Collegium

No.27, Spring 2003

SPECIAL EDITION

Proceedings of the Bruges Colloquium

Relevance of International Humanitarian Law to Non-State Actors

25th-26th October 2002

Actes du Colloque de Bruges

La pertinence du Droit international humanitaire pour les acteurs non-étatiques

25-26 octobre 2002

Brugge College of Europe Collège d'Europe Natolin

COMITE INTERNATIONAL DE LA CROIX-ROUGE

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Bernard Lhoest

Délégation du CICR à Bruxelles

Collegium

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PART II: BINDING NON-STATE ACTORS TO RESPECT INTERNATIONAL HUMANITARIAN LAW

Préface

Dr Marc Vuijlsteke
Thierry Germond

Au nom du Collège d'Europe et de la Délégation du Comité international de la Croix-Rouge (CICR) à Bruxelles, nous sommes heureux de vous présenter les Actes du troisième Colloque de Bruges sur le Droit international humanitaire. Ce Colloque, qui s'est tenu les 25 et 26 octobre 2002 avait pour thème celui des acteurs non-étatiques. Le lecteur y trouvera quantité d'informations, d'analyses pertinentes, et de pistes de réflexions, qui susciteront très certainement d'intenses débats et discussions autour de ce thème crucial.

Le Colloque de Bruges est, après trois stimulantes éditions, devenu un événement incontournable pour qui s'intéresse au droit international en général, et plus spécifiquement au droit international humanitaire, et souhaite le mettre en perspective dans le cadre des développements des institutions atlantiques et de l'Union européenne et de leurs politiques. Nous nous en réjouissons et désirons poursuivre dans ce sens.

Le Collège d'Europe et la Délégation du CICR à Bruxelles organiseront à ce titre un quatrième Colloque annuel les 11 et 12 septembre 2003. Ce Colloque de droit international humanitaire portera sur les possibilités d'améliorer le respect du droit international humanitaire dans les conflits contemporains.

Après l'étude des défis qui se posent aujourd'hui à ce droit (Colloque 2000), après l'étude de l'impact du droit humanitaire sur l'évolution des politiques de sécurité (Colloque 2001), après l'étude de la problématique des acteurs non-étatiques, à laquelle sont consacrés ces Actes du Colloque 2002, il s'agira, en 2003, de discuter de la mise en oeuvre du droit, de son aspect opérationnel. Car en

effet, ne l'oublions pas, le droit humanitaire est un droit à vocation opérationnelle, un droit qui vise activement à assister et à protéger les victimes, civiles et militaires, des conflits armés.

Nous vous souhaitons une stimulante lecture de cet ouvrage, et nous réjouissons de vous retrouver à Bruges, les 11 et 12 septembre 2003 prochains, pour le quatrième Colloque de Bruges en Droit international humanitaire.

Dr Marc Vuijlsteke
Directeur DG Développement
Collège d'Europe

Thierry Germond
Chef de Délégation
CICR Bruxelles

Avant-propos: discours d'ouverture du Professeur Paul Demaret

Directeur des Etudes Juridiques, Collège d'Europe

Au nom du Collège d'Europe et au nom du Recteur, le Professeur Robert Picht, qui ne peut être parmi nous ce jour, je voudrais vous souhaiter très chaleureusement la bienvenue à vous tous qui participez aujourd'hui et demain au troisième Colloque organisé par le Comité international de la Croix-Rouge (CICR) en collaboration avec le Collège d'Europe.

Trois colloques qui ont eu et auront pour thème l'application du droit international humanitaire aux conflits armés dans le monde d'aujourd'hui. Le premier colloque, organisé en 2000, avait pour thème *"current challenges in international humanitarian law"*. Le second, organisé en 2001, portait sur *"the impact of international humanitarian law on current security policy trends"*. Le présent colloque a pour sujet *"the relevance of international humanitarian law to non-state actors"*. Il s'agit d'un thème éminemment pertinent au vu des formes de conflits armés que notre monde malheureusement connaît aujourd'hui et au vu de l'actualité la plus immédiate – je me réfère aux évènements en cours à Moscou.

Vous allez discuter la façon dont le droit international humanitaire pourrait être appliqué dans le cadre d'opérations de sécurité collective et d'opérations militaires visant des groupes terroristes. Symétriquement, vous allez examiner une question d'une particulière difficulté: la façon dont des acteurs non-étatiques impliqués dans des formes de conflits armés pourraient être amenés à respecter eux-mêmes le droit international humanitaire.

Le Collège d'Europe est très honoré d'accueillir des manifestations telles que celle-ci, portant sur la mise en oeuvre du droit international humanitaire.

Le Collège se félicite de la collaboration qu'il a nouée avec le Comité international de la Croix-Rouge (CICR) et, en ce qui concerne le Collège d'Europe, je voudrais distinguer ici la personne qui a joué un rôle essentiel dans le développement de cette collaboration avec le CICR, à savoir le Docteur Marc Vuijlsteke, Directeur Général du Développement, qui nous rejoindra dans un instant, et je voudrais le féliciter à l'égal des représentants du CICR.

En tant que représentant du Collège d'Europe, et comme j'espère qu'une collaboration entre le Comité international de la Croix-Rouge (CICR) et le Collège d'Europe se poursuivra, permettez-moi de présenter brièvement le Collège d'Europe. Il s'agit d'une institution qui existe depuis plus d'un demi-siècle et son histoire est liée étroitement au développement de la construction européenne. Le Collège a été fondé en 1949, dans la foulée du Congrès de La Haye, c'est-à-dire avant même la création des Communautés européennes. Son objectif premier était de permettre à de jeunes européens de diverses nationalités de réfléchir ensemble à la nouvelle Europe émergeant des suites de la deuxième guerre mondiale, d'étudier cette Europe en voie de transformation, de se préparer à y jouer un rôle et au-delà, modestement, de favoriser la paix et son maintien entre les nations européennes.

Les études européennes à Bruges, d'abord de caractère fort général, se sont ensuite spécialisées, à mesure que la construction européenne prenait des aspects plus concrets et plus techniques. Aujourd'hui le campus de Bruges compte environ trois cent étudiants de plus de quarante nationalités différentes. Ces étudiants se répartissent en trois programmes axés sur l'Union européenne (UE): programme de droit, programme d'économie, programme de sciences politiques. Le corps professoral est lui-même composé de plus d'une centaine de professeurs visiteurs de diverses origines et venant de toute l'Europe et d'au-delà. Les programmes d'études ont une durée d'un an environ et débouchent sur un diplôme d'études approfondies. Le Collège d'Europe n'a cependant pas oublié son origine et ne mise pas tout sur la spécialisation et les enseignements de nature technique. Quatre choses méritent d'être notées à ce point de vue.

Premièrement, et c'est une caractéristique essentielle de l'institution, tous les étudiants vivent ensemble dans des résidences. Ils font donc l'expérience de l'Europe dans sa richesse et dans sa diversité tout autant à travers leur vie en commun qu'au travers des enseignements européens qu'ils suivent.

Deuxièmement, les étudiants sont tenus de sortir du cadre de leur spécialisation. Ils doivent tous participer à un programme d'études générales et spécialisées portant sur l'histoire européenne, sur l'évolution des sociétés européennes aujourd'hui, et sur la place de l'Union européenne (UE) dans le monde.

