

Armed violence in fragile states:

Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties

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Abstract

The gradual process of state failure is commonly accompanied by armed violence. Apart from occasional outbreaks, armed violence in fragile states tends to smoulder with relatively low intensity, often over an extended period of time. The actual level of violence may oscillate around the level of violence that is commonly accepted as triggering the application of international humanitarian law (IHL). In addition, because of the specific objectives typically – though not necessarily always – pursued by armed groups in failed state conflict scenarios, cross-border spillover effects are fairly frequent. The qualification of armed violence in such scenarios according to the conflict categories laid down in IHL thus raises some rather specific issues. Moreover, weak states, failing states, and ultimately failed states are increasingly perceived as a key threat to international security. States seem increasingly inclined to assume sporadic order maintenance functions in the place of disabled governments so as to maintain the perceived security threat at a tolerable level. Current efforts to repress acts of piracy off the coast of Somalia are an evident case in point. Since the Security Council, in Resolution 1851, at least implied the possibility of applying IHL in that specific

* The views expressed in this article reflect the author's opinion and not necessarily those of the ICRC.

context, the application of this legal regime to sporadic law enforcement operations by third parties also demands further scrutiny.



The complex process of what is commonly referred to as ‘state failure’ is usually accompanied by, and typically associated with, armed conflict. Indeed, the two phenomena all too often go hand in hand and mutually reinforce each other, with one frequently being the root cause of the other. The absence of effective government control and the inability to exercise basic state functions provide fertile ground for disorder, crime and ultimately armed conflict to thrive. Conversely, internal violence and armed conflict are causes of instability and potential catalysts of state failure. Once this downward spiral is set in motion, the likelihood of a protracted crisis is increased immensely. For more than a decade the situation in Somalia has continuously been qualified by the Security Council as a threat to peace. This creates innumerable humanitarian challenges and raises an array of complex legal questions at various levels ranging from *jus ad bellum* to *jus in bello*. The latter will be the primary focus of this contribution.

In an environment in which the state as the central addressee of international legal obligations, especially human rights obligations,¹ is largely inexistent, it is of crucial importance to determine the applicable framework of humanitarian law and work towards the creation of incentives for compliance. This compliance with IHL throughout the armed conflict may be a first and admittedly tentative step towards a return to the rule of law and reconciliation between warring factions in the aftermath of hostilities. Yet the complexity and specific dynamic of armed violence in fragile, failing and failed states and the diversity and relative volatility of players, often coupled with activities of transnational terrorist and criminal networks, render particularly difficult the very determination of which legal framework is applicable and whether the situation is to be qualified as an armed conflict within the meaning of IHL.

It is against this background that the following brief article considers whether, and if so, to what extent, the specific situation of failed and failing states (i.e. the absence of government control in a given state) influences the qualification of armed violence as an armed conflict under IHL. In addition, it will focus on two phenomena that typically, albeit not necessarily always, accompany conflicts in fragile states: (a) the spillover of armed clashes into neighbouring countries; and (b) the exercise of specific, very limited, law enforcement functions by third parties that aim to fill the void left by a disabled government. Regional spillover effects are frequent in failed state conflict scenarios: they increase the number of players involved in the conflict and they add an international, cross-border element that may complicate a precise qualification of the situation. What is more, in times of

1 But see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

transnational terrorism and powerful criminal networks operating on an international scale, states are ever more likely to perceive the absence of government control in a given state as a potential threat to their own security interests.² They may thus be increasingly inclined to step in and take over at least rudimentary, rather sporadic, order maintenance functions sufficient to maintain the perceived security threat at a tolerable level. Current efforts to repress acts of piracy and armed robbery at sea off the coast of Somalia are a case in point.³ Such law enforcement efforts by third parties may overlap with an ongoing armed conflict between local players and add another level of intricate questions pertaining to the identification of the legal framework applicable.

Fragile statehood: weak states, failing states and failed states

Fragile statehood can perhaps best be defined in terms of state structures and institutions with severe inadequacies in their performance of key tasks and functions vis-à-vis their citizens.⁴ In terms of public international law, the relevant criterion is the loss of government control, which may of course vary in form and extent.⁵ Obviously, this concept covers a broad spectrum of states.⁶ The loss of government control and the ability to exercise basic state functions is a gradual process; at times it may even be the result of calculated politics rather than 'weakness' in the true sense of the word.⁷ The inability of a state to effectively perform one or other of the basic state functions – namely to provide security and ensure well-being and the rule of law – is frequent,⁸ whereas the inability to perform any of them is rather exceptional. Similarly, while loss of control over certain delimited parts of a state's territory is not uncommon, total and protracted loss of central control over the entire territory is rare and arguably warrants the specific categorization and suggestive designation as a failed state, in view of the

2 See e.g. European Union, *A secure Europe in a better world: European Security Strategy* (hereinafter *European Security Strategy*), Brussels, December 2003, pp. 3ff., available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> (last visited 2 July 2009).

