with civil society and academia in order to interpret the existing norms, which will be discussed below. For that reason, I will focus on the formal direct role potentially given to armed groups. As proposed by the authors, this possibility leaves considerable room for armed groups to provide input, be active participants in the development and codification of IHL applicable in armed conflict, and interact with states and other armed groups present, but keeps the ultimate decision-making to the states. This mechanism seems to replicate the model of 'observer status without voting rights' adopted at the 1974–1977 Diplomatic Conference to which reference was made above. Apart from the fact that not all entities present are treated equally, one very interesting element here is that the format allows one common denominator to emerge: the conference itself. A diplomatic forum might just give the possibility to step back, re-focus on the humanitarian imperatives, and find common ground. Nevertheless, the ghost of over-politicization is still present, making this option controversial. Keeping in mind that a variety of approaches is needed to address a variety of situations, this approach might still work for some armed groups, although not all. Indeed, one might say that different roles and approaches are possible, even necessary.

44 See 'The law of war and Colombia' (text around note 34) in Human Rights Watch, 'War without quarter: Colombia and international humanitarian law', 1998, as quoted in A. Roberts and S. Sivakumaran, above note 34, notes 133 and 134. For El Salvador, see the statement of the FMLN Political and Diplomatic Commission to the effect that they were entitled to detain an ambulance transporting a wounded man at a crossroad, since there was no agreement or pledge between the parties in regard to the evacuation by road of armed forces wounded: Second Report of the United Nations Observer Mission in El Salvador, UN Doc. A/46/658, 15 November 1991, paras. 64–65.

45 A. Roberts and S. Sivakumaran, above note 34, section IV.

Addressing the realities of armed groups: interpretation and contextualization of existing norms

Although it is challenging to find a common denominator between the different armed groups active in non-international conflicts, when it comes to improving the condition and treatment of people affected by armed conflict, one main element is vital in all situations: compliance with the existing legal framework. If new rules applicable to armed conflicts are to be negotiated and adopted, then the propositions presented above should be considered, to make sure that all the actors, including non-state armed groups, are represented. Strengthening IHL should nevertheless be the main concern.

As Dr. Jakob Kellenberger, President of the ICRC, recently said: '[o]ne can say with some certainty that if all the parties concerned showed perfect regard for humanitarian law, most of the humanitarian issues before us would not exist'.⁴⁶ With this approach in mind, I will now look at the best ways to address the realities of armed groups through the interpretation and contextualization of existing norms.

Feeding into the interpretation of existing norms: working together with civil society and academia

Interpretation and contextualization of existing norms is not the exclusive preserve of states; it could even be argued that it is the bread and butter of academia, which is even less a subject of international law than are armed groups, at least as far as enforcement is concerned. Indeed, engaging armed groups at that level would potentially enhance their compliance with the norms applicable to conflicts without any infringement upon the sovereign rights of states.

Initiatives where factual research is taking place, and where 'emerging issues' and 'contemporary challenges' to IHL are identified, are often led by independent organizations and civil society, providing a favourable opportunity to collect the views of armed groups. It is therefore surprising that they are so seldom invited to participate in such projects.⁴⁷

Of course, academia and armed groups have different motivations and intended outcomes for participating in discussions around the interpretation and contextualization of existing norms: professors and researchers have academic freedom and scientific objectivity to forewarn themselves against biases of political

46 Jakob Kellenberger, 'Strengthening legal protection for victims of armed conflicts', 21 September 2010, available at: <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm> (last visited 29 April 2011).

47 As Sassòli noted, it is remarkable that armed groups were completely excluded from the Alabama Process, an informal non-governmental 'post-modern' process aimed at action-oriented research, informal discussions with governments, and possible new interpretations of humanitarian law. M. Sassòli, above note 1, p. 24. See also 'The Alabama Process', co-organized by the Swiss Department of Foreign Affairs and the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), available at: <http://ihl.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=481> (last visited 1 May 2011).

agendas and potential corruption,⁴⁸ which is not the case for armed groups. Nevertheless, that should not altogether discredit armed groups' potential contribution to the discussions and, further down the line, to the evolution of the law applicable to armed conflicts towards a more realistic legal framework. What armed groups bring to the table is a necessary complement to the academic, humanitarian, civil society, and international community contributions. Their views and perspectives are based on their experiences, as parties to armed conflict, and they should be collected and documented as such.

It is of utmost importance to keep a record of the experience of engaging the armed groups and disseminate the non-sensitive information, wherever possible. New technologies now allow wide broadcasting, which could be both a blessing and a curse. To ensure that armed groups do not over-exploit these opportunities, organizations setting up such research initiatives need to make sure that their version of the story is also in the public domain: drafting a public report is a simple yet elegant solution. Even an organization such as the ICRC, which is universally known for relying on confidentiality as an essential operational tool, is very active in its contribution to the development of IHL. It can indeed issue general reports or documents on its interaction with armed groups, which would not constitute a breach of its confidentiality as long as it refrains from attributing instances of practice.

As a matter of fact, the ongoing 'Strengthening Legal Protection for Victims of Armed Conflicts' project, led by the ICRC, has great potential for initiating parallel dialogues with non-state actors in addition to the main bilateral discussions between the ICRC and states. This project initially produced an internal research study (not made public) and led, at the end of 2011, to the adoption by states and National Societies of a resolution bearing the same name at the 31st International Conference of the Red Cross and Red Crescent. This resolution provides a basis for strengthening IHL in two areas where gaps have been identified: the protection of people deprived of their freedom, and mechanisms to ensure compliance with IHL.⁴⁹ Although the project relies mostly on the co-operation and support of states, who are, according to the ICRC, the only ones that 'can influence the evolution of international law',⁵⁰ it provides an important chance to gather the views of armed groups on, for example, opportunities to conclude specific tailored-made agreements or declarations that expressly bind them to IHL, which could then potentially be reflected at future law-making negotiations.

A second example is the initiative 'Towards a Better Protection of Civilians in Armed Conflicts', led by the Geneva Academy of International Humanitarian

48 See *contra* Ed Pilkington, 'The Monitor Group: Gaddafi's PR firm used academics', in *The Guardian*, 4 March 2011, available at: <http://www.guardian.co.uk/world/2011/mar/04/the-monitor-group-gadaffi-pr> (last visited 27 April 2011): 'Ethical problems arise when the distinction between lobbying and academia becomes blurred'.

49 'Resolution 1: strengthening legal protection for victims of armed conflicts', 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, available at: <http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm> (last visited 5 January 2012).

50 J. Kellenberger, above note 46.

Law and Human Rights. It provides another very interesting outlook on the capacity and willingness of armed groups to accept and take responsibility for the respect of norms intended to protect civilians. To make a link with the notion of indirect participation of armed groups in the negotiation of hybrid treaties, it is interesting to look at the seventh proposed good practice, addressing the engagement with armed non-state actors:

It is not realistic for armed non-state actors to participate formally in the drafting of multilateral treaties nor that such actors formally adhere to those treaties, but it is possible for their views to be reflected at future law-making negotiations. Armed non-state actors may sometimes argue that they are not bound by international norms as they had no role in their negotiation and adoption. Although this argument should be opposed, it is worth seeking to involve armed non-state actors in international discussions on new norms. Their views could, for example, be discerned by analysing relevant agreements or unilateral declarations. It may be easier to associate former members of armed non-state actors in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behaviour of armed non-state actors.⁵¹

The outcome of this project was to create tools respectively for armed non-state actors and the international community,⁵² and for humanitarian actors and mediators who work towards strengthening compliance with norms by armed non-state actors.⁵³ Armed groups from different regions attended the meetings leading up to those reports; the areas represented included Colombia, Congo, Darfur, Kosovo Kurdistan, Malaysia, Nepal, Nigeria, Northern Ireland, Palestine, Sierra Leone, and Sri Lanka. One of those participants, the Patani United Liberation Organization (PULO), party to an armed conflict against the Malaysian state, made a public statement about their presence at that ‘international forum’:

This honour has put PULO in line with the liberation movements, recognised its existence among International Organisations, at the same time it has raised Patani liberation struggle to a level that is quite remarkable that has never happened before in the history of the Patani struggle. This shows that the international society has paid serious attention to the Patani liberation struggle and it be listed as one of areas that should be given particular attention and more serious international observation.⁵⁴

51 Geneva Academy, above note 25, p. 8.

52 Geneva Academy of International Humanitarian Law and Human Rights, ‘Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts. Summary of good practice discussed and elaborated during an expert workshop in October 2010’, February 2011, available at: http://www.adh-geneva.ch/docs/projets/NonStateActors/Armed%20Non-State%20Actors%20and%20International%20Norms_Workshop%20Summary_ENG.pdf (last visited 1 May 2011).

53 Geneva Academy, above note 25.

54 ‘PULO towards the international forum’, 11 March 2010, available at: <http://puloinfo.net/Statements.asp?ID=12> (last visited 2 May 2011).

This example of an armed group's publicized participation in an international forum on respect for humanitarian law illustrates well the intricate operation of entering into dialogue with armed groups that aim to find a legitimate place in the 'first layer' of public international law: the content of the declaration made by the PULO may or may not be accurate; whether it creates political precedents on the international scene will be up to states members of the international community to decide. However, beyond that, it shows that this particular armed group publicly recognized its participation in the conference and, to some degree, the value, seriousness, and validity of such an initiative. From a humanitarian perspective, this in itself is a net gain.

One last successful example of engaging with a wide range of interlocutors including armed groups, documenting their views, and reporting on what is viable and feasible in engaging with armed groups is the 'Viewpoints' project of the Centre for Humanitarian Dialogue. This two-volume edited collection brings together first-hand accounts and observations from individuals with diverse connections and experiences, such as researchers, policy advisers, former members of armed groups, academics, NGO directors, mediators and consultants in peace processes, and former diplomats.⁵⁵ The reader will notice that the scope of this undertaking is above and beyond *jus in bello*: it addresses peace processes in a holistic way, by discussing weapons control, violence reduction, disarmament, demobilization, and reintegration. It does not specifically discuss IHL. When an armed conflict is raging, the distinction between *jus ad bellum* and *jus in bello*, and recognition of the autonomy of the two concepts, is fundamental in order to curb violence and better protect victims of non-international armed conflicts.⁵⁶ However, when engaging in an academic exercise aimed at information gathering beyond an operational framework, it might prove successful to address both bodies of law at the same time and allow the key actors to express their views without the legal restrictions necessary in an operational setting. We should not forget that, for some armed groups, the peace process is the end to which the respect or violations of rules of humanitarian law is the means.

Illustrations of formal undertakings of existing norms: special agreements, unilateral declarations, and parallel structures to the 'treaty law' mechanisms

Paragraph 3 of Common Article 3 urges⁵⁷ parties to non-international armed conflict to declare their intention and mutual consent of applying all or part of

55 Cate Buchanan (ed.), *Viewpoints: Negotiating Disarmament*, Vol. 1, Centre for Humanitarian Dialogue, March 2008, available at: <http://www.hdcentre.org/publications/reflections-guns-fighters-and-armed-violence-peace-processes> (last visited 26 April 2011) and Vol. 2, November 2008, available at: <http://www.hdcentre.org/publications/viewpoints-volume-2-negotiating-disarmament> (last visited 26 April 2011).

56 See generally F. Bugnion, above note 26.

57 Indeed, the ICRC's commentaries tell us that 'the provision does not merely offer a convenient possibility, but makes an urgent request, points out a duty'. See J. Pictet, above note 28.

the remaining provisions of the Geneva Conventions through the conclusion of special agreements. This mechanism promoted by the ICRC has been used on many occasions,⁵⁸ but it cannot be said to be a common tool. Although Common Article 3 makes it clear that concluding a special agreement in no way affects the legal status of the parties to the conflict, it is true that, politically, entering into a mutually agreed binding document without any legal necessity to do so might grant a certain level of legitimacy to the belligerent. Even the ICRC recognizes that:

in practice, special agreements could be more successfully attempted when a conflict is either seemingly intractable and/or taking place on more or less equal terms between the State and armed group(s), i.e. when an armed group exercises significant territorial control, has an effective chain of command, etc.⁵⁹

The second kind of formal undertaking that armed groups can make is a unilateral declaration (also referred to as a declaration of intention). These are a ‘second-best option’ for armed groups to ratifying or formally becoming party to IHL treaties. Nevertheless, unilateral declarations allow such groups to express their commitment to abide by the rules. Thus they are often used, and in different contexts: by the *Front de Libération Nationale in Algeria* (1956), by the *Farabundo Martí para la Liberación Nacional* (FMLN) in El Salvador (1988), by the National Democratic Front of the Philippines (1991), and by the *Ejército de Liberación Nacional* in Colombia (1995), to name just a few examples.⁶⁰ Politically, being able to show a declaration of intention to the population and to the international community is a viable procedure; however, they can hardly be enforced legally,⁶¹ so there is a risk of instrumentalization.

A third undertaking, not to be confused with the unilateral declarations discussed above, is available only to national liberation movements. Indeed, a declaration made to the depositary pursuant to Article 96(3) of the First Additional Protocol⁶² by such a movement will create reciprocal rights and obligations between parties, which is not the case with declaration of intention.

58 For example, the Yemen civil war (1962), the civil war in Nigeria (1967), and the conflict in the former Yugoslavia (1992). Specific special agreements for the establishment of protected areas achieved by the ICRC include Dacca/Dhakka (1971), Nicosia (1974), Jaffna (1990), Dubrovnik and Osjek (1991), discussed in Michel Veuthey, ‘Implementing international humanitarian law: old and new ways’, in Bertrand G. Ramcharan (ed.), *Human Rights Protection in the Field*, Martinus Nijhoff, Leiden/Boston, 2006, p. 87, available at: <http://evenium.com/uploads/contents/100000796002/File/71498//mvimplementingihlramcharan.pdf>, p. 11 (last visited 26 April 2011). See also M. Mack, above note 3, pp. 16–18.

59 M. Mack, above note 3, p. 17.

60 *Ibid.*, p. 20.

61 It should be pointed out, however, that the binding character of an international obligation assumed by a unilateral declaration is based on good faith. See ICJ *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 268, para. 46: ‘Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected’.

62 Since 1963, the following unilateral declarations have been issued: Declaration of 23 May 1968 in Kampala by the rebel Biafran authorities; Declaration of 16 June 1977 by Joshua Nkomo of the African National Congress and the Zimbabwean African People’s Union (ANC-ZAPU); Declaration of 8 September 1977 by Ndabaningi Sithole of the African National Congress (ANC, Zimbabwe); Declaration of 23 September 1977 by Bishop Muzorewa of the United African National Council (UANC); Declaration of 25 July 1980

Special agreements and unilateral declarations involving armed groups may have limited reach, but armed groups are not monoliths.⁶³ The interaction between the parties to the armed conflict and the ICRC that leads to the conclusion of such formal undertakings can nevertheless provide a basis for humanitarian action, access to victims, and opportunities to disseminate IHL to all actors waging war.

Moreover, the creation of parallel structures mirroring 'treaty law' mechanisms constitutes an interesting avenue for engaging armed groups in the development on humanitarian law by contributing to the existing norms. For instance, some armed groups will manifest their intention to adhere to international humanitarian treaty law directly to Switzerland, as the official depository of the instruments. One example (although not the best, since it considered itself a state at the time) is the Palestinian authorities that adhered to the four Geneva Conventions and the two Additional Protocols (although without a firm acceptance of such adherence by the Swiss Federal Council).⁶⁴ Another example is the Provisional Government of the Algerian Republic that acceded to the Geneva Conventions two years before Algeria gained independence as a state.⁶⁵ To my knowledge, the Swiss Federal Council does not make its correspondence public, so it is impossible to know who else submitted accession documents and, if so, what the content of the documents is. Yet this goes to show that some armed groups that are parties to a non-international conflict are proactively seeking to be engaged in the law applicable to armed conflicts. Of course, the armed groups will always have a political and strategic agenda: it is more often than not the main reason why they are waging war. However, deconstructing the negotiation of international instruments and the conclusion of legally binding documents through the study of egocentric and tactical considerations is not necessarily relevant, when the end result is positive in terms of commitment toward the spirit of IHL. What difference does it make to the civilian population crushed by armed conflict if, by fixing the technical limits for the use of certain projectiles in the St. Petersburg Declaration of 1868, Czar

by the Uniao Nacional para a Independencia Total de Angola (UNITA); Declaration of 28 November 1980 by the African National Congress (ANC, South Africa); Declaration of the South West Africa People's Organization (SWAPO); UNITA (Angola) Declaration of 5 April 1988; Declaration in June 1988 by John Garang (Sudan); Declaration of 6 October 1988 in Geneva by SWAPO; Declaration of the Rwandese Patriotic Front of 22 October 1992. See 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.

63 This expression was recently used the United Nations Secretary-General: see UN Doc. S/2009/277, above note 8, para. 46.

64 'On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".' ICRC, 'International humanitarian law: treaties & documents: Palestine', available at: <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS> (last visited 27 April 2011).

65 See Michel Veuthey, 'Learning from history: accession to the conventions, special agreements, and unilateral declarations', in *Proceedings of the Bruges Colloquium*, above note 42, p. 143.

Alexander II may not really have wanted to ‘alleviat[e] as much as possible the calamities of war’⁶⁶ but, more probably, knew that he did not have sufficient funds to purchase the explosive projectiles that the Declaration banished? What negative impacts does it have on the civilian population that one of many armed groups who were all parties to a civil war signed the deed of commitment banning anti-personnel mines not just for humanitarian reasons but mostly because all of the other groups had joined before them?

Lastly, one other way of making the voices of armed groups heard on international humanitarian treaty law binding them is to set up an analogous mechanism to the reservation procedure accessible to states. As stated in the Vienna Convention on the Law of Treaties, when a state ratifies (or signs, accepts, approves, or accedes to) an international instrument, it can formulate a reservation to some of the treaty’s provisions in order to protect its sovereign will.⁶⁷ Such reservations modify the provisions in question to the same extent for other parties in relation to the reserving state. Hence, reservations are part of a fundamentally reciprocal mechanism and allow parties clearly to state their intention to apply and respect – or not – the provisions of a treaty. A reservation does not directly impact the treaty as an ‘institution’; rather it provides boundaries for the relationships that the parties build together around the treaty.⁶⁸

Under conventional IHL, reservations that are compatible with the object and purpose of the instruments are not prohibited *per se* by the Geneva Conventions and the Additional Protocols. In fact, twenty-two states parties to the Geneva Conventions⁶⁹ and thirty-five states parties to the Additional Protocols⁷⁰ made reservations upon signature or ratification of those instruments. With that many reservations, relationships between states parties are bound to vary depending on the content of reservations made by each state.⁷¹ Furthermore, it erodes the concept in non-international armed conflicts, since reservations are mechanisms accessible only to states. In fact, by not having the possibility of entering reservations, armed

66 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November–11 December 1868, Preamble.

67 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 21.

68 *Ibid.*, Art. 21(2).

69 Albania, Angola, Australia, Bangladesh, Barbados, China, the Czech Republic, Guinea-Bissau, the Islamic Republic of Iran, Israel, the Democratic Republic of Korea, the Republic of Korea, Kuwait, New Zealand, Pakistan, Portugal, the Russian Federation, Suriname, the United Kingdom, the United States of America, Vietnam, and Yemen all made reservations upon signature or ratification of the Geneva Conventions. See Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Berne, p. 342, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 26 April 2011).

70 Out of the 167 states that ratified Additional Protocol I, Albania, Angola, Argentina, Australia, Austria, Belgium, Canada, China, Denmark, Egypt, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, the Holy See, Iceland, Ireland, Italy, Japan, the Republic of Korea, Kuwait, Liechtenstein, Malta, Mauritius, Mongolia, the Netherlands, Oman, Portugal, Qatar, Saudi Arabia, Spain, Sweden, the Syrian Arab Republic, the United Arab Emirates, and the United Kingdom, all made reservations upon signature or ratification. See: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited 26 April 2011).

71 On the concept and the impact of immediate reciprocity in IHL, see René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 147.

groups miss out on the possibility of influencing the application of the rules that they are otherwise requested to observe and respect. In this context, the less inclusive the process is, the less motivation there is to respect the emerging norms. Of course, as was said earlier in this article, legally speaking, lack of motivation will never justify violations of humanitarian rules by armed groups since the rules bind all parties to the conflict, whether they agree or not. Nevertheless, moral and psychological incentives might be lacking.

One would be right in arguing that the impact of the reservation mechanism in international humanitarian treaty law is considerably limited. The ICJ has taught us that a reservation has to be compatible with the object and purpose of the Convention; if not, it could be challenged by another party to the Convention, who will be in their own right to consider that the reserving state is not a party to the Convention.⁷² This allows the ‘contesting’ state to free itself from the conventional bilateral obligations in its relation to the state formulating the reservation. In international humanitarian treaty law, several key sections qualify as *erga omnes* obligations.⁷³ Thus, even if a state party formulates reservations to those non-bilateralizable norms, these cannot be invoked by other state parties to modify their own obligations. Indeed, these obligations formulate basic norms that are owed to all states and to the international community as a whole. Even if a state party were to submit reservations to those key humanitarian obligations, it would have no significant impact. This levels the field between state and non-state armed groups, as neither can substantially modify the content of these humanitarian obligations.⁷⁴ Nevertheless, improved commitment to humanitarian standards could be achieved if a parallel mechanism mirroring the reservation process were available to armed groups.

Brief observations on the crystallization of customary norms

Once again, the application of the statist doctrine on customs as a source of international public law threatens the realistic application of humanitarian law to non-state armed groups. Under this traditional doctrine, customary IHL can be

72 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951, p. 8.

73 Examples of such norms include those contained in Common Article 3; Part II of the Fourth Geneva Convention (which provides for the general protection of populations against certain consequences of war); sections of AP I regarding the treatment of refugees and stateless persons in the power of a party to the conflict (Art. 73) and the fundamental guarantees of all persons in the power of a party to the conflict (Art. 75); and AP II as a whole: *ibid.*, p. 150.

74 On a related note, it should be added that the *clausa si omnes* (the participation clause) originally found in the 1899 Convention with Respect to the Laws and Customs of War, The Hague, 29 July 1899 (reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, 4th edn, Martinus Nijhoff, Leiden/Boston, 2004, p. 69), which allowed states parties to ignore the Conventions if one or more parties to the conflict did not ratify them, can no longer be found in IHL treaty law. As Theodore Meron explains, this clause threatened the integrity of the Nuremberg prosecutions, but the tribunal countered that argument by stating that the rules laid out in the 1907 Hague Convention IV were, by 1939, considered customary, making the general-participation clause fall into desuetude. See Theodore Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, No. 2, April 2000, pp. 247–248.

derived only from states' practices and *opinio juris*. It is more or less along these lines that the ICRC customary law study has been edited, qualifying the legal significance of the practice of armed groups in the crystallization of customary norms as 'unclear'.⁷⁵ As a minimum, it could be argued that the practice of armed groups is at least declaratory of existing customary rules.

Although I acknowledge the need for an expansion from the traditional approach to customary law to consider armed groups' practices as a contribution to customary rules, the complexity of such an endeavour cannot be overlooked: the current intricate system supporting the creation and confirmation of customary norms in public international law is not necessarily designed to take into consideration views and practices of actors other than states. To open the door for input from other stakeholders would necessitate major adjustments in numerous areas. For instance, all the practices of 'mutual interactions of a variety of international actors – states, substate actors, "people" and international organizations'⁷⁶ – might very well be needed in order to determine the existence of a customary rule, while keeping the coherence of the system. As mentioned by Arend, this would lead to the presence of multiple levels of customary norms in international law, as well as differently tailored boundaries of the rules, depending on who is involved.⁷⁷ For example, if an armed group's practice contributes to either the creation or the crystallization of a customary norm of humanitarian law, it could apply to relations between the armed group and any international organization.

However, what I perceive as the major impediment here is not necessarily linked to armed groups themselves or to difficulties of gathering their practices in a reliable and accurate fashion, although this is one of the problems that would need to be addressed; rather, it is related to the difficulty of gathering any kind of 'real life' practices, be it from state or non-state actors. Indeed, the International Criminal Tribunal for the Former Yugoslavia stated in *Tadić* that:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the

75 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, p. xxxvi. See also Jean-Marie Henckaerts, 'International humanitarian law as customary international law', in *Refugee Survey Quarterly*, Vol. 21, No. 3, 2002, p. 192: 'The practice of armed opposition groups does not constitute State practice given that armed opposition groups do not possess international legal personality. Such practice may nevertheless contain evidence of the acceptance of certain rules in non-international armed conflicts. Such practice includes codes of conduct, allegations of violations by governmental armed forces, commitments made to observe certain rules of international humanitarian law, whether unilaterally or toward the ICRC'.

76 Anthony C. Arend, *Legal Rules and International Society*, Oxford University Press, Oxford, 1999, p. 177.

77 *Ibid.*

actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.⁷⁸

This trend of avoiding the difficult question of practice by focusing more on *opinio juris* supports the proposition that the problem lies in the customary international legal system itself, not in the armed groups specifically. Indeed, in the *Tadić* decision quoted above, the Tribunal affirmed that the behaviour of insurgents among other actors, has been 'instrumental in bringing about the formation of the customary rules'.⁷⁹

Without going further into an in-depth analysis of this specific issue, suffice to say that I follow in the steps of Arend,⁸⁰ Sassòli,⁸¹ and McCorquodale,⁸² and, to some extent, Roberts and Sivakumaran (with their concept of hybrid custom),⁸³ and agree that armed groups' practice should contribute to new customary rules.⁸⁴

Opening the door to tailored and soft-law solutions

Before concluding this article, a few words are needed on the possibility to develop potential solutions to address the situation of armed groups. It should be noted that this is a field that in itself would necessitate a lengthier analysis than the one allowed here.

To build on ownership of already existing rules, one needs to rely on mechanisms that formalize the commitments of non-state armed groups, and also look for inspiration from analogous branches of international law where non-state actors are active: cyber-law, international sports law, are *lex mercatoria* are all bodies of law challenging the statist doctrine and created to address practical gaps that rendered existing law impractical and unrealistic for those key non-state actors.⁸⁵ The parallel with cyber-law, or *lex electronica*, is an interesting one. Cyberspace has

78 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defense for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 99. See also Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 22.

79 *Prosecutor v. Tadić*, above note 78, para. 108.

80 A. C. Arend, above note 76, pp. 177–178.

81 M. Sassòli, above note 1, pp. 21–22: 'In my view, customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions, or in the form of statements, mutual accusations and justifications for their own behaviour. Non-State actors would logically be subject to customary law which they contribute to creating'.

82 R. McCorquodale, 'An inclusive international legal system', above note 37, pp. 498–499.

83 A. Roberts and S. Sivakumaran, above note 34, Section IV.B.

84 See generally on the topic, Hui Han Lie, 'The influence of armed opposition groups on the formation of customary rules of international humanitarian law', Masters thesis, University of Amsterdam, November 2003, available at: <http://www.southsouthnetwork.com/scriptie.doc> (last visited 1 May 2011).

85 For a few comments on a potential new *lex armatorum*, see M. Sassòli, above note 1, p. 23.

its programming on one side and its interconnectivity on the other; war has its regulations on means and methods of warfare on one side and the protection of those who are not taking part in hostilities on the other, which makes them both a technical and a social construction where law almost comes as an afterthought. Technical imperatives and social norms have as much influence as, if not more than, legal obligations, for both the content creators in cyberspace and the parties in an armed conflict.⁸⁶ That being said, a major hurdle lies in the very nature of armed groups and the lack of a common vision for all. As Sassòli noted, ‘the greater difficulty is that armed groups... are not repeat players and are illegal under their domestic legislation... and do not fight worldwide against each other’.⁸⁷

Another example for potentially analogous applications is provided by soft-law solutions. Developing non-binding normative standards is, of course, a complementary solution to building ownership around the existing compulsory norms, but it does allow for the establishment of some sort of dialogue between the armed groups and the states, circumventing, to a certain extent, the concerns mentioned earlier⁸⁸ about involving armed groups in international law-making without challenging the current statist legal order. The Guiding Principles on Business and Human Rights submitted by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises⁸⁹ provide a good example of an analogous soft-law document. It would also be worth looking for inspiration in the Organization for Economic Co-operation and Development’s Guidelines for Multinational Enterprises.⁹⁰ These Guidelines are ‘recommendations addressed by governments to multinational enterprises operating in or from adhering countries’.⁹¹ The main difference – and it is a fundamental one – between multinational businesses and armed groups is that the latter are illegal under their domestic jurisdiction, so that the OECD model could not be replicated without major changes. It is not realistic to have states discuss the positive contribution of armed groups, but it could be feasible

86 See Pierre Trudel, ‘La lex electronica’, p. 8, available at: <http://www.chairelrwilson.ca/cours/drt3808/LexelectronicaTrudel.pdf> (last visited 5 January 2012): ‘Le cyberspace est à la fois construction technique et construction sociale. Le sujet de droit y agit et interagit en respectant des règles, en organisant sa conduite de manière à se conformer à des impératifs techniques et à des exigences sociales. Mais dans le cyberspace, la capacité de contourner les règles ou tout simplement de s’exclure de leur application demeure toujours disponible et paraît plus aisée que pour les activités se déroulant sur le territoire d’un État.’

87 M. Sassòli, above note 1, p. 23.

88 Namely, the over-politicization of the treaty-making process, the practical difficulties and potential criminal implications of reaching out to armed groups considered illegal, the possible enhancement of the status of the armed groups, the inappropriate legitimizing of armed groups, and the downgrading of humanitarian law protections.

89 Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN General Assembly, Human Rights Council, UN Doc. A/HRC/17/3, 21 March 2011, available at: <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (last visited 5 January 2012).

90 OECD Guidelines for Multinational Enterprises, Revision 2011, available at: http://www.oecd.org/document/18/0,3746,en_2649_34889_2397532_1_1_1_1,00.html (last visited 5 January 2012).

91 *Ibid.*, Foreword.

to have them reinforce the humanitarian imperatives in an updated and more relevant language to the realities of today's armed conflicts, or to provide a blueprint for armed groups on how to know and show that they are respecting international humanitarian norms. In the end, if a number of non-binding statements, because of their strong persuasive character (and maybe perhaps because of their limited enforceability), influence the actions of states and non-state actors, it is a win-win situation, as long as it is in line with the spirit of humanitarian law.

Conclusion

Contemporary non-international armed conflicts are more often than not waged asymmetrically between two groups with significantly different capabilities. The asymmetries, whether in the form of military power or general resources, are almost always in favour of the state. Terrorist attacks, namely acts used to frighten the population and influence the behaviour of a government or organization, provide an example of how armed groups attempt to overcome this imbalance by using unconventional methods for maximum impact when faced with a significantly larger state arsenal. In this situation (which should not be perceived as a new phenomenon of the twenty-first century⁹²), there are examples where state military forces are reacting by stepping further away from the practices enforced in symmetrical warfare,⁹³ although it could be assertively argued that theories on counter-insurgency advocate 'winning the hearts and minds' and the need to respect the law. In this latter case, the end would justify the means, as all parties to an armed conflict, states included, need to 'walk the talk' of humanitarian norms. This is an important element in order for armed groups to line up with the advocates of humanitarian ideas, even beyond the realm of conventional legal norms and treaty law. In order to build a culture of compliance toward international humanitarian norms, all parties to a conflict need to hear the 'imperative call of civilization' and act upon it. State actors must also actively contribute to this culture, given their privileged position in the international legal order.

One of the main purposes of this article was to show that it was possible and opportune to move away from the Westphalian model to include armed groups

92 See Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 150–151.

93 See *ibid.*, p. 163, note 37, where the existence of a new American organization, called the Strategic Support Branch, is mentioned. This organization is designed to operate without detection and under the Secretary of Defense's direct control, and deploys small teams of case officers, linguists, interrogators, and technical specialists alongside newly empowered special operations forces. See also Barton Gellman, 'The secret unit expands Rumsfeld's domain', in *Washington Post*, 23 January 2005, available at: <http://www.washingtonpost.com/ac2/wp-dyn/A29414-2005Jan22?language=printer> (last visited 1 May 2011); see *contra* 'Statement From Pentagon spokesman Lawrence DiRita on intelligence activities of the Defense Department', US Department of Defense's Release No. 062-0523, 23 January 2005, available at: <http://www.au.af.mil/au/awc/awcgate/dod/nr20050123-2000.htm> (last visited 5 January 2012), although Pfanner, in January 2005, referred to the same statement, but hosted at another address that is no longer valid, and stated that 'the creation of a new unit was confirmed in a statement from Pentagon spokesman Lawrence DiRita (on intelligence activities of the Defense Department)', 23 January 2005.

in the development of the law governing armed conflicts, without going as far as to give them state-like law-making prerogatives. Even today, states are the main actors in, subject of, and at the origins of the sources of public international law. However, with those prerogatives come duties as well. In order to halt violence against victims of armed conflicts, states need to do what only they have the power to do: their policies and legislations should never result in harm to the civilian population even if measures of economic isolation of certain armed groups are taken; they should adopt strategies for the protection of civilians in order to strengthen the normative framework, the operational response, and the national capacity; they should support more systematic data collection and analysis of the human costs of the use of explosive weapons; and finally, they should consider the potential humanitarian consequences of their legal and policy initiatives to avoid introducing measures⁹⁴ that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for humanitarian purposes.⁹⁵ If they do all of that, then perhaps the urgency of engaging armed groups in the development of the law applicable to armed conflicts will be a little bit less pressing.

94 An American example of such a measure could be the prohibition, through the *USA Patriot Act* (18 U.S.C. §2339B), of material support, which includes ‘training’, ‘expert advice or assistance’, ‘service’, and ‘personnel’, to groups designated as terrorists. See *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, 561 U.S. 25, 21 June 2010. See also Naz Modirzadeh, Dustin Lewis and Claude Bruderlein, ‘Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape’, in this issue. Also, on the problem of institutionalization of ‘terrorist blacklists’ at international and national levels, see Nicolas Florquin and Elisabeth Decrey Warner, ‘Engaging non-state armed groups or listing terrorists? Implications for the arms control community’, in *Disarmament Forum*, Vol. 1, 2008, p. 17, available at: <http://www.unidir.org/pdf/articles/pdf-art2708.pdf> (last visited 5 January 2012).

95 These are taken from some of the United Nations Secretary-General’s recommendations to member states in his Report from 2010, UN Doc. S/2010/579, above note 11.

Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call *Deed of Commitment*

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Abstract

Armed non-state actors are involved in most armed conflicts today, yet international law provides few mechanisms to ensure that they comply with humanitarian norms applicable to them. In particular, monitoring and verification mechanisms that address the conduct of armed non-state actors rarely appear in multilateral treaties, and, even when they do, are weak and not applied in practice. Over the past few years, a number of alternative mechanisms have been developed to better monitor respect of humanitarian norms during internal armed conflicts and

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verify allegations of violations. This article examines the strength of these various mechanisms and then focuses on the Deed of Commitment, an innovative instrument developed by the Swiss-based non-governmental organization Geneva Call, to hold armed non-state actors accountable. Experience with the Deed of Commitment on the prohibition of anti-personnel mines shows that these alternative mechanisms can be effective in ensuring better compliance with at least some humanitarian norms.

.....

War gives such a rude shock to the whole legal system that, if the means by which the rule of law is upheld are too vulnerable, its very authority may be endangered.¹
(Jean Pictet)

Humanitarian norms² applicable to armed non-state actors (ANSAs)³ have evolved significantly over recent history. Traditionally, only the recognition of belligerency by the opposing state triggered ANSA rights and obligations under the law of war. Article 3 Common to the Geneva Conventions of 1949 marked the first international humanitarian law (IHL) treaty provision applicable to non-state parties to conflict, and this was expanded upon by Additional Protocol II of 1977.⁴ By 2005, according to the International Committee of the Red Cross (ICRC) study on customary IHL, at least 140 rules governed the conduct of ANSAs.⁵ Moreover, a number of legal experts contend that certain standards of human rights law may bind ANSAs,⁶ while some of the most recent international and regional human

1 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, International Committee of the Red Cross (ICRC), Geneva, 1952, p. 377.

2 The term 'humanitarian norms' refers to international humanitarian law and relevant standards of international human rights law.

3 There is no universally agreed definition of 'armed non-state actors'. For its operational purposes, Geneva Call uses this term to refer to organized armed entities that are primarily motivated by political goals, operate outside effective state control, and lack legal capacity to become party to relevant international treaties. This includes armed groups, *de facto* governing authorities, national liberation movements, and non- or partially internationally recognized states.

4 However, Additional Protocol II only refers to conflicts which meet certain criteria, i.e. those 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. See Additional Protocol II, Art. 1(1).

5 There are eight additional rules whose applicability to non-international armed conflicts is listed as 'arguable'. See Jean-Marie Henckaerts, 'Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict', in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 198–212.

6 Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Oxford University Press, Oxford, 2006; Christian Tomuschat, 'The applicability of human rights law to insurgent movements', in H. Fischer, U. Froissart, W. Heintchel von Heinegg, and C. Raap (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 586–587.

rights treaties address the conduct of ANSAs, even if the language does not seem to create direct obligations.⁷

So, now that it is recognized – at least with respect to IHL – that, for the most part, the same norms apply to ANSAs and states,⁸ what can be said about mechanisms to ensure compliance with these norms? Indeed the shock exerted by war, as noted in Pictet’s epigraph, is even greater in internal armed conflicts, where state authorities often face an existential threat from within. In a recent speech marking the sixtieth anniversary of the Geneva Conventions, the President of the ICRC lamented the weaknesses of IHL compliance mechanisms, noting that they are not mandatory and they depend on consent of the parties once conflict has broken out. He further emphasized that ‘while lack of compliance of non-State armed groups is also a very serious problem that we need to address, reinforcement of international law rules *and mechanisms* lies in the hands of States’.⁹ While the ICRC President is certainly correct that states have responsibility for the development of international law mechanisms in the formal sense, this article shows that, in real terms, ANSAs can contribute not only to improved respect for humanitarian norms but also to the reinforcement and effective functioning of compliance mechanisms. In fact, when they do not contribute as such, there is a greater risk that ANSAs will perceive such mechanisms as biased in favour of states.

There are different types of compliance mechanisms to ensure respect for humanitarian norms, but this article deals with the role of monitoring, reporting, and verification (MRV)¹⁰ mechanisms that address the conduct of ANSAs. Some of these are anchored in multilateral treaties, others in humanitarian agreements, and others through United Nations (UN) institutions. All of the above involve states, or regional or international organizations. However, there are also examples of MRV mechanisms that are independent of state involvement. One such mechanism – the focus of the central sections of this article – derives from the *Deed of Commitment* under Geneva Call, a Swiss-based non-governmental organization (NGO) that since

7 For example, the word ‘should’ appears in Art. 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which refers to armed groups. Also, Art. 7(5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa starts off with the words, ‘Members of armed groups shall be prohibited from: ...’ and subsequently lists several actions that are to be prohibited.

8 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on Jurisdiction (Appeals Chamber), 2 October 1995, paras. 96–126, esp. paras. 113, 119, and 126.

9 Jakob Kellenberger, ‘Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations’, 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, emphasis added, available at: <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-260909.htm> (last visited 12 March 2012).

10 For the purpose of this article, monitoring is defined as the systematic collection, analysis, and use of information to follow up on compliance with humanitarian norms; verification or fact-finding refers to the investigation of alleged violations or incidents that have taken place in a particular situation; reporting is defined as the processing of information in oral or written reports. These definitions derive from Program on Humanitarian Policy and Conflict Research (HPCR), *Monitoring, Reporting and Fact-finding Mechanisms: A Mapping and Assessment of Contemporary Efforts*, HPCR, Harvard University, November 2010 and Amnesty International and Council for the Development of Social Science Research in Africa, *Monitoring and Investigating Human Rights Violations in Africa: A Handbook*, Russell Press, Basford, Notts, 2000.

2000 has been engaging ANSAs to abide by humanitarian norms, initially with respect to the ban on anti-personnel (AP) mines.¹¹

There are a number of reasons why it is of interest to look specifically at MRV mechanisms that address the conduct of ANSAs. First, and foremost, ANSAs are involved in the vast majority of today's armed conflicts.¹² Second, although ANSAs have obligations to respect humanitarian norms (as discussed above), they are excluded from the supervision of multilateral treaty-based MRV mechanisms in practice, if not as a matter of law.¹³ Third, many of the non-multilateral treaty-based MRV mechanisms that address ANSAs are either new¹⁴ or have not been the subject of comparative analysis.¹⁵ Little is known about these mechanisms, their practice, and their impact on ANSA compliance with humanitarian norms.

This article aims to share Geneva Call's MRV experience with the *Deed of Commitment for Adherence to a Total Ban on Anti-personnel Mines and for Cooperation in Mine Action* (hereafter the *Deed of Commitment Banning AP Mines*). It is hoped that this contribution may encourage other organizations to expand on such work and document other examples of MRV mechanisms addressing the conduct of ANSAs. The article first provides a brief overview of MRV mechanisms in IHL, human rights, and weapons treaties in order to discern general trends as to their strengths and weaknesses. It then looks in more detail at the MRV mechanisms, both treaty-based and otherwise, that address ANSAs. The discussion is mainly limited to the mechanisms as such and does not evaluate their effectiveness. The main part of the article turns to Geneva Call's particular experience in monitoring and verifying ANSA compliance with the *Deed of Commitment Banning AP Mines*. The work of this organization is presented, along with its innovative approach, whose centrepiece is the *Deed of Commitment* instrument. In the next section, the MRV mechanisms provided for under the *Deed of Commitment Banning AP Mines* are described, with comparative attention given to pinpointing similarities with and differences from the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Ottawa Convention). Actual practice and implementation of these mechanisms is also examined, with emphasis on the *Deed of Commitment*. The article concludes by analysing some of the main strengths and limitations of the *Deed of Commitment* MRV machinery and by looking at lessons learned and potential areas for improvement in the ways in which these mechanisms address the conduct of ANSAs.

11 See below, pp. 684–689.

12 In 2010, according to the Stockholm International Peace Research Institute (SIPRI), all major armed conflicts waged worldwide were intrastate. Over the decade 2001–2010, only two of the twenty-nine major armed conflicts recorded by SIPRI were interstate. See SIPRI, *SIPRI Yearbook 2011: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2011.

13 See below, pp. 679–680 on the Enquiry Procedure and the International Humanitarian Fact-Finding Commission.

14 For example the Geneva Call *Deed of Commitment*: see below, pp. 685–687.

15 This is generally the case for humanitarian agreements: see below, p. 680.

Analysis of international MRV mechanisms

It would be redundant to reproduce here a survey of international MRV mechanisms¹⁶ relevant to situations of armed conflict.¹⁷ Rather, the analysis will focus on such mechanisms that address ANSAs, and highlight aspects of them that shed light on the following criteria: a) who performs the monitoring (self or external); b) what triggers the mechanism, to what extent consent is required, and, if so, whether there are sanctions for non-cooperation; and c) the transparency of the mechanism. In all cases, it will be considered whether ANSAs are treated differently from states.

Before doing so, a few words should be said on MRV mechanisms in IHL, human rights, and weapons treaties in general.¹⁸ In an ideal world, such mechanisms would address all parties to conflict (in terms of the provisions relevant to armed conflict), would involve self-reporting as well as external MRV, would be mandatory, with sanctions for non-cooperation, and would be fully transparent. The world, however, is not ideal.

MRV mechanisms in IHL, human rights, and weapons treaties: a brief overview

IHL treaties such as the Geneva Conventions and their Additional Protocols do not contain self-reporting mechanisms. However, periodic, compulsory self-reporting by states is a common component of many international human rights treaties.¹⁹

16 International mechanisms refer to mechanisms that formally involve states or regional or international organizations.

17 See Sylvain Vité, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Bruylant, Brussels, 1999; ICRC, *Improving Compliance with International Humanitarian Law: ICRC Expert Seminars*, ICRC, Geneva, 2003; Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2008; Théo Boutruche, 'Credible fact-finding and allegations of international humanitarian law violations: challenges in theory and practice', in *Journal of Conflict and Security Law*, Vol. 16, No. 1, January 2011, pp. 105–140; Toni Pfanner, 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims', in *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, pp. 279–328; Patricia Watts, 'Monitoring human rights treaties', in *Verification Yearbook 2004*, Verification Research, Training and Information Centre (VERTIC), London, 2004, pp. 213–232; ICRC & Swiss Federal Department of Foreign Affairs, *60 Years of the Geneva Conventions and the Decades Ahead (Geneva, 9–10 November 2009)*, Merkur Druck, Bern, 2010.

18 Weapons treaties are considered distinct from IHL treaties for convenience of analysis. Those considered are: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention, BWC); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, CWC); Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons, CCW); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention), and the Convention on Cluster Munitions (Oslo Convention). This article does not consider nuclear weapons treaties.

19 States parties must submit a report every four years under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC).

Sometimes referred to as confidence-building or transparency reporting, it also features in several weapons treaties.²⁰ Under human rights treaties, state reports are generally subject to supervision and recommendations by treaty bodies. This process does not occur as extensively with respect to weapons treaties.²¹

While IHL treaties do, in some cases, contain external MRV mechanisms subject to the consent of the parties, human rights treaties and most weapons treaties tend to be weak on external monitoring, especially fact-finding and on-site verification.²² For human rights treaties that do envision external monitoring, opt-in²³ or opt-out²⁴ provisions exist, and consent is generally required for on-site visits.²⁵ The Optional Protocol to the Convention Against Torture (CAT OP) creates an exceptionally strong mechanism, under which the Subcommittee on Prevention undertakes mandatory regular inspections of places where persons are deprived of their liberty.²⁶ On the weapons side, the Chemical Weapons Convention (CWC) is an exception to the rule, with a strong verification mechanism, elements of which are mandatory.²⁷

When envisioned, external MRV mechanisms under international treaties can be performed by a variety of actors, including treaty bodies, Protecting Powers,²⁸ the ICRC or other humanitarian organisations,²⁹ and NGOs.³⁰ Some human rights treaty mechanisms are triggered by individual complaints, but, when they are,

20 In 1986, the second Review Conference of the BWC introduced confidence-building measures, see <http://www.unog.ch/bwc/cbms> (last visited 12 March 2012). Art. 7 of the Ottawa Convention is an example of transparency reporting in a weapons treaty, while Art. 13(4) of CCW Protocol II provides for transparent annual reports by High Contracting Parties.

21 Implementation bodies do exist for the BWC and CWC, but these do not function in the same way as human rights treaty bodies. No similar body exists with respect to the Ottawa and Oslo Conventions. See below, pp. 690–693.

22 See below, pp. 693–696, for the Ottawa Convention.

23 See CAT, Art. 22(1), and Art. 31(1) of the International Convention for the Protection of All Persons from Enforced Disappearance (CED). Sometimes, Optional Protocols act as opt-in mechanisms: see Art. 1 of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR OP) and Arts. 1 and 2 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW OP).

24 Where provision is made in a treaty for a more investigative inquiry or fact-finding mechanism, states can generally opt out. See CEDAW OP, Art. 8; CAT, Art. 20; and Art. 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD OP), which all allow for inquiry mechanisms, while CEDAW OP, Art. 10; CAT, Art. 28; and CRPD OP, Art. 8 allow states to opt out of the respective mechanisms.

25 For example, CEDAW OP, Art. 8(2); CAT, Art. 20(3); CRPD, OP Art. 6(2).

26 CAT OP, Arts. 2 and 4. Note that, as of February 2012, there are 150 states parties to the CAT (with 10 states taking advantage of Art. 28 to opt out of the mandatory fact-finding provision envisioned under Art. 20), while there are only 62 states parties to the CAT OP, which establishes a much more stringent mechanism. This is perhaps indicative of states' reluctance to commit to stronger MRV mechanisms.

27 See Part III of the Verification Annex to the CWC.

28 The 'Protecting Powers' system was one of the main mechanisms for monitoring compliance with IHL in international armed conflicts prior to World War II. Although the mechanism was incorporated in the four Geneva Conventions, 'the "Protecting Powers" system has been infrequently relied upon: the Suez Affair (1956), Goa (1961), the Franco-Tunisian conflict in Bizerte (1961), the Indo-Pakistani war (1971) and to some extent the Falklands/Malvinas war between Argentina and the UK. The limited list of cases reveals that states are generally reluctant to appoint protecting powers in international armed conflicts.' (ICRC & Swiss Federal Department of Foreign Affairs, above note 17, p. 38).

29 See Arts. 10/10/10/11 of the 1949 Geneva Conventions and Art. 5 of Additional Protocol I.

30 See below, p. 681. NGOs are in many cases allowed to submit information to treaty bodies.

domestic remedies must be exhausted first.³¹ Others can be triggered by reliable information indicating widespread or systematic violations,³² or by other states parties.³³ Human rights treaty mechanisms are a mixed bag when it comes to transparency. Self-reporting is predominantly transparent, whereas external monitoring tends to be confidential in most treaty body regimes that allow for external MRV – with the exception of NGO shadow reports.³⁴ The CAT OP uses transparency as a sanction against non-cooperation with the MRV mechanism. If the state party refuses to co-operate with the Subcommittee regarding its MRV functions, the Committee Against Torture can make a public statement or publish the Subcommittee's report.³⁵

International mechanisms that address ANSAs

As most current armed conflicts involve ANSAs, it is crucial that MRV mechanisms address their conduct. For the purposes of this analysis, the following four sources are examined in order to identify those actual mechanisms that address ANSAs: multilateral treaties, humanitarian agreements, UN ad hoc commissions, and UN Security Council (UNSC) thematic monitoring mechanisms. These mechanisms will be evaluated according to the three criteria given above.³⁶

Multilateral treaties

Most IHL, human rights, and weapons treaties only address the conduct of states. Neither Additional Protocol II nor Common Article 3 – the two major IHL treaty regimes that do address the conduct of ANSAs – have any MRV provisions. On the other hand, the Enquiry Procedure common to the Geneva Conventions could be interpreted to apply to situations of non-international armed conflicts covered by Common Article 3,³⁷ and the International Humanitarian Fact-Finding Commission (IHFFC), established under Additional Protocol I, has deemed its mandate to extend to these conflicts with the agreement of all parties.³⁸ These

31 Most human rights mechanisms that allow consideration of individual complaints require exhaustion of local remedies. See, for example, CAT, Art. 22(4)(b); CED, Art. 31(2)(d); CEDAW OP, Art. 4(1); International Convention on the Elimination of All Forms of Racial Discrimination, Art. 14(7)(a); CRPD OP, Art. 2(d); and ICCPR OP, Art. 2.

32 E.g. CAT, Art. 20(1); CEDAW OP, Art. 8(1); and CRPD OP, Art. 6(1).

33 E.g. Ottawa Convention, Art. 8 and Oslo Convention, Art. 8.

34 Art. 45(a) of the CRC allows for formal submission of such reports. Other treaty bodies may informally receive reports from NGOs. See Office of the High Commissioner for Human Rights (OHCHR), *Working with the United Nations Human Rights Programme: A Handbook for Civil Society*, OHCHR, New York and Geneva, 2008, pp. 33, 40, 49, and 50.

35 CAT OP, Art. 16(4).

36 There are other sources of international MRV mechanisms such as special procedures, but they remain outside the scope of this analysis.

37 Articles 52/53/132/149 of the Geneva Conventions. One could argue that it is applicable because the scope of coverage is 'concerning any alleged violation of the Convention' and the term 'Party to the conflict' – the same as in Common Article 3 – is used.

38 E. David, above note 17, p. 670.

mechanisms will therefore be considered in the analysis below, without prejudice to whether they in fact apply to the conduct of ANSAs.³⁹

Humanitarian agreements

These agreements may be pursuant to Common Article 3 of the Geneva Conventions – in which case they are referred to as ‘special agreements’ – wherein state and non-state parties agree to apply some or all of the further provisions of the Conventions otherwise only applicable to international armed conflict,⁴⁰ or they may be more expansive, covering human rights issues as well. This article considers six such agreements.⁴¹ In addition, it considers a bilateral agreement between a third party – the UN – and an ANSA, the Justice and Equality Movement (JEM).⁴²

UN ad hoc commissions

Ad hoc commissions may be established by various bodies of the UN, and many such commissions do address the conduct of ANSAs. This analysis is limited to two samples that have received significant attention: the International Commission of Inquiry on Darfur (the Darfur Commission), established by the UNSC Resolution 1564 of 18 September 2004, and the UN Fact Finding Mission on the Gaza Conflict (the Gaza Mission), established by the UN Human Rights Council Resolution S-9/1 of 12 January 2009.

39 These mechanisms have never been used in international armed conflict, so one may question whether they would ever be invoked in conflicts involving ANSAs. There is, however, an indication that the IHFFC was about to be used in Colombia before a change in government. See Frits Kalshoven, ‘The International Humanitarian Fact-Finding Commission: a sleeping beauty?’, in *Humanit res V lkerrecht*, Vol. 15, Issue 4, 2002, p. 215.

40 Para. 3 of Common Article 3 to the Geneva Conventions reads as follows: ‘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’.

41 These agreements are drawn from the compilation made by Olivier Bangerter, ‘Collection of agreements on IHL: armed groups and governments or third parties’, unpublished document, April 2011 (on file with the authors). They are: Agreement signed on 22 May 1992 by representatives of the Presidency of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action and the Croatian Democratic Community (the Bosnia-Herzegovina Agreement); Mozambique National Resistance–RENAMO Joint Declaration with the Government of Mozambique on the Guiding Principles of Humanitarian Assistance, 16 July 1992 (the Mozambique–RENAMO Agreement); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998 (the CARHRIHL Agreement); Agreement on the Civilian Protection Component of the International Monitoring Team (IMT) between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front, 27 October 2009 (the Philippines–MILF Agreement); San Jose Agreement on Human Rights between the Government of El Salvador and the Frente Farabundo Marti para La Liberacion Nacional, 26 July 1990 (the San Jose Agreement); Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 10 March 2002 (the Sudan–SPLM Agreement). All these documents are in the public domain.

42 Memorandum of Understanding between the Justice and Equality Movement (JEM) and the United Nations regarding the Protection of Children in Darfur, 21 July 2010 (the JEM–UN Agreement), available online at: http://reliefweb.int/sites/reliefweb.int/files/resources/3864EE07BF38473C852577670066EA08-Full_Report.pdf (last visited 12 March 2012).

UNSC thematic monitoring mechanisms

The UNSC has created separate monitoring mechanisms addressing conduct of ANSAs on children and armed conflict issues,⁴³ as well as sexual violence in armed conflict.⁴⁴

The next section analyses the international MRV mechanisms addressing non-states parties to conflict from the sources described above. It does not attempt to analyse whether the mechanisms have been effective in their implementation.

Who performs the MRV?

It is clear that MRV mechanisms limited to self-reporting are insufficient. ‘Trust, yet verify’ is the Russian proverb made famous by United States President Ronald Reagan regarding arms control. Nevertheless, the virtues of self-reporting should not be ignored.⁴⁵ It can strengthen a sense of ownership of the implementation process – especially important for ANSAs, who are generally excluded from formation of norms – and the process of self-critical reflection can result in new measures to improve compliance with substantive obligations.

Self-monitoring: Humanitarian agreements are the only international MRV mechanisms addressing ANSAs that contain self-MRV provisions. This is the case in three of the seven agreements analysed.⁴⁶ JEM commits to periodic monitoring, but no timeframe is included in the agreement.⁴⁷

External monitoring: As far as multilateral treaties are concerned, Article 90 of Additional Protocol I to the Geneva Conventions establishes the IHFFC, composed of fifteen members ‘of high moral standing and acknowledged impartiality’, while the Enquiry Procedure leaves it up to the parties to decide on the modalities.⁴⁸ In treaties where the conduct of ANSAs is addressed, and the mechanisms allow for formal or informal monitoring by NGOs, then ANSA conduct may be subject to external monitoring through NGO shadow reports. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict is one such example. In other mechanisms such as humanitarian agreements, external MRV is conducted by the UN,⁴⁹ ‘mediators’,⁵⁰ an international monitoring team,⁵¹ or mission personnel selected by the United

43 UN Security Council Resolution 1612, UN Doc. S/Res/1612, 26 July 2005, para. 3.

44 UN Security Council Resolution 1960, UN Doc. S/Res/1960, 16 Dec 2010, paras. 3 and 4. As this process is still being developed, it will not be addressed in this article.

45 ‘Opinions on the value of the system range from the view that it is an empty diplomatic ritual that should be disbanded, at one extreme, to the opposite view that, while the system is not flawless, it is a valuable tool in ensuring implementation’. P. Watts, above note 17, p. 221. On the virtues of self-reporting, see also below, pp. 690–692.

46 Bosnia-Herzegovina Agreement, Art. 5.2; CARHRIHL Agreement, Part V; JEM–UN Agreement, Art 1.2.

47 JEM–UN Agreement, Art. 1.2.

48 Arts. 52/53/132/149 of the Geneva Conventions.

49 San Jose Agreement, Art. X.

50 Mozambique–RENAMO Agreement, Art. V.

51 Philippines–MILF Agreement, Art. 2.

States and funding partners.⁵² The UNSC thematic mechanisms also allow for NGOs to contribute to the Monitoring and Reporting Mechanism (MRM); nevertheless, all information included in reports must be UN verified.⁵³ NGO monitoring is also central to the Philippines–MILF Agreement.⁵⁴

The only international mechanism that envisions both self and external MRV is the JEM–UN Agreement, although the ‘external’ MRV is to be performed by the UN – a party to the agreement yet not a party to the conflict.⁵⁵

Trigger mechanisms, consent, and sanctions for non-cooperation

A recent contributor to this *Journal* observed that ‘the history of international humanitarian law shows that states have consistently rejected any form of binding supervision of their conduct in armed conflict, especially in non-international conflicts’.⁵⁶ The Enquiry Procedure of the Geneva Conventions may be initiated at the request of only one party to the conflict, but, if the parties cannot agree on the procedure, they ‘should’ agree on an umpire. Far from a technicality, this could indefinitely delay the mechanism.⁵⁷ While the IHFFC contains a voluntary provision recognizing reciprocal jurisdiction, it would only be applicable in international armed conflicts, as it only applies between High Contracting Parties. Otherwise, consent by all parties is required to trigger the IHFFC.⁵⁸ Consequently, even if the Enquiry Procedure and/or the IHFFC would be operable in a non-international armed conflict, the result remains the same – there are no mandatory MRV provisions in multilateral treaties that address the conduct of ANSAs.

Other mechanisms generally go further towards incorporating binding provisions. The MRV components of two of the humanitarian agreements are mandatory and operate without the need for specific allegations to trigger the processes.⁵⁹ Parties to the Bosnia-Herzegovina Agreement undertake to open an enquiry when informed ‘of any allegation of violation of international humanitarian law’.⁶⁰ The Sudan–SPLM Agreement also contains a mandatory mechanism, but

52 Sudan–SPLM Agreement Art. 2(2)(e). The parties must agree to the selection, but agreement must not be unreasonably withheld.

53 Office of the Special Representative of the Secretary General for Children and Armed Conflict, UN Children’s Fund (UNICEF) and UN Department of Peacekeeping Operations (DPKO), *MRM Field Manual: Monitoring and Reporting Mechanism (MRM) on Grave Violations Against Children in Situations of Armed Conflict*, Section F.3.1 (‘Basics of verification for MRM’), August 2010, p. 22.

54 Art. 2 of the Philippines–MILF Agreement states, ‘the Parties shall designate humanitarian organizations and nongovernmental organizations, both international and national, with proven track record for impartiality, neutrality and independence, to carry out the civilian protection functions’.

55 JEM–UN Agreement, Art. 1.3.

56 T. Pfanner, above note 17, p. 307.

57 *Ibid.*, p. 285, ‘An enquiry procedure is provided for under the Geneva Conventions, but to date has never been used since its inception in 1929. Its dependence on the belligerents’ consent is doubtless one of the reasons why this mechanism has not been put to the test.’

58 Additional Protocol I to the Geneva Conventions, Art. 90(2)(a) and (d). See also 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*, ICRC/Martinus Nijhoff, Geneva/Dordrecht, 1987, para. 3626.

59 Philippines–MILF Agreement, Art. 2; JEM–UN Agreement, Arts. 1.2 and 1.3.

60 Bosnia-Herzegovina Agreement, Art 5.2.

with a higher threshold that is only triggered by alleged serious violations of the agreement, which include but are not limited to grave breaches as defined in the Geneva Conventions. Moreover, it is the overall co-ordinator of the Verification Mission who is empowered to decide when an alleged incident warrants investigation.⁶¹ Under the CARHRIHL Agreement, agreement by consensus by a Joint Monitoring Committee comprised of the parties to the conflict triggers investigation of alleged violations.⁶² The San Jose Agreement mechanism is not initiated until the cessation of the armed conflict.⁶³

Both UN ad hoc commissions were established after the fact to investigate alleged violations, and therefore the concept of triggers is not relevant. Neither requires consent of the parties. The Darfur Commission, established by UNSC resolution, calls upon all parties to co-operate with the Commission.⁶⁴ The resolution establishing the Gaza Mission, under the Human Rights Council, 'calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission'.⁶⁵ The co-operation of the ANSA is not addressed, which may be explained by the fact that the resolution itself originally only contemplated a fact-finding mission to investigate violations committed by the state, namely Israel.

The UNSC MRM mechanism does not require consent, and is formally triggered by the listing of a party to a conflict in the annexes to the UN Secretary-General's annual report on children and armed conflict.⁶⁶ At the time of writing, a party to a conflict should be listed if it violates international child use and recruitment obligations 'applicable to them',⁶⁷ and/or engages 'in contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed conflict'.⁶⁸ For an ANSA to be de-listed, it must enter into dialogue with the UN.⁶⁹ However, consent of the state party to the conflict is required for such dialogue. Without such consent, it seems that the ANSA will remain listed indefinitely, regardless of whether or not it ceases violations.⁷⁰

There is only one mechanism considered in this section to which a specific provision on sanctions for non-cooperation applies. UN Security Council

61 Sudan-SPLM Agreement, Art. 2.

62 CARHRIHL Agreement, Art. 3.

63 San Jose Agreement, Art. XIX.

64 UN Security Council Resolution 1564, UN Doc. S/Res/1564, 18 September 2004, para. 12.

65 Human Rights Council Resolution S-9/1, 12 January 2009, para. 14.

66 *MRM Field Manual*, above note 53, p. 5.

67 UN Security Council Resolution 1379, UN Doc. S/Res/1379, 20 November 2001, para. 16.

68 UN Security Council Resolution 1882, UN Doc. S/Res/1882, 4 August 2009, para. 3.

69 'As part of the de-listing process, a party to the conflict, whether a State or non-State actor, is required to enter into dialogue with the United Nations to prepare and implement a concrete, time-bound action plan to cease and prevent grave violations committed against children for which the party has been listed in the Secretary-General's report on children and armed conflict, in accordance with Security Council resolutions 1539 (2004), 1612 (2005) and 1882 (2009)'. Report of the UN Secretary-General to the Security Council, *Children and Armed Conflict*, UN Doc. A/64/742-S/2010/181, 13 April 2010, p. 179.

70 UN Security Council Resolution 1612, para. 2d. See also 'Letter dated 4 April 2007 from the Permanent Representatives of Myanmar, Nepal, the Philippines, Sri Lanka, the Sudan and Uganda to the United Nations addressed to the Secretary-General', UN Doc. A/61/845-S/2007/189.

Resolution 1564 contemplates the possibility of ‘additional measures’ against the state party, Sudan, if it fails to comply fully with the resolution – which would include failure to co-operate with the Darfur Commission.⁷¹ There is no mention of potential sanctions for non-cooperation of the non-state party, the SPLM.

Transparency of the mechanism

While none of the international mechanisms stipulate that the findings will remain confidential, only the Sudan–SPLM Agreement clearly states that MRV reports will be made public.⁷² Many humanitarian agreements do not address transparency of reporting,⁷³ and, although both of the UN ad hoc commissions publicized their reports, the resolutions pursuant to which they were established did not request them to do so. MRM reporting is partially transparent, as annual reports, the listing regime, and ad hoc country reports are public, while bi-monthly global horizontal notes and action plans are confidential.⁷⁴ The IHFFC may only publicly report its findings with the agreement of all parties to the conflict. Some of the other international mechanisms point to specific end users. For example, one humanitarian agreement stipulates that any substantiated violation may be communicated to the international community,⁷⁵ whereas another mandates the verification body ‘to use the media to the extent useful for the fulfilment of its mandate’.⁷⁶

Geneva Call and the *Deed of Commitment Banning AP Mines*

It is not surprising that the weakness of multilateral treaty-based MRV mechanisms addressing the conduct of ANSAs has spawned alternative approaches, such as some of the international mechanisms described above. This section focuses on the *Deed of Commitment*, an innovative MRV mechanism that has been developed by Geneva Call to supervise ANSA commitments on specific humanitarian norms. The section outlines the origins and work of this NGO, as well as the progress achieved to date. Subsequent sections then look in more detail at the MRV mechanisms provided for under the *Deed of Commitment Banning AP Mines* and the ways in which these mechanisms have been put into practice, with comparative attention paid to the Ottawa Convention. Two country cases studies are presented in associated boxes.

71 UN Security Council Resolution 1564, para. 14.

72 Sudan–SPLM Agreement, Art. 4(b).

73 CARHRIL Agreement, Philippines–MILF Agreement, and Bosnia–Herzegovina Agreement.

74 See *MRM Field Manual*, above note 53, p. 32. Note that MRM also contributes to other monitoring mechanisms such as the Universal Peer Review.

75 Mozambique–RENAMO Agreement, Art. VII.

76 San Jose Agreement, Art. XIV(k).

Geneva Call

In current armed conflicts, violations of humanitarian norms are widespread. Many of these violations – though by no means all – are committed by ANSAs. Yet, the state-centric nature of international law poses challenges when it comes to addressing their behaviour. First, existing international treaties and their implementation mechanisms remain predominantly focused on states. Second, even though they are bound by IHL, ANSAs cannot become parties to relevant international treaties, and they are generally precluded from participating in norm-making processes. Thus, ANSAs may not feel bound to respect rules that they have neither put forward nor formally adhered to.⁷⁷

Against this background, humanitarian actors have increasingly engaged with ANSAs in recent years. Through a variety of methods (such as advocacy, dialogue, negotiation, training, and capacity-building), UN agencies, the ICRC, and NGOs have sought to enhance ANSA compliance with international standards.⁷⁸ This practice of engagement is not new⁷⁹ but has expanded significantly since the 1990s.⁸⁰

Geneva Call's creation should be considered in this context. The initiative originated in the late 1990s from the International Campaign to Ban Landmines (ICBL) in response to the understanding that AP mines would not be eradicated

77 See Sandesh Sivakumaran, 'The ownership of international humanitarian law: non-state armed groups and the formation and enforcement of the rules', in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, University of British Columbia Press, Vancouver, 2012 (forthcoming).

