

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

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Abstract

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

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

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

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

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

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

- 1 This fact is too frequently overlooked by those who are trying to end the recruitment of children. Although easier to indoctrinate than adults and less aware of danger, children lack discipline and discernment, both necessary qualities during fighting.
- 2 Interview with the author, August 2009. For their own safety, most persons who provided information on which this article is based remain anonymous.
- 3 In this article, we will look at the practice of opposition armed groups (rebels, insurgents, etc.) and of pro-government groups (paramilitary groups, self-defence militias, etc.) that are party to a non-international armed conflict where IHL applies, be it in through treaty law or customary law. Some groups actually respect these norms without linking them to any particular conventions and thus achieve the objective of IHL, which is to protect the victims of armed conflict while taking military necessity into account.
- 4 ‘The “incentives for armed groups to comply with the law should be emphasized”, including the increased likelihood of reciprocal respect for the law by opposing parties’, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 29 May 2009, UN Doc. S/2009/277, para. 41 (emphasis added). This is also the conclusion of Hugo Slim, in his excellent book, *Killing Civilians: Method, Madness and Morality in War*, Hurst and Co., London, 2007.

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

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

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

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

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

- 5 The protection of persons who are *hors de combat*, and especially prisoners, has had a lower profile. This may be due to the fact that protection of civilians occupies much more space in international discourse also.
- 6 Mullah Omar's Eid al-Fitr message, 8 September 2010. A translation is available at: <http://geopoliticus.wordpress.com/2010/09/08/mullah-mohammad-omars-eid-al-fitr-address-for-2010/> (last visited 20 October 2011).
- 7 Some observers have doubts about the authenticity of this text, which was nonetheless published on the Taliban's website, available at: http://alemarah-iea.com/english/index.php?option=com_content&about-civilian-casual&catid=4:statements&Itemid=4, where it is no longer accessible. However, it was mentioned in a report by Jon Boone, 'Taliban call for joint inquiry into civilian Afghan deaths considered', in *The Guardian*, 16 August 2010, available at: <http://www.guardian.co.uk/world/2010/aug/16/taliban-afghan-civilian-deaths-nato-un> (last visited 12 October 2011). For a critical assessment of the Taliban use of 'war crimes' language in their statements on civilian casualties and targeting, see Kate Clark's pieces on the Afghan Analysts Network, in particular 'Killing civilians: Taleban and international law', 23 May 2011, available at: <http://aan-afghanistan.com/index.asp?id=1733>, and 'The *Lahya*: Calling the Taleban to account', July 2011, available at: http://aan-afghanistan.com/uploads/20110704_CKClark_The_Layha.pdf (both last visited 12 October 2011).
- 8 JEM and SLM-Unity are two opposition groups in Darfur. The full text is available at: <http://www.hdcentre.org/files/110708.pdf> (last visited 12 October 2011).
- 9 The same could also be said of some states that have ratified the instruments of IHL without changing what they do in the field.