3 See SC Res. 1851, 16 December 2008.

4 Ulrich Schneekener, *Internationale Statebuilding: Dilemmata, Strategien und Anforderungen an die deutsche Politik*, SWP Research Paper, German Institute for International and Security Affairs (SWP), Berlin, October 2007, p. 7; available at http://www.swp-berlin.org/de/common/get_document.php?asset_id=3993 (last visited 2 July 2007).

5 Robin Geiß, 'Failed States', *Die normative Erfassung gescheiterter Staaten*, Duncker and Humblot, Berlin, 2005.

6 See Robert I. Rotberg, 'Failed states, collapsed states, weak states: Causes and indicators', in R. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*, Brookings Institution Press, Washington DC, 2003, pp. 1–25.

7 In order to consolidate their power in the capital, governments may opt to neglect the periphery, perhaps even to instigate erosion or conflict so as to divert tensions from the capital, and at the same time deliberately 'outsource' the performance of certain state functions to third parties. See A. Weber, *Kriege ohne Grenzen und das 'erfolgreiche Scheitern' der Staaten am Horn von Afrika*, SWP Research Paper, Berlin, September 2008, p. 6.

8 See U. Schneekener, 'States at risk: Zur analyse fragiler Staatlichkeit', in U. Schneekener (ed.), *Fragile Staatlichkeit*, Nomos, Baden-Baden, 2006, pp. 9–40.

various implications it entails at the international level. Even in weak, failed and failing states, chaos and anarchy are not necessarily the rule, nor do they necessarily prevail throughout the entire country.⁹ Contested forms of rudimentary political order, based on traditional structures of communal self-organization, often re-emerge as central structures fade. In that case, various non-state entities will claim or indeed possess a locally confined monopoly on the use of force and control access to natural resources, the remaining infrastructure and international humanitarian aid.¹⁰ Consequently, state-building attempts – by definition designed to re-install the central state monopoly on the use of force – will be perceived as hostile by those who have set up consolidated local power monopolies, as state-building in the classic sense would necessitate a redistribution of power to their disadvantage.

To give a better understanding of the broad range of fragile statehood, it is often suggested that a distinction be made between weak states, failing states and ultimately failed or collapsed states. With respect to the latter category, there seems to be widespread agreement that the only ‘failed state’ in this narrow sense is Somalia where, despite the inauguration of a Transitional National Government (TNG) in 2000 and sporadic periods of seemingly re-emerging stability, there has on the whole been hardly any government control ever since the former President Siad Barre was ousted in 1991. Nevertheless, even in this arguably most extreme case of protracted loss of government control, neither the country’s sovereignty nor its statehood – one of the defining criteria of statehood is, after all, the exercise of effective government control – has ever been seriously questioned.¹¹ For example, Security Council Resolutions 1816, 1833, 1846 and most recently 1851 dealing with the repression of piracy off the coast of Somalia, while acknowledging the inability of the Transitional Government to repress piracy in the region, explicitly reaffirm respect for the sovereignty, territorial integrity, political independence and unity of Somalia.¹² This affirmation may have to be ascribed to no more than the mere existence of the Transitional Government. In 1992, Security Council Resolutions 733 (1992) and 794 (1992) did not contain any such explicit affirmation of Somalia’s sovereignty,¹³ but nor did those resolutions, based on Chapter VII of the UN Charter, cast Somalia’s sovereignty or statehood in doubt. Indeed, throughout the entire period from 1992, despite an oftentimes vacant seat, Somalia has

9 U. Schneckener, *How transnational terrorists profit from fragile states*, SWP Research Paper, Berlin, 2004, pp. 5, 10; available at: http://www.swp-berlin.org/en/common/get_document.php?asset_id=2406 (last visited 9 July 2009).

10 U. Schneckener, ‘Fragile statehood, armed non-state actors and security governance’, in A. Bryden and M. Caparini (eds.), *Private Actors and Security Governance*, Berlin, 2006, pp. 23, 34.

11 Montevideo Convention on the Rights and Duties of States, 23 December 1933; LNTS Vol. CLXV, 25. According to Article 1 of the Montevideo Convention: ‘The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.’ But see also J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford, 2007.

12 SC Res. 1816, 2 June 2008; SC Res. 1838, 7 October 2008; SC Res. 1846, 2 December 2008; SC Res. 1851, 16 December 2008.

13 SC Res. 733, 23 January 1992; SC Res. 794, 3 December 1992.

undisputedly remained a member of the United Nations.¹⁴ Similarly, despite occasional suggestions in relation to failed states for certain limitations (by way of a teleological reduction) to the prohibition on the use of force laid down in Article 2(4) of the UN Charter and the non-intervention principle in its Article 2(7),¹⁵ the continuity of a state that lacks government control even over a prolonged period of time has not been questioned either.¹⁶