78 For details, see Nicolas Florquin, Pascal Bongard, and Emilia Richard, 'Options for engagement: armed groups and humanitarian norms', in Small Arms Survey, *Small Arms Survey 2010: Gangs, Groups, and Guns*, Cambridge University Press, Cambridge, 2010, pp. 308–310.

79 As far back as 1871, Henry Dunant, one of the founders of the ICRC, engaged with leaders of the Paris Commune to negotiate the release of hostages taken by the insurgents. See Olivier Bangterter, 'The ICRC and non-state armed groups', in Geneva Call, Program for the Study of International Organization (PSIO), and UN Institute for Disarmament Research (UNIDIR), *Exploring Criteria and Conditions for Engaging Armed Non-state Actors to Respect Humanitarian Law and Human Rights Law*, Geneva Call, Geneva, 2008, p. 75.

80 The issue of ANSA compliance with humanitarian norms has also been the subject of many studies and seminars over the last decade. See, *inter alia*, Claude Bruderlein, *The Role of Non-state Actors in Building Human Security: The Case of Armed Groups in Intra-state Wars*, Centre for Humanitarian Dialogue, Geneva, 2000; David Petrasek (ed.), *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Geneva, 2000; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002; ICRC and College of Europe, *Relevance of International Humanitarian Law to Non-state Actors*, Collegium No. 27, Bruges, 2003 and *Improving Compliance with International Humanitarian Law*, Collegium No. 30, Bruges, 2004; Gerard McHugh and Manual Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, UN, New York, 2006; ICRC, *Improving Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2007; Coalition to Stop the Use of Child Soldiers, *International Forum on Armed Groups and the Involvement of Children in Armed Conflict*, London, 2007; International Institute of Humanitarian Law, *Non-state Actors and International Humanitarian Law: Organized Armed Groups: A Challenge for the 21st Century*, FrancoAngeli, Milano, 2010; Forced Migration Review, *Armed Non-state Actors and Migration*, No. 37, Refugee Studies Centre, Oxford, March 2011; and Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-state Actors*, Geneva, 2011. See also A. Clapham, above note 6, and Geneva Call, PSIO, and UNIDIR, above note 79.

unless ANSAs also renounced their use.⁸¹ This type of weapon has been used by more ANSAs than government forces in past years.⁸² Some armed groups have even manufactured their own mines or mine-like explosive devices. Moreover, the Ottawa Convention does not apply directly to ANSAs⁸³ but requires states parties to impose penal sanctions to suppress any activity prohibited under the Convention undertaken on territory under their jurisdiction or control.⁸⁴

While initially focusing on the AP mine ban, Geneva Call aims to engage ANSAs on wider humanitarian norms and its work has recently expanded to encompass the protection of children and the prohibition of sexual violence in armed conflict.⁸⁵ It has also increasingly responded to ANSA demands to help build their knowledge and enforcement capacities in IHL through customized training courses, sometimes delivered in collaboration with the ICRC, the International Institute of Humanitarian Law, and other partners.

In its efforts to address the lack of ownership of norms by ANSAs, Geneva Call has adopted an ‘inclusive’ approach, whereby ANSAs have the opportunity – through signing an innovative instrument named the *Deed of Commitment* – to declare formally their adherence to humanitarian norms and to pledge to respect them. The *Deed of Commitment* contains provisions similar to those in international treaties. It is signed by the ANSA leadership and countersigned by Geneva Call and the Government of the Republic and Canton of Geneva, usually at a ceremony in the Alabama Room in Geneva’s City Hall, where the first Geneva Convention was adopted in 1864.⁸⁶ The signed documents are deposited with the Canton of Geneva, which serves as custodian of the *Deed of Commitment*. For Geneva Call, engaging ANSAs is a long-term effort: it involves constructive and sustained dialogue to persuade them to sign the *Deed of Commitment*, and continues after signature through supporting its implementation and monitoring compliance. The *Deed of Commitment* does not in itself guarantee a better respect of humanitarian norms but provides a useful tool to hold signatories accountable for their pledge.

81 On the origins of Geneva Call, see ICBL, *Landmine Monitor Report 1999: Toward a Mine-free World*, Human Rights Watch, New York, 1999, pp. 940–945; Swiss Campaign to Ban Landmines, *Engaging Non-state Actors in a Landmine Ban: A Pioneering Conference*, Quezon City, 2001, pp. 137–138; Yeshua Moser-Puangsuwan, ‘Outside the treaty not the norm: non-state armed groups and the landmine ban’, in Jody Williams, Stephen D. Goose, and Mary Wareham (eds), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*, Rowman & Littlefield Publishers, Lanham, MD, 2008, pp. 166–169.

82 Landmine Monitor has identified ANSA use of AP mines in at least twenty-eight countries from 1999 to 2009. The armed groups that have made the most extensive use of AP mines and improvised explosive devices are probably the Revolutionary Armed Forces of Colombia (FARC) and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, followed by the Karen National Liberation Army (KNLA) in Myanmar/Burma. In comparison, Landmine Monitor identified twenty-one governments that have allegedly used AP mines during the same period. See ICBL, *Landmine Monitor Report 2009: Toward a Mine-free World*, Mine Action Canada, Ottawa, 2009, p. 10.

83 On ANSAs obligations towards the Ottawa Convention, see Kathleen Lawand, ‘Non-state actors and the mine ban: the Ottawa Convention framework’, in Italian Campaign Against Landmines, *Beyond States: Engaging Non-state Armed Groups for a Truly Effective Mine Ban*, Rome, 2005, pp. 17–22.

84 Ottawa Convention, Art. 9.

85 The development beyond the AP mine issue was foreseen from the outset in the statutes of Geneva Call (Art. 3).

86 For a discussion on the legal status of the *Deed of Commitment*, see A. Clapham, above note 6, pp. 291–299.



Figure 1. Signing of the Geneva Call *Deed of Commitment Banning AP Mines* by the *Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie* (CNDD-FDD), in the presence of the Ambassador of the Republic of Burundi to Switzerland, Geneva, Alabama Room, 15 December 2003. Photo: Geneva Call.

To date, Geneva Call has developed two such instruments: the *Deed of Commitment Banning AP Mines* in 2000 and the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* in 2010.⁸⁷ This article does not look at the latter as there is no MRV experience with this instrument as yet.

The *Deed of Commitment Banning AP Mines*

The *Deed of Commitment Banning AP Mines* mirrors states obligations under the Ottawa Convention. In signing it, ANSAs indicate their willingness to prohibit the use, production, stockpiling, and transfer of AP mines, under all circumstances.⁸⁸ Signatories also commit to destroy any AP mine stocks that they may have,⁸⁹ to cooperate in and, where feasible, undertake mine action activities (mine clearance, victim assistance, and mine-risk education),⁹⁰ and to take necessary measures (orders, disciplinary sanctions, training, and dissemination measures) to enforce

87 The text of the two *Deeds of Commitment* is available on the Geneva Call website: <http://www.genevacall.org> (last visited 12 March 2012). A third *Deed of Commitment*, on the prohibition of sexual violence and gender discrimination, will be launched this year.

88 Geneva Call, *Deed of Commitment Banning AP Mines*, Art. 1. Under this article, all devices that effectively explode by the presence, proximity, or contact of a person are prohibited. This includes commercially manufactured AP mines, victim-activated improvised explosive devices, booby traps, and anti-vehicle mines that can be triggered by the weight of a person.

89 *Ibid.*, Arts. 1 and 2.

90 *Ibid.*, Art. 2.

compliance.⁹¹ Moreover, the *Deed of Commitment* contains an MRV provision, which includes a self-reporting requirement and, more radically, an agreement to allow for external monitoring of compliance, including field verification missions, by Geneva Call.⁹² This is discussed in depth below.

In addition to these provisions, which form the core obligations of the *Deed of Commitment Banning AP Mines*, signatories agree to consider their commitment to the mine ban as one step or part of a broader pledge to humanitarian norms.⁹³ This clause provides a basis for Geneva Call to engage ANSAs on other humanitarian issues. Signatories also recognize that, pursuant to Common Article 3 to the Geneva Conventions, adhering to the *Deed of Commitment* does not affect their legal status.⁹⁴ No sanctions are foreseen apart from the possibility for Geneva Call to publicize non-compliance in case of confirmed violations or in the event that the signatory does not co-operate in the MRV process, which is in itself a breach of the *Deed of Commitment*.⁹⁵

As of February 2012, forty-one ANSAs from ten different countries and territories (Myanmar/Burma, Burundi, India, Iraq, Iran, the Philippines, Somalia, Sudan, Turkey, and Western Sahara) have signed the *Deed of Commitment Banning AP Mines*.⁹⁶ Overall, their compliance record has been good. Except in one case,⁹⁷ no conclusive evidence of violation of the prohibition on the use, production, acquisition, and transfer of AP mines has been found by Geneva Call. The majority of signatories have carried out, or facilitated, mine action activities in areas under their control.⁹⁸ *Altogether, they have destroyed over 20,000 stockpiled AP mines to date, along with thousands of improvised explosive devices and abandoned explosive ordnance.* In addition, as a result of the efforts of Geneva Call and its partners, several other ANSAs that have not signed the *Deed of Commitment Banning AP Mines* have nonetheless pledged to prohibit or limit the use of AP mines, either unilaterally or within a ceasefire agreement with the government.⁹⁹

91 *Ibid.*, Art. 4.

92 *Ibid.*, Art. 3.

93 *Ibid.*, Art. 5.

94 *Ibid.*, Art. 6.

95 *Ibid.*, Art. 7.

96 See the full list of signatories on Geneva Call's website: <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm> (last visited 12 March 2012). Note that nineteen of the forty-one signatories are no longer active. Some of them have become part of state's authorities while the others have either dissolved or abandoned armed struggle.

97 See below, pp. 699–701.

98 For details on signatories' implementation of the *Deed of Commitment Banning AP Mines*, see Geneva Call, *Engaging Armed Non-state Actors in a Landmine Ban: The Geneva Call Progress Report (2000–2007)*, Geneva Call, Geneva, 2007, pp. 14–19, and Geneva Call, *Non-state Actor Mine Action and Compliance to the Deed of Commitment banning Anti-Personnel Landmines (January 2008–June 2010)*, Geneva Call, Geneva, 2010.

99 See Geneva Call, *Engaging Armed Non-state Actors*, above note 98, pp. 7–8. According to ICBL, the use of AP mines by ANSAs was confirmed in four countries (Afghanistan, Colombia, Myanmar, and Pakistan) in 2010–2011. This is the lowest number of countries with recorded ANSA use ever reported by Landmine Monitor since 1999. See ICBL, *Landmine Monitor 2011: Toward a Mine-free World*, Mine Action Canada, Ottawa, 2011, p. 12.

Engaging ANSAs has not been without its challenges and controversy¹⁰⁰ but, over the years, Geneva Call has won international recognition and support for its efforts, notably from states parties to the Ottawa Convention,¹⁰¹ the UN,¹⁰² the European Union,¹⁰³ and the African Union.¹⁰⁴

The *Deed of Commitment* MRV mechanisms

The key provision in respect of monitoring and verifying compliance with the terms of the *Deed of Commitment Banning AP Mines* is Article 3.¹⁰⁵ This Article obliges signatories to

allow and cooperate in the monitoring and verification of [their] commitment by Geneva Call and other independent international and national organizations associated for this purpose with Geneva Call. Such monitoring and verification includes field visits and inspections in all areas where anti-personnel mines may be present, and the provision of the necessary information and reports, as may be required for such purposes in the spirit of transparency and accountability.

Based on Article 3, Geneva Call has devised a three-pronged system to monitor compliance with the *Deed of Commitment*: self-reporting, third-party monitoring, and field missions. These mechanisms, which constitute the heart of the *Deed of Commitment* compliance regime, are detailed here, considered in relation to the three criteria given at the beginning of the article, and compared in turn with the Ottawa Convention MRV system and actual practice.

100 See Pascal Bongard, 'Engaging armed non-state actors on humanitarian norms: the experience of Geneva Call and the landmine ban', in Geneva Call, PSIO, and UNIDIR, above note 79, pp. 116–119.

101 See for example the Declaration of the Fifth Meeting of the States Parties, 19 September 2003, APLC/MSP.5/2003/5, para. 12. See also the Review of the Operation and Status of the Convention: 1999–2004 APLC/CONF/2004/5, Part II, para. 9 and the Review of the Operation and Status of the Convention: 2005–2009, APLC/CONF/2009/9, para. 24.

102 *Report of the Secretary-General on the protection of civilians in armed conflict*, UN Doc. S/2009/277, 29 May 2009, para. 43 and UN Doc. S/2010/579, 11 November 2010, para. 53.

103 See European Parliament resolutions, Measures to Promote a Commitment by Non-state Actors to a Total Ban on Anti-Personnel Landmines, B5-0542/2001, 6 September 2001; Review of Ottawa Treaty on Anti-Personnel Mines, B5-0215/2004, 22 April 2004; A Mine-free World, B6-0414/2005, 7 July 2005; and 10th Anniversary of the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, B6-0518/2007, 13 December 2007. The European Commission has also regularly expressed political support for Geneva Call's work during meetings of states parties to the Ottawa Convention.

104 African Union, Common African Position on Anti-Personnel Landmines, adopted at the 2nd Continental Conference of African Experts on Landmines, 17 September 2004, para. 9(xi), available at: http://www.nairobisummit.org/fileadmin/pdf/review_conference/regional_conference/addis/AU_Common_African_Position_17Sept04_FINAL_E.pdf (last visited 12 March 2012).

105 Note that the MRV provision in the two *Deeds of Commitment* is substantially the same. See Art. 9 of the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict*.

Self-reporting

The first element of the *Deed of Commitment* compliance regime is the provision of information by signatories as to the implementation of their obligations. Article 3 does not stipulate the form or method of transmission of such information to Geneva Call, nor does it specify the timeframe, but in practice this has been done on a continual basis through written correspondences (emails, letters, reports, etc.), verbal communications, and statements at Meetings of Signatories to the *Deed of Commitment*.¹⁰⁶

In addition, Geneva Call designed a standardized reporting form for signatories in 2004, modelled on the Ottawa Convention Article 7 transparency reports,¹⁰⁷ which require states parties to report on their compliance.¹⁰⁸ Information to be supplied in Geneva Call's form includes: possible cases of violations of the prohibition obligations, enforcement measures, numbers and types of AP mines stockpiled, progress in mine action activities (including stockpile destruction), and information on other humanitarian commitments and policies. Following discussions at the second Meeting of Signatories to the *Deed of Commitment*, the template was further refined to make it more comprehensive and user-friendly. In particular, tick boxes were included, to allow signatories to respond to the principle questions on one page and provide additional information in separate annexes.

The purpose of these mandatory self-reporting measures is to assess progress in the implementation of the *Deed of Commitment*, and to identify challenges as well as assistance needs. Geneva Call plays a supervisory role; it compiles and reviews all the data provided by signatories and, when necessary, requests clarifications or additional details, and make recommendations. A summary of this information is publicized in its reports, communiqués, and statements.¹⁰⁹ In contrast to the Article 7 transparency reports, standard compliance reports completed by signatory ANSAs have not yet been made public, but Geneva Call will do so in the near future.¹¹⁰

For comparison, there is no standing institutional body mandated under the Ottawa Convention to oversee the transparency reports provided by states parties. The reports are submitted to the UN Secretary-General, the depositary of the Convention, who is only required to transmit them to the states

106 Geneva Call has convened two such meetings to date, in 2004 and 2009 in Geneva. These meetings are similar to the Meetings of States Parties and Review Conferences provided in Arts. 11 and 12 of the Ottawa Convention.

107 See Ottawa Convention, Art. 7. The first Meeting of States Parties, held in Mozambique in 1999, adopted standard forms for reporting under Art. 7. See Angela Woodward, 'The United Nations' role in implementing the compliance aspects of the Ottawa Convention', in ICBL, *Landmine Monitor Report 2000: Toward a Mine-free World*, Human Rights Watch, New York, 2000, p. 1083.

108 Each state party must submit an initial report to the UN Secretary-General, the Convention's depositary, no later than 180 days after the Convention enters into force and then provide annual updates by 30 April each year.

109 All these documents are available on Geneva Call's website, <http://www.genevacall.org>, under the section 'resources'. See in particular Geneva Call progress and annual reports.

110 Sensitive information, however, such as the location of stockpiles, will not be communicated.

parties.¹¹¹ However, annual Meetings of States Parties and Review Conferences, as well as the intersessional work programme,¹¹² offer important opportunities for review and monitoring, including on matters arising from the Article 7 transparency reports. In 2000, states parties also established an informal Contact Group on Article 7 to promote compliance with their reporting obligation. Furthermore, as part of its mandate to provide secretariat services and support to the Ottawa Convention and its states parties, the Implementation Support Unit (ISU)¹¹³ has been instructed, on behalf of successive Presidents of the Convention, to summarize the information contained in the transparency reports and to publicize this information.¹¹⁴

In practice, nearly all signatories to the *Deed of Commitment Banning AP Mines* (thirty-eight out of forty-one) have abided by their reporting obligation, providing information and reports to Geneva Call on their implementation.¹¹⁵ This represents a rate of compliance of 93%. The three signatories that did not fulfil their requirements dissolved shortly after their signing of the *Deed of Commitment* and did not report on their implementation while still active. For comparison, though the requirements are more stringent, all states parties to the Ottawa Convention but one (155 out of 156) have submitted initial transparency reports in compliance with Article 7 (99%), while the rate for annual updates has ranged between 54% and 79% since 1999.¹¹⁶

As with states parties to the Ottawa Convention, the quality of information supplied by signatories to the *Deed of Commitment* has varied considerably. Some reports have been quite comprehensive and have included many details, not only on the required issues but also on the general landmine situation, the origins of the problem, and the needs for assistance. Other signatories, on the other hand, have provided only scant or fragmentary information.¹¹⁷

111 This has been done through a database, which is accessible not just to states parties but also to the general public at: <http://www.unog.ch/80256EE600585943/%28http://Pages%29/A5378B203CBE9B8CC12573E7006380FA?OpenDocument> (last visited 12 March 2012).

112 The intersessional work programme was established at the First Meeting of the States Parties in 1999. At this meeting, the states parties recognized the importance of having intersessional Standing Committees of Experts on issues related to the operation of the Ottawa Convention. Subsequently, states parties established the intersessional work programme made up of thematic Standing Committees, which focus on key elements of treaty implementation (general status and operation of the Convention, stockpile destruction, mine clearance, and victim assistance).

113 Pursuant to a decision of states parties, the ISU was established in 2001 by the Geneva International Centre for Humanitarian Demining (GICHD) to support the operation and implementation of the Convention. See <http://www.apminebanconvention.org/implementation-support-unit/overview> (last visited 12 March 2012).

114 E-mail from Kerry Brinkert, ISU Director, 1 August 2011. For more details on the Ottawa Convention's implementation machinery, see Kerry Brinkert, 'An emphasis on action: the Mine Ban Treaty's implementation mechanisms', in J. Williams, S. D. Goose, and M. Wareham, above note 81, pp. 87–104.

115 See Geneva Call, *Non-state Actor Mine Action*, above note 98, p. 11.

116 Landmine and Cluster Munitions Monitor fact sheet, 'Transparency Reporting (Article 7)', November 2010, available at: <http://www.the-monitor.org/index.php/content/view/full/24553> (last visited 12 March 2012). This does not include the recent accession of three additional states as, at the time of writing, the Convention has not yet entered into force for these countries.

117 For example, Geneva Call has experienced difficulties in obtaining precise information from some signatories on the total number of stockpiled mines in their possession. See Geneva Call, *Engaging Armed Non-state Actors*, above note 98, pp. 28–29.

To date, Geneva Call has requested clarification from six signatories regarding allegations of non-compliance with the *Deed of Commitment Banning AP Mines*.¹¹⁸ All ANSAs provided responses, four of them after having conducted an internal investigation to clarify the circumstances of suspicious mine incidents. By contrast, the Ottawa Convention's compliance provisions contained in Article 8 have never been formally invoked to clarify compliance concerns.¹¹⁹ Nearly all cases have been addressed in a manner consistent with paragraph 1 of Article 8, through ad hoc informal consultations.¹²⁰ However, two states parties reportedly carried out investigations into allegations of use.¹²¹

Third-party monitoring

In addition to signatory ANSAs, Geneva Call gathers relevant information from a range of third-party actors (e.g. governments, media, international, NGOs, and civil society organizations) to monitor signatories' compliance with the *Deed of Commitment*. The information is collected either remotely or through field missions. It is a continuous process, involving a systematic tracking of developments on the ground. Allegations of a signatory ANSA's non-compliance with the terms of the *Deed of Commitment* usually emanate from one of these third-party sources. In such an instance, Geneva Call initially seeks a response to the allegations from the signatory and simultaneously consults with other sources.

The possibility of third-party monitoring is mentioned in the *Deed of Commitment's* text. Article 3 requires signatories 'to cooperate in the monitoring of their commitment by Geneva Call and other independent organizations associated for this purpose with Geneva Call'.¹²² Such other organizations are not defined but may include, for example, Geneva Call's local partners, such as ICBL country campaigns. Moreover, a number of ANSAs have stressed during Meetings of Signatories to the *Deed of Commitment* the importance of neutral, external monitoring, especially when investigating allegations originating from other parties to the conflict.¹²³

In practice, since its creation in 2000, Geneva Call has developed growing links with third-party actors present in areas where signatories operate, in particular with the ICBL and its Landmine Monitor's network,¹²⁴ mine action NGOs, and bodies monitoring ceasefire agreements, human rights, and IHL. Such links

118 *Ibid.*, p. 26; Geneva Call, *Non-state Actor Mine Action*, above note 98, p. 6.

119 ICBL, above note 99, p. 3.

120 Stephen D. Goose, 'Goodwill yields good results: cooperative compliance and the mine ban treaty', in J. Williams, S. D. Goose, and M. Wareham, above note 81, pp. 108–109.

121 ICBL, *Landmine Monitor Report 2002: Toward a Mine-free World*, Human Rights Watch, New York, 2002, p. 502; ICBL, *Landmine Monitor 2010: Toward a Mine-free World*, Mine Action Canada, Ottawa, 2010, pp. 3–4; ICBL, above note 99, pp. 3–4.

122 Emphasis added.

123 See the report of the first Meeting of Signatories to the *Deed of Commitment*, Geneva Call, PSIO, and Armed Groups Project, *An Inclusive Approach to Armed Non-state Actors and International Humanitarian Norms*, Geneva Call, Geneva, 2005, pp. 20–21.

124 The Landmine Monitor is an initiative of the ICBL created in 1998 to report on the universalization and implementation of the Ottawa Convention. In 2009, the Landmine Monitor changed its name to the

developed over the years have proved useful in monitoring implementation, particularly in areas where access is problematic and there have been concerns of non-compliance. Third-party actors have assisted in cross-checking information reported by signatory ANSAs; they have also drawn Geneva Call's attention to mine incidents and helped to verify allegations of violations. Several compliance issues were successfully resolved thanks to third-party sources.¹²⁵ In other cases, however, third-party informants have been unable or reluctant to provide precise information, citing the necessity to protect their sources or to safeguard their operational space. Moreover, local sources – in particular local media – often lack the necessary details or may be biased towards one side of the conflict.¹²⁶

The Ottawa Convention contains no mechanism for external monitoring, as is the case in other weapons treaties, but a number of third-party actors, such as the ISU and the ICRC, have monitored the Convention's operation in practice. Moreover, NGOs (especially the ICBL) have assumed an important watchdog role. Although it is not formally recognized in the treaty text, over the years the Landmine Monitor has become an accepted part of the compliance monitoring process.¹²⁷ Its independent reporting has complemented the states parties' transparency reports required under Article 7 and has enhanced the capabilities of the official system for detecting potential violations and promoting compliance.

Field missions

The third mechanism – field missions – is the main element of the *Deed of Commitment's* MRV machinery. Such missions are conducted on a routine basis to follow up on implementation of the *Deed of Commitment* (monitoring missions) or to verify compliance in the event of allegations of violations (verification missions).

As with the Ottawa Convention, the *Deed of Commitment Banning AP Mines* does not specify the precise circumstances under which a monitoring or verification mission may be triggered. However, whereas under the Convention the deployment of a fact-finding mission depends on the activism and agreement of other states parties to make use of Article 8,¹²⁸ Geneva Call can decide *on its own discretion* when circumstances warrant field investigation. No further approval is

Landmine and Cluster Munition Monitor to reflect its decision to report on the Oslo Convention in addition to the Ottawa Convention.

125 Geneva Call, *Non-state Actor Mine Action*, above note 98, p. 11, and Geneva Call newsletter No. 3, Vol. 6, November 2008, p. 3.

126 Media reports are frequently inaccurate regarding the circumstances of incidents involving the use of explosive devices (types of device used, mode of activation, etc.). These details are critical for determining whether the incidents constitute a possible violation of the *Deed of Commitment Banning AP Mines*. In some countries, Geneva Call has provided training to the local journalists to enhance the accuracy of their reporting.

127 Mary Wareham, 'Evidence-based advocacy: civil society monitoring of the Mine Ban Treaty', in J. Williams, S. D. Goose, and M. Wareham, above note 81, p. 60. See also <http://www.the-monitor.org> (last visited 12 March 2012).

128 Article 8 provides for the possibility of sending a fact-finding mission without the consent of the concerned state, but this must be agreed by a majority of states parties. See below, p. 694.

required from signatories, since consent to facilitate ‘visits and inspections’ has already been granted at the time of their signing of the *Deed of Commitment*.¹²⁹ In the event of allegations of violations, it is normally in situations where the allegations are credible and point to a serious breach of the *Deed of Commitment*, and where information gathered from third-party actors is inconclusive. The verification mission would naturally involve discussions with concerned stakeholders, confronting the signatory ANSA with the allegations, and, where possible, investigating facts on the spot and interviewing victims and witnesses of incidents.

With respect to the Ottawa Convention, Article 8 – its longest provision – establishes a procedure that states parties can use in order to address concerns about the compliance with the Convention by another state party.¹³⁰ As its first paragraph makes clear, this Article is founded on the preference by states parties ‘to work together in a spirit of cooperation to facilitate compliance by states parties with their obligations’ under the Convention.¹³¹ If this co-operative approach fails, one or more states parties may submit a ‘request for clarification’ to the suspected state, through the UN Secretary-General. If there is no response or an unsatisfactory response by the requested state within twenty-eight days, the matter may be taken up at the next Meeting of States Parties or a Special Meeting may be convened. States parties may then decide, by majority vote, to send an obligatory ‘fact-finding mission’ to the territory of the state in question to gather additional information for use in determining compliance.

In contrast to Article 8 of the Ottawa Convention, Article 3 of the *Deed of Commitment Banning AP Mines* does not specify the duties of the signatory during a verification mission, the composition of the visiting team, the duration of the mission, or the reporting procedure. It only states that the mission is to be granted access to all areas where relevant facts might be expected to be collated. Signatory ANSAs, unlike states parties to the Ottawa Convention,¹³² have no right to limit access to information, equipment, or areas that it deems sensitive. Only imperative security considerations may justify restrictions.

At the conclusion of a verification mission, Geneva Call meets with the relevant ANSA to present the results of its investigation and to discuss the appropriate measures, if any, to be undertaken. In accordance with the *Deed of Commitment* and Geneva Call transparency policy, the mission’s findings are then

129 *Deed of Commitment Banning AP Mines*, Art. 3.

130 For a critical analysis of the Ottawa Convention MRV mechanisms, especially Article 8, see Trevor Findlay, ‘Verification of the Ottawa Convention: workable hybrid or fatal compromise?’, in *Disarmament Forum*, UNIDIR, Geneva, No. 4, September 1999, pp. 45–55; Angela Woodward, ‘Verifying the Ottawa Convention’, in *Verification Yearbook 2001*, VERTIC, London, 2001, pp. 99–115. See also Thomas Hajnoczi, Thomas Desch, and Deborah Chatsis, ‘The Ban Treaty’, in Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin (eds), *To Walk Without Fear: The Global Movement to Ban Landmines*, Oxford University Press, Oxford, 1998, pp. 301–304; David Atwood, *Promoting Compliance: Observations on the Anti-Personnel Mine Ban Convention*, Geneva Centre for Security Policy, Geneva, No. 17, 2000; Stuart Maslen, *Commentaries on Arms Control Treaties, Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction*, Oxford University Press, Oxford, 2004, pp. 209–242; S. D. Goose, above note 120, pp. 106–110.

131 Ottawa Convention, Art. 8(1).

132 S. Maslen, above note 130, p. 238; A. Woodward, above note 130, p. 102.

publicly reported. Under Article 7, signatories accept that 'Geneva Call may publicize [signatories'] compliance or *non-compliance* with the *Deed of Commitment*'.¹³³ In the event that the signatory is found responsible for violations and refuses to implement the corrective actions recommended by the verification mission, Geneva Call may resort to a public denunciation. This is a measure of last resort that Geneva Call may take depending on the gravity of the violation and its potential impact on the behaviour of the non-compliant signatory.

With regards to the Ottawa Convention, Article 8 requires the fact-finding mission to report the results of its findings to the annual Meeting of States Parties or the Special Meeting of States Parties. States parties may then, by a two-thirds majority if consensus cannot be reached, request the state party concerned to take actions to address the compliance issue and, if this is not achieved, suggest further measures to resolve the issue, including 'the initiation of appropriate procedures in conformity with international law'.¹³⁴

In practice, Geneva Call has conducted periodic field visits to twenty-nine signatory ANSAs so far.¹³⁵ Most of these visits were routine follow-up missions aimed at monitoring and/or supporting implementation of the *Deed of Commitment Banning AP Mines*: observance of stockpile destruction operations, training on the *Deed of Commitment*'s obligations, implementation workshops, and so forth. They have sometimes included mine action specialists working with partner organizations. No signatory has ever refused to receive a Geneva Call delegation, even following allegations of non-compliance. On the contrary, ANSAs have generally facilitated field missions, by appointing focal persons during the visit, arranging meetings with relevant interlocutors, and/or providing local transportation. Some have even disclosed their weapons stockpiles.¹³⁶ Out of the twelve signatories that have not been visited by Geneva Call, seven dissolved shortly after their signing of the *Deed of Commitment*. With regard to the other five, access has not been denied by the signatory but rather by the concerned states, though in some cases Geneva Call's local partner organizations were able to meet with signatories on their territory.

No routine monitoring missions are formally envisaged under the Ottawa Convention¹³⁷ but in practice some of the work done by UN agencies, the ISU, ICBL, and other entities is indirectly related to the verification provisions of the Convention. For example, assessment missions conducted by UN agencies in mine-affected states often ascertain new information for those states' Article 7

133 *Deed of Commitment Banning AP Mines*, Art.7, emphasis added.

134 Ottawa Convention, Art. 8(19). These procedures are not spelled out but, according to Trevor Findlay, they are a 'commonly used euphemism for the imposition of some form of sanction such as suspension of treaty benefits or referral of the matter to the Security Council or the International Court of Justice'. See T. Findlay, above note 130, p. 46.

135 Geneva Call, *Non-state Actor Mine Action*, above note 98, p. 11.

136 Monitoring missions have not necessarily always included on-site inspections of signatories' weapons stockpiles.

137 For Trevor Findlay, 'with no continuous, routine monitoring or inspection system, any request for a fact-finding mission is bound to be seen as politically inflammatory, however reasonable the grounds for the request. The fact that the treaty portrays a fact-finding mission as a last resort in case of alleged non-compliance would further increase its political saliency and makes it less likely that one will ever be initiated'. See T. Findlay, above note 130, p. 47.

reports.¹³⁸ Landmine Monitor researchers also routinely monitor implementation of the Ottawa Convention by states parties.

Since 2000, there have only been a few occasions where it has been necessary for Geneva Call to conduct actual field verification missions. These were in 2002 and 2009 in Mindanao, southern Philippines, to investigate allegations of AP mine use by the Moro Islamic Liberation Front (MILF), and in 2007 in Puntland, north-east Somalia, to verify reports of AP mine acquisition from Ethiopia. The context and findings of these verification missions are detailed in the case studies below. In one other case, an on-site visit could not be undertaken owing to the concerned state's opposition.¹³⁹ Preliminary enquiries were nonetheless made by local partners inside the country. As mentioned earlier, except in one case, Geneva Call has found no conclusive evidence to support the allegations.¹⁴⁰

For comparison, no similar fact-finding mission has ever been conducted under Article 8 of the Ottawa Convention, in spite of serious and credible allegations of use and transfer of AP mines by several states parties.¹⁴¹

Case study 1: Geneva Call verification mission in Puntland, Somalia

The Puntland authorities signed the *Deed of Commitment Banning AP Mines* in 2002, along with fifteen other Somali ANSAs. Somalia is not yet party to the Ottawa Convention. In November 2006, the UN Monitoring Group on Somalia, a body that monitors the arms embargo, reported that the Puntland authorities had received from Ethiopia – a state party to the Convention – 180 AP mines and 340 unspecified landmines as part of a larger arms shipment.¹⁴² At that time, Puntland was preparing to enter into combat against the Islamic Courts Union (ICU), which controlled most of south and central Somalia.

Pursuant to Article 3 of the *Deed of Commitment Banning AP Mines*, Geneva Call requested clarification from the Puntland authorities, which categorically denied the allegations.¹⁴³ The Ethiopian government similarly denied the charges in the reports.¹⁴⁴ Meanwhile, Geneva Call sought additional information from the Monitoring Group itself, in particular regarding their source of information and the types of mines reportedly transferred, but did not obtain a response. Enquiries by the Presidents of the Seventh and Eighth Meetings of

138 A. Woodward, above note 130, p. 103.

139 Geneva Call, *Engaging Armed Non-state Actors*, above note 98, pp. 28–29.

140 See below, pp. 699–701.

141 See ICBL, above note 82, pp. 10–15; ICBL, *Landmine Monitor 2010*, above note 121, pp. 3–4; ICBL, above note 99, pp. 3–4. See also S. D. Goose, above note 120, pp. 111–114.

142 Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1676, UN Doc. S/2006/913, 22 November 2006, paras. 68 and 75.

143 Letter from Hassan Dahir Mohamud, Vice-President of the Puntland State of Somalia, to Geneva Call, 10 January 2007.

144 ICBL, *Landmine Monitor Report 2007: Toward a Mine-free World*, Mine Action Canada, Ottawa, 2007, pp. 384–385.

States Parties to the Monitoring Group in respect of the allegations against Ethiopia went similarly unanswered.¹⁴⁵ Geneva Call also contacted other actors that operate in Somalia about the report. No-one could corroborate or disprove the arms transfer but some expressed doubts regarding the reliability of other allegations contained in the report. No AP mines were reported to have been used in late 2006 during the fighting between Puntland armed forces and the ICU militia.

Nonetheless, the allegations were considered both serious and detailed enough to necessitate field verification and, in July 2007, a Geneva Call team visited Puntland to this effect. The mission was supposed to take place earlier but was delayed owing to security concerns and the lack of availability of specialists in stockpile destruction. Indeed, Geneva Call originally intended to take advantage of the visit to both address the allegations and assist the authorities in destroying forty-eight stockpiled AP mines that had been previously declared.¹⁴⁶ However, no partner organizations had technical experts available at that time and, in the end, the mission involved solely Geneva Call staff, including an ammunition and small arms specialist, as well as members of the Puntland Mine Action Centre (PMAC). During meetings with Geneva Call in Garowe, M. Jama Hersi Farah, Minister of State for Security, reiterated Puntland's respect of the *Deed of Commitment* obligations and the need for technical assistance in stockpile destruction. Geneva Call also discussed the allegations with Colonel Abdisamad Ali Shire, General Commander of Puntland's armed forces, who denied having acquired new AP mines and, in an unprecedented move, allowed the inspection of weapons stockpiles in several military camps cited in the Monitoring Group's report. In Galkayo, Geneva Call found twelve anti-vehicle mines and large amounts of unsafe abandoned explosive ordnance – including BM-21 rockets and white-phosphorus bombs – requiring urgent disposal. No banned devices were identified. In Garowe, Geneva Call was able to verify that the forty-eight PMP-71 AP mines that the Puntland authorities had disclosed to Geneva Call in 2004 remained in storage.¹⁴⁷ It was therefore concluded that there was no evidence to indicate that a violation of the *Deed of Commitment* had occurred.¹⁴⁸

Following on from these enquiries, Geneva Call facilitated the deployment of the Mines Advisory Group (MAG), a British technical organization, to ensure the destruction of the stockpiled AP mines, as well as the unsafe ammunition that had been identified during the inspection. In co-operation with PMAC, MAG destroyed the forty-eight PMP-71 mines

145 ICBL, *Landmine Monitor Report 2008: Toward a Mine-free World*, Mine Action Canada, Ottawa, 2008, p. 1005.

146 See Geneva Call, *Landmines in Somalia: Report of the Geneva Call follow up mission to Puntland, Hiran and Bakol regions, 15–27 September 2004*, Geneva Call, Geneva, 2005, pp. 9 and 13.

147 *Ibid.*

148 Geneva Call press release, 'Somalia: Puntland authorities grant unprecedented access to their stockpiles, request international assistance for humanitarian mine action', 30 September 2007, available at: <http://www.genevacall.org/news/press-releases/f-press-releases/2001-2010/2007-30sep-gc.htm> (last visited 12 March 2012).

in July 2008.¹⁴⁹ This was the first officially recorded destruction of AP mine stocks in Puntland. Subsequently, MAG and PMAC destroyed an additional 460 AP mines,¹⁵⁰ as well as several tonnes of abandoned ordnance held in Galkayo military camps,¹⁵¹ thus reducing the likelihood of accidental detonation.

In conclusion, while it is very challenging to verify allegations of AP mines acquisition and to know whether all stockpiles have been declared, Geneva Call was able to witness the co-operative attitude of the Puntland authorities, who demonstrated transparency and good faith and proceeded with the destruction of their AP mines stocks. Conversely, according to the ICBL,¹⁵² the allegations of transfer from Ethiopia were seemingly not pursued vigorously by states parties, and no fact-finding mission was conducted into this country under Article 8 of the Ottawa Convention.



Figure 2. Puntland forces hand over stockpiled AP mines to MAG for destruction, in compliance with the Geneva Call *Deed of Commitment Banning AP Mines*, Garowe, Somalia, July 2008. Photo: MAG Somalia.

149 Geneva Call/MAG/PMAC press release, 'Somalia: Puntland authorities destroy anti-personnel mines', 24 July 2008, available at: <http://www.genevacall.org/news/press-releases/f-press-releases/2001-2010/2008-24jul-gc-mag.pdf> (last visited 12 March 2012).

150 MAG, 'Somalia: munitions stockpile clearance in Puntland', 1 May 2009, available at: <http://www.maginternational.org/MAG/en/news/somalia-munitions-stockpile-clearance-in-puntland/> (last visited 12 March 2012); MAG, 'Somalia: largest haul of mines destroyed', 17 February 2011, available at: <http://www.maginternational.org/news/somalia-largest-haul-of-mines-destroyed/> (last visited 12 March 2012).

151 MAG, 'Somalia: twelve tonnes of unsafe munitions cleared from army compound', 9 December 2009, available at: <http://www.maginternational.org/MAG/en/news/somalia-twelve-tonnes-of-unsafe-munitions-cleared-from-army-compound-/> (last visited 12 March 2012).

152 ICBL, above note 144, p. 385.



Figure 3. Meeting with members of the Moro Islamic Liberation Front during Geneva Call verification mission, Mindanao, Philippines, November 2009. Photo: Geneva Call.

Case study 2: Geneva Call verification missions in Mindanao, Philippines¹⁵³

The MILF in the southern Philippines was one of the initial signatories to the *Deed of Commitment Banning AP Mines*. Allegations that it had used AP mines in the immediate period after its signing had been the subject of a first fact-finding mission in 2002 that had not been fully realized. The Government of the Republic of the Philippines (GPH), citing security concerns, did not give the necessary clearances to the international members of the mission, which included the technical experts, to visit relevant field locations. However, the 2002 verification team was able to meet relevant actors, including MILF representatives. The MILF acknowledged that ‘string-pull’-activated improvised explosive devices (IEDs) had been utilised by its forces, but believed that the use of such devices was consistent with its obligations under the *Deed of Commitment*. In this respect, the mission considered that command-detonation required an electronic (as opposed to a manual) firing mechanism. In certain instances, ‘string-pull’ devices had the potential to become victim-activated and therefore were prohibited under the *Deed of Commitment*. After clarification with its leadership, the MILF agreed to desist from using such devices in future. The full documentation and findings of this mission were later published by Geneva Call.¹⁵⁴

153 This section was written by Chris Rush, Senior Programme Officer with Geneva Call.

154 See Geneva Call, *Seeking Rebel Accountability: Report of the Geneva Call Mission to the Moro Islamic Liberation Front in Central Mindanao, Philippines (3–8 April 2002)*, Geneva Call, Quezon City, 2002.

In the period from 2003 until mid-2008, there were a few isolated allegations of AP mine use levelled against the MILF, which denied such use.¹⁵⁵ An incident scrutinized by Geneva Call in May 2008 involved the use of a device not banned under the *Deed of Commitment*.¹⁵⁶ However, from August to October 2008 there were a number of reports in the Philippine media that MILF forces were using landmines, including AP devices, in their conflict with the GPH. Most of the allegations emanated from government sources, specifically from within the armed forces and the police.¹⁵⁷ The reports varied from vague and passing references to specific and detailed accounts. The alleged incidents coincided with a marked escalation in the conflict, in the wake of the aborted signing of a Memorandum of Agreement between the GPH and the MILF that would have represented a significant step forward in the peace process.

Through desk enquiries and a routine field mission in October 2008, Geneva Call sought – and received – details of the allegations from the government. It compiled and shared these with the MILF leadership, who provided a response to each alleged incident. The responses ranged from denials of involvement in specific incidents to acknowledgement of involvement but with the assertion that the use of the weapons was not prohibited under the *Deed of Commitment*. Geneva Call also sought information from other actors who ordinarily had a ground presence in the relevant areas. However, it was readily apparent that the areas where the alleged incidents took place had been, and largely still were, highly insecure. As the population had mostly fled to safer areas, non-military actors had not been in the vicinity of the alleged incidents either when they occurred or afterwards and were therefore not able to provide significant information.

With the government asserting mine use and the MILF denying, and limited input from third-party actors, it was not possible to reach a definitive conclusion as to whether there had been any violations of the *Deed of Commitment*. However, these enquiries did lead Geneva Call to conclude that there was enough credibility to the allegations to seek to pursue them further. It was considered that the most effective way to do this was through conducting a verification mission approved and facilitated by both parties.

The MILF leadership, in line with its Article 3 obligations, quickly and publicly agreed to co-operate with the proposed mission. Geneva Call successfully advocated to the GPH that, being a state party to the Ottawa Convention, the approval and facilitation of the on-site inspection would serve towards meeting its obligations to ensure that the terms of that instrument were

155 ICBL, *Landmine Monitor Report 2004: Toward a Mine-free World*, Human Rights Watch, New York, 2004, p. 673; ICBL, above note 145, p. 587.

156 '2 MILF mujahideen killed, 11 troops wounded in Basilan clash', in *Mindanao Examiner*, 25 May 2008, available at: http://mindanaoexaminer.com/news.php?news_id=20080524235217 (last visited 12 March 2012).

157 See Geneva Call, *Fact Finding During Armed Conflict: Report of the 2009 Verification Mission to the Philippines to Investigate Allegations of Landmine Use by the Moro Islamic Liberation Front*, Geneva Call, Geneva, 2010, pp. 47–48.

respected within its territory.¹⁵⁸ The Terms of Reference for the mission were straightforward and consisted of a three-part test that may be paraphrased as follows:

- 1) Were AP mines utilized during the period in question?
- 2) If point 1 was answered in the affirmative, could their use be attributed to the MILF?
- 3) If both points 1 and 2 were answered in the affirmative, whether such violation(s) were, or should have been, known to those in the command structure of the MILF? Dialogue with the MILF leadership in respect of measures to redress non-compliance was prescribed in such an instance.

The verification team was assembled with the Terms of Reference very much in mind, and included a technical as well as a legal and fact-finding expert.¹⁵⁹ The mission took place in November 2009, over a year after the first allegations were made. The delay was caused by a combination of factors – pursuing initial inquiries, seeking permissions, and making the necessary arrangements. Most significantly, the ground situation was not considered by the GPH to be conducive for such a mission for much of the period in question. It was only after a suspension of military operations by the government in July 2009, which was immediately followed by a reciprocal measure by the MILF, that the final clearance was given for the mission to proceed. The fact-finding team, which, because of security considerations, was accompanied by representatives of the GPH and MILF ceasefire committees, travelled to relevant locations, interviewed witnesses, and inspected devices. It was able to conclude that there was AP mine use in two incidents that were the subject of its enquiries, and probable use in another. In terms of attribution, it was recognized that several armed actors were active in the areas where the incidents took place and there was not enough evidence to conclude definitively that the MILF was responsible for them, though the mission did conclude that in one of these incidents involvement of forces associated with the MILF was likely.

The mission shared its findings with the MILF. Although there had not been a finding of a violation of the obligations under the *Deed of Commitment*, it was considered that the leadership needed to ensure that its forces were better aware of the scope of the AP mine ban. The key recommendation in this respect was that the MILF should consider incorporating the ban into its internal code of conduct. Furthermore, it was recommended that the MILF should consider disseminating information on the AP mine ban within its ranks. The MILF agreed to both of these recommendations and is currently working with Geneva Call to ensure that they are implemented.

158 The approval letter is reproduced in *ibid.*, p. 51.

159 The legal and fact-finding expert was Eric David, Professor of International Law at the Free University of Brussels and a member of the IHFFC.

Strengths and limitations of the *Deed of Commitment's* MRV mechanisms

Taken together, the three MRV mechanisms developed under Article 3 of the *Deed of Commitment Banning AP Mines* have proven to be quite effective for monitoring compliance. They have enabled Geneva Call to clarify and resolve most cases of allegations made against signatories. According to Professor Andrew Clapham, who made this judgement as early as 2006, ‘the prospect of continual verification and monitoring through field missions means that, in terms of detecting non-compliance, the [*Deed of Commitment*] regime has the potential to become even more effective than the formal [Ottawa] treaty regime’.¹⁶⁰ Yet, individually, these mechanisms have both strengths and shortcomings. The following section outlines the main advantages and disadvantages inherent in each mechanism, based on lessons learned by Geneva Call over the last decade.

Strengths

Self-reporting has the advantage of ensuring that signatory ANSAs take responsibility for monitoring their own compliance. It increases their sense of ownership of the norms contained in the *Deed of Commitment* and allows them to demonstrate their implementation efforts. The information reported also provides valuable baseline data for Geneva Call to gauge progress, and to identify challenges as well as needs for support.

However, as described above, Geneva Call does not only rely on self-reporting to monitor compliance. Information reported by signatories is verified through third-party sources and first-hand observation. Furthermore, the *Deed of Commitment* creates absolute and unconditional (except for security reasons) obligations for signatory ANSAs to allow Geneva Call to monitor their actions, whereas under the Ottawa Convention there is a high threshold that has to be met before authorizing a fact-finding mission (a majority vote of states parties). Such a binding and permanent external monitoring system is crucial to assess compliance, to detect potential violations, and to verify allegations. Gaining trust is also important. It is unlikely that another organization, without this supervisory role accorded by signatories to Geneva Call, would be granted the same level of access. Many third-party actors have also shared sensitive information in confidence.

Additionally, Geneva Call has the advantage over humanitarian organizations with a broader mandate in that it focuses its engagement efforts solely on *specific* humanitarian norms. The obligations under scrutiny are narrower. Moreover, only ANSA commitments are monitored, which is a clear advantage in terms of scope.

Overall, while not matching the ‘intrusive’ verification measures typical of disarmament treaties, the *Deed of Commitment* MRV machinery is strong compared

160 A. Clapham, above note 6, p. 299. In the interest of transparency, it should be pointed out that Professor Clapham was a member of Geneva Call’s Board from 2004 to 2010.

to other systems that address ANSAs: a) it involves self- as well as external monitoring by Geneva Call and partner organizations; b) it has mandatory powers; and c) it is transparent. Furthermore, it provides for consequences – though not particularly heavy ones – in case of confirmed violations (publicity of non-compliance).¹⁶¹ The examples of the verification missions in the Philippines and in Puntland demonstrate how the three MRV mechanisms come into play when addressing allegations: a prompt response and full collaboration from the concerned signatory ANSA in the fact-finding process, consultation with third-party monitors about the credibility of the allegations, and more importantly, follow-up measures and implementation of the verification missions' recommendations. The interplay between self-reporting, third-party monitoring, and field missions mitigates any weakness inherent in each individual mechanism.

Challenges and limitations

In addition to its strengths, the *Deed of Commitment's* MRV system has been hampered by a range of external factors and has its own limitations. Travel restrictions imposed by states are undoubtedly the main challenge that Geneva Call has faced with regards to MRV. Several concerned states have, for purported political or security reasons, refused permission for field missions to proceed on their territory. This has had severe negative consequences on the verification process. In particular circumstances, such as in relation to 'failed states', securing governmental co-operation is less imperative, but these are exceptions and often states' political support is key to efforts to verify compliance. In this respect, Geneva Call's experience in the Philippines clearly indicates that concerned states may indeed co-operate in monitoring ANSA compliance.

Insecurity has also been an impediment for Geneva Call MRV efforts. ANSAs usually operate in a situation of armed conflict, and fighting has sometimes prohibited, or restricted, Geneva Call's access. Somalia is a case in point. Owing to the war conditions prevailing in the south of the country, Geneva Call has been unable on several occasions to travel to areas controlled by signatories.¹⁶²

Aside from lack of access, another important limitation concerns the level of resources and capacity available at Geneva Call. The organization makes a considerable effort to monitor implementation of the *Deed of Commitment* but has often not had sufficient resources to ensure systematic, let alone prompt, follow-up in each context. This is compounded by the fact that arranging field missions to ANSA-controlled areas, which are often remote, is time-consuming. In addition to

161 This does not preclude other forms of consequences. During Meetings of Signatories to the *Deed of Commitment*, some ANSA representatives recommended further measures to deal with proven cases of non-compliance, such as a public condemnation by signatories or exclusion from the *Deed of Commitment*. Other delegations suggested that the utility of sanctions varies widely and that they must be tailored to each specific situation in order to be effective. While recognizing the importance of exercising pressure on signatories that do not live up to their commitment, they stressed the need to help non-compliers address the challenges they face on the ground and that contribute to non-compliance. See Geneva Call, PSIO, and Armed Groups Project, above note 123, p. 22.

162 See Geneva Call, *Engaging Armed Non-state Actors*, above note 98, pp. 22 and 30.

logistical, security, and political challenges, funding shortages have also limited Geneva Call ground presence and contributed to delays in the deployment of a number of missions, including verification missions. A related aspect is that Geneva Call itself has limited expertise in fact-finding and needs to continue to improve its in-house methodological procedures. It has already worked with the Geneva Academy of International Humanitarian Law and Human Rights on a study focusing on standards of proof used in fact-finding processes.¹⁶³

Self-reporting and third-party monitoring mechanisms also present weaknesses. Although nearly all signatories have reported to Geneva Call on their implementation of the *Deed of Commitment*, the quality of information provided has been uneven. Likewise, reports from some third-party actors, in particular local media, have been fraught with bias or have lacked key elements – for example, on the nature of the device exploded or its mode of activation – making an objective judgement on compliance difficult. Other third-party actors have been reluctant to share or corroborate information for safety or institutional reasons.

Finally, some limitations are inherent to the peculiarities of the issue to be monitored. Because of the small size and portability of AP mines, verifying allegations of transfer or acquisition is particularly challenging.¹⁶⁴ Verification of non-production is equally problematic, as many ANSAs have easy access to explosives and the knowledge to manufacture homemade devices. The use of AP mines is perhaps more verifiable, since it is unlikely to go completely unnoticed. As Mary Wareham from Landmine Monitor has noted, ‘increased presence of NGOs and media in conflict zones together with improvements in information technology make it much harder for governments and even rebel groups to hide new anti-personnel mine use’.¹⁶⁵ The difficulty relates more to determining whether the device exploded is prohibited under the *Deed of Commitment* and to attributing responsibility, especially when several armed actors, including splinter factions, operate in the same territory. The experience of Geneva Call’s verification mission in the Philippines in 2009 is instructive in this regard. In a majority of incidents, the mission was able to make findings as to the nature of devices under scrutiny. However, on the issue of attribution of responsibility for the utilization, it failed to reach definitive conclusions. It is likely that the length of time that elapsed between the incidents and the investigation was a contributing factor. In the same manner, monitoring ‘positive’ obligations of signatories, such as stockpile destruction, is a hard task because the *Deed of Commitment*, contrary to the Ottawa Convention,¹⁶⁶ does not set deadlines for completion of these requirements.

As an overall lesson, Geneva Call will have to take into account such factors in implementing its new *Deeds of Commitment*, for example the circumstances

163 The forthcoming study was previewed at a Human Rights Day Conference entitled The UN Human Rights Council: Commissions of Inquiry, held in Geneva in December 2011. See <http://www.unige.ch/international/collOI/Events/UNOprogrammeDec11.pdf> (last visited 12 March 2012).

164 T. Findlay, above note 130, pp. 51–54.

165 M. Wareham, above note 127, p. 55.

166 Under Art. 4 of the Ottawa Convention, states parties must complete the destruction of their AP mine stocks no later than four years after becoming party to the Convention.

particular to children and armed conflict. This includes the volition of children, as well as the effect of other MRV mechanisms where they exist, such as the MRM.

Conclusion

Effective MRV mechanisms are a key component for ensuring compliance with humanitarian norms. However, multilateral humanitarian, human rights, and weapons treaties tend to result in less robust MRV mechanisms than other non-traditional means of oversight such as humanitarian agreements, the UNSC thematic processes, UN ad hoc commissions, and the Geneva Call *Deeds of Commitment*. Moreover, even when multilateral treaties do contain MRV components, they rarely address the conduct of ANSAs, or, if they do, these are not applied in reality.

It is therefore not surprising that alternative mechanisms have been developed in order to better monitor and verify the conduct of both state and non-state parties to conflict. Nevertheless, while these mechanisms are much more likely to involve mandatory provisions, most of them are not universally applicable, because they are either limited to a particular conflict or type of actor, or, in the case of the MRM, only formally address 'listed' parties. The *Deed of Commitment* is also limited, but the fact that it only contemplates the conduct of ANSAs does not suggest that non-state parties to conflict require greater oversight than state parties; rather, it responds to the gap in the application of other existing mechanisms. The *Deed of Commitment* is similar to treaties and agreements in that consent to be bound is a prerequisite to its application. Unlike the MRM and UN ad hoc mechanisms, it cannot be imposed upon an ANSA. However, once an ANSA becomes a signatory to the *Deed of Commitment*, its MRV mechanisms remain applicable at all times, without the need for further consent. Furthermore, unlike all but one of the international mechanisms assessed in this article (the JEM-UN Agreement), its provisions require both self- and external monitoring.

It should further be highlighted that MRV processes can do more than detect violations. They can also identify obstacles to implementation, and improve compliance. This is true of the self-reporting mechanisms of many human rights treaties, as well as some of the non-traditional mechanisms. For example, Geneva Call field verification missions have not only enabled the addressing of allegations of non-compliance with the *Deed of Commitment Banning AP Mines*, but have also resulted in further implementation measures by signatories, such as the destruction of stockpiled AP mines by the Puntland authorities and improvement of norm dissemination by the MILF.

In any situation, the co-operation of states is crucial to the process in order to secure access of external monitors, as was positively demonstrated by the Philippine government during the Geneva Call verification mission to Mindanao in 2009. The mission's legal and fact-finding expert, Professor Eric David, noted:

As far as I am aware, this is the first time in the history of international relations that such a fact-finding mission has been carried out with the agreement of, and

facilitation by, both parties to an armed conflict, *in casu*, a State and a non-State actor.¹⁶⁷

Such co-operation between the Philippine government and the MILF was proven to be possible, even during armed conflict.

Experience with the *Deed of Commitment Banning AP Mines* demonstrates not only that ANSAs can make humanitarian commitments but that they can indeed co-operate in the scrutiny of their own compliance. Signatories have reported on their implementation, and they have allowed for, and facilitated, monitoring and verification missions. They have even suggested improvements in the MRV system itself. This sense of ownership not only of norms but also of processes to ensure respect of norms should be encouraged.

Finally, Geneva Call's example shows that ANSAs can accept a formal inspection role for NGOs, including external monitoring.¹⁶⁸ Geneva Call has been able to conduct three field verification missions so far, whereas no similar fact-finding undertaking has been tested under the Ottawa Convention, despite credible allegations of non-compliance by several states parties. The case of Puntland and Ethiopia is telling in this regard.

In closing, this article has sought to argue that alternative MRV mechanisms, such as the *Deed of Commitment*, have proven capable of ensuring better ANSA compliance with at least some humanitarian norms. If political sensitivities are too great a barrier for traditional multilateral treaty mechanisms to become more effective, then other options should be explored. Suggestions have been made for ways to improve monitoring of ANSAs: for example, to create an independent expert body mandated to comment on ANSA self-compliance reports, or even to establish an auditing mechanism implemented by ANSAs themselves, similar to that used to monitor respect of human rights by corporate entities.¹⁶⁹ These suggestions also carry their own political sensitivities but, for the time being at least, embracing innovative non-traditional mechanisms may be the only way to prevent the rule of law from becoming just another casualty of war.

167 Geneva Call press release, 'Verification mission to investigate allegations of landmine use by the Moro Islamic Liberation Front in the Philippines conducted', 30 November 2009, available online at: <http://www.genevacall.org/news/press-releases/f-press-releases/2001-2010/2009-30nov-gc.htm> (last visited 12 March 2012).

168 For a discussion of the monitoring role of NGOs, see Andreas Persbo, 'The role of non-governmental organizations in the verification of international agreements', in *Disarmament Forum*, UNIDIR, Geneva, No. 3, September 2010, pp. 65–73; Olivier Meier and Clare Tenner, 'Non-governmental monitoring of international agreements', in *Verification Yearbook 2001*, VERTIC, London, 2001, pp. 207–227.

169 Marco Sassòli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law', in *International Humanitarian Legal Studies*, No. 1, 2010, pp. 36–42.

Between insurgents and government: the International Committee of the Red Cross's action in the Algerian War (1954–1962)

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Abstract

The French government and an armed insurrectionary movement – the National Liberation Front (FLN) – confronted each other for over seven years in the Algerian War, which would become the archetype of wars of national liberation. It brought the new conditions of struggle in revolutionary warfare to a convulsive climax characterized by terrorist attacks, underground warfare, and repression. On the humanitarian front, the challenge of ensuring respect for humanitarian rules in asymmetric warfare was posed more bluntly than in any previous conflict. The International Committee of the Red Cross (ICRC) faced the triple challenge of offering its services to a government facing an armed insurgency that it claimed to be able to bring under control through police action alone, of entering into contact with

a liberation movement, and of conducting a humanitarian action in the context of an insurrectionary war.



From insurrection to independence

On the night of 31 October/1 November 1954, a series of bomb attacks shook thirty locations in Algeria, while a communiqué of the National Liberation Front (FLN) revealed the existence of an armed struggle organization capable of conducting co-ordinated actions throughout the entire country. This ‘Night of All Saints Day’ would mark the beginning of eight years of fratricidal strife that would cause the collapse of the Fourth Republic, drive France to the brink of civil war, and lead to the independence of Algeria.

It was not a bolt from the blue. France had conquered Algeria between 1830 and 1848 without having a clear colonial plan and without knowing what it would do with this conquest. While it had only taken a few days for the French army to seize Algiers, eighteen years of persistent struggle followed before the interior was conquered. Heavy fighting and the large-scale scorched earth policy of Marshal Bugeaud left deep wounds in Algerians’ collective memory. The confiscation of land to facilitate the installation of European settlers – the *pieds noirs* – led to the impoverishment of the Algerian population, while the eviction of the local aristocracy caused the erosion of traditional social structures. An assimilation policy, applied with little determination, aroused the distrust of defenders of Islam without attracting the support of the Algerian elite. Finally, the *colons* defeated all attempts made by a number of governments of the French Republic to grant political rights to the indigenous people. Young Algerians, only a small minority of whom had had the opportunity to attend school and even fewer of whom had had access to university, discovered that France taught them human rights but denied them the benefits of this body of law. There was an uneasy cohabitation between the Muslim and European populations: they were two communities that had not learned to share the same fate.

France’s June 1940 defeat by Germany had demonstrated the country’s weakness. The Allies’ success in the 8 November 1942 Anglo-American landings in Algeria and Morocco was seen by Muslims as an indication of a further decline of metropolitan France. Overly timid overtures by the French Committee of National Liberation aroused the scorn of Algerian nationalists, while they were violently rejected by the settlers. On 8 May 1945, at the very moment that the German surrender was putting an end to six years of war in Europe, riots broke out in Sétif. The disproportionate repression persuaded many Algerian leaders that the equal rights promised by France were a sham and that there was no way out other than the independence of their homeland.

On 7 May 1954, the surrender of the fortified camp of Dien Bien Phu in Laos gave further evidence of France’s weakness and isolation and showed the

effectiveness of a revolutionary struggle involving the mobilization of the whole nation. The example had been given. During that summer, a group of young militants from the Algerian People's Party decided to transform the political fight into an armed struggle.

As in 1945, the attacks of 1 November 1954 provoked a disproportionate response. Indeed, France considered Algeria a French territory, inhabited by more than one million French settlers whom it was unthinkable to abandon. But the FLN, which had taken the lead in the insurgency, aimed at continuing the fight until Algerian independence was granted. The use of spectacular terrorist attacks was meant to provoke a violent reaction by security forces and settlers. Such a reaction would in turn unite the Muslim community behind the FLN and cause an irreparable rupture between that community and the settlers. These conditions led to a brutal struggle. The FLN, which did not hesitate to execute Algerians collaborating with France, won increasing numbers of supporters among the Algerian population. A part of French public opinion and some politicians gradually came to the conviction that the struggle was hopeless and that, following the granting of independence to Tunisia and Morocco in March 1956, Algerian independence had become inevitable. But part of the army and the vast majority of settlers refused to consider the prospect of an independent Algeria, leading France to the brink of civil war.

The war years were thus marked by the tragic cycle of terrorist attacks provoking repression followed by new attacks resulting in ever harsher repression. The end result was that there were increasing numbers of victims in both camps.

From the spring of 1955, the French authorities declared a state of emergency and deported those suspected of FLN sympathies to internment camps, leniently entitled *centres d'hébergement* (accommodation centres). The FLN then multiplied attacks against Europeans, who in turn created 'anti-terrorist groups'. The FLN also established a political structure: the Congress of Soummam (a valley in the Kabyle region) met secretly from 20 August to 5 September 1956, founding the National Council of the Algerian Revolution (CNRA) with thirty-four members and a Coordination and Implementation Committee (CCE) composed of five members.

Clandestine contacts between French emissaries and leaders of the FLN were made in Morocco. However, on 22 October 1956, the plane from Morocco to Tunis bringing back five leaders of the FLN – Ait Ahmed, Mohamed Boudiaf, Ahmed Ben Bella, Mohamed Khider, and Professor Mostefa Lacheraf – was intercepted by the French Air Force and the five occupants were incarcerated in France.

Ten days later, Israel, France, and Great Britain launched the Suez expedition. While Israel's main objective was to destroy the bases of the Palestinian *fedayeen* in Gaza and the Sinai, and England's was to regain control of the Suez Canal (which had been nationalized by Egypt a few weeks earlier), France primarily aimed at depriving the FLN of its main external support by overthrowing President Gamal Abdel Nasser, seen as the figurehead of Arab nationalism and as the main backer of the Algerian uprising. The expedition ended in a humiliating fiasco for the

former colonial powers: under the double pressure of the United States and the Soviet Union, France and England were forced to withdraw their troops. Nasser triumphed and the FLN could now count on greater support from Egypt.

In Algeria the insurgency continued to grow, and spread to the cities. General Salan, a veteran of the war in Indochina, was appointed commander-in-chief in Algeria, while General Massu, commander of the 10th Parachute Division, was named responsible for restoring order in Algiers. On 7 January 1957, the 'paras' took over Algiers. They entered the kasbah on 13 January, arresting 1,500 suspects. But the attacks continued and it was not until September 1957 that the parachutists managed to take control of the situation. Yet the guerrilla struggle continued, especially in the Aurès and Kabyle regions. The French army recruited *harkis* (soldiers of Algerian origin) throughout the country. Repression deepened and entire populations were confined to 'regroupment centres'.

In 1958 the leaders of the FLN set up a base for the National Liberation Army (ALN) in Tunisia near Sakiet Sidi Youssef. On 11 January, French soldiers were ambushed by the ALN on the Algerian–Tunisian border. Fifteen were killed, one was wounded, and four were taken prisoner. On 8 February, the French army bombed Sakiet Sidi Youssef. Habib Bourguiba, President of the Republic of Tunisia, recalled the country's ambassador in Paris, demanding the withdrawal of French troops from all Tunisian territory, including the Naval Air Station at Bizerte that France had been allowed to keep at the end of the protectorate.

In the following months, clashes between the French army – which had enrolled almost 20,000 *harkis* – and the ALN intensified. On 10 May 1958, the FLN executed three French soldiers in Tunisia in retaliation for the execution of several of its activists who had been sentenced to death by French courts in Algeria. This execution provoked a very strong emotional reaction. On 13 May, the French Algerians organized a massive demonstration in Algiers calling for a 'French Algeria'. Generals Massu and Salan formed a 'Committee of Public Safety' that took power in Algeria, while, in Paris, the Fourth Republic was going through a new ministerial crisis. On 15 May, General de Gaulle made it known that he was ready to 'assume the powers of the Republic'. On 29 May, René Coty, President of the Republic, announced in Parliament that he had called on General de Gaulle to form the next government. Thus, the coup of 13 May marked the end of the Fourth Republic, whose authority was undermined by incessant governmental crises, defeat in Indochina, and its inability to restore order in Algeria.