Troisièmement, le Collège d'Europe, après la chute du mur de Berlin, a établi à Natolin, près de Varsovie, un second campus qui a pu être créé grâce au concours conjugué du Collège d'Europe, de la Commission européenne, et de la Pologne. Ce campus compte une centaine d'étudiants et leur programme d'études est de nature inter-disciplinaire, un accent particulier étant mis sur les questions liées à l'élargissement de l'Union européenne (UE), les questions de pré-adhésion et de post-adhésion, ainsi que sur les relations avec les nouveaux Etats voisins de l'UE. Ces voisins changent puisque l'UE change et s'étend.

Quatrièmement, le Collège d'Europe a toujours tenu à être un lieu où de grandes questions d'intérêt général pour l'Europe puissent être débattues dans un climat de liberté et d'indépendance académiques. Ainsi, le mois prochain, une grande conférence portant sur le futur de l'éducation en Europe se tiendra ici au Collège.

Le droit international humanitaire est une matière qui intéresse évidemment l'Europe. Ce droit est né sur l'Europe des champs de bataille du dix-neuvième siècle. Les guerres de la première moitié du vingtième siècle ont montré, de façon tantôt positive tantôt négative, toute l'utilité de ce droit si l'on prend au sérieux le respect de la personne humaine. Ce droit intéresse aujourd'hui l'Union européenne (UE) qui, à travers certains de ses Etats membres, participe à des opérations armées de maintien de la paix ou de lutte contre le terrorisme en Europe et hors d'Europe.

Plus profondément l'UE et ses Etats membres qui prônent le respect du droit, de la démocratie, et des libertés individuelles, se doivent de promouvoir le respect du droit international humanitaire non seulement en Europe mais plus encore dans le monde, et doivent jouer un rôle particulier dans ce domaine. Si l'UE progressait davantage sur la voie de l'intégration en matière politique et en matière de sécurité, l'on pourrait d'ailleurs songer à créer au Collège d'Europe un séminaire portant sur l'UE et le droit international humanitaire.

Quoi qu'il en soit, j'espère que la collaboration entre le Comité international de la Croix-Rouge (CICR) et le Collège d'Europe se poursuivra dans le futur à travers l'organisation d'autres rencontres de ce genre et à travers d'autres publications telles que celles qui ont déjà été produites, et je me réjouirais beaucoup si cela était le cas et si je pouvais être des vôtres l'année prochaine. Encore merci d'avoir choisi le Collège d'Europe pour cette organisation.

Bonne chance.

Avant-propos: discours d'ouverture du Professeur Anne Petitpierre

Vice-Présidente du Comité international de la Croix-Rouge

C'est pour moi un grand plaisir d'ouvrir, avec le Professeur Demaret, ce troisième Colloque annuel de droit international humanitaire conjointement organisé par le Collège d'Europe et le Comité international de la Croix-Rouge (CICR).

Je ne pourrais cependant ouvrir ce Colloque sans honorer la mémoire du Professeur Akkermans, subitement décédé le 17 juin dernier. Le Recteur Akkermans a oeuvré au rapprochement du Collège d'Europe et du Comité international de la Croix-Rouge (CICR), et s'est beaucoup investi personnellement dans la promotion du droit humanitaire au sein du Collège. Le CICR tient à lui témoigner une grande reconnaissance pour son engagement.

La Communauté des Etats a donné mandat au Comité international de la Croix-Rouge (CICR) de promouvoir la connaissance du droit international humanitaire, et de participer à son développement. C'est pourquoi le CICR mène, depuis sa création en 1863, des activités de promotion de la connaissance du droit international humanitaire au sein de la population civile, que ce soit dans les écoles, dans les universités ou à destination du "grand public". S'il attribue une importance particulière à l'effort qui doit être fait en ce qui concerne les forces armées et de sécurité, aussi bien en temps de paix, que de troubles ou qu'en temps de guerre, le CICR ne considère pas cet effort comme exclusif de l'information qui doit être donnée à l'ensemble de la société. Bien entendu, la Communauté des diplomates et fonctionnaires nationaux et internationaux est également un destinataire naturel, et même un public de choix, pour cet effort, dans la mesure où cette communauté rassemble ceux qui sont le plus quotidiennement concernés par le développement et la mise en oeuvre de ce droit, mais la nature et l'évolution des conflits nous amènent à élargir de plus en plus le cercle des personnes visées.

Lors du premier Colloque de droit humanitaire que nous avons organisé avec le Collège d'Europe, dans ce même lieu, j'avais exprimé le souhait de voir le Comité international de la Croix-Rouge (CICR) et le Collège d'Europe développer une plate-forme de débat et de discussion sur l'évolution et l'avenir du droit international humanitaire. Ce droit reste à ce jour l'outil le plus performant pour assurer l'assistance et la protection des victimes des conflits armés, et limiter le recours à certaines méthodes ou certains moyens de combat. Je suis donc particulièrement heureuse aujourd'hui de voir que nous en sommes à la troisième édition de ces rencontres, mais surtout que chaque année elle suscite plus d'intérêt et de débats, débats par ailleurs de plus en plus animés si j'en juge par ceux de l'année dernière. L'actualité des sujets abordés, autant que la qualité des participants, est sans doute un facteur décisif à cet égard.

En 2001 déjà, en abordant "l'impact du droit international humanitaire sur l'évolution des politiques de sécurité", qui plus est en abordant ce thème au mois d'octobre, nous avons pu voir combien il est nécessaire de tirer rapidement les leçons de l'évolution des conflits et l'actualité nous l'avait amplement démontré. Le droit humanitaire n'est ni figé, ni même simplement statique. Il répond à une réalité concrète qui est la souffrance humaine en situation de conflit armé. Il suppose un débat permanent à la lumière du contexte global du droit international, et en le situant dans celui de la réalité des conflits d'aujourd'hui. C'est une préoccupation du Comité international de la Croix-Rouge (CICR) de travailler à son évolution et de veiller à assurer son adéquation à cette réalité.

Le thème choisi par le Comité international de la Croix-Rouge (CICR) et le Collège d'Europe pour le Colloque 2002, soit "la pertinence du droit humanitaire pour les acteurs non-étatiques", répond clairement à cette préoccupation. Traditionnellement, les Etats, seuls sujets naturels du droit international, étaient les uniques acteurs de la scène internationale. Nous conviendrons tous que ce n'est plus le cas aujourd'hui et que, dans tous les domaines des relations internationales - économique, écologique, politique, militaire - les acteurs non-étatiques, qu'ils soient infra ou supra étatiques, ont pris de plus en plus d'importance, et se sont imposés, parfois de façon plutôt brutale, en tant qu'acteurs incontournables sur la scène internationale.

En 1949 déjà, et plus encore en 1977, la Communauté des Etats avait prévu des règles de droit international humanitaire qui s'appliqueraient dans le cadre d'un conflit armé entre un Etat et un acteur non-étatique ou entre deux acteurs non-étatiques. Mais ce rôle des acteurs non-étatiques, comme d'ailleurs celui des Etats, est aujourd'hui différent de celui qu'ils jouaient en 1949 ou même en 1977.