State failure: a problem of global reach

In 1992, Security Council Resolution 794 was considered a milestone resolution because, without explicit reference to any cross-border effects, it confirmed a threat to peace in the sense of the UN Charter's Article 39 solely on grounds of 'the magnitude of the human tragedy caused by the conflict in Somalia'.¹⁷ During the following years, failed and failing states were associated first of all with humanitarian catastrophes and, in view of the risk of local spillover effects, at the most were regarded as a regional problem. This perception has changed, at the latest since September 2001. Today, state failure in and of itself is understood – largely because of the attractiveness of weak states to transnational terror networks and transnational criminal organizations, and irrespective of an acute humanitarian crisis – as a concern of global reach.¹⁸ Afghanistan and Pakistan have become security priorities for the international community; both the US National Security Strategy (2002) report and the European Security Strategy (2003) report have identified state failure as a central threat to international security.¹⁹ In 2009, amid the turmoil of a global financial and economic crisis, the risk of further weakened state structures and occurrences of state failure is clearly as pertinent as ever.²⁰

14 According to Articles 3 and 4 of the UN Charter, membership in the United Nations is only open to states.

15 Matthias Herdegen, 'Der Wegfall effektiver Staatsgewalt', in *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34, 1996, p. 49 (pp. 58ff.).

16 See e.g. Daniel Thürer, 'The failed state and international law', *International Review of the Red Cross*, Nr. 836, 1999, pp. 731–761.

17 SC Res. 794, 3 December 1992.

18 It has been shown that weak and failing states, in which government supervision can be evaded, are generally – except for Afghanistan – more attractive to transnational terrorist networks that need a certain level of infrastructure than failed states and areas affected by a fully fledged armed conflict. See Schneckener, above note 4, p. 30.

19 The White House, *The National Security Strategy of the USA*, September 2002, p. 4, available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> (last visited 2 July 2009); European Union, *European Security Strategy*, above note 2, p. 5. See also *Report on the implementation of the European Security Strategy: Providing security in a changing world*, S407/08, Brussels, 11 December 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf (last visited 2 July 2009).

20 It is primarily against this background that the high-level so-called '3C Conference' – the 3Cs standing for a coherent, co-ordinated and complementary approach – was convened by the Swiss government in association with the OECD, the United Nations, the World Bank and NATO in March 2009. Document available at: http://www.3c-conference2009.ch/en/Home/Conference_Papers/media/Afghanistan%20paper%20final%20final.pdf (last visited 9 July 2009).

It remains to be seen whether the Security Council will follow through and one day consider state failure, as such, as a threat to peace in the sense of Article 39, irrespective of an impending humanitarian crisis. The better view may be to regard fragile statehood merely as a catalyst for potential threats to peace rather than as a threat *per se*.²¹ However, past experience has shown that once the potential threats commonly associated with fragile statehood start to materialize,²² the mutually reinforcing effects of fragile statehood and those various security threats will soon lead to a consolidated and persistent crisis that becomes more and more difficult to counter. Preambular paragraph 11 of Security Council Resolution 1851 notably determines ‘that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region’.²³ States may be increasingly inclined to seek avenues for more preventive and less costly action. Categorizing state failure – and more specifically, the absence of government control and the inability to perform basic law enforcement functions – as a threat to peace may pave the way for such a preventive approach.

Weak, failing and failed states: international relations

In a primarily state-centred international system that after two world wars was primarily designed to curb overly powerful states, the conceptualization and integration of overly weak states has proved quite problematic. States that lack a central government are not only incapable of exercising essential state functions domestically; they are also unable to operate on the international plane. This has far-reaching implications. Without a representative government, a state cannot enter into international agreements and may even be incapable of requesting and consenting to urgently required interventions by third parties; diplomatic channels lie dormant, and international representation – if any – will be reduced to a bare minimum.²⁴ Weak, failing and especially failed states, therefore, are prone to international isolation. In 1999, the Secretary-General of the United Nations noted that ‘the representation of the Somali people in intergovernmental and

21 See Schneckener, above note 10, p. 24.

22 The US National Security Strategy report states: ‘America is now threatened less by conquering states than we are by failing ones’. See *The National Security Strategy of the United States of America*, Washington DC, September 2002. The European Union’s *European Security Strategy*, above note 2, p. 5, emphasizes that ‘[c]ollapse of the State can be associated with obvious threats, such as organised crime or terrorism. State failure is an alarming phenomenon, that undermines global governance, and adds to regional instability’. The report of the UN Secretary General’s High-Level Panel on Threats, Challenges and Change, *A more secure world*, initiated by UN Secretary-General Kofi Annan, emphasizes that the issue of fragile statehood is at the core of most of today’s relevant security problems and identifies six ‘clusters of threat’, but without designating as a threat failing and failed states as such – see UN Secretary General’s High-Level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations, New York, 2004, pp. 23ff.