On 17 September 1958, in Cairo, the CCE approved the creation of the Provisional Government of the Algerian Republic (GPRA), headed by Ferhat Abbas, author of the *Manifesto of the Algerian People* (March 1943), who had long been seen as a moderate leader before joining the FLN in April 1956. In the following days, the GPRA was recognized by Tunisia, Morocco, Syria, Lebanon, and Egypt.

With the FLN expanding its control over the Muslim population, ensuring external support, and opening a second front by organizing a wave of bombings in metropolitan France, General de Gaulle became convinced of the inevitability of Algerian independence. On 16 September 1959, he unveiled his plan for the self-determination of Algeria and offered a 'peace of the braves'. The announcement

stunned the settlers, who had appealed to de Gaulle on behalf of French Algeria. They saw self-determination as the first step towards withdrawal. It also disappointed the military, who were convinced that they could prevail in the field. The first Franco-Algerian negotiations took place at Melun, near Paris, from 25 to 29 June 1960. They failed because France demanded that the FLN renounce armed struggle during the negotiations but intended to continue its own contacts with the Algerian National Movement (MNA), a rival of the FLN. The FLN, on the other hand, had no intention of renouncing the continuation of armed struggle during the negotiations or of its claim to be recognized as the only representative of the Algerian people. By September, the attacks had resumed in force in Algiers.

The move towards self-determination led to a split between the government in Paris, on the one hand, and the French in Algeria and a part of the army, on the other. This in turn led to barricades (January 1960), an attempted coup d'état (22 April 1961), and a wave of terrorist attacks perpetrated by Europeans and orchestrated by the Secret Army Organization (OAS). By December 1961, the OAS had nearly taken control of Algiers. This wave of attacks destroyed the last possibility of cohabitation between the two communities and caught the French government in the crossfire, putting it under increasing pressure to reach an agreement with the FLN before France in turn slipped into civil war.

Organized through the good offices of Swiss diplomacy, several secret contacts took place at Les Rousses, near Geneva. Negotiations resumed on 7 March 1962 and the Evian agreements were signed on 18 March 1962. The cease-fire came into force the next day. On 8 April, the population of metropolitan France massively approved the Evian agreements. However, during the months of April, May, and June, Europeans fled *en masse* from Algeria.

On 1 July 1962, the Algerian population voted almost unanimously for independence, which was proclaimed on 3 July.

The activities of the International Committee of the Red Cross¹

The ICRC's offer of services

On 16 November 1954, in Paris, Jacques Chenevière, a member of the International Committee of the Red Cross (ICRC)'s Presidential Council, met Professor Brouardel, President of the French Red Cross. He pointed to the experiences in the Bengal region and in Guatemala,² as well as to the work of the Commission of Experts for the Examination of the Question of Assistance to Political Detainees that

- 1 For a more complete overview of the ICRC's activities during the Algerian war, see the following works: Françoise Perret and François Bugnion, *De Budapest à Saïgon: Histoire du Comité international de la Croix-Rouge, vol. IV, 1956–1965*, ICRC and Georg Éditeur, Geneva, 2009, pp. 177–221; Magali Herrmann, *Le CICR et la guerre d'Algérie: une guerre sans nom, des prisonniers sans statut (1954–1958)*, mémoire de licence de la Faculté des Lettres de l'Université de Genève, 2006.
- 2 Catherine Rey-Schyrer, *De Yalta à Dien Bien Phu: Histoire du Comité international de la Croix-Rouge, vol. III, 1945–1955*, ICRC and Georg Éditeur, Geneva, 2007, pp. 421–427 and 671–676.

the ICRC had brought together in a meeting in Geneva from 9 to 11 June 1953.³ He stressed that the presence of ICRC delegates and their visits in situations of unrest such as those prevailing in Tunisia and Algeria could bring about an element of *détente*, independently of any material aid. Although President Brouardel showed a great deal of interest in these questions, the conversation did not lead to any concrete results. Moreover, this exchange of views was merely of an exploratory character, mainly to emphasize the attention that the ICRC was bound to bring to these problems.⁴ At its meeting of 25 November 1954, having heard the report of Chenevière, the Presidential Council decided to instruct the head of the ICRC delegation in Paris, William Michel, to raise the issue – at the appropriate moment – with ‘an eminent French personality well known to him’.⁵ To this end, the Council decided to prepare a note setting out the general framework of the approach that should be used. It was further decided to inform the honorary delegate of the ICRC in Algeria, Roger Vust, of this initiative.⁶

In this important approach to the French government, the ICRC was aided by a fortuitous circumstance: William Michel, its head of delegation in Paris, and the Prime Minister, Pierre Mendès-France, had married two cousins who were so closely related that they were often taken for sisters. During World War II, Mendès-France was forced to seek refuge in Switzerland, where he stayed temporarily with Michel and his wife before joining the Free French Forces in London.⁷

According to the testimony of Pierre Gaillard, who would become the backbone of the ICRC's activity in Algeria, Michel and Mendès-France discussed the North African situation in December 1954 during a family celebration.⁸ The drawing up of the aide-mémoire that was to serve as the basis of Michel's approach necessitated several discussions in the Presidential Council, demonstrating the importance that the ICRC attached to this first formal approach to the French government. In the end, the ICRC relied on the findings of the Commission of Experts mentioned above.⁹

Pierre Mendès-France received William Michel on 31 January 1955. The delegate offered the services of the ICRC regarding the situation prevailing in Algeria, Morocco, and Tunisia, pointing to the activities that the ICRC could initiate in such situations and highlighting the advantages for the French authorities. At the request of the Prime Minister, Michel confirmed the offer of the ICRC's services in a letter dated 1 February 1955, in which, on the basis of instructions received from

3 *Commission of Experts for the Examination of the Question of Assistance to Political Detainees, Geneva, June 9–11, 1953*, ICRC, Geneva, 1953; also published in *Revue internationale de la Croix-Rouge*, English supplement, Vol. VI, No. 7, July 1953, pp. 124–131, and in *Annual Report 1953*, pp. 66–68 and 84–91; C. Rey-Schyr, *De Yalta à Dien Bien Phu*, above note 2, pp. 318–323.

4 ICRC Archives, A PV C1 Pl, Minutes of the Presidential Council, 25 November 1954, p. 3.

5 *Ibid.*

6 *Ibid.* An honorary delegate of the ICRC is a Swiss citizen resident in a foreign country where, in general, he is employed by a Swiss company, and who has been asked by the ICRC to render various services: for example, contacting certain personalities, visiting prisoners, distribution of relief supplies, etc.

7 Interview with Christian Michel, son of William Michel, by François Bugnion, 7 March 2008.

8 ICRC Archives, ‘Oral history: interview with Pierre Gaillard, May–July 1992’, transcription, pp. 99–100.

9 ICRC, *Commission of Experts for the Examination of the Question of Assistance to Political Detainees, Geneva, June 9–11, 1953*, ICRC, Geneva, 1953.

Geneva, he stated the ICRC's objectives in North Africa and its mode of action: receiving lists of names of those arrested; obtaining permission for ICRC delegates to visit all detention sites and to hold private interviews with the prisoners, it being understood that the purpose of these visits would be strictly limited to the conditions and not to the motives of detention; exchanging correspondence between prisoners and their families; and having the right to distribute aid to detainees and their families. Finally, the ICRC ensured that its activities would be directed as usual at strictly humanitarian ends and would not result in any publicity.¹⁰

The next day, Pierre Mendès-France informed the ICRC that the French government was prepared to allow its delegates to go to Algeria and Morocco and visit detention sites with the right to hold private interviews with detainees. In his response, the Prime Minister wrote that it would not be possible to communicate the list of names of those arrested as it changed daily, owing to new arrests as well as releases from detention. However, he agreed to visits to detention sites under the terms specified by the ICRC and accepted the principle of distributing relief supplies where needed. He placed particular emphasis on confidentiality. Finally, he invited the ICRC to contact the Governor General of Algeria to establish the procedures for the implementation of the proposed action.¹¹ The almost immediate response from the Prime Minister suggests that the two men had agreed, both on procedure and in substance, during their meeting of 31 January 1955.

However, this exchange of notes – which for eight years fixed the framework of the ICRC action in Algeria – is silent on the crucial question of the legal characterization of the situation in Algeria. The memorandum of 31 January 1955 that defined the framework of William Michel's approach is entitled 'Troubles intérieurs' ('Internal Strife').¹² Thus, three months after the 'Night of All Saints Day', the ICRC position still remained within the context of its jurisdiction as recognized in Article VI, Section 5 of the Statutes of the International Red Cross revised by the Eighteenth International Conference of the Red Cross meeting in Toronto in 1952,¹³

10 ICRC Archives, B AG 200 (3), Letter from the head of delegation of the ICRC in France, William Michel, to the Prime Minister, Pierre Mendès-France, 1 February 1955 (for an English version, see below, Appendix 1).

11 ICRC Archives, B AG 200 (3), Letter from Pierre Mendès-France to the head of the delegation of the ICRC in France, 2 February 1955 (for an English version, see below, Appendix 2).

12 ICRC Archives, A PV C1 Pl, 'Troubles intérieurs, Aide-mémoire approuvé par la séance de Présidence du 16 décembre 1954' [Internal strife, memorandum approved by the Presidential Council, 16 December 1954], annex to the minutes of the Presidential Council, 16 December 1954. ICRC Archives, B AG 012 004, 'Troubles intérieurs', 31 January 1955.

13 'As a neutral institution whose humanitarian work is carried out particularly in time of war, civil war, or internal strife, it endeavours at all times to ensure the protection of and assistance to military and civilian victims of such conflicts and of their direct results'. Art. VI, para. 5, of the Statutes of the International Red Cross adopted by the Thirteenth International Conference of the Red Cross, The Hague, 1928, and amended by the Eighteenth International Conference meeting in Toronto, 1952: see *Handbook of the International Red Cross*, 10th edition, ICRC/League of Red Cross Societies, Geneva, 1953, pp. 305–311, *ad loc.* p. 308. The International Conference of the Red Cross brings together representatives of the National Societies of the Red Cross, of the ICRC, of the League of Red Cross Societies (today the International Federation of Red Cross and Red Crescent Societies), and of the states that are signatories to the Geneva Conventions. It is the highest deliberative authority of the Red Cross and, in principle, meets every four years.

and not that of an armed conflict not of an international character within the meaning of Article 3 common to the four Geneva Conventions of 1949 (Common Article 3).

We can easily understand why this was the case. As early as 7 November 1954, François Mitterrand, the Interior Minister of the government of Pierre Mendès-France, had set the tone by stating emphatically: 'Algeria is France'. On 12 November 1954, the Prime Minister repeated: 'Between Algeria and metropolitan France, there can be no conceivable secession'.¹⁴ From this perspective, the French government could not recognize the existence of a non-international armed conflict within the meaning of Common Article 3. Like virtually all governments confronting an insurrection and despite the immediate dispatch of massive military reinforcements to Algeria, the French government initially denied the existence of an armed conflict and claimed to be able to deal with this situation by use of police resources and the application of criminal law alone.

In addition, the application of Common Article 3 presupposes the existence of an 'armed conflict not of an international character'. Although Common Article 3 does not define the minimum level of hostility required for its implementation, it is clear that it assumes the existence of an armed conflict and of parties involved in the conflict: that is, a minimum of organization on both sides.

It would take eighteen months and an extension of fighting to most of the territory of Algeria before the French government would admit the existence of a non-international armed conflict to which Common Article 3 applied.¹⁵ For the time being, the Prime Minister's response authorized the ICRC to send delegates to Algeria and Morocco, where they would have access to detention sites and would be able to hold private interviews with the captives. For the ICRC, this was the main point. The exchange of notes on 1–2 February 1955 therefore marked the starting point of the ICRC action in Algeria, and also defined its scope and limits. On this basis the ICRC would develop its action, at least until the summer of 1956.

On 6 February 1955, Pierre Mendès-France was overthrown by a cabal orchestrated by René Mayer, the deputy from Constantine and chief spokesman for the Algerian settlers at the Palais Bourbon. However, the successor government of Edgar Faure did not call into question the agreement of its predecessor. The ICRC delegates were therefore able to take up their posts.

First missions in Algeria and Morocco

Visiting detainees was the essential element of the ICRC's work in the Algerian conflict. All visits were made following the same scenario: the delegates began by contacting the local French authorities in order to draw up the list of places they intended to visit and to establish the procedures that would guide their visit accompanied by a liaison officer. Once at the detention site – internment camp or

14 Alain-Gérard Slama, *La guerre d'Algérie: histoire d'une déchirure*, Gallimard, Paris, 1996, pp. 48–49; Pierre Miquel, *La guerre d'Algérie*, Fayard, Paris, 1993, p. 153.

15 For the text of Common Article 3, see below.

prison – the delegates would discuss with the commander and visit the facilities (dormitories or cells, kitchens, sanitary facilities, solitary confinement units, etc.). They would then hold interviews without witnesses with the detainees of their choice. These interviews were the crucial point of the visit because this was most often the moment at which delegates were able to gather information about possible ill-treatment. A doctor also participated in these interviews as a delegate, in order to verify the health of prisoners and, where applicable, the accuracy of allegations of mistreatment. After the visit, the delegates had a final interview with the commander, sharing with him their findings and making recommendations for certain improvements. This practice was consistent with that followed by the ICRC since World War I.¹⁶

With the end of the tour, the delegates would draw up a detailed report with their observations and recommendations to the authorities for measures to improve the lives of the detainees. The report would then be sent to ICRC headquarters in Geneva, which would in turn transmit it to the French authorities in Paris, along with a covering letter in which the institution drew the government's attention to the improvements that should be made to the detention regime and, where appropriate, to cases of ill-treatment identified by its delegates. In addition, delegates would send relief supplies to detainees in accordance with their certified needs.

The first mission, including the head of the ICRC delegation in France, William Michel, and two delegates, Pierre Gaillard and Jean-Pierre Maunoir, went to Morocco from 23 February to 30 March 1955 for a series of visits to detention centres where Algerians were being interned. In accordance with the agreement given by the Prime Minister, the ICRC delegates received permission to interview the detainees of their choice during these visits, which covered forty-one centres with approximately 2,000 people.

In addition, from 14 March to 18 April 1955, ICRC delegates visited prisons in Algeria, but here they faced great difficulties. Most detainees arrested because of the recent events were still defendants. Therefore, they were under the jurisdiction of the investigating judges. For each visit, the delegates had to obtain authorization from the judges, which proved to be a long and difficult process. This was particularly the case because some judges were not willing to grant the ICRC delegates the authorization to hold private interviews with detainees under interrogation. However, during this mission the delegates were able to visit forty-three prisons. Following these visits, the ICRC communicated its delegates' reports to the detaining authority, namely, the French government.¹⁷

16 For ICRC practice concerning visits to detention sites, see François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, and Macmillan Education, Oxford, 2003, pp. 90–96, 176–186, and 580–657.

17 ICRC Archives, B AG 225 (12), Report on visits to detention centres in Morocco and Algeria by ICRC delegates (23 February–18 April 1955).

Approaches to the French authorities and to representatives of the insurgency

While the situation in Algeria continued to worsen in the second half of 1955, the ICRC made new approaches to the French government in order to send a second on-site mission.¹⁸ Simultaneously, it attempted to establish contacts with people close to the Algerian nationalists so as to draw their attention to the universal obligation to respect the fundamental rules of international humanitarian law (IHL).¹⁹

Finally, an ICRC delegate, David de Traz, managed to make contact with representatives of the Algerian revolution in Cairo in February 1956. The delegate informed his interlocutors of ICRC activities in Algeria. He urged them to ensure that their followers respected the principles of the Geneva Conventions of 1949, in particular the provisions of Common Article 3.²⁰ At the same time, William Michel met a representative of the FLN.²¹

On 23 February 1956, the Algerian delegation in Cairo sent a letter to David de Traz signed by Mohamed Khider for the FLN and Ahmed Ben Bella for the ALN and by which the signatories undertook to implement the provisions of the Geneva Conventions concerning all French prisoners of war taken by the ALN, 'subject to reciprocity on the part of the Government of the French Republic'.²²

This reserve was of paramount importance, because France did not recognize the applicability of the four Geneva Conventions of 12 August 1949 to the Algerian conflict. These Conventions relate to international armed conflicts and, for France, the Algerian conflict was a non-international conflict to which only Article 3 Common to the four Geneva Conventions could be applied. This article stipulates:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

18 ICRC Archives, B AG 200 (3), Minutes of meeting between Prime Minister Edgar Faure's technical advisor and Roger Gallopin, Executive Director of the ICRC, 27 August 1955; ICRC Archives, B AG 200 (3), Minutes of meeting between Edgar Faure's technical advisor and William Michel, 2 September 1955; ICRC Archives, B AG 200 (3), 'Le Comité international de la Croix-Rouge et les événements de l'Afrique du Nord' ('The ICRC and the events in North Africa'), January 1956 – Note No. 1, D. 425.

19 ICRC Archives, B AG 200 (3), Note by Pierre Gaillard, 5 September 1955.

20 ICRC Archives, B AG 200 (3), Radiogram from David de Traz to the ICRC, 16 February 1956.

21 ICRC Archives, B AG 200 (3), Note by William Michel, 16 February 1956.

22 ICRC Archives, B AG 200 (12), Letter from the Algerian delegation in Cairo to David de Traz, 23 February 1956.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

In fact, it was only on 23 June 1956 that, by a declaration of Prime Minister Guy Mollet, the French government recognized the applicability of Common Article 3 to the Algerian conflict. But the Algerians, who insisted on the international character of the conflict, called for full implementation of all four Geneva Conventions.

The stakes were high, especially in regard to the individual responsibility of combatants. In international conflicts the soldier is seen as an instrument of the state. Provided he has complied with the laws and customs of war, he incurs no individual responsibility for the fact of taking up arms. In cases of non-international armed conflict, the state reserves the right to suppress the rebellion by using the instruments of criminal law. An insurgent could therefore be convicted for the mere fact of participating in hostilities. This implementation of criminal law provides the state with substantial means of repression. However, it erases the distinction between the combatants who respect the laws and customs of war and those who do not respect them. In addition, it will almost inevitably lead to a spiral of reprisals and counter-reprisals. Indeed, the insurgents, who no longer recognize the jurisdiction of the courts or the legal system of the state against which they are fighting, will consider each conviction in the courts as a new injustice and every execution as an assassination.

In an attempt to break the deadlock, the ICRC delegates sought to obtain the guarantee that FLN fighters captured while bearing arms openly would be granted the same protection as that provided in the Third Geneva Convention of 12 August 1949 to prisoners of war in cases of international armed conflict. The goal of this approach was to convince the French authorities to renounce bringing before a tribunal fighters who bore arms openly.

New missions to Algeria

In early 1956, the ICRC had still not received the French government's authorization to send a new mission to Algeria. The ICRC President, Léopold Boissier, therefore went to Paris, where he was received on 26 March by the Prime Minister, Guy Mollet, who welcomed the proposal that ICRC delegates visit detention sites in Algeria.²³ By a letter dated 6 April 1956, Guy Mollet informed the ICRC that he agreed to a new mission to Algeria, reiterated the objectives and modalities that Pierre Mendès-France had accepted on 2 February 1955, and put particular emphasis on the respect of confidentiality.²⁴ This authorization locked the ICRC's work into a relatively narrow framework, but it nevertheless represented a substantial expansion in relation to Common Article 3.

Thus, from 12 May to 28 June 1956, five ICRC delegates (Claude Pilloud, René Bovey, Pierre Gaillard, and the doctors Gaillard and Willener) visited sixty-one internment camps and detention sites throughout Algeria. During these visits the delegates were allowed, as was the case in previous visits, to hold private interviews with detainees. Through these interviews the delegates discovered the existence of other camps, the 'Transit and Screening Centres', which were under military administration and where prisoners sometimes remained for several months undergoing interrogation that could go as far as torture. The delegates then tried to get authorization to visit these centres, which were spread over many military sectors, each of which was under the command of a different military officer, which of course greatly complicated their efforts. The ICRC did not publicize the mission of its delegates but, on 23 June, Guy Mollet spoke of it publicly in a speech at the Maison de l'Amérique latine in Paris. In that speech he said that, 'in accordance with Article 3 common to all four Geneva Conventions', the French government had allowed ICRC delegates to visit the internment camps and detention sites in Algeria.²⁵

This statement marked an important turning point in the attitude of the French government. Until then, despite a growing commitment of the French army and fierce fighting in the mountainous areas of Algeria, France had refused to recognize the existence of an armed conflict and the application – albeit in the rudimentary form of Common Article 3 – of the laws of war to the events taking place in Algeria.

From 16 October to 3 November 1956, Pierre Gaillard and Doctor Gaillard undertook a new mission to Algeria, during which they visited six internment camps.

23 ICRC Archives, A PV C1 Pl, Minutes of Presidential Council, 29 March 1956.

24 ICRC Archives, B AG 251 (12), Letter from Prime Minister Guy Mollet to the ICRC, 6 April 1956.

25 ICRC Archives, B AG 251 (12), Mission of the ICRC in Algeria – May–June 1956 – Report presented to Prime Minister Guy Mollet; ICRC Archives, B AG 251 (12), Note by Pierre Boissier, ICRC delegate in France, to the ICRC, 26 June 1956; *Revue internationale de la Croix-Rouge*, No. 452, August 1956, pp. 441–442; Communiqué of the Prime Minister, 23 June 1958, quoted in Jean Siotis, *Le Droit de la guerre et les conflits armés d'un caractère non-international*, Librairie générale de Droit et de Jurisprudence, Paris, 1958, p. 211; interviews with Pierre Gaillard by Françoise Perret, January–February 1992.

Continuation of contacts with representatives of the FLN

While developing its activities for Algerian militants in French hands, the ICRC endeavoured to maintain its dialogue with North African political figures, especially in order to get the opportunity to aid soldiers and French civilians in the hands of insurgents. It instructed David de Traz to take steps along these lines with the FLN delegation in Cairo.²⁶ De Traz wrote to Mohamed Khider, representative of the FLN, on 24 April 1956 to inform him of the new mission of the ICRC delegates in Algeria and to request lists of prisoners held by the ALN, as well as the authorization for ICRC delegates to visit them.²⁷

However, at a meeting held on 4 June at the FLN headquarters in Cairo, Ben Bella informed the ICRC delegate that the conditions in which the combatants of the FLN were fighting in Algeria – with no fallback positions, constantly on the move, looking for makeshift shelters – made such visits impossible.²⁸ Thus, the ICRC approaches to the FLN delegation in Cairo on behalf of French prisoners in the hands of the insurgents appeared to have failed temporarily. In addition, the FLN did not transmit to the ICRC the lists of the French held by them.

The ICRC then decided to contact the FLN representatives in Morocco. De Traz informed Khider, who approved this initiative and gave him a letter of introduction to a representative of the FLN in Tangiers.²⁹ De Traz then left for Morocco on 3 October 1956, while the ICRC delegate in Cairo, Edmond Müller, continued his contacts with the FLN delegation, who once again gave him reason to hope that ICRC delegates would soon be able to visit the prisoners in the hands of the ALN.³⁰

During his mission to Tangiers and Tetouan, de Traz interviewed FLN leaders who promised him that he would be able to meet with prisoners held by the ALN as soon as they had been brought into Moroccan territory: that is, within one or two months. However, on 22 October 1956, the plane bringing the five historic leaders of the FLN back from Morocco to Tunis was intercepted by the French Air Force and its occupants were detained in France. The ICRC thus lost valuable contacts. Nevertheless, negotiations with the FLN were not completely interrupted. Indeed, the ICRC immediately took steps to gain access to the FLN leaders imprisoned in metropolitan France. So it was through prison visits that the ICRC continued its dialogue with these leaders.

On 11 December 1956, an ICRC delegate in Paris, Pierre Boissier, met Ben Bella in the Santé prison. Ben Bella told him that he believed that an ICRC visit to detainees held by the FLN in Morocco would be possible. In March 1957, Claude Pilloud met with FLN leaders in Morocco and gave them a consignment of medicine worth 10,000 Swiss francs. He again tried to obtain permission for the ICRC to visit detainees held by the FLN either in Morocco or in Algeria, and received certain

26 ICRC Archives, B AG 251 (12), Letter from Roger Gallopin to David de Traz, 10 April 1956.

27 ICRC Archives, B AG 251 (12), Letter from David de Traz to Mohamed Khider, 24 April 1956.

28 ICRC Archives, B AG 251 (12), Letter from Edmond Müller (delegate in Cairo) to the ICRC, 7 June 1956.

29 ICRC Archives, B AG 200 (12), Note by Jean-Pierre Maunoir, 3 October 1956.

30 ICRC Archives, B AG 251 (12), Notes by Edmond Müller to the ICRC, 10 and 17 October 1956.

assurances in this regard. So in April 1957 the ICRC sent two delegates to Morocco in order to visit detainees held by the FLN. But by the end of May 1957 these visits had still not been realized and the delegates returned to Geneva. However, the ICRC remained in contact with representatives of the FLN, particularly in Cairo, Morocco, and Tunisia, and submitted several proposals to them in order to enhance respect for the basic rules of IHL, particularly Common Article 3.³¹

New missions to Algeria (1957–1958)

In May and June 1957, and then again from November 1957 to February 1958, Pierre Gaillard and Doctor Gaillard visited 115 internment camps and detention sites in Algeria. They travelled throughout the country and, taking advantage of the contacts they had made with the military authorities and of the confidence that had been established, were able to negotiate the granting of a special status to combatants captured while carrying arms openly. This negotiation – mainly led by Pierre Gaillard, with the support of the ICRC's Legal Division – took place over several months with the relevant Ministries in Paris, as well as with the Military High Command in Algiers.

Finally, on 19 March 1958, General Salan, commander-in-chief of French forces in Algeria, ordered the creation of special camps for ALN fighters who were captured while bearing arms openly. Although the circular stated that the captives should not be considered as prisoners of war, the regime that would henceforth be applied to them would be similar to that of war prisoners.

The link between the conduct of the insurgents in battle and their fate in case of capture clearly emerges from this directive. Under the heading 'general ideas', the following points are made:

Rebels who are driven into a corner in combat very often display a determination that leads to their extermination.

This tenacity is less a manifestation of a spirit of sacrifice in the service of a cause deemed sacred than the result of effective psychological training.

In fact, prisoner interrogations show that the 'mujahedeen' are insistently warned during their training concerning the dangers they face in case of surrender: French troops massacring prisoners after torture or, in the most favourable case, bringing them before tribunals that automatically condemn them to the death penalty.

Cuttings from some French and foreign newspapers and from foreign radio stations widely cited by the rebels very effectively support this propaganda.

The level of fear thus maintained gives the bands a cutting edge that it is important to wear down as much as possible in order to reduce our losses.

31 ICRC Archives, B AG 210 (12–51), Minutes of meeting between Pierre Boissier and Ahmed Ben Bella, 11 December 1956; ICRC Archives B AG 200 (12), 'Le CICR et les événements d'Afrique du Nord – Résumé chronologique' ('The ICRC and the events in North Africa – chronological summary'), 27 June 1957.

One way to do this is to give prisoners as liberal a treatment as possible and to make this well known.³²

As a result, General Salan ordered the establishment of military camps where rebels who were captured while bearing arms openly would be interned. While stressing that the military internees should not be considered prisoners of war, he ordered that the regime that would henceforth be applied to them should in fact correspond to that of war prisoners. Thus, the military internment camps should 'be subject to military discipline, with the aim of prohibiting any act and every word that could be interpreted as an affront to the dignity of prisoners'. Finally, under this directive, the French authorities abandoned the practice of systematically bringing to trial all ALN members captured while bearing arms: 'The proposals to bring prisoners to trial will be systematically avoided, except for those who have committed atrocities or who demonstrate a fanaticism that may affect the positive development of the general state of mind'.³³ In short, this instruction, whose importance should not be underestimated, aimed at inserting the fighting in Algeria into the framework of IHL, and not into that of French criminal law alone, which was rejected by the Algerian nationalists.

Of course, General Salan placed himself on his own terrain – that of military effectiveness. However, the creation of these internment camps also represented the culmination of efforts by the ICRC conducted for over a year, both in Algiers and in Paris, to ask that fighters captured while bearing arms openly have a special status, based on that which the Third Geneva Convention provides to prisoners of war. The objective was to distinguish between the combatants who openly bore arms and those who resorted to attacks intended to spread terror among the civilian population, and thus to induce the combatants to comply with the laws and customs of war. More generally, it was a question of reintegrating the war in Algeria into the only legal framework that could contain the violence: international humanitarian law.

In December 1958, during a new round of visits to sixteen detention sites, Pierre Gaillard and Doctor Gaillard went to two military internment centres. On the occasion of their visit, the military released ten Algerian fighters. At the same time, two other delegates, William Michel and Jean-Pierre Maunoir, visited the Algerians arrested in France and held in the administrative centre of Vadenay (Seine-et-Marne).³⁴ In March, June, and November 1959, delegates visited four Algerian internment camps in France and prisons in Paris and other regions,

32 See Appendix 3 below for the complete text of General Salan's directive of 19 March 1958.

33 ICRC Archives, B AG 225 (12), Army High Command, 10th Military Region, Note of 19 March 1958, reproduced in: *The ICRC and the Algerian conflict*, ICRC, Geneva, 1962, p. 7. In a subsequent directive dated 23 March 1958, General Salan corrected the terminology of the directive of 19 March 1958, substituting the expression '*camps militaires d'internés*' ('military camps for internees') for the expression '*camps d'internés militaires*' ('camps for military internees'). This terminological clarification reflected the concerns of the French authorities and of the High Command to avoid any expression that could be interpreted as conferring the status of prisoners of war on fighters captured while bearing arms openly.

34 ICRC, *Annual Report 1956*, pp. 43–44; ICRC, *Annual Report 1958*, pp. 7–9. *Revue internationale de la Croix-Rouge*, No. 464, August 1957, pp. 438–439; No. 471, March 1958, p. 153; No. 476, August 1958, pp. 405–408; No. 481, January 1959, pp. 24–25; No. 482, February 1959, pp. 68–70.



Figure 1: An ICRC delegate visiting a prisoners camp, Oranie, 1958. © ICRC.

including Fort Liedot on the island of Aix, where they met the leaders of the FLN: Ben Bella, Ait Ahmed, and Khider.

Creation of the Algerian Red Crescent

During David de Traz's mission to Morocco in October 1956, his contacts informed him of their decision to establish an Algerian Red Crescent, and, on 10 January 1957, a communiqué in the FLN journal, *Résistance algérienne*, announced the founding of this association. On 14 March 1957, the President of the Algerian Red Crescent, Omar Boukli Hacène, who had had contact with Claude Pilloud in Morocco, asked for official recognition of his society by the ICRC. On 29 April 1957, the ICRC informed him that it could not recognize the Algerian Red Crescent because it did not meet the conditions for recognition approved by the Seventeenth International Conference of the Red Cross, held in Stockholm in 1948, particularly the condition that a National Society must exercise its activity on the territory of an independent state where the Geneva Conventions are in force.³⁵ However, the ICRC

35 According to the Statutes of the International Red Cross, approved at the Eighteenth International Conference of the Red Cross held in Toronto in 1952, the ICRC has in particular the responsibility of recognizing any newly created or reconstituted National Society fulfilling the conditions for recognition currently in force. The first of these conditions, fixed at the Seventeenth International Conference of the Red Cross held in Stockholm in August 1948, stipulates that a society that is a candidate for admission

said that it was ready to maintain a working relationship with the Algerian Red Crescent in carrying out humanitarian action.³⁶

On 22 May 1957, Ferhat Abbas, a member of the National Council of the Algerian Revolution, came to the ICRC headquarters in order to accredit Doctor Ben Tami as the Algerian Red Crescent liaison representative with the ICRC. While refusing a formal accreditation as the representative of a National Society, which it could not recognize as such, the ICRC agreed to correspond with Doctor Ben Tami for all matters relating to the association he represented. But the Algerian Red Crescent did not accept the ICRC's refusal to recognize it and, in June 1957, it sent a letter to the ICRC, in which it strongly objected to this position.³⁷

In the following months, the Algerian Red Crescent intensified its approaches so as to be allowed to participate in the Nineteenth International Conference of the Red Cross, which was to be held in New Delhi in October and November 1957. It would not be invited there, but the fate of the Algerian people was widely discussed and was the focus of a resolution (see below).

Relief for Algerian refugees in Morocco and Tunisia and for displaced persons in Algeria

Since Moroccan independence on 2 March 1956, Algerian civilians – mostly women, children, and the elderly fleeing the fighting or avoiding internment – had been taking refuge in Morocco. A very difficult situation soon arose for these refugees. In the spring of 1957, ICRC delegates estimated that there were about 40,000 refugees scattered along the Algerian–Moroccan border. Thanks to the donations it received from a number of National Red Cross and Red Crescent Societies, the ICRC decided to undertake a relief effort for these refugees. With the agreement of the Moroccan authorities, ICRC delegates distributed food and clothing to them.

Algerian civilians also took refuge in Tunisia, which had been independent since 20 March 1956. In June 1957 the authorities and the Tunisian Red Crescent requested aid from the ICRC. The ICRC delegate who had been dispatched there noted the presence of some 5,000 refugees in the border region, and by mid-August

must have been founded in the territory of an independent state that is a signatory of the Geneva Conventions (*Seventeenth International Conference of the Red Cross, Stockholm, 20–30 August 1948, Report*, Swedish Red Cross Society, Stockholm, 1948, p. 89). The ICRC is bound by the conditions adopted by the International Conference; its role is like that of a notary who ensures that the conditions have been truly fulfilled. However, the ICRC is ready to collaborate on a pragmatic basis with any Red Cross or Red Crescent Society that respects the Fundamental Principles of the Red Cross and Red Crescent, whether or not the Society has been formally recognized. Concerning the work of the Algerian Red Crescent during the Algerian War, see Farouk Benatia, *Les actions humanitaires pendant la lutte de libération (1954–1962)*, Éditions Dahlab, Algiers, n.d.

36 ICRC Archives, B AG 251 (126), Mission report of David de Traz, 25 October 1956; ICRC Archives, B AG 122 (12), Letter from ICRC to Omar Boukli Hacène, 29 April 1957; ICRC Archives, B AG 200 (12), Note of David de Traz, 30 July 1957.

37 ICRC Archives, B AG 200 (12) 'Le CICR et les événements d'Afrique du Nord', above note 31; ICRC Archives, B AG 200 (12), Note by Claude Pilloud, 23 May 1957.



Figure 2: Aïn Bessens, distributing milk in school canteens, 1960. © ICRC.

the ICRC, in collaboration with the Tunisian Red Crescent, had organized the distribution of food, clothing, and blankets.³⁸

At the end of 1957, the fate of Algerian refugees in Tunisia and Morocco was a concern of the entire Red Cross and Red Crescent Movement. The Nineteenth International Conference of the Red Cross, meeting in New Delhi from 28 October to 7 November, unanimously adopted a resolution that stressed the utter destitution of the Algerian refugees and launched 'an urgent appeal to the world' to come to their aid.³⁹ With this resolution, on 12 December 1957 the ICRC and the League of Red Cross Societies⁴⁰ launched a joint appeal for Algerian refugees in Morocco and Tunisia.⁴¹

During the winter of 1957–1958, the ICRC distributed aid from the United Nations High Commissioner for Refugees to Algerian refugees in Tunisia. It undertook this action in conjunction with the League of Red Cross Societies and with the assistance of the authorities and the Tunisian Red Crescent. Such a distribution was in progress when the French Air Force bombarded Sakhiet Sidi Youssef on 8 February 1958, and the ICRC trucks were damaged.

38 *Revue internationale de la Croix-Rouge*, No. 468, October 1957, pp. 551–553.

39 Resolution XI, *Nineteenth International Conference of the Red Cross, New Delhi, October–November 1957, Report*, Indian Red Cross, New Delhi, 1958, p. 153.

40 Today, the International Federation of Red Cross and Red Crescent Societies.

41 ICRC, 'Appeal from the International Red Cross: International aid to Algerian refugees', Press release No. 634b (joint communiqué of the ICRC and the League), 12 December 1957.



Figure 3: Distribution of emergency relief to orphans by the French Red Cross at the cité de regroupement de Bazer Sakra (Bazer Sakra regroupement centre), 1961. © ICRC.

As of 15 March 1958, the Tunisian Red Crescent took responsibility for this distribution in collaboration with the League. During that year, the ICRC also continued its distributions of relief supplies to Algerian refugees in Morocco. From December, the responsibility for this action was taken over by the Moroccan Red Crescent in collaboration with the League.⁴²

Since 1957, ICRC delegates in Algeria had been allowed to make a limited distribution of emergency relief to internally displaced populations of Algeria.⁴³ These relief efforts, conducted in partnership with the French Red Cross, grew in proportion to the increasing number of displaced persons inside Algeria. In 1962, there were an estimated 2.2 million displaced persons, mostly women and children, spread across some 2,000 centres. At this stage of the war, one quarter of the Muslim population of Algeria were thus interned in ‘regroupment centres’.

Release of prisoners held by the ALN

In early 1958, two ICRC delegates were for the first time allowed to visit prisoners held by the ALN: on 30 January, Jean de Preux and Georg Hoffmann came from

42 ICRC Archives, A PV A PI, Minutes of the Committee, Plenary Sessions, 13 February, 6 March, and 1 May 1958, and 3 June 1959. ICRC, *Annual Report 1957*, pp. 27–33; ICRC, *Annual Report 1958*, pp. 10–12. *Revue internationale de la Croix-Rouge*, No. 470, February 1958, pp. 85–86; No. 471, March 1958, pp. 141–142; No. 473, May 1958, pp. 278–280; No. 476, August 1958, pp. 410–412; No. 482, February 1959, pp. 70–73; No. 486, June 1959, pp. 308–309; No. 494, February 1960, pp. 89–90.

43 *Revue internationale de la Croix-Rouge*, No. 476, August 1958, p. 409.

Tunis and, on Algerian territory, not far from the Tunisian border, visited four French prisoners captured in the region.⁴⁴ The ICRC did not ask for the authorization of the French authorities to carry out this visit. It limited itself to informing the military authorities on the spot, suggesting that they ‘close their eyes to the clandestine crossing of the border by its delegates’.⁴⁵

To our knowledge, this semi-clandestine border crossing by a delegate without seeking formal approval of the government of a state torn by civil war is unprecedented in the history of the ICRC. In all likelihood it was due to the political issues of the day and the opposing positions that were held by the parties to the conflict:

- The FLN claimed to control a portion of Algerian territory, which allowed it to claim a form of international recognition;
- France claimed control of all Algerian territory, while acknowledging that the Salan Line, a fortified military line along the Tunisian border, was not based exactly on the border between Algeria and Tunisia but was slightly set back from the border itself.

In this context, if the ICRC had asked the French authorities for permission to send a delegate to an area of Algerian territory controlled by the FLN, Paris would have had no choice but to refuse. However, the humanitarian issue was important, since it meant seeing four French prisoners never previously visited, hence the risk taken by the ICRC.

On 20 March 1958, the FLN gave de Preux, who had returned to Tunis to continue the negotiations begun in January, a list of ten recently captured French soldiers. Following its usual practice, the ICRC immediately notified their families.⁴⁶ On 20 October, the ALN decided to release the four prisoners that de Preux had met earlier in the year. They were turned over to two ICRC delegates at the headquarters of the Tunisian Red Crescent. Similarly, on 4 December, eight French soldiers captured by the ALN were turned over to ICRC delegates in Rabat at the headquarters of the Moroccan Red Crescent. In addition to these prisoner releases, the ICRC obtained the ALN's agreement that the prisoners whom it held could send messages that would be forwarded to their families. Thus, in 1958 the ICRC received 169 messages from French prisoners, as well as lists of prisoners held by the FLN.

The ICRC remained in regular contact with the FLN, and on 20 February 1959 in Oujda, a Moroccan town near the Algerian border, six French prisoners were released during a ceremony at the local headquarters of the Moroccan Red Crescent. Following numerous approaches by the ICRC to the GPRA, on 15 and 18 May 1959, the FLN released fifteen French prisoners in the Kabyle countryside – including six civilians – and a Swiss citizen who had been detained for months in

44 ICRC, ‘Two delegates of the International Committee of the Red Cross see the four prisoners of Sakhiet’, Press Release No. 636b, 3 February 1958.

45 ICRC Archives, A PV C1 Pl, Minutes of the Presidential Council, 23 January 1958, pp. 3–4; 30 January 1958, pp. 2–3; dossier 210 (12–15).

46 ICRC, ‘The ICRC receives a first list of French combatants captured by the FLN’, Press Release No. 641b, 20 March 1958.

the Kabyle maquis. No ICRC representative attended this release, which, for reasons of military security, obviously could only have taken place clandestinely. During the following months, the ICRC obtained several more releases of individuals held captive by the ALN. At the end of 1959, the number of those released totalled forty-five.⁴⁷

Confronting violations of the Geneva Conventions

In every conflict in which it operates, the ICRC receives protests relating to violations of the Geneva Conventions. From the beginning of the war in Algeria, the opposing forces accused each other of dreadful atrocities. Thus, the ICRC received complaints from both the FLN and French authorities requesting that it investigate violations of IHL allegedly committed by the opposing party, which led it repeatedly to present the reasons why it felt that it was not justified in conducting investigations to ascertain violations of the laws and customs of war.⁴⁸

In the summer of 1957, the Syrian and Jordanian Red Crescent Societies submitted protests to the League in which they accused the French Red Cross of denying medical assistance to 'Algerian nationalists' and 'Algerian victims of the events'. They also accused the French authorities of preventing physicians from going to their aid.⁴⁹ The League forwarded these two letters to the ICRC, which, in accordance with established custom in such cases, transmitted them to the French Red Cross. The latter responded by denying the allegations and adding that, in many cases, ambulances and nursing staff of the French Red Cross were attacked by the indigenous population. The ICRC sent this response to the Syrian and Jordanian Red Crescents.⁵⁰

The Syrian and Jordanian Red Crescents brought this matter before the Nineteenth International Conference of the Red Cross in the autumn of 1957. The Conference adopted a resolution that, while not specifically mentioning the situation in Algeria, clearly referred to it and reaffirmed the principle of the neutrality of medical action:

The XIXth International Conference of the Red Cross, considering the efforts already made by the International Committee of the Red Cross to minimize the suffering caused by armed conflicts of all types, expresses the wish that a new

47 ICRC Archives, A PV C1 Pl, Minutes of the Presidential Council, 23 January 1958. ICRC, *Annual Report 1958*, pp. 9–10. *Revue internationale de la Croix-Rouge*, No. 470, February 1958, pp. 84–85; No. 472, April 1958, p. 192; No. 476, August 1958, pp. 408–409; No. 479, November 1958, pp. 617–618; No. 481, January 1959, pp. 24–25; No. 482, February 1959, pp. 70–71. See also F. Bugnion, above note 16, p. 451.

48 ICRC Archives, B AG 202 (12), Note from the ICRC to the French Government, 4 June 1957.

49 ICRC Archives, B AG 202 (12), Letter from the Syrian Red Crescent to the League, 22 July 1957; Letter from the Jordanian Red Crescent to the League, 14 August 1957.

50 ICRC Archives, B AG 202 (12), Letter from the ICRC to the French Red Cross, 22 August 1957; Letters from the French Red Cross to the ICRC, 6 and 19 September 1957.

provision be added to the existing Geneva Conventions of 1949, extending the provisions of Article 3 thereof so that:

- a) the wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,
- b) the inviolable principle of medical professional secrecy may be respected,
- c) there may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes.

Furthermore, makes an urgent appeal to all Governments to repeal any measures which might be contrary to the present Resolution.⁵¹

From 1958, the ICRC delegates in Algeria lodged requests with the French authorities in support of doctors who were being prosecuted for having treated insurgents. The ICRC based its actions on Article 18, paragraph 3, of the First Geneva Convention and on Resolution XVII of the Nineteenth International Conference. In most cases these approaches led to measures of leniency or reductions in sentences.⁵²

In May 1958, following the execution of three French soldiers by the FLN, the ICRC approached the Coordination and Implementation Committee of the FLN, in session in Cairo, to put an end to such retaliatory measures.⁵³ It also sent the French government and the FLN an important memorandum on 28 May 1958, urging them to respect the fundamental principles of international humanitarian law.

After reminding both parties of the strictly humanitarian nature of its action, the ICRC reiterated the critical importance of compliance with Common Article 3 and requested that, in case of capture, members of the armed forces should not be subject to criminal proceedings 'for the mere fact of having taken part in the struggle' and that they should receive 'humane treatment and all the essential safeguards accorded to prisoners of war'. If criminal proceedings were nevertheless engaged against captured members of the armed forces because of crimes or misdemeanours they had allegedly committed, the ICRC requested that it be informed and allowed to follow the proceedings and provide legal assistance to defendants. If the proceedings resulted in death sentences handed down in legal form by competent courts, the ICRC called for a stay of the executions during the hostilities and that the condemned should be accorded the treatment due to prisoners of war. The ICRC also reiterated that reprisals were prohibited. In conclusion, the ICRC asked that 'the FLN decide that it is able to make such commitments to the ICRC which the latter is also trying to obtain from the French

51 Resolution XVII, *Nineteenth International Conference of the Red Cross, New Delhi, October–November 1957, Report*, pp. 154–155.

52 ICRC Archives, A PV C1 Pl, Minutes of the Presidential Council, 23 October 1958; ICRC, *Annual Report 1958*, p. 9; F. Bugnion, above note 16, p. 479.

53 ICRC Archives, A PV A Pl, Minutes of the Committee, plenary session, 4 June 1958.

Government', and requested both the French government and the FLN to refrain from any action that would be likely to endanger its efforts on behalf of the victims of the conflict until it had received responses from both sides.⁵⁴

Not surprisingly, the French government did not like being put on almost the same level as the FLN and it so informed the ICRC. In a letter dated 18 June 1958, the ICRC said that it wrote its memorandum with the 'conviction that only certain decisions to be taken or confirmed by both parties to the conflict would lead to satisfactory results', and that in using the term "both parties to the conflict" it did not ignore the essential difference between the Government of a State and a group that has de facto authority without having a clearly defined legal status'.⁵⁵

In August 1959, the ICRC President, Léopold Boissier, met with the President of the GPRA, Ferhat Abbas. He reminded him of the memorandum of 28 May 1958, to which the Provisional Government had not responded, and expressed the concerns of the ICRC concerning French civilians and soldiers who had fallen into the hands of the ALN. Ferhat Abbas assured him that specific instructions had been given to the fighters that prisoners be humanely treated, but he recognized that it was difficult to have control of the situation given the extreme dispersal of units in constant movement. Moreover, local commanders who had witnessed aerial bombardments that caused severe losses among the civilian population were likely to resort to reprisals.

At the end of 1959, the ICRC wrote to Ferhat Abbas, expressing the hope that the GPRA would respond concretely to the memorandum of 28 May 1958. In January 1960, having still received no reply from the GPRA, the ICRC sent its Delegate General for the Middle East, David de Traz, to Tunis in order to get a satisfactory response from the GPRA representatives there to the proposals made by the ICRC.

On 11 June 1960, the GPRA informed the ICRC of its decision to accede to the Geneva Conventions of 12 August 1949. Without taking a stand on the legal status of this declaration, the ICRC viewed it as a positive response to its memorandum of 28 May 1958. So it resumed its approaches to the GPRA to develop practical measures to help prisoners held by the ALN, such as transmitting lists of names of prisoners, conveying messages to family members, and the authorization of visits by ICRC delegates. However, these efforts were of no avail.

In an attempt to resolve the situation, the ICRC sent several temporary missions to Tunis to meet with the GPRA. However, despite an interview on 22 November 1961 with the new President of the GPRA, Ben Youssef Ben Khedda, and the Vice-President, Krim Belkacem, the ICRC never received an answer to its memorandum of 28 May 1958. Indeed, since the Algerian insurgency had established a provisional government, the GPRA, which postulated the existence of an Algerian Republic in conflict with France, it could not accept, without contradicting itself, the formal ICRC memorandum, which was based on Common

54 ICRC Archives, B AG 225 (12), Memorandum of the ICRC, 28 May 1958 (for an English version, see below, Appendix 4).

55 ICRC Archives, B AG 200 (12), Letter from the ICRC to the French Government, 18 June 1958.

Article 3, which applies to non-international armed conflicts.⁵⁶ Nevertheless, to demonstrate its commitment to respect IHL, the FLN, in the presence of ICRC delegates, released in Tunisia and Morocco some of the French prisoners that it held.⁵⁷

The French press publishes reports of ICRC visits

Visits to detention sites and private interviews with the prisoners were the cornerstone of ICRC activity in Algeria. From 15 October to 27 November 1959, four delegates undertook a new mission to Algeria, during which they visited eighty-two detention sites.⁵⁸ This was the seventh series of visits since the beginning of the war. In accordance with prior agreement with the French government, the ICRC sent reports of the visits of its delegates to the General Delegation of the government in Algiers, as well as to the Ministry of Foreign Affairs and the Ministry of Justice in Paris. After forwarding the reports, Pierre Gaillard and William Michel attended an inter-ministerial conference that met in Paris with representatives of the relevant ministries, as well as with two generals who had come specifically from Algeria. None of the participants disputed the findings of the delegates, including those regarding the interrogation methods used in some centres.

A thunderbolt struck on 5 January 1960: the newspaper *Le Monde* published a summary of the reports of the seventh mission of the ICRC in Algeria, clearly showing that it possessed the entire collection of these reports: eighty-two detailed reports, accompanied by a position paper summarizing the most important findings – a total of 270 pages. At the same time, *Le Monde* published a statement from the Prime Minister that declared that the ICRC missions had received every facility for visiting detention sites.⁵⁹

This publication had a considerable impact, since the debate dividing France at the time specifically concerned the use of torture in Algeria. It had been a continuous debate since the beginning of the war. On 13 January 1955, *France-Observateur* published an article by Claude Bourdet entitled 'Your Gestapo in Algeria'. Two days later, *L'Express* published an article by François Mauriac entitled 'The Question'.⁶⁰ On 17 February 1958 there appeared, also under the title *The*

56 Mohammed Bedjaoui, *La Révolution algérienne et le droit*, Éditions de l'Association des Juristes démocrates, Brussels, 1961, p. 216.

57 ICRC Archives, A PV C1 Pl, Minutes of the meeting of the Presidential Council, 27 August 1959; ICRC Archives, B AG 200 (12), Letter from Léopold Boissier to Ferhat Abbas, 4 December 1959; ICRC Archives, B AG 200 (12), Minutes of meeting between Pierre Gaillard, the Minister of Health of the GPRA, and Doctor Ben Tami, representative of the Algerian Red Crescent in Geneva, 22 November 1960. ICRC, *Annual Report 1959*, pp. 10–12; ICRC, *Annual Report 1960*, pp. 17–18; ICRC, *Annual Report 1961*, p. 20. *Revue internationale de la Croix-Rouge*, No. 495, March 1960, pp. 122–123; No. 518, February 1962, pp. 71–72. Interviews between Pierre Gaillard and Françoise Perret, June to September 1992.

58 ICRC, 'The ICRC visits places of detention in Algeria and France', Press Release No. 688b, 16 October 1959; ICRC, 'The seventh mission of the ICRC in Algeria', Press Release No. 692b, 7 December 1959.

59 *Le Monde*, 5 January 1960, pp. 1 and 3. *Libération* had also received a copy of the ICRC report but issue number 5 of 5 January 1960 had been seized 'because of the commentary which accompanied the analysis of the ICRC reports' (*Le Monde*, 6 January 1960).

60 A.-G. Slama, above note 14, pp. 68 and 148–149.

Question, the precise and terrifying testimony of the former editor of the *Alger Républicain*, Henri Alleg, on the way he was tortured. Censorship prohibited the distribution of the book, but it was then published in Lausanne, with an afterword by Jean-Paul Sartre entitled 'A Victory'.⁶¹

In May 1958, Albert Camus, to whom the Swedish Academy had awarded the Nobel Prize for literature only a few months earlier, in turn denounced the practice of torture in the introduction to *Chronique algérienne*. He not only described this practice as a 'crime' and a 'humiliation' that might easily 'justify the crimes that we want to fight', but he also wrote that it was his belief that the use of torture inevitably paved the way for 'the demoralization of France and the abandonment of Algeria'.⁶²

For five years the war in Algeria had torn France apart, and the dispute over torture was the most painful point of this fault line. Indeed, many French people could not bear the idea that the police or the French army would use interrogation methods based on those of the Gestapo, against which they had rebelled – risking their lives – only fifteen years earlier.

The ICRC report contained no revelation of practices that were not already known through previously published testimony. However, it came from an institution outside the debate that divided France, respected for its neutrality and impartiality. Above all, it was based on interviews that the delegates had had with the prisoners in detention facilities and on the findings that delegates and medical doctors of the ICRC had made inside prisons. While written in the restrained, factual style that is customary for the ICRC, the report of the delegates nevertheless put its finger on the wholly inadequate prison conditions, the overcrowding and lack of hygiene in many camps, and especially on cases of torture and forced disappearances.

At no time did the French authorities lay the responsibility for the release of this report at the ICRC's doorstep.⁶³ Nevertheless, the ICRC feared that its publication would undermine its reputation for discretion, and the trust that governments had in its ability to meet its commitment to confidentiality. It feared that this exposure would compromise its potential for action over the long term, not only in Algeria and France but wherever it tried to help prisoners of war or political prisoners. Conversely, some journalists and writers criticized the ICRC for not

61 Henri Alleg, *La question*, with afterword 'Une victoire' by Jean-Paul Sartre, La Cité, Lausanne, 1958. The same editor from Lausanne would publish in 1959, under the title *La gangrène*, a collection of accounts by Algerian victims of torture.

62 Albert Camus, *Actuelles III: Chronique algérienne*, Gallimard, Paris, 1958, pp. 15–16; *Œuvres complètes*, Gallimard (Bibliothèque de la Pléiade), Paris, 2008, vol. IV, p. 299.

63 According to the testimony of the historian Pierre Vidal-Naquet, the origin of the leak was Gaston Gosselin, who was then a close collaborator of the Minister of Justice Edmond Michelet: 'At the Ministry of Justice, which was occupied by Edmond Michelet from January 1959 to August 1961, there was a small group formed by two of the Minister's former fellow-deportees [at Dachau], Gaston Gosselin and Joseph Rovani. Both of them were resolutely hostile to the current practice in Algeria. While Rovani acted in a discrete manner, Gosselin did not hesitate at provoking scandals, for example, by transmitting to a journalist, Pierre Viansson-Ponté, the report on Algeria by the ICRC. This document was published in *Le Monde*, 5 January 1960.' Pierre Vidal-Naquet, *La raison d'État*, La Découverte, Paris, 2002, p. 6.

having alerted the public itself as soon as it found cases of torture in Algeria. On 8 January 1960, the ICRC published a long statement in which it reiterated the purpose and procedures for visits to detention sites, as well as the reason for the confidentiality agreement, without which the ICRC would never have obtained access to the captives.⁶⁴

There is no doubt that the article in *Le Monde* and the disclosure of the ICRC report on the seventh series of visits to detention sites in Algeria forced the French government to confront its responsibilities, obliging the political authorities to put a minimum of order in the detention system in place in Algeria and, in particular, in the interrogation methods. However, the ICRC had to pay the price for this disclosure. It took one year of approaches and negotiations before the French authorities allowed it to once again send delegates to visit detention sites in Algeria, under the pretext that the prisons were being reorganized.

It was only in January 1961 that the ICRC was allowed to resume visits to detainees in Algeria. That year its delegates made three series of visits, during which they went to 124 detention sites. Meanwhile, ICRC delegates continued to visit the Algerians detained in France: between March and July 1961, they visited twenty detention centres.

A new series of visits in France took place from 5 to 20 November 1961, while most of the Algerian detainees were on a hunger strike. Delegates went to the hospital in Garches, where three ministers of the GPRA were interned: Ben Bella, Ait Ahmed, and Khider. After their meetings with the ministers, they submitted to the French authorities some proposals to improve the detention conditions. These were accepted, and the ICRC informed the Algerian detainees, who decided to end their hunger strike.

A last visit to the Algerians detained in Algeria was conducted in May 1962.⁶⁵ In total, from February 1955 to July 1962, the ICRC sent ten itinerant missions to Algeria. Its delegates carried out 490 visits to detention sites: prisons, screening centres, military camps of internees, hospitals, and so forth. In addition, from 1958 to 1962, delegates conducted 96 visits in France to internment sites in which Algerian militants were detained.⁶⁶

64 ICRC, 'Information concerning visits to places of detention by the delegates of the International Committee of the Red Cross', Press Release No. 694b, 8 January 1960. ICRC Archives, A PV A Pl, Minutes of the Committee, plenary session, 9 January 1960. ICRC, *Annual Report 1959*, pp. 8–10; ICRC, *Annual Report 1960*, pp. 16–17. *Revue internationale de la Croix-Rouge*, No. 841, July 1959, p. 341; No. 493, January 1960, p. 18; No. 494, February 1960, pp. 87–89; English supplement, Vol. XIII, No. 2, February 1960, pp. 32–34.

65 ICRC, *Annual Report 1961*, pp. 17–19; ICRC, *Annual Report 1962*, pp. 8–9. *Revue internationale de la Croix-Rouge*, No. 508, April 1961, pp. 202–203; No. 516, December 1961, pp. 605–606; No. 517, January 1962, pp. 29–30; No. 519, March 1962, pp. 130–131.

66 ICRC, *Annual Reports*, from 1955 to 1962; ICRC, *The ICRC and the Algerian conflict*, above note 33; F. Bugnion, above note 16, pp. 632–633.



Figure 4: Transit and Screening Centre (CTT) of Barika Barika, 1961. © ICRC.

Events following the cease-fire

An emergency action plan

Following the announcement of the cease-fire on 19 March 1962, the OAS multiplied attacks throughout Algeria. The permanent delegate of the ICRC in Algiers, Roger Vust, tried to send relief supplies to the injured. He was joined by Pierre Gaillard. Together with the Algerian authorities and the High Commissioner of France, the ICRC delegates drew up an emergency action plan, including medical assistance for the civilian population, visiting prisoners, searching for the missing, and distributing relief supplies to displaced persons. In mid-May the ICRC medical teams arrived in Algeria.⁶⁷

The Evian agreements and the fate of prisoners

Signed on 18 March 1962 and followed the next day by the proclamation of the cease-fire, the Evian agreements provided for a twenty-day period, from 19 March, during which the parties undertook to release the prisoners they held. They were to

67 ICRC Archives, B AG 200 (12), Report on the mission of Dr. de Chastonay, 8 June 1962. ICRC, *Annual Report 1962*, pp. 10–11. *Revue internationale de la Croix-Rouge*, No. 520, April 1962, p. 177; No. 522, June 1962, pp. 294–295; No. 523, July 1962, pp. 330–332.

inform the ICRC of the locations of the prisoners as well as of 'any action taken for their release'.⁶⁸

At the end of that period, the French authorities notified the ICRC of the locations of 3,600 prisoners captured while bearing arms and the measures taken for their release and their return home. The first actual prisoner releases took place in early April.⁶⁹ At the same time, the GPRA released three French soldiers held since the spring of 1961. Two other French soldiers captured by the ALN in February 1961 were released in the Kabyle region to the local Armistice Commission in Tizi Ouzou. Four other French soldiers were released in June 1962 in Morocco. Finally, twenty legionnaires originating from a variety of European countries were released before the end of 1962.

The search for missing persons, visiting prisoners, and the *harki* problem

However, there were still no news concerning 330 French soldiers and 264 European civilians reported missing at one time or another during the conflict.⁷⁰ ICRC delegates organized research activities in different regions of Algeria in an effort to find these people. They launched regular appeals on the radio in French and Arabic, and they tried to gain the support of the newly established Algerian authorities.

In addition, the cease-fire brought about a complete reversal of the situation in Algeria. As FLN fighters were released and the ALN entered the country triumphantly from its bases in Morocco and Tunisia, vengeance fell on those Algerians who had remained loyal to France. The *harkis* and other auxiliaries of the French army were arrested en masse. There were also reports of disappearances among the *pieds noirs* who had not yet been repatriated to France.

ICRC delegates attempted to visit people arrested in the unrest following the cease-fire. They obtained a number of prisoner releases. In addition, at the request of French authorities, the ICRC sent a special mission to Algeria to trace missing persons. However, despite numerous visits to detention sites and a special mission of the ICRC's Vice-President, Samuel Gonard, who was received by the President of the Republic of Algeria, Ahmed Ben Bella, and several ministers who all promised their support, this mission obtained few concrete results.⁷¹ Similarly, whereas in the aftermath of independence the ICRC obtained permission to visit prisons where the former auxiliaries of the French army were confined, it could not get permission to visit those who were interned in military camps and the steps taken for these prisoners met with incomprehension and indifference.

68 'Accord sur le cessez-le-feu en Algérie, signé à Évian le 18 mars 1962' ('Cease-fire agreements in Algeria, signed at Evian, 18 March 1962'), in *Revue générale de Droit international public*, 66e année, vol. 3, tome XXXIII, July–September 1962, pp. 686–692. See also *Keesing's Contemporary Archives*, 9–16 June 1962, p. 18801.

69 ICRC, *Annual Report 1962*, p. 9. *Revue internationale de la Croix-Rouge*, No. 520, April 1962, p. 176.

70 ICRC, *Annual Report 1962*, p. 10. *Revue internationale de la Croix-Rouge*, No. 521, May 1962, p. 244; No. 522, June 1962, p. 289.

71 ICRC Archives, B AG 251 (12), Letter from Léopold Boissier, President of the ICRC, to Jean de Broglie, State Secretary in Charge of Algerian Affairs, 22 March 1963. ICRC, *Annual Report 1963*, pp. 9–11. *Revue internationale de la Croix-Rouge*, No. 531, March 1963, p. 138.

At its meeting of 19 September 1963, the Presidential Council of the ICRC noted that the problem of the *harkis* was now the responsibility of the Algerian and French governments. The special mission of the ICRC ended in September 1963. The Algerian Red Crescent – recognized on 4 July 1963 – now took over responsibility for the follow-up to the actions undertaken by the ICRC.⁷²

Conclusion

The ICRC action in Algeria took place within the framework of a war of national liberation that pitted against one another two opponents whose means were completely asymmetrical. On one side was an insurrectionary movement, originally consisting of small cells of fighters, including intellectuals, isolated and practically without material resources but highly motivated, that won the support of an ever-increasing part of the population. On the other was a regular army, with sophisticated weaponry, that would gradually be eroded by doubts. It was also a war marked by the cycle of terrorist attacks, repression, retaliation, and torture. In this situation, the primary aim of the ICRC was to ensure that all those who had fallen into the hands of their opponents were humanely treated. To accomplish this, it intensified its approach to both the French authorities and the leaders of the FLN.

The task was not an easy one. Indeed, at the beginning of the conflict, the French government, which denied the existence of an armed conflict to which humanitarian law was applicable, believed that it could overcome the insurgency by repressive – essentially police – measures and by the application of criminal law that the Algerian insurgents rejected, just as they rejected the jurisdiction of French courts. This inevitably led to the spiral of reprisals and counter-reprisals. To fulfil its mission, the ICRC would therefore try to reinsert the Algerian conflict into the only legal framework that could help contain the violence, that of international humanitarian law. This would be the linking thread of its action, from the offer of its services on 31 January 1955 up to independence.

In this context, particular attention should be paid to the negotiations that were conducted throughout the year 1957 for the establishment of a special status for captured combatants who had openly borne arms, to the directive of 19 March 1958 of General Salan and the memorandum of 28 May 1958. Article 3 common to the four Geneva Conventions of 12 August 1949, for which this would really be the first large-scale application, would become the main reference in this approach.

However, the asymmetry of forces was also felt in terms of humanitarian negotiation. Indeed, in its contacts with the French authorities, the ICRC negotiated both in Paris and in Algiers with people who had the necessary means to enforce their orders. To the extent that they accepted the proposals of the ICRC, the message

72 ICRC Archives, B AG 251 (12), Letters from Léopold Boissier, President of the ICRC, to Jean de Broglie, 5 April and 20 May 1963; ICRC Archives, B AG 251 (12), Report of the mission of Samuel Gonard, 28 June 1963; ICRC Archives, B AG 251 (12), Note of Roger Gallopin, Executive Director of the ICRC, to Georg Hoffmann, head of the ICRC special mission to Algeria, 1 July 1963. ICRC, *Annual Report 1963*, pp. 9–11. *Revue internationale de la Croix-Rouge*, No. 532, April 1963, pp. 178–179.

was passed on and improvements were obtained. The credibility of ICRC delegates in the eyes of the French military grew during the course of their missions. This took a quite visible form in the rank of the liaison officer who accompanied them: in early missions it was a captain, then a lieutenant colonel, and finally a general, with whom the delegates were authorized to enter any camp without warning.⁷³

While the ICRC's repeated actions led to many improvements in prison conditions and in particular to the establishment of a special status and of military internment camps for fighters captured while bearing arms openly, on the other hand, its actions did not stop the practice of torture during interrogations of prisoners. The publication by *Le Monde* on 5 January 1960 of extracts from the synthesis report on the seventh series of visits to detention sites in Algeria provoked very strong emotions and reopened the debate on the interrogation methods used in Algeria. However, this disclosure had its price. Although the French authorities admitted that the leak was not attributable to the ICRC, it would take more than a year before it was authorized to send a new mission to Algeria.

However, the ICRC action on behalf of prisoners held by the ALN faced almost insurmountable obstacles. Indeed, leaders of the FLN reported to ICRC delegates that the conditions under which their men fought did not permit the organization of visits to the prisoners they held. In addition they did not control all their fighters and could therefore not prevent acts of retaliation, which they attributed to the asymmetry of forces and to air strikes. In fact, the ICRC obtained only very limited results regarding French soldiers or civilians captured by the FLN. Another area in which the ICRC was unable to develop its activities was the protection of the *harkis* in the hands of the new Algerian authorities.

In parallel with its efforts for the various categories of prisoners, the ICRC managed to achieve, with the help of the French Red Cross, the Red Crescent Societies of Morocco and Tunisia, and the League of Red Cross Societies, a major relief action for the Algerian civilian population severely affected by the war.