Et surtout, peut-être, notre perception du phénomène a changé. Les instruments de droit international humanitaire dont nous disposons en 2002, qui sont hérités de 1949 et 1977, sont-ils de ce fait inadaptés à la réalité des conflits d'aujourd'hui ?

C'est la question que certains se sont posée, et même avec insistance, depuis le 11 septembre 2001. Nous avons pu lire des hypothèses et des thèses les plus diverses, sinon les plus contradictoires, dans la presse, dans des revues, spécialisées ou non, et dans des déclarations publiques. D'aucuns estiment que pour des raisons sécuritaires, au demeurant très compréhensibles, l'on serait en droit de balayer d'un revers de main 150 ans d'évolution humaniste, politique, et juridique. Cette négation d'un acquis, qui est un acquis de civilisation, est dangereuse pour tous, à commencer par ceux qu'inquiètent les contraintes du droit humanitaire. Elle est le résultat insatisfaisant d'une réflexion insuffisante dont le postulat est contestable. D'une part, elle revient à négliger la grande majorité des conflits contemporains - il y a encore beaucoup de conflits qui manifestement sont couverts par le droit international humanitaire - et à ne se concentrer que sur certains problèmes sécuritaires pour définir des normes qui se voudraient universelles. D'autre part, elle ne s'accompagne pas encore d'une clarification des normes de droit applicable aux diverses situations.

Le droit international humanitaire a, de tout temps, recherché un plus juste équilibre entre un souci légitime de la sécurité de l'Etat et de ses citoyens, et la préservation de la vie humaine, de la santé, et de la dignité. Il n'en va pas autrement aujourd'hui. Les problèmes d'adéquation et de mise en oeuvre du droit international en général, et du droit international humanitaire en particulier, sont en constante évolution. J'espère que les débats d'idées que nous aurons lors du Colloque nous permettront de clarifier les réels défis du monde actuel et d'indiquer de meilleures pistes de réflexions à suivre.

Comme indiqué sur le programme, la première partie du Colloque sera dévolue à une analyse de l'évolution et des perspectives en matière de sécurité internationale et d'usage de la force. La lecture des journaux nous amène tous les jours à effectuer de telles analyses. Nous procéderons ensuite à une étude de la place des acteurs non-étatiques dans le droit humanitaire actuel, avant de ponctuer cette première partie par une synthèse critique et une discussion approfondie de ces sujets.

La deuxième partie nous amènera à évoquer deux sujets concrets d'une grande importance et d'une grande actualité, à savoir le terrorisme d'une part, et les opérations de sécurité collective d'autre part. En ce qui concerne le terrorisme, dans le prolongement d'un débat déjà amorcé bien évidemment en octobre

2001, l'orateur nous rappellera les certitudes juridiques, mais aussi les interrogations fondamentales qu'il suscite en droit humanitaire. Les opérations de sécurité collective quant à elles, qu'elles aient lieu dans le cadre d'opérations armées anti-terrorisme ou non, sont également confrontées à des défis en matière de droit humanitaire. Nous bénéficierons d'une analyse de ces dernières, avant d'avoir l'occasion d'en débattre.

Demain matin, la troisième partie de ce Colloque nous permettra d'étudier de quelle manière des acteurs non-étatiques peuvent être liés aux normes de droit international humanitaire. Il s'agira d'étudier les mécanismes de responsabilité des acteurs non-étatiques en droit international, avant de se pencher sur certaines expériences passées - il y en a malheureusement -, dont nous pourrons certainement tirer de riches enseignements. Enfin, pour compléter ces débats, nous verrons les outils que nous offrent le droit conventionnel et le droit coutumier en cette matière.

Je serai en outre particulièrement heureuse d'accueillir ce soir Monsieur Robert Cooper, invité d'honneur du Collège d'Europe et du Comité international de la Croix-Rouge (CICR). Monsieur Cooper est Directeur général pour les Affaires extérieures et politico-militaires au Secrétariat général du Conseil de l'Union européenne (UE). Au service diplomatique britannique depuis plus de vingt ans, Robert Cooper a une longue expérience des relations diplomatiques, entre autres en matière de défense. Il est également l'auteur de nombreuses publications de réflexion et d'analyse qui lui ont valu d'être qualifié de "commentateur le plus pointu de notre époque sur les questions stratégiques", une citation qui sera certainement confirmée ce soir.

Toutes ces interventions serviront de cadre aux discussions que le programme nous autorise. C'est une partie très importante de nos travaux. Je les souhaite nombreuses, intenses, profondes, mais surtout très ouvertes. La richesse de ce Colloque est faite d'une part de la qualité des orateurs présents, et d'autre part de la diversité des participants. Il est ouvert aux experts comme aux non-spécialistes, c'est ce qui assure son intérêt et la vivacité des débats.

Comme lors des éditions précédentes, mais aujourd'hui avec plus d'assurance au regard des expériences faites, j'émets le voeu que ce Colloque s'affirme comme un lieu de rencontre pour tous ceux qui souhaitent que le droit continue à être le seul correctif apporté par la civilisation à l'aveugle violence suicidaire de la guerre.

Asymmetric warfare: some personal reflections

Speaker: Major General Anthony Rogers

The topic for this morning's session is entitled 'International Humanitarian Law Challenges in the New trends in International Security.' It is my opinion, however, that these trends in international security are not really new. What we are dealing with now is something that we have already had to deal with for centuries. When I talk about asymmetric warfare, which is going to be the subject of my presentation today, I refer to a situation where regular, well-armed and well-trained forces are opposed by what one might call irregular forces, which are lightly armed and more loosely structured. The latter avoid a direct confrontation with the opposing armed forces, which they know they will lose, and so concentrate on the State's weaknesses and vulnerabilities. That is what I call asymmetric warfare and I think the war on terrorism that is concerning us at the moment is just part of that phenomenon.

We find examples of asymmetric warfare in Napoleon's campaigns in Spain in the nineteenth century. German armed forces occupying the Balkans during World War II had to deal with the same problem. The British armed forces have been very much engaged in asymmetric operations in the twentieth century, first of all in Ireland, then in Palestine, Kenya, Aden, Malaysia and various other places. So, as far as we in the United Kingdom are concerned, at any rate, the situation that we have to deal with now is very familiar. It does, however, place a great strain on the rule of law, whether it be national law or international law, and that is what I shall endeavour to explain.

Why? Well, the regular forces are clearly identifiable. They are concentrated, have a clear command structure, possess powerful weapons, have their own logistic support and rely on all that for mobility and operational effectiveness.

On the other hand, irregular forces, because they want to avoid a direct confrontation, prefer not to be so clearly identifiable and so are dispersed in small groups or cells. They have a loose command structure, with a lot being left to local initiative, they are usually lightly armed and have little logistic support, relying very much on the civilian population. They also use their knowledge of the terrain, as well as perhaps their knowledge of the locality and of the local people. Irregular forces will flourish in areas where the terrain offers cover, be it mountains, forests, marshlands, towns or cities. They adopt hit-and-run tactics and stealth. They seek shelter, supplies, and intelligence from the civilian population. They may require foreign supplies – here there is an international dimension – of arms and ammunition. Attacks are going to be surprise attacks, usually ambush or sabotage which will, perhaps, provoke the regular forces on the other side into an excessive retaliation that evokes sympathy for the irregulars in the international media. The irregulars are probably not too concerned about international humanitarian law. They do not mind attacking civilians or capturing or intimidating officials in order to achieve their objectives. Hostage taking is quite common and economic targets often seem to be the object of attack as well. One would find it hard to justify many of the methods that have just been described, if international humanitarian law is applied.