23 SC Res. 1851, 16 December 2008.

24 Geiß, above note 5, pp. 129–150.

international fora [is] absent'.²⁵ What is more, the channels through which international assistance is commonly delivered are traditionally 'state-centred'. They focus on established and recognized state institutions such as the various ministries or – in the case of financial assistance – on central and national banks. It is telling, perhaps, that as early as 1999 the UN Secretary-General urged international financial institutions such as the World Bank and the European Development Fund to exercise flexibility in situations in which a central government and governmental institutions are absent.²⁶ The Cotonou Agreement in particular makes explicit provision for supporting states which, in the absence of normally established government institutions, have not even been able to sign or ratify the Agreement.²⁷ Still, governmental bodies often have a certain predisposition, based on their common *modus operandi*, to engage with other governmental bodies and recognized state institutions and it seems that the readiness to engage with a variety of different (non-state) entities at field level could still be improved, especially under the umbrella of a whole-of-government approach.²⁸

The legal qualification of armed violence within a failed state

The conflict scenario in a 'failed state' is typically (a legal analysis of these patterns demands some degree of generalization) made up of hostilities between various armed groups. In the absence of government forces, this scenario cannot be qualified as either an international armed conflict or a non-international armed conflict in the sense of Article 2(1) of Additional Protocol II.²⁹ Thus from the outset only Article 3 common to the four 1949 Geneva Conventions, which encompasses armed conflicts that take place between armed factions within a country and in which the government is not involved,³⁰ as well as those rules of customary

25 *Report of the Secretary General on the Situation in Somalia*, S/1999/882, 16 August 1999, para 63.

26 *Ibid.*, para 72.

27 This was a reaction to the fact that notably Somalia had not been able to sign the Lomé IV Convention, a requirement for entitlement to benefit from the 7th and 8th European Development Funds. According to Article 93(4) of the Cotonou Agreement, which replaced the Lomé Convention in 2000, the Council of Ministers may decide to accord special support to members of the African, Caribbean and Pacific group of states which, in the absence of normally established government institutions, have not been able to sign or ratify this Agreement.

28 See Organisation for Economic Co-operation and Development (OECD), *Whole of government approaches to fragile States*, Paris, 2006, available at: <http://www.oecd.org/dataoecd/15/24/37826256.pdf> (last visited 8 July 2005).

29 Protocol II Additional to the Geneva Conventions of 1949 and Relating to Non-International Armed Conflicts. In reality, of course, various armed groups maintain relations with and may receive support of some sort from states, and raging chaos may well be the result of calculated government policy. However, indirect support can take various forms, and in most instances states will be keen to keep such support secret and to avoid attribution which could possibly have an impact on the qualification of the armed conflict, even though it would still have to be qualified as a non-international armed conflict if states are only involved on one side of it.

30 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter Appeal on Jurisdiction), 2 October 1995, paras 67, 70.

international humanitarian law that become applicable at the specific threshold of Common Article 3, are potentially applicable.³¹

‘Low-intensity conflicts’

The decisive question in a failed state scenario without outside interference from third states is therefore whether the threshold of a non-international armed conflict has been reached. In *Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) affirmed that a non-international armed conflict in the sense of Common Article 3 exists when there is protracted armed violence between organized armed groups within a state.³² Subsequent judgments of the ICTY, while using *Tadic* as a starting point,³³ have devoted particular attention to the intensity of the armed violence and have elaborated on the required degree of organization of the armed groups involved.³⁴ In *Limaj*, the ICTY confirmed that ‘the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and the organization of the parties ...’³⁵ In practice, ascertaining this particular threshold on a case-by-case basis, namely the intensity and existence of protracted armed violence as well as a certain minimum level of organization of the armed groups involved, may prove problematic. Especially in conflict situations in weak, failing and failed states the organizational structure of the parties involved commonly remains rather basic and the level of violence at times oscillates around the threshold of violence required by Common Article 3.

31 See also Geiß, above note 5, pp. 225–244.

32 ICTY, *Prosecutor v. Tadic*, Appeal on Jurisdiction, above note 30, para 70. See also Sonia Boelaert-Suominen, ‘The Yugoslav Tribunal and the common core of humanitarian law applicable to all armed conflicts’, *Leiden Journal of International Law*, Vol. 13, 2000, p. 619, at pp. 632ff.; Ch. Greenwood, ‘The development of international law by the International Criminal Tribunal for the former Yugoslavia’, *Max Planck Yearbook of United Nations Law*, Vol 2, 1998, p. 97, at p. 114.

33 For an in-depth analysis of this jurisprudence see Eve LaHaye, *War Crimes in Internal Armed Conflicts*, Cambridge 2008, pp. 9ff.

34 See e.g. ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, para 59; ICTY, *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, paras 567–69; ICTY, *Prosecutor v. Mucić et al. (Čelebići Camp)*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, paras 183–92; ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, paras 83–174.

35 ICTY, *Prosecutor v. Limaj*, above note 34, para 170. Various indicative criteria have been suggested in the literature and in international jurisprudence in order to facilitate the determination whether a given situation has met the required threshold to qualify as a non-international armed conflict: ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 49, 60; ICTY, *Prosecutor v. Limaj*, above note 34, paras 94–134; LaHaye, above note 33, pp. 5ff. With regard to the intensity of the armed violence the following factors have been taken into consideration: the recurrence and gravity of attacks, the temporal and territorial expansion of violence, the ‘collective character’ of hostilities, control over territory, the distribution and type of weapons employed, and whether the conflict received the attention of the Security Council or, going one step further, whether it was specifically addressed or even qualified as such by the Security Council; see G. Nolte, ‘The different functions of the Security Council with respect to humanitarian law’, in V. Lowe, A. Roberts *et al.* (eds.), *The Security Council and War*, Oxford University Press, Oxford, 2008, pp. 519–535. Conversely, the *Limaj* case has been particularly instructive in terms of the required degree of organization of an armed group.