Studied with hindsight, it is clear that the ICRC's action in Algeria represented a turning point. Indeed, in this first major war of independence in Africa, the ICRC had been a pioneer. Early in the conflict, while the FLN was considered by the vast majority of French public opinion – with the exception of a few famous artists and writers – as a terrorist movement, the ICRC immediately sought contact with its leaders to try to get their commitment to respect the fundamental principles of IHL. To rescue victims of a ruthless war and to contain the violence, the ICRC did not hesitate to deal with those whom the Western world rejected as purely criminal. This precedent for the ICRC would be a valuable experience for its future interventions in other wars of liberation, and paved the way for further developments of IHL. Indeed, some articles of the Additional Protocols to the Geneva Conventions, adopted on 8 June 1977, reflect the lessons learned during the war in Algeria, nearly twenty years earlier. Just as the war in Algeria has, from many points of view, been seen as the paradigm of wars of liberation, and has had exemplary significance for the conflicts that followed, particularly in Africa, the

73 Interviews with Pierre Gaillard by Françoise Perret, January–February 1992.

ICRC's work in the context of this conflict became the model for its commitment in subsequent conflicts.

Appendix 1: Letter from William Michel, head of the ICRC delegation in France, to the Prime Minister, Pierre Mendès-France, 1 February 1955

Mr. Prime Minister,

During the interview you kindly gave me on 31 January and for which I once again thank you, I had the honour of presenting to you the questions concerning North Africa which are of concern to the International Committee of the Red Cross.

I was able to inform you of the various steps taken in this region since 1952 to enable our institution to fulfil its strictly humanitarian mission.

Currently, the International Committee has the duty to once again draw the benevolent attention of the French government to its previous offers of service and to inform you of the measures that would enable it to carry out in the territories of Algeria, Morocco and Tunisia, some of its traditional activities as listed below:

1. Receive lists of the names of persons arrested due to the events (convicted or accused defendants, and possibly suspects).

In addition, the International Committee of the Red Cross would recommend that prisoners' families receive timely notification, if this is not already the case, of their detention.

2. Be authorized to visit sites of internment and detention of such people, it being understood that the purpose of these visits would be strictly limited to the conditions, and not to the motives, of detention. We would like the delegate of the International Committee to be authorized to hold private interviews with detainees during these visits. It goes without saying that, where appropriate, the delegate will not fail to present to the competent authorities the findings that he may have made during his visits.
3. Facilitate and if necessary organize – presumably with the assistance of the French Red Cross – correspondence between prisoners and their families or with the Red Cross . . .
4. Study and develop the possibility of the distribution of relief supplies (material or intellectual) to prisoners, no doubt with the help of the French Red Cross.
5. Study, under the same conditions, the possibility of relief action for the families of those detained or interned who, deprived of their natural support by recent events, may be in difficulty.

It is understood that the ICRC action would, as usual, be exercised with a strictly humanitarian purpose and would not result, on our part, in any publicity. It would still have a beneficial effect, we believe, as demonstrated by the International Committee's experiences in this domain.

In the hope, Mr. Prime Minister, that you will welcome the above proposals, which have, we think, some degree of urgency, please accept, with the expression of my thanks in advance, the assurances of my highest consideration.

W. H. Michel⁷⁴

Appendix 2: Letter from Pierre Mendès-France, Prime Minister, to William Michel, head of the ICRC delegation in France, 2 February 1955

Paris, 2 February 1955

Prime Minister,
Dear Sir,

I have received the letter of 1 February in which you confirm the oral requests you made on 31 January concerning the North African questions of concern to the International Committee of the Red Cross.

I have carefully studied your various requests and I have the honour to communicate to you, point by point below, the decisions taken by the Government.

1. For obvious reasons of public order, the French Government cannot give you the list of names of people who have been arrested due to the events that have occurred in North Africa. The list of those persons would in fact be of no practical interest to you, because it undergoes frequent changes, most people in question being quickly released, while others may be arrested.

For the same reasons, I cannot give you the list of family members of inmates. Moreover, these families – contrary to what your letter seems to imply – are notified of the arrest and place of detention of persons whom the police or justice system consider should remain in custody.

2. The French Government is willing to allow representatives of your Committee to go to Algeria and Morocco and visit detention centres, with the understanding that the purpose of these visits would be strictly limited, as you yourself suggest, to the detention regime. The Government will give instructions so that your delegates can, if they wish, hold private interviews with detainees.

I am certain that subsequently you will not fail to inform the French Government of any observations that your delegates might wish to make.

It seems to me that the stay of your delegates in Algeria and Morocco should be of limited duration, not exceeding one month.

3. Moreover, you suggest facilitating the exchange of correspondence between prisoners and their families. While thanking you for this proposal, I must tell you that it seems pointless to me, inmates being able to correspond in the framework of rules that take into account the humanitarian considerations

⁷⁴ ICRC Archives, B AG 200 (3), Letter from the head of the ICRC delegation in France, William Michel, to the Prime Minister, Pierre Mendès-France, 1 February 1955 (ICRC translation).

underlying your suggestion. You will be able to ascertain this point during the visits referred to above, under point number 2.

4. I would appreciate it if you would let me know more precisely the scope of the suggestion you wanted to make concerning the distribution of certain material or intellectual assistance to prisoners. It goes without saying that the French Government is willing to receive and transmit to the beneficiaries such relief supplies as the Red Cross may wish to send them.
5. The French Government is also at your disposal in response to any proposal that you might make concerning aid to the families of detainees or internees. I would be happy to hear any details on this point from you.

I took note that the action which your International Committee intends to conduct in North Africa, will not lead to any publicity. In fact, it is only on this condition that it is likely to achieve the beneficial effect you expect, without creating any difficulties.

I am sending a copy of this letter to the Resident General of France in Rabat and to the Governor General of Algeria. I leave it to you to get in touch with them as to the practical application to be given to it.

Please accept, dear Sir, my most devoted sentiments.

[Signed] P. Mendès-France⁷⁵

Appendix 3: Directive of 19 March 1958 by General Salan

Algiers, 19 March 1958
Joint High Command
10th Military Region
Staff Headquarters - 6th Bureau
No. 250 / RM.10/6/S. C.

MEMORANDUM

RE: Camps for Military Internees

REFERENCE: Memorandum No. 816/RM.10/6/SC, 24 November 1957

I. – General ideas

Rebels who are driven into a corner in combat very often display a determination that leads to their extermination.

This tenacity is less a manifestation of a spirit of sacrifice in the service of a cause deemed sacred than the result of effective psychological training.

In fact, prisoner interrogations show that the ‘mujahedeen’ are insistently warned during their training concerning the dangers they face in case of surrender: French troops massacring prisoners after torture or, in the most favourable case,

75 ICRC Archives, B AG 200 (3), Letter from Pierre Mendès-France to the head of the ICRC delegation in France, 2 February 1955 (ICRC translation).

bringing them before tribunals that automatically condemn them to the death penalty.

Clippings from some French and foreign newspapers and from foreign radio stations widely cited by the rebels very effectively support this propaganda.

The level of fear thus maintained gives the bands a cutting edge that it is important to wear down as much as possible in order to reduce our losses.

One way to do this is to give prisoners as liberal a treatment as possible and to make this well known.

The Reference Memorandum marked a first step in this direction. The creation of Camps for Military Internees will complete the solution to the problem to the extent permitted by current regulations, that is to say, without giving special status to prisoners.

II. – Organization

Upon receipt of this Memorandum, rebels captured while bearing arms openly, after a brief screening and their operational exploitation at the sector level, will be grouped in special centres.

The number and importance of these centres in each Army Corps will be a function of the number of prisoners detained.

In the absence of immediately available credits or those expected in the near future, the Camps for Military Internees [Camps d'internés militaires (CIM)] will be installed in the Transit and Screening Centres [Centres de Triage et de Transit (CTT)] which will thus become more specialized.

Credits which may be attributed in the future will be distributed with the aim of resuming the previously planned program for the improvement of the CTT.

III. – Operation

Just as is the case for the rehabilitation centres, there must be good administration of the CIM.

Their regime will be that of the CTT.

Efforts will focus on housing, bedding and the cleanliness of the surroundings.

The food will depend on the size of the allocated budget.

The camps will be subject to military discipline, with the aim of prohibiting any act and every word that could be interpreted as an affront to the dignity of prisoners.

IV. – Status of prisoners

A study of a special status for the prisoners, but excluding any idea of belligerency, has been requested.

Pending its further development, the legal status of prisoners will be that of suspects detained in CTT. Once the time limit of thirty days allowed for screening

has been exceeded, their detention in the Camps for Military Internees will be requested of the qualified administrative authorities.

The proposals to bring prisoners to trial will be systematically avoided, except for those who have committed atrocities or who demonstrate a fanaticism that may affect the positive development of the general state of mind.

V. – Psychological action and intelligence research

It is understood that the military internees should not be considered prisoners of war.

The Geneva Conventions do not apply to them and their being handed over to an appropriate civil body will be continued and the search for intelligence information through their interrogation still allowed.

The psychological action to which they will be subject should tend towards their incorporation into *harkas* or Military Units, or their use as monitors of psychological action in the *douars*.

The establishment of CIM should not, therefore, constitute an additional burden for the zones, the prisoners being in any case, currently the responsibility of the Units in various CTT.

The measures taken will be the object of a report to be sent under this stamp no later than 1 April 1958.

Signed: General R. SALAN
P. O. Brigadier General DULAC
Chief of Staff⁷⁶

Appendix 4: Memorandum of the ICRC, 28 May 1958

The main task of the International Committee of the Red Cross, a specifically neutral body, independent of any influence of national, racial or religious character, is to come to the aid of victims of armed conflict.

In its strictly humanitarian action, it is guided by the terms and spirit of the Geneva Conventions. Its authority is based on the experiences and services it has rendered for decades. To accomplish its humanitarian work, it relies solely on its responsibility to initiate action and the acceptance of its endeavours, which it undertakes with all possible persuasion and firmness. This is the way it has acted in the Algerian conflict since 1955, with results that must unfortunately be considered inadequate.

In recent weeks the situation has worsened. Thus, motivated by a desire to mitigate some of the particularly painful effects, the ICRC feels obliged to suggest to

76 ICRC Archives, B AG 225 (12), Army High Command, 10th Military Region, Note of 19 March 1958 (ICRC translation).

the FLN and the French Government that they make a commitment to the ICRC to observe the following rules:

1. Article 3 common to the four Geneva Conventions of 1949 will be fully respected.
2. In case of their capture, members of the armed forces will not be prosecuted for the mere fact of having participated in combat. They will receive humane treatment and all the essential safeguards accorded to prisoners of war. They will be allowed to communicate with their families and to receive communications from them. Their names will be communicated to the ICRC, which will be authorized to visit them, and, if necessary, to distribute relief supplies to them.
3. If criminal proceedings are engaged against captured members of the armed forces because of crimes or misdemeanours which they had allegedly committed, the ICRC will be informed and allowed to follow the proceedings and provide legal assistance to defendants.
If the proceedings result in death sentences handed down in legal form by competent courts, there shall be a stay of such executions during the hostilities and the condemned shall continue to be accorded the treatment due to prisoners of war.
4. Reprisals, for whatever reasons, will be excluded.

The International Committee of the Red Cross earnestly hopes that the FLN decide that it is able to make such commitments to the ICRC, which the latter is also trying to obtain from the French Government. In this case, it will take note of the commitments made to it by both sides and will immediately inform both parties.

Finally, the International Committee expresses the firm hope that any act likely to endanger its efforts in favour of the persons mentioned above will be avoided until an answer has been given to this communication and to that which it has simultaneously addressed to the French Government [the FLN].⁷⁷

⁷⁷ ICRC Archives, B AG 225 (12), Memorandum of the ICRC, 28 May 1958 (ICRC translation).

Taking prisoners: reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups

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Abstract

While detention by armed opposition groups in non-international armed conflict is a reality that is foreseen and not prohibited by international humanitarian law, the grounds upon which it may take place are not defined. This article looks more closely at the customary international humanitarian law prohibition on arbitrary deprivation of liberty, and how it can apply to armed opposition groups in a manner that makes compliance realistic. It focuses on the legal bases upon which armed opposition groups may detain persons who are taken into custody in order to remove

* Email: deborah.casalin@adh-geneve.ch. All views expressed are personal. This article is adapted from the author's LL.M. thesis, 'Application of IHL to armed opposition groups in non-international armed conflicts: the prohibition on arbitrary detention and the duty to distinguish oneself', Geneva Academy of International Humanitarian Law and Human Rights, January 2009, which was written under the supervision of Prof. Marco Sassòli and nominated for the 2009 Henri Dunant Prize. The author would like to thank Prof. Sassòli for his guidance in producing the original thesis, and Dr. Toni Pfanner, Dr. Jelena Pejic, and the *Review* team for their subsequent comments. Any errors or omissions are the author's own.

them from hostilities or for security purposes. An approach to detention by armed opposition groups based on the principles of international humanitarian law applicable to international armed conflicts is explored and its limitations defined.

.....

The rebels here said they caught a spy in the court building . . . The response was swift. Prosecutors interrogated the man on Thursday, and the rebels said they planned to detain him, for now.¹ (Karim Faheem)

In a typical non-international armed conflict (NIAC) between a state and a non-state armed opposition group, it is inherent that the rules of international humanitarian law (IHL) – which in principle apply equally to all parties to a conflict – will in fact be applied to parties that are unequal in many ways. Nevertheless, whatever there is to be said about armed opposition groups’ factual compliance with IHL, most IHL rules can be applied to an armed opposition group without many problems. State armies and armed opposition groups are equally capable in theory of refraining from killing prisoners, using prohibited weapons, or attacking civilians. However, a small number of IHL norms may give rise to difficulties of legal interpretation when applied to armed opposition groups instead of states. One example is the IHL prohibition on arbitrary deprivation of liberty in NIACs.²

Armed opposition groups in NIACs do take prisoners – this is a reality that IHL foresees and does not prohibit (but does not expressly allow either). However, the grounds upon which this may take place are less clear. What is clear is that customary IHL prohibits the arbitrary deprivation of liberty, and that interpreting this rule in the same way when applied to armed opposition groups as when applied to states would realistically make it impossible for armed opposition groups to comply with the requirements.

Notwithstanding the situation in IHL, the domestic law of all states prohibits detention by armed opposition groups. If group members are to be punished for the mere fact of having detained an individual – tarred with the same brush as hostage-takers and kidnappers, regardless of the reason for detention – they will have less of an incentive to comply with the prohibition on hostage-taking in future, or with the rules on humane treatment of detainees. This could have potentially devastating consequences for the persons detained and for the civilian population at large.

This article will look more closely at the IHL prohibition on arbitrary deprivation of liberty, and how it can be applied to armed opposition groups in a

- 1 Karim Faheem, ‘In the cradle of Libya’s uprising, the rebels learn to govern themselves’, in *New York Times*, 24 February 2011, available at: <http://www.nytimes.com/2011/02/25/world/africa/25benghazi.html> (last visited 30 April 2011). Quotes are used for illustrative purposes only, and do not reflect a position on the individual cases or situations to which they refer.
- 2 As set out in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 99: ‘Arbitrary deprivation of liberty is prohibited’.

manner that makes compliance realistic and promotes respect for the norms governing the treatment of detainees. The first section examines the general parameters of the IHL prohibition on arbitrary deprivation of liberty (with reference to the complementary rule in international human rights law (IHRL)) and confirms its applicability to armed opposition groups. The second section exposes problems that arise from applying this prohibition to states and armed opposition groups in an identical manner. The final section examines how the IHL prohibition on arbitrary deprivation of liberty could be applied more realistically to armed opposition groups, relying on the analogous provisions of the IHL applicable to international armed conflicts.

While situations may arise where armed opposition groups may (or even must) detain an individual on the basis of a criminal offence,³ this article focuses on situations where detention does not arise from suspicion or conviction of a criminal act, but on detention of enemy soldiers to remove them from hostilities (similar to detention of prisoners of war (POWs)), and detention of civilians for security reasons when the armed opposition group becomes the *de facto* authority in a territory.

An overview of the IHL prohibition on arbitrary deprivation of liberty in non-international armed conflicts

The customary IHL rule prohibiting arbitrary deprivation of liberty in NIACs⁴ has been affirmed on the basis of state practice – all states prescribe by law the grounds for detention during a NIAC; a substantial number have also specifically criminalized arbitrary detention in NIACs, and most military manuals prohibit this practice.⁵ States have additionally condemned arbitrary detention in NIACs through the United Nations General Assembly,⁶ the Security Council,⁷ and the United Nations High Commissioner for Human Rights.⁸

3 E.g. where members of an armed opposition group are suspected of war crimes and the commander must discharge his or her responsibility to investigate and punish such crimes. See Marco Sassoli, *Possible legal mechanisms to improve compliance by armed opposition groups with IHL and IHRL*, paper delivered at the Armed Opposition Groups Conference, Vancouver, 13–15 November 2003, available at: <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> (last visited 22 November 2011); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art. 28(a)(i); ICRC, *Customary IHL*, Rule 153, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule153 (last visited 22 November 2011).

4 J.-M. Henckaerts and L. Doswald-Beck, above note 2, Rule 99.

5 *Ibid.*, p. 347.

6 *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, UN General Assembly, UN Doc. A/RES/50/193 (1995), para. 16; *Situation of Human Rights in the Sudan*, UN General Assembly, UN Doc. A/RES/55/116 (2001), para. 2(b)(i).

7 *Bosnia and Herzegovina*, UN Security Council, UN Doc. S/RES/1019 (1995); *Burundi*, UN Security Council, UN Doc. S/RES/1072 (1996).

8 *Situation of Human Rights in the Sudan*, UN High Commissioner for Human Rights, UN Doc. E/CN.4/1995/77 (1995), para. 15.

However, IHL does not give a clear definition of the concept of arbitrary deprivation of liberty in NIACs, and does not expressly refer to any legal grounds for detention. It is thus necessary to find a legal standard to determine the meaning of ‘arbitrary deprivation of liberty’ in a NIAC context. Taking into account that a corresponding prohibition on arbitrary arrest and detention exists in IHRL,⁹ this would *prima facie* be the most logical starting point for interpreting and giving content to the concept of arbitrary deprivation of liberty in IHL.¹⁰ In this regard, it is worth noting that IHRL still applies during NIACs to the extent that the state has not made permissible derogations,¹¹ or that an IHRL rule has not been superseded by a more specific rule of IHL operating as *lex specialis*.¹² The International Committee of the Red Cross (ICRC) study on customary international humanitarian law agrees that some IHL concepts require interpretation in the light of IHRL,¹³ and follows this approach by using IHRL extensively to interpret the IHL prohibition on arbitrary detention, with regard to both substantive grounds and procedural requirements for detention in NIACs.¹⁴

International humanitarian rights law and the prohibition on arbitrary detention

Given this relationship between IHL and IHRL, and the fact that the concept of arbitrary deprivation of liberty has largely been imported from IHRL, it is important to examine the prohibition on arbitrary detention in IHRL in order to interpret the corresponding IHL prohibition.

In IHRL, the most universally accepted formulation of the prohibition on arbitrary detention is that in the International Covenant on Civil and Political Rights, which provides that: ‘No person may be deprived of liberty except on grounds and according to procedures established by law’.¹⁵ Regarding the substantive grounds for detention, no concrete parameters for acceptable grounds

9 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Art. 9 (1); African Charter on Human and Peoples’ Rights (ACHPR), 27 June 1981, 1520 UNTS 217, Art. 6; American Convention on Human Rights (ACHR), 22 November 1969, 1144 UNTS 123, Art. 7(3); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222, Art. 5(1).

10 A situation such as that envisaged in Marco Sassòli, ‘Le droit international humanitaire, une *lex specialis* par rapport aux droits humains? (IHL, a *lex specialis* in respect of human rights?)’, in Andreas Auer, Alexandre Flückiger, and Michel Hottelier (eds), *Les droits de l’homme et la constitution: Études en l’honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva 2007, p. 390.

11 ICCPR Art. 4(1); ACHR Art. 27(1); ECHR Art. 15(1); International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 106.

12 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 2.

13 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. xxxi.

14 *Ibid.*, pp. 347–352.

15 ICCPR, Art. 9(1). Similar provisions exist in ACHR, Art. 7 and ECHR, Art. 5, although the ECHR does not use the criterion of arbitrariness, but sets out defined exceptions to the prohibition on deprivation of liberty.

are set – the main requirement is that they be enshrined in existing law. The United Nations Working Group on Arbitrary Detention – mandated to pronounce on general issues related to arbitrary detention so as to assist states in preventing this practice – gives some further guidance on this point by stating that detention may be considered arbitrary on substantive grounds if it is ‘clearly impossible’ to invoke a legal justification for the detention (e.g. the detainee’s sentence has been completed, or an amnesty law applies to him or her).¹⁶ Detention may also be arbitrary on substantive grounds if it is imposed as a result of the detained person’s exercise of the rights and freedoms established in the Universal Declaration of Human Rights (UDHR) or other international instruments.¹⁷ According to the African Commission on Human and Peoples’ Rights, detention may be arbitrary if the substantive grounds set out by law are too vague.¹⁸ Furthermore, even if there are valid grounds for the detention when it is imposed, the detention will be considered arbitrary if it continues after the grounds for it have expired (e.g. the detainee’s release has been ordered).¹⁹

On the other hand, detention may be considered arbitrary on procedural grounds if there is a failure to detain in accordance with procedures established by law.²⁰ This would include giving reasons for the detention²¹ and giving the accused the opportunity to challenge the legality of his or her detention before a regularly constituted, independent tribunal.²² The arrest should also be effected by a competent official or person authorized to do so.²³ Additionally, a grave failure to respect fair trial standards established in the UDHR or relevant international instruments may also render a detention arbitrary.²⁴ In the case of *Mukong v. Cameroon*, the United Nations Human Rights Committee (charged with the monitoring of the International Covenant on Civil and Political Rights) held the view that arbitrariness must be interpreted broadly ‘to include elements of inappropriateness, injustice, lack of predictability and due process of law’. Thus, even in cases where procedures set out in national law are strictly complied with, a detention may still be considered arbitrary if it does not conform to wider considerations of the rule of law.²⁵

16 UN Working Group on Arbitrary Detention, ‘Fact sheet No. 26, Annex IV, Revised methods of work’, Art. 8(a), available at: <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> (last visited 15 November 2011).

17 *Ibid.*, Art. 8(b).

18 ACHPR, *Amnesty International v. Sudan*, Communication Nos. 48/90, 50/91, 52/91, 89/93, ACHPR 13th Annual Activity Report, 1999, p. 124, para. 59.

19 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 348. See e.g. the UN Human Rights Committee’s finding in *William Torres Ramirez v. Uruguay*, Communication No. R. 1/4, UN Doc. Supp. No. 40 (A/35/40), p. 121 (1980), para. 18.

20 ICCPR, Art. 9(1).

21 *Ibid.*, Art. 9(3).

22 *Ibid.*, Art. 9(4).

23 Body of Principles for the Protection of All Persons Under Any Form of Detention, UN General Assembly, UN Doc. A/RES/43/173 (1988), Principle 2.

24 UN Working Group on Arbitrary Detention, above note 16, Art. 8(c).

25 *Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 (1994), para. 9.8.

The IHL prohibition on arbitrary deprivation of liberty in NIACs as applicable to armed opposition groups

Several legal explanations have arisen as to how armed opposition groups are bound by IHL norms. Some of these require recognition of the armed opposition group by states,²⁶ others require the armed opposition group's consent,²⁷ while yet others require neither of the above.²⁸ Two models that are the most pertinent in explaining the applicability of the prohibition on arbitrary deprivation of liberty (without requiring the armed opposition group's consent) are the direct application of customary IHL to non-state entities and the doctrine of 'legislative jurisdiction'. The former is in line with the concept of functional international personality advanced by the seminal International Court of Justice *Reparations* case.²⁹ The direct applicability of customary IHL to armed opposition groups has also been supported by the Special Court for Sierra Leone and the International Commission of Inquiry on Darfur.³⁰ The doctrine of 'legislative jurisdiction' similarly holds that international obligations are binding on non-state entities insofar as they are capable of holding them, by virtue of the state's capacity to legislate for and on behalf of its nationals and individuals in its territory, whether through domestic law or directly through obligations incurred at international level.³¹

Either way, it is clear that the customary prohibition on arbitrary deprivation of liberty is applicable to armed opposition groups. This is illustrated

- 26 E.g. traditional recognition of belligerency. See Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', in *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, p. 492.
- 27 E.g. special agreements envisaged by Common Article 3 of the 1949 Geneva Conventions (GCs); declarations under Additional Protocol I (AP I), Art. 96(3); the law of treaties pertaining to third-party obligations (i.e. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 35). See Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, April 1981, p. 423.
- 28 E.g. textual interpretation of Common Article 3 (applying to 'parties to a conflict'); contextual interpretation of Additional Protocol II (AP II) in the light of the territorial control requirement in Art. 1(1); the application of basic general principles of international law (ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Reports 1986, para. 218); assumption of state responsibility through the fact of claiming to represent a territory (ICRC, *Commentary on the Geneva Conventions*, p. 51, available at: <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument> (last visited 21 November 2011)); succession to state responsibility (International Law Commission, *Draft Articles on State Responsibility for Internationally Wrongful Acts (with Commentary)*, 2001, Art. 10). On the concept of legislative jurisdiction, see Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, April 2006, p. 369. See further Jann Kleffner, 'The applicability of international humanitarian law to armed groups', in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 443–461.
- 29 ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174; see also *Military and Paramilitary Activities in and against Nicaragua*, above note 28, p. 14, paras. 113–114.
- 30 Special Court for Sierra Leone, *Prosecutor v. Kallon & Kamara (Jurisdiction)*, Case No. SCSL-04-15-PT-060, 13 March 2004, para. 47; 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, 2005, para. 172.
- 31 A detailed discussion of the legislative jurisdiction theory, as well as a critical analysis of the above methods of binding armed opposition groups, is to be found in S. Sivakumaran, above note 28.

by the United Nations Commission on Human Rights calling upon ‘parties to the hostilities’ (that is, not only the government) in Sudan to protect all civilians from violations of IHL, including arbitrary detention.³² Parties to the conflict who have a duty to protect civilians from arbitrary deprivation of liberty are evidently prohibited from engaging in this practice themselves. This is further supported by the Inter-American Commission on Human Rights, which has stated in the context of detentions by armed opposition groups that it considers the prohibition on arbitrary detention to be one of the international norms applicable in NIAC,³³ and that such norms ‘apply equally to and expressly bind all the parties to the conflict’.³⁴

The IHL prohibition on arbitrary deprivation of liberty as applied to states cannot be applied in the same way to armed opposition groups

The general interpretation of the IHL prohibition on arbitrary deprivation of liberty as outlined above cannot, however, be applied to armed opposition groups in a realistic manner. Applying the prohibition to these groups in such a way would raise a legal issue for them regarding the substantive basis for detention, as existing national law would never authorize detention by armed opposition groups, nor would it permit them to make laws that would serve as a basis for detention. Armed opposition groups could also not meet procedural requirements, as they would lack the authority under national law to arrest, to issue warrants, or to set up tribunals to review the legality of the detention. While this may be in line with states’ domestic law, IHL does not prevent detention or other warlike acts by armed opposition groups (regardless of their status in domestic law): the basic IHL principle of necessity merely dictates that these acts must be strictly limited to those necessary for a party to achieve the aim of weakening the enemy’s military potential (in the case of an armed opposition group, this would be limited to acts necessary to overcome government control).³⁵ By implication, IHL cannot prohibit a party from overcoming the enemy by means of acts that fall within these limits.³⁶

Indeed, experience has shown that the principle of equality of belligerents is an important factor in inducing armed opposition groups’ compliance with IHL (although ‘equality’ is necessarily a more limited concept in NIACs, as at least one

32 *Situation of Human Rights in Sudan*, UN Commission on Human Rights, CHR Res. 1993/66 (1993), para. 15.

33 Inter-American Commission on Human Rights (IACHR), Press Release No. 5/98, 1 April 1998, available at: <http://www.cidh.org/Comunicados/English/1998/Press3-9.htm> (last visited 15 November 2011).

34 IACHR, *Third Report on the Human Rights Situation in Colombia*, 26 February 1999, Chapter 4, para. 13, available at: <http://www.cidh.oas.org/countryrep/colom99en/chapter-4.htm> (last visited 15 November 2011).

35 Antoine Bouvier and Marco Sassòli, *How Does Law Protect in War? Vol. I*, ICRC, Geneva, 2006, p. 81 and n. 12.

36 *Ibid.*, p. 82.

party is not a sovereign state).³⁷ Indeed, in the absence of the formal recognition of belligerency, observance of customary IHL has generally been based on *de facto* reciprocity: for example, rebels who accord captured members of government forces the same treatment as POWs have been more likely to receive the same treatment in return.³⁸ Conversely, an armed opposition group is unlikely to comply with the prohibition on arbitrary deprivation of liberty if it almost totally precludes the group from detaining individuals legally, as such an application of the rule would deny any reciprocity and put them in such an unequal position that it would largely negate any possibility of weakening the enemy's military.

In such a situation, the armed opposition group may see no reason to commit itself to IHL and turn to more devastating methods of overcoming enemy fighters, including those that constitute war crimes, such as killing captured persons or fighting on the basis that no prisoners will be taken.³⁹ Alternatively, such groups will continue to detain prisoners regardless of legality, the drawback being that, in this situation, the group will also have no incentive to feel constrained by IHL as to whom it may detain and under what circumstances, not to mention how the group is expected to treat detainees. When detention of enemy fighters in order to remove them from hostilities is painted with the same brush as hostage-taking and kidnapping, there is little incentive to comply with the prohibition on the latter two.⁴⁰ Being placed outside the bounds of IHL may also make armed opposition groups more reluctant to submit to monitoring of conditions in their detention facilities. In all of these scenarios, those detained will be the ones to pay the price.

The above dilemma highlights the fact that, although IHRL is important in interpreting IHL rules (especially in a case such as the present where IHL of NIACs seems to offer little in the way of defining the concept of 'arbitrary deprivation of liberty'), caution should be exercised in importing rules directly from one system to another without taking into account the differences in the IHL and IHRL systems, as well as the contexts in which they operate.⁴¹ IHRL standards were mainly designed to be applied by states, while IHL is a system specifically conceived to apply between

37 Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict', in *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 686.

38 Deidre Willmott, 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court', in *Melbourne Journal of International Law*, Vol. 5, 2004, p. 200.

39 On the killing of captured persons, see Common Article 3(d); Rome Statute of the International Criminal Court, Art. 8(2)(c). On the denial of quarter, see AP II, Art. 4(1); ICRC, *Customary IHL*, Rule 46, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule46 (last visited 19 November 2011); Rome Statute of the International Criminal Court, Art. 8(2)(e)(x).

40 For an example of an armed opposition group differentiating between hostage-taking and other types of detention, in writing at least, see the statement of the Moro Islamic Liberation Front (MILF), 'Resolution to reiterate MILF policy of strongly and continuously condemning all kidnap for ransom activities in Mindanao and everywhere, and to take drastic action against the perpetrators of this heinous crime in all MILF areas', 26 February 2002, available at: <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2002-26feb-milf.htm> (last visited 4 May 2011).

41 M. Sassòli, above note 10, p. 391.

parties to a conflict (in the case of IHL of NIACs, for a conflict where at least one party applying the rules will not be a state). Thus, the differences in the addressees of the rules and their relationships with each other must be taken into account.⁴² Zegveld advocates caution in applying human rights norms to armed opposition groups for the reason that these norms often presume the existence of a government.⁴³ It can be said, in light of the human rights standards for the basis of detention (e.g. requiring detention to be based on legislation), that the norms relating to arbitrary detention belong in this category.

Regarding differences in context, it is worth remembering that the International Court of Justice envisaged adjustments in IHRL for situations of armed conflict in the relationship between IHL and IHRL by holding that IHL applies as *lex specialis* in conflicts.⁴⁴ IHRL itself also foresees such an eventuality by including derogations clauses,⁴⁵ which allow for adaptation of obligations in a conflict situation. On a more practical level, and keeping in mind the previously discussed considerations of encouraging compliance by armed opposition groups, it should be borne in mind that, even for human rights actors working in a conflict situation, the fact that IHL was specifically designed to limit human rights violations in wartime (as well as the fact that most military commanders are trained in IHL rather than IHRL, and the sense of fairness that IHL gives to the parties involved) often makes IHL a more persuasive basis on which to work. Again, reciprocity is a prominent factor in ensuring compliance.⁴⁶

The importance of a realistic approach to human rights in armed conflict has been stressed by Abresch, who states (in the context of the right to life in internal armed conflict) that:

It is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible . . . Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.⁴⁷

It is submitted that a strict application of human rights standards to interpret the IHL prohibition on arbitrary deprivation of liberty in NIACs as applied to armed opposition groups creates just such a situation where compliance and military success are mutually exclusive.

42 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 53–54.

43 *Ibid.*, p. 152.

44 ICJ, above note 12, para. 26.

45 ICCPR, Art. 4; ECHR, Art. 15; ACHR, Art. 27.

46 United Nations Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7, United Nations, New York/Geneva, 2001, p. 329, available at: <http://www.ohchr.org/Documents/Publications/training7part1618en.pdf> (last visited 3 May 2011).

47 William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya.', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 750.

Circumstances under which IHL may permit detention by armed opposition groups: drawing an analogy with IHL of international armed conflicts

How, then, can the prohibition on arbitrary deprivation of liberty be applied in such a way that it induces compliance by armed opposition groups, while bearing in mind that parties will not (and are not expected to) comply with a system that completely precludes them from weakening their opponent militarily? According to Zegveld, ‘under Common Article 3 and Protocol II, armed opposition groups are not prohibited from restricting the liberty of persons’.⁴⁸ In fact, Common Article 3 applies to ‘members of armed forces taking no active part in hostilities, including those placed *hors de combat* . . . by detention’, and Article 5 of Additional Protocol II to ‘persons deprived of their liberty for reasons related to the armed conflict’. In Zegveld’s opinion, the fact that these instruments prescribe standards of treatment for certain detainees – in terms that are addressed to both parties to the conflict – serves as evidence that IHL of NIACs does envisage detention by armed opposition groups in some circumstances. The only type of deprivation of liberty specifically prohibited by Common Article 3 and Additional Protocol II is hostage-taking,⁴⁹ which requires the specific intent to coerce someone to take action or refrain from so doing.⁵⁰ In substantiating the view that the IHL of NIACs does not preclude detention by armed opposition groups, Zegveld points to the example of the former United Nations Commission on Human Rights urging armed opposition groups in Afghanistan to release all prisoners detained without trial,⁵¹ and is of the opinion that this did not express a blanket prohibition on detentions by armed opposition groups but merely a prohibition on detaining persons without trial within a reasonable time.⁵² The Institute of International Humanitarian Law’s manual on the law of NIAC similarly does not identify a ban on detention by armed opposition groups, but only states that kidnapping or abduction of civilians is prohibited.⁵³

The question remains, however: under what circumstances may an armed opposition group detain an individual in the first place? This will be examined further below, focusing on situations where an individual is not detained on a purported criminal charge, but rather in circumstances comparable to a POW in an international armed conflict (i.e. in order to remove an enemy fighter from hostilities), or in circumstances comparable to a civilian under occupation being

48 L. Zegveld, above note 42, p. 65.

49 Common Article 3(1)(b); AP II, Art. 4(2)(c).

50 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 336.

51 *Situation of Human Rights in Afghanistan*, UN Commission on Human Rights, CHR Res. 1993/66 (1993), para. 8.

52 L. Zegveld, above note 42, p. 65.

53 Michael Schmitt, Charles Garraway, and Yoram Dinstein, *Manual on the Law of Non-international Armed Conflicts with Commentary*, International Institute of Humanitarian Law, San Remo, 2006, Rule 1.2.4(g) and (h).

detained for imperative security reasons. However, some general conditions should be observed first in all cases.

General conditions

First and foremost, detention by armed opposition groups can only be considered if IHL is applicable to the situation, namely an 'armed conflict' in the sense of Common Article 3. This must be distinguished from mere internal disturbances, tensions, or riots, as well as organized criminal activity, where ordinary criminal law – as well as the full spectrum of IHRL – would apply to prohibit detentions by non-state groups entirely. Detention by armed opposition groups also remains absolutely prohibited where this amounts to hostage-taking, as per the customary IHL definition, which requires the intent to coerce someone to take action or refrain from doing so.⁵⁴ This is entirely different from a situation where the intention of detaining an individual is in order to remove them from hostilities (in the case of a member of the armed forces) or for security reasons (in the case of a civilian living under the armed opposition group's territorial control). Should a detention be effected with a coercive motive, this would be excluded from the ambit of the permissible detention and would amount to an act of hostage-taking prohibited by both Common Article 3 and customary IHL.

Regarding minimum standards of treatment of detainees, the armed opposition group would have to apply the Common Article 3 standards in all cases, regardless of the purported reasons for the detention, as these standards must be applied 'in all circumstances'. In addition, if the conflict falls within the scope of Additional Protocol II (i.e. the armed opposition group has reached the level of organization and control required by Article 1 of that instrument), the standards of treatment in Article 5 of the Protocol must be applied. Pejic also highlights the requirement that the minimum guarantees for persons under detention in NIAC should be applied by armed opposition groups as far as 'practically feasible', regardless of the legality of detention.⁵⁵ Whenever access can be obtained, supervision by a body such as the ICRC is particularly important in ensuring that humane conditions of detention are maintained – the ICRC has already undertaken such activities in respect of persons detained by armed opposition groups in, *inter alia*, Djibouti,⁵⁶ Côte d'Ivoire,⁵⁷ Mali,⁵⁸ Somalia,⁵⁹ and Sudan.⁶⁰

54 J.-M. Henckaerts and L. Doswald-Beck, above note 2, p. 336.

55 Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of armed violence', in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 376.

56 ICRC, *Annual Report*, ICRC, Geneva, 1992, p. 53.

57 ICRC, *Annual Report*, ICRC, Geneva, 2002, p. 114.

58 ICRC, 'Mali: two soldiers freed under the auspices of the ICRC', Press Release 08/159, 25 August 2008, available at: <http://www.icrc.org/eng/resources/documents/news-release/mali-news-250808.htm> (last visited 19 November 2011).

59 ICRC, *Annual Report*, ICRC, Geneva, 1992, p. 48.

60 *Ibid.*, p. 51.

Detention of members of state armed forces

*Rebels said they arrested two pro-Qaddafi fighters, accusing one of them of being a sniper because he was wearing a flak-jacket and his car was stocked full of bullets.*⁶¹ (Abeer Tayel)

Zegveld holds that, where detention by armed opposition groups has been deemed acceptable, the standards for determining when this may take place have been imported from the law of international armed conflict into the law of NIACs.⁶² The application of the IHL of international armed conflicts by analogy to detentions in NIACs is also suggested and elaborated by Sassòli and Olson.⁶³ In legal terms, it could be said that the approach applied in order to deem detention by armed opposition groups acceptable was to interpret the IHL prohibition on arbitrary deprivation of liberty in light of Common Article 3, which apparently envisages detention by armed opposition groups in some circumstances; these circumstances were then defined using the analogous IHL of international armed conflict (i.e. the standards of Geneva Convention III). Detention by armed opposition groups in a situation analogous to those prescribed by the law of international armed conflict would therefore not be considered arbitrary for want of a legal basis, since Common Article 3 (and, in certain cases, Article 5 of Additional Protocol II) serves as the pre-existing legal grounds for detention. This would also mean that the problem of basing detention on retroactive laws would not come to the fore. In such a case, Geneva Convention III would then be used for guidance in interpretation of what it means to detain in connection with hostilities. This could be considered a type of ‘quasi-POW’ detention (i.e. imprisonment of enemy fighters for the purpose of placing them *hors de combat*).

It must be noted that this type of analogous interpretation cannot render detention by armed opposition groups a formal POW detention in the sense of Geneva Convention III, with all its attendant safeguards such as compulsory ICRC supervision and detailed rules of treatment.⁶⁴ Since the detainees would not automatically benefit from such safeguards, such an analogy should only regulate the circumstances under which detention is permissible, but should not be taken to mean that detention should be permitted without procedural guarantees.⁶⁵ As a minimum, these should correspond to those granted to POWs in an international armed conflict who dispute their status as combatants: that is, the detainee should have the right to have the legality of detention checked by an independent and

61 Abeer Tayel, ‘Rebel head urges all Libyans to join revolt as rebels attack pro-Qaddafi Tripoli hideout’, in *Al Arabiya*, 25 August 2011, available at: <http://www.alarabiya.net/articles/2011/08/25/164050.html> (last visited 19 November 2011).

62 L. Zegveld, above note 42, pp. 65–66.

63 Marco Sassòli and Laura 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, September 2008, pp. 423–424.

64 M. Sassòli, above note 10, p. 387.

65 *Ibid.*

impartial body.⁶⁶ ‘Quasi-POW’ detention would also confer no general legal capacity or recognition of status on armed opposition groups, as it is merely an application of Common Article 3, whose application has no effect on the legal status of parties to the conflict.⁶⁷

Detention of civilians

*To be very honest, we didn't find any weapons in their houses or on them, but they arrived into the country illegally and during a very sensitive time . . . This led us to believe they were working for the enemy.*⁶⁸ (Othman bin Othman)

Common Article 3, in prescribing standards of treatment for persons in detention, does not indicate whether such detained persons are civilians or fighters; thus it does not appear to prohibit detention of civilians. Similarly, Article 4 of Additional Protocol II provides for the treatment of persons detained for reasons related to the conflict, without specifying whether these persons would have been taking part in hostilities or not. As for the circumstances under which such detentions could take place, Zegveld is of the opinion that, again, international bodies have drawn on the IHL of international armed conflicts; in the case of civilians, the relevant provisions are to be found in Geneva Convention IV.⁶⁹

However, as far as civilians are concerned, caution should be exercised in loosening the IHRL-based concept of ‘arbitrary detention’, requiring a basis for detention in state law, in favour of the IHL-based *lex specialis* interpretation. In the case of detention of state soldiers, such an approach may be necessary, owing to the inappropriateness and impracticability of the IHRL-oriented interpretation, as well as the need to increase reciprocity in order to encourage IHL compliance by armed opposition groups. Such a modification of the IHRL rule by IHL as *lex specialis* is justifiable in this specific case because, in IHL, detaining fighters to remove them from hostilities is a permissible method of warfare – an alternative to killing. In the case of civilians, this consideration does not come into the equation.

Allowing armed opposition groups to detain civilians would not have an effect on encouraging compliance with IHL, as detention of civilians (unlike that of fighters) is not a legitimate method of warfare, even in international armed conflicts (hence the fact that, in international armed conflicts, civilians may only be detained for reasons connected to the conflict in the very limited circumstances set out in Geneva Convention IV, Articles 42 and 78, i.e. in a party's own territory or in a

66 GC III, Art. 5 indicates that POWs whose status is in doubt should have their status determined by a competent tribunal. This is rephrased in a more universally applicable manner by Pejic, who holds that, as a minimum, all persons under any type of administrative detention should have their detention checked by an independent and impartial body. J. Pejic, above note 55, pp. 386–387. ‘Quasi-POW’ detention would still qualify as a form of administrative detention, as POW status would not apply *de jure*.

67 Common Article 3(2).

68 Othman bin Othman (Libyan rebel commander), quoted in Hadeel Al-Shalchi and Karin Laub, ‘Foreigners claim harassment by Libya rebels’, in *Associated Press*, 4 September 2011, available at: http://www.msnbc.msn.com/id/44393896/ns/world_news-mideast_n_africa/t/foreigners-complain-harassment-libya-rebels/ (last visited 16 November 2011).

69 L. Zegveld, above note 42, p. 69.

situation of occupation where it exercises a high degree of control over a territory). Therefore, it cannot be justified as a means of creating greater reciprocity between the parties. Banning armed opposition groups from detaining civilians during open conflict will not render military success impossible, and thus a more equality-targeted interpretation need not be applied in order to promote compliance by armed opposition groups with IHL.

In short, while exceptional justifications exist for applying IHL as *lex specialis* in the case of detained state fighters (namely the need for greater reciprocity and compliance, and the availability of detention as a method of warfare), this does not exist in the case of civilians, and therefore their protections under IHRL should remain unaffected as a general rule. Nevertheless, continuing the analogy to the IHL of international armed conflicts, one possible exception does present itself: in the case where an armed opposition group is a *de facto* authority controlling an area where state influence is limited or non-existent – a situation analogous to occupation – the question could then be raised as to whether an armed opposition group could legally intern civilians for security reasons.⁷⁰ In order for such a detention to be lawful, the basis for detention could be determined through the analogous application of the IHL of international armed conflicts (specifically, the rules relating to the grounds for internment of civilians under occupation).⁷¹ Therefore, a civilian could validly be detained for imperative reasons linked to the security of the armed opposition group authority, until such time as those imperative reasons no longer exist.⁷²

However, as Geneva Convention IV would not be applicable *de jure*, it would be necessary for the armed opposition group to base such security detentions on some existing law in order to satisfy the principle of legality – usually the existing law of the state. As for the possibility of the group's own 'laws' providing the basis for detention, this is controversial and indeed likely to be rejected by the territorial state. Nevertheless, international practice exists to indicate some pragmatic acceptance of such laws by international observers, in the interests of eliciting the armed opposition group's compliance with IHL or human rights standards.⁷³ Even so, in such a case it would be appropriate to at least continue the analogy

70 Sivakumaran raises a similar question with regard to the establishment of courts, and indicates that, at a minimum, armed opposition groups must hold territorial control to meet the requisite standards to constitute a court. Sandesh Sivakumaran, 'Courts of armed opposition groups: fair trials or summary justice?', in *Journal of International Criminal Justice*, Vol. 7, No. 3, 2009, pp. 489–513.

71 While security detention of civilians (particularly of enemy aliens) is also possible in a party's own territory in international armed conflicts (GC IV, Art. 42), this would not be an appropriate analogy for non-international armed conflicts. This is because an armed opposition group cannot be said to have its 'own' sovereign territory with a differentiation between its own nationals – towards whom it would have clear legal obligations – and aliens who require extra protection through IHL when they fall into the group's hands. An armed group can only be in control of territory that it has captured (occupied) from the territorial state. In such a case, all persons living under the group's control are subject to the exercise of power by an entity other than their state of nationality, and should thus be considered as equally requiring international legal protection from that entity, as would occur in a situation of occupation by another state.

72 In parallel with GC IV, Arts 78 and 132.

73 For example, rather than stating that laws promulgated by the Farabundo Marti National Liberation Front in El Salvador were invalid, the UN Observer Mission in El Salvador scrutinized these for compliance with

and apply the same limitations on the application of 'laws' of armed opposition groups as are applied to penal laws made by an occupying power under Geneva Convention IV (especially regarding subject matter and retroactivity).⁷⁴

As far as procedural guarantees are concerned, these should at least meet the standards set in Geneva Convention IV for the internment of civilians, namely a regular and fair procedure, which is subject to appeal and is reviewed at least every six months,⁷⁵ as well as the right to visits by the ICRC (or another monitoring body).⁷⁶ Further procedural safeguards should also be implemented as far as the armed opposition group is capable of doing so.⁷⁷ As such a group acting as a *de facto* government may also be bound by additional human rights obligations, *inter alia* insofar as it exercises government functions,⁷⁸ these standards should be seen as a minimum.

Conclusion

The strong influence of IHRL on the interpretation of 'arbitrary deprivation of liberty' in customary IHL is only natural, considering the relationship between the two bodies of law, as well as the fact that interpretation of the concept by international bodies has so far been more extensive in the field of IHRL owing to the mandate of these bodies. However, as shown above, the IHL prohibition on arbitrary deprivation of liberty cannot exclude armed opposition groups from detaining members of state armed forces as 'quasi-POWs', and possibly, in some limited circumstances, placing civilians living under their *de facto* territorial control under administrative detention.

It has therefore been submitted in this article that the requirement of a basis for detention be informed by the analogous provisions of the IHL of international armed conflicts. The protection and humane treatment of detainees (and the monitoring thereof) should remain paramount, and detention of these categories of persons should not be conflated with hostage-taking or kidnapping.

Application of this approach may be difficult, as the principal means of implementing it during hostilities requires consensus of the parties. Nevertheless, the legal characterization of armed opposition groups' actions under international law makes a difference as far as the position of third states is concerned, as this will determine whether third states may recognize these actions as legal or not, with implications in the fields of international criminal law and refugee law, among others. Ultimately, it should also help to serve the aim of protecting those taken prisoner by encouraging compliance with IHL in a pragmatic fashion.

IHL. See S. Sivakumaran, above note 70, where this example is discussed and a convincing argument given that IHL does not exclude the possibility of armed opposition groups applying their own law.

74 See GC IV, Arts 64 and 65.

75 *Ibid.*, Art. 76.

76 *Ibid.*

77 A range of such basic safeguards is outlined in J. Pejic, above note 55.

78 See A. Clapham, above note 26, pp. 498–508.

Detention by armed groups: overcoming challenges to humanitarian action

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Abstract

Armed conflict and deprivation of liberty are inexorably linked. Deprivation of liberty by non-state armed groups is a consequence of the predominantly non-international character of contemporary armed conflicts. Regardless of the nature of the detaining authority or the overarching legality of its detention operations, deprivation of liberty may nonetheless have serious humanitarian implications for the individuals detained. Despite a need for humanitarian action, effective engagement is hampered by certain threshold obstacles, such as the perceived risk of the group's legitimization. Since the formative work of the International Committee of the Red Cross (ICRC)'s founder, Henry Dunant, the ICRC has sought to overcome these obstacles. In doing so it draws upon its experience of humanitarian action in state detention, adapting it to the exigencies of armed groups and the peculiarities of their detention practice. Although not without setbacks, the ICRC retains a unique role in this regard and strives to ameliorate the treatment and conditions of detention of persons deprived of liberty by armed groups.

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On the night of 21 June 2007, at Tazerzait in the Agadez region of northern Niger, the Mouvement des Nigériens pour la Justice (MNJ) attacked and overran an outpost of the Nigerian Armed Forces, killing fifteen¹ and capturing seventy-two.² The International Committee of the Red Cross (ICRC) initiated a humanitarian response, obtaining access to the detainees within a week, providing emergency medical care, and facilitating the release of thirty-four critically injured individuals.³ The ICRC subsequently visited the remaining detainees on two occasions, provided material assistance – such as blankets, clothing, hygiene items, and foodstuffs – as well as medical aid, and engaged in a confidential bilateral dialogue with the MNJ aimed at ensuring the humane treatment and conditions of detention of the persons deprived of their liberty.⁴

This article is a (necessarily incomprehensive) exploration of humanitarian engagement of non-state parties to non-international armed conflict (hereafter ‘armed groups’) in relation to their detention practice.⁵ In doing so, it aims to contribute to the broader reflection on the engagement of armed groups that is being carried out by humanitarian actors.⁶ As has been noted, holistic humanitarian engagement of armed groups should include ‘efforts to persuade [them] to respect humanitarian and human rights principles, including [*inter alia*, to] treat captured combatants and others hors de combat humanely, without discrimination and with respect for their rights’.⁷

To address this issue, this article is divided into three substantive sections, each with a different subject. The first considers armed groups. It describes the reality of detention by such groups in non-international armed conflict (NIAC) and its implications for the individuals detained. The second is concerned principally with humanitarian actors. It outlines some of the obstacles, legal and operational,

- 1 International Crisis Group, *Crisis Watch*, No. 47, 1 July 2007, p. 4, available at: <http://www.crisisgroup.org/~media/Files/CrisisWatch/2007/cw47.ashx> (last visited 15 February 2011).
- 2 BBC News, ‘Aid for captured Niger soldiers’, 26 June 2007, available at: <http://news.bbc.co.uk/2/hi/africa/6240846.stm> (last visited 15 February 2011).
- 3 ICRC, *Annual Report 2007*, May 2008, p. 157, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011), and ICRC, ‘Niger: detainees released under ICRC auspices’, News Release 08/19, 14 February 2008, available at: <http://www.icrc.org/eng/resources/documents/news-release/niger-news-040208.htm> (last visited 14 February 2011).
- 4 ICRC, News Release 08/19, above note 3. See also ICRC, *Annual Report 2008*, May 2009, p. 161, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011).
- 5 For the relevant applicable international humanitarian law in non-international armed conflict, see Article 3 common to the four 1949 Geneva Conventions (Common Article 3); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (AP II), Art. 1(I).
- 6 See Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, OCHA, January 2006, p. 5, available at: <http://ochaonline.un.org/humanitariannegotiations/Documents/Manual.pdf> (last visited 21 January 2012); Claudia Hofmann, ‘Engaging non-state armed groups in humanitarian action’, in *International Peacekeeping*, Vol. 13, No. 3, 2006, p. 396; Lucia Withers, ‘Child-soldiers: how to engage in dialogue with non state armed groups’, in Coalition to Stop the Use of Child Soldiers, *Swiss Human Rights Book: Realizing the Rights of Children*, January 2007, available at: http://www.swisshumanrightsbook.com/SHRB/shrb_02_files/347_24%20withers.pdf (last visited 21 January 2012).
- 7 David Petrasek, ‘Vive la différence? Humanitarian and political approaches to engaging armed groups’, Conciliation Resources, 2005, available at: <http://www.c-r.org/our-work/accord/engaging-groups/vive-la-difference.php> (last visited 18 February 2011).

to humanitarian engagement of armed groups in relation to their detention practice. The third looks at the ICRC. It considers the humanitarian action of the ICRC, explaining for whom, and how, it works in response to deprivation of liberty by armed groups.

Deprivation of liberty by armed groups

Armed conflict and deprivation of liberty are inexorably linked, as demonstrated by the numerous provisions of the Geneva Conventions devoted to regulating various aspects of detention. In the six decades subsequent to the drafting of the Conventions, the implications of detention in NIACs, in contrast to those exclusively between states, have been subject to increased popular, academic, political, and humanitarian scrutiny. In the first years of the twenty-first century, armed conflicts have been predominantly non-international in character,⁸ each, by definition, involving at least one non-state armed group.⁹

Detention by armed groups is neither infrequent nor, necessarily, small-scale. In the first decade of the twenty-first century alone, and among many others, the Communist Party–Maoists (CPN-M) in Nepal, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Taliban in Afghanistan, the Forces Armées Force Nouvelles (FAFN) in Côte d'Ivoire, the Sudanese People's Liberation Army/Movement in Sudan, and the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejército de Liberación Nacional (ELN) in Colombia have all, and on multiple occasions, deprived people of liberty.

Characterized by diversity

Just as 'armed groups are characterised by their great diversity',¹⁰ so too are their dealings with detainees. The extent, frequency, and location of detention differ, as do the infrastructure, expertise, and financial resources available for the administration of detention. Some armed groups expressly recognize the humanitarian entitlements of detainees and regulate the conduct of their members accordingly, while others do not. It is evident, however, that detention by armed groups may not conform to the stereotype of its being ad hoc, small-scale, and rudimentary. For this, the FAFN offers one telling example. Following the outbreak of hostilities between it and the state, the FAFN secured territorial control of much of northern Côte d'Ivoire. Between 2002 and 2007, it established and maintained extensive, routine

8 Michelle Mack and Jelena Pejic, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflict*, ICRC, 2008, pp. 2 and 5, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (last visited 14 February 2011). See also C. Hofmann, above note 6, p. 396.

9 Common Article 3; AP II, Art. 1(1).

10 Teresa Whitfield, *Engaging with Armed Groups: Dilemmas & Options for Mediators*, Centre for Humanitarian Dialogue, October 2010, p. 6, available at: www.hdcentre.org/files/HDC_MPS2_EN.pdf (last visited 7 February 2011). M. Mack and J. Pejic, above note 8, p. 11, also note that the 'parties [to NIAC] vary widely in character'.

detention operations, utilizing the detention infrastructure of the state. Under the auspices of the military and police, respectively, the FAFN generally segregated conflict-related detainees, such as members of the state armed forces, and common-law detainees, subjecting the latter to a nominal trial. Deprivation of liberty by the FAFN was, in sum, ostensibly ‘state-like’.

Of the varied characteristics of deprivation of liberty by armed groups, the overarching ‘objectives’ merit brief consideration. Armed groups deprive members of the opposing armed forces of their liberty to secure military advantage or otherwise safeguard their own security. The capture on 7 August 2005, in Khalikot district, Nepal, of sixty-two members of the Royal Nepalese Army by the CPN-M, is but one of many examples.¹¹ The result in such cases is *de facto* internment: that is, a deprivation of liberty to mitigate the serious security risk posed by the individuals, absent an intention to bring criminal charges against them. There is, however, little evidence of armed groups having expressly instituted an internment regime and ensured the requisite due process.¹² Rather, the ‘internees’ are simply held until their release is convenient, as determined by the security, and sometimes political, considerations of the group. By contrast, some armed groups ‘arrest’, ‘try’, and ‘sentence’ individuals for alleged criminal violations. That is, they use detention as a means to ensure law and order pursuant to a ‘criminal code’ in the territory under their control.¹³ In Sri Lanka, for example, the LTTE maintained a sophisticated judicial system – including ‘17 courts in a hierarchical structure’¹⁴ – that led to, among other sentences, imprisonment.¹⁵ Indeed, to separate these examples is misleading: both the CPN-M and the LTTE routinely deprived people of liberty for purposes related, and unrelated, to the armed conflict.

In addition, some armed groups deprive people of liberty for the purpose of treating them as hostages. During a three-year period in Colombia in the 1990s, at the zenith of hostage-taking in that context, armed groups – principally the FARC and the ELN – accounted for approximately 1,490 of the 3,338 ‘kidnappings for ransom’, nearly ‘50% of *all* kidnappings for ransom . . . in the world’ at that time.¹⁶ Such hostage-taking inevitably has grave implications for both the hostage and his/her family and is strictly prohibited by humanitarian law.¹⁷ It is important to note,

11 ICRC, ‘Nepal: the long walk home – 62 armed forces and security personnel released under ICRC auspices’, New Release 05/51, 15 September 2005, available at: <http://www.icrc.org/eng/resources/documents/misc/6g9ghk.htm> (last visited 18 February 2011).

12 In international armed conflict, Articles 43 and 78 of the Fourth Geneva Convention (GC IV) require periodic review of the reasons for the continued internment of civilian internees. In NIAC, reference should be made to Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, ICRC and Cambridge University Press, Cambridge, 2009, pp. 347–352.

13 Sandesh Sivakumaran, ‘Courts of armed opposition groups: fair trials or summary justice?’, in *Journal of International Criminal Justice*, Vol. 7, 2009, pp. 490–495.

14 *Ibid.*, p. 494.

15 Kristian Stokke, ‘Building the Tamil Eelam state: emerging state institutions and forms of governance in LTTE-controlled areas in Sri Lanka’, in *Third World Quarterly*, Vol. 27, No. 6, 2006, p. 1027. See also Syed Rifaat Hussain, ‘Liberation Tigers of Tamil Eelam (LTTE): failed quest for a “homeland”’, in Klejda Mulaj (ed.), *Violent Non-state Actors in World Politics*, Hurst & Company, London, 2010, p. 384.

16 Arturo Carrillo-Suarez, ‘Issues in international humanitarian law as applied to internal armed conflict’, in *American University International Law Review*, Vol. 15, No. 1, 1999–2000, p. 25.

17 Common Article 3(1)(b); AP II, Art. 4(2)(c).

however, that, contrary to popular discourse, not every deprivation of liberty by an armed group equates to hostage-taking. Hostage-taking arises where the deprivation of liberty is accompanied by a threat against the life, integrity, or liberty of the individual in pursuance of concessions by a third party.¹⁸ In the absence of these elements, internment and detention as described in the preceding paragraph do not amount to hostage-taking, regardless of the legality of deprivation of liberty by armed groups, as is considered below.

Humanitarian implications

If the characteristics of detention by armed groups differ, one to another and in comparison to states, the *terminus a quo* for understanding the impact of their practices on detainees is paradoxically homogenous. That is, '[e]very detainee is in a situation of particular vulnerability [regardless of the character of the detaining authority], both vis-à-vis their captor and in relation to their environment'.¹⁹ Moreover, persons held by the opposing party to an armed conflict may be particularly vulnerable, both because of their allegiance to an enemy entity and, as is often the case, because of the breakdown of law and order.

This notwithstanding, characteristics peculiar or common to armed groups *per se* may increase the likelihood of the occurrence – or the consequences of – certain humanitarian concerns. Limited territorial control may restrict the availability of goods and services essential to the maintenance of humane conditions of detention. A horizontal structure, absent effective hierarchy, may impede the enforcement of norms intended to protect detainees. Inability to engage with external actors may limit the group's capacity to respond to acute humanitarian crises. Given the diversity of armed groups, neither a list of such variables, nor a summary of their impact upon the detainees can be comprehensively compiled. Not all attributes of armed groups are, however, inherently detrimental to detainees. An armed group's objectives, culture, or constituency – often recognized as fundamentally underpinning groups' identity and behaviour²⁰ – may equally be cause for humane treatment and conditions in detention.

In addition to the characteristics of armed groups *per se*, certain attributes common to detention by armed groups have implications for persons deprived of liberty. Among others, these include lack of judicial oversight, of detention

18 See ICRC, 'ICRC position on hostage taking', in *International Review of the Red Cross*, Vol. 84, No. 846, 2002, pp. 467–470; International Convention Against the Taking of Hostages, open for signature 17 December 1979, 1316 U.N.T.S. 205 (entered into force 3 June 1983), Art. 1; Elements of Crimes of the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Arts. 8(2)(a)(viii) and 8(2)(c) (iii), pp. 129 and 147.

19 Alain Aeschlimann, 'Protection of detainees: ICRC action behind bars', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 83.

20 G. McHugh and M. Bessler, above note 6, pp. 17–21, list '*motivations*, structure, principles of action, interests, *constituency*, needs, *ethno-cultural considerations* and control of population and territory' foremost among the characteristics of armed groups, which, if understood, 'can greatly assist negotiators in securing better outcomes' (emphasis added). This is also true for humanitarian actors.

management expertise, and of allocated financial resources.²¹ Perhaps most peculiar to armed groups is a tendency to detain persons in undisclosed, remote locales, without standard detention infrastructure.²² This is a logical consequence of waging war against better-resourced states, in which the armed group's survival is dependent upon clandestine operations. For the detainees, the implications are a dearth of essential items/services, an absence of family contact, frequent transfers, exposure to harsh climatic variables, and so forth.²³

Furthermore, the inherently clandestine nature of detention by armed groups risks exposing detainees to the effects of the hostilities.²⁴ In 2005, for example, the Sri Lankan air force allegedly – and unwittingly – killed a Sri Lankan army service member in an attack upon the LTTE.²⁵ Ironically, where the location of detention is disclosed, the lives and wellbeing of the detainees may be threatened by military operations to release them. This was the case in Afghanistan in August 2010, when a military raid upon a Taliban detention facility succeeded in liberating twenty-seven detainees, but inadvertently killed five.²⁶

Obstacles to humanitarian engagement

The existence of detention by armed groups and its potentially serious implications for persons deprived of liberty make a strong case for humanitarian engagement. For humanitarian actors,²⁷ however, there are serious obstacles to doing so, many of which have been considered in relation to the foundational question of whether, or

21 Even within relatively well-resourced armed groups, the persons immediately responsible for the care and custody of the detainees may not have access to essential finances, personnel, equipment, infrastructure, etc.

22 There are, however, many noteworthy exceptions, such as the detention operations of the FAFN, described above. Furthermore, some armed groups detain in populated, urban environments that are under the general control of the opposing party to the armed conflict. In such cases, the location of the detention operations is subject to the strictest secrecy.

23 Sjöberg notes that persons deprived of liberty by the ELN are 'held in the jungles under harsh conditions (lack of medicine, medical services, food, etc.). As a consequence, they sometimes get sick or even die'. 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 of International and Development Studies, Geneva, September 2009, p. 170. For similar comments concerning the FARC, see p. 225.

24 In violation of AP II, Arts. 5(1)(b) and 5(2)(c). Sjöberg notes that persons held by the ELN in Colombia were at risk of exposure to hostilities. See *ibid.*, p. 170.

25 This incident has not, however, been confirmed by the Sri Lankan Air Force itself. See Now Public, 'SLAF airstrike targeted POW centre – Vanni Radio', 18 February 2009, available at: <http://www.nowpublic.com/world/slaf-airstrike-targeted-pow-centre-vanni-radio> (last visited 25 February 2011); Siber News, 'SLA's detained soldier in custody as POW killed in SLAF airstrike', 19 February 2009, available at: <http://sibernews.com/200902192058.html> (last visited 25 February 2011).

26 'NATO forces raid secret Taliban prison', in *Sydney Morning Herald (AFP)*, 18 August 2010, available at: <http://news.smh.com.au/breaking-news-world/nato-forces-raid-secret-taliban-prison-20100818-12fay.html> (last visited 18 February 2011).

27 For present purposes, 'humanitarian actors' include local government and non-governmental organizations (NGOs), the United Nations, the ICRC, and international NGOs.

not, to engage armed groups.²⁸ For present purposes, it is necessary only to explore those obstacles, both legal and operational, that have a particular or acute bearing upon humanitarian action in favour of persons deprived of liberty.

Authority to detain

A threshold obstacle to the engagement of armed groups vis-à-vis detention is identifying the existence, and defining the limits, of a legal authority for groups to deprive people of liberty. Domestic law vests this authority exclusively in the state and the implications of international law are open to interpretation. By one reading, humanitarian law regulates the treatment and conditions of deprivation of liberty in connection with NIAC, but does not establish its legality. That is, in the absence of an express authority and so as not to create a dichotomous result vis-à-vis domestic law, humanitarian law, at best, simply *does not prohibit* deprivation of liberty. As detention by armed groups, by this reasoning, lacks a legal basis, some humanitarian actors may be precluded from even attempting engagement.