So where does this all fit into current events? If one looks at the newspapers of the last few days, one sees quite a few instances of asymmetric warfare at work. We find, for example, that Mounir el-Motassadeq is on trial in Hamburg for complicity in the New York and Washington attacks, apparently on the basis that he was involved in funding a terrorist cell in Hamburg. Apart from the fact that he denied any involvement in those offences, he did, according to press reports, admit that he had spent some time at an Al-Qaeda training camp in Afghanistan, where he had learnt about weapons and weapons training, but that is as far as it went. We have the Bali bombing on 12 October and some are suggesting that there may be links between that and the Al-Qaeda movement. On 21 October, 14 people were reported killed in Northern Israel when Palestinian suicide bombers detonated a car bomb alongside a bus, one of a long series of such attacks. It is interesting there that we are talking of suicide bombers. That too is not a new phenomenon, as the US Navy found to their cost during World War II when they had to deal with kamikaze pilots from Japan. It is just another form of attack, perhaps the most extreme form of attack, but nothing new. We also read in the papers that the real IRA, a splinter group from the Irish Republican Army, are in turmoil at the moment and might well disband – they are the group thought to be responsible for the Omagh bombing in 1998

when 29 people, ordinary civilians, were killed. In Washington a sniper, who has been captured in the meantime, has killed a number of people at random. And finally, we learn that up to 40 armed Chechen rebels have seized control of a Moscow theatre and threaten to blow it up, with 700 hostages, if Russia does not pull out of Chechnya. I suppose these are all examples of what we are talking about, namely asymmetric warfare, whether you go from the extremes of the attacks on Washington and the World Trade Centre to the lone sniper in Washington. And somewhere in that spectrum, you have a state of armed conflict, perhaps, to which international humanitarian law applies.

Where do the armed forces fit into this war against terrorism? As a former member of the armed forces, I consider that it is an important question because, by and large, the armed forces are not usually equipped or trained to deal with these situations. That is why, we read in the news, that the French army is undergoing restructuring, the aim being to enable them to deal more effectively with asymmetric warfare. It is probably going to be a long and very difficult road. I remember at one stage in my career the future structure of the British armed forces being discussed, especially the purpose and role of the armed forces, and how they should be equipped and trained. The conclusion was that the main role of the armed forces is to fight high-intensity warfare, that is traditional warfare where armed forces of opposing States confront each other. This was where the main thrust of training and equipment should be.

That does not mean that the armed forces cannot be useful in other roles, but they are not designed for ready deployment in these roles and a period of transition is inevitable before they can be really effective. The typical example, of course, is the case of soldiers called out to deal with a riot when civilian police cannot cope with the situation. The soldiers are armed with rifles and live ammunition and are facing rioters. What are they supposed to do in dispersing the riot? Basically they have only two options: (1) do nothing or (2) open fire with live ammunition, causing injury and death. The use of lethal force at Amritsar in India in 1919 had far-reaching political consequences and is seen by some commentators as the beginning of the end of British rule in India. Another case of troops opening fire that occurred in Londonderry in 1972 - what is known in the press as 'Bloody Sunday' – is currently the subject of a lengthy inquiry. I cite these cases as examples of armed forces having weapons at their disposal but not the right weapons to deal with the particular situation that they faced. So when we talk about the war against terrorism, we have to think very carefully about what the role of the armed forces is going to be in that fight.

That is because the fight against terrorism is not so much a war in the traditional sense but rather a fight against large-scale criminal activity. In dealing with large-scale criminal activity the armed forces, to my mind, have only a supporting role. They are only one of many strands in the fight against terrorism. The others are diplomatic, political, intelligence, police work and finally the criminal justice system. Where do all these fit?

On the diplomatic side there has to be co-operation between States if terrorism is to be fought effectively. Certainly the peace process in Northern Ireland benefits greatly from co-operation between the British and Irish Governments and this must be true of any anti-terrorism operation. So the diplomatic effort is very important. There is also the political effort. A lot of support for terrorist organisations flows from grievances among the population that supports them. So those grievances have to be taken seriously and addressed because if they are not, sympathy and support for terrorist organisations will increase. This is the political front.

Very important in the war on terrorism is, I suppose, intelligence work, because of the way terrorists operate and the clandestine nature of their operations, their cellular structure and so forth. These people are not easily identified and exposed so that they can be dealt with. One sees some new technology in operation, such as intelligence-gathering drones being used in Washington to find the sniper. It remains to be seen how effective they were and if the final arrest was due to old-fashioned police methods. I suspect that probably the latter hypothesis is true. So how do you penetrate these cells, how do you find out how terrorists operate, what their next target might be, who the perpetrators of bombings are, who controls them or finances them? One goes back to well-tried methods - the use of informers, for instance. You either infiltrate your own agents into these terrorist cells or you recruit people who have their own connections with them. Either way, this leads to a whole host of legal difficulties that we could perhaps address. There is concern in London at the very moment about a case where the police had used as an informer a person who, under their very noses, carried out a murder. This whole business of use of informers is legally challenging because you may have to tolerate criminal activity on the part of the informer. In order for him to be effective, he has to be able to participate in the activities of the terrorist cell that he has infiltrated. So there are legal problems as well as moral dilemmas that informers' handlers have to face in such cases.

Interrogation is another area where there may be a conflict between operational necessity on the one hand and the law on the other. Some of the interrogation techniques used by the British security forces in Northern Ireland, while not amounting to torture, came in for criticism before the European Court of Human Rights on the basis that detainees' human rights were infringed by the practices that were adopted.[1] Of course, one can have countless moral arguments about torture and whether in an extreme case torture could ever be justified, the classic case being when somebody who has planted a bomb, which he says is timed to go off in half an hour, has been detained but refuses to say where the bomb is. Are you allowed to use more vigorous, to put it nicely, interrogation methods in order to get that person to tell you what you need to know in order to protect the population who are affected by that bomb? This is an interesting moral question but the law is clear: there can be no derogation from the prohibition of torture and of inhuman or degrading treatment.

Other techniques that have been employed in the past are to try to separate the rebel movement, the terrorists or the insurgents, whatever they might be, from the civilian population. The British forces tried this during the Boer war at the beginning of the twentieth century by putting people into internment camps. At least, they knew that those people could be kept under observation and military operations could be conducted elsewhere. Conditions in the internment camps were, unfortunately, poor and many internees died of disease. So internment is a rather blunt weapon that might not work very well in practice. Internment under emergency legislation was tried in Northern Ireland in 1971, but proved not to be very successful and so that policy was suspended in 1975. Nonetheless, it is one of the policies that will be considered when dealing with the war on terrorism and may be useful in some circumstances.