Failed and failing states are often associated with ‘low-intensity conflicts’ in which fluctuating levels of violence and sporadic outbreaks of hostilities predominate over sustained combat operations and large-scale military operations. Small arms and crude tools such as machetes and axes are prevalent weapons in such conflict scenarios, and fighters, partly composed of child soldiers and other forced recruits, are often ill-trained, inexperienced and only rudimentarily organized at best. The absence of large-scale military confrontations is explained by the fact that conflicts in failed and failing states are characterized by a (changing) variety of warring factions which, unlike those in traditional anti-regime conflicts, are rarely out to gain central power and oust the central government; this would involve battling against more organized military forces. Instead they strive for regional control over individual strategic and economic focal points.³⁶ Motivated primarily by economic gain and – unlike guerrilla forces in anti-regime conflicts – largely independent from and relatively indifferent to acceptance by the local civilian population, these factions have little or no interest in exercising basic state functions or assuming responsibility over an extended part of the country’s territory.³⁷ Rather than overcoming the enemy, which is a notion inherent to the humanitarian law rules on the conduct of hostilities, it may be more important to them to create and maintain societal instability, to disrupt and dissolve traditional communal networks and, more generally, to prevent a re-emergence of effective state control over certain parts of the country. In 1992, when describing the situation in Somalia, the Security Council referred to a ‘proliferation of armed banditry’ and spoke of a ‘sporadic outbreak of hostilities’.³⁸ Against this background, some discussion could conceivably have arisen over the qualification of the situation in Somalia throughout the entire period from 1992 until 2009 as a non-international armed conflict. Yet in the past, even after the establishment of the Transitional National Government in 2000 and leaving aside interference by third states, the situation in Somalia has continuously been qualified as such, without any particular attention to the delineation of armed conflicts and situations of violence that remain below that threshold.³⁹

This qualification certainly appears to be maintainable, especially in view of the IACHR’s finding in the famous *Tablada* decision where the Court held

36 Schneckener, above note 4, p. 13.

37 Schneckener, above note 10, p. 23.

38 SC Res. 775, 28 August 1992; SC Res. 767, 24 July 1992; SC Res. 897, 4 February 1994.

39 According to the report of the UN Independent Expert for Somalia of 14 January 2002: ‘... international humanitarian law relating to non-international armed conflict applies in the whole territory of Somalia, irrespective of whether a specific area is engulfed in active fighting or not’; E/CN.4/2002/119, 14 January 2002, para 31. The report further stated that: ‘This application extends to the “Puntland” regional government in the north-east, which considers itself part of Somalia, as well as to “Somaliland”, which is asserting independence, although there is no international recognition of its separate status’ (*ibid.*). The previous independent expert had likewise been of the opinion that ‘... all parties to the conflict [in Somalia] are bound by the laws and customs applicable in armed conflicts not of an international nature’, E/CN.4/2000/110, 26 January 2000. For similar qualifications see also e.g. E/CN.4/1999/103, 18 February 1993, para 34; E/CN.4/1997/88, 3 March 1997, para 55; E/CN.4/1998/96, 16 January 1998, para 12.

that: ‘... it is important to understand that the application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory ...’⁴⁰, and in light of the decision of the ICTY Trial Chamber in *Limaj* that ‘some degree of organization by the parties will suffice to establish the existence of an armed conflict’.⁴¹ Nonetheless, the seemingly ready qualification of low-intensity conflicts in a failed state environment as situations of non-international armed conflict raises the question why potentially similar levels of violence, for example the violence in no/low-income urban areas of some major cities (especially in Latin America), involving criminal gangs and certain forms of militias more or less closely linked to the police, have not been qualified – and indeed have commonly not even been considered qualifiable – as such.⁴² On a more abstract level, this also raises the question whether (theoretically) similar levels of violence could be qualified differently depending on whether there is effective overall government control (Brazil) or not (Somalia).

Because a total loss of government control is so exceptional, too little state practice has evolved to reach a conclusive answer as to whether, in failed state situations, a somewhat lowered threshold of violence and organizational structure could suffice to meet the legal requirements for qualification as a non-international armed conflict. After all, in relation to Somalia the Security Council has continuously acknowledged the ‘extraordinary nature’ and ‘the unique character of the situation in Somalia’ from 1992 up until today.⁴³ Theoretically, of course, one could think of reasons why armed violence in failed state scenarios could more readily be qualified as an armed conflict in the sense of IHL. First, concerns that have traditionally supported a heightened threshold for non-international armed conflicts in contradistinction to internal disturbances and tensions, namely states’ concerns about outside interference in their internal affairs,⁴⁴ are attenuated in the absence of effective government control. Second, the application of IHL might

40 Inter-American Court of Human Rights, *Juan Carlos Abella v. Argentina (Tablada Case)*, No. 11.137, Report 55/97, para 152. The relatively high threshold identified by the ICTR in the *Akayesu* case, where it was held that Common Article 3 requires armed groups to be ‘organized as military in possession of a part of the national territory’ has not found widespread acceptance and is regarded as exceedingly high – see ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Chamber I), para 619.