In the alternative, international humanitarian law (IHL) can be understood implicitly to confer an authority to deprive people of liberty upon parties to NIAC. Indeed, reference to ‘persons, *hors de combat* by... detention’ and ‘regularly constituted courts’ in Common Article 3, and to persons ‘interned’ in the Second Additional Protocol, Articles 5 and 6, are superfluous if not understood to be accompanied by an authority to detain or intern respectively.²⁹ That this authority would extend to armed groups is, furthermore, secured by the principle of the ‘equality of belligerents’, by which humanitarian law sets equal parameters for each party to the conflict, regardless of the overarching (il)legality of the conflict or the nature of the parties.³⁰

If these ‘authorities’ are accepted, each elicits further complex considerations, thorough appraisal of which is beyond the scope of this article. In brief, an authority to detain begs questions as to whether non-state actors have the capacity to enact ‘law’, whether armed groups’ courts are ‘regularly constituted’,³¹ and to what extent they are capable of ensuring the necessary judicial guarantees.³²

28 See, among others, T. Whitfield, above note 10, and Ann-Kristin Sjöberg, ‘Dealing with the devil? Humanitarian engagement with armed non-state actors: the case of the National Liberation Army, Colombia’, paper delivered at International Studies Association annual meeting, San Francisco, 26–29 March 2008, available at: www.humansecuritygateway.com/documents/ISA_dealingwiththediabol.pdf (last visited 15 February 2011).

29 ‘In the ICRC’s view, both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC.’ Jelena Pejic, ‘The protective scope of Common Article 3: more than meets the eye’, in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 207.

30 Equality before humanitarian law may be fundamental to armed groups’ acceptance of, and adherence to, it. In other words, armed groups prohibited from depriving people of liberty, and thus unable to pursue their military objectives efficiently, may consider humanitarian law inherently biased in favour of their enemy. On the ‘equality of belligerents’ in NIAC, see generally 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. 681–682.

31 Within the meaning of Common Article 3. See *ibid.*, pp. 671–676.

32 See Common Article 3(d) and AP II, Art. 6; see also S. Sivakumaran, above note 13, esp. pp. 498–509.

Similarly, an authority to intern raises questions as to whether armed groups can establish a legal basis for internment,³³ whether the grounds for internment should mirror those foreseen by the humanitarian law of international armed conflict³⁴ and to what extent groups are capable of ensuring procedural safeguards, including an independent and impartial body to review the case of each internee.³⁵

More pressing is the fact that even if these ‘authorities’ were to be accepted, it is inherent in the character of humanitarian law that they would extend only to deprivation of liberty with a nexus to the conflict.³⁶ International law fails to provide even an implicit legal basis for deprivation of liberty unrelated to the conflict.³⁷ The FAFN, CPN-M, and LTTE, among others, would thus have been ‘permitted’ to hold members of the opposing armed forces and to ‘prosecute’ and ‘try’ persons for violations of the laws of war but not to administer criminal justice – that is, enforce common law crimes – in the territory under their control. Humanitarian engagement in response to this type of detention therefore remains inherently controversial.

Normative frameworks

If the absence of an express authority to detain is not an insurmountable obstacle, a subsequent challenge lies in determining which normative frameworks govern the treatment, conditions and due process of persons in the custody of armed groups. The applicability of human rights law, which details comprehensive protections for detainees³⁸ and which some armed groups indicate would be an acceptable basis for

33 See J. Pejic, above note 29. See also Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 17–18.

34 The subsequent question is whether the internment regime during NIAC should mirror that of the Third or Fourth Geneva Convention (GC III or GC IV). See Marco Sassòli and Laura M. Olsen, ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 616–627.

35 See Jelena Pejic, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’, in *International Review of the Red Cross*, Vol. 87, No. 858, 2005. This article was published as an Annex to the ICRC’s Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts presented to the 2007 International Conference of the Red Cross and Red Crescent, and expresses the ICRC’s institutional position.

36 For detention, this is evidenced by the AP II, Art. 6, which affords judicial guarantees to persons prosecuted and punished for ‘criminal offences related to the armed conflict’ (emphasis added).

37 Note that analogy to the law of occupation may resolve this conundrum. Zegveld suggests that GC IV, Art. 64, applied by analogy to NIAC, would balance ‘the principle of the continuity of the national legal system and the reality of a plurality of authorities’. Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 71.

38 See, for example, International Covenant on Civil and Political Rights (ICCPR), entered into force 23 March 1976, Arts. 6, 7, 9, 14, and 15; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987; Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, adopted 9 December 1988.

humanitarian dialogue,³⁹ is particularly problematic. Although the applicability of human rights law during armed conflict is beyond dispute,⁴⁰ it is generally considered to bind only states parties to the concerned international instruments – an interpretation based on the text of the conventions themselves,⁴¹ and underpinned by the understanding that ‘human rights law purports to govern the relations between the government representing the state and the governed’.⁴² Although the emerging counter-contention represents an important development towards the full accountability of some armed groups, it does not yet enjoy universal acceptance.⁴³ Indeed, as the counter-contention stands – favouring the applicability of human rights only for armed groups that exercise administrative control of territory⁴⁴ – relatively few groups may ultimately be bound.

Humanitarian law, by contrast, categorically binds armed groups.⁴⁵ Common Article 3 and the Second Additional Protocol oblige all parties to NIAC to ensure certain fundamental protections for persons deprived of liberty. Even here, however, effective humanitarian engagement is challenged by a lack of comprehensive regulation of detention. In contrast to the law of international armed conflict, rules governing conditions of detention, transfers, procedural safeguards for internment, and other issues, are either absent or lacking specificity in the treaty law of NIAC.⁴⁶

In addition, engagement on the basis of norms that are otherwise applicable and relevant may yet be impeded by a lack of willingness of the concerned armed group to accept that international law governs its operations. Armed groups may reject international law, which, after all, ‘is mainly made by states . . . is mainly addressed to states [and] its implementation mechanisms are even more state-centered’.⁴⁷ Rejection of the full corpus of international law on political or

39 See, for example, The Sudan Justice and Equality Movement (JEM), Establishment of a JEM Committee for Human Rights, Decree No. 71, 2010, available at: <http://www.sudanjem.com/2010/10/establishment-of-a-jem-committee-for-human-rights/> (last visited 14 April 2011).

40 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para 106.

41 ICCPR, Art. 2, for example, imposes obligations upon ‘each state party’.

42 Andrew Clapham, *The Human Rights Obligations of Non-state Actors*, Oxford University Press, New York, 2006, p. 36.

43 For more detail, see David Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, pp. 60–61, available at: http://www.ichrp.org/files/reports/6/105_report_en.pdf (last visited 9 February 2011).

44 Christian Tomuschat, ‘The applicability of human rights law to insurgent movements’, in H. Fischer *et al.* (eds), *Krisensicherung und Humanitärer Schutz: Festschrift für Dieter Fleck (Crisis Management and Humanitarian Protection)*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 586. See also A. Clapham, above note 42, pp. 283–284; Annysa Bellal, Gilles Giacca, and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’, in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 18–28.

45 See Common Article 3 and AP II, Art. 1. See also J. Somer, above note 30, pp. 660–663; S. Sivakumaran, above note 13, pp. 496–497. Although note that ‘[d]ifferent legal constructions exist to explain why armed groups are . . . bound by certain IHL rules’ (M. Sassòli, above note 33, pp. 12–13). See also A. Clapham, above note 44, p. 280, and A. Bellal *et al.*, above note 44, pp. 9–10.

46 J. Pejic, above note 29, pp. 206–207, 215.

47 Marco Sassòli, ‘The implementation of international humanitarian law: current and inherent challenges’, in *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 63.

ideological grounds is not, however, the norm among armed groups. In fact, there are many examples of groups having accepted international law expressly⁴⁸ or indicated commitment to comparable standards. In 1988, for example, and prior to making a commitment to the Geneva Conventions and Additional Protocols as such, the Melito Glor Command of the New People's Army in the Philippines issued a policy on 'the Proper Treatment of POWs [*sic*]'.⁴⁹ Although brief, this policy describes several essential rights and protections of persons deprived of liberty that mirror provisions of the law applicable during international armed conflict.⁵⁰ More common than wholesale rejection of the entirety of international law is the rejection of certain specific norms. Often, these norms are those perceived by the armed group as detrimental to its war effort and those for which adherence would incur a substantial financial, logistical, or other burden. For humanitarian actors therefore, the identification and invocation of normative frameworks that are applicable, relevant, comprehensive and accepted, may present an obstacle to effective engagement of armed groups.

The risk of legitimization

Concurrently with these principally legal challenges, all humanitarian engagement is further threatened by a perceived risk of armed groups' undue 'legitimization':⁵¹ an apprehension by states that engagement will bolster the group's claim to be the legitimate authority of certain territory, suggest its humanitarian credentials or otherwise contribute to its being perceived favourably. The Supreme Court of the United States, upholding the constitutionality of the prohibition of 'knowingly provid[ing] material support or resources to a foreign terrorist organization',⁵² has given expression to this view by stating that:

Material support meant to 'promot[e] peaceable, lawful conduct' . . . can further terrorism by foreign groups in multiple ways . . . [I]mportantly [, it] helps lend legitimacy to foreign terrorist groups⁵³ – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.⁵⁴

48 The Revolutionary People's Front in India, as one of many examples, made a declaration during the 49th Session of the Human Rights Sub-Commission, 1997, of its 'unequivocal intention to comply with Article 3 common of the Geneva Conventions'. Human Rights Watch, *These Fellows Must be Eliminated: Relentless Violence and Impunity in Manipur*, 15 September 2008, p. 19, note 33, available at: <http://www.hrw.org/en/node/75175/section/1> (last visited 20 November 2010).

49 'Memo of Melito Glor Command on Policy Towards Prisoners of War, 18 June 1988', in NDFP Human Rights Monitoring Committee, *NDFP Adherence to International Humanitarian Law: On Prisoners of War*, revised edition, Utrecht, 2009, p. 92. In fact, in NIAC the concept of prisoners of war does not exist. It is possible that some armed groups employ the language of international armed conflict when describing their humanitarian obligations to imply their own state-like status.

50 *Ibid.*, pp. 92–93.

51 T. Whitfield, above note 10, p. 11.

52 18 U.S.C. §2339B(a)(1).

53 Including those party to an NIAC, such as the LTTE prior to 2009.

54 *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, 561 U.S. 25, 21 June 2010.

Pursuant to this reasoning, the risk of legitimization is not exclusively a consequence of political discourse, but may result from humanitarian engagement and its associated activities, such as training and the provision of 'expert advice and assistance'.⁵⁵ Thus, whether or not a causal link actually exists between humanitarian engagement, legitimization and 'more terrorist attacks',⁵⁶ the US Supreme Court succinctly articulates a position held by some states – a position, it is submitted, that could effectively preclude humanitarian action as such and is contrary to the letter and spirit of IHL.

The perceived risk of legitimization is particularly acute for action vis-à-vis judicial guarantees. The prerogative to arrest, try and sentence persons is vested exclusively in the judiciary of a state. As the Chief Justice of Sri Lanka noted:

Judicial power is part of the sovereignty of the people and it cannot be exercised by any other persons than those who are vested with it. . . . The LTTE can have a conciliation mechanism if they want . . . [b]ut they have no judicial authority.⁵⁷

For the development of a humanitarian response to purported criminal detention, however, the treatment and conditions of detention of persons deprived of liberty cannot be isolated from due process considerations. An absence of effective judicial guarantees has both direct humanitarian consequences, such as wrongful 'conviction' or indeterminate deprivations of liberty, and indirect implications, such as overcrowding and its consequences. For humanitarian actors it is therefore imperative – but difficult, given the legal, political, and practical constraints – to safeguard the detainees' interest in 'fair' parameters for otherwise arbitrary detention under domestic law.⁵⁸

Operational obstacles

At the operational level, impediments to access and constructive dialogue also challenge effective humanitarian action for the benefit of persons deprived of liberty. The main obstacle – which merits brief consideration despite being true of engagement other than that related to detention – is to establishing effective contact with the concerned group:

Governments have embassies and representatives abroad who can be contacted. In most cases, contacts can be made openly and transparently. In contrast, speaking to the leadership of an armed group can be fraught with difficulties. . . . it is not always clear who actually represents the armed group – leaders in prison, leaders abroad or 'commanders' 'in the hills'.⁵⁹

55 18 U.S.C. §2339A(b)(1–3).

56 The decision of the Supreme Court in *Holder, Attorney General, et al. v. Humanitarian Law Project et al.* has been subject to criticism. See, for example, Christopher Thornton, 'Darfur and the flaws of *Holder v. HLP*', in *Forced Migration Review*, No. 37, 2011, pp. 39–40.

57 S. Sivakumaran, above note 13, p. 507, citing Laila Nasry, 'Interview with Chief Justice Sarath N de Silva: LTTE has no judicial authority – CJ', in *Sunday Times*, Sri Lanka, 14 November 2004, available at: <http://sundaytimes.lk/021208/news/courts.html> (last visited 22 February 2011).

58 See Common Article 3; AP II, Art. 6.

59 D. Petrasek, above note 43, pp. 46–47.

Where the necessary contacts are forthcoming, effective engagement is further threatened by humanitarian actors' inability to identify and understand each group's attributes and appreciate them within the particular context. Humanitarian actors suffer from the same problems as mediators, who, as Whitfield notes, 'embark upon engagement with armed groups with large gaps in their knowledge of them [and it is] not surprising that, on occasion, their engagement has unforeseen and undesirable impacts'.⁶⁰ The reclusive nature of many armed groups, coupled with the complexity inherent in their infinite variety, often makes this threshold assessment particularly difficult.

Accessing and understanding the detention

In the context of an established relationship with the concerned armed group, challenges still arise regarding accessing and understanding their dealings with detainees. Unlike the procedure with states, agreement to visit persons deprived of liberty is rarely secured by means of a single commitment by one representative of the group. Rather, it may be necessary for humanitarian actors to establish contact with multiple, often elusive, individuals within a group – such as both senior and regional commanders – depending on its structure and the efficiency of its internal communications and hierarchy. Even once substantive dialogue has commenced, it is possible that the individual with whom humanitarian actors have most regular contact is not best positioned to influence the situation of the detainees themselves. This is often the case where the armed group restricts its external contact to select 'liaison officers' and results inevitably in the reduced effectiveness of humanitarian engagement.

Access to persons deprived of liberty by armed groups may, moreover, be jeopardized by the remote, clandestine, and/or transient nature of the detention. Some armed groups keep detainees with mobile, operational military units and/or reject contact with humanitarian actors on the basis of the perceived threat that it would pose to the group's security. Paradoxically, even where the armed group itself has expressly consented to humanitarian action, a prevailing situation of lawlessness and banditry may also preclude its commission without excessive risk accruing to humanitarian personnel.

In addition to an understanding of the group itself and acts and omissions *intra muros*, a thorough comprehension of the situation of persons deprived of liberty by armed groups involves extensive assessment of the situation *extra muros*. The humanitarian implications of detention may be heavily influenced by the environment beyond the place of captivity. To give but one example, the influence of the group's constituency, its requirements and values, always need to be comprehensively understood: often, armed groups deprive people of liberty at the behest of their constituency and treat detainees according to their dictates. To respond effectively, humanitarian actors must therefore assess and analyse, among other things, complex cultural, social, political, economic, or historical factors.

60 T. Whitfield, above note 10, p. 26.

Maintaining a constructive, effective dialogue

Maintaining a mutually coherent dialogue for the benefit of persons deprived of liberty that is adapted to the peculiarities of each armed group – including the education and expertise of its members – presents a common challenge. Dialogue is often facilitated with relatively ‘sophisticated’ armed groups. Indeed, some groups – for example, the LTTE until 2009⁶¹ – have lawyers and other relevant professionals, such as doctors and engineers. It is less common, however, for armed groups to have personnel who are trained and experienced in prison management and operations and humanitarian actors must adjust their dialogue accordingly to increase the likelihood of achieving the most favourable outcomes.

Assuming the acceptance of all or some of the relevant international legal standards, humanitarian actors must still present them in an adapted, contextualized manner. How, for example, should the right of persons deprived of liberty to send and receive letters be presented to a transient armed group that objects to the transfer of any information on the basis of veracious security concerns?⁶² How might an armed group ensure that its courts are regularly constituted and that it affords ‘all the guarantees which are recognised as indispensable by civilised people’, as required by Common Article 3? Despite the difficulty, failure to present such standards so as to make them achievable for the particular armed group will inevitably lead to them being rejected as a basis for dialogue.

Finally, in practice, the most difficult dialogue to maintain is that in which an armed group engages selectively, taking the services offered by external actors but avoiding substantive dialogue toward better humanitarian protections. In such cases, humanitarian actors may face a complex dilemma: to discontinue engagement to the detriment of the intended beneficiaries or to persist with an armed group that is unwilling to make its own substantive commitment toward improved treatment and conditions of detention.

The action of the International Committee of the Red Cross

In 1871, the founder of the ICRC, Henry Dunant, is reputed to have made the first – and particularly bold – humanitarian interventions for the benefit of persons deprived of liberty, in this case by the Commune, the non-state authority then in control of Paris.⁶³ Since then, the ICRC has refined its approach and has routinely employed dialogue and activities in similar contexts toward similar

61 S. Sivakumaran, above note 13, p. 494.

62 In fact, as described by the AP II, Art. 5(2)(b), this particular obligation affords parties to conflict a certain margin for fulfilment; obliging them only ‘within the limits of their capabilities’. The Commentary to the AP II describes Article 5(2) as ‘only compulsory as far as the means are available, [but] nevertheless important’. Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers/ICRC, Geneva, 1987, p. 1389, para 4580.

63 Pierre Bossier, *History of the International Committee of the Red Cross: from Solferino to Tsushima*, English translation of French original, Henry Dunant Institute, Geneva, 1985, p. 262.

humanitarian objectives. In Hungary in 1956, for example, the ICRC Delegate Herbert Beckh:

made contact with the insurgents [and] spoke for over an hour with [their commander], who formally undertook to order his troops to afford humane treatment to any adversaries who fell into their hands, in accordance with the principles of the Geneva Conventions. As a result, the insurgents were persuaded not to execute about 300 prisoners they were holding... Before returning to Vienna, Beckh went to the border town of Sopron where... he visited 29 prisoners still being held by the insurgents...⁶⁴

In the twenty-first century, the ICRC continues to engage non-state detaining ‘authorities’ in this manner in many of the contexts in which it works.⁶⁵ Recently it has, for example, visited persons deprived of liberty by the (then) ‘armed opposition’ in Libya.⁶⁶

Who the ICRC works for

This humanitarian engagement is premised upon the ICRC’s treaty authorization – foreseen by Common Article 3 – to act on the basis of an offer of services to the parties to NIACs.⁶⁷ More specifically, its engagement of armed groups is rooted in the inescapable reality that the action or inaction of non-state parties has a significant bearing upon the humanitarian consequences of armed conflict. As a neutral, independent, and impartial organization, the ICRC works to ensure that all parties understand, accept, and adhere to their obligations, including those with respect to persons deprived of liberty. The considerations vis-à-vis the legality of detention by armed groups, noted above, do not, therefore, preclude the ICRC from responding to existing deprivations of liberty. In fact, there is a credible contention that, in some cases, deprivation of liberty itself has an inherently humanitarian value. As Sassòli notes, armed groups that

cannot legally intern members of government forces [are] left with no option but to release the captured enemy fighters or to kill them. The former is unrealistic, because it obliges the group to increase the military potential of its enemies, the latter is a war crime.⁶⁸

Similar reasoning may apply – albeit in less stark terms – to criminal detention unrelated to the conflict; that is, where an armed group maintains effective

64 Françoise Perret, ‘ICRC operations in Hungary and the Middle East in 1956’, in *International Review of the Red Cross*, No. 313, 1996, available at: <http://www.icrc.org/eng/resources/documents/misc/57jn8c.htm> (last visited 29 April 2011). See also Isabelle Vonèche Cardia, *L’Octobre Hongrois: Entre Croix Rouge et Drapeau Rouge*, Bruylant, Bruxelles, 1996, p. 39.

65 See, for example, A. Aeschlimann, above note 19, p. 90, esp. note 22.

66 ICRC, ‘Libya: ICRC visits 50 detainees in Benghazi’, News Release 11/74 25 March 2011, available at: <http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-03-25.htm> (last visited 6 April 2011).

67 See also the Statutes of the International Committee of the Red Cross, Art. 4(1)(d).

68 M. Sassòli, above note 33, p. 19.

territorial control for extended periods, such as in Sri Lanka and Côte d'Ivoire, and the local population requires it to provide protection from criminality, imprisonment accompanied by adequate treatment and conditions may best ensure the dignity and humanity of 'sentenced' persons.⁶⁹ This contention is not, however, without limits. Regardless of the standards *intra muros*, fundamentally arbitrary detention is not a humanitarian outcome for the individual(s) deprived of liberty under any circumstances. Although sometimes difficult to apply, parameters equivalent to those governing deprivation of liberty by states, such as the principles of individual liability⁷⁰ and *nullem crimen sine lege*,⁷¹ must therefore also curb the 'authority' of armed groups to deprive people of liberty during NIAC.

In international armed conflict, the Geneva Conventions explicitly mandate the ICRC to work in favour of certain categories of persons deprived of liberty, principally prisoners of war⁷² and civilians.⁷³ In NIAC, the ICRC prioritizes work in favour of persons in analogous situations:

In determining the detainees for whom its activities are deployed in internal armed conflicts, the ICRC draws in practice partly on concepts applicable to international armed conflicts. It accordingly seeks to have access first and foremost to persons who have taken a direct part in the hostilities (members of government armed forces or rebel forces in enemy hands) and to civilians arrested by the government or the rebels on account of their support, whether real or presumed, for the opposing forces.⁷⁴

In addition, 'the ICRC is often led by extension to concern itself' with persons deprived of liberty for reasons unrelated to the conflict, including for 'ordinary penal offences'.⁷⁵ As Aeschlimann notes, such persons may 'have identical, or sometimes even greater, humanitarian needs'.⁷⁶ All persons held by armed groups, generally absent the accountability mechanisms, oversight and infrastructure of a state are inherently vulnerable. Moreover, criminal detention is necessarily accompanied by judicial guarantees – without which the detention is arbitrary⁷⁷ – that few armed groups have the capacity to ensure. It is in this context that the ICRC has

69 Imprisonment is certainly the more humane outcome where the alternative is mob or popular justice. Note, however, that in contrast to the internment of enemy forces or persons posing a serious risk to armed groups' security, there may in some cases be practical, humane alternatives to detention, such as fines or community service.

70 Individual liability is a principle relevant to both detention and internment. On the latter, see Ryan Goodman, 'Rationales for detention: security threats and intelligence value', in Michael Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85, 2009, p. 378; and J. Pejic, above note 29, p. 209.

71 The capacity of armed groups to satisfy the principle of *nullem crimen sine lege* – also known as the 'principle of legality' – is particularly contentious.

72 GC III, Art. 126.

73 GC IV, Art. 143.

74 A. Aeschlimann, above note 19, p. 88.

75 *Ibid.*

76 *Ibid.*

77 Common Article 3; AP II, Art. 6; J.-M. Henckaerts and L. Doswald-Beck, above note 12, pp. 344, 347–352.

‘made regular visits [in Sri Lanka] to police stations and some prisons where detainees were held by the LTTE for *common crimes*’.⁷⁸

In all cases, the situation of the individual is of paramount importance. To address his or her concerns, the ICRC uses those tools that it has routinely employed to improve conditions and treatment in state detention. That is, the standard methods of ICRC action, founded in almost a century of work in favour of persons deprived of liberty,⁷⁹ are observed, regardless of the fundamentally different character of, and between, armed groups. In essence, therefore, the ICRC engages in confidential, bilateral dialogue with armed groups to ameliorate humanitarian problems such as ill-treatment, inadequate conditions of detention, disrupted family links, disappearances, and lack of due process guarantees. Of these, the last has generally been addressed in response to purported criminal detention by particularly sophisticated armed groups, such as the FAFN, which had both extensive territorial and administrative control of northern Côte d’Ivoire. The ICRC’s Annual Report 2005 notes that:

In *Forces Nouvelles*-controlled areas, the ICRC was concerned about detention conditions, the absence of a functioning judicial system and the consequent lack of judicial guarantees. It raised these issues on several occasions with the detaining authorities and the *Forces Nouvelles*’ leadership.⁸⁰

How the ICRC works

At the outset of engagement with an armed group – in relation to detention or otherwise – the ICRC utilizes all available resources, including its staff, its local interlocutors, archived records, and open-source information, to better understand the group itself. It assesses, *inter alia*, the group’s hierarchy, structure, motivations, normative framework, constituency, and territorial control – all characteristics that, potentially, have implications for persons deprived of liberty and the means adopted to ameliorate their situation. The results of such assessments, which are repeated throughout the ICRC’s relationship with the group, facilitate the development of a strategy for the humanitarian response best adapted to the armed group and most likely to achieve positive outcomes for the persons deprived of liberty.

Detention visits

If the first tier of a comprehensive assessment is concerned with the armed group *per se*, the second is necessarily focused upon the treatment and conditions to which it subjects persons deprived of liberty. As with state detention, visits enable the ICRC to identify or anticipate humanitarian concerns and understand them within

78 ICRC, *Annual Report 2005*, May 2006, p. 188 (emphasis added), available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 9 February 2011).

79 The ICRC’s first formal detention visits were made in 1915 with the agreement of the parties to World War I.

80 ICRC, *Annual Report 2005*, above note 78, p. 128.

their particular context, including the constraints upon the detention administration. Ultimately, the content of its confidential, bilateral dialogue and the objective of its recommendations and other *démarches* are based on what the ICRC learns and observes about treatment and conditions of detention during its visits.

For each detention visit, the ICRC relies upon the detention visit modalities that buttress the same activity in state detention.⁸¹ The possibility to speak freely and in private with the detainees of the ICRC's choice, for example, enables the ICRC to identify and understand both the concerns common to the detainee population and those specific to each individual. This modality is thus valuable regardless of the detaining authority's character as either state or non-state. Given the circumstances of particular armed groups, however, the ICRC has been prepared to adapt one or more of its modalities to enable it to address humanitarian concerns. It may, for example, visit persons outside of their usual place of detention, and thus not conduct a full tour of the premises, where the armed group's security dictates and the objectives of that tour can be otherwise achieved. The ICRC only adapts its modalities for a specific visit and only with the armed group's acceptance, in principle, of the modalities in full. That is, the modalities remain available to use, as and when the ICRC deems appropriate.

Detention visits are naturally premised upon access to the armed group and their detainees. To be best positioned to establish access, the ICRC creates and maintains a relationship of trust with armed groups.⁸² Generally, this relationship is developed over time in the context of a range of activities, including those related to health and sanitation. Impartial treatment of the war wounded, for example, often familiarizes armed groups with the ICRC.⁸³ Indeed, it is the norm for the ICRC to have had contact with each armed group prior to pursuing a substantive, detention-oriented dialogue. To the greatest extent possible, the ICRC also engages with third parties who have the potential to inhibit access, and is organized to overcome physical or logistical obstacles, such as those resulting from the remote location of detention. In some contexts, such as Nepal, this requires being prepared for long, sometimes physically demanding, operations and maintaining various transport options. The ICRC's *Annual Report* for 2005 notes that, in Nepal, the 'CPN-M released a total of 99 people, and the ICRC mediated their handover to the government and ensured their safe passage home in long journeys by foot, car and/or aircraft'.⁸⁴ Even meticulous preparation cannot, however, anticipate all eventualities. In Afghanistan in 2007, an 'ICRC team was seized [by an armed opposition group] as they were returning from a failed mission to facilitate the release of a [kidnapped]

81 The modalities are: access to all detainees within the field of the ICRC's interest; access to all premises used by and for detainees; authorization to repeat visits; possibility to speak freely and in private with the detainees of the ICRC's choice; and the assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorize it to compile such a list during the visit.

82 T. Whitfield, above note 10, p. 21, notes that 'winning the trust of an armed group may be a slow and difficult process'.

83 The ICRC treats the war wounded in many contexts, such as Chad. See ICRC, *Annual Report 2006*, May 2007, pp. 83–84, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 8 April 2011).

84 ICRC, *Annual Report 2005*, above note 78, pp. 175–176.

German engineer'.⁸⁵ Although, in that case, the individuals were released – having been treated well – within days of their capture, the incident indicates the considerable risks inherent in such operations.

More specifically, the ICRC seeks to demonstrate the value of a confidential humanitarian dialogue, founded upon detention visits, with due consideration for the circumstances of the armed group, including the risks related to its security. This may be facilitated by the ICRC's detention visits to groups' members deprived of liberty by the state, which effectively familiarizes them with the ICRC's role, mandate, and action. Present in Afghanistan for more than two decades, for example,⁸⁶ the ICRC has had contact with individuals in their successive roles as the state-detaining authority, detainees of the state, and, more recently, administrators of non-state detention.⁸⁷

Confidential, bilateral dialogue

On the basis of its detention visits, the ICRC uses confidential,⁸⁸ bilateral dialogue to 'persuade the responsible authorities to respect the fundamental rights of individuals'.⁸⁹ Despite some overlap, this dialogue is distinguishable from that which advocates adherence to international standards in general terms. The latter includes dissemination of the principal legal frameworks governing detention, and facilitation of the integration of that law into armed group's codes of conduct, unilateral declarations,⁹⁰ and/or bilateral agreements.⁹¹ Although an important, principally preventative, humanitarian tool, which also remains available to the ICRC at all times,⁹² such generic engagement is not adapted to the exigencies of

85 John Hemming, 'Taliban free 4 ICRC staff kidnapped in Afghanistan', in *Reuters*, 29 September 2007, available at: <http://www.reuters.com/article/2007/09/29/us-afghan-kidnap-idUSISL27248020070929> (last visited 8 April 2011).

86 ICRC, 'Afghanistan: 20 years there and much left to do', News Release, 12 June 2007, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-regional-news-120607.htm> (last visited 17 February 2011).

87 ICRC, 'Afghanistan: first ICRC visit to detainees in Taliban custody', News Release 09/251, 15 December 2009, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-news-151209.htm> (last visited 14 February 2011).

88 As in response to state detention, the ICRC reserves the right to publicize its findings in relation to detention by armed groups where 'the following conditions are met: (1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations; (4) such publicity is in the interest of the persons or populations affected or threatened'. See ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', in *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 397.

89 A. Aeschlimann, above note 19, p. 94.

90 The NGO Geneva Call, for example, engages armed groups to make a 'Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' that contains far-reaching obligations vis-à-vis anti-personnel mines: see Geneva Call, 'Anti-personnel mines and armed non-state actors', 2009, available at: <http://www.genevacall.org/Themes/Landmines/landmines.htm> (last visited 4 March 2011).

91 Common Article 3(2).

92 M. Mack and J. Pejic, above note 8, p. 22.

armed groups, their detention operations, and the concerns of the detainees whom they hold.⁹³

The objectives of the ICRC's confidential dialogue are determined at all times by international legal norms, foremost among which is IHL.⁹⁴ Although primacy is given to the law directly applicable, that of NIAC, the ICRC also considers other bodies of law, including human rights law in the case of highly sophisticated groups that perform government-like functions, and the law of international armed conflict by analogy.⁹⁵ In all cases, the express invocation of any international legal norms is facilitated where the group has committed to their adherence. The ICRC holds armed groups to their own commitments, regardless of the context in which they were made or the group's motivation – humanitarian, political, or otherwise – for having made them. Even where the ICRC is able to invoke international law, however, it does so in an adapted, contextualized manner:

Although [international law] should always be presented accurately and without compromising existing provisions, presentations of the law should not be theoretical or 'academic'. The law should be discussed in terms that are concrete and operational. Discussions of the law should also be persuasive and relevant to the circumstances. It is especially important to bear in mind the motivation and the perceptions of the parties to a conflict.⁹⁶

In addition to emphasizing the legal standards that are applicable, *stricto sensu*, or those to which the group has committed, the ICRC selects and invokes other, or alternative, norms that are accepted by the concerned group and relevant to their detention operations. The International Council on Human Rights Policy rightly recognizes that:

some armed groups challenge the legitimacy of international law. . . . Groups whose aims or ideology will not accommodate a world of sovereign states, or who claim divine (religious) authority, might question the legitimacy of international norms. In such cases, one might usefully look for rules in traditional or religious codes that are *similar to prohibitions in international law*.⁹⁷

In all cases, the ICRC first determines that such norms, and the framework in which they exist, will hold armed groups to standards at least equivalent to those required by international law. Globally, the ICRC thus has a keen interest in

93 '[T]he best [humanitarian] response or responses have to be defined, based on an analysis of the situation as a whole and adapted to the problems identified and their causes'. A. Aeschlimann, above note 19, p. 94.

94 Sassòli, noting the complexity inherent in attempting to establish a dialogue with armed groups on the basis of domestic law, states that 'the only possibility to engage [armed groups] is to engage them by international law and by mechanisms of international law'. M. Sassòli, above note 47, p. 63. There have, however, been some situations in which an armed group has been willing to apply domestic law.

95 There are, however, certain fundamental differences between the two legal regimes – such as 'protected person status' in international armed conflict – that cannot readily be used by analogy. See Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War*, 2nd edition, ICRC, Geneva, 2006, Vol. I, p. 253.

96 M. Mack and J. Pejic, above note 8, p. 13.

97 D. Petrasek, above note 43, pp. 59–60 (emphasis added).

acquiring a comprehensive understanding of alternative normative frameworks and comparing them with international law: it has, for example, convened and facilitated comparative dialogue on Islamic law and IHL.⁹⁸ Second, the ICRC establishes whether the particular armed group would be willing to accept invocation of the identified norms, considering, *inter alia*, the strength of its relationship with the group and the availability of relevant expertise. In some contexts, the ICRC considers that the norms enshrined in specific ideological or cultural frameworks are insufficiently understood, or would not be productively invoked by external actors, such that reliance upon them would be counter-productive.

Finally, beyond normative frameworks, the ICRC employs other *argumentaires* to persuade armed groups to improve treatment and conditions of detention.⁹⁹ Of these, the principal argument is fundamentally humanitarian: that is, the ICRC presents sub-standard treatment and conditions in terms of their impact upon the individual. Overcrowding, for example, is thus described not as a ratio of persons per square metre relative to an international standard but in terms of the physical and psychological impact upon the detainees. Alleged ill-treatment is, likewise, often articulated as a direct quote of the person who has been subject to it.

Using these norms and *argumentaires*, the ICRC makes recommendations to armed groups for the improved treatment and conditions of detainees. In ensuring that these recommendations are achievable, given the sometimes limited resources and infrastructure available for the administration of the detention, the ICRC emphasizes the humanitarian intent, or purpose, of the relevant norms. To set its recommendations so as to be both realistic and to attain the *most* humanitarian outcome, the ICRC often uses the living conditions of the group's own members as indicative of its capacity to accommodate detainees.¹⁰⁰ The expectation of the ICRC is that all armed groups, regardless of their sophistication, are capable of ensuring humane treatment and conditions of detention, and it works progressively toward that objective.¹⁰¹ As such, the ICRC generally does not advise armed groups not to detain or recommend release except in response to hostage-taking and pressing humanitarian concerns, such as a threat to the life or wellbeing of the detainee(s) on account of ill-health or injury that the armed group is unable to address. In some cases, too, a dialogue toward the realization of due process guarantees may

98 ICRC, 'Afghanistan: conference on Islam and humanitarian law', News Release 06/55, 21 September 2006, available at: <http://www.icrc.org/eng/resources/documents/news-release/afghanistan-news-210906.htm> (last visited 14 April 2011).

99 These are akin to those often used to secure adherence to international standards generally. Humanitarian actors may – subject to a comprehensive understanding of the concerned group – use Bangerter's 'reasons why armed groups choose to respect international humanitarian law' to argue in favour of the protection of detainees in accordance with international standards. Olivier Bangerter, 'Reasons why armed groups choose to respect international humanitarian law or not', in *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 353–384.

100 In international armed conflict, a similar standard applies vis-à-vis the conditions of prisoners of war: see GC III, Art. 25.

101 Note, too, that non-state parties to NIAC have at least a minimum level of organization. See International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Jurisdiction (Appeals Chamber), 2 October 1995, para 70.

constitute an implicit recommendation that certain individuals should be released: where, for example, they are held absent alleged personal wrongdoing or do not themselves pose a risk to the security of the armed group.

Assistance

Although persuasion through dialogue is the ICRC's preferred mode of action,¹⁰² the ICRC also provides assistance to ameliorate particular concerns in non-state detention. Assistance is often a contribution of small but essential items, such as 'medicines, clothes, blankets and jerrycans',¹⁰³ or the exchange of personal messages between the detainee and his or her family. In exceptional circumstances, it may extend to the provision of more extensive supplies and services, including the facilitation of family visits¹⁰⁴ or financial support for detainees' nourishment.¹⁰⁵ Such assistance to armed groups has been recognized to be central to ensuring their compliance with international norms, subject to certain important limitations:

Compliance with certain norms . . . may need external assistance to help build their capacity. . . . Technical assistance to an armed non-state actor, for example on protection issues or respect for due process and fair trial, merits further consideration. Care will, though, have to be taken to ensure that those promoting better compliance with norms do not become complicit in any future criminal behaviour by an armed non-state actor or become engaged in developing military strategy.¹⁰⁶

Bearing in mind these considerations, before assisting the ICRC cautiously balances the humanitarian need and the capacity of the armed group itself to respond. It considers, among other things, to what extent the issue to be addressed is the result of the incapacity, as opposed to intentionality, of the person(s) administering the detention, favouring assistance only in response to the former. Under no circumstances does assistance provided by the ICRC enable an armed group to detain. Rather, it is directed toward the amelioration of specific, identified humanitarian concerns. Moreover, as each armed group is singularly responsible for ensuring humane treatment and conditions of detention, assistance is only provided in the context of a dialogue toward the assumption of all of its responsibilities.

Of the ICRC's actions, its interventions as a neutral intermediary also merit consideration because they constitute a common part of the response to deprivation of liberty by armed groups. In particular, in this role the ICRC frequently facilitates

102 The modes of action common to all of the ICRC's protection action are persuasion, support, mobilization, substitution, and denunciation.

103 ICRC, *Annual Report 2008*, above note 4, p. 161.

104 ICRC, *Annual Report 2005*, above note 78, p. 188.

105 ICRC, *Annual Report 2006*, above note 83, p. 146.

106 Geneva Academy of International Humanitarian Law and Human Rights, 'Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts', summary of initial research and discussions during an expert workshop in Geneva in March 2010, available at: <http://www.adh-geneva.ch/news/armed-non-state-actors-international-norms> (last visited 11 February 2011).

the release of detainees.¹⁰⁷ As noted above, the ICRC generally does not ‘require’ release. Rather, it acts to ensure the safe repatriation of those detainees whom the armed group has, of its own accord, decided to release. This distinction, which is important for the ICRC (as a strictly neutral, independent humanitarian organization) in all circumstances, is critical in instances of hostage-taking. The ICRC does not involve itself in substantive negotiations (such as the exchange of demands or ransoms) that are fundamentally contrary to the absolute character of the prohibition of hostage-taking.

Transparent humanitarian action

Throughout its action – protection and assistance – in response to deprivation of liberty by armed groups, the ICRC maintains a transparent dialogue with opposing parties to the armed conflict.¹⁰⁸ Specifically, without breaching the confidentiality owed to the armed group, the ICRC informs the state with which the armed group is in conflict of the existence and objectives of its engagement with the group. Under no circumstances does the ICRC’s engagement confer legitimacy upon armed groups. In law, this is established by Common Article 3, paragraph 2, which expressly states that the ICRC’s offer of services to parties to NIAC does ‘not affect [their] legal status’.¹⁰⁹ Indeed, the intent of this Article is mirrored in practice: the action of the ICRC is not understood by other states, the United Nations, or any other actor as affirming the status that an armed group purports to obtain.

Above all, in most cases, parties to armed conflict recognize that the work of the ICRC directly benefits their personnel – such as members of the state’s armed forces – who have been deprived of liberty. Put simply, parties rightly understand the ICRC to be a neutral, impartial, and independent humanitarian organization working to ensure the humane treatment and conditions of detention of detainees until their unconditional release by other means.

Conclusion

Deprivation of liberty is a reality during armed conflict. The regular occurrence of detention by armed groups reflects the current prevalence of NIACs, including, on occasion, those in which armed groups are *de facto* administrators of the territory under their control. In turn, it is not surprising, given the inherent vulnerability of persons deprived of liberty, that such detention has humanitarian implications, which may be exacerbated by the particularities of armed groups *per se* and of their

107 P. J. C. Schimmelpenninck van der Oije, ‘International humanitarian law from a field perspective’, in *Yearbook of International Humanitarian Law*, Vol. 9, 2006, pp. 408–409. Of the ICRC’s many press releases in this regard, see for example ICRC ‘Sudan: ICRC facilitates another handover of released detainees’, Release 10/101, 9 June 2010, available at: <http://www.icrc.org/eng/resources/documents/news-release/sudan-news-090610.htm> (last visited 7 April 2011).

108 Note that a NIAC may arise exclusively between two armed groups: see Common Article 3.

109 Common Article 3(2).

detention practice. This fact alone – regarding detention and its consequences – necessitates humanitarian engagement of armed groups in order to ensure the humane treatment and adequate conditions of detention for persons deprived of liberty.

In attempting to do so effectively, however, humanitarian actors are confronted by a range of obstacles. In addition to the challenges common to any engagement of armed groups, these include the facts that: the legal basis for detention is absent in domestic law and human rights law and only implicit in IHL; the obligations incumbent upon armed groups for the respect of detainees, where not also of disputed applicability by the group, are either not always comprehensive or lack specificity; engagement in relation to detention, particularly for judicial guarantees, risks legitimization, perceived or real, of armed groups; and, finally, establishing and maintaining a dialogue and access to armed groups and their detention operations is often inherently difficult. As a result, humanitarian actors may be precluded from addressing this particular issue.

The ICRC endeavours to overcome these obstacles and to work for the benefit of persons deprived of liberty by armed groups. In doing so, its humanitarian action is fundamentally the same as that which it routinely utilizes in response to detention by states. The ICRC employs confidential, bilateral dialogue – informed by access to detainees, the place of detention, and the individual(s) administering the detention – as its principal tool to humanitarian ends. This dialogue is guided by IHL and is often enhanced by other *argumentaires*. It results in adapted, contextualized recommendations to the armed group for the improved treatment and conditions of detention of persons deprived of liberty. This dialogue is supplemented, subject to careful consideration, by assistance that is directed not at enabling the detention practice but at improving the situation of the detainees. This is done with full transparency with all opposing parties to the armed conflict.

Although the strength of this approach has its foundation in the ICRC's extensive experience, it would be erroneous to suggest that the ICRC's best endeavours have unfailingly achieved humanitarian outcomes for each person deprived of liberty by an armed group. For the ICRC, as for other humanitarian actors, access to armed groups and their detainees 'can sometimes be difficult to obtain'.¹¹⁰ In the case of Staff Sergeant Gilad Shalit, for example, the ICRC has acknowledged that its humanitarian action is fundamentally obstructed by lack of access.¹¹¹ Moreover, even with access, the ICRC has, on occasion, been unable to persuade armed groups to adopt or abandon practices – particularly those that the group considers fundamental to the effective waging of an asymmetric war – so as to adhere to international norms for the benefit of persons deprived of liberty. The

110 A. Aeschlimann, above note 19, p. 90, paraphrased.

111 ICRC, 'Gaza: ICRC urges Hamas to allow captured Israeli soldier Gilad Shalit regular contact with his family', News Release 09/1224, 18 June 2009, available at: <http://www.icrc.org/eng/resources/documents/news-release/palestine-news-180609.htm> (last visited 18 February 2011); ICRC, 'Gaza: ICRC remains determined to help Gilad Shalit', Interview with Béatrice Mégevand-Roggo, 23 June 2010, available at: <http://www.icrc.org/eng/resources/documents/interview/israel-shalit-interview-230610.htm> (last visited 21 February 2011).

stark reality is that in Colombia – where the ICRC has had a strong field presence since 1991,¹¹² and has routinely engaged in dialogue with the principal armed groups – hostage-taking continues to occur,¹¹³ reduced in frequency and scale primarily by the prevailing circumstances of the decades-long conflict.

That the ICRC is unable to achieve the most humanitarian outcome in each and every situation of deprivation of liberty by armed groups compels it to reconsider its approach but does not undermine its dogged persistence. The value of its humanitarian action resides largely in its unique role in response to deprivation of liberty by armed groups. Few, if any, other humanitarian actors work exclusively for the benefit of persons deprived of liberty in terms of treatment and conditions of detention absent involvement in the inherently political considerations associated with their release. This strictly neutral, independent, and impartial action contributes to the humane treatment and conditions of detention of the individuals affected. Ultimately, however, this contribution is best assessed by the individuals whom it purports to benefit. Commodore Ajith Boyagoda (rtd.) of the Sri Lankan Navy, deprived of liberty by the LTTE for eight years, described the ICRC's regular visits as 'a kind of insurance policy against ill-treatment' and stated:

We basically survived because of the ICRC – not only because of the things they provided such as food, medicines and the Red Cross Messages, but also because we could bring our grievances to them as a neutral party. . . . This was a huge consolation to us.¹¹⁴

112 Jenatsch notes that '[t]he ICRC began its work in Colombia in 1969 with prison visits, and in 1980 a permanent delegation was established in Bogotá. The actual fieldwork, however, did not begin until 1991, when local offices were opened in Bucaramanga and Villavicencio'. Thomas Jenatsch, 'The ICRC as a humanitarian mediator in the Colombian conflict: possibilities and limits', in *International Review of the Red Cross*, No. 323, 1998, available at <http://www.icrc.org/eng/resources/documents/misc/57jpch.htm> (last visited 4 April 2011).

113 See, for example, 'Colombian troops rescue 22 kidnapped oil workers', in *Guardian Online*, 8 March 2011, available at: <http://www.guardian.co.uk/world/2011/mar/08/colombian-troops-rescue-oil-workers> (last visited 6 April 2011).

114 ICRC, 'A lifeline to the outside world', Feature, 5 June 2008, available at: <http://www.icrc.org/eng/resources/documents/feature/sri-lanka-feature-naval-commande-050608.htm> (last visited 15 February 2011).

Closing the gap: symbolic reparations and armed groups

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Abstract

The question of whether non-state armed groups could and should provide reparations to their victims has been largely overlooked. This article explores this gap, with a particular focus on symbolic reparations, such as acknowledgement of the truth and apologies. It argues that, while the question is fraught with legal, conceptual, and practical difficulties, there are some circumstances in which armed groups are capable of providing measures of reparations to their victims. The article identifies the issue of attacks on informers as one potential area for armed groups to provide such measures, and demonstrates that in a few cases armed groups have already engaged in actions that could be seen as analogous to symbolic reparations. The article's main case study is provided by recent actions by the Irish Republican Army (IRA) in relation to its past attacks against suspected informers.

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While non-state actors have been involved in violence throughout history, the influence of armed groups has been rising exponentially in the last two decades. Armed groups are present in virtually all major areas of violence: for example, Iraq, Afghanistan, Somalia, Pakistan, Lebanon, Gaza, Colombia, Côte d'Ivoire, Nigeria, the Democratic Republic of Congo (DRC), Chechnya, the fragmented set of

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conflicts with Al Qaeda and its affiliates, and the recent conflict in Libya. Armed groups have also participated in the recent conflicts in Nepal, Sri Lanka, Algeria, Sierra Leone, Kosovo, and Northern Ireland. Non-international armed conflicts involving non-state armed groups are now the dominant form of conflict in world affairs, with inter-state wars becoming the exception.¹ At the beginning of 2008 there were twenty-six active armed conflicts worldwide, all of them involving armed groups.² Thus, ‘by definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, i.e. non-international armed conflicts, are non-state armed groups’.³ In addition, many armed groups have operated and committed abuses in situations of political violence that do not cross the threshold for being considered as an armed conflict under international humanitarian law (IHL) (for example, the Maoist armed groups in north-east India, or ETA in Spain).

The rise in importance of armed groups has led to several developments. First, the legal norms applying to the conduct of armed groups, in particular IHL, have been gradually articulated and clarified, and indeed have become the subject of a growing body of literature.⁴ Perhaps the most important step has been the clarification of customary rules of IHL: the majority (though not all) of the 161 rules governing armed conflicts that were authoritatively identified by the International Committee of the Red Cross (ICRC) apply in non-international armed conflict and are thus binding on armed groups.⁵ The general principle of applying at least some of the norms of IHL to armed groups is now beyond dispute; the Special Court for Sierra Leone (SCSL), for example, was able to simply assert that: ‘... it is well settled

- 1 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 2nd edition, Polity Press, Cambridge, 2006; Richard Schultz and Andrea Dew, *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Combat*, Columbia University Press, New York, 2006; UN High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibilities*, United Nations, 2004, p. 17.
- 2 Joseph J. Hewitt, Jonathan Wilkenfeld, and Ted Robert Gurr, *Peace and Conflict 2010*, Paradigm Publishers, Boulder, CO, 2010, p. 27.
- 3 Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 6.
- 4 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Law and Policy, Occasional Paper 6, 2006, available at: <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (last visited 20 January 2012); Sandesh Sivakumaran, ‘Binding armed opposition groups’, in *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, pp. 369–394; Anne-Marie La Rosa and Caroline Wuerzner, ‘Armed groups, sanctions and the implementation of international humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 327–341; Cherif Bassiouni, ‘The new wars and the crisis of compliance with the law of armed conflict by non-state actors’, in *Journal of Criminal Law and Criminology*, Vol. 98, No. 3, 2008, pp. 711–810; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002; Andrew Clapham, ‘Human rights obligations of non-state actors in conflict situation’, in *International Review of the Red Cross*, Vol. 88, No. 863, 2006, pp. 491–523; Noelle Higgins, ‘The regulation of armed non-state actors: promoting the application of the laws of war to conflicts involving national liberation movements’, in *Human Rights Brief*, Vol. 17, No. 1, 2009, pp. 12–17; M. Sassòli above note 3.
- 5 See the ICRC database of customary IHL, available at: <http://www.icrc.org/customary-ihl/eng/docs/home> (last visited 8 August 2011). See also International Commission of Inquiry on Darfur, ‘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’, Geneva, 25 January 2005, para. 166, available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 20 January 2012).

that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties'.⁶ While the question of the application of human rights norms to armed groups is not as settled, there have been several sources claiming such application, at least in some circumstances.⁷ In terms of accountability, international criminal law applies to members of armed groups almost without distinction from state agents, and the Rome Statute of the International Criminal Court (ICC) has confirmed that members of armed groups can be held criminally responsible for war crimes, crimes against humanity (which are defined there as attacks that take place pursuant to or in furtherance of 'a State or organizational policy'),⁸ and genocide.⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁰ and the SCSL¹¹ have prosecuted members and leaders of armed groups. The ICC's first indictment was against a member of an armed group, not against a state leader or official, and as of April 2011 members of armed groups remain a majority (fourteen out of twenty-two) of the individuals indicted by the ICC.¹²

While the increasing ability to hold individual perpetrators to account is important, in general there is an agreement that international criminal law and individual prosecutions do not address the full range of the needs of victims.¹³ Indeed, as will be detailed below, the issue of reparations – including symbolic reparations – has emerged as a central theme in response to state abuses. However, the rising attention of scholars and advocates to armed groups has not yet involved sustained attention to the issue of reparations from armed groups. As Zegveld wrote, 'while international bodies have given due consideration to the accountability of individual leaders of armed opposition groups, they have so far largely ignored the accountability of the groups in favour of the accountability of individual members'.¹⁴ Overlooking of the question of reparations from armed groups is a major omission, which could leave victims of abuses by armed groups unable to achieve the redress that they seek.

It is important to emphasize early on that the main reason why the question of reparations from armed groups has not garnered adequate attention is likely to be that in most cases it is not feasible to require any type of reparations from armed

6 SCSL, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber), 31 May 2004, para. 22.

7 Jan Arno Hessbruegge, 'Human rights violations arising from conduct of non-state actors', in *Buffalo Human Rights Law Review*, Vol. 11, 2005, pp. 21–88; A. Clapham, above note 4; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan', in *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 47–79.

8 ICC Rome Statute, Art. 7(2)(a), emphasis added.

9 *Ibid.*, Art. 6, which does not specify that perpetrators must be state officials or agents.

10 See e.g. ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008.

11 See e.g. SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF Case)*, Case No. SCSL-04-15-T, 2 March 2009.

12 See ICC, 'Situations and cases', available at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited 8 August 2011).

13 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. 573–639.

14 L. Zegveld, above note 4, p. 223.

groups. Armed groups often lack the capacity to provide reparations, and frequently do also not have the political will to do so. In some cases, armed groups also disintegrate and cease to exist in the aftermath of conflicts. In addition, there is a dearth of formal mechanisms through which victims can claim such reparations from armed groups. While a variety of international, regional, and national mechanisms are available to victims of state abuses who seek to bring a reparation claim against a state, there are no equivalent mechanisms in relation to armed groups. For example, victims of armed groups cannot address an armed group directly through mechanisms such as the European Court of Human Rights or the United Nations Human Rights Committee, as they can do in relation to states.

However, while it is certainly true that reparations from armed groups will not be feasible in *all* cases, it is wrong to assume that they will simply *never* be feasible. As will be elaborated below, this article presents the argument that, at least in some cases, and in relation to at least some forms of reparations, it would indeed be feasible to discuss the question of reparations from armed groups. This potential should be explored, analysed, and cultivated, even while accepting the feasibility hurdles.

The argument should also be viewed in the context of the extraordinary developments over the last fifteen years or so of international norms and practice in relation to armed groups. As was mentioned above, during this period the ICRC customary law study clarified the IHL norms applicable to armed groups; the ICC has made dramatic steps in terms of individual criminal responsibility of armed groups' leaders and members; and innovative mechanisms have emerged in relation to international monitoring of the conduct of armed groups,¹⁵ as well as voluntary commitments by armed groups on issues such as anti-personnel landmines and the treatment of children.¹⁶ This landscape would probably have seemed unfeasible to observers in the early 1990s. The question of reparations from armed groups could become the next frontier in this development curve, and should be assessed accordingly. Finally, it is important to note that the articulation of norms and the advocacy for their realization could have important meaning even when the feasibility of the advocacy can be questioned. Organizations advocating for respect for human rights and IHL often make recommendations to states in the full knowledge that the chances of all these recommendations being acted upon are slim, and it could be that a similar approach might at times be useful in relation to armed groups.

The remainder of the article will be structured as follows: the next section explores in greater detail the question of reparations from armed groups, and will argue that this topic has been thus far overlooked, which could result in a gap in relation to the right to redress of victims. The following section then identifies attacks against alleged informers by armed groups as a potentially suitable 'entry

15 For example, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict.

16 See for example the work of the non-governmental organization *Geneva Call*, available at: <http://www.genevacall.org/Themes/themes.htm> (last visited 8 August 2011).

point' to the issue of symbolic reparations from armed groups, and describes an early precedent of an armed group providing measures of symbolic reparations in this context: the African National Congress (ANC) in 1992–1993. Next, the article turns to focus on actions taken by the Irish Republican Army (IRA) in the years after the peace agreement in Northern Ireland in relation to its past attacks on alleged informers. This section demonstrates that these actions are consistent with many of the principles regarding symbolic reparations, though neither the IRA nor the ANC self-described them as 'symbolic reparations' or made explicit references to the duty to provide reparations under international human rights or humanitarian law. Finally, the implications of the discussion, in particular the potential view of armed groups as post-conflict actors, are explored in the conclusion.

Armed groups and the duty to provide reparations: a blind spot?

Advocacy for the right to reparations of victims of serious human rights abuses and violations of IHL has become one of the central tenets of transitional justice and the struggle for accountability for abuses.¹⁷ This trend is premised on moving beyond a narrow focus on attempting to bring perpetrators to justice, and instead is focused on the victims of abuses, acknowledging their suffering and their needs and attempting to address the damage done.¹⁸

The central source detailing these rights is the 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 ('Basic Principles'), which were adopted by the United Nations General Assembly in 2006.¹⁹ The Basic Principles were described as 'an international bill of rights of victims'.²⁰

A crucial feature of the modern understanding and practice of reparation is that it involves more than just financial compensation to victims. The concept of reparations refers to a wide range of measures that can be taken in response to violations and abuses, with the exact appropriate forms depending on context and circumstances.²¹ In addition to compensation, the Basic Principles detail other modalities of reparations: restitution, rehabilitation, guarantees of non-repetition, and satisfaction. Especially with regard to satisfaction, there have been

17 Pablo De Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, Oxford, 2006; International Center for Transitional Justice, *Reparations in Theory and Practice*, New York, 2007.

18 Jemima Garcia-Godos, 'Victim reparations in the Peruvian truth commission and the challenge of historical interpretation', in *International Journal of Transitional Justice*, Vol. 2, 2008, p. 65.

19 Adopted by UNGA Res. 60/147, 21 March 2006.

20 Cherif Bassiouni, 'International recognition of victims' rights', in *Human Rights Law Review*, Vol. 6, No. 2, pp. 203–279. Victims' rights were also formulated in an overlapping UN instrument, 'The updated set of principles for the protection and promotion of human rights through action to combat impunity', Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

21 Naomi Roht-Arriaza, 'Reparations decisions and dilemmas', in *Hastings International and Comparative Law Review*, Vol. 27, 2004, pp. 157–200; Max Du Plessis and Stephen Pete, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Intersentia, Oxford, 2007.

developments in theory and practice in relation to what are often referred to as ‘moral reparations’ or ‘symbolic reparations’: various forms of truth-recovery (including the concept of a right to truth),²² acknowledgment of responsibility, apologies, and responding to the non-material needs of victims.

The term ‘symbolic’ does not necessarily mean forms of reparations that are less significant – only that they involve a greater intangible element.²³ Symbolic reparations can range from disclosing the truth about past events (for example, in relation to enforced disappearances), offering official apologies, or restoring the good name of victims, to commemoration measures such as changing of names of public spaces or the creation of museums and parks dedicated to the memory of victims.²⁴ The Basic Principles dedicate significant space to elaborating modalities of symbolic reparations and they have featured in recommendations from truth commissions and international bodies, most notably the Inter-American Court of Human Rights.²⁵ In comparison to financial compensation, symbolic reparations ‘cater to a broader range of victim concerns, and take seriously their need for recognition, respect, dignity and hope for a safe future’.²⁶ Measures such as apologies, commemorations, and tributes, are often seen as more important to the victim than material ones.²⁷ As one commentator suggests, ‘[c]ommemorations can fill the vacuum with creative responses and may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their society’.²⁸ The Office of the High Commissioner for Human Rights has further observed that

symbolic measures derive their great potential from the fact that they are carriers of meaning, and therefore can help victims in particular and society in general to make sense of the painful events of the past [and] allow [victims] to move on.²⁹

In all its manifestations, reparation has emerged as a key feature of accountability and transitional justice. It was defined as a way to make “elusive ideas of truth, justice and reconciliation into something more concrete” and to ensure that

22 See United Nations Human Rights Council, *Study on the Right to the Truth*, UN Doc. E/CN.4/2006/91, 8 February 2006.

23 Frédéric Mégret, ‘The International Criminal Court and the failure to mention symbolic reparations’, in *Social Science Research Network*, 2008, p. 3, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275087 (last visited 8 August 2011).

24 For an overview see Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-conflict States: Reparation Programmes*, United Nations, New York and Geneva, 2008, pp. 22–23.

25 James L. Cavalaro and Stephanie Erin Brewer, ‘Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court’, in *American Journal of International Law*, Vol. 102, No. 4, pp. 768–827.

26 F. Mégret, above note 23, p. 6.

27 C. Bassiouni, above note 20, p. 272.

28 Yael Danieli, ‘The right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms: preliminary reflections from a psychological perspective’, in Eduardo Vetere and Pedro David (eds), *Victims of Crime and Abuse of Power*, United Nations, New York, 2005, p. 261.

29 OHCHR, above note 24, p. 23.

the physical, psychological and social damage in societies emerging from a violent past is acknowledged and addressed".³⁰

Although the question of the potential application of international norms to armed groups has been a subject of much attention recently, there seems to be a major gap or blind spot in relation to the question of reparations and truth-recovery. On the whole, there has been little attention to practical ways in which the principles of reparations should and could apply to armed groups. While it is possible to detect a growing appreciation that extending the applicability of reparation standards to armed groups would be a logical consequence of treating their actions as violations of international norms, most analysis and advocacy has remained tentative. There are currently only modest efforts to search for concrete precedents of reparation-like measures by armed groups or to explore practical modalities in which armed groups could provide such measures. A survey and analysis of scholarly writing, United Nations (UN) standard-making and practice, NGO advocacy, and other sources, reveal an ambivalent and ambiguous state of affairs, where approaches to the rights of victims of armed groups vis-à-vis the armed groups as collective entities remain underdeveloped.

Gillard, for example, accepts that 'a responsibility to make reparation would be a natural consequence of the fact that organized armed groups are bound by international humanitarian law', but then merely asserts that 'to date such responsibility has taken the form of individual criminal responsibility of violators'.³¹ According to Kleffner, 'the possibility of claiming reparations for the injury caused [by organized armed groups] has thus far remained, in the main, a theoretical one'.³² For Kleffner this remains the case notwithstanding a 'growing recognition that organized armed groups can be subjected to claims of reparations'.³³ Sassòli similarly finds that, while 'logically' a violation of norms by an armed group should result in an obligation to provide reparations, 'until now, such reparations were only rarely asked from armed groups and even more rarely awarded to their victims'.³⁴

The question of whether non-state armed groups have obligations to provide reparations is not addressed explicitly in the Basic Principles. On the one hand, the fact that the Basic Principles apply not only to victims of human rights violations but also to those of violations of IHL (a framework where armed groups have in some contexts duties analogous to states) could be seen as an indication that armed groups could have obligations under this framework. The Basic Principles are mostly formulated around the rights of victims – rather than in relation to the duty-bearers – thus potentially leaving the question open. At the same time, General Assembly Resolution 60/147, which adopted the Principles, referred explicitly only

30 J. Garcia-Godos, above note 18, pp. 64–65.

31 Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 535.

32 Jann Kleffner, 'The collective accountability of organized armed groups for system crimes', in André Nollkaemper (ed.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, p. 255.

33 *Ibid.*, p. 256.

34 M. Sassòli, above note 3, p. 47.

to states, its preamble text reading as follows: ‘... recommends that *States* take the Basic Principles and Guidelines into account’. There are also several explicit references to states in the texts of Principles 4 and 5, for instance.

The ICRC study on customary IHL is also cautious and ambiguous on the question of the existence of a duty by armed groups to provide reparations. On the one hand, the study states that: ‘There is some practice to the effect that armed opposition groups are required to provide appropriate reparation for the damage resulting from violations of international humanitarian law’. However, the ICRC also includes the hesitant statement that:

Even if it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups ... the consequences of such responsibility are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation ...³⁵

At the same time, it is interesting to note that the ICRC considered symbolic reparation as part of the potential obligation of armed groups to provide reparations, as it cites a public apology by an armed group in Colombia (for the killing of three children in one of its armed attacks) as an indication of practice.³⁶ Thus, there is enough in the ICRC study to inspire interpretations calling for reparations from armed groups,³⁷ though it is not asserted as a fully binding international customary norm, in sharp distinction to most other rules enumerated in the study. At the same time, it must be recalled that the threshold for establishing a practice as a customary norm is very high, and civil society advocacy organizations routinely rely on standards – and progressive interpretations of standards – that have not yet reached the status of customary law, or indeed call for the development of new standards where there appears to be a gap in international norms.³⁸

Turning to UN bodies, we discover a similarly ambivalent state of affairs. Though UN treaty bodies such as the Human Rights Committee do not normally address abuses by armed groups, in recent years there have been two high-profile, ad hoc United Nations bodies whose mandate extended to cover armed groups.

35 See rule 150 in the ICRC customary law study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2009, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150 (last visited 8 August 2011).

36 *Ibid.*, Vol. II, Ch. 42, Rule 150, Section C, XII.

37 For example, in an analysis of the ICRC study, Fleck argues that non-state actors have obligations ‘to make reparations to victims of war for acts committed under their responsibility’, apparently with no distinctions between them and states. See Dieter Fleck, ‘International accountability for violations of the *ius in bello*: the impact of the ICRC study on customary international humanitarian law’, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 179–199.

38 It is interesting to note that the ICRC has recently identified the issue of reparation for victims of violations as an area in which legal development is urgently required, and presumably this could include the question of reparations by armed groups. See ‘Strengthening legal protection for victims of armed conflicts: the ICRC study on the current state of international humanitarian law’, Address by Dr Jakob Kellenberger, President of the International Committee of the Red Cross, 21 September 2010, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-development-statement-210910> (last visited 8 August 2011).

As with much else on the issue, their practice was uneven and did not result in a clear doctrine. On the one hand, The UN Commission of Inquiry on Darfur suggested that non-state armed groups should provide reparations. That commission, which documented abuses by both the government of Sudan and several rebel armed groups, proposed the establishment of a compensation mechanism (Compensation Commission) as a component toward redressing the rights of the victims of the conflict. Crucially, the commission noted, alongside the obligation of the Sudanese government to pay compensation for crimes perpetrated in Darfur by its agents, that: '[a] similar obligation is incumbent upon rebels for all crimes they may have committed'.³⁹ This is a clear and relatively authoritative statement on the application of reparation duties to armed groups. However, there has been a different approach by a similarly prominent UN commission of inquiry: the Goldstone Commission, which examined the conflict in Gaza between the state of Israel and Palestinian armed groups. Though the Goldstone Commission (which operated after the Darfur Commission) documented and condemned abuses by Hamas and other Palestinian armed groups (against both Israeli civilians and Palestinian residents of Gaza), it did not include a recommendation to provide reparations to victims in its recommendations to Palestinian armed groups.⁴⁰ This omission is also important because Hamas has had overall control of the territory and population of Gaza, and enjoys, on some levels, a quasi-state status and a degree of *de facto* international recognition, all attributes that make it a particularly fitting addressee for a recommendation on reparations.

Outside the UN, the work of several truth commissions involved forms of collective accountability for armed groups. Many truth commissions documented, analysed, and condemned actions by armed groups. Indeed, while UN human rights bodies remain ambivalent in relation to armed groups, truth commissions have become perhaps the main type of official body to offer a broad analysis of armed groups' conduct. Truth commissions that have addressed armed groups' abuses include, among others, those in El Salvador, Guatemala, South Africa, Peru, Sierra Leone, and Liberia. On some occasions it has led to engagements by the armed groups as such, or their leaders, with these bodies. The South African ANC's engagement with the Truth and Reconciliation Commission included forms of symbolic reparations such as truth-recovery and acknowledgment, though the fact that by that time the ANC had become the ruling party has complicated the conceptual and legal significance of its acts.⁴¹ In Sierra Leone several former high-ranking Revolutionary United Front (RUF) commanders offered (limited) apologies as part of reconciliation ceremonies performed during the truth commission's

39 International Commission of Inquiry on Darfur, above note 5, para. 590 onwards, esp. para. 600.

40 See Report of the United Nations Fact Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 15 September 2009, paras. 1770–1771. It is interesting to note, however, that the commission recommended that the Palestinian Authority should ensure prompt and independent investigations of all allegations of serious human rights violations.