How do you deal with terrorists? Again, here it is, in my view, more a police-type operation than a military operation. You cannot really deal with terrorists by use of air power, for example. Once, through intelligence, you have identified suspects you have to get police on the ground to carry out the arrests. I do not think that there is a particular role for the armed forces there, except, possibly, where you have to send an arrest squad into a hazardous location and need military support. This remains, however, primarily a police operation.

The next stage, once you have arrested suspects, is to bring them to trial and this is where the justice system comes into effect. Securing evidence in the

1 Ireland v. United Kingdom, 58 *International Law Reports* 188.

normal way is one thing but securing convictions tends to be more difficult. Because terrorists will often try to intimidate witnesses and jurors, it is sometimes necessary to give witnesses protection and even to abandon the jury system and adopt special courts presided over by judges sitting on their own, known in Northern Ireland as 'Diplock courts', to get round the problem of jury intimidation. All of this puts strains on the legal system and on human rights law. The rebel movements, the insurgents, the terrorists are going to exploit human rights law to the maximum extent for their benefit. Human rights law stresses very much the rights of the individual as opposed to those of the State. It requires the State, even in the most extreme circumstances, to protect the rights of those individuals from State interference. How one can do so at the same time as prosecuting effectively the war on terrorism is something we need to think and talk about.

One of the ways to get round the problem is by derogating from whatever human rights treaties a State is party to. States, however, are very reluctant to do that because of the international political consequences of such derogations. In order to be able to deal with the problem, derogations need to be considered at the very least. In the past, countries have dealt with similar situations by declarations of martial law or state of siege, which I think is allowed for in the constitution of some countries. As far as the United Kingdom is concerned, the last time martial law powers were tried was during the troubles in Ireland during World War I and shortly thereafter. That was not really seen to work very effectively either. The legal theory behind the imposition of martial law was that the civil courts would not interfere with the acts of the executive so long as the emergency situation continued. At the end of the emergency the courts would, however, have the right to enquire, subject to the passing of an act of indemnity by Parliament. Nevertheless, applications were made to the civil courts, which were still sitting during those emergencies, and the civil courts did their very best to uphold the rule of law. This led to some clashes between the military, on the one hand, and the judiciary, on the other, and raised the issue of which was mightier: the pen or the sword.

My favourite case in this regard is that of Egan v Macready,[2] dealt with in the Irish courts. This led to a constitutional crisis because a suspect had been arrested by the military and he applied to the court for his release on a writ of habeas corpus. When the case was heard, counsel for the Crown said that it was not

2 1921] *International Law Reports* 265.

proposed to release the prisoner whereupon the judge, O'Connor MR, said that he would order a writ of attachment for contempt of court to the general officer commanding. The general officer commanding, General Macready, then gave instructions that on no account was the prisoner to be released and that in a martial law situation he would have no hesitation in arresting anyone, including the judge himself, who attempted to carry out service of the writ. In the event, neither the judge nor the general was arrested and the prisoner was released following behind the scenes representations.

No attempt was made in the more recent difficulties in Northern Ireland to deal with the situation by martial law powers. What we have is a series of Emergency Powers or Emergency Provisions Acts, most recently the Terrorism Act of 2000. Everything has been dealt with within the framework of national legislation. The modern trend, therefore, seems to be to pass the necessary emergency legislation with or without derogations from human rights treaties. Internationally one is looking for co-operation between States in order to eliminate places where terrorists can take refuge, crack down on international arms supplies, collect and share intelligence and evidence and to arrest and bring suspects to trial. Of course there is no international tribunal as yet that can deal with these offences so, for the time being at any rate, trials will depend on national courts exercising jurisdiction.[3]

Résumé

La guerre asymétrique est une situation dans laquelle des forces régulières, bien armées et bien entraînées, font face à des forces dites irrégulières qui, de leur côté, disposent d'un armement léger et d'une structure moins lourde. Les forces irrégulières évitent une confrontation directe avec les forces régulières, car elles savent qu'elles en sortiraient perdantes. C'est pourquoi les forces irrégulières concentrent leurs attaques sur les points faibles et vulnérables de l'Etat. La guerre actuelle contre le terrorisme est un exemple de guerre asymétrique. Il ne s'agit pas d'un phénomène nouveau car on en trouve des illustrations dans l'histoire. Ce qui est clair, néanmoins, c'est que la guerre asymétrique soulève d'importantes questions relatives à la mise en oeuvre du droit, qu'il soit national ou international.

3 For an article on the use of military courts to try the Guantanamo Bay suspects, see A. P. V. Rogers, The Use of Military Courts to Try Suspects, 51 *International and Comparative Law Quarterly*, 967.

Les forces régulières peuvent facilement être identifiées. Elles sont concentrées et ont une structure de commandement clairement définie. Elles possèdent des armes puissantes et ont leur propre soutien logistique. Elles reposent sur ces éléments pour assurer leur mobilité et leur efficacité opérationnelle. A l'inverse, les forces irrégulières sont moins facilement identifiables et sont dispersées en petits groupes. La chaîne de commandement est floue et laisse beaucoup de place aux initiatives locales. Elles possèdent un armement léger, peu d'appui logistique et reposent sur la population, que ce soit pour se loger, se fournir en produits divers, ou obtenir des renseignements. Les forces irrégulières ont recours aux embuscades et au sabotage, une tactique qui peut entraîner des représailles excessives de la part des forces régulières. Le respect du droit international humanitaire n'est pas la préoccupation majeure des forces irrégulières, qui n'hésitent pas à attaquer des civils ou des cibles économiques et à prendre des otages afin d'atteindre leurs objectifs.

L'actualité récente donne plusieurs exemples de guerre asymétrique. Le plus connu est certainement l'attaque contre les tours jumelles du *World Trade Centre* et le Pentagone qui a eu lieu à New York et à Washington, D.C. le 11 septembre 2001. Nous pouvons aussi citer la voiture piégée qui a explosé à Bali le 12 octobre 2002, les attaques suicides commises par des Palestiniens en Israël, et le tireur isolé qui a terrifié les environs de Washington, D.C. D'autre part, en ce moment même, un théâtre de Moscou est aux mains de rebelles tchétchènes armés, qui menacent de le faire sauter avec 700 otages si la Russie ne se retire pas de la Tchétchénie. L'attaque du 11 septembre 2001, d'une part, et le tireur isolé, d'autre part, sont deux extrêmes sur l'éventail de la guerre asymétrique et, à un point précis de cet éventail, on trouve une situation de conflit armé à laquelle le droit international humanitaire s'applique.