41 ICTY, *Prosecutor v. Limaj*, above note 34, para 89.

42 See e.g. compilation prepared by OHCHR, *Brazil, A/HRC/WG.6/1/BRA/2*, 28 February 2008, available at: http://www.upr-info.org/IMG/pdf/Bra_UN_comp.pdf (last visited 9 July 2009); Human Rights Watch’s submission to the Human Rights Council, 8 April 2008, available at: <http://www.hrw.org/en/news/2008/04/06/universal-periodic-review-brazil> (last visited 9 July 2009).

43 Recent Security Council Resolutions 1816, 1846 and 1851 – albeit with regard to the repression of piracy – not only underscored the particularity of the situation in Somalia but explicitly emphasized that those resolutions shall not be considered as establishing customary international law. SC Res. 1851, 16 December 2008, para 10: ‘Affirms that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law’.

44 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, p. 14, para 205.

simply seem politically desirable. In an environment in which the domestic legal order is dysfunctional, where the communitarian value system is indeed profoundly disturbed and the central addressee of human rights obligations no longer exists, IHL could provide an internationally accepted (lowest) common denominator on which the warring factions could potentially agree and which could serve as a starting point for attempts to regulate their behaviour.

However, disagreement over formerly common values and domestic rules is typical for warring parties in each and every armed conflict and hardly warrants any specific recognition in the case of armed conflicts in failed states. Rules relating to the actual conduct of hostilities are justified only if a certain level of hostilities is reached, and they can be credible and effective only if those involved in the hostilities show a minimum organizational structure that ensures an actual ability to comply. Moreover, it would appear premature to dispense with the traditional (sovereignty-based) distinction between armed conflict and internal disturbances in failed state situations, since there have been no indications in state practice that the sovereignty of a failed state is diminished and a government may, at least in theory, be reinstalled at any time. As regards the foregoing comparison between levels of violence in failed states and urban violence, there is already a notable difference in that urban violence is by definition territorially confined to a specific and relatively delimited (urban) area, whereas armed violence in failed states is prone to territorial expansion and even to regional spillover, as will be seen below. This does not mean that territorially confined urban violence could not eventually reach the threshold of an armed conflict, but it does show that in the said comparison, factually different – rather than similar – situations of violence have been qualified differently.

Thus rather than indicating the acceptance of a separate sub-category of armed conflicts specific to failed states, the unquestioned, decade-long qualification of the situation in Somalia as a non-international armed conflict may be more plausibly regarded as proof that the various aforesaid criteria for the existence of an armed conflict can be referred to somewhat interchangeably. It would seem that the duration, persistence and geographical expansion of armed violence may partly compensate for a lower level of intensity, perhaps even more so if despite relatively low or fluctuating levels of violence, repercussions on the civilian population are extremely severe.

Territorial spillover

In failed and failing state conflict scenarios, territorial spillover effects appear to be quite frequent. This is due at least in part to the fact that, unlike in traditional ‘civil wars’, territorial demarcations and international borders are of little relevance for armed groups that are striving for economic gain rather than regime change and government control. Evidently, cross-border activities are an additional component that must be considered when qualifying the armed conflict in terms of IHL. Common Article 3 of the four Geneva Conventions, drafted against the backdrop of the Spanish Civil War, was – at least when adopted – meant to cover

traditional forms of civil war in which an organized armed group would strive for regime change, and in so doing gradually establish control over increasing parts of territory within a single state.⁴⁵ This traditional concept found its way into Common Article 3 through the explicit reference to non-international armed conflicts ‘occurring in the territory of one of the High Contracting Parties’ and is reflected in Article 10(1) of the ILC Draft Articles on Responsibility of States, which refers to ‘an insurrectional movement which becomes the new Government of a State’.⁴⁶ The possibility of overcoming the presumed historical context of the territoriality criterion (namely, that it was originally introduced in Common Article 3 at a time when not all states were party to the Geneva Conventions, with the aim of ensuring that it would only apply in the territory of Contracting Parties) remains a moot point. In *Tadic*, the ICTY Appeals Chamber’s definition of international armed conflict still referred to protracted armed violence between organized armed groups *within a State*.⁴⁷ Clearly, a sweeping and global application of IHL without any territorial confines whatsoever is not maintainable owing to the unjustifiable worldwide derogations from human rights law this would bring about, and in light of the very object and purpose of IHL, i.e. to provide relatively basic but feasible standards in areas where the reality of armed conflict simply forestalls the application of more protective (human rights) standards. Discussions about the ‘territoriality criterion’ have mainly focused on what in modern parlance is now often termed ‘transnational armed conflicts’ (i.e. a situation in which a state targets an organized armed group on the territory of another state), and more generally on ‘overseas contingency operations’, formerly referred to as the ‘global war on terror’.⁴⁸ Far less attention has been given to qualifying situations in which a non-international armed conflict spills over into the territory of a neighbouring country. Problems in qualifying them often do arise, not only from the cross-border element as such, but also – though not always – from the subsequent increase in the number of parties to an already ongoing armed conflict. With regard to the territoriality issue it remains unclear, for want of significant relevant practice or jurisprudence, whether territorial spillover would necessitate a renewed assessment of whether the threshold of a non-international armed conflict has been reached in the neighbouring country, or whether the previously existing armed conflict could be considered as continuing unchanged after having crossed the border.