41 Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, Routledge, London, 2010, p. 41.

public hearings.⁴² The Guatemalan guerrillas offered a public apology to victims of their actions in the aftermath of the publication of the truth commission report.⁴³ However, not all cases where a truth commission dealt with armed groups' abuses involved engagement with members of the armed groups: in Peru, for example, members of the main rebel group, *Sendero Luminoso*, were denied the opportunity to testify before the commission.⁴⁴ While several truth commissions recommended providing reparations to victims of armed groups (including commissions in Peru, Sierra Leone, and South Africa), the reparations were to be provided by the state, rather than by the armed groups themselves.⁴⁵ Thus, while accepting that victims of armed groups have rights to reparations, these commissions have not addressed the duty of such groups to provide those reparations. In at least two other cases, individual members of armed groups were required to provide forms of reparations as part of their reintegration: this involved returning looted property in Colombia,⁴⁶ and engagement with 'traditional' reconciliation mechanisms in Northern Uganda.⁴⁷ While these are important precedents, here as well the focus has been on engaging individuals rather than the groups as collective entities.

In addition to these sources, it is also significant that some leading international human rights organizations, such as Human Rights Watch and Amnesty International, have called on armed groups to provide reparations to victims.⁴⁸ At the same time, this practice has not been systematic, and rarely involves public campaigning. It is further noteworthy that the influential International Center for Transitional Justice, the leading international organization working on transitional justice and reparations, appears not to have explored in any depth the issue of claiming reparations and truth from armed groups.

What can be the reasons for this relative neglect of the question of reparations from armed groups? Several potential explanations will be offered here. The first reason, as was detailed above, is the lack of an unequivocal international

42 Rosalind Shaw, 'Linking justice with reintegration? Ex-combatants and the Sierra Leone experiment', in Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford University Press, Stanford, CA, 2010, pp. 127–129.

43 See 'Guatemala rebels apologize for abuses during civil war', in *Miami Herald*, 14 March 1999.

44 Theidon Kimberly, 'Histories of innocence: postwar stories in Peru', in R. Shaw and L. Waldorf, above note 42, pp. 92–109.

45 Cecily Rose, 'An emerging norm: the duty of states to provide reparations for human rights violations by non-state actors', in *Hastings International and Comparative Law Review*, Vol. 33, 2010, pp. 307–344.

46 Catalina Diaz, 'Challenging impunity from below: the contested ownership of transitional justice in Colombia', in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Hart, Oxford, 2008, pp. 189–216.

47 Erin Baines, 'The haunting of Alice: local approaches to justice and reconciliation in northern Uganda', in *International Journal of Transitional Justice*, Vol. 1, 2007, pp. 91–114.

48 See Human Rights Watch, *Turning a Blind Eye: Impunity for Laws-of-War Violations during the Gaza War*, 2010, p. 47 (in relation to Hamas); Human Rights Watch, *All Quiet on the Northern Front? Uninvestigated Laws of War Violations in Yemen's War with Huthi Rebels*, 2010, p. 6 (in relation to Huthis rebels); Amnesty International, *Israel/Lebanon: Out of All Proportion: Civilians Bear the Brunt of the War*, 2006, p. 68 (in relation to Hezbollah).

legal basis for such obligations. A related challenge is that there are few adequate forums to pursue these claims:

Even when rules apply to non-state actors... in most cases no international forum exists in which the individual victim, the injured state, an international intergovernmental or non-governmental organization, or a third State could invoke the responsibility of a non-State actor and obtain relief.⁴⁹

Another problem is the general reluctance of states to recognize armed groups as addressees of international norms – since this could confer a measure of legitimacy on them.⁵⁰ Such reluctance may be even more pronounced when it comes to providing reparations, especially symbolic reparations, which could be seen as a measure reserved for states. A third problem, mentioned above, is that it may seem unfeasible to demand reparations from armed groups: for example, the International Center for Transitional Justice argued that ‘it is usually not feasible to hold armed groups, whether pro or anti-government, directly accountable for reparations’;⁵¹ and Rose argued that ‘victims of atrocities committed by rebel groups are typically unable to obtain reparations directly from their perpetrators’, one of the reasons being that ‘members of rebel groups are generally not capable of providing their victims with reparations for the harm they have caused’.⁵² Finally, there appears to be a perception that symbolic reparation is simply not relevant to armed groups. For example, Kleffner asserts that ‘satisfaction’ as a form of reparation would not be transposed to armed groups;⁵³ Guembe and Olea reject the notion that ‘non-economic reparations’ could be a responsibility of an armed group, and argue that ‘[i]t is difficult to imagine that victims’ dignity depends on perpetrators’ actions’.⁵⁴

Of these, it is likely that the last two have been the most important factors in hampering an exploration of the issue of symbolic reparations from armed groups: such reparations appear both unfeasible and unnecessary. However, as is argued below, there are contexts in which such measures would both be feasible and would serve an important function for their victims. Indeed, it is demonstrated below that precedents of armed groups providing measures analogous to symbolic reparations already exist, but they have remained ‘below the radar’ of the relevant literature and regrettably have not been recognized as such. A careful analysis of these cases will reveal the potential of symbolic reparations from armed groups and will hopefully lead to more sustained engagement with this issue by both scholars and practitioners.

49 M. Sassòli, above note 3, p. 7.

50 ‘States do not wish to attribute government-like qualities to these groups. Conferring international legal personality on armed groups would involve recognizing the existence of another authority within the state’, L. Zegveld, above note 4, pp. 162–163.

51 ICTJ, *Providing Meaningful Reparations to Victims*, Briefing, December 2009, available at: http://www.iccnw.org/documents/ICTJ_SDN_briefing_AUPD-Reparatns.pdf (last visited 20 January 2012).

52 C. Rose, above note 45, pp. 309–310.

53 J. Kleffner, above note 32, p. 265.

54 Maria José Guembe and Helena Olea, ‘No justice, no peace: discussion of a legal framework regarding the demobilization of non-state armed groups in Colombia’, in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice*, Cambridge University Press, Cambridge, 2006, p. 136.

Armed groups' attacks against their 'own side': the potential for truth and reparations

Having identified the general gap in relation to armed groups, the next step should be beginning to identify suitable thematic 'entry points' that could allow exploration of the potential for armed groups to provide symbolic reparations. As explained below, I argue that attacks against alleged informers is an issue that could be particularly fitting for such measures. Although attention by governments and the media normally tends to focus on armed groups' attacks against government forces and the civilian population associated with the government side, punishment of alleged informers from within the organization's own ranks, or from the community it seeks to represent,⁵⁵ are common to virtually all armed groups. Armed groups, such as FARC (Revolutionary Armed Forces of Colombia),⁵⁶ the Taliban,⁵⁷ GAM (the Free Aceh Movement),⁵⁸ Palestinian armed groups,⁵⁹ the PKK (Kurdistan Workers' Party),⁶⁰ and ETA,⁶¹ as well as Hezbollah, the LTTE (*Liberation Tigers of Tamil Eelam*) and the Shining Path (*Sendero Luminoso*),⁶² have all killed informers or suspected informers. In a typology of political violence, such attacks are considered as 'horizontal violence', directed at an armed group's own ostensible constituency, as opposed to the more common 'vertical violence' directed at government targets.⁶³ Almost invariably, such attacks by armed groups also involve killings and other abuses against individuals who were not in fact informers, either because of intelligence or operational mistakes, or because of malicious false denunciations.⁶⁴ Depending on the context, such attacks can be considered as human rights abuses or violations of IHL, and they will virtually always constitute crimes under domestic law.

I argue that the potential for measures of dealing with the past – self-critique and reaching out to victims during transitions out of conflict – by armed groups could be relatively significant in relation to such attacks on

55 Anti-state armed groups that seek independence, autonomy, the end of perceived foreign or hostile domination, or a radical transformation of the political order, tend to operate within a broader community, usually with similar national, ethnic, religious, cultural, or linguistic attributes, in which there is usually wide passive support for the goals (if not always the means) of the group, from which active members are recruited, and which the group can claim as a constituency.

56 Eric Fichtl, 'The ambiguous nature of collaboration in Colombia', in *Colombia Journal*, 29 March 2004.

57 Amnesty International, *As if Hell Fell on Me: The Human Rights Crisis in Northwest Pakistan*, 2010, pp. 45–46.

58 Human Rights Watch, *Indonesia: The War in Aceh*, 2001, p. 23.

59 Hillel Cohen and Ron Dudai, 'Human rights dilemmas in using informers to combat terrorism', in *Terrorism and Political Violence*, Vol. 17, No. 1, 2005, pp. 229–243.

60 Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence*, New York University Press, New York, 2007, p. 135.

61 Joseba Zulaika, *Basque Violence: Metaphor and Sacrament*, University of Nevada Press, Reno, NV, 1988, p. 85.

62 Brendan O'Leary and Andrew Silke, 'Understanding and ending persistent conflicts', in Marianne Heiberg, Brendan O'Leary, and John Tirman (eds), *Terror, Insurgency, and the State: Ending Protracted Conflicts*, University of Pennsylvania Press, Philadelphia, PA, 2007, p. 398.

63 Don Foster, Paul Haupt, and Marésa de Beer, *The Theatre of Violence: Narratives of Protagonists in the South African Conflict*, Human Sciences Research Council Press, Cape Town, 2005, pp. 60–62.

64 Stathis Kalyvas, *The Logic of Violence in Civil Wars*, Cambridge University Press, Cambridge, 2006, p. 342.

individuals from the groups' 'own side'. One main reason is that this is an issue where an armed group could face pressure from its own constituency to account for its conduct, rather than from the state's or 'enemy' side, or from outsiders from the international community. Informers and others who are considered 'traitors' are often hate figures in their communities and members of the community would often not disapprove of abuses of informers.⁶⁵ But community members would be critical if the status of informers was applied unfairly to some individuals, and may demand a higher level of 'procedural' legitimacy when dealing with suspected informers than when dealing with other targets. As, almost by definition, the suspected traitors come from the heart of the organization and the community, if they or their relatives demand truth and accountability, such a campaign comes from within the armed group's areas of support and could be more difficult to ignore. 'Internal' critique of armed group actions toward members of the community can also be seen as more legitimate and safer than criticizing the armed group for methods of attack against the perceived enemy.⁶⁶ This could make it harder for the armed group to resist pressure to confront such abuses, in comparison to pressure coming from the 'enemy' side or from outsiders. As the status of being labelled as informer typically leads to ostracism and harassment of the individuals and often also of their families, they may be keen to use a general atmosphere of transition out of violence to attempt to clear their or their relatives' names.

A second facilitating factor is that armed groups' attacks on suspected informers tend to be more regulated than attacks on the government side, and sometimes involve a quasi-judicial process by the armed group. While armed groups usually attack government personnel or supporters based on their general affiliation (according to the group's definition of 'legitimate target'), in the case of punishing their own members or supporters armed groups will often engage in some process of determining individual 'guilt'. Thus, for example, the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) in El Salvador,⁶⁷ the South African ANC in its camps in exile,⁶⁸ the Unified Communist Party of Nepal (CPN-M),⁶⁹ the National Democratic Front of the Philippines (NDFP),⁷⁰ and Maoist

65 Ron Dudai and Hillel Cohen, 'Triangle of betrayal: collaborators and transitional justice in the Israeli-Palestinian Conflict', in *Journal of Human Rights*, Vol. 6, No. 1, pp. 37–58.

66 For example, Palestinian civil society organizations have normally been reluctant to criticize publicly abuses of Palestinian armed groups against Israeli civilians (most notably suicide bombings), but have done so in relation to armed groups' killings of suspected Palestinian informers. See e.g. Palestinian Human Rights Monitoring Group, *The 'Intra'fada: The Chaos of the Weapons*, 2004; Palestinian Centre for Human Rights, '2 Palestinians killed by Palestinian armed groups in the West Bank: extra-judicial assassination of citizens for suspected treason', Field Update, 21 March 2006, available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=3094:2-palestinians-killed-by-palestinian-armed-groups-in-the-west-bank-&catid=61:field-update-security-chaos-&Itemid=211 (last visited 20 January 2012).

67 Americas Watch, *Violations of Fair Trial Guarantees by the FMLN*, 1990.

68 Stephen Ellis, 'Mbokodo: security in ANC camps, 1961–1990', in *African Affairs*, Vol. 93, 1994, pp. 279–298.

69 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. 681–682.

70 See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Mission to the Philippines, UN Doc. A/HRC/8/3/Add.2, 16 April 2008, paras. 31–33, available

groups in India⁷¹ all punished their own members or members of their community suspected as being informers using a relatively formalized ‘court’ system. This factor is important for several reasons. First, it could allow the group to admit ‘procedural’ mistakes, without necessarily disavowing their entire ideology and practice. Second, the process of deliberations over individual guilt of a group’s member could leave some form of material evidence (by way of records of confessions, court procedure, and so on), which could be used in a truth-recovery process. These features could contribute to making abuses of alleged informers a suitable topic for an armed group to begin confronting its past conduct.

The precedent of the African National Congress inquiries

Indeed, I argue that it is not a coincidence that perhaps the most notable example thus far of an armed group confronting its past abuses was in relation to attacks on suspected informers. I refer to public inquiries established by the South African ANC in the early 1990s to examine allegations of abuses against suspected informers in its ranks. In Hayner’s oft-cited survey of truth commissions, these inquiries are noted as the only example of a truth commission established by a non-state armed group.⁷² It is important to note that these inquiries took place when the ANC was still an opposition group, and was not yet elected to power.

Although rumours and allegations of abuses against suspected informers in the ANC camps in exile had been circulating for a long time, it was only after the ban on the ANC was lifted in 1990 that the accusations were made public. Pressure came from individual ANC members who were detained and tortured by the ANC, and from the relatives of ANC members who did not return from exile and whose fate remained unknown. Some of the ANC members formed a Returned Exiles Committee to take the ANC to task. In 1992 Nelson Mandela established a ‘Commission for Enquiry into Complaints by Former African National Congress Prisoners and Detainees’, known as the Skweyiya Commission, and a follow-up commission, the Motsuenyane Commission, was established the following year. The Motsuenyane Commission was directed by three commissioners, two of them from outside South Africa; it held public hearings and its proceedings were close to formal court hearings. Both commissions found evidence for abuses by ANC cadres against suspected informers in its ranks. Nelson Mandela accepted collective responsibility on the part of the leadership of the ANC, and issued an apology.⁷³ These steps can be seen as akin to symbolic reparations. The ANC experience in confronting its past

at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/130/01/PDF/G0813001.pdf?OpenElement> (last visited 20 January 2012).

71 Human Rights Watch, *‘Being Neutral is Our Biggest Crime’: Government, Vigilante, and Naxalite Abuses in India’s Chhattisgarh State*, 2008, p. 11.

72 Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, New York, 2002, p. 60.

73 See Kenneth Christie, *The South African Truth Commission*, Palgrave, New York, 2000, pp. 79–80; Priscilla Hayner, ‘Fifteen truth commissions 1974 to 1994: a comparative study’, in *Human Rights Quarterly*, Vol. 16, 1994, pp. 632–633.

abuses was certainly not fully successful.⁷⁴ However, it does serve as an important precedent, demonstrating that in the right conditions an armed group is capable of engaging in such endeavours. The ANC inquiries brought at least some measure of redress to victims, and exposed the ANC to public embarrassment and shaming.

Several factors made this undertaking by the ANC feasible. First, the pressure to account, emanating from the heart of the movement, made it difficult for the ANC to avoid the topic. The abuses against alleged informers in the ANC camps were not necessarily the most severe or widespread abuses that the ANC had been involved in, but – as was explained above – the fact that the targets were from the very centre of the organization and the community meant that the ANC was more likely to engage with them. Second, the organizational nature of the ANC was an important factor. The ANC's internal cohesion and disciplined organizational culture,⁷⁵ and the authority and respect that the leadership (especially Mandela) enjoyed among the organization's members, meant that the leadership could successfully hold these inquiries. Its capacity to do so was also helped by the nature of the abuses, which involved court-martials and hearings, and which left evidentiary tracks that assisted the work of the commissions.

Over time, however, the prominence of the subsequent South African Truth and Reconciliation Commission may have ended up almost completely overshadowing the ANC's earlier inquiries, which tend to be omitted from general narratives of the development of transitional justice. Rather than becoming a model for innovative mechanisms to hold armed groups to account and provide some measure of redress to their victims, the ANC inquiries have by and large been ignored or even actively excluded by scholars of truth commissions and symbolic reparations. In an important study of truth commissions, Freeman has criticized the notion that the ANC inquiries should be seen as a truth commission. Rather than gauging the potential of such undertakings to contribute to symbolic reparations for victims, his only reference to the ANC effort was to point out that, since it was not set up and authorized by a state, it cannot be considered as a truth commission.⁷⁶ The recent second edition of Hayner's survey of truth commission has omitted the earlier edition's reference to the ANC commissions.⁷⁷ Nevertheless, the ANC's exercise remains a powerful demonstration of the potential of non-state armed groups voluntarily to adopt collective measures of confronting their own past abuses.

74 For a critical view on these commissions, arguing that they did not result in concrete alleviation of the victims' suffering, see Todd Cleveland, "'We still want the truth': the ANC's Angolan detention camps and post-apartheid memory', in *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 25, No. 1, 2005, pp. 63–78.

75 Stephen Ellis and Tsepo Sechaba, *Comrades against Apartheid: The ANC and the South African Communist Party in Exile*, James Currey, London, 1992.

76 Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press, Cambridge, 2006, p. 18.

77 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edition, Routledge, New York, 2010.

Symbolic reparations from armed groups in practice: the IRA case

The remainder of this article takes the discussion forward by focusing on one concrete example of an armed group providing at least some measures of truth-recovery and symbolic reparation in the aftermath of a conflict: the IRA in Northern Ireland after the 1998 Belfast Agreement. As will be shown below, over this period the IRA has engaged in a series of acts that closely resemble actions that states are required to take as part of their obligations to provide redress to victims of abuses. This has been especially marked in relation to IRA abuses against suspected informers: the IRA leadership has disclosed truth about disappearances of alleged informers, admitted false accusations against suspected informers, and offered acknowledgment and apologies. As will be detailed below, these acts clearly correspond to measures of symbolic reparations as provided in the Basic Principles.

It is a curious fact that these measures by the IRA have generally not yet been explored in the transitional justice literature and the literature on engaging with armed groups. This is a glaring omission, especially given that the conflict in Northern Ireland – and the IRA's role in it – has been one of the most extensively studied cases of political violence in modern times. This omission may be symptomatic of a tendency in the literature to focus on legal and conceptual debates, often at the expense of attention to developments on the ground.

It is crucial to note the importance of the group's organizational structure for the feasibility of pursuing such measures of dealing with the past. The IRA, though it never maintained long-term control over territory (as armed groups such as FARC or LTTE did), has been a relatively organized, centralized, and disciplined armed group.⁷⁸ As with the example of the ANC, such organizational features are vital for the feasibility of efforts to uncover details about past actions and offer authoritative acknowledgment and apology.

In the remainder of this section, I will begin by identifying and analysing two areas in which the IRA addressed aspects of its past treatment of alleged informers.⁷⁹ The first of these is in relation to 'disappearances' of alleged informers, where the organization passed on details of the location of their bodies and apologized for the suffering caused to their families owing to the withholding of information. The second is in relation to the killing of wrongly accused informers, where the organization 'exonerated' individuals formerly labelled as informers. Subsequently, I will briefly show that the IRA also engaged in symbolic reparations beyond the issue of informers. Finally, I will explore the implication of the IRA's reliance on its own code of conduct – rather than international norms – in addressing its past actions.

78 See Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland*, Clarendon, Oxford, 2001, p. 11.

79 On the issue of IRA informers and the treatment of real and alleged informers more generally, see Ron Dudai, 'Informers and the transition in Northern Ireland', in *British Journal of Criminology*, Vol. 52, No. 1, 2012, pp. 32–54.

The IRA and ‘the disappeared’: verification of the facts and public disclosure of the truth

The issue of disappearances has been central to the development of the notion of symbolic reparations and more specifically the concept of a right to truth.⁸⁰ Although never reaching anything remotely resembling the scale of the abuse in Latin America, the Northern Ireland conflict also featured the phenomenon of disappearances: in the 1970s and 1980s, the IRA abducted, killed, and secretly buried several alleged informers, as well as a few of its members suspected of stealing weapons or of other violations of discipline.⁸¹ They have come to be known as ‘the disappeared’ in local parlance. The suffering of the families of the disappeared reached public prominence only after the peace process had begun: ‘most of the families suffered in silence over the years, speaking out only after the IRA’s 1994 ceasefire’.⁸² This is similar to the way in which accusations regarding the ANC’s treatment of alleged informers in exile have surfaced and reached public prominence only after the South African peace process has begun. The most compelling pressure levelled at the IRA came from the families themselves.⁸³ At least some of the families came from within republican communities, as most of the disappeared were IRA members and many of their family members and friends remain aligned with the republican movement. This type of pressure, from within its own constituency, was difficult for the IRA to defy, or to portray as mere state-led propaganda. It perhaps also legitimized and eased the process from the IRA’s perspective, since it could maintain that it is bowing to internal pressure rather than to demands from the British state.

In 1998 the IRA announced that it had set up a special investigating unit, headed by a person the IRA defined as one of its most senior officers, in order to investigate the disappearances and attempt to locate the whereabouts of the bodies of those killed and secretly buried.⁸⁴ Subsequently, the IRA formally admitted for the first time that it was responsible for the killing and disappearances of several individuals. In addition to the acknowledgment the IRA also issued an apology. It called the disappearances an ‘injustice for which we accept full responsibility’ and added ‘we are sorry that this has taken so long to resolve and for prolonged anguish caused to the families’.⁸⁵ Shortly after, information received from the IRA led to the discovery of the bodies of several of the

80 United Nations Human Rights Council, above note 22, para. 8.

81 See e.g. Ed Moloney, *Voices from The Grave: Two Men’s War in Ireland*, Public Affairs, New York, 2010, pp. 111–132.

82 David McKittrick, ‘The bloodstained soil of Ireland yields first of the “disappeared”’, in *The Independent*, 29 May 1999.

83 See e.g. Kim Sengupta, ‘Families appeal to IRA over graves’, in *The Independent*, 8 September 1998.

84 See ‘Help us find bodies – IRA’, in *BBC News*, 8 December 1998, available at: http://news.bbc.co.uk/1/hi/events/northern_ireland/latest_news/230227.stm (last visited 20 January 2012); ‘IRA continues search for missing bodies’, in *An Phoblacht*, 10 December 1998, available at: <http://www.anphoblacht.com/news/detail/31650> (last visited 20 January 2012).

85 ‘IRA investigation locates grave sites’, in *An Phoblacht*, 1 April 1999, available at: <http://www.anphoblacht.com/news/detail/32141> (last visited 20 January 2012). The IRA later admitted responsibility for the disappearances of two other people.

disappeared,⁸⁶ and others have been discovered in the succeeding years.⁸⁷ In 2003, following the discovery of one body, the IRA issued a statement reiterating its apology:

... we would like to take this opportunity to state our position in relation to those killed and buried by the IRA. We are sorry that the suffering of those families has continued for so long. We wish to apologise for the grief caused.⁸⁸

Republican sources reported continuing efforts to locate the whereabouts of the remaining missing bodies;⁸⁹ at the time of writing, the latest recovery of a body took place in November 2010.⁹⁰

The IRA's engagement with the issue of the disappeared demonstrates the capacity of armed groups to provide at least some measures of symbolic reparations. Throughout, this has been a collective measure, taken by, and on behalf of, the organization as such. Many of the IRA's actions closely resemble the type of symbolic reparations that would have been required from states under similar circumstances. Some of the relevant specific obligations as formulated in the Basic Principles require states responsible for human rights violations to provide: '[v]erification of the facts and full and public disclosure of the truth ...';⁹¹ '[t]he search for the whereabouts of the disappeared ...';⁹² and '[p]ublic apology, including acknowledgement of the facts and acceptance of responsibility ...'.⁹³ The actions of the IRA in relation to the disappeared correspond to these obligations: the IRA has acknowledged the commission of wrongful acts; taken responsibility for them; recognized the consequences of these acts for victims; expressed regret; offered a formal apology; and provided factual disclosure of the truth, including the location of missing bodies. It has thus acted according to some of the international norms

86 D. McKittrick, above note 82.

87 The actual recovery was carried out by a special body, the Independent Commission for the Location of Victims Remains (ICLVR), which was established by the British and Irish governments to co-ordinate the search for the disappeared. According to the legislation setting up the ICLVR, information passed in relation to locations of disappeared will be inadmissible in courts and forensic examination of the bodies will be limited to identifying the individuals and will not be used in police investigation. This was set up in two parallel legalizations, in the UK and in the Republic of Ireland: the Northern Ireland (Location of Victims' Remains Act) 1999 (in the UK) and the Criminal Justice (Location of Victims' Remains Act) 1999 (in the Irish Republic).

88 See Sinn Féin statement, available at: <http://www.sinnfein.ie/contents/15239> (last visited 8 August 2010).

89 'Republican efforts continue to retrieve missing bodies', in *An Phoblacht*, 13 July 2006, available at: <http://www.anphoblacht.com/news/detail/15069> (last visited 20 January 2012); 'IRA "was wrong" over bodies issue', in *BBC News*, 11 July 2006, available at: http://news.bbc.co.uk/1/hi/northern_ireland/5170594.stm (last visited 20 January 2012).

90 See updated details on the ICLVR website, available at: <http://www.iclvr.ie/en/ICLVR/Pages/TheDisappeared> (last visited 1 September 2010). Many of the bodies were secretly buried in beaches, and the shifting and difficult terrain meant that the location of bodies has been difficult even when information was passed from the IRA. A former senior police officer who directs the ICLVR's investigative forensic work has confirmed that the information received has been mostly accurate and of high quality: see 'Interview with Geoff Knupfer', in *BBC News*, available at: http://news.bbc.co.uk/1/hi/northern_ireland/8020817.stm (last visited 1 September 2010).

91 Basic Principles, Art. 22(b).

92 *Ibid.*, Art. 22(c).

93 *Ibid.*, Art. 22(e).

that usually apply to states, and showed that armed groups could and should, at least in some circumstances, be held to account using broadly the same standards as states.

To be sure, the IRA did not comply with all the relevant obligations. It did not offer monetary compensation to victims, and it did not identify individual perpetrators for prosecutions – indeed, as explained above, the passing of truth in relation to location of the disappeared was premised on *de facto* immunity from prosecutions. However, as shown above, the IRA did provide symbolic reparations, including truth. In that sense it presents one concrete example of an armed group providing state-like measures of symbolic reparations.

It is important to note also that this process, in which the IRA has been confronting some of its past abuses, seems to have been an important component in the process of conflict-transformation and confidence-building in the immediate aftermath of the 1998 Belfast Agreement. It has provided an implicit confirmation of the IRA's shift from political violence to peaceful engagement. As McEvoy and Conway wrote: 'The spectacle of diggers removing hundreds of tons of earth from remote parts of Ireland, surrounded by media and anxious families, was a powerful symbol of the attempts at a transition from a violent past.'⁹⁴

The IRA and wrongly accused informers: restoring the reputation of victims?

One of the specific forms of symbolic reparations included in the Basic Principles is 'an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim'.⁹⁵ This is an emblematic example of symbolic reparations: a non-monetary act, designed to respond to the needs of victims in particular circumstances. Several reparations programmes established by states included specific measures 'to rehabilitate not just the health of victims but what may be called their "civic status"'. These include measures to restore the good name of victims by making public declarations of their innocence, expunging criminal records...'.⁹⁶ This form of symbolic reparation applies, for example, to individuals who were wrongly accused or convicted by past regimes, where the material and symbolic status of being convicted carries a difficult burden for them or their families.⁹⁷ One of the aims of such measures is to lead to

94 Kieran McEvoy and Heather Conway, 'The dead, the law and the politics of the past', in *Journal of Law and Society*, Vol. 31, No. 4, 2004, p. 560.

95 Basic Principles, Art. 22(d).

96 OHCHR, above note 24, p. 25.

97 An example of this type of reparation is the case of *Juan Manuel Contreras San Martín et al. v. Chile*, in the Inter-American Court of Human Rights, where, as a form of reparation for individuals wrongly convicted of crimes, the government has agreed in a friendly settlement: '[t]o publicly provide reparation to the victims before their community by means by an act of the Regional Government duly disseminated by the mass media, designed to restore their reputation and honor that had been certainly damaged by the judicial decisions that once harmed them'. Inter-American Court of Human Rights, *Juan Manuel Contreras San Martín et al. v. Chile*, Case 11.715, Report No. 32/02, 12 March 2002, para. 14.

reintegration of victims (including families of those who were killed or executed) in society.⁹⁸

At first glance this form of symbolic reparation may seem completely inapplicable to non-state armed groups. The notion that armed groups can be involved in rehabilitation, can bestow a good name on anyone or restore their civic status, may seem out of place. And yet, the IRA has been engaging in a process that can be seen to provide exactly such measure of reparation. The IRA has conducted several investigations aimed at responding to claims that individuals that it killed in the past as alleged informers were not in fact informers and were wrongly accused.⁹⁹ In these cases the IRA responded to pressure from relatives and friends of those killed, who sought precisely this form of symbolic reparation: restoring the good names and dignity of their loved ones.

As in many societies that experience political conflict, in Northern Ireland informers were and remain hate figures.¹⁰⁰ The term ‘informer’ is the deepest insult in republican vocabulary.¹⁰¹ Being considered as an informer carries a very heavy stigma and social ostracism, which also affects their family members. For example, a relative of an IRA member killed by the organization as an alleged informer said that: ‘It’s one of the most hated things in the world that your father was an informer or your grandfather was an informer’.¹⁰² The problem is particularly intense because republican communities tend to be small and close-knit, and is especially painful for families who maintain links to the republican movement.¹⁰³ With this background, it is easy to appreciate that an opportunity to clear the names of relatives accused of informing, restoring their good name and their ‘community status’ if not ‘civic status’, would in fact be of paramount importance to victims. For example, a woman whose brother was killed as an informer by the IRA has recently campaigned to get the IRA to ‘tell me the truth, to clear my brother’s name and to give us an apology’, in order to help the family.¹⁰⁴ As an ex-IRA member explained to the author in an interview: ‘[t]here’s no greater insult that you can call a person than to call him an informer. So families do want the names of their loved-ones cleared and have them exonerated, if possible.’¹⁰⁵

98 F. Mégret, above note 23.

99 There is some overlap with the issue of the disappeared, but most individuals killed by the IRA as alleged informers were not disappeared. On the killings of informers by the IRA, see e.g. Ed Moloney, *A Secret History of the IRA*, 2nd edition, Penguin, London, 2007.

100 Kevin Toolis, *Rebel Hearts: Journeys within the IRA’s Soul*, Picador, London, 1995, p. 194; R. Dudai, above note 79.

101 Susan McKay, *Bear in Mind These Dead*, Faber and Faber, London, 2009, p. 235.

102 Ardoyne Commemoration Project, *Ardoyne: The Untold Truth*, Beyond the Pale Publications, Belfast, 2002, p. 367.

103 In an interview with the author, an ex-combatant and community activist said that: ‘When somebody was outed as an informer, the families felt themselves distanced from the republican community, because it was the republican community that killed their loved ones – but they were supposed to be part of it. They partly withdrew, because of the shame. The civilian population, especially young adults, didn’t help because they inflicted a lot of cruelty on them’. Interview in Belfast, April 2009.

104 S. McKay, above note 101, p. 235.

105 Interview with ex-combatant, Belfast, August 2010.

A process of re-examining the veracity of accusation of informing against some of those killed as informers has begun after the IRA initiated its inquiry in relation to the locations of the disappeared. In this case, the pressure for the process came almost exclusively from families and individuals from within the republican movement. As with the ANC inquiries and the IRA inquiries in relation to the disappeared, it could only become possible once the transition out of conflict had begun. In particular, it involved pressure not just from families but even from former combatants who felt uneasy about their comrades who were killed and were willing to push for investigations.¹⁰⁶

Part of the momentum for this process came following reliable claims that a senior member of the IRA's internal security unit, a unit whose task was to unearth informers in the organization's ranks, was himself an informer.¹⁰⁷ This revelation has led many to suspect the credibility of accusations made by this unit over the years. As a result, the IRA 'has been coming under intense pressure in Catholic areas from families of IRA men killed for informing'.¹⁰⁸ However, it is important to note that the process of these IRA inquiries had begun before these revelations, and while they are certainly one of the key factors facilitating it, they did not provide the exclusive factor behind the IRA inquiries.

As a result of this process of investigations, which were conducted by a panel relying on interviewing members and uncovering any remaining material evidence, the IRA has made several public declarations 'exonerating' individuals who were long accused of being informers, expunging their guilt in the eyes of the community. Such statements are usually issued in republican publications¹⁰⁹ and later reported by the wider media. For example, in one case, the IRA stated that its investigation found no evidence to support the claims made at the time that a member 'was responsible for passing information concerning the location of arms dumps and the movement of Volunteers'.¹¹⁰ The IRA also apologized to the family of another member wrongly accused.¹¹¹ In another example, the IRA issued an apology following an 'in-depth inquiry' into the circumstances surrounding the killing of a member, stating among other points that while '[a]t the time allegations were made that he was an informer', those allegations have not been accurate.¹¹²

106 Interview with ex-combatant, Belfast, August 2010. In the interview, he explained further the dynamics behind such pressure from republicans: 'There's a tendency in a conflict situation that your first priority is to protect the army, and everything else is secondary. That happened and the leadership wasn't questioned. Like any other army the IRA wasn't a democratic organization. It's only when you're coming out of conflict that the possibility opens up to look at previous actions.'

107 Rosie Cowan, 'He did the IRA's dirty work for 25 years – and was paid £80,000 a year by the government', in *The Guardian*, 12 May 2003.

108 Jim Cusack, 'Terror chiefs say "Sorry" to families of slain informers', in *The Independent*, 5 October 2003.

109 Normally by way of a statement from the IRA published in the republican weekly *An Phoblacht*, usually signed by the codename P. O'Neill, the traditional code attesting to the authenticity of statements from the IRA.

110 'IRA Statement', in *An Phoblacht*, 25 September 2003, available at: <http://www.anphoblacht.com/news/detail/1407> (last visited 20 January 2012).

111 J. Cusack, above note 108.

112 'IRA apology', in *An Phoblacht*, 5 April 2007, available at: <http://www.anphoblacht.com/news/detail/18563> (last visited 20 January 2012).

In 2009 the IRA issued a statement acknowledging that a person killed as an alleged informer was not in fact an informer and that '[h]opefully the stigma which surrounded Bernard's death will now be removed and this will help the Teggart family who have suffered grievously as the result of the conflict'.¹¹³ Other similar cases, where relatives and friends of people killed as informers demand inquiries and apologies from the IRA leadership, continue to emerge.¹¹⁴

The process of making public declarations acknowledging that past accusations were wrong, and the associated removal of painful stigma, can fairly easily be seen as a form of symbolic reparation akin to what human rights advocates demand from states in analogous circumstances. It corresponds to the modality of reparation, mentioned above, of 'an official declaration . . . restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim'.¹¹⁵ The important point to make here is that those seeking the 'restoration of dignity' were looking for the armed group – not the state – to make these declarations. Their demand for redress was targeted at the armed group. While the legal and conceptual implications of treating armed groups such as the IRA as able to provide symbolic reparations may be uncharted territory currently, the potential to contribute to improvement in victims' lives should perhaps be the decisive factor.¹¹⁶

Indeed, at least according to several public statements by families, it seems that the IRA inquiries led to positive results in terms of the families' wellbeing, and even rehabilitation. Although it is impossible to rule out the possibility that these statements were compelled by the circumstances in which these families live, the sentiments, and especially the sense of relief, appear genuine. For example, a brother of one IRA member who was exonerated from being an informer confirmed that, as far as the family are concerned, his good name has been restored, and added: 'We are on a journey seeking dignified closure. We believe the army [IRA] investigation has played a role in helping us reach the end of that long journey'.¹¹⁷ The family of another exonerated member said that they 'welcome this latest [IRA] statement clearing our son and brother . . . of being an informer' and 'express our sincere gratitude to the Republican Movement and the present day leadership'.¹¹⁸ Such responses from victims are perhaps the most powerful impetus to explore further mechanisms through which armed groups could provide this type of redress.

113 '15-year-old Bernard Teggart was not an informer', in *An Phoblacht*, 6 August 2009, available at: <http://www.anphoblacht.com/news/detail/38660> (last visited 20 January 2012).

114 See e.g. 'Killed for being an informer, but it was just a lie', in *Belfast Telegraph*, 25 September 2010.

115 Basic Principles, Art. 22(d).

116 In addition, another consideration could be that campaigning for armed groups to provide symbolic reparations could also be a method of publicly 'shaming' groups that commit abuses.

117 'Volunteer cleared in IRA probe: Lenadon man was not paid informer, family is told after in-depth inquiry', in *Irelandclick.com*, 25 September 2003, available at: http://www.nuzhound.com/articles/Irelandclick/arts2003/sep25_IRA_volunteer_cleared.php (last visited 8 August 2010).

118 'Statement from the Braniff family in Belfast', in *An Phoblacht*, 25 September 2003, available at: <http://www.anphoblacht.com/news/detail/1407> (last visited 20 January 2012). See also e.g. Suzanne McGonagle, 'Murdered teen's family welcome admission he was not an informer', in *Irish News*, 7 August 2009.

Beyond informers: symbolic reparations in relation to other victims

This article is focused on the issue of attacks on alleged informers as a topic with a relatively high potential to generate symbolic reparations from armed groups. However, it is important to note this is not the only issue that could have such a potential. Indeed, the IRA's activities in relation to its past actions have also moved beyond this issue. In 2002 the organization issued a broad apology for 'all of the deaths and injuries of non-combatants' caused by the organization.¹¹⁹ Later, in several cases the organization took responsibility for specific accidental killings it had hitherto denied involvement in, provided details in relation to its actions, and offered acknowledgment and apologies.

For example, in 2005, following a request from a family to examine the circumstances surrounding the killing three decades earlier of a 14-year-old girl, the IRA took responsibility for the killing – a killing that the organization had hitherto denied its involvement in – and 'apologized unreservedly' to her family.¹²⁰ In 2006 the IRA issued a statement about an incident in which one person was killed, following a request from a family 'to investigate the circumstances surrounding' the death of their loved one. At the time of the killing the IRA did not acknowledge involvement in the incident. In its statement, the IRA revealed that the man was killed when an explosive device, intended for a British army patrol, was detonated prematurely, and confirmed that he was not an IRA member and was not involved in the operation. The statement added that 'the IRA leadership offers its sincere apologies to the . . . family for the death of Eugene and for the heartache and trauma that our actions have caused'.¹²¹ In 2007 the IRA admitted that a 17-month-old girl was killed in Belfast in the 1970s after she was struck by a ricochet when the IRA fired shots at a British army patrol. In this case also, the IRA initially denied involvement, and in its statement the IRA leadership offered apology to the family 'for the pain and heartache that they have suffered as a result of our action'.¹²² These are just few examples of a broader process, and they show that the actions in relation to alleged informers can also be transposed to other cases. They demonstrate again that there are cases in which it will be feasible for an armed group to provide at least some measure of symbolic reparation.

119 IRA statement from 16 July 2002. The full text is available at: <http://cain.ulst.ac.uk/events/peace/docs/ira160702.htm> (last visited 8 August 2010).

120 The girl was killed by a stray bullet from an IRA unit shooting at a British army patrol. The IRA at the time claimed that she was killed by British Army bullets and even later claimed that it had killed a soldier in retaliation. See Eamonn MacDermott, 'IRA apologise for death of Derry schoolgirl', in *Derry Journal*, 24 June 2005. The full text of the IRA 2005 statement is available at: <http://cain.ulst.ac.uk/othelem/organ/ira/ira230605.htm> (last visited 8 August 2011).

121 'IRA apology', in *An Phoblacht*, 13 April 2006, available at: <http://www.anphoblacht.com/news/detail/13838> (last visited 20 January 2012).

122 'IRA offers apology', in *An Phoblacht*, 6 September 2007, available at: <http://www.anphoblacht.com/news/detail/20561> (last visited 20 January 2012).

Symbolic reparations and the reliance on armed groups' 'codes of conduct'

The literature on engagement with armed groups identifies the adoption of 'codes of conducts' by armed groups as one of the effective ways of encouraging compliance with international legal norms by these groups.¹²³ While the literature on engagement gives a prominent place to the adoption of codes of conduct during a conflict, only scant attention has been given to their possible use as normative framework during a process of dealing with the past.

In this context, it is interesting to note that the ANC's commissions of inquiry, referred to above, used its code of conduct as the normative point of reference and characterized its relevant conduct as violations of the code (the ANC also made references to human rights norms, though these references generally remained abstract and did not refer to specific treaties or instruments).¹²⁴ In its inquiries and statements the IRA has also often referred to its own code of conduct and procedures – the 'Green Book' – as the normative point of reference.¹²⁵ For example, in one case the IRA apologized because a killing was not authorized by the organization's leadership, in violation of the IRA's internal regulations.¹²⁶ In another case, the IRA stated that when one of its members was court-martialled and sentenced to death no appeal was lodged – in violation of its code of conduct, and thus 'the IRA accepts that proper procedure was not adhered to in relation to the process of appeal'.¹²⁷ A senior ex-combatant who discussed these issues with the author said that the inquiries examine, among other things, 'what the IRA should have done in accordance with its own policies'.¹²⁸

The reference to its own code probably allowed the IRA leadership to offer apologies more readily, as it is premised on treating the organization itself as a legitimate entity, and retaining the authority and status of its own procedures. While violation of state law is part of an armed group's *raison d'être*, and international norms – norms created by states – are also often dismissed by armed groups, it is much more difficult for an organization to justify violations of its own rules.

But a reliance on internal procedures rather than human rights norms naturally also has negative effects. In all the cases described here, the IRA has apologized only for what it has essentially deemed to be 'excesses': for the secret burial of individuals (but not for their killing), and for the accidental killings of passers-by or people wrongly accused as informers (but not for the organization's

123 See e.g. A.-M. La Rosa and C. Wuerzner, above note 4, p. 333.

124 See e.g. African National Congress National Executive Committee's Response to the Motsuenyane Commission's Report, 29 August 1993.

125 Unlike some recent codes of conduct that include explicit references to IHL or human rights, the IRA's code, often referred to as the 'Green Book', has no such references. It does contain a rudimentary procedural system of court martial for investigations and punishments of members. Though theoretically confidential, the Green Book was, for example, published in an annex in Martin Dillon, *The Dirty War*, Hutchinson, London, 1990.

126 'IRA apology', 5 April 2007, above note 112.

127 'IRA statement', 25 September 2003, above note 110.

128 Interview with ex-combatant, Belfast, 31 August 2010.

targeting policy as such). By referring only to 'mistaken' killings of individuals who turned out to be wrongly accused of being informers, the IRA has at least implicitly reiterated the legitimacy of its 'accurate' killings of real informers. However, while the organization's authority to court-martial and execute informers was in line with its internal procedures, it has been argued that it was unlawful by international legal standards.¹²⁹ Finally, a related point is that, in the context of broader reconciliation and conflict-transformation processes, the notion that the families of those wrongly accused as being informers can now – with their loved ones 'cleared' by the IRA investigations – reconcile with their communities, leaves the families of those not cleared in a precarious position, their social ostracism at least implicitly reinforced.

Conclusions: armed groups as post-conflict actors

This article has demonstrated that, at least in some contexts, victims of abuses direct their demands for symbolic reparations and truth at armed groups, not states; and that, in some circumstances, these non-state groups have the capacity and willingness to provide some measures of remedy to those victims. It is reasonable to assume that such cases can go beyond Northern Ireland and South Africa, and the ad hoc experiences of the ANC and the IRA in setting inquiries should become more common if the needs of victims are to be met. To some degree these are uncharted waters. But the logic is clear: if armed groups can commit state-like abuses, based on their state-like characteristics, then they should be pressed to provide state-like reparations.¹³⁰ The approach suggested in this article involves 'taking armed groups seriously',¹³¹ not just as perpetrators of abuses and passive objects of sanctions but also as active duty-holders and actors who can provide measures of redress to victims of their past abuses.

An important implication of the analysis presented above is the need to appreciate that some armed groups can remain a significant factor in a transitional or post-conflict phase, even when direct violence subsides. Indeed, this observation is a premise of the wider call to explore the question of truth and symbolic reparations from armed groups, since it is almost inevitable that the potential to achieve truth and symbolic reparations would be significantly higher during transitions out of violence than at the height of conflict.

It must be emphasized again that this observation will not be applicable to all armed groups. In many cases it will remain unfeasible to discuss any form of reparation from armed groups. The LTTE in Sri Lanka, for instance, is a case in point: in the aftermath of the conflict the group was simply eliminated as an entity, and no military or political structures with direct or indirect affiliation with

129 See contemporary condemnation of informer killings by the IRA in Human Rights Watch, *Northern Ireland: Human Rights Abuses by all Sides*, 1993, and Amnesty International, *Political Killings in Northern Ireland*, 1994.

130 A similar and perhaps even stronger case can be made in relation to *de facto* states or 'state-like entities', such as South Ossetia or Somaliland.

131 M. Sassòli, above note 3.

it have remained. In such circumstances it makes little sense to demand reparations from the LTTE. However, this scenario of the complete military and political defeat of an armed group is not universal, and more complex scenarios, such as in Northern Ireland, in which armed groups neither take power in a country nor are completely eliminated, also exist. While it is beyond the remit of this article to recommend specific potential cases for advocacy for reparation from armed groups, it is clear that the structural circumstances that made it feasible in relation to the ANC and the IRA are not in any way unique to Northern Ireland and South Africa.

In this context, it is important to note that there appears to be a perception in the literature that the influence of armed groups simply disappears at the end of the conflict, as they either unequivocally take over power in a state or are completely eliminated.¹³² However, the IRA's case is one demonstration of the inadequacy of such assumptions. It shows that the political and social authority of an armed group may remain paramount in the communities that supported it even after the end of direct violence. Though the IRA ceased its military operations while failing to achieve its stated goal of Irish unity, it did not disappear and still carries authority within republican communities in Northern Ireland. More than a decade after it announced its ceasefire, actions and statements by the IRA still have the potential to affect the lives of many individuals and families. In the aftermath of violence, the IRA was neither totally eliminated nor did it capture full power in the country, and, although its military structures seem to have become dormant, it has remained an influential non-state actor. This status meant that, although large-scale violence by the IRA has ended, victims seeking redress and those advocating on their behalf still had an address to appeal to.

These conditions can apply elsewhere as well. Many other armed groups and their political affiliates may retain significant influence on segments of the society even after a conflict ends.¹³³ As Beck notes, contrary to some media and other accounts, armed groups do not come out of the blue as intruders, but are embedded in pre-existing social structures and ties within communities.¹³⁴ This also means that armed groups do not simply disappear with the end of violence. As Beck writes in relation to UNITA's members and supporters in post-conflict Angola: 'Their loyalty outlived the armed group itself.'¹³⁵ This observation is also relevant to Northern Ireland and other places. An appreciation of the fact that many armed groups are not ephemeral phenomena, and that they exert influence in their communities through social control and not just direct violence, would be an important step towards developing adequate transitional justice tools to address abuses by armed groups.

132 For example, Zegveld argued that 'opposition groups which fail to achieve their goals typically disintegrate and disappear after the conflict': L. Zegveld, above note 4, p. 156; and see also J. Kleffner, above note 32, p. 265.

133 This is also a result of the fact that many transitions out of internal, identity-based conflicts can be long, complex, and non-linear. See Colm Campbell and Fionnuala Ni Aoláin, 'The paradox of transition in conflicted democracies', in *Human Rights Quarterly*, Vol. 27, 2005, pp. 172–213.

134 Teresa Beck, 'Staging society: sources of loyalty in the Angolan UNITA', in *Contemporary Security Policy*, Vol. 30, 2009, pp. 343–355.

135 *Ibid.*, p. 344.

SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

Enhancing civilian protection from use of explosive weapons in populated areas: building a policy and research agenda

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Abstract

Every day, and in a range of contexts, the use of explosive weapons in populated areas harms civilians. Evidence is growing that elevated levels of civilian harm fit a recurrent pattern, suggesting that more coherent and effective humanitarian responses are needed to enhance civilian protection, especially changes in behaviour of users of explosive weapons. This article describes the effects of explosive violence, critically examines how the existing humanitarian law regime tends to address this issue and explores some current developments in building a research and policy agenda to try to reduce civilian harm from the use of explosive weapons.

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* The views expressed in this article are the sole responsibility of the authors, and do not necessarily reflect the views or opinions of the United Nations, the United Nations Institute for Disarmament Research (UNIDIR), its staff members, or sponsors. The authors extend their thanks to Richard Moyes and anonymous reviewers for their comments.

When the muffled blast of a mortar round echoes in the distance or the thunder of artillery fire erupts, Hassan (a taxi-turned-ambulance driver in war-torn Mogadishu) stares at his mobile phone. 'Now I pick up my clients from pools of blood in shattered homes. . . . Most of the calls are about a mortar shell smashing into a populated area.' . . . The hardest part begins when he reaches the wounded and has to pick his way through body parts to identify who has a chance of surviving and needs his services the most.¹ (Mustafa Haji Abdinur)

Violence, including armed violence, is 'a leading worldwide public health problem'.² Among the means of armed violence, use of explosive weapons can be 'an important cause of death and injury',³ as shown by the quotation above describing life for residents of Mogadishu, Somalia. The impact of explosive weapons use in populated areas is so serious that the United Nations (UN) Secretary-General has repeatedly singled it out as a distinct humanitarian problem: in his 2009 report to the Security Council on the protection of civilians in armed conflict, he expressed increasing concern at the use of explosive weapons in 'densely populated environments', which 'inevitably has an indiscriminate and severe humanitarian impact'.⁴ In 2010, he added that data collected across a range of conflicts revealed

substantial and ongoing civilian suffering caused by explosive weapons when they are used in populated areas. Civilians within the vicinity of an explosion are likely to be killed or injured by the blast and fragmentation effects of such weapons. They may be harmed by the collapse of buildings or suffer as a result of damage to infrastructure that is vital to the well-being of the civilian population, such as hospitals and sanitation systems. The use of explosive weapons also creates unexploded ordnance that persists as a threat to civilians until it is removed.⁵

This article briefly describes characteristics of the harm that the use of explosive weapons in populated areas causes to civilians. The second section critically examines how international humanitarian law (IHL) currently frames this humanitarian concern. The article then presents a novel framework that views explosive weapons as a coherent technological and moral category and attributes a distinct pattern of harm to this technology. This new perspective on the problem of explosive violence has already begun to stimulate some research and reflection within the international humanitarian community. The last section of the article

- 1 Mustafa Haji Abdinur, 'A day in the life of a Mogadishu ambulance driver', in *France 24*, 23 August 2010.
- 2 Prevention of Violence: A Public Health Priority, Resolution WHA49.25 adopted by the Forty-ninth World Health Assembly, Geneva, 20–25 May 1996.
- 3 Cæcilie Buhmann, 'The direct and indirect costs of explosive violence', in *British Medical Journal*, Vol. 339, 2009, p. 761.
- 4 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2009/277, 29 May 2009, para. 36.
- 5 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2010/579, 11 November 2011, para. 49.

also indicates possible directions for further research and policy initiatives aimed at better understanding and reducing the human cost associated with the use of explosive weapons in populated areas.

At the outset, it is important to clarify some key terminology. By ‘explosive weapons’ we mean weapons that generally consist of a casing with a high-explosive filling and whose destructive effects result mainly from the blast wave and fragmentation produced by detonation.⁶ For example, mortar bombs, artillery shells, aircraft bombs, rocket and missile warheads, cluster submunitions, and many improvised explosive devices (IEDs) fall within this technological category, the boundaries of which are yet to be formally defined in international law and policy.⁷

The main focus of this article is on the use of explosive weapons in populated areas. The terms ‘(densely) populated area’ and ‘concentration of civilians’ are well-established legal notions, though there is no single agreed definition and international instruments vary slightly in the formulations they deploy.⁸ In this article, the term ‘populated area’ is used as shorthand to refer to places where civilians are likely to be present in high numbers and where public infrastructure is dense. These include locations where civilians live, work, or travel; places that encompass main streets, bus stations, markets, office buildings, camps sheltering displaced persons, residential compounds, or city neighbourhoods.

The article’s main concern regarding humanitarian impacts is the harm to civilians. The term ‘civilian’ is not defined positively in international law (the Geneva Conventions describe civilians by what they are not). Moreover, the degree of involvement and participation of civilians in armed conflict can arguably be ambiguous in terms, for instance, of economic contribution or ideological support. While acknowledging this, we note Slim’s point that ‘at the heart of the civilian idea is a moral argument about identity and harmlessness’ that is meant to transcend such ambiguities.⁹ In view of this, states accept a responsibility to protect civilians from violence. This article focuses on situations that legally qualify as ‘armed

6 Jonas A. Zukas and William P. Walters (eds), *Explosive Effects and Applications*, Springer, New York, 1998, p. 9; Richard Moyes, *Explosive Violence: The Problem of Explosive Weapons*, Landmine Action, London, 2009, p. 4. In addition to primary fragments from the shattered casing, the blast wave creates secondary fragmentation by accelerating objects near the explosion, such as parts of structures and shards of window glass.

7 William Boothby describes weapons falling into his category of ‘missiles, bombs and artillery’ as those that ‘typically employ a warhead with an explosive fill such that a combination of blast and fragmentation will provide the damaging effect of the weapon’. William Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009, p. 225. See also Report of Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974 (Lucerne Report), ICRC, Geneva, 1975, p. 44.

8 See for example, 1980 Protocol II to the United Nations Convention on Certain Conventional Weapons (CCW), Art. 4(2); 1996 CCW Amended Protocol II, Art. 7(3); 1980 CCW Protocol III, Arts. 1(2) and 2(2); and 1977 Additional Protocol I to the Geneva Conventions (AP I), Art. 51(5)(a). Note also the references by the European Court of Human Rights (ECtHR) to ‘populated areas’ in explosive-weapons-related cases, such as in ECtHR, *Case of Isayeva v. Russia*, Merits and Just Satisfaction, Judgment, 24 February 2005, and ECtHR, *Case of Esmukhambetov and Others v. Russia*, Application No. 23445/03, Merits and Just Satisfaction, Judgment, 29 March 2011.

9 Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, Hurst & Company, London, 2007, p. 183.

conflicts¹⁰ governed by the rules of IHL,¹¹ which confer such protection from the effects of hostilities, including from explosive violence, on the civilian population and individual civilians.¹² The humanitarian impacts of explosive violence are certainly not limited to such situations, of course. The use of explosive weapons is, for example, a feature of the struggle between powerful drug cartels in Mexico and government forces pitted against them, as well as in crime and internal disturbances in Burundi.¹³ Nevertheless, it is noteworthy that states generally refrain from explosive weapons use outside armed conflict, and use by non-state actors (including in connection with ‘terrorism’) tends to be criminalized. Explosive violence in such situations is usually perceived as alarming and unacceptable.¹⁴

The humanitarian problem of explosive weapons’ use in populated areas: why should we worry?

Reports of explosive weapons causing death, injury, and material destruction reach us daily from many places around the world.¹⁵ A growing body of evidence indicates a consistent pattern of harm to civilians from the use of explosive weapons in places such as towns, cities, and other areas in which civilians congregate.

Explosive violence produces a distinct pattern of death and injury. Survivors of explosive weapons use tend to suffer multiple, complex, and severe wounds from the blast and fragmentation effects, and from being caught in collapsing structures.¹⁶ The physical and mental trauma can result in a range of debilitating long-term conditions, including lifelong disability, requiring considerable medical and public health resources.¹⁷ Drawing on findings about armed

10 The ‘use of heavy weapons’, including the shelling of towns, has been used as an indicator for the existence of an armed conflict in the legal sense. See for example, International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Ljube Bošković & Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 177.

11 IHL is defined broadly here to encompass the rules and principles of ‘Geneva law’ and ‘Hague law’.

12 AP I, Art. 51(1). Note that the ECtHR also referred to ‘civilians’ when it discussed the risk posed by the detonation of a bomb in ECtHR, *Case of McCann and Others v. the United Kingdom*, Application No. 18984/91, Merits and Just Satisfaction, Judgment, 27 September 1995.

13 Oscar Becerra, ‘Drugs of choice: Mexico faces security dilemma’, in *Jane’s Intelligence Review*, Vol. 23, No. 1, January 2011, pp. 8–10. See also the documentary film produced by Seth Chase and Brice Blondel, directed by Seth Chase, ‘Bang for your Buck’, ShootingPoverty.org, 2010, which describes explosive hand grenade attacks in Burundi, available at: <http://vimeo.com/16198602> (last visited 2 May 2011).

14 The use of explosive force by states that may result in the deprivation of life probably goes beyond what is ‘absolutely necessary’ for the achievement of legitimate law enforcement purposes. In a recent judgment, for example, the ECtHR considered that ‘the indiscriminate bombing of a village inhabited by civilians – women and children being among their number – was manifestly disproportionate to the achievement of the purpose under Article 2, para. 2 (a)’ of the European Convention on Human Rights. See *Esmukhambetov and Others v. Russia*, above note 8, para. 150.

15 The Explosive Violence Monitoring Project of the British humanitarian organization Action against Armed Violence (AOAV) publishes bi-weekly reports on explosive violence, available at: <http://www.landmineaction.org/issues/page.asp?PLID=1017&pageID=1068> (last visited 2 May 2011).

16 R. Moyes, above note 6, p. 29.

17 See for instance Robin Coupland and Hans Samnegaard, ‘Effect of type and transfer of conventional weapons on civilian injuries: retrospective analysis of prospective data from Red Cross hospitals’, in *British Medical Journal*, Vol. 319, 1999, pp. 410–412. For more information about the particular wounding

violence generally, it is reasonable to posit that men have a higher propensity to be directly killed or injured and disabled by explosive violence.¹⁸ Nevertheless, existing studies suggest that women are significantly at risk from this form of armed violence,¹⁹ though more research is needed into the demographic characteristics of civilian harm from the use of explosive weapons in populated areas. It is reasonable to assume, for instance, that explosive weapon attacks on settlements, for example, disproportionately affect women in societies within which their sphere of action revolves mainly around the home.

In addition, damage to social and economic ‘infrastructure vital to the well-being of the civilian population’²⁰ caused by explosive weapons has deleterious effects on civilians. The destruction of transport facilities, markets, power, sanitation, and health infrastructure, as well as housing and shelter, impedes community access to food, clean water, health care, education, and other necessities of life. Even if such infrastructure is not completely disrupted, it may force changes to civilian behaviour that increase their vulnerability to the effects of armed violence. For civilians waiting for food or clean water at aid distribution points, for instance, explosive weapons use can pose mortal peril.²¹ Meanwhile, destruction of education and health infrastructure may also deepen pre-existing gender gaps in these areas. Anecdotal evidence suggests a link between the use of explosive weapons in populated areas and (protracted) displacement,²² which again results in particular hardship for women, who are more likely than men to be internally displaced persons (IDPs) or refugees.²³ Finally, explosive weapons consistently leave behind explosive remnants. These continue to pose a threat to civilians and cause ongoing harm long after use unless dealt with, and have a negative impact on socio-economic development.²⁴

A few examples can show how explosive violence is apparent across many different recent and contemporary contexts, and appears to inflict civilian harm on

patterns caused by such weapons, see International Committee of the Red Cross (ICRC), *Wound Ballistics: An Introduction for Health, Legal, Forensic, Military and Law Enforcement Professionals*, ICRC, Geneva, 2008; and C. Stewart, ‘Blast injuries: preparing for the inevitable’, in *Emergency Medicine Practice*, Vol. 8, No. 4, April 2006, pp. 1–28.

18 The World Bank, *World Development Report 2011: Conflict, Security, and Development*, World Bank, 2011, p. 61.

19 Madelyn Hsiao-Rei Hicks, *et al.*, ‘Violent deaths of Iraqi civilians, 2003–2008: analysis by perpetrator, weapon, time, and location’, in *PLoS Medicine*, Vol. 8, No. 2, 2011, available at: <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000415> (last visited 2 May 2011). See also R. Moyes, above note 6, p. 26.

20 *Report of the Secretary-General*, 2009, above note 4, para. 36.

21 C.J. Chivers, ‘Qaddafi troops fire cluster bombs into civilian areas’, in *New York Times*, 15 April 2011, available at: <http://www.nytimes.com/2011/04/16/world/africa/16libya.html> (last visited 2 May 2011): ‘The toll of the Grad rocket strikes also framed the ways in which civilians are being forced to take risks to survive. Misurata has few open markets, almost no electricity and limited supplies of food. To eat, many residents must stand in bread lines. When one of the rockets that landed in Qasr Ahmed exploded beside such a line, it killed several people waiting for food. “I jumped onto the ground when the explosions started”, said Ali Hmouda, 36, an employee of the port. “My friend did not. His head came off.”’

22 Esther Cann and Katherine Harrison, *100 Incidents of Humanitarian Harm: Explosive Weapons in Populated Areas, 2009–2010*, Action on Armed Violence, London, March 2011, p. 50.

23 World Bank, above note 18, p. 61.

24 John Borrie, *Explosive Remnants of War: A Global Survey*, Landmine Action, London, 2003.

a significant scale. Humanitarian organizations such as the International Committee of the Red Cross (ICRC) and Doctors Without Borders have broadcast public alarm about thousands of war-wounded people – most of them civilians – caught in mortar or artillery fire or in landmine explosions, and suffering blast and fragmentation injuries, requiring treatment at their clinics and hospitals in and around Mogadishu. The ICRC noted that numbers of these dead and war-wounded ‘sharply increased’ in 2010.²⁵ In recent years, the United Nations Assistance Mission in Afghanistan (UNAMA) has repeatedly identified forms of explosive weapons use as the ‘tactics’ responsible for most recorded civilian deaths, injuries, and major damage.²⁶ Large-scale destruction of homes, cultivations, roads, schools, and hospitals occurred in this way in South Lebanon in summer 2006,²⁷ as well as along the Gaza Strip²⁸ and in the Vanni region of Sri Lanka in 2009.²⁹ Use of explosive weapons in populated areas in Iraq such as in the Coalition air attacks during the 2003 invasion and widespread subsequent IED use by anti-Coalition forces have resulted in high risk to civilians, including the death and injury of many thousands.³⁰

Recent and current conflicts have been distinguished by mismatches of opposing capabilities among belligerents.³¹ This asymmetry can increase the appeal of populated areas as environments in which to launch attacks and then hide among civilians, or environments to dominate because control of the population is a strategic objective.³² Yet if explosive weapons are used, the higher the population density or concentration of civilians or civilian objects in a place, the more people

25 ICRC, ‘Somalia: war wounded in Mogadishu referral hospitals reach new peak’, 27 January 2011, available at: <http://www.icrc.org/eng/resources/documents/news-footage/somalia-tvnews-2011-01-27.htm> (last visited 2 May 2011). See also Médecins sans frontières, ‘Somalia: MSF treats 66 women and children injured by indiscriminate shelling’, Press Release, 3 February 2010, available at: <http://www.doctorswithoutborders.org/press/release.cfm?id=4251&cat=press-release> (last visited 3 May 2011).

26 According to UNAMA, suicide attacks and IEDs deployed by anti-government forces caused the largest proportion (55%) of conflict-related civilian casualties in Afghanistan in 2010, followed by air attacks by pro-government forces (16%). UNAMA Human Rights Unit, *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict*, March 2011, p. i. UNAMA said that the 2,777 civilian deaths in 2010 represented a 15% increase over 2009, when it had noted that such ‘attacks frequently resulted in civilian fatalities and the destruction of civilian property and infrastructure’. UNAMA Human Rights Unit, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict 2009*, 2010. Note that UNAMA’s data do not include deaths and injury from some explosive weapons (such as mortars and ground-launched artillery), and do not recognize explosive weapons as a specific data category.

27 Greg Crowther, *Counting the Cost: The Economic Impact of Cluster Munition Contamination in Lebanon*, Landmine Action, London, 2008.

28 UN Development Programme, *One Year After Report: Gaza Early Recovery and Reconstruction Needs Assessment*, New York, 2010, available at: <http://www.undp.ps/en/newsroom/publications/pdf/other/gazaoneyear.pdf> (last visited 2 May 2011).

29 Médecins sans frontières, ‘MSF treating hundreds of wounded arriving from Sri Lankan war zone’, 21 April 2009, available at: <http://www.msf.org/msf/articles/2009/04/msf-treating-hundreds-of-wounded-arriving-from-sri-lankan-war-zone.cfm> (last visited 2 May 2011); *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last visited 2 May 2011).

30 M. H.-R. Hicks *et al.*, above note 19, p. 11.

31 See Herfried Münkler, ‘The Wars of the 21st Century’, in *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 7–22.

32 See Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Allen Lane, London, 2006.

and civilian infrastructure are likely to be within the blast and fragmentation radius of an explosion. Despite this, conflicts in Vietnam, Chechnya, Gaza, the West Bank, Afghanistan, and Iraq have all shown that belligerents do operate out of populated areas, including locating military bases and other facilities there, thereby exacerbating the risks to civilians of being affected by hostilities.³³ Demographic shifts from the countryside to urban environments this century are likely to continue or even exacerbate such phenomena. 'Because resources, power, and people are concentrated in and around them, cities are by definition vulnerable entities',³⁴ in which the use of explosive weapons not only runs the risk of killing and injuring civilians but also damages physical infrastructure and disrupts essential civilian services.

It will be noted that the preceding paragraph does not draw a distinction between states and non-state armed actors. States often use a discourse of 'terrorism', which focuses on the harm and illegitimacy of use of explosive and other weapons by non-state actors. This can detract critical attention from states' own use of explosive weapons in populated areas, which is also a source of harm. Historically, both states and non-state actors have used explosive weapons in populated areas and continue to do so.