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

The decision to respect the law – or not

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

- 10 Most other statistics can be suspected of being flawed for several reasons. First, they may be the work of players who have a stake in the conflict; whatever the actual quality of their work, there is always a risk that such reporting is biased, and especially so during the actual conflict. Second, most reporting done during armed conflict is incomplete because of lack of access to some areas of the country and because victims may refuse to talk. Truth and Reconciliation Commissions are not immune to flaws but present the best possible conditions for reporting on violations: the support of former parties, easy access to places and people, and their aim of reconciliation and not settling scores.
- 11 The Sierra Leone Truth and Reconciliation Commission attributes 60.5% of the violations committed in the country to the Revolutionary United Front (RUF). *Witness to Truth: Sierra Leone Truth and Reconciliation Commission Report*, Vol. 2, para. 107, available at: <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf> (last visited 12 October 2011).
- 12 In Guatemala, the *Comisión para el Esclarecimiento Histórico* (CEH) attributes 93% of the violations to the government. *Guatemala: Memory of Silence*, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 82, available at: <http://shr.aas.org/guatemala/ceh/report/english/toc.html> (last visited 12 October 2011). In El Salvador, the Commission attributes a mere 5% of violations to the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), while ‘agents of the State, paramilitary groups allied to them and death squads’ are credited with almost 85%. UN Security Council, Annex, *From Madness to Hope: The 12-year War in El Salvador*, Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1993, available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html> (last visited 12 October 2011). In Timor Leste, the Timor-Leste Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste*, CAVR) attributes 57.6% of the ‘fatal violations’ to the Indonesian army and police and 32.3% to their local auxiliaries. *Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation* (CAVR), Part 6: ‘The profile of human rights violations in Timor-Leste, 1974 to 1999’, para. 10, available at: <http://www.cavr-timorleste.org/cheгаFiles/finalReportEng/06-Profile-of-Violations.pdf> (last visited 12 October 2011). However, it points out that many violations are carried out by several different groups working together; from its statistics, it may be inferred that it considers some 70% of the violations to be attributable directly or indirectly to government forces.
- 13 In Peru, 54% of the violations are attributed to the Shining Path movement and around 35% to government agents, according to the conclusions of the *Comisión de la Verdad y Reconciliación* (Truth and Reconciliation Commission) in its final report, *Informe Final*, Vol. 1, ch. 3, available in Spanish at: <http://www.cverdad.org.pe/ifinal/index.php> (last visited 12 October 2011), pp. 181–182.
- 14 9.8%, according to the report of the Sierra Leone Truth and Reconciliation Commission, above note 11, para. 108.

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

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

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

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

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

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

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

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

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

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

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

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

Why decide to respect the law?

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

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

Our aim

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

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

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

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

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

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

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

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

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

Convictions

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

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

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

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

27 There are exceptions, such as the Shining Path.

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

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

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

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

Concern for public relations

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

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

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

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

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

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

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

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

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

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

'It is to our advantage'

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

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

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

35 Interview with the author, October 2010.

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

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

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

The combatants' morale and discipline

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

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

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

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

The support of the people

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44 See above note 28.

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

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

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

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

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

47 We will deal with specific categories below.

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

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

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

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

Weakening the enemy

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

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

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

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

The long-term impact

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

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

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

52 Mao Tse-Tung, above note 40.

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

54 In accordance with the rules of customary law determined by the ICRC's study Rule 8, 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.' See J.-M. Henckaerts, 'Study on Customary International Humanitarian Law', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 198.

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

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

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

Inciting the adversary to reciprocate

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

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

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

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

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

‘Because of what IHL is’

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

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

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

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

58 Interview with the author, October 2010.

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

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

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

Why decide not to respect the law?

‘Because of who we are’

The group’s aims

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

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

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

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

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

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

64 A. Sjöberg, above note 46, p. 238.

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

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

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

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

Lack of knowledge and understanding of IHL

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

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

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

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

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

Allegiance to other laws

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

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

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

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

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

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

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

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

‘Not respecting the law helps us to win’

Military advantage

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

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

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

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

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

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

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

Asymmetry: key issue or good excuse?

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

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

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

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

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

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

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

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

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

Terror to control the people

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

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

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

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

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

84 At least in the short term.

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

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

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

Reaching the enemy through the people

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

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

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

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

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

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

Groups held hostage by their own fighters

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

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

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

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

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

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

Atrocities as a political and propaganda lever

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

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

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

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

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

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

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

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

‘We have nothing (left) to lose’

Terrorist lists, national legislation, and international justice

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

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

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

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

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

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

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

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

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

Massive unconditional state support

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

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

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

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

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

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

The role of revenge

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

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

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

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

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

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

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

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

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

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

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

Because of what IHL is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Different definitions

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

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

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

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

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

116 In this regard there is no uniformity in international law, although the most recent texts tend towards 18 years of age. In particular, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, of 25 May 2000, states that 'Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years' (Art. 4, para. 1).

117 Interviews with the author, 2009 and 2010.

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

124 Interview with the author, 2010.