Of course, the practical differences in either approach will be minor if significant spillover allows the situation in the neighbouring country to be immediately qualified as a non-international armed conflict. At the same time,

45 Lindsay Moir, *The Law of Internal Armed Conflict*, pp. 52ff. Nevertheless, the Spanish Civil War did of course have far-reaching international implications.

46 Claus Krefß, ‘Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater?’, in G. Hankel (ed.), *Macht und Recht: Völkerrecht und Völkerstrafrecht zu Beginn des 21. Jahrhunderts*, Hamburger Edition, Hamburg, 2007, p. 357; Moir, above note 45, pp. 52ff.

47 *Prosecutor v. Tadic*, Appeal on Jurisdiction, above note 30, para 70 (emphasis added).

48 See e.g. *Hamdan v. Rumsfeld*, 548 U.S. (2006), p. 67.

despite the panoply of indicative criteria established in international jurisprudence to facilitate initial assessment of the existence of a non-international armed conflict, specific (factual) criteria to determine whether a third party has subsequently become a party to an already ongoing armed conflict do not yet seem sufficiently developed.

Law enforcement operations by third parties: the repression of piracy as a case in point

As has been noted above, in times of transnational terrorism and transnational criminal networks states increasingly perceive state failure as a direct threat to their security interests. They will thus probably be all the more inclined to partially fill the control gap and assume specific law enforcement functions in place of a disabled government so as to keep potential threats under control. Ongoing operations to repress piracy and armed robbery at sea off the coast of Somalia are a topical case in point. Piracy is certainly only one specific aspect of a far more complex crisis situation in Somalia, but one with particular global security implications. It has traditionally been viewed as a crime over which universal jurisdiction should be exercised and the fight against piracy has been seen as an act of law enforcement.⁴⁹ Yet Resolution 1851 of 16 December 2008, like previous resolutions on the subject, explicitly recognizes ‘the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia ...’⁵⁰ It is against this background that the Security Council, by virtue especially of Resolutions 1816, 1846 and 1851, has defined and extended the legal basis for the exercise of enforcement and adjudicative jurisdiction by third parties with regard to the repression of piracy in the area. Security Council Resolutions 1816 and 1846 relate to counter-piracy operations at sea, i.e. both on the high seas and within Somalia’s territorial waters. These resolutions are based on and have reaffirmed the regime of enforcement powers granted by the United Nations Convention for the Law of the Seas (UNCLOS). However, unlike previous resolutions that only concerned counter-piracy operations at sea, Security Council Resolution 1851 relating to counter-piracy operations on the Somali mainland also refers for the first time to IHL. In the relevant part of operative paragraph 6, the resolution provides that states ‘... may undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures

49 See e.g. Douglas Guilfoyle, ‘Piracy off Somalia: UN Security Council Resolution 1816 and IMO regional counter-piracy efforts’, *International and Comparative Law Quarterly*, Vol. 57, 2008, p. 696. Moreover, operative paragraph 5 of Security Council Resolution 1851 (16 December 2008) reflects this perception by encouraging states ‘to effectively investigate and prosecute piracy and armed robbery at sea offences’.

50 SC Res. 1851, 16 December 2008, preambular para 5. Similarly, preambular paragraph 7 of SC Res. 1816 (2 June 2008) took into account: ‘the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters’.

undertaken pursuant to the authority of this paragraph shall be undertaken consistent with *applicable international humanitarian and human rights law*.⁵¹ Of course, the wording ‘in Somalia’ could be understood at face value to mean not only Somalia’s mainland but also its territorial waters. However, given that Resolution 1851 explicitly confirms the continuing relevance of Resolution 1846, which specifically deals with the exercise of enforcement powers in Somalia’s territorial waters,⁵² a more restrictive interpretation, i.e. the application of Resolution 1851 only to the Somali mainland, appears appropriate.⁵³ Therefore, nothing in the regime of enforcement powers established by virtue of the various Security Council Resolutions to date suggests that IHL would be of relevance in the repression of piracy at sea.