Explosive weapons play an important role in the military doctrines of states, and dependence on such weapons by state armed forces looks set to continue for the foreseeable future (despite research into alternative military technologies), as shown by continued developments in the potency, stability, portability, and precision of explosive weapons. State-led developments in explosive weapons have not necessarily been about creating 'a bigger bang' but about achieving greater precision over the delivery of explosive force to target, something that conceivably can lower the threshold for use of these weapons and create additional humanitarian risk to civilians in the vicinity of targets. Such is the central importance of explosive weapons technology to state power that states have generally sought to ensure a monopoly on production, possession, transfer, and use of explosive weapons within their territories.

However, monopolies of states on possession and employment of explosive violence on their territories is increasingly under threat in both quantitative and qualitative terms. The sophistication and destructiveness of IEDs have increased dramatically since the basic early designs of non-state armed actors such as the Provisional Irish Republican Army in the 1970s, who used basic triggers and agricultural chemicals.³⁵ In Iraq, for instance, insurgents obtained military munitions from abandoned or insecure stockpiles following the 2003 invasion by

33 Michael John-Hopkins, 'Regulating the conduct of urban warfare: lessons from contemporary asymmetric armed conflicts', in *International Review of the Red Cross*, Vol. 92, No. 878, June 2010, p. 471.

34 Alexandre Vautravers, 'Military operations in urban areas', in *International Review of the Red Cross*, Vol. 92, No. 878, June 2010, p. 450.

35 Adam Higginbotham, 'U.S. military learns to fight deadliest weapons', in *Wired Magazine*, 28 July 2010, available at: http://www.wired.com/magazine/2010/07/ff_roadside_bombs (last visited 13 May 2011); 'With one of the most intensive and ingenious programs of homemade bombmaking R&D in history, Northern Ireland's Provisional IRA worked its way through every available bandwidth from model airplane controllers to cell phones.'

American-led forces, and since then have deployed these in weapons such as car bombs, suicide bomber vests, and buried command-operated artillery or mortar-shell devices detonated in a variety of ways.³⁶ Moreover, bombers sometimes belong to networks exchanging explosives knowledge and expertise that are global in reach. States parties to the United Nations Convention on Certain Conventional Weapons (CCW Convention) have become so concerned about the diversion of military-type explosive munitions and their components to non-state actors that these have begun to feature in their discussions on responding to the threat of IEDs.³⁷ The increasing frequency of use and destructive power of such explosive weapons is of great humanitarian concern.³⁸ Yet IEDs are only part of the humanitarian threat that the proliferation of explosive weapons in the hands of non-state actors may cause. Non-state actors such as Lebanon's Hezbollah are now more heavily equipped with 'officially' manufactured rockets, missiles, and other explosive weapons than some state militaries. Libyan rebels fighting Quaddafi's regime in 2011 furnished themselves at least in part from captured state arsenals. Islamic militia forces in Mogadishu have deployed heavy military explosive weapons such as artillery, direct-fire cannons, and mortars.

In view of the humanitarian issues described above, there is urgent need to question critically the acceptability of using explosive weapons in populated areas, with a view to changing policy and user practices. Yet the public, the media, and many humanitarian actors tend to treat the pattern of civilian harm from explosive weapons use in armed conflict as 'normal' – or at least a 'fact of life' – without examining this assumption. In contrast, civilian harm from weapons other than explosive weapons, such as white phosphorus or dense inert metal explosives (DIME), is often the focus of greatest concern, as media coverage of the 2009 conflict in Gaza indicated.³⁹ The risks that explosive weapons pose to civilians in populated areas seem to have become part of the background, and thus acceptable. This 'moral outrage gap'⁴⁰ is also reflected in the dominant legal discourse, which

36 Clay Wilson, *Improvised explosive devices (IEDs) in Iraq and Afghanistan: effects and countermeasures*, CRS Report for Congress, Congressional Research Service, Washington DC, 21 November 2007, available at: <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA475029> (last visited 12 May 2011).

37 Twelfth Annual Conference of the High Contracting Parties to 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, *Improvised explosive devices (IEDs)*, Report submitted by the Coordinator, UN Doc. CCW/AP.II/CONF.12/3, November 2010, available at: [http://www.unog.ch/80256EDD006B8954/\(http:Assets\)/9D351066DC9A78B4C12577E00064355C/\\$file/Report+APII+Coordinator+on+IED+\(Draft\).pdf](http://www.unog.ch/80256EDD006B8954/(http:Assets)/9D351066DC9A78B4C12577E00064355C/$file/Report+APII+Coordinator+on+IED+(Draft).pdf) (last visited 22 February 2012).

38 Adrian King, *Improvised explosive devices (IEDs): a growing threat to humanitarian demining operations?*, paper delivered at The Geneva International Centre for Humanitarian Demining Technology Workshop, 6–8 September 2010, PowerPoint presentation available at: <http://www.gichd.org/fileadmin/pdf/technology/Technology-Workshop-2010/R-7Sept2010-ThreatToHumanitarianOps-TechWS.pdf> (last visited 12 May 2011).

39 Landmine Action, *Explosive violence: Israel and Gaza*, Policy Brief, 30 January 2009, p. 1, available at: <http://www.landmineaction.org/resources/Explosive%20violence%20-%20Israel%20and%20Gaza.pdf> (last visited 2 May 2011).

40 Roos Boer, Bsart Schuurman and Miriam Struyk, *Protecting Civilians from Explosive Violence: 1. Defining the Humanitarian Problem*, Pax Christi Netherlands, Utrecht, 2011, p. 20.

fails to articulate the serious humanitarian problem that the use of explosive weapons in populated areas causes in a manner that adequately contributes to higher standards for civilian protection.

International humanitarian law and the protection of civilians against the use of explosive weapons in populated areas

IHL has traditionally been a key frame of reference for addressing civilian harm from the use of explosive weapons.⁴¹ The following section briefly surveys the evolution of existing IHL rules on specific types of explosive weapons and some attempts at devising rules to protect civilians in populated areas from bombardments more generally.

From balloon-borne bombs, to blast and fragmentation weapons and cluster munitions

Towards the turn of the twentieth century, the increasing range of land and naval artillery, coupled with the possibility of using aircraft for hostile purposes, enabled attacks on population centres far from the battlefield. This led states at the First Hague Peace Conference in 1899 to prohibit 'The attack or bombardment of towns, villages, habitations or buildings which are not defended'⁴² and to adopt a declaration that forbade the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.⁴³ This declaration, though renewed at the Second Hague Peace Conference in 1907, was not widely ratified and it was understood that it in any case only applied to non-dirigible balloons and not to motorized aircraft.⁴⁴ Attacks by airplanes were brought into the ambit of Article 25 of the 1907 Hague Regulations, which prohibited 'attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings', but again with the important proviso that they be 'undefended'.⁴⁵ The term 'undefended' was interpreted in such a way as effectively to permit the bombardment of civilian settlements that contained any kind of military objective. This position was made explicit in another Convention adopted in 1907, which allowed naval bombardment of military objectives in undefended towns, villages, or dwellings under certain conditions.⁴⁶ These rules proved unable to prevent grave civilian harm from

41 It is increasingly recognized that human rights law applies alongside IHL during armed conflict, but what the interplay of these legal regimes means in terms of substantive rights and obligations remains subject to considerable debate.

42 1899 Hague Regulations, Art. 25.

43 1899 Hague Declaration to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature.

44 Chris af Jochnick and Roger Normand, 'The legitimization of violence: a critical history of the laws of war', in *Harvard International Law Journal*, Vol. 35, No. 1, 1994, p. 73.

45 1907 Hague Regulations, Art. 25.

46 1907 Hague Convention concerning Bombardment by Naval Forces in Time of War, Chapter I. Conditions include the requirements that the bombardment be preceded by a formal summons to

explosive weapons use, including unprecedented aerial attacks, on population centres during World War I.

In the wake of World War I, the drafters of the Hague Rules on Air Warfare (1922/1923) attempted to regulate aerial bombardment. Under the Hague Rules, the bombardment of settlements in the immediate neighbourhood of the operations of land forces would be legitimate, 'provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population'.⁴⁷ However, the Rules were never adopted. As bombardment of cities renewed in the 1930s, and the public expressed its horror at the bombing of towns such as Guernica in 1937, the Assembly of the League of Nations called for urgent regulation of air warfare, based, *inter alia*, on the principle that: 'Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence'.⁴⁸ No such rules were adopted before the outbreak of World War II, which was marked by practices that epitomize the notion of 'indiscriminate attacks'. In particular, the saturation of vast areas, including population centres, with explosive force in so-called 'strategic' bombing campaigns had disastrous consequences for civilian populations.⁴⁹

The use of explosive (and other) weapons in and near concentrations of civilians continued to cause grave civilian harm after World War II, for example in South-east Asia.⁵⁰ In the 1970s, government experts meeting in Lucerne (1974) and Lugano (1976) discussed the effects of what they termed 'blast and fragmentation weapons'. The experts did not define this category of weapons, but considered that, as 'blast and fragmentation effects were to a varying degree inherent in all explosive devices', there was no clear separation between blast weapons and fragmentation weapons.⁵¹ The experts could not agree whether such weapons caused indiscriminate effects or unnecessary suffering within the meaning of what was then Draft Additional Protocol I to the Geneva Conventions. Additional Protocol I, as

comply with the naval forces' request and that destruction of military objectives by other means is impossible.

47 1922 Hague Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Art. 24(4).

48 Protection of Civilian Populations against Bombing from the Air in Case of War, League of Nations Assembly Resolution, 30 September 1938.

49 See, for example, Yuki Tanaka and Marilyn B. Young (eds), *Bombing Civilians: A Twentieth-century History*, The New Press, New York, 2009. For a consideration of the wartime moral debate about bombing see Jonathan Glover, *Humanity: A Moral History of the Twentieth Century*, Pimlico, London, 2001, pp. 69–88.

50 See, for example, Eric Prokosch, *The Technology of Killing: A Military and Political History of Antipersonnel Weapons*, Zed Books, London, 1995, which links the refinement of these weapons to conflicts in Korea and, from the 1960s, South-east Asia. For a description of the effects of cluster bomb and artillery attacks on densely populated areas in Lebanon in the 1970s and 1980s, see, for example, Kevin Danaher, 'Israel's use of cluster bombs in Lebanon', in *Journal of Palestine Studies*, Vol. 11, No. 4, 1982, pp. 52–54.

51 Lucerne Report, above note 7, pp. 44 and 49. Recently, the Program on Humanitarian Policy and Conflict Research at Harvard University argued that 'Blast weapons must be distinguished from fragmentation weapons' in its *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Harvard University, Cambridge, MA, March 2010, pp. 75 and 77.

adopted in 1977, did however outlaw the practice of area bombardment and other indiscriminate and disproportionate attacks,⁵² but no instrument prohibiting or restricting blast and fragmentation weapons was annexed to the CCW adopted in 1980.⁵³

Instead, over the coming decades, states negotiated several instruments to regulate or prohibit specific types of explosive weapons. CCW Protocol II, agreed in 1980, restricts the use of ‘mines, booby-traps and other devices’. This protocol was amended in 1996, but disappointment with the outcome of these negotiations led to an international treaty banning anti-personnel mines in 1997 (the Ottawa Convention). CCW Protocol V, adopted in 2003, imposes obligations on states to remediate the ‘serious post-conflict humanitarian problems’ caused by the remnants of explosive weapons.⁵⁴ The CCW’s efforts to negotiate minimum standards in order to ensure ‘mines other than anti-personnel mines’ are detectable for humanitarian reasons failed in 2005, though in late 2011 states parties decided to convene a meeting of experts in 2012 to discuss further the implementation of IHL with regard to these mines.⁵⁵ Cluster munitions were banned by the 2008 Convention on Cluster Munitions, achieved in a process pursued outside the CCW. In the latter forum negotiations of a protocol that aimed to restrict certain cluster munitions continued until November 2011, at which point states accepted that they could not reach agreement on this issue within the CCW. CCW states parties will continue discussions on IEDs in the framework of CCW Amended Protocol II.

This brief survey indicates that humanitarian harm from explosive violence, as such, is not a new phenomenon. It also shows that states are clearly aware of the risks that blast and fragmentation effects of explosive weapons pose to civilians, especially in the context of populated areas, both during and after conflict.⁵⁶ But, even though ‘area bombing’ is illegal today, and many states no longer consider the use of cluster munitions acceptable practice, the use of other explosive weapons – even in densely populated areas – remains a common feature of contemporary armed conflicts. No international treaty prohibits blast and fragmentation weapons or regulates their use through specifically tailored rules.

52 AP I, Art. 51(4–5).

53 Blast effects of weapons were dealt with primarily in connection with fuel–air explosives, which led to some restrictions on incendiary weapons on targets ‘within a concentration of civilians’ under 1980 CCW Protocol III. CCW Protocol I, also adopted in 1980, prohibits the use of weapons the primary effect of which is to injure by fragments not detectable by X-rays. These instruments leave unaddressed the humanitarian impacts of blast and fragmentation of most commonly used explosive weapons.

54 2003 CCW Protocol V, preamble.

55 CCW, Final Document of the Fourth Review Conference, Geneva, 14–25 November 2011 (Part II): Final Declaration (Advance Version), Decision 1. See also François Rivasseau, ‘The past and future of the CCW’, in *Arms Control Today*, March 2011, available at: http://www.armscontrol.org/act/2011_03/LookingBack (last visited 3 May 2011).

56 This is also demonstrated, for example, in International Security Assistance Force (ISAF), ‘Tactical directive’, Kabul, 6 July 2009, available at: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited 3 May 2011), which restricts use of ‘air-to-ground munitions and indirect fires against residential compounds’. See also ‘For the record: Maj. Gen. Nathan Mugisha discusses civilian casualties’, in *AMISOM Bulletin*, Vol. 17, p. 2: ‘rules of engagement clearly state that public places like schools, hospitals or markets are never to be targeted’ and ‘public places, including Bakara market, are no fire zones’.

However, as with all means and methods of warfare (and, let us recall, the choice is not unlimited),⁵⁷ explosive weapons use remains subject to the rules on the conduct of hostilities.⁵⁸

Does international humanitarian law adequately protect civilians in populated areas from blast and fragmentation?

There are a number of different types of criticism that could be levelled at the prevailing IHL discourse's handling of issues pertaining to civilian protection from the effects of the use of explosive weapons in populated areas. Some critics have argued that IHL rules suffer a critical deficiency, claiming that 'the laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values', and do not impose restraint on customary military practices beyond military expedience itself. Instead, the laws of war cloak these practices in a mantle of legitimacy, providing them with 'a humanitarian cover that helps shield them from criticism'.⁵⁹

Others believe that IHL restrains users of force and humanizes war by balancing military necessity with concerns for humanity. From this perspective, the rules on the conduct of hostilities are 'to give effect' to the 'general protection' that civilians enjoy 'against dangers arising from military operations'.⁶⁰ But the consistent pattern of elevated civilian harm associated with the use of explosive weapons in populated areas suggests that IHL as applied in practice does not sufficiently protect civilians from this type of danger.⁶¹ This pattern of civilian harm also indicates a deeper problem than sporadic violations of the law. Grounds for concern remain about how legal rules on proportionality, distinction, and precautions are implemented, including to what extent these constitute an adequate basis for a solution to the humanitarian problems caused by explosive weapons.

Proportionality: uncertainty and disagreement about the (un)acceptability of incidental civilian harm

The legal prohibition against disproportionate attacks⁶² and the related prohibition against 'wanton destruction of cities, towns or villages, or devastation not justified

57 AP I, Art. 35(1).

58 The provisions of AP I largely reflect customary law in this respect and will provide the basis for the following discussion.

59 C. af Jochnick and R. Normand, above note 44, p. 50. These authors argue further that 'the laws of war have facilitated rather than restrained wartime violence. Through law, violence has been legitimated'. Furthermore 'By endorsing military necessity without substantive limitations, the laws of war ask only that belligerents act in accord with military self-interest. Belligerents who meet this hollow requirement receive in return a powerful rhetorical tool to protect their controversial conduct from humanitarian challenges' (p. 58).

60 AP I, Art. 51(1).

61 'Aerial bombardment of civilian centres is almost inevitable in modern warfare. If the law is meant to temper these attacks, it has proved pliant.' Thomas W. Smith, 'The new law of war: legitimizing hi-tech and infrastructural violence', in *International Studies Quarterly*, Vol. 46, No. 3, 2002, p. 359.

62 Pursuant to AP I, Arts. 51(4) and (5)(b), attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in

by military necessity' are central to the law on the conduct of hostilities. However, these concepts can only ever provide a relative measure of civilian protection. First, the majority view holds that the proportionality rule does not impose an absolute limit on extensive (in contrast to 'excessive') civilian harm.⁶³ Second, what is to be considered proportionate is in most cases unclear and disputed.⁶⁴ The question how to balance the vague, abstract, and, above all, dissimilar values of expected civilian harm and anticipated military advantage remains.⁶⁵ This means that IHL implicitly accepts an undefined, yet potentially very high level of civilian harm that can be justified by users of force with reference to military necessity.⁶⁶ Similar uncertainties and disagreements surround some precautionary obligations under IHL.⁶⁷ This situation weighs against the emergence of clear common standards about what level of civilian harm is acceptable as an incidental by-product of the use of force.

In practice, proportionality tends to be evaluated on an operational and tactical level, rather than a strategic one, and in relation to discrete acts of violence (attacks). The geographical and temporal scopes of the proportionality assessment, and of the 'attack' itself, remain disputed. Focus is usually on the immediate effects of violence, mostly on death and injury, and tends to understate longer-term civilian harm, for example from infrastructure damage vital to the survival of the civilian population.⁶⁸ There seems to be growing recognition that 'foreseeable' effects should be factored into the assessment, including, notably, those from unexploded ordnance.⁶⁹ Yet even if certain 'reverberating' effects are to be taken into account,

relation to the concrete and direct military advantage anticipated' are to be considered indiscriminate and are prohibited.

- 63 A number of scholars contest the interpretation given by Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 1980, p. 626, who claim that: 'The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive'. See, for example, Michael N. Schmitt, 'Precision attack and international humanitarian law', in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, p. 457: 'The standard is "excessive" (a comparative concept), not "extensive" (an absolute concept)'.
- 64 'The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.' ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000, para. 48. See also A. P. V. Rogers, 'Zero-casualty warfare', in *International Review of the Red Cross*, No. 837, 2000, available at: <http://www.icrc.org/eng/resources/documents/misc/57jqcu.htm> (last visited 3 May 2011).
- 65 'The determination of what constitutes "excessive" collateral damage is unclear to the point of inapplicability... The principle of proportionality thus far remains a rhetorical tool, with little substantive content.' Hamutal E. Shamash, 'How much is too much? An examination of the principle of jus in bello proportionality', in *Israel Defense Forces Law Review*, Vol. 2, 2006, pp. 2-3.
- 66 'As we have seen, arguments from necessity allow warring parties to justify an enormous amount of civilian suffering.' Hugo Slim, above note 9, p. 174. See also T. W. Smith, above note 61, pp. 360-361.
- 67 From the perspective of civilian protection, it is particularly worrying that there is no consensus about what civilian harm 'may be expected', what effects are to be considered 'foreseeable', and what standard of care applies when using explosive weapons in populated areas. It is doubtful that 'an imprecise rule of reason' confers adequate protection. See M. N. Schmitt, above note 63, p. 463.
- 68 T. W. Smith, above note 61, p. 370, notes in relation to the 1991 Gulf War that, while estimates of the ratio of bomb tonnage to civilian deaths in air attacks show remarkable reductions in immediate collateral damage, if one takes into account the long-term effects, 'aerial bombing looks anything but humane'; and (p. 365) 'Although the Coalition hewed more or less to humanitarian law, the destruction was enormous.'
- 69 See, for example, Timothy McCormack and Paramdeep Mtharu, *Expected Civilian Damage & The Proportionality Equation: International Humanitarian Law & Explosive Remnants of War*, Asia Pacific

IHL does not lend itself to preventing civilian harm, such as might result from a breakdown of the public health system following damage to transport infrastructure and overstraining of medical resources.⁷⁰

Proportionality and precautionary assessments of discrete attacks are also not conducive to recognizing and responding to patterns of civilian harm related to a particular weapon technology. First, such patterns manifest over a longer period of time and across different contexts. Second, while a link between a pattern of harm and a weapon technology can be based on the IHL prohibition of superfluous injury and unnecessary suffering, this so-called SirUS rule is not generally applied to civilians.⁷¹ Because civilians should not be harmed in the first place, it is difficult under IHL to prevent civilian harm on the basis of wounding patterns and qualitative aspects of civilian suffering from a weapon technology.

Distinction: not only a question of accuracy

Users of force, a significant number of legal scholars, and, indeed, humanitarian actors often approach civilian harm caused by the use of explosive weapons in populated areas in terms of the IHL rule of distinction⁷² and the related prohibition of indiscriminate attacks.⁷³ The emphasis is on how ‘precision attacks’, ‘smart’ weapons, and technological innovations can help overcome the challenges posed by ‘inter-mingling’, ‘co-location’, ‘dual-use’, and ‘human shields’ in ‘urban’, ‘asymmetrical’, or ‘new’ warfare scenarios. Much attention is paid to the accurate delivery of explosive weapons to their targets where considerations related to distance occupy centre stage.⁷⁴ In legal terms, this translates into a focus on the prohibition of attacks that ‘are not directed at a specific military objective’ or that ‘employ a method or

Centre for Military Law, University of Melbourne Law School, 2006, pp. 12–13. See also 1996 CCW Amended Protocol II, Art. 3(10)(a), which requires that the ‘long-term effect of mines upon the local civilian population’ be taken into account when taking precautions.

- 70 In the context of international criminal law, the ICTY raised this issue in terms of ‘cumulative effects’. See ICTY, above note 64, para. 52: “‘However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.’” (ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, 14 January 2000, para. 526). This formulation in *Kupreškić* can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear.’ Other rules of international law may be relevant in this regard, but it does not appear that, in practice, they have proven effective means to prevent and reduce civilian harm from explosive violence.
- 71 With the possible exception of civilians directly participating in hostilities. See Théo Boutruche, ‘L’interdiction des maux superflus: contribution à l’étude des principes et règles relatifs aux moyens et méthodes de guerre en droit international humanitaire’, PhD thesis No. 559, Université de Genève, Geneva, 2008, pp. 74–101.
- 72 The rule on distinction, as reflected in AP I, Art. 48, requires that: ‘In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.’
- 73 AP I, Art. 51(4–5).
- 74 This may have something to do with the important role of air power, which from its beginnings has been tied up with the use of explosive weapons. Air-launched attacks raise particular issues for civilian

means of combat which cannot be' so directed.⁷⁵ In this context, civilian suffering becomes 'abstracted into the meta-discourse of military planning'.⁷⁶ Users of force are seldom pushed (and rarely seek) to justify incidental civilian harm as a proportionate side effect of an attack. Instead, they tend to argue that civilian harm was non-intentional and resulted from a mistake or an accident. Too often the discussion ends there.

On the relatively rare occasions when claims of accidental civilian harm are scrutinized – for example, in relation to precautionary obligations with regard to weapon choice and the targeting process – discussions do not seem to be grounded in scientific evidence of a weapon's impact on civilians in practice. Largely theoretical considerations dominate the debate as they did, for instance, in the context of anti-personnel mines and cluster munitions until challenged by international campaigns against these weapons based on evidence of their humanitarian effects. Many commentators infer from claims about a weapon's accuracy that its use reduces risk to civilians and civilian harm. High accuracy is desirable if it increases an attacker's ability to avoid, or in any case to minimize, civilian harm, and if its use actually results in less harm. However, the risk of civilian harm cannot be assessed in isolation. It is misleading to call weapons that can be precisely targeted 'clean weapons'⁷⁷ because this occludes the possibility that accuracy may in practice result 'in a net increase in potential harm to the civilian population' by enabling attacks on targets located in urban and other densely populated areas that would not have been attacked with less accurate weaponry.⁷⁸

Moreover, the size of blast and fragmentation zones of certain weapons pose a problem in or near populated areas independently of accurate delivery. Human Rights Watch has, for example, accused Israel of violating the prohibition against indiscriminate attacks by firing '155 mm high explosive artillery munitions into densely populated areas of Gaza' – shells that 'inflict blast and fragmentation damage up to 300 meters from the point of impact', noting that the user's internal guidelines forbid targeting them within 350 metres of friendly troops.⁷⁹ Meanwhile the UN Fact Finding Mission on the 2009 Gaza conflict considered that: 'Mortars are area weapons. They kill or maim whoever is within the impact zone after

protection because of the potentially great (and increasing) distance between the place where targeting decisions are made, the launch point, and the target.

75 AP I, Arts. 51(4)(a) and (b).

76 H. Slim, above note 9, p. 53.

77 Françoise J. Hampson, 'Means and methods of warfare in the conflict in the Gulf', in P. J. Rowe (ed.), *The Gulf War 1990–91 in International and English Law*, Routledge, London, New York, 1993, pp. 90 and 104.

78 M. N. Schmitt, above note 63, p. 453.

79 Human Rights Watch (HRW), 'Letter to EU foreign ministers to address violations between Israel and Hamas', 16 March 2009, available at: <http://www.hrw.org/en/news/2009/03/16/letter-eu-foreign-ministers-address-violations-between-israel-and-hamas> (last visited 3 May 2011). On other occasions HRW has referred to the 'expected lethal radius' and 'expected casualty radius' of a M107 shell, and the 'concentrated blast radius' of a missile, used in or near a populated area. See HRW, *Indiscriminate fire: Palestinian rocket attacks on Israel and Israeli artillery shelling in the Gaza Strip*, 2007, p. 51, and HRW, *Precisely wrong: Gaza civilians killed by Israeli drone-launched missiles*, 2009, p. 3, both available at: <http://www.hrw.org/publications/reports?topic=667®ion=228> (last visited 22 February 2012).

detonation and they are incapable of distinguishing between combatants and civilians'.⁸⁰ This indicates growing recognition that blast and fragmentation effects are problematic in populated areas from the point of view of civilian protection, even if this concern has not always been consistently articulated in terms of IHL.⁸¹

Insufficient transparency and redress for victims

IHL does not prescribe steps that have to be taken or procedural safeguards that have to be in place to produce knowledge about the effects of explosive and other weapons on civilians. It does not expect users of force to publicize information about what they base their assessments on, and it does not shift the burden of proof away from those likely to suffer harm onto the proponents of the harmful activity. Instead, secrecy continues to surround the most important decisions affecting the protection of civilians from the effects of hostilities, leaving legal commentators to second-guess military decisions. Understandably, these commentators are at times 'wary of making judgments regarding military matters, knowing that [they] have insufficient information, and being used to being told exactly that by the military'.⁸²

It is in part due to this lack of transparency that civilian losses are often ignored, and that IHL has not proven a good basis for victims and survivors, their families, and their communities to obtain redress for harm done and consolidate respect for their rights.⁸³ For one thing, IHL contemplates compensation for harm only if the law has been violated (as explained above, something currently very difficult to ascertain in the majority of cases where civilians suffer harm from explosive violence) and it does not confer an individual right to reparation or other forms of redress.⁸⁴ In addition, in dealing with the consequences of civilian harm,

80 *Human Rights in Palestine and Other Occupied Arab Territories*, Report of the United Nations Fact Finding Mission on the Gaza Conflict, Human Rights Council, UN Doc. A/HRC/12/48, 15 September 2009, paras. 697–699. There is some ambiguity about whether concerns about 'area effect' refer to the blast and fragmentation zones of the explosion of a single munition, to the area potentially affected by explosive force (such as the footprint of a cluster munition), or to the 'circular error probable' of a weapon (a question of accuracy). See for example the 'Explanatory Memorandum' annexed to Report of Conference of Government Experts on the Use of Certain Conventional Weapons, Lugano, 28 January–26 February 1976, ICRC, Geneva, 1976, p. 204. See also, B'tselem, 'Stop mortar fire at populated areas in Gaza Strip', 23 March 2011, available at: http://www.btselem.org/english/gaza_strip/20110323_forbidden_mortar_fire_on_gaza.asp (last visited 3 May 2011).

81 See for example, HRW and Harvard Law School's International Human Rights Clinic, 'Use of explosive weapons in populated areas', 4 November 2011, available at: <http://www.hrw.org/news/2011/11/04/use-explosive-weapons-populated-areas> (last visited 20 December 2011).

82 H.E. Shamash, above note 65, p. 33. See also Gregory S. McNeal, 'The U.S. practice of collateral damage estimation and mitigation', 9 November 2011, available at: <http://ssrn.com/abstract=1819583> (last visited 20 December 2011). This recent study paper provides an empirically grounded descriptive account of how the US military implements its IHL obligation to mitigate and prevent harm to civilians. It is a welcome contribution to scholarly literature in that it aims to provide commentators with essential information for analysing US military practices hitherto 'shrouded in secrecy and largely inaccessible'.

83 See for example, Christopher Rogers, *Civilians in Armed Conflict: Civilian Harm and Conflict in Northwest Pakistan*, Campaign for Innocent Victims in Conflict (CIVIC), Washington, 2010.

84 'From the point of view of justice', the argument that an individual right to reparation would defy the capacity of states to ensure adequate reparation to victims 'is flawed, because its consequence is that the more widespread and massive the violation, the less right to reparation for the victims'. Cordula Droegge,

focus is on individual criminal responsibility, which is mostly concerned with the intentional (or reckless) infliction of harm. It would seem, therefore, that current legal debate diverts attention from underlying issues affecting civilian lives and livelihoods, and does not effectively prevent users from ‘externalizing’ the heavy costs of the use of explosive weapons in populated areas onto civilians without providing adequate avenues for redress.⁸⁵

The explosive violence framework

Hitherto, IHL implementation and debates within the discourse it generates have not proven conducive to critical and constructive debate about civilian suffering from the use of explosive weapons in populated areas. This is at least partly because the legal discourse itself acts as a barrier to discussion: an ‘absolutist and legalistic attitude to discussion of civilian suffering means that most international discussion of civilian protection is self-censored as non-negotiable’.⁸⁶ Efforts over the last decade to address the humanitarian consequences of explosive remnants of war,⁸⁷ anti-vehicle mines, and cluster munitions⁸⁸ starkly underlined the shortcomings of existing frameworks such as IHL for fostering critical debate about ways in which systematically to reduce civilian suffering in armed conflict from the use of weapons. In the context of cluster munitions, the notion of banning those weapons that cause unacceptable harm to civilians would become an important benchmark for the so-called Oslo process leading to the Convention on Cluster Munitions in 2008. This initiative emerged after enough states concluded that existing IHL rules were not sufficient, proceeding in a manner resembling the international campaign to ban anti-personnel mines more than a decade earlier. As the logical implications of such effects-based framings sank in for some of those following these developments, it would lead to new thinking.⁸⁹ In 2009, the British non-governmental organization (NGO) Landmine Action (now Action on Armed Violence) drew many of these ideas together into a report entitled *Explosive Violence: The Problem of Explosive Weapons*, which featured a foreword written by the UN’s Emergency Relief

‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’, in *Israel Law Review*, Vol. 40, No. 2, 2007, p. 354.

- 85 Michael W. Reisman, ‘The lessons of Qana’, in *Yale Journal of International Law*, Vol. 22, 1997, pp. 397–398. See also Eyal Benvenisti, ‘Human dignity in combat: the duty to spare enemy civilians’, in *Israel Law Review*, Vol. 39, No. 2, pp. 97–99.
- 86 H. Slim, above note 9, pp. 259 and 260: ‘Arguing on the basis of the law alone leads to a syllogistic position that allows for no discussion and no real reasoning.’ Citing humanitarian laws in an absolute fashion suggests ‘that there is no argument to be had on the subject and no reasoning to be made’.
- 87 Louis Maresca, ‘A new protocol on explosive remnants of war: the history and negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons’, in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 815–835.
- 88 John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions was Won*, UNIDIR, Geneva, 2009.
- 89 Brian Rappert and Richard Moyes, ‘The prohibition of cluster munitions: setting international precedents for defining inhumanity’, in *Nonproliferation Review*, Vol. 16, No. 2, 2009, pp. 237–256.

Coordinator and proposed explosive weapons as a distinct technological and ethical categorization or framework.⁹⁰

Although there were few signs before 2009 that explosive weapons were explicitly treated as a distinct category by researchers or policy-makers, many humanitarian organizations had long been aware of data indicating that blast and fragmentation injuries cause substantial and ongoing human suffering and impose severe developmental costs.⁹¹ A retrospective cohort study of events involving armed violence, conducted by random selection over a five-year period and published in 2005, showed that ‘a common phenomenon of people using explosives against civilians as a means to express their grievances could be highlighted’. However, the authors also noted that: ‘To our knowledge, this has not been expressed or examined as a discrete policy issue or in public health terms’.⁹² Interest in measuring and monitoring aspects of armed violence was growing, especially regarding civilian casualties in conflicts in Iraq and Afghanistan,⁹³ and would reveal explosive weapons such as IEDs and air-delivered munitions as significant causes of death, injury, and infrastructural damage.⁹⁴ But such studies often failed to make a conceptual connection between the characteristics of harm and the use of weapons that produce blast and fragmentation effects. Drawing on a dataset based on English-language media reports of incidents of explosive violence worldwide from April to September 2006, collected in collaboration with the global health charity Medact, Landmine Action’s report offered five observations grounded in evidence about characteristics of explosive violence treated as a coherent phenomenon:

- within a short sample period, explosive violence was geographically widespread, but with intensive incidence in a few contexts;
- the incidents of explosive violence generally produced multiple deaths and injuries;
- explosive violence killed and injured significant numbers of people who were not combatants;

90 R. Moyes, above note 6.

91 In addition to immediate death and injury, researchers also came to examine the developmental impacts of armed violence, including explosive violence, on communities. In recent years, the 2006 Geneva Declaration on Armed Violence and Development has formed one framework for integrating evidence and policy, with the related 2010 Oslo Commitments emphasizing measurability as an important component of achieving armed violence reductions in differing contexts. See Geneva Declaration on Armed Violence and Development, 7 June 2006, available at: www.genevadeclaration.org (last visited 3 May 2011); Oslo Commitments on Armed Violence: Achieving the Millennium Development Goals, 12 May 2010, available at: <http://www.osloconferencearmedviolence.no> (last visited 3 May 2011).

92 Nathan Taback and Robin M. Coupland, ‘Towards collation and modelling of the global cost of armed violence on civilians’, in *Medicine, Conflict and Survival*, Vol. 21, No. 1, 2005, p. 25.

93 See Kelly M. Greenhill, ‘Counting the cost: the politics of numbers in armed conflict’, in Peter Andreas and Kelly M. Greenhill (eds), *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Cornell University Press, Ithaca, NY, 2010, pp. 127–158.

94 See, for instance, Madelyn Hsiao-Rei Hicks *et al.*, ‘The weapons that kill civilians: deaths of children and noncombatants in Iraq, 2003–2008’, in *New England Journal of Medicine*, Vol. 360, No. 16, 16 April 2009, pp. 1585–1588.

- attacks with explosive weapons in populated areas were linked to elevated levels of civilian harm; and
- in attacks in populated areas, civilians made up the great majority of victims.⁹⁵

Landmine Action's report argued that, although there has been no categorical discussion of explosive weapons in international public discourse, policy, or law, states already treat explosive weapons as a distinct category in their own common usage and practice. States tend to limit the use of explosive weapons to the 'special circumstances' of armed conflict, often occurring outside their territory among people to whom they are less accountable than their own population. Conversely, states generally abstain from using explosive weapons for purposes of domestic law enforcement and they claim a monopoly over their legal control, excluding them from private ownership.⁹⁶

The explosive violence framework as constructed in Landmine Action's report provides a basis on which critically to question prevailing assumptions about the acceptability of explosive weapons use in populated areas. Why, for instance, do governments not seem to consider their actions accountable – or as accountable – when it comes to protecting the lives of civilians from explosive violence in societies other than their own? In a globalizing, urbanizing age of insurgency and 'war amongst the people'⁹⁷ it is an important question, and a logical extension of efforts to protect civilians from the hazards of cluster munitions and anti-personnel mines. For that matter, the CCW's protocol on explosive remnants of war⁹⁸ is an existing treaty that goes a long way towards recognizing explosive weapons as a category in need of special controls: why accept special responsibilities regarding the after-effects of explosive weapons but not also recognize the categorical problems with this technology at time of use? Unlike weapons such as firearms, explosive weapons are indiscriminate within their zone of effect, both spatially and temporally, which means that they are prone to impacts on civilians both across the immediate environment and in the longer term if used in populated areas.

Landmine Action's report suggested that several types of effort for building the agenda on explosive weapons present themselves. The first is to build the debate – to raise awareness and increase acceptance of basic concepts such as explosive weapons and populated areas, and to widen recognition that the use of the former in the latter represents a distinct humanitarian and ethical problem in policy discourse. A second step is to build transparency around the use of explosive force in populated areas through better data collection and analysis, not only by NGOs and international organizations but also by states themselves. (It is, after all, tendentious for these users of explosive weapons to argue that they are protecting civilians if they make no effort to demonstrate their claims based on facts.) Historically, such evidence was necessary to 'shift the burden of proof' of acceptability on to users, and for new norms on landmines, explosive remnants of war, and cluster munitions to

95 For a description of the methodology for this study, see R. Moyes, above note 6, pp. 70–71.

96 *Ibid.*, pp. 10–12. As noted above, this monopoly is increasingly challenged by non-state actors.

97 R. Smith, above note 32, p. xiii.

98 2003 CCW Protocol V.

emerge. Third, accountability could be enhanced if states were to publish policy statements regarding when the use of explosive weapons is acceptable, including in populated areas, and whether or how this relates to accountability for such use. Fourth, states in particular should recognize and act on their responsibilities to the victims of explosive weapons, in the same way as they have already accepted similar obligations through treaties such as the CCW's 2003 Protocol V, the 1997 Anti-Personnel Mine Ban Convention, and the 2008 Convention on Cluster Munitions.

Building an action-oriented research and policy agenda on the use of explosive weapons in populated areas

The explosive violence framework could provide 'a powerful point of engagement for organisations and institutions concerned with civilian protection'⁹⁹ and others. A growing number of actors have already begun to engage with the problems that explosive weapons use poses to humanitarian protection, human rights, and development.

Progress to date in building the discourse and agenda-setting

The United Nations

As mentioned in the introduction, the UN Secretary-General has repeatedly expressed concern about the humanitarian impact of explosive weapons use in densely populated areas. His concerns appear to have resonated strongly within the family of UN agencies and institutions in the areas of development promotion, humanitarian co-ordination, staff security, refugee and child protection, mine action, and disarmament, since explosive violence is increasingly apparent as a theme in statements and items for consideration in working-level policy processes.¹⁰⁰

Early steps to raise awareness were facilitated in part by a project entitled 'Discourse on Explosive Weapons' (DEW) at the UN Institute for Disarmament Research (UNIDIR), which commenced in early 2010. The DEW project organized several symposia, bringing together practitioners and policy-makers in order to stimulate discussions on explosive weapons issues and explore ways of addressing the humanitarian challenges involved. UNIDIR published several briefing papers and summary reports, and disseminated explosive-weapons-related information via a dedicated website.¹⁰¹

99 R. Moyes, above note 6, p. 10.

100 See, for instance, *Deputy Secretary-General, at Meeting on Cluster Munitions Treaty, Seeks Action on Comparable Issues: Anti-Vehicle Mines, Explosives in Populated Areas*, UN Department for Public Information, UN Doc. DSG/ SM/531 DC/3266, 9 November 2010. Explosive weapons issues have been raised during 2010 and 2011 in the UN inter-agency process on mine action, in the context of work on UN staff safety and security from IEDs, and in April 2011 in the Global Protection Cluster.

101 All documents produced by the DEW project are available at: <http://explosiveweapons.info/> and <http://www.unidir.org/>. The DEW project, together with others, also disseminates news about explosive weapons

Alongside this, the UN Office for the Coordination of Humanitarian Affairs (OCHA) played an important role in raising awareness of the impact of explosive weapons on civilians in armed conflict. The head of OCHA, the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, repeatedly emphasized the humanitarian challenge posed by the use of explosive weapons in populated areas, for example in a statement at the Security Council's open debate on the protection of civilians in July 2010,¹⁰² and, more recently, in statements calling for the protection of civilians in Libya¹⁰³ and Côte d'Ivoire.¹⁰⁴ OCHA also co-hosted two explosive-weapons-focused events in September 2010,¹⁰⁵ raised explosive-weapons-related concerns in its briefings to the Security Council's informal expert group on the protection of civilians, and supported inclusion of the issue in the Secretary-General's reports on civilian protection.

In his latest report on the protection of civilians in armed conflict, the Secretary-General made specific recommendations, calling on

Member States, United Nations actors and international and non-governmental organizations to consider the issue of explosive weapons closely, including by supporting more systematic data collection and analysis of the human costs of their use. This is essential to deepening the understanding of the humanitarian impact of such weapons and to informing the development of policy and practice that would strengthen the implementation of international humanitarian and human rights law . . .

I would also urge increased cooperation by Member States, both in terms of collecting and making available to the United Nations and other relevant actors information on civilian harm resulting from the use of explosive weapons and in terms of issuing policy statements that outline the conditions under which explosive weapons might be used in populated areas.¹⁰⁶

incidents causing civilian harm via the twitter feed <http://twitter.com/explosiviolence> (all last visited 3 May 2011).

102 UN Security Council, sixty-fifth year, 6354th Meeting, Wednesday, 7 July 2010, 10 a.m., New York, UN Doc. S/PV.6354, p. 6.

103 UN OCHA, 'United Nations humanitarian chief highlights humanitarian consequences of continued fighting in Libya', New York, 17 March 2011, available at: <http://reliefweb.int/node/392448/pdf> (last visited 3 May 2011). In May 2011, with reference to fighting in the Libyan town of Misrata, the UN's Emergency Relief Coordinator stated that 'Explosive weapons have an immediate and indiscriminate impact, killing and injuring those caught in the blast radius, including civilians and the damage to buildings and infrastructure hampers longer term reconstruction and development. I reiterate my call on parties to conflict to refrain from the use of these weapons in densely populated areas.' 'United Nations Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Amos: Briefing to the Security Council on Protection of Civilians, New York, 10 May 2011', available at: <http://reliefweb.int/node/400939> (last visited 13 May 2011).

104 UN OCHA, 'United Nations Humanitarian Chief alarmed at Cote D'Ivoire violence', New York, 18 March 2011, available at: <http://reliefweb.int/node/392465/pdf> (last visited 3 May 2011).

105 On 14 September 2010, OCHA, together with the Permanent Mission of Austria to the United Nations in New York, co-hosted a panel discussion on the humanitarian impacts of explosive weapons, and on 15 September 2010, OCHA co-organized a symposium on explosive weapons together with the DEW project. More information on the latter event is available at: <http://explosiveweapons.info/events0/explosive-weapons-use-in-populated-areas-a-pressing-humanitarian-concern/> (last visited 3 May 2011).

106 *Report of the Secretary-General*, 2011, above note 5, paras. 50–51.

These recommendations offer a broad mandate for the international community to orient itself toward confronting the effects of explosive weapons on civilians, initially by developing a more detailed picture of the humanitarian problem and policies and practices around the use of explosive weapons. It also suggests opportunities for engagement, in particular by states, to clarify how they regard their obligations to protect civilians, and prompt thinking on steps to enhance the level of civilian protection in practical terms.

The International Committee of the Red Cross

An important strand of ICRC humanitarian work in recent decades has been to focus attention on the human costs of the wounding effects of weapons of various kinds. Evidence of the humanitarian problem this poses can be seen in data collected by the ICRC through its field hospitals.¹⁰⁷ An ICRC study on the effects of violence on the provision of health care, published in mid-2011, explicitly identifies explosive weapons as one of the principal forms of violence affecting hospitals, and other healthcare facilities, medical vehicles, healthcare personnel, and the people in their care.¹⁰⁸

Despite this, the ICRC has tended to frame the humanitarian problems posed by use of explosive weapons primarily in terms of international rules governing the conduct of hostilities, especially the rules of distinction and proportionality, and it often uses legalistic terminology in its humanitarian communication. Of late, however, the ICRC appears to be lending greater emphasis to the specific problems that explosive weapons pose for civilians in that communication. Senior ICRC staff publicly stated in 2010, for instance, that ‘Waging battle in densely populated urban areas, sometimes with highly explosive weapons’ was an example of the constant evolution in the means and methods of warfare contributing to the suffering of civilians in today’s conflicts.¹⁰⁹ The ICRC president noted that ‘military operations conducted in densely populated urban areas, often using explosive force... can have devastating humanitarian consequences for civilian populations in such environments’,¹¹⁰ later adding that it is very difficult to respect the rules on distinction and proportionality in such situations.¹¹¹

107 R. Coupland and H. Samnegaard, above note 17. For more information about the particular wounding patterns caused by such weapons, see ICRC, *Wound Ballistics: An Introduction for Health, Legal, Forensic, Military and Law Enforcement Professionals*, ICRC, Geneva, 2008.

108 ICRC, *Health Care in Danger: a Sixteen-country Study*, 2011, available at: <http://www.icrc.org/eng/resources/documents/report/hcid-report-2011-08-10.htm> (last visited 20 December 2011).

109 See the statement by Yves Daccord, director-general of the ICRC, in UN Security Council, sixty-fifth year, 6427th Meeting, Monday, 22 November 2010, 10 a.m., New York, UN Doc. S/PV.6427, p. 10.

110 ‘Sixty years of the Geneva Conventions and the decades ahead’, statement by Jakob Kellenberger, President of the ICRC, 9 November 2009, available at: <http://www.icrc.org/eng/resources/documents/statement/geneva-convention-statement-091109.htm> (last visited 3 May 2011). See also ‘Geneva Conventions still going strong at 60’, interview with Knut Dörmann, head of the ICRC’s legal division, 7 August 2009, available at: www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-convention-interview-120809 (last visited 3 May 2011).

111 Pierre Ruetschi, ‘Jakob Kellenberger “Combien de morts faudra-t-il encore à Gaza!”’, in *24 heures*, 2 February 2009, available at: <http://www.24heures.ch/actu/monde/jakob-kellenberger-combien-morts-faudra-gaza-2009-02-01> (last visited 4 May 2011).

The ICRC further elaborated on the problem in a report on IHL and the challenges of contemporary armed conflicts prepared for the 31st International Conference of the Red Cross and Red Crescent. In that report, the ICRC took the position that: ‘The use of explosive weapons in densely populated areas exposes the civilian population and infrastructure to heightened – and even extreme – risks of incidental or indiscriminate death, injury or destruction’. Moreover, ‘due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas’.¹¹²

Interested states

Although there was little echo from states in the 2009 Security Council open debate on the Secretary-General’s concerns about the impacts of explosive weapons use on civilians,¹¹³ there was some change discernible during 2010. In September, together with OCHA, Austria hosted a panel discussion on humanitarian impacts of explosive weapons in New York. In the November 2010 Security Council open debate among states, an increase was noticed in statements relating to the humanitarian problems posed by the use of explosive weapons in the vicinity of civilians. A number of representatives – including those from Australia, Costa Rica, Mexico, Norway, Slovenia, and the European Union – shared their concerns about the threat posed to civilians by the use of explosive weapons in populated areas and the humanitarian consequences of such use, and some supported the Secretary-General’s recommendations quoted earlier.¹¹⁴ Switzerland considered that the ‘use of certain explosive weapons in densely populated areas is clearly a major source of suffering for civilians in situations of armed conflict’ and said that the issue should be considered further, ‘especially with a view to better implementing international humanitarian law’.¹¹⁵ Mexico condemned ‘the use of explosives in areas where civilian populations are concentrated because of their indiscriminate effects and the attendant risks’ and expressed the hope that the Security Council ‘will in the future adopt more forceful measures in response to the humanitarian impact of the use of explosives in densely populated areas’.¹¹⁶ At subsequent Security Council debates on the protection of civilians, additional states voiced concern about the humanitarian

112 *International humanitarian law and the challenges of contemporary armed conflicts*, report prepared by ICRC, Geneva, October 2011, for 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November–1 December 2011, Doc. 31IC/11/5.1.2, pp. 40–42.

113 UN Security Council, sixty-fourth year, 6151st Meeting, Friday 26 June 2009, 10 a.m., New York, UN Doc. S/PV.6151, 26 June 2009 and UN Doc. S/PV.6151 (Resumption 1). Several government representatives deplored the humanitarian impacts of improvised explosive devices detonated in high-density civilian areas, the use of cluster munitions or air bombardments, and the impact of landmines and explosive remnants of war, but only one state, Syria, used the term ‘explosive weapons’.

114 See the statements of Australia, Austria, Costa Rica (on behalf of the Human Security Network), Mexico, Norway, Slovenia, Switzerland, and the European Union, UN Doc. S/PV.6427 and UN Doc. S/PV.6427 (Resumption 1), above note 109.

115 *Ibid.*, p. 31.

116 *Ibid.*, pp. 23–24.

impacts of explosive violence. In November 2011, Norway invited others to hold discussions on this issue ahead of the next debate.¹¹⁷

Civil society

Landmine Action's 2009 Explosive Violence report provided both a conceptual basis for treating explosive weapons as a category and some initial research into the pattern of harm that such weapons cause in populated areas. Since then, a number of other NGOs have begun to undertake work to increase knowledge about how explosive violence affects particularly vulnerable groups. Concerned about children being killed or injured by explosive weapons, or dying because of damage caused to health services and infrastructure, Save the Children UK published a study in early 2011 that analysed impacts on children of the use of explosive weapons in populated areas in a number of contexts, including Afghanistan, Iraq, the Occupied Palestinian Territory, Somalia, and Yemen; and a detailed policy analysis was published by the Dutch NGO, IKV Pax Christi.¹¹⁸ In March 2011, Action on Armed Violence published a study of 100 incidents of explosive weapons use around civilians, which illustrated and analysed patterns of harm.¹¹⁹ Meanwhile, explosive weapons have begun to be identified as an analytical category in studies of civilian casualties such as those of the British-based project Iraq Body Count.

This has helped to prompt recognition among a broader group of NGOs about the particular humanitarian problems that explosive weapons appear to cause. In March 2011, a group of NGOs met in Geneva to form a coalition focused on this theme. The International Network on Explosive Weapons (INEW) was founded by Action on Armed Violence, Handicap International, Human Rights Watch, Medact, Norwegian People's Aid, Oxfam International, IKV Pax Christi, and Save the Children UK. Many of these civil society actors have worked together in the past on explosive-weapons-related problems including landmines, cluster munitions, and explosive remnants of war. INEW calls for 'immediate action to prevent human suffering from the use of explosive weapons in populated areas'.¹²⁰

The outline above indicates that investigating and tackling the effects of explosive weapons on civilians is becoming a more urgent concern among a broad range of actors in the international community. Building the debate is already well underway. Significantly, the actors with an interest in the humanitarian problem of explosive weapons do not appear limited to one particular stream of policy work, something that may reflect their recognition of the transversal nature of this problem. However, it also underlines the need for a coherent research and policy

117 See UN Docs. S/PV.6531 and S/PV.6531 (Resumption 1) of 10 May 2011, and UN Docs. S/PV.6650 and S/PV.6650 (Resumption 1) of 9 November 2011.

118 Kerry Smith, *Devastating Impact: Explosive Weapons and Children*, Save the Children UK, London, 2011, available at: <http://www.savethechildren.org.uk/resources/online-library/devastating-impact-explosive-weapons-and-children> (last visited 24 February 2011); R. Boer *et al.*, above note 40.

119 E. Cann and K. Harrison, above note 22.

120 Information on INEW's call, membership, and publications is available at: <http://www.inew.org/> (last visited 20 December 2011).

agenda to build upon recognition of the humanitarian problem and generate further direction and momentum toward effective ways in which to respond. The explosive violence framework suggests several next steps. It is to some ideas about an agenda, and identifying some of its necessary elements that we now turn.

Building a clearer picture of the human costs

The central proposition of the explosive violence framework is that elevated levels of civilian harm results from the use of explosive weapons in populated areas, and that these elevated levels of harm are prevalent across a range of spatial and temporal contexts. Although evidence from a number of different studies appears to support this proposition, there is a need for further research into the pattern of harm in order to deepen understanding and inform the policy debate, in line with the UN Secretary-General's recommendation, supported by a number of states.

More case studies into the pattern of harm of explosive weapons use in particular situations would be helpful, both individually and in aggregate, in illustrating the actual effects of the use of explosive weapons.¹²¹ Useful data can also be gleaned from other sources, such as Human Rights Watch assessments of the impact of recent hostilities on civilians in Southern Lebanon, Georgia–Russia, and Somalia, although such reports until recently did not use the terminology of explosive weapons.¹²² Being able readily to compare the effects of explosive weapons use using more common criteria, especially the manner in which data is categorized, would make it easier to test assumptions and scrutinize user claims.¹²³

Analysis of large relevant datasets for trend information about explosive weapons use would help in mapping the pattern of harm. To this end, tools developed by Coupland and Taback¹²⁴ to model the global cost of armed violence on civilians statistically have already been used to a limited initial extent in the explosive violence context, based on collation, coding, and analysis of media reporting.¹²⁵ Meanwhile, several projects have sought to collect casualty data for Iraq since the 2003 invasion, and to analyse these datasets for trends, including deaths and injury from use of explosive weapons, according to type of perpetrator. In Afghanistan, the International Security Assistance Force (ISAF), the UN Assistance Mission to Afghanistan (UNAMA), and others have each collected their own civilian casualty datasets, including various weapons-related categorizations (air strike, IED, etc.). However, until portions were released recently to

121 AOV has already produced research of this kind. See *ibid.*, and R. Moyes, above note 6.

122 See, for example, HRW, 'Somalia: stop war crimes in Mogadishu: United Nations should establish international commission of inquiry', 14 February 2011, available at: <http://www.hrw.org/en/news/2011/02/14/somalia-stop-war-crimes-mogadishu> (last visited 4 May 2011). See also HRW and Harvard Law School's International Human Rights Clinic, above note 81.

123 AOV has transparently outlined the assumptions about data and meaning of the terms it uses, including in its bi-weekly reports on explosive violence; see above note 15.

124 N. Taback and R. Coupland, above note 92, pp. 19–27.

125 R. Moyes, above note 6.

the journal *Science*, these datasets were not available in the public domain.¹²⁶ This highlights two challenges associated with large datasets of civilian casualties. First, for a variety of reasons, it can be difficult to obtain access to datasets.¹²⁷ Second, the way in which data is categorized in these datasets is a significant factor determining the explosive-weapons-relevant trends (if any) that can be observed. If these political and methodological challenges can be overcome, significant opportunity exists for systematic investigation into establishing whether there is a pattern of harm from explosive weapons use across different geographical contexts.

Such data could also be of value in developing improved technical analysis of which explosive weapons cause what kind of harm to civilians, and thus point toward policy options to prevent such harm. Many militaries have, since World War II, developed sophisticated techniques to improve the technical characteristics of their explosive munitions, to increase their lethality using insights from wound ballistics and other disciplines, and to enhance protection for friendly combatants on the battlefield from them (for instance, ‘danger close’ buffer zones). In contrast, a systematic understanding of the gamut of effects on civilians of explosive weapons in populated areas appears to lag behind, as shown in the course of recent international efforts to address the risks of cluster munitions to civilians: ‘major military nations have basic deficiencies in their knowledge about the humanitarian consequences associated with their use of force’.¹²⁸ Questions to raise include: Are some explosive weapons worse in enclosed or semi-enclosed urban environments than others, for instance, in terms of blast or fragmentation risk to civilians in the vicinity? How do explosive weapons vary in their impact on physical infrastructure essential to civilian wellbeing, such as water and sanitation networks? How do concentrations of structures such as buildings modify the effect radiuses of different explosive weapons? Findings of such technical research could inform operational measures to enhance civilian protection, and user policies.

Critically examining norms governing explosive weapons policies and practices

Research into the pattern of civilian harm, and the technological characteristics and contexts of use associated with that harm can be usefully combined with research into the social and legal norms governing explosive weapons policies and practices. Work on the latter could, for example, contribute to articulating the hitherto implicit transition between situations characterized by a strong presumption against the use of explosive weapons by states (law enforcement) to situations marked by general acceptability of such use in the vicinity of civilians (armed conflict).

126 John Bohannon, ‘Counting the Dead in Afghanistan’, in *Science*, Vol. 331, No. 6022, 11 March 2011, pp. 1256–1260.

127 American Civil Liberties Union (ACLU), *Request under Freedom of Information Act*, 13 January 2010, available at: <http://www.aclu.org/national-security/predator-drone-foia-request> (last visited 4 May 2011).

128 Brian Rappert and Richard Moyes, ‘Enhancing the protection of civilians from armed conflict: precautionary lessons’, in *Medicine, Conflict and Survival*, Vol. 26, No. 1, January–March 2010, p. 42.

Future research in this area could involve a survey of national and international policies and practices governing the production, stockpiling, transfer, and use of explosive weapons, including an analysis of laws and policies determining who may use explosive weapons against whom, among whom, where, and for what purpose. This could also include an examination of protective standards applicable to activities involving explosive weapons, and the responsibility assumed by users towards persons put at risk and those harmed by such activities.¹²⁹

States, in particular, should heed the UN Secretary-General's call and issue policy statements about what use of explosive weapons in populated areas they consider acceptable. Such information would improve transparency about targeting processes that have escaped scrutiny under IHL. It would also increase user accountability towards domestic publics and towards victims of explosive violence. Revealing that states accept different levels of risk to civilians depending on the context of use would help to shift the burden of proof onto users to justify when, why, and under what conditions explosive weapons may be employed in populated areas. In combination with evidence of a pattern of civilian harm from the use of explosive weapons in populated areas, this could contribute to 'de-normalizing' recourse to this practice in situations of armed conflict and persuade users to change their policies and practices associated with elevated civilian harm.

Conclusion

In this article we have argued that, historically, the use of explosive weapons in populated areas has been a significant source of harm to civilians during armed conflict, and continues to be so today despite international rules devised to protect civilians from the effects of hostilities. A consistent pattern of civilian harm appears to manifest itself when explosive weapons are used in populated areas. However, at least until recently, states have not acknowledged that there might be a humanitarian problem beyond 'accidental' or atypical incidents of harm from explosive violence, or particular worst culprits such as cluster munitions. Yet many of the arguments used to justify controls over perceived worst culprits also apply to other explosive weapons, which in practice can cause equivalent harm when used within concentrations of civilians. Indeed, some of those states opposing, for instance, international bans on anti-personnel mines or cluster munitions insisted that restrictions on these weapons would compel them to deploy 'worse' weapons such as heavy artillery or rockets out of military necessity. But such threats prompt a stark question: if it is unacceptable to use one kind of explosive weapon, why would it be acceptable to use another if the harm to civilians is similar or worse?

Of course, reconciling the brutality of armed conflict with civilized norms such as protecting civilians is a conundrum for which humanitarian law provides principles that are at times in tension with one another. Often, it seems, military necessity trumps concern for the protection of civilians. In this regard, the explosive

129 UNIDIR's 'Norms on Explosive Weapons' (NEW) project is carrying out research in this area.

violence framework, and considering explosive weapons as a category in particular, provides one way to formulate questions and collect relevant evidence in order critically to examine the claims made by explosive weapons users of all kinds about their commitment to protect civilians, to stigmatize the use of explosive weapons in populated areas, and to hold users to greater account for the harm they inflict on civilian populations. It invites a humanitarian discourse that welcomes evidence, rather than a discourse favouring the status quo based on elastic notions of military necessity and proportionality that lack transparency.

Tools for research and policy analysis such as the explosive violence framework are especially important when states claim civilian protection to rationalize their explosive weapons use, as in contemporary conflicts in Afghanistan, Libya, and Côte d'Ivoire. It is striking that, in the context of the last, in 2011, the UN Security Council explicitly held up the use of 'heavy weapons' as a threat to the civilian population that should be prevented with all necessary means. Without defining or even describing this threat, the Security Council authorized military intervention that foresaw the use of explosive weapons in populated areas that could pose equally acute hazards to civilians.¹³⁰ This underlines a risk that, without informed understanding of the effects of explosive weapons as a category and in the absence of rigorous examination of user claims about these weapons (such as accuracy), the discourse remains a circular one in which laws are perceived as rationalization rather than restraint. Not only will this breed cynicism about the value of legal rules on the means and methods of warfare among states, but it undermines efforts to stigmatize use of explosive weapons in populated areas by non-state actors at a time when the former are losing their monopoly on technology of explosive force to the latter.

On the other hand, a discourse based on evidence about the effects of explosive weapons and norms around their use or non-use would help to clarify which explosive weapons cause a pattern of elevated harm to civilians when used in populated areas, and hopefully lead to meaningful efforts to prevent their use in those contexts by anyone. Whether enhanced prevention is best achieved through more international treaty-making or other forms of normative strengthening remains to be seen, especially as current research and advocacy on the use of explosive weapons in populated areas is at a formative stage. Nevertheless, greater evidence and more sophisticated argumentation about the effects of explosive weapons on civilians will increase pressure on users of explosive weapons to justify their policies and their actions. History shows that such critical examination is usually necessary in order to call into question general attitudes about means and methods of warfare, and to generate the political and diplomatic momentum necessary to improve humanitarian standards for civilian protection in armed conflict.

¹³⁰ *The situation in Côte d'Ivoire*, UN Security Council resolution S/RES/1975 of 30 March 2011, operative para. 6. See also African Court on Human and Peoples' Rights, *In the Matter of African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order for Provisional Measures, 25 March 2011, para. 2.

COMMENTS AND OPINIONS

The European Court of Human Rights' *Al-Jedda* judgment: the oversight of international humanitarian law

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Abstract

The European Court of Human Rights' judgment in the Al-Jedda case dealt with the lawfulness of UK detention practice in Iraq under the European Convention on Human Rights. The Court's opinion could, however, be read as having broader implications for the ability of states parties to that treaty to conduct detention operations in situations of armed conflict. This article analyzes what the Court did – and did not say – about the application of international humanitarian law.

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The European Court of Human Rights (ECtHR) handed down two long-awaited and momentous judgments against the United Kingdom in July 2011, related to the conduct of UK forces during the occupation and armed conflict in Iraq.¹ The first decision, in the *Al-Skeini* case,² essentially clarified and revised the Court's

* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

position on the extraterritorial application of the European Convention on Human Rights (ECHR) and attracted the most attention. The second case, *Al-Jedda*,³ received less attention even though its legal and practical consequences are just as significant. The purpose of this article is to outline some of the ramifications of the *Al-Jedda* case that have not been picked up in other commentary, in particular its implications for detention operations carried out by ECHR member states abroad. As will be argued, the Court’s approach to and interpretation of international humanitarian (IHL) law do not comport with the spirit or letter of this body of rules.

The facts of the case

The case was lodged by a dual Iraqi/British national, Mr. Hilal Abdul-Razzaq Ali Al-Jedda, who had been interned for imperative reasons of security by UK forces at the Sha’ibah Divisional Temporary Detention Facility in Basrah City between October 2004 and December 2007. He was believed by the British authorities to have been:

personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces.⁴

Al-Jedda’s internment was subject to a review process that was conducted by UK forces and later involved Iraqi representatives as well. The Court’s description of the review process is provided below:

1. The applicant’s internment was initially authorised by the senior officer in the detention facility. Reviews were conducted seven days and twenty-eight days later by the Divisional Internment Review Committee (‘the DIRC’). This comprised the senior officer in the detention facility and Army legal and military personnel. Owing to the sensitivity of the intelligence material upon which the applicant’s arrest and detention had been based, only two members of the DIRC were permitted to examine it. Their recommendations were passed to the Commander of the Coalition’s Multinational Division (South East) (‘the Commander’), who himself examined the intelligence file on the applicant and took the decision to continue the internment. Between January and

1 Both cases were decided by the Grand Chamber of the ECtHR and were almost unanimous.

2 ECtHR, *Al-Skeini v. The United Kingdom*, App. No. 55721/07, 7 July 2011.

3 ECtHR, *Al-Jedda v. The United Kingdom*, App. No. 27021/08, 7 July 2011.

4 *Al-Jedda*, above note 3, para. 11.

July 2005 a monthly review was carried out by the Commander, on the basis of the recommendations of the DIRC. Between July 2005 and December 2007 the decision to intern was taken by the DIRC itself, which during this period included as members the Commander together with members of the legal, intelligence and other staffs. There was no procedure for disclosure of evidence nor for an oral hearing, but representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for consideration. The two Commanders who authorised the applicant's internment in 2005 and 2006 gave evidence to the domestic courts that there was a substantial weight of intelligence material indicating that there were reasonable grounds for suspecting the applicant of the matters alleged against him.

2. When the applicant had been detained 18 months, the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the Multi-National Force, the Iraqi Interim Government and the Ambassador for the United Kingdom. It met once and thereafter delegated powers to a Joint Detention Review Committee, which comprised Iraqi representatives and officers from the Multi-National Force.⁵

Al-Jedda was released from internment on December 30, 2007. He lost an appeal against an order depriving him of British citizenship in 2009. The Special Immigrations Appeal Commission held – for reasons set out in detail in a closed judgment – that on the balance of probabilities the Secretary of State [for Defence] had proved that Al-Jedda had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad.⁶ Al-Jedda did not appeal against that judgment.

The legal proceedings and the Grand Chamber's decision

Al-Jedda's complaint before the ECtHR alleged that his internment by UK forces in Iraq was in breach of Article 5(1) of the European Convention on Human Rights. The relevant paragraph guarantees the right to liberty and security of person, and exhaustively lists six permitted reasons, based on which a deprivation of liberty may lawfully occur.⁷ Needless to say, detention, or internment for imperative reasons of

5 *Ibid.*, paras. 12 and 13.

6 *Ibid.*, para. 15.

7 Article 5(1) of the ECHR provides that: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

security, a quintessentially wartime ground for detention, is not among them. It should be noted that Al-Jedda did not complain of a violation of Article 5(4) of the European Convention concerning the lack of judicial review of the detention, as proceedings on this issue were still pending before UK courts at the time his application was lodged.