Quelle est la place des forces armées dans la lutte contre le terrorisme? Cette question mérite d'être posée car, de manière générale, ces forces armées ne sont ni entraînées ni équipées pour faire face à ce genre de situations. Lorsqu'une discussion a eu lieu sur le rôle qu'auraient dans le futur les forces armées britanniques, la conclusion fût que la fonction principale des forces armées consiste, comme par le passé, à faire la guerre traditionnelle de haute intensité entre Etats ennemis. Cela ne veut pas dire que les forces armées ne pourraient pas utilement faire autre chose, mais une période de transition est nécessaire afin qu'elles aient la formation et l'équipement adéquats. Un cas typique d'inadaptation des forces armées se présente lorsque l'on fait appel à ces dernières en cas d'émeutes parce que la police est dépassée. Les forces armées auront le

choix entre tirer à balles réelles, ce qui provoquera des blessés et/ou des morts, ou ne rien faire. Il ne suffit donc pas pour un Etat d'avoir des forces armées à sa disposition et de les utiliser. Encore faut-il qu'elles aient les armes appropriées lorsqu'on leur demande d'intervenir dans une situation inhabituelle pour elles. C'est pourquoi nous devons réfléchir sérieusement au rôle que nous envisageons de faire jouer aux forces armées dans la lutte contre le terrorisme.
La guerre contre le terrorisme s'apparente plus à une lutte contre des activités criminelles à grande échelle qu'à une guerre dans le sens classique du terme. En ce sens, dans le cadre de cette lutte, les forces armées ont uniquement un rôle de soutien et ne sont qu'un rouage parmi d'autres, à savoir la diplomatie, la politique, les renseignements, la police, et le système de justice criminelle.

Sur le plan diplomatique, une lutte efficace contre le terrorisme implique une coopération entre Etats. A titre d'exemple, le processus de paix en Irlande du Nord est grandement facilité par la collaboration entre les gouvernements britannique et irlandais. L'aspect politique est important également, puisque le soutien que les terroristes reçoivent de la part de la population provient en grande partie de griefs que celle-ci peut avoir. Il faut donc prendre en compte ces revendications, sinon l'appui aux organisations terroristes risque d'augmenter.

En raison des caractéristiques des groupes terroristes, notamment la nature clandestine de leurs opérations et leur organisation en cellules, le travail de renseignement est fondamental. Il existe de nouvelles technologies qui permettent de récolter des informations mais, afin de pénétrer les réseaux terroristes, les bonnes vieilles méthodes de police, comme par exemple le recours à des informateurs, restent sans doute encore les plus efficaces. L'emploi d'informateurs pose néanmoins des problèmes juridiques et un dilemme moral car, pour pouvoir être efficaces, ces derniers doivent pouvoir participer aux opérations de la cellule infiltrée et peuvent donc être amenés à commettre des crimes.

Un dilemme similaire, opposant le droit d'un côté et la nécessité opérationnelle de l'autre, peut se poser en cas d'interrogatoire. L'exemple typique est celui d'une personne arrêtée qui a caché quelque part une bombe qui doit bientôt exploser, mais refuse de dire où elle se trouve. La tentation est grande de soumettre cette personne à la torture afin d'obtenir l'information qui permettra peut-être de sauver des vies. C'est une question qui mérite d'être débattue sur le plan moral mais dont la réponse, d'un point de vue juridique, est claire: il n'y a pas de dérogation permise à la torture et aux traitements inhumains ou dégradants.

Une autre technique qui peut être utilisée afin d'affaiblir un mouvement terroriste, rebelle ou insurgé, consiste à séparer celui-ci de la population civile. C'est ainsi que les Britanniques ont eu recours à l'internement de civils dans des camps durant la guerre contre les Boers en Afrique du Sud au début du vingtième siècle. Le coût en vies humaines de cette mesure fut élevé. L'internement fut à nouveau utilisé en Irlande du Nord de 1971 à 1975 avec des résultats mitigés. Il n'en reste pas moins que cette politique est un outil dont l'emploi pourrait s'avérer utile dans la lutte contre le terrorisme.

La capture de terroristes est davantage une opération de police qu'une opération militaire. Une fois que les suspects ont été identifiés, c'est le rôle de la police de procéder à leur arrestation. Dans certains cas spécifiques impliquant un risque élevé, les forces armées peuvent cependant intervenir en soutien de la police.

L'étape suivante consiste à traduire les suspects en justice. Un problème qui risque de se poser est celui de l'intimidation des témoins et des jurés par les terroristes, à tel point qu'il faut parfois protéger les témoins et abandonner le système du jury. On se trouve alors dans une situation où les juges sont amenés à siéger seuls, comme c'est le cas par exemple en Irlande du Nord avec les tribunaux Diplock. Ce genre de mesures a un impact négatif sur le système judiciaire et sur les droits de l'homme. De leur côté, les terroristes, rebelles ou insurgés vont tenter de profiter au maximum des droits de l'homme, dans la mesure où celui-ci met l'accent sur les droits de l'individu plutôt que sur ceux de l'Etat. Les droits de l'homme exigent des autorités, même dans les circonstances les plus extrêmes, que celles-ci protègent les individus de l'intervention de l'Etat. Il n'est pas facile de concilier cette obligation avec la nécessité de mener une lutte efficace contre le terrorisme, et nous devons nous pencher sur cette question.

Un Etat peut, d'une certaine manière, résoudre le problème en dérogeant aux traités relatifs aux droits de l'homme auxquels il est partie. La réticence des Etats à cet égard est toutefois grande, en raison des conséquences politiques internationales de ces dérogations. Il n'en reste pas moins qu'elles doivent au minimum être envisagées comme une solution permettant de sortir d'une situation difficile. Certains pays ont, par le passé, eu recours à l'état de siège ou à la loi martiale. Ce fut notamment le cas de la Grande-Bretagne qui a déclaré la loi martiale en Irlande au moment de la première guerre mondiale et juste après. L'efficacité apparemment douteuse de cette mesure explique peut-être pourquoi la Grande-Bretagne n'a ensuite plus eu recours à la loi martiale, y compris dans le cadre des événements plus récents en Irlande du Nord.

En théorie, l'imposition de la loi martiale signifie que les tribunaux civils n'interfèrent pas avec les actes du pouvoir exécutif tant que la situation d'exception existe. Dans la pratique cependant, des requêtes peuvent être introduites auprès des tribunaux civils qui continuent de siéger même en période de loi martiale. Les tribunaux civils vont, dès lors, s'efforcer du mieux qu'ils peuvent de faire observer la loi et ceci peut donner lieu à des conflits entre les militaires, d'une part, et le pouvoir judiciaire d'autre part. On peut en quelque sorte parler d'opposition entre l'épée et la plume et se demander lequel des deux instruments est le plus puissant.

Dans le cadre de la lutte contre le terrorisme, la tendance actuelle semble être d'avoir recours à une législation d'exception avec ou sans dérogation aux traités concernant les droits de l'homme. Au niveau international, les Etats cherchent à renforcer leur coopération afin de priver les terroristes de refuges et d'armes, et afin de récolter et de mettre en commun des renseignements et des preuves qui permettront d'arrêter et de traduire les suspects en justice. Pour le moment toutefois, en l'absence d'un tribunal international compétent pour juger les délits terroristes, il revient aux tribunaux nationaux d'exercer leur juridiction en la matière.

Highlights of the question time

You seem to make an equation between terrorists and irregular armed forces and I wonder to what extent this equation really holds, because I can certainly see situations where irregular forces are facing regular forces with means and methods that could easily be comprised by the Geneva Conventions. So would you care to elaborate a little more on whether we have, on one side, irregular armed forces which carry out some kind of asymmetric warfare, but still one that could be contained within the Geneva Conventions and, on the other side, "true terrorists", because the distinction calls for a definition of terrorism. To sum up, can you define terrorism and can we make a distinction between terrorists and irregular armed forces?

I would not like to define terrorism. What I would say is that the methods used by terrorists, even if we include in this category the lone sniper currently operating in the Washington D.C. area, are quite similar to those used by irregular armed forces in a situation of armed conflict. One is never very sure where, on that spectrum of events from a large scale operation mounted by irregular forces

against regular armed forces at one end of the spectrum to the lone sniper in Washington D.C. at the other end of the spectrum, international humanitarian law comes into effect. For example, in Northern Ireland the United Kingdom government has always maintained that it is not an armed conflict which is going on, but rather an internal security situation dealt with by the normal processes of the law and that the armed forces are present only in a supportive role. It is a matter that is open for debate, but this is very much the line taken. So precisely where international humanitarian law applies and where it does not is one of the big grey areas that we constantly have to battle with.

Take the situation in the former Yugoslavia. One used to ask eminent international law professors like Professor Greenwood if there was an international armed conflict going on in the former Yugoslavia or if it was an internal armed conflict or an armed conflict at all. The answer you would get from him was that it was a very complicated series of international and internal armed conflicts. You would have to look at the precise situation to decide into which category it falls. And I think that such judicial pronouncements as there have been, the Tadic case in particular, do not really help in resolving the issue at all. So the only reason why I am equating terrorism with asymmetric warfare is the similarity of the methods used and the similarity of the objects of attack by the terrorists or the irregulars in either case.

Given the present climate, where would you draw the line between a common criminal offence which may happen to instill terror in a certain population and actual terrorism?

Again this is an impossible question to answer because nobody knows where that line is but, until there is an international tribunal with jurisdiction to deal with this type of offences, they are inevitably going to be dealt with under domestic legal jurisdiction and presumably therefore they will be considered and dealt with as ordinary criminal offences.

Le droit international humanitaire et les acteurs non étatiques

Orateur: Professeur Eric David

On peut identifier quatre grandes catégories d'acteurs non étatiques : les particuliers, les groupes armés ou insurgés, les mouvements de libération nationale, les organisations internationales. Nous avons décidé d'y ajouter les Etats non reconnus car l'application du droit international à ces derniers peut soulever des questions de même nature que l'application du droit international à des entités non étatiques.

On examinera ces catégories d'acteurs en partant de l'entité "la moins étatique" jusqu'à celle qui apparaît comme "la plus étatique".

I. Les particuliers

Les particuliers ne doivent pas être confondus avec les militaires car, même si ceux-ci sont des individus, les militaires restent des représentants de l'Etat, des agents étatiques, non des personnes privées. Or, la question posée ici est de savoir si ces dernières peuvent être directement sujets de droits et d'obligations en vertu du droit international humanitaire.

La question sera examinée sans tenir compte des différents types de conflits armés.

Que le droit international puisse avoir des effets directs en s'appliquant directement aux particuliers n'est pas une nouveauté. Le jugement du tribunal de Nuremberg ne disait rien d'autre lorsqu'il affirmait:

« […] il est surabondamment prouvé que la violation du droit international fait naître des responsabilités individuelles. Ce sont des hommes, et non des entités abstraites, qui commettent les crimes dont la sanction s'impose, comme sanction du droit international. » [1]

Les incriminations du droit international sont donc applicables aux particuliers, indépendamment de leur statut d'agent étatique. Il suffit que la norme internationale leur confère directement des droits et obligations et qu'elle soit suffisamment précise, complète et inconditionnelle. L'article premier de la Convention européenne des Droits de l'Homme en est un exemple classique [2].

Si aujourd'hui, l'application directe de la Convention européenne des Droits de l'Homme et du droit européen aux particuliers est chose courante, il n'en va pas autrement du droit international humanitaire pourvu qu'il leur confère des droits et des obligations, peu importe que ces particuliers soient des terroristes, des forces irrégulières ou le citoyen *lambda*.

L'effet direct du droit international humanitaire concerne aussi bien les personnes physiques que morales. Les plaintes déposées contre la compagnie Total Fina Elf aux Etats-Unis (action civile) [3], en Belgique (mai 2002) [4] et en France (septembre 2002) (actions pénales) [5] pour complicité en matière de crimes contre l'humanité (sous la qualification d'esclavage, de travail forcé ou de séquestration) au Myanmar en attestent. D'ailleurs, le droit pénal moderne d'un certain nombre d'Etats reconnaît la responsabilité pénale des personnes morales. C'est le cas en France comme en Belgique (code pénal, article 5).

Il en va de même en droit international public puisque divers traités demandent aux Etats parties de poursuivre les personnes morales impliquées dans les infractions prévues par ces traités (*e.g.*, Convention de l'OUA du 29 janvier 1979 pour l'élimination du mercenariat, article 1 § 3 ; Convention européenne de Strasbourg

1 Jugement des 30 sept.-1er oct.1946, doc.off., vol.1, p.235.
2 L'article 1er initial disait à propos des droits et libertés prévus par le titre II de la Convention que les Etats devaient « s'engager à les reconnaître » ; H. Rolin avait proposé et obtenu qu'on remplace ces mots par « reconnaissent » afin de mieux faire ressortir le caractère directement applicable des dispositions du titre II de la Convention, Conseil de l'Europe, *Recueil des travaux préparatoires de la CEDH*, La Haye, Nijhoff, 1979, V, pp. 27 et 35.
3 *Cfr.* US Crt of App., 9th Cir., *Unocal*, 18 Sept 2002, www.laborrights.org/projects/corporate/unocal/unocal0911802.pdf
4 *Le Soir* (Bruxelles), 8 mai 2002 (www.lesoir.be/)
5 www.liberation.fr/page.php?Article=60227

du 27 janvier 1999 sur la corruption, article 18 ; Convention des Nations Unies sur le financement du terrorisme du 10 janvier 2000, article 5 ; etc).

Certaines personnes physiques sont plus spécifiquement protégées que d'autres au plan juridique ; ainsi en va-t-il des femmes et des enfants qui font l'objet de dispositions particulières à l'Assemblée Générale des Nations Unies [6], dans les Conventions de Genève de 1949 (articles 25 et 108/III ; 24, 27, 50/IV, etc), dans leurs Protocoles Additionnels de 1977 (articles 76-78/I, 4-5/II), dans la Convention sur les droits de l'enfant du 20 novembre 1989 (article 38) et dans son Protocole facultatif du 25 mai 2000.

Sur un plan plus anecdotique, le premier jugement de fond rendu par le Tribunal international pour le Rwanda, en l'affaire *Akayesu*, le 2 septembre 1998, avait affirmé que l'accusé pouvait être poursuivi pour crimes contre l'humanité et génocide, mais non pour crimes de guerre, car c'était un … civil [7] ! Cette erreur grossière, reprise dans les décisions *Kayishema/Ruzindana* [8] et *Rutaganda* [9], a heureusement été réparée par la Chambre d'Appel du Tribunal qui a reconnu que des dispositions telles que l'article 3 commun ou les règles du second Protocole Additionnel liaient les civils [10]. Confirmation éclatante de l'applicabilité des règles du droit international humanitaire aux particuliers quelle que soit leur qualité ou statut.

II. Les groupes armés / insurgés

Le droit international humanitaire s'applique aux groupes armés, insurgés, rebelles et autres forces du genre en cas de conflit armé non international, ainsi que cela ressort, entre autres, de l'article 3 commun aux Conventions de Genève, du second Protocole Additionnel, et de l'article 8, § 2, c-f du Statut de la Cour Pénale Internationale.

On s'est demandé s'il n'était pas étrange qu'un groupe qui n'a pas participé à l'élaboration de la règle puisse se la voir opposer. La réponse juridique est simple : c'est l'Etat qui est lié par la règle, c'est-à-dire autant son gouvernement que sa population, en ce compris, bien sûr, les individus et les groupes qui la

6 A/Rés. 3318 (XXIX), 14 déc. 1974.
7 TPIR, aff. ICTR-96-4-T, 2 sept. 1998, §§ 632 ss.
8 *Id.*, aff. ICTR-95-1-T, 21 mai 1999, §§ 616-618.
9 *Id.*, aff. ICTR-96-3-T, 6 déc. 1999, § 96.
10 *Id.*, aff. ICTR-96-4-A, *Akayesu*, 1er juin 2001, §§ 435 ss.

composent. Que ceux-ci soient rebelles, insurgés ou autres, importe peu : ils n'en sont pas moins liés par la règle qui lie l'Etat dont ils font partie. Il n'en va pas autrement du droit international humanitaire dès lors qu'il s'applique à l'ensemble des composantes de l'Etat.

III. Les mouvements de libération nationale

L'ensemble du droit international humanitaire s'applique aux mouvements de libération nationale pour autant qu'ils l'acceptent. Ceci résulte de la lutte politique menée aux Nations Unies (NU) dans les années soixante par les pays en développement et les Etats socialistes pour que les guerres de libération nationale fussent considérées comme des conflits armés internationaux. Plusieurs résolutions de l'Assemblée Générale des NU avaient reconnu cette qualification, notamment la résolution 3103 (XXVIII) du 12 décembre 1973. L'article 1 § 4 du premier Protocole Additionnel consacre la règle, et il ne semble pas qu'elle soit contestée aujourd'hui. Il s'agit, désormais, d'une situation historique car il n'y a plus guère de conflits que l'on peut qualifier de guerres de libération nationale, à l'exception, peut-être, des conflits palestinien et sahraoui, ce dernier restant d'ailleurs en veilleuse grâce au cessez-le-feu proposé par le Secrétaire général des NU et accepté par le Front Polisario et le Maroc le 6 septembre 1991[11].

Le premier Protocole Additionnel aux Conventions de Genève (article 96 § 3) et la Convention du 10 octobre 1980 sur l'interdiction ou la limitation de l'emploi de certaines armes qui causent des maux traumatiques excessifs (article 7 § 4) ont d'ailleurs reconnu aux mouvements de libération nationale le droit de faire une déclaration officielle d'acceptation des Conventions de Genève et des instruments précités. Si ces mouvements font cette déclaration, ils sont tenus par ces instruments même si ce n'est pas le cas de l'autre partie au conflit ; de fait, ni Israël, ni le Maroc ne sont parties au premier Protocole Additionnel.

IV. Les organisations internationales

Il y a longtemps qu'on parle de l'application du droit international humanitaire aux organisations internationales. Diverses constructions juridiques ont été proposées et différents raisonnements ont été élaborés afin de démontrer que

11 Voy. e.a., doc. ONU S/2000/197, p. 2.

le droit international humanitaire pouvait leur être appliqué : on s'est référé, par exemple, à la théorie de la succession des Etats ou à la maxime " nemo plus juris dat quam ipse habet ", à savoir que, lorsque des Etats créent une organisation internationale, ils ne pourraient pas lui transmettre des droits ou obligations dont ils ne seraient pas eux-mêmes titulaires. A la réflexion, ces raisonnements ne sont guère satisfaisants et se heurtent à des difficultés qu'on n'examinera pas ici [12].

Il est plus simple d'observer que les organisations internationales sont des sujets de droit international, liés par le droit international, ainsi que la Cour internationale de Justice l'a constaté:

> « l'organisation internationale est un sujet de droit international lié, en tant que tel, par toutes les obligations que lui imposent les règles générales du droit international […] » [13]

Derrière cette conclusion se trouve l'idée que, quand les Etats créent une organisation internationale, ils donnent naissance à un nouvel acteur des relations internationales qui est censé entrer dans le cercle huppé et fermé de la communauté internationale et, si le nouveau venu souhaite faire partie du « club », il doit en respecter les règles.

Conséquence logique : même si une organisation internationale n'est liée que par les traités qu'elle accepte, hormis son propre acte constitutif, elle doit aussi respecter l'ensemble du droit international coutumier qui, lui, n'exige aucune formalité particulière pour lier ses destinataires.

A côté de cette soumission « nécessaire » de l'organisation internationale au droit international humanitaire coutumier, il y a aussi les accords de siège conclus entre une organisation internationale et l'Etat sur le territoire duquel l'organisation envoie des forces, par exemple des forces de maintien de la paix. Dans ces accords de siège figure une clause, notamment dans le cas de l'Organisation des Nations Unies (ONU), où il est précisé que cette dernière accepte d'appliquer les « principes et l'esprit » des Conventions de Genève et des Protocoles Additionnels [14]. Cette clause se retrouve dans la plupart des accords conclus par l'ONU.

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12 Pour plus de détails, DAVID, E., *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3e éd., §§ 1.181 ss.

13 *Interprétation de l'accord entre l'Organisation mondiale de la Santé et l'Egypte, CIJ, Rec. 1980*, pp. 89-90, § 37.

14 Pour des exemples, DAVID, *op. cit.*, §§ 1.174 ss.

Enfin, la circulaire du Secrétaire Général, adoptée le 6 août et entrée en vigueur le 12 août 1999 à l'occasion du cinquantième anniversaire des Conventions de Genève, établit un noyau de règles fondamentales qui doivent être appliquées par les troupes des Nations Unies se trouvant sur le terrain.

V. Les Etats non reconnus

S'agit-il encore d'acteurs non-étatiques ? On peut en discuter longtemps, mais dès lors que leur statut d'Etat est discuté, on les traitera comme s'ils n'étaient pas tout à fait des Etats.

En cas de sécession, comme dans le cas de la Yougoslavie – que les Nations Unies ont toutefois assimilé à un cas de dissolution – les nouvelles entités – Croatie, Bosnie-Herzégovine – n'étaient pas des Etats pour le gouvernement de Belgrade aussi longtemps qu'il ne les avait pas reconnues. Par conséquent, hormis les accords particuliers passés entre ces entités et le gouvernement central, normalement, le droit applicable à ce conflit se limitait à celui des conflits armés non internationaux, à savoir, les règles de l'article 3 commun et du second Protocole Additionnel qui liaient la Yougoslavie. Toutefois, à partir du moment où cette dernière reconnaissait le statut d'Etat à l'entité sécessionniste, le conflit devenait international entre le gouvernement central et l'entité reconnue [15].

D'autres situations peuvent se produire. *Quid,* par exemple, de Taïwan ? S'agit-il d'une sécession ou d'un conflit sur la représentation de l'ensemble de la Chine ? Il semble qu'on peut parler plutôt de sécession puisque Taïwan (ou Taïpei) demande aujourd'hui son admission aux Nations Unies en tant que " République de Chine " [16], distincte