Where the Somali mainland is concerned, however, Resolution 1851 clearly embraces this possibility, even though it does not, by merely speaking of the ‘applicable international humanitarian [...] law’, provide any clear-cut determination to this end. This general reference to IHL raises the question how its application could be construed in that specific context, in which third parties are conducting what appear to be law-enforcement operations in the territory of a failed state where a non-international armed conflict is in progress. As things stand, at least two interpretations seem possible. On the one hand, third states co-operating with the TFG in Somalia – as Resolution 1851 explicitly requests⁵⁴ – could become parties to the existing conflict there simply by collaborating with an entity that is already party to an ongoing non-international armed conflict.⁵⁵ On the other hand, Resolution 1851 could be read in such a way that the counter-piracy operations in and of themselves – independently of the ongoing conflict in Somalia – could eventually reach the threshold of a non-international armed conflict, thereby triggering the application of IHL. There is no indication that the Security Council considered either of these constellations in any detail during the discussions that led to the adoption of Resolution 1851.⁵⁶ It seems rather likely that through the general reference to the ‘applicable international humanitarian and human rights law’, the Security Council, while authorizing the use of ‘all necessary measures’, simultaneously simply wanted to emphasize that the exercise of enforcement jurisdiction vis-à-vis pirates is subject to certain legal restraints, i.e. to whichever of those bodies of law is applicable. There is thus no implication in Resolution 1851 that the failed-state situation prevailing in Somalia could or

51 *Ibid.*, para 6 (emphasis added).

52 SC Res. 1846, 2 December 2008, para 10.

53 Moreover, such a distinction between counter-piracy operations at sea and on land would seem to be in line with the fact that the Security Council qualified the situation in Somalia, and not the incidents of piracy, as a threat to international peace and security. Notably, the Security Council emphasized that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia only exacerbate the crisis situation prevailing in Somalia.

54 SC Res. 1851, 16 December 2008, para 6.

55 See e.g. SC Res. 1872, 26 May 2009.

56 See United Nations Department of Public Information, *Security Council authorizes States to use land-based operations in Somalia*, Press Release, 16 December 2008, available at <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm> (last visited 9 July 2009).

should have any bearing on identification of the applicable legal framework. For the time being, the unequivocally stated objectives of the operations conducted on the basis of Resolutions 1846 and 1851 are law enforcement and the repression of crime.⁵⁷ The Security Council has repeatedly confirmed this law enforcement paradigm, for example by referring to the overall aim of ensuring ‘the long-term security of international navigation off the coast of Somalia’⁵⁸ and calling upon states ‘to effectively investigate and prosecute piracy and armed robbery at sea offences’.⁵⁹ Even though the ‘pirates’ use weapons of war such as machine-guns and portable rocket-launchers, and despite an apparently persistently high number of hostages,⁶⁰ significant fighting between the ‘pirates’ and the units acting on the basis of these resolutions has not been reported. Indeed, the governments involved in the repression of piracy off the coast of Somalia are not seeking to overcome their ‘enemy’ militarily – the legitimate aim underlying the rules of IHL on the conduct of hostilities. Rather, as Security Council Resolution 1846 explicitly confirms, their operations are aimed at the ‘full eradication’⁶¹ or the ‘rooting out’ of piracy,⁶² a legitimate law enforcement objective which in its comprehensiveness cannot, however, be so readily reconciled with IHL’s legitimate aim, based on military necessity, to defeat the enemy militarily. The repression and eradication of crime – especially if intended to be full and effective – will not take place in accordance with the IHL distinction between civilian and military, but will on the contrary be directed against each and every person supposed to be somehow involved in piracy. The nature of a genuine law enforcement operation does not change simply because it is conducted in a failed state or in a territory where an armed conflict is in progress. In other words, the mere existence of an already high level of violence does not automatically transform each and every law enforcement operation into an involvement in a non-international armed conflict governed by IHL. After all, even a government already undisputedly involved in a non-international armed conflict may still carry out regular law enforcement operations unrelated to the armed conflict that are subject merely to human rights law. Consequently, the mere fact that Somalia’s Transitional Government, with which third parties are currently co-operating in the attempt to repress piracy, is engaged in an ongoing non-international armed conflict is not in and of itself a decisive criterion for legal qualification of the counter-piracy operations as part of such a conflict.

57 The mere use of military equipment does not change this assessment. It should be noted that where counter-operations at sea are concerned, UNCLOS explicitly mandates naval vessels to carry them out.

58 SC Res. 1851, 16 December 2008, para 4.

59 *Ibid.*, para 5.

60 See e.g. Amnesty International, *Somalia pirates hold 130 hostages after hijacking nine ships*, 10 September 2008, available at http://www.amnesty.org.uk/news_details.asp?NewsID=17875 (last visited 8 July 2009).

61 SC Res. 1846, 2 December 2008, para 10.

62 SC Res. 1851, 16 December 2008, para 6.

Conclusion

The term ‘failed state’ is not a term of art and certainly not a delineated category of armed conflict in the legal sense. Despite apparent insinuations here and there, the absence of government control as such has no bearing on the qualification of armed violence between non-governmental organized armed groups as a non-international armed conflict. State failure, however, is typically – though not necessarily always – accompanied by oscillating levels of violence, regional spillover effects, and a multitude of players striving for regional rather than central control, and seeking economic gain rather than legitimacy and government responsibility. It is these concomitant phenomena that often raise difficult questions not only for the initial qualification of a given situation as a non-international armed conflict, but also when hostilities cross national borders, and it must be determined whether a third party has subsequently become a party to an already ongoing armed conflict.