The domestic proceedings will not be mentioned here except to note that, for different reasons, the three courts that examined the case, ending with the House of Lords, ruled in the Government’s favour. In its submissions before the ECtHR, the UK posited two arguments: first, that the internment was attributable to the United Nations and not to the United Kingdom, and that Al-Jedda was therefore not within UK jurisdiction under Article 1 of the European Convention; second, and in the alternative, the Government argued that Al-Jedda’s internment was carried out pursuant to United Nations Security Council Resolution 1546, which created an obligation on the UK to detain him and which, pursuant to Article 103 of the United Nations Charter, overrode obligations under the European Convention on Human Rights.⁸

The first contention was rejected by the ECtHR, as it had been by the House of Lords before it. The Court determined that Al-Jedda’s detention could not be attributable to the United Nations after, *inter alia*, analysing relevant UN Security Council resolutions that authorized the multinational force of which the UK was a part. The Court considered that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that Al-Jedda’s detention was therefore not attributable to the United Nations.⁹

The Government’s second argument was essentially that the relevant UN Security Council resolutions authorized the Multinational Force to take ‘all necessary measures’ to contribute to the maintenance of security and stability in Iraq, and that such measures comprised the use of preventive detention ‘where necessary for imperative reasons of security’. The wording on detention was not included in UN Security Council Resolution 1546 itself,¹⁰ but was provided for in letters exchanged between the then Iraqi Prime Minister and the then US Secretary of State that were annexed to the resolution and were believed to constitute its integral part. In the Government’s view, the UK’s obligations under Article 5 of the European Convention were displaced by the legal regime established by Resolution 1546 owing to the operation of Articles 25 and 103 of the UN Charter. Pursuant to the latter, states’ obligations under the Charter prevail over their obligations under any other international agreement in the event of a conflict. The Government argued, based on practice and prevailing international law doctrine, that the

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’

8 *Al-Jedda*, above note 3, para. 60.

9 *Ibid.*, para. 84.

10 UNSC Resolution, UN Doc. S/RES/1546 (2004), 8 June 2004.

language of Article 103 cannot be limited to Security Council resolutions *obliging* states to act in a particular way, but also extends to decisions *authorizing* them to do so (as Resolution 1546 and the appended letters had done).

The ECtHR did not explicitly opine on this issue, but addressed it indirectly by positing that the ‘key question’ was ‘whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment’.¹¹ The Court then adopted an interpretive ‘presumption’ that the UN Security Council does not intend to impose ‘any obligation’ on member states to breach fundamental human rights, and that, in the event of ambiguity in the text of a resolution, the Court must choose the interpretation most in harmony with the European Convention.¹² The Court added that, in light of the UN’s role in promoting and encouraging respect for human rights, it is to be expected that ‘clear and explicit language would be used were the Security Council to intend States to take particular measures that would conflict with their obligations under human rights law’. The Court concluded that, owing to the ambiguity of Resolution 1546 (it rejected the legal significance of the appended letters mentioned above),¹³ it could not be held that the Security Council intended to oblige the Multinational Force to resort to internment in breach of international human rights instruments, including the European Convention.

The most relevant part of the *Al-Jedda* judgment for the purposes of this article is the section in which the Court examines international humanitarian law. It is of particular significance because it appears to be a first in terms of the Court’s direct interpretation of specific IHL treaties, the Fourth Geneva Convention in particular, some articles of which are included in the judgment’s section on relevant law.¹⁴

The paragraph of the Judgment dealing with IHL is reproduced in full:¹⁵

107. The Court has considered whether, in the absence of express provision in Resolution 1546, there was *any other legal basis for the applicant’s detention that could operate to disapply the requirements of Article 5 § 1*. The Government have argued that the effect of the authorisations in paragraphs 9 and 10 of Resolution 1546 was that the Multi-National Force continued to exercise the ‘specific authorities, responsibilities and obligations’ that had vested in the United States and the United Kingdom as Occupying Powers under international humanitarian law and that these ‘obligations’ included the obligation to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence. Some support for this submission

11 *Al-Jedda*, above note 3, para. 101.

12 *Ibid.*, para. 102.

13 ‘However, such an agreement could not override the binding obligations under the Convention. In this respect, the Court recalls its case-law to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States subsequent to the entry into force of the Convention’... *Al-Jedda* Judgment, above note 3, para. 108.

14 See GC IV, Arts 27, 41–43, and 78, which were laid out in paragraphs 42–44 of the judgment, entitled: ‘Relevant provisions of international humanitarian law’.

15 Only references to other paragraphs in the Judgment have been omitted.

can be derived from the findings of the domestic courts. . . . The Court notes in this respect that paragraph 2 of the Resolution clearly stated that the occupation was to end by 30 June 2004. However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the Coalition Provisional Authority to the Interim Government of Iraq, the position under international humanitarian law which had previously applied, *the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial.* Article 43 of the Hague Regulations requires an Occupying Power to take ‘all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. . . . While the International Court of Justice in its judgment *Armed Activities on the Territory of the Congo* interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law, including the provisions of the International Covenant for the Protection of Civil and Political Rights, to which it was a signatory. . . . *In the Court’s view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort.*¹⁶

The Court holding in the case, based on the reasoning outlined above, was that there was no conflict between the UK’s obligations under the UN Charter and its obligations under the European Convention. It held that *Al-Jedda*’s detention was in breach of Article 5(1) of the ECHR, as its provisions were not displaced and none of the permissible grounds for detention exhaustively listed in the article applied.

Implications of the *Al-Jedda* case for international humanitarian law

As may be deduced from the above, a principal consequence of the Court’s decision is that ECHR member states will in future have to secure ‘clear and explicit language’ on detention/internment in a Chapter VII UN Security Council resolution in order to avoid a conflict with the ECHR. The Court did not indicate what level of specificity would be desired. An appropriate resolution would presumably need both to provide the grounds for internment and to outline the process that must be followed. Leaving aside whether the Security Council could reach a political agreement on the requisite standards, the more important question is whether the Security Council is the right body to legislate on detention matters, a task implicitly put to it by the ECtHR. It is not clear why the Security Council, composed of 15 member states, should be

¹⁶ *Al-Jedda*, above note 3, para. 107, emphasis added.

better placed to regulate detention in armed conflict than the 194 states parties to the Geneva Conventions, each of which have already agreed to be bound by the provisions regulating internment.

If the Security Council were to rely on the relevant provisions of the 1949 Geneva Conventions, the main result would be one of duplication, in which case the question is why duplication is necessary. If, on the other hand, the Security Council chose to draft new rules on detention in armed conflict, that is, provisions that departed from IHL, it would introduce unwelcome uncertainty into the conduct of military operations and effectively create two sets of rules for states taking part in multinational forces, whether under UN auspices or otherwise. One set would presumably apply when detention is regulated by a binding Security Council resolution, while another would apply in situations of armed conflict in which the Council has not opined on detention under Chapter VII. The resulting fragmentation of the law would be of great concern from both a legal and a protection point of view.¹⁷

The second consequence of the ECtHR's ruling in *Al-Jedda* is a dismissal of the Fourth Geneva Convention as a legal basis that 'could operate to disapply' the requirements of Article 5(1) of the ECHR.¹⁸ The Court explained this conclusion by stating that it 'did not find established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial'.¹⁹ It further added that, in its view, 'it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort'.²⁰ In between these two statements is included a brief reference to the judgment of the International Court of Justice (ICJ) in the *Democratic Republic of Congo v. Uganda* case.²¹

Each point will be addressed in turn below. Before that, however, a brief reminder of the relevant IHL provisions on detention and internment is warranted. Both the Fourth Geneva Convention on the protection of civilians and the Third Geneva Convention on prisoners of war will be summarized as the reasons for the Court's disavowal of IHL as a legal basis for internment would apply equally under

17 It should also be noted that the *Al-Jedda* judgment only determined that the relevant article of the ECHR was not displaced by UN Security Council Resolution 1546 because the language of the latter was not sufficiently clear and precise. The Court did not pronounce on whether the resolution could have prevailed over the ECHR if those requirements had been met, which is by no means a given. As already mentioned, the Court also did not explicitly opine on whether Article 103 of the UN Charter is triggered only when a state's conflicting *obligations* under another international instrument are in conflict with its obligations under the Charter (i.e. a Chapter VII resolution), or whether *authorizations* are also covered by the operation of Article 103. See Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', in *European Journal of International Law*, Vol. 23, 2012, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917395 (last visited 23 January 2012).

18 *Al-Jedda*, above note 3, para. 107. Even though Al-Jedda was in fact interned when the armed conflict in Iraq was non-international in character, the legal regime applied to his detention by the UK as a result of UN Security Council Resolution 1546 was that prescribed by the Fourth Geneva Convention, an issue that the Court did not contest in para. 107.

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

either Convention. Based on the Court’s arguments, it would appear irrelevant whether Al-Jedda was detained as a civilian (which was the case), or as a prisoner of war (POW).

In international armed conflict, IHL permits the internment of prisoners of war and, under certain conditions, of civilians.

POW internment

POWs²² are essentially combatants captured by the adverse party in an international armed conflict. As a term of art, ‘combatant’ denotes a legal status that, as such, exists only in this type of conflict. Under IHL rules on the conduct of hostilities, a combatant is a member of the armed forces of a party to an international armed conflict who has ‘the right to participate directly in hostilities’.²³ This means that he or she may use force against, that is, target and kill or injure, other persons taking a direct part in hostilities and destroy other enemy military objectives. Because such activity is obviously prejudicial to the security of the adverse party, the Third Geneva Convention provides that a detaining state ‘may subject prisoners of war to internment’.²⁴ That state is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is, *ipso facto*, a security threat.²⁵ However, a POW may not be prosecuted by the detaining state for lawful acts of violence committed in the course of hostilities (‘combatant privilege’) but only for violations of IHL, in particular war crimes, or other crimes under international law such as genocide or crimes against humanity.

In case of doubt about the entitlement to POW status of a captured belligerent, Article 5 of the Third Geneva Convention provides that such person shall be protected by the Convention until his or her status has been determined by a competent tribunal.²⁶ This provision is often misunderstood as requiring judicial review. That is not the case, as Article 5 tribunals are meant to operate in or near the zone of combat; they only determine status, not criminal or any other responsibility.²⁷

POW internment must end and POWs must be released at the cessation of active hostilities,²⁸ unless they are subject to criminal proceedings or are serving a criminal sentence.²⁹ They may also be released earlier on medical

22 GC III, Art. 4.

23 Additional Protocol I (AP I), Art. 43 (2).

24 GC III, Art. 21.

25 Judicial review under the domestic law of the detaining state could be sought to obtain the release of a POW who is detained despite the end of active hostilities. As mentioned further below, that is a grave breach of IHL.

26 GC III, Art. 5.

27 See commentary to Article 45 (1) of AP I, on the nature of a ‘competent tribunal’ under Article 5 of GC III, in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of 12 August, 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 1745.

28 GC III, Art. 118.

29 *Ibid.*, Art. 119.

grounds³⁰ or on their own cognizance.³¹ Unjustifiable delay in the repatriation of POWs at the close of active hostilities is a grave breach of Additional Protocol I.³²

Internment of civilians

Under the Fourth Geneva Convention, internment – and assigned residence – are the most severe ‘measures of control’³³ that may be taken by a state with respect to civilians whose activity is deemed to pose a serious threat to its security. It is uncontroversial that direct civilian participation in hostilities falls into that category. Despite the fact that only combatants are explicitly authorized under IHL to participate directly in hostilities,³⁴ the reality is that civilians often do so as well, in both international and non-international armed conflicts. (In such cases they are colloquially referred to as ‘unprivileged belligerents’, or wrongly referred to as ‘unlawful combatants’.) Direct civilian participation in hostilities modifies the basic IHL rules under which civilians are entitled to protection against the dangers arising from military operations³⁵ and may not be made the object of attack.³⁶ IHL expressly provides that civilians are protected from direct attack ‘unless and for such time as they take a direct part in hostilities’.³⁷

Apart from direct participation in hostilities, other civilian behaviour may also meet the threshold of posing a serious security threat to the detaining power (Al-Jedda’s alleged activity being a case in point).³⁸ The Fourth Geneva Convention provides different wording in terms of permissible grounds for internment depending on whether an internee is detained in a state party’s own territory (‘if the security of the Detaining Power makes it absolutely necessary’)³⁹ or is held in occupied territory (‘imperative reasons of security’).⁴⁰ It has been suggested that the difference in language is irrelevant and aims to indicate that internment in occupied territory should in practice be more exceptional than in the territory of a party to the conflict.⁴¹

The internment review process in a state party’s territory also appears to differ somewhat from that in occupied territory. In a state’s own territory, internment review is to be carried out by an ‘appropriate court or administrative

30 *Ibid.*, Arts. 109(1) and 110.

31 *Ibid.*, Art. 21.

32 AP I, Art. 85(4)(b).

33 GC IV, Arts. 27, 41, and 78.

34 The only exception is the relatively rare occurrence of a *levée en masse*, provided for in GC III, Art. 4(6).

35 AP I, Art. 51(1). Given the consequences of direct civilian participation in hostilities, it is clearly crucial to avoid broad interpretations. The ICRC’s view on this issue is outlined in Nils Melzer, *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL*, ICRC, Geneva, 2009, available at: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

36 AP I, Art. 51(2).

37 *Ibid.*, Art. 51(3) and AP II, Art. 13(3).

38 Examples of activities that are not direct participation in hostilities but would constitute a serious security threat are the financing of combat operations, general recruitment for combat, etc.

39 GC IV, Art. 42(1).

40 *Ibid.*, Art. 78(1).

41 Jean Pictet (ed.), *Geneva Convention IV, Commentary*, ICRC, Geneva, 1958, p. 367.

board’,⁴² whereas in occupied territory the Convention refers to a ‘regular procedure’ that is to be administered by a ‘competent body’.⁴³ Despite these and other textual differences the rules are in essence the same. A person interned in international armed conflict has the right to submit a request for review of the decision on internment (to challenge it), the review must be expeditiously conducted⁴⁴ either by a court or an administrative board, and periodic review is thereafter to be automatic, at least on a six-monthly basis.⁴⁵ The Fourth Convention does not specify the right to legal assistance, but does not bar it either.

It is sometimes asked why IHL provides procedural safeguards for civilians interned in international armed conflict and not to POWs.⁴⁶ The simple answer is that, in reality, there is far less certainty as to the threat a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary’s armed forces. In contemporary warfare civilians are, for example, often detained not in combat but on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person’s activity meets the high legal standard that would justify internment.

Unlike combatants, who may not be prosecuted by a capturing state for direct participation in hostilities (combatant privilege), civilians who do so can be prosecuted for having taken up arms and for all acts of violence committed during such participation, as well as for war crimes or other crimes under international law that might have been committed. This rule is the same in both international and non-international armed conflict. Contrary to certain assertions,⁴⁷ direct civilian participation is not a violation of IHL and is not a war crime *per se* under either treaty or customary IHL.⁴⁸

Civilian internment must cease as soon as the reasons that necessitated it no longer exist.⁴⁹ It must in any event end ‘as soon as possible after the close of hostilities’.⁵⁰ Unjustifiable delay in the repatriation of civilians is also a grave breach of Additional Protocol I.⁵¹

The ECtHR’s implicit finding in relation to IHL in the *Al-Jedda* case was that the provisions of the Fourth Geneva Convention did not constitute an independent legal basis for detention. It is not clear from the judgment why

42 GC IV, Art. 43 (1).

43 *Ibid.*, Art. 78 (2).

44 *Ibid.*, Arts. 41 and 78.

45 J. Pictet, above note 41, pp. 261, 368–369.

46 See Charles Garraway, ‘“Combatants”: substance or semantics?’, in Michael Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff Publishers, Leiden, 2007, p. 330.

47 See, for example, Canada, National Defence, Joint Doctrine Manual, *Law of Armed Conflict at the Operational and Tactical Levels*, B-GJ-005-104/FP-021, Office of the Judge Advocate General, 13 August 2001, p. 16–4, para. 1609(3)(g), available at: http://www.cda.forces.gc.ca/cfm/c-cdmfc/documents/LOAC-DDCA_2004-eng.pdf (last visited 25 January 2012).

48 See, for example, the list of War Crimes under Article 8 of the Statute of the International Criminal Court.

49 GC IV, Art. 132; AP I, Art. 75(3).

50 GC IV, Arts. 46 and 133(1).

51 AP I, Art. 85(4)(b).

this conclusion was reached, given that, according to the principle of legality, a deprivation of liberty is permissible when it transpires on grounds and in accordance with procedures that are established by law (a statute in the case of domestic law,⁵² a treaty or customary law in the case of IHL). As has been explained above, the Fourth Geneva Convention both provides the grounds for the internment of civilians in a state party's own territory, as well as in occupied territory, and in each case outlines the procedure to be followed. The level of detail of the relevant provisions, when read in conjunction with Article 75(3) of Additional Protocol I, is no lower than the provisions of general human rights law related to non-criminal detention, that is, Article 9(1) and 9(4) of the International Covenant on Civil and Political Rights, to which the Court also referred.

Furthermore, it is almost uniformly recognized and accepted in state practice that IHL governing international armed conflict provides a sufficient legal basis for detention. There is, admittedly, some debate among legal scholars as to whether the Fourth Geneva Convention must be accompanied by domestic legislation. It is unclear why this question, where posed, is posed only in relation to the Fourth Convention and not the Third, for there is no indication that the treaties differ in the legal authority provided or in the level of elaboration of rights granted. It is submitted that the Fourth Convention constitutes, on its own, a sufficient legal basis for internment.

The Court's expressed argument as to why the Fourth Convention does not provide a legal basis for detention was that there is no 'obligation' on the detaining state/occupying power 'to use indefinite internment . . . without trial'.⁵³ It must be said that that the Court's approach to and understanding of IHL merits review in relation to all the elements put forward.

First, as demonstrated by the language of the Fourth Geneva Convention summarized above, the notion of internment as an *obligation* on the parties to an international armed conflict is absent from IHL. Under the Convention, states are authorized ('may') intern a person whose activity represents a serious security threat, to their forces and/or to the security of others, such as civilians. However, parties to an armed conflict are also free not to intern a person – despite an obvious potential security risk to themselves or the accomplishment of their mission – based on other considerations inherent to succeeding in an armed conflict (e.g. the prevailing military circumstances, logistical impediments, the need to foster trust, the need to win the hearts and minds of the local population, etc). The logic of armed conflict differs in this respect from the logic of peacetime, as a result of which the respective rules on detention in the relevant bodies of law also diverge. It would thus be not only legally incorrect but also operationally counter-productive if IHL were read to oblige states to intern in military operations, rather than authorize them to do so. By leaving states no possibility but to apply internment, a disservice would also be done to persons who would 'have to be' interned as a result, but could

52 Manfred Nowak, *U.N. Covenant on Civil and Political Rights*, 2nd edn, Engel, Kehl am Rhein, 2005, Commentary on Article 9, para. 27.

53 *Al-Jedda*, above note 3, para. 107.

be released if it were not for the legal obligation – hardly a human-rights-friendly outcome.

Second, it is unfortunate that the European Court used the term ‘indefinite detention’. Its recent adoption in some of the legal literature, as well as in the media, may serve to create a perception of acceptability where none should exist. As already noted, IHL is clear on the duration of internment for imperative reasons of security: it must end as soon as the reasons justifying it cease to exist.⁵⁴ The initial and periodic review processes described above were designed precisely because there is no assumption that a person will automatically constitute an imperative security threat until the end of an armed conflict. Each case has to be examined initially on the merits, and periodically thereafter, to assess whether the threat level posed remains the same. In view of the rapid progression of events in armed conflict, the assessment may, and in most cases does, change. The outer temporal limit of internment, according to which it must in all cases end at the close of active hostilities, may thus be called the ‘default’ position. The close of hostilities is a factual matter that is also determined on a case-by-case basis.

Third, by implying that criminal trial is the only lawful and desired outcome of detention, the Court is overlooking the fact that IHL rules on detention differ from human rights provisions, under which criminal trial is the norm. The former are specific to the reality they govern, which is armed conflict, not peacetime. By way of reminder, the ultimate aim of military operations is to prevail over the enemy’s armed forces. IHL attempts to humanize war by providing rules regulating the conduct of hostilities, and rules permitting the detention of persons – either because they take a direct part in hostilities or because of other activity that represents a serious security threat. If parties to a conflict are allowed to use force – that is, to target and kill persons who constitute military objectives because they take a direct part in hostilities – then they are clearly also authorized to detain persons who fall into their power while doing so.

Internment is not conceived as a punishment but as a measure aimed at removing combatants, as well as other persons seriously harmful to the detaining authority, from the ‘battlefield’ for such time as they pose a security threat.⁵⁵ The notion of a criminal trial for persons who have merely taken up arms and inflicted violence against the adversary is not part of the ‘fabric’ of IHL because such activity is not a war crime *per se* under this body of rules. Rather, it is up to the domestic law of the detaining state to determine whether a captured person (the exception being POWs, as explained above) will be prosecuted for unprivileged belligerency. In the vast majority of cases, and unless they are tried for war crimes, internees are spared prosecution under domestic law in international armed conflict and are simply released when they no longer pose a security threat, and in any case must be released when hostilities cease. In this context, strange as it may sound,

54 GC IV, Art.132; AP I, Art. 75(3).

55 Because internment is not akin to trial-related detention, internment conditions, as well as other aspects of internment provided for in the Fourth Geneva Convention, are not modelled on the rules governing detention for criminal purposes.

internment can actually be preferable to criminal trial from an internee's standpoint. It is likely to last for a shorter time than if the activity that led to internment was the subject of domestic criminal proceedings. The release of Al-Jedda is a case in point. Had he been criminally tried under UK or Iraqi law, it is quite possible that he would still be in prison today.

The European Court's other express argument for rejecting IHL as the basis for Al-Jedda's deprivation of liberty is that 'internment is to be viewed not' as an 'obligation' on the detaining state, but as a 'measure of last resort'. The fact that IHL does not provide an obligation to intern, which the Court apparently would have required to find that Al-Jedda could be detained under IHL, has been explained above. Two brief remarks may be made with regard to the conclusion that it must be a measure of last resort.

The first is that the Court did not rely on the wording of IHL, for reasons that remain unclear. The language of the relevant articles of the Fourth Geneva Convention are different⁵⁶ and do not convey that precise meaning. Rather, they indicate that internment is the most 'severe' measure of control that a state may apply with respect to a person who represents a serious security threat. It is submitted that the quality of a measure, suggested by the word 'severe', does not necessarily imply sequence – that is, that other options must be exhausted before it is undertaken. Moreover, given that this standard is not generally part of human rights rules or jurisprudence governing detention, but is relevant to the use of force, it is likewise unclear why the Court chose to introduce this concept in relation to deprivation of liberty in armed conflict. The second remark is that, despite enunciating the requirement, the Court did not opine on whether Al-Jedda's internment could, under the circumstances, have been a justified as 'a measure of last resort'.

Finally, as regards the IHL-related aspects of the *Al-Jedda* judgment, it may be noted that the way in which the European Court relied on the ICJ's *DRC v. Uganda* case is curious. It was cited in order to illustrate that IHL does not contain an obligation to intern (dealt with above), and to indicate that an occupying power has a duty to secure respect for the applicable provisions of human rights law, including the ICCPR.⁵⁷ This is certainly a well-established proposition. However, beyond the general statement on the parallel application of IHL and human rights law, the ICJ made no comment in that case on the specific interplay of the two legal frameworks, as a result of which no conclusion can be drawn with respect to the detention issue examined in *Al-Jedda*. In addition, there are other cases in which the ICJ outlined its views in more detail, not referred to in the ECtHR's judgment. For example, the ICJ stated in the 1996 Nuclear Weapons Advisory Opinion that what constituted an arbitrary deprivation of life in armed conflict was to be determined by the applicable *lex specialis*, namely IHL.⁵⁸ Given that this conclusion was reached

56 GC IV, Arts. 41 and 78.

57 *Al-Jedda*, above note 3, para. 107.

58 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25.

in relation to the non-derogable right to life under human rights law, there would seem to be room to believe that a similar conclusion could be reached when a derogable right, such as liberty, is involved.⁵⁹

According to the *Al-Jedda* judgment, the only other way in which ECHR member states could possibly intern in an armed conflict without falling afoul of their obligations under the European Convention – aside from securing a Chapter VII Security Council resolution – would be to derogate lawfully under Article 15 of that treaty. It is interesting to note that the Court devotes a mere half a sentence to this option.⁶⁰ Under Article 15, states may take measures, ‘in time of war or other public emergency threatening the life of the nation’, derogating from some of their obligations under the Convention – including Article 5 – ‘to the extent strictly required by the exigencies of the situation’.⁶¹

It is unclear, however, whether an ECHR member state could successfully invoke Article 15 based on the plain language of the text. First, the wording requires the war in which the state might be involved to ‘threaten the life of the nation’. It would appear that recent armed conflicts involving ECHR countries in the territory of a third ‘host’ state could not be deemed to have reached the requisite threat level to them. A second and overlapping issue is which country should in fact derogate: the intervening or the ‘host’ state? On occasion, it has been posited in expert debates that the host country should derogate from its obligations under the international human rights law treaties to which it is a party.⁶² However, in cases where internees in a multinational military operation are under the effective control of an intervening ECHR state, it remains unclear how a ‘host’ state’s derogation of its own obligations could suffice.

Given that no ECHR country has ever derogated with respect to military action taken abroad, these and other legal issues have never been tested. The reasons are presumably not only legal, as it must be acknowledged that there would probably be formidable political obstacles as well. An alternative would be for states to base arguments in detention-related cases on the *lex specialis* nature of IHL governing international armed conflict, which the UK government did not do in *Al-Jedda*. It is to be hoped that this course of action, which should be considered preferable, might be attempted in the future.

59 In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court made a broader statement about the interplay of human rights law and IHL, reiterating that IHL is the *lex specialis* to the general law of human rights: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ 136, para. 106.

60 *Al-Jedda*, above note 3, para. 99.

61 ECHR, Art. 15.

62 See *Report of expert meeting on procedural safeguards for security detention in non-international armed conflict*, Chatham House and ICRC, London, 22–23 September 2008, available at: <http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf> (last visited 23 January 2012).

Concluding remarks

The importance of the *Al-Jedda* judgment for detention operations carried out by ECHR member states abroad can hardly be overstated. The import of the Court's decision is that states parties to the European Convention may not intern civilians – even though non-criminal detention for imperative reasons of security may be necessary and is allowed under IHL in international armed conflict – unless there is a binding and explicit UN Security Council mandate, or a derogation to Article 5 of the ECHR has been entered. By implying that a Chapter VII UN Security Council could possibly displace the operation of the relevant detention provisions of the ECHR, the Court has effectively invited the Security Council to legislate on matters of detention. The wisdom or feasibility of the Court's suggestion to this effect may be deemed questionable.

The Court also reminded ECHR member states, albeit very briefly, that derogation is another avenue by which they could avoid a conflict with their obligations under the European Convention when engaged in detention abroad. Whether this option will be resorted to by member states in the future remains to be seen.

What the Court did not do was to accept that IHL constitutes a valid legal basis for detention in international armed conflict, based on its conclusion that the Fourth Geneva Convention does not impose an obligation of internment on parties to such conflicts. In so doing, the Court seems not to have grasped the logic of IHL, and thus, it is submitted, erroneously interpreted the plain language of that treaty. Importantly, the Court's conclusion about why the Fourth Geneva Convention could not be a basis for civilian internment may be read to apply equally to POW internment (like the Fourth Convention, the Third Convention only authorizes, but does not explicitly 'oblige', internment). This may be deemed a potential and serious revision of a legal regime – IHL – agreed to by all states in the world and one generally considered to constitute the applicable *lex specialis* in international armed conflicts. It is thus also submitted that ECHR member states should seriously consider arguing similar cases in the future, where they arise, on the IHL *lex specialis* ground.

Whatever course is chosen, it is clear that, for the moment, *Al-Jedda* casts a chilling shadow on the current and future lawfulness of detention operations carried out by ECHR states abroad. In addition, their ability to engage with other, non-ECHR, countries in multinational military forces with a detention mandate currently remains, at best, uncertain.

REPORTS AND DOCUMENTS

What's new in law and case law across the world

Biannual update on national legislation and case law
January–June 2011

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The biannual report on national legislation and case law is an important tool in promoting the exchange of information on national measures for implementation of international humanitarian law (IHL). The ICRC was asked to undertake this task of information exchange through a resolution adopted at the 26th International Conference of the Red Cross and Red Crescent in 1996.

The laws presented below are those adopted by states in the first half of 2011 (January–June) and cover a variety of topics linked to IHL: from emblem protection to reparation for conflict victims to prohibition or restriction of certain weapons. The full texts of these laws are included in the ICRC's database on national implementation at: <http://www.icrc.org/ihl-nat>, and can be used by states working on implementing law in their own country.

ICRC Advisory Service

The ICRC's Advisory Service aims to foster a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its three priorities are: to encourage and support adherence to IHL-related treaties; to assist states by providing technical assistance directly to governments to incorporate IHL into the domestic legal framework; and to collect and facilitate exchange of information on national measures of implementation.

The inclusion of selected cases illustrates, among other things, the growing number of domestic prosecutions for violations of IHL and shows the practical application of domestic implementing measures to punish these crimes. National IHL committees and other similar bodies are also increasing in number. More and more states find them an important tool in facilitating national measures of implementation. The recent creation of a committee in the Cook Islands has brought the global total to 101.

To further its implementation work, the ICRC organized a number of workshops and national and regional events in the period under review. Of particular note was the 3rd Commonwealth Red Cross and Red Crescent IHL Conference, which brought together countries and National Red Cross and Red Crescent Societies from all around the Commonwealth to discuss developments in IHL and prepare for the 31st International Conference of the Red Cross and Red Crescent. In a strong outcome statement, participants agreed to give greater priority to promoting respect for IHL by encouraging Commonwealth states to accede to outstanding relevant treaties and adopt effective measures where necessary to implement their obligations under IHL treaties. The Commonwealth Secretariat was invited to continue to work to include IHL on the agenda of relevant Commonwealth meetings and to continue its valuable work in the IHL field.

Universal participation in international treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict, and is therefore a priority for the ICRC. In the period under review, ten of the twenty-eight IHL-related international conventions and protocols were ratified or acceded to, showing continued steady accession to the Protocols Additional to the 1949 Geneva Conventions and a number of states adhering to the Convention on Cluster Munitions. It is worth noting that the Convention on Cluster Munitions, which was only adopted at the end of 2008, came into force on 1 August 2010 and by the end of 2011 already has fifty-nine states parties (the complete list can be found at <http://www.icrc.org/ihl>).

Conventions	States	Ratification Date	Total number of ratifications (as of 30 June)
1977 Additional Protocols I (AP I) and II (AP II) to the Geneva Conventions	Morocco	03.06.2011	AP I 171 AP II 166
2005 Additional Protocol III to the Geneva Conventions	Argentina Belarus	16.03.2011 31.03.2011	56
2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	Djibouti St. Vincent and the Grenadines Saudi Arabia	27.04.2011 29.03.2011 a 10.06.2011 a	142
1998 Rome Statute of the International Criminal Court	Grenada Tunisia	19.05.2011 a 24.06.2011 a	116
1999 Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict	Oman	16.05.2011	60
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction	Mozambique	29.03.2011	16
1976 Convention on the Prohibition of Military or any Hostile use of Environmental Modification Techniques	Estonia Cameroon	14.04.2011 18.04.2011	76

(Cont.)

Conventions	States	Ratification Date	Total number of ratifications (as of 30 June)
Amended Protocol II (1996) to the 1980 Convention on the Prohibitions or Restrictions on the use of certain Conventional Weapons	Serbia (Republic of)	14.02.2011	97
2008 Convention on Cluster Munitions	Botswana	27.06.2011	59
	Bulgaria	06.04.2011	
	Costa Rica	28.04.2011	
	El Salvador	10.01.2011	
	Ghana	03.02.2011	
	Grenada	29.06.2011 a	
	Lithuania	24.03.2011	
	Mozambique	14.03.2011	
	Netherlands	23.02.2011 a	
Portugal	09.03.2011		

Ratifications January–June 2011

A. Legislation

Argentina

Crimes Against Liberty, Law No. 26.679, amending the Penal Code and the Code of Criminal Procedure, 5 May 2011

Congress adopted amendments to the Criminal Code and Code of Criminal Procedure on 13 April 2011, effectively penalizing enforced disappearances and barring the applicability of statutes of limitations to the crime. The law, promulgated on 5 May 2011, creates an offence where ‘any public officer or person or member of a group of persons, acting with the authorization, support or acquiescence of the State’, deprives someone of their liberty, followed by a lack of information or a refusal to acknowledge such deprivation of liberty or to provide any information on the whereabouts of such person.

The offence is Article 142ter of the Criminal Code and carries a penalty of ten to twenty-five years’ imprisonment, along with a permanent and absolute prohibition to hold any public office or act as a private security agent. The penalty is raised to life imprisonment if the act results in death of the victim, or when the victim is a pregnant woman, any person under 18 or over 70 years of age, or has disabilities, or when the victim is a person born during the disappearance of their mother.

Finally, a new Article, 194bis, mandates judges to remove from the investigation, on their own initiative or upon request from one of the parties to the case, any security forces involved in the search upon mere suspicion that members of these forces were involved as perpetrators or participants in the commission of the offence.

Bahrain

Ministerial Resolution No. 5 on the establishment and formation of the National Committee for the Prohibition of the Creation, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 10 February 2011

On 10 February 2011, the Council of Ministers of the Kingdom of Bahrain approved the formation of a National Committee for the Prohibition of the Creation, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. According to Ministerial Resolution No. 5, which entered into force on the date of issuance, the Committee falls under the jurisdiction of the Ministry of Foreign Affairs, and shall have the authority, *inter alia*, to ‘review legislation, regulations and decisions necessary for the implementation’ of the Convention on the Prohibition of

the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and shall inform the Organisation for the Prohibition of Chemical Weapons (OPCW) of the legislative and administrative measures taken to that effect.

The Committee is composed of representatives of the Ministries of Foreign Affairs, Health, the Interior, Internal Affairs, Industry and Trade, Municipalities Affairs, and Urban Planning; and representatives of the Defence Force, the Public Authority for the Protection of Marine Resources, Environment and Wildlife, and the National Organization for Oil and Gas. It is empowered to create a permanent communication channel with the OPCW, perform the inventory and classification of chemicals relevant to the Convention, and set the necessary rules and regulations for the use of such chemicals. It controls anything related to chemical activities, in both governmental and private agencies, and ensures compliance with the regulations stipulated, as well as educating the public and private sectors on the Convention. Finally, it shall develop the appropriate mechanisms to facilitate the inspection of chemicals and shall follow up and implement decisions issued by the Technical Secretariat of the Organization with respect to the implementation of the provisions of the Convention.

Colombia

Law No. 1424 on transitional justice, truth, justice and reparation of victims of demobilized groups, and the granting of benefits and other provisions

The Government of Colombia adopted and published Law 1424 on 29 December 2010, entering immediately into force, with the expressed objective of 'contributing to achieving a lasting peace, satisfying the guarantees of truth, justice and reparation, all within a transitional justice framework, in regards to the conduct of members of demobilized groups' involved only in the commission of such crimes as the illegal use of military uniforms and emblems, carrying weapons, and being part of a joint criminal enterprise.

The Government shall promote the implementation of an Agreement for the Contribution to Historic Truth and Reparation with those members who, within twelve months after the entry into force of the law, show a commitment to the process of reintegration to society and contribute all pertinent information regarding the armed groups to which they belonged. Once the former member of an armed group has expressed commitment to the process, the relevant judicial authority may suspend any warrant for his or her arrest. The law also allows those already convicted and sentenced to have their sentences reduced.

The law does not exempt those members of armed groups falling under its scope and benefits from being investigated and/or prosecuted according to the penal laws applicable at the time of the offence (Article 5).

Law No. 1448 on the provision of attention, assistance and integral reparation to the victims of the internal armed conflict and other provisions, 10 June 2011

The Law on Reparation to Victims, adopted and published in the Official Gazette on 10 June 2011, entered into force on the same day. The law aims to establish a number of judicial, administrative, social, economic, individual, and collective measures to benefit the victims of the internal armed conflict, allowing them to exercise their rights to truth, justice, and reparations. It provides humanitarian assistance and reparations to allow victims to recover their dignity and exercise their full citizenship.

The law defines ‘victims’ as those who, individually or collectively, have suffered harm in acts that occurred on or after 10 January 1985, as a consequence of violations of international humanitarian law or international human rights law, occurring in the midst of the internal armed conflict. The term extends to family members and partners of those killed or disappeared. The definition shall not be interpreted to grant any sort of recognition to terrorist or other armed groups.

The text extensively defines and describes the rights and general principles of law applicable to victims of the armed conflict, such as the right to truth, justice, and full reparation, including modalities for providing testimony, access to judicial assistance, and payment of judicial expenses.

Title IV focuses exclusively on reparations, defined to include restitution, compensation, rehabilitation, satisfaction, and guarantees of no repetition. Articles 72 and following establish the state adoption of measures to restore the lands of the displaced or to compensate accordingly, and to provide for extensive provisions on identification, registration, proof of loss of lands, and the legal procedure to certify ownership.

Finally, the law also provides for the creation of the necessary institutions in charge of implementing the law. Thus it contemplates a National Network to provide information and attention to victims, a National Victims Register, a National System of Reparations for Victims, and other subsidiary offices. The law shall remain in force for ten years after its promulgation.

Cook Islands

Geneva Conventions and Additional Protocols Amendment Act 2011, Act No. 6, 2011

The Parliament of the Cook Islands enacted an Act, assented to by the Queen’s Representative on 14 July 2011, to amend the Geneva Conventions and Additional Protocols Act 2002, to enable effect to be given to Additional Protocol III to the Geneva Conventions. The Protocol regulates the existence, use, and abuse of an additional distinctive emblem, composed of a red crystal on white background.

The Act incorporates definitions and references to the third Protocol into the provisions of the 2002 Act. Among the most relevant changes, it is worth noting that Section 5(2) includes a new paragraph (f), establishing as a grave breach

of Protocol Additional III any 'misuse of the third Protocol emblem amounting to perfidious use in the meaning of Article 85 paragraph 3 of Protocol Additional I'. Section 10 of the 2002 Act is also amended to prohibit the use for any purpose of the additional emblem, except when under the authority of the Minister of Foreign Affairs. A breach of this provision shall be considered an offence and the person responsible for its commission liable upon conviction to a fine and the forfeiture of any goods upon or in connection with which the emblem was used.

Cluster Munitions Act 2011, Act No. 8, 2011

An Act to implement the Convention on Cluster Munitions in the Cook Islands was enacted by Parliament and assented to by the Queen's Representative on 14 July 2011. The Act provides for relevant definitions of the terms 'cluster munition', 'explosive bomblet', 'transfer', and others. An offence is committed if someone uses, develops, produces, acquires, possesses, retains, stockpiles, or transfers to any other person cluster munitions or explosive bomblets. It provides penalties of imprisonment for up to ten years, or a fine, or both. The High Court has jurisdiction in these offences.

A person also commits an offence if, being a director, manager, or other similar officer of a body corporate, he or she 'fails or refuses to take all reasonable practicable steps to ensure that the body corporate does not commit an offence' in the terms mentioned above. Section 6 establishes extra-territorial jurisdiction for the offences committed abroad 'by body corporate incorporated under the laws of the Cook Islands or residents of the Cook Islands'.

The Act creates exceptions to the prohibitions under Section 4, allowing the retention or acquisition of a specified number of cluster munitions or bomblets for such purposes as the development of techniques for and training in the detection, clearance, or destruction of cluster munitions and explosive bomblets. The exception shall also apply to, *inter alia*, police officers and members of the New Zealand or Australian Defence Forces acting in the course of their duties for the purpose of the conduct of criminal proceedings or rendering cluster munitions harmless.

The Minister has power to require any information or documents relevant to the administration or enforcement of the Act, or the Cook Islands' obligation to report under Article 7, or the country's obligation to provide information under Article 8 of the Convention. Failure without reasonable excuse, refusal to comply, or knowingly making a false or misleading statement in response to such a request shall be considered an offence and subject to a term not exceeding five years' imprisonment, or a fine, or both.

Fiji

The Biological and Toxin Weapons Decree 2011, Decree No. 17 of 2011, 6 May 2011

The Biological and Toxin Weapons Decree 2011 was signed by the President of Fiji on 28 April 2011 and published in the Official Gazette on 6 May 2011, with the

stated purpose of fulfilling Fiji's obligations under the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, and the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

The Act makes it an offence to develop, produce, manufacture, possess, stockpile, acquire, retain, import, export, re-export, transport, transit, trans-ship, transfer to any recipient direct or indirectly, or use any microbial or other biological agent or any toxin whatsoever, of types and quantities that have no justification for prophylactic, protective, or other peaceful purposes. The offence also applies to any weapon, equipment, or means of delivery designed to use or share such agents or toxins for hostile purposes or in armed conflict. The prohibition extends to anyone who aids, abets, encourages or incites, or finances the commission, or attempts to commit any act mentioned above. Penalties include conviction and imprisonment not exceeding fourteen years or a fine. Bodies corporate may also be fined.

Extra-territorial jurisdiction is provided for and the offences may be prosecuted if, at the time of commission, the perpetrator was a citizen of Fiji or a citizen of a state engaged in an armed conflict against Fiji. They may also be prosecuted if the victim of the alleged offence was a citizen of Fiji or a citizen of a state allied with Fiji in an armed conflict. The Decree would allow prosecution even under the principle of universal jurisdiction if the suspect of the offence is found to be present in Fiji.

The Decree also extensively addresses enforcement and control. Part III provides for the appointment and powers of inspectors, including the capacity to enter and inspect any place, with the consent of the occupant or under authority of a warrant, believed on reasonable grounds to hold any microbial or other biological agent, weapons, or means of delivery, or any information relevant to the administration of the Decree. Part IV regulates the disclosure of information on persons involved with biological agents or toxins. It also empowers the Minister to appoint analysts. Under Section 37 the Minister for Defence and any other Minister with powers in relation to biological agents or toxins may make regulations for the purpose of implementing the Decree.

France

*Law No. 2011-266 of 14 March 2011 on the fight against the proliferation of weapons of mass destruction and their means of delivery*¹

On 14 March 2011, the French Executive and Legislature adopted Law No. 2011-266 relative to the fight against proliferation of weapons of mass destruction and their

1 Loi n° 2011-260 du 14 mars 2011 relative à la lutte contre la prolifération des armes de destruction massive et de leurs vecteurs (1), published in the *Official Gazette*, No. 0062, 15 March 2011, p. 4577, text no. 1.

means of delivery. It was published on the next day in the *Official Gazette* of the French Republic. The law comprehensively amends and incorporates numerous provisions into the Code of Defence, the Penal Code, the Code of Criminal Procedure, and the Code of Customs, under the following categories: the fight against proliferation of weapons of mass destruction (WMDs), subdivided in Title I into Nuclear (Chapter I), Biological (Chapter II) and Chemical (Chapter III). Title II refers specifically to the fight against proliferation of the means of delivery of WMDs. Title III covers the manipulation of goods with more than one use ('double-use goods'). Title IV deals specifically with amendments to the procedure applicable to crimes related to proliferation of WMDs, including jurisdictional issues. Titles V and VI include additional miscellaneous amendments.

Among the numerous changes, the law amends the list of prohibited conduct related to biological agents and toxins, now including transportation, acquisition, transfer, import, export, trading, brokerage, and financing of these activities. For chemical weapons, financing activities are also criminalized and punished. The penalties for violations have been aligned to those applicable for chemical weapons: imprisonment of up to twenty years, or thirty if committed as part of a terrorist activity.

Regarding the means of delivery of WMDs, the law provides for offences related to the manufacture, trade, acquisition, possession, carriage, transportation, disposal, and import of military equipment when such offences involve delivering WMDs. In these cases the penalty is increased to fifteen years' imprisonment, or twenty if committed by an organized group. The means of delivery of WMDs are defined as missiles, rockets, and other unmanned systems capable of delivering nuclear, chemical, or biological weapons that are specifically designed for such purpose. Financing acts of this new offence is also criminalized and punished, as well as resorting by fraudulent means to an authorization or approval as required by the Code of Defence to perform an activity in connection with war material when such permits or approval includes means of delivery of WMDs. Criminal liability of legal persons is also provided.

Finally, the new law supplements laws on anti-terrorism by listing crimes that might be described as terrorist acts.

Paraguay

Presidential Decree No. 5.684 on the establishment of a National Information Bureau in case of Armed Conflict

The President of Paraguay signed Presidential Decree No. 5.684 on 22 December 2010, effectively assigning the functions and responsibilities of a National Information Bureau, in the terms specified in the 1949 Geneva Conventions, to the Office for Legal Affairs, Human Rights and International Humanitarian Law, under the Ministry of Defence. According to international treaties, the Bureau should, upon outbreak of an armed conflict and in all cases of occupation, collect all relevant information regarding prisoners of war and protected persons in the power

of Paraguay, and forward such information to the powers involved, in order to inform the concerned next of kin.

The Decree takes into due consideration a request by the Ministry of Defence stressing the importance of setting up the said Bureau in time of peace, to comply quickly and effectively with the treaty obligations binding Paraguay in the case of an armed conflict. Apart from members of the Office for Legal Affairs, the Bureau includes representatives from the Ministries of Foreign Affairs, the Interior, Justice and Work, and Health, as well as a representative from the Commander in Chief for the Armed Forces, and the National Police.

Article 3 authorizes the Minister for National Defence to propose all necessary measures, courses of action, and legal amendments to allow for the Bureau's operation. The Office shall also collect any useful data and information from all relevant public offices in order to fulfil its mandate.

B. National Committees on International Humanitarian Law

Cook Islands

The Government of the Cook Islands approved Memorandum No. CM (11) 072, on 1 March 2011 establishing the Cook Islands International Humanitarian Law Committee. The committee shall have as its main objectives the identification of IHL of relevance to the Cook Islands, the identification of legal deficiencies and/or vacuums in existing legislation, and the promotion of and respect for humanitarian law.

The Committee shall be comprised of Crown Law, the Ministries of Health, Finance and Economic Management, Justice, Police, the Ombudsman Office and the Cook Islands Red Cross. It shall be chaired by the Ministry of Foreign Affairs and Immigration.

C. Case law

Bosnia and Herzegovina

Prosecutor v. Šefik Alić, Case No. X-KR-06/294, Appellate Chamber of the War Crimes Court of Bosnia and Herzegovina, 21 January 2011

The Appellate Chamber of the Court of Bosnia and Herzegovina pronounced Mr. Šefik Alić, former member of the Fifth Corps with the Army of Bosnia and Herzegovina, guilty of violating Article 175(a) of the Criminal Code, for 'participating in the inhuman treatment of prisoners of war and, knowing that the prisoners would be killed, in the capacity of the Assistant Commander for Security, failing to take the necessary and reasonable measures to prevent that' (p. 5). Mr. Alić was sentenced on 21 January 2011 to ten years' imprisonment.

The four prisoners, members of the Serbian Krajina Army, were killed by an irregular member of the Fifth Corps. The court ruled, however, that Alić must have known that this member represented a threat to the lives of those prisoners and that his duty as Assistant Commander for Security was to prevent harm. It was held that Alić was present when the four were captured and that he participated in their questioning. His personal attitude during the course of the examination of these prisoners, including while the irregular member of the Fifth Corps acted in a threatening and aggressive manner, demonstrated his readiness to deprive these persons of their lives. Not only did Alić fail to prevent the abuse and beating of the prisoners, but he also personally joined in on two occasions. The Appellate Chamber held that the fact the member of the Fifth Corps was ‘an irregular soldier’ did not relieve Alić of his responsibility, but rather accentuated his obligation to protect the prisoners. He had further breached his duties by not informing about the crime.

In reaching its decision on the ten-year prison sentence, the Appellate Chamber Chairman said that the Chamber considered Alić’s young age at the time when the crime was committed and the fact that he had just been appointed an assistant commander for security as mitigating circumstances.

Prosecutor v. Stipo Žulj, Supreme Court of the Federation of Bosnia and Herzegovina, 11 April 2011

On 11 April 2011, the Supreme Court of the Federation of Bosnia and Herzegovina confirmed a verdict of not guilty for Mr. Stipo Žulj for a charge of war crimes allegedly committed in the Kupres area. Mr. Žulj had been acquitted by the Cantonal Court in Livno on 17 March 2010 of killing a soldier in the Olovo village on 3 November 1994, as a member of the Special Unit with the Ministry of Internal Affairs of the then Croatian Community of Herceg-Bosna. The Cantonal Prosecution in Livno appealed the verdict over what it said were violations of the criminal proceeding, as well as wrongly and incompletely determined facts, and asked the Court to revoke the verdict.

The Defence in turn called on the Court to reject the Cantonal Prosecution’s appeal as groundless, given that it had not been proved that the accused committed the actions described in the indictment, adding that it considered that the facts had been correctly determined and that the Court had made a correct decision. The acquittal was upheld.

Prosecutor v. Miodrag Marković, Case No. X-KR-09/948, Trial Chamber of the War Crimes Court of Bosnia and Herzegovina, 15 April 2011

On 15 April 2011, the Court of Bosnia and Herzegovina sentenced Mr. Miodrag Marković on to seven years in prison for an offence, committed in Dragalovci village, Doboј municipality, on 11 July 1992, of taking an underage girl from her

family house, raping her, and threatening to rape her again and kill her family. The accused was found individually criminally responsible for War Crimes Against Civilians pursuant to Article 173(1)(e) of the Criminal Code, which penalizes rape.

The Court found that Mr. Marković banged on the door, demanding it be opened or he would kill those inside. After he fired a bullet, the mother opened the door and was told to hand her daughter over to him. He dragged the daughter to a haystack in a meadow, ordered her to strip, and raped her. Marković then threatened the victim, who was 17 years old at the time, by telling her not to tell anyone about what happened or else he would rape her again and kill her family members.

The Chamber held that the allegations against Marković, a former member of the Republika Srpska Army, were proved beyond reasonable doubt by the detailed and convincing testimonies provided by the victim, witnesses, and court experts.

Prosecutor v. Dalibor Ponorac and Marko Marić, Supreme Court of Republika Srpska, Bosnia and Herzegovina, 21 April 2011

On 21 April 2011, the Supreme Court of Republika Srpska confirmed the guilty verdict handed down by the District Court in Banja Luka in October 2010 for war crimes against Mr. Marko Marić and Mr. Dalibor Ponorac, sentencing the two men to thirteen and eight years' imprisonment respectively.

According to the verdict, the accused approached Vrbanja, Banja Luka on 29 December 1993, met two individuals, forced them into a building, and killed them. Later Mr. Marić shot and killed a third person, who had been walking alongside the road. The Supreme Court rejected all arguments from the Defence and confirmed the initial verdict.

Prosecutor v. Nedeljko Šikman, Cantonal Court in Bihać, Bosnia and Herzegovina, 21 April 2011

On 21 April 2011, the Cantonal Court in Bihać found Mr. Nedeljko Šikman guilty of war crimes committed in Ključ and sentenced him to seven and a half years in prison. Šikman was sentenced after the Trial Chamber of the Cantonal Court in Bihać accepted a guilty plea agreement concluded between the accused and the Office of the Una-Sana Cantonal Prosecution.

Šikman admitted to strangling a 69-year-old woman in Biljani village, Ključ municipality on 30 October 1994. According to the facts of the case, Šikman pulled her out through the window, took a kerchief off her head, tied it around her neck, and strangled her. He then dragged her to a nearby stable, where her neighbours found her dead the next day. He expressed regret for having committed the crime, stressing that he was young and drunk. He agreed to cooperate with the investigative bodies in revealing the perpetrators of other

crimes committed in the Ključ area. The son of the victim consented to the plea agreement.

Prosecutor v. Darko Dolić, Trial Chamber of the War Crimes Court of Bosnia and Herzegovina, 28 April 2011

The Trial Chamber of the Court of Bosnia and Herzegovina found Mr. Darko Dolić, a former member of the Croatian Defence Council (HVO), not guilty of War Crimes Against Civilians on 26 April 2011. The Prosecutor's Office had charged Dolić with a violation of Article 173(1) paragraphs (c), (e) and (f) of the Criminal Code, related to torture and inhumane treatment, rape, and pillaging, for allegedly taking part in the torture of detained Bosniak civilians in Družinovići village, near Prozor in July and August 1993.

The Trial Chamber stated that the Prosecution's Office had failed to provide sufficient evidence on the identity of the perpetrator, not proving beyond reasonable doubt that it had been Dolić who committed the offences. The Court also acquitted Dolić of the charges that he raped three people in the summer of 1993.

Statements given by Prosecution witnesses mentioned a person named Mario Dolić as the perpetrator of the crimes committed in Družinovići. This led the Court to consider some Prosecution witnesses' statements as disputable with regards to Mr. Darko Dolić's involvement. Further, in explaining the acquittal for the charges of rape allegedly committed in August 1993, the Trial Chamber argued that the Defence had proved that Dolić had been assigned to the front line, away from the area of the crime, in July and August 1993.

Prosecutor v. Lazar Ristić and Predrag Dević, Cantonal Court in Bihać, Bosnia and Herzegovina, 28 April 2011

The Cantonal Court in Bihać found Mr. Lazar Ristić and Mr. Predrag Dević guilty of the murder of fifteen Bosniak civilians in the locality of Sanski Most in October 1995, sentencing them to twenty and twelve years' imprisonment respectively. The first instance verdict was handed down on 28 April 2011.

According to the Court, the prosecution proved beyond reasonable doubt that fifteen Bosniak men escorted by soldiers of the Republika Srpska were killed after the car transporting them was stopped by Mr. Ristić and Mr. Dević and a third party called Petar Arsenić. The Bosniak men were returning home after having performed their civil duty. Key witnesses, members of the Republika Srpska Army who escorted the victims, provided clear and decisive testimonies. The Court also relied on the statement given by Mr. Arsenić, who admitted the killings and expressed regret. Arsenić provided a detailed description of the crimes and of Mr. Ristić and Dević's participation in their commission.

The sentence against Mr. Ristić took into account a previous sentence against him pronounced by the Cantonal Court in Bihać, for the murder of two Bosniak women in Sanski Most in 1992.

Germany

Prosecutor v. John Demjanjuk, *Munich District Court II, 12 May 2011*

Mr. John Demjanjuk, a Ukrainian-born retired autoworker, was found guilty on 12 May 2011 by the Munich District Court II for being an accessory to the killing of approximately 28,000 prisoners at the Sobidor death camp in 1943. He was sentenced to five years in prison. Mr. Demjanjuk was allowed to remain at liberty awaiting appeal; he died on 12 March 2012, at the age of 91.

The case and reasoning of the Court has been criticized by the Defence on several counts. First, it was argued that there was a manifest lack of jurisdiction to try Mr. Demjanjuk, since he was never a German citizen, Sobibor is in Poland, and the victims killed at the camp were Dutch. The Defence also criticized the fact that Polish prosecutors had already decided to drop the case, for lack of evidence, in 2007. Criticism has further come from the fact that the only documentary piece of evidence regarding Mr. Demjanjuk's presence in the Sobidor camp was a document of identity that was suspected of having been forged by the Soviet KGB.

Finally, the Defence criticized the fact that Mr. Demjanjuk was convicted for being an accessory to murder without further evidence regarding his involvement than the fact that he was present at the camp, labouring as a camp guard. No evidence of actual participation in the killings was produced during the proceedings.

Norway

Prosecutor v. Mirsad Repak, *Supreme Court of the Kingdom of Norway, 14 April 2011*

The Supreme Court of the Kingdom of Norway sentenced Mr. Mirsad Repak, a former member of the Croatian Defence Forces, to eight years in prison for crimes committed against civilians detained at the Dretelj camp, Bosnia and Herzegovina. The Court thus upheld a guilty verdict handed down by the Oslo Court of Appeals, but increased the sentence. Repak was first arrested in May 2007. Under a first instance verdict he was found guilty and sentenced to five years in prison for crimes committed against Serb civilians in the Dretelj detention camp, near Capljina. On appeal, the Appellate Court in Oslo reduced the sentence against Repak to four and a half years in prison. The Supreme Court found Repak guilty of breaching Section 223(1) and (2) of the 1905 Norwegian Penal Code, on the unlawful deprivation of liberty. The Code, now derogated, was found to be applicable to the events in question for being in force at the time the offences were committed.

Mr. Repak was found guilty on thirteen counts. The indictment charged him with taking part in depriving civilians of liberty and detaining them at the Dretelj detention camp, near Capljina, and severe mistreatment of detainees, including sexual abuse, brutal violence, intimidation and humiliation, and deprivation of

adequate access to food. Analysing Mr. Repak's participation, the Court concluded that he had acted with intent or complicity in the offences, or alternatively could have foreseen the consequences regarding the atrocities suffered by the victims, a level sufficient to find guilt under Section 43 of the Penal Code. According to the sentencing Judge, Mr. Repak 'played a central role in allowing the extensive and sometimes extremely brutal atrocities against the 13 victims to take place'.

In sentencing, the Supreme Court found it necessary to point to the fact that the crimes in question were extremely grievous and committed against defenceless people. While it refused to 'go into the question whether the crimes satisfied the requirements for war crimes as laid down in international law', they would 'clearly be contrary to the rules that apply in wartime'. The Court also rejected the notion that the passage of time since the crimes were committed – nineteen years – could serve as reason for a lighter sentence. Most importantly, it rejected the argument that the Parliament of Bosnia and Herzegovina had passed a law on amnesty in 1999, by which, according to the Defence, Mr. Repak would have been barred from being prosecuted. In view of the Court, the Penal Code of 1905 did not require double criminality, making it possible to prosecute in Norway even if the acts had not constituted crimes in Bosnia. Finally, the Court attempted to find guidance in the sentences of the International Criminal Tribunal for the former Yugoslavia (ICTY), but found them to be of limited significance, primarily because they dealt with war crimes and not with 'deprivation of liberty committed in time of war, without applying the aggravating term war crime'.

Serbia

Prosecutor v. Agush Memishi, et al., Trial Chamber of the War Crimes Department, Higher Court in Belgrade, 21 January 2011

On 21 January 2011, the Trial Chamber of the War Crimes Department – part of the Higher Court in Belgrade – convicted Mr. Agush Memishi and eight other officers belonging to the Kosovo Liberation Army for War Crimes Against Civilians, committed in the area of Gnjilane from early June to late December 1999.

The Court found that the accused tortured their victims by stabbing them and suffocating them with plastic bags, and later killed them and disposed of their bodies in a lake. This resulted in the killings of 32 Serb and non-Albanian civilians and 153 cases of people being arrested, detained, tortured, and later released. Mr. Memishi and two others received a sentence of fifteen years' imprisonment; four others received ten years, and the last two eight years.

Sweden

Stockholm Tingsrätt (Stockholm District Court), B 382-10, 2011-04-08

The Stockholm District Court found Mr. Ahmet Makitan, a Bosnian-born Swedish national, guilty of having participated in the abuse of twenty-one Serb civilians from

May to August 1992 in Dretelj detention camp, near Capljina, and sentenced him to five years in prison. He was also ordered to pay Krona 1.5 million (KM 324,000 or €165,900) as compensation to victims.

Mr. Makitan was arrested in January 2010, following an investigation by the Swedish National War Crimes Commission (Rikskriminalpolisens krigsbrottskommision) carried out with the help of the United Nations International War Crimes Tribunal in The Hague. A former soldier with the Croatian Defence Forces (HOS), Makitan was charged with ‘aggravated war crimes and abduction’, and was accused of torturing Serb prisoners, including civilians, between May and August 1992. Makitan helped imprison civilians without due process and held them hostage with the aim of using them for prisoner exchanges.

As an HOS guard at the camp, he was also accused of inflicting serious injury on prisoners, depriving them of food, water, and sufficient medical attention, and making them do forced labour.

United States of America

Mashour Abdullah Muqbel Alsabri, et al. v. Barack Obama et al., *United States District Court for the District of Columbia, Civil Action No. 06-1767 (RMU)*, 3 February 2011

On 3 February 2011, the United States District Court for the District of Columbia denied a petition for a writ of habeas corpus to Mr. Mashour Abdullah Muqbel Alsabri, a Yemeni national detained in the US Naval Station at Guantánamo Bay, Cuba. The Court found that the Government had established, by a preponderance of the evidence, that

the petitioner travelled from Yemen to Afghanistan in 2000 to fight with the Taliban, al-Qaida or associated forces, stayed in Taliban and al-Qaida guesthouses, sought out and received military-style training from the Taliban or al-Qaida, travelled to the battle lines in Afghanistan as part of the Taliban or al-Qaida and remained part of those forces at the time of his capture in early 2002.

Based on the totality of the evidence, the Court stated that it was compelled to conclude that the petitioner was ‘part of the Taliban, al-Qaida or associated forces’, and therefore lawfully detained.

Federal district courts have jurisdiction over habeas corpus petitions filed by individuals detained at Guantánamo, as determined by the Supreme Court resolution of *Boumediene v. Bush* (2008), where it established that such individuals were indeed entitled to the privilege of habeas corpus to challenge the legality of their detention.

In finding the detention of Mr. Alsabri lawful, the District Court restated the Government’s authority to detain, for the duration of hostilities, individuals who were proved, under the standard of ‘more likely than not by the preponderance of

the evidence', to be 'part of' forces associated with Al Qaeda or the Taliban, as well as those individuals who purposefully and materially support such forces in hostilities against the United States. Such authority stems from the Authorization for the Use of Military Force (AUMF) Act.

Regarding the use of hearsay evidence, the Court also restated its own criteria, stating that 'although hearsay evidence is always admissible in these habeas proceedings, the court must make individualized determinations about the reliability and accuracy of that evidence and the weight it is to be afforded' (p. 9). In this case in particular, the Court agreed with the Government, in that it would presume the authenticity of but not the accuracy of the Government's intelligence and interrogation reports.

**Uthman Abdul Rahim Mohammed Uthman, Detainee, Camp Delta
v. Barack Obama, President of the United States, et al., No. 10-5235,
United States Court Of Appeals for the District Of Columbia Circuit, 29
March 2011**

On 29 March 2011, the US Court of Appeals for the District of Columbia Circuit overturned a decision to grant a petition for habeas corpus filed by Mr. Uthman Abdul Rahim Mohammed Uthman, a Yemeni national captured in Afghanistan and detained in the US Naval Base at Guantánamo Bay, Cuba, since January 2002. The District Court had granted release in 2004.

In reaching its decision, the Court of Appeals recalled its rejection, already stated in previous cases, of a formal 'command structure' test: that is, one where the key question is 'whether an individual received and executed orders from the enemy force's combat apparatus' in order to determine whether an individual was 'part of' Al Qaeda or other organizations. Such a test had been used for this case during the first instance proceedings.

According to the Court of Appeals, 'the determination . . . must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization'. As such, while demonstrating that someone is part of Al Qaeda's command structure would be *sufficient* to show that that person is 'part of' Al Qaeda, it would not be *necessary*, giving credit as well to other indicia that a particular individual is sufficiently involved with the organization as to be deemed part of it, even if the person never formally received or executed any orders.

Regarding the facts of the case, the Court considered, *inter alia*, that Mr. Uthman was captured in the vicinity of Tora Bora, an area where Al Qaeda forces gathered to fight the US; that he was captured travelling with two Al Qaeda members and one Taliban fighter; and that he lied to hide the fact that someone else paid for his travel to Afghanistan, relevant to the case in that 'false exculpatory statements are evidence – often strong evidence – of guilt' (p. 11). In concluding Uthman's account of the facts, the Court argued that he piled 'coincidence upon coincidence upon coincidence', and, while it remained possible that Uthman was 'innocently going about his business and just happened to show up in a variety of

extraordinary places – a kind of Forrest Gump in the war against al Qaeda’, the far more likely explanation was that he was indeed part of Al Qaeda.

Hussein Salem Mohammed Almerfedi v. Barack Obama, et al., US Court of Appeals for the District of Columbia Circuit, 10 June 2011

The US Court of Appeals for the District of Columbia Circuit overturned a first instance decision to release Mr. Hussein Mohammed Almerfedi, a Yemeni national detained at the US Naval Base in Guantánamo Bay, Cuba. Mr. Almerfedi had been granted a writ of habeas corpus by the District Court after finding that the Government had failed to demonstrate, by a preponderance of the evidence, that he was a ‘part of’ Al Qaeda. The Government appealed the decision, arguing that the lower court had erred when finding certain evidence unreliable, ‘thereby improperly excluding it from consideration, and failed to give sufficient weight to the reliable evidence it did consider’. The Court of Appeals agreed.

The evidence presented by the Government was based on two sources: Mr. Almerfedi’s own admissions and the statements provided by another Guantánamo detainee. With this in mind, the petitioner compared such evidence to two standards: the evidence produced by the Government in other cases involving Guantánamo detainees, and the burden of proof necessary for a criminal conviction – that is, beyond reasonable doubt. The Court rejected both comparisons, stating first that, even if the Government’s evidence for other cases had been stronger, this was irrelevant, in that all the evidence supporting the Government in those cases was listed ‘without needing to consider the minimum amount of evidence that would establish a preponderance’.

The Court also rejected the comparison to a criminal case, stating that that was not the analytical framework called for by the preponderance of evidence standard used in civil cases, which is the standard applicable to the current habeas corpus petitions. It would only require a court to ‘make a comparative judgment about the evidence’ and ‘determine whether a proposition is more likely true than not true based on the evidence in the record’. Certainty would not be necessary, nor the absolute absence of any reasonable doubt.

US v. Justin Cannon and Christopher Drotleff, US District Court for the Eastern District of Virginia, 14 March 2011

On 14 March 2011, the US District Court for the Eastern District of Virginia found Mr. Justin Cannon and Mr. Christopher Drotleff, two former Blackwater contractors operating in Afghanistan, guilty of involuntary manslaughter, for the killing of two Afghan nationals and the wounding of a third. They were sentenced to thirty and thirty-seven months’ imprisonment respectively.

Cannon and Drotleff were working for a subsidiary of Blackwater under a Defense Department sub-contract when their two-vehicle convoy became involved in a traffic accident in Kabul, on 5 May 2009. They then opened fire on a car

departing from the scene, resulting in the death of one of the passengers. A second civilian, walking past the scene, was also killed in the incident. Prosecutors argued against any sentence reduction for Mr. Cannon, on the basis that he behaved recklessly, failed to report the incident promptly, and told an Afghan interpreter to lie about his alleged drinking earlier in the evening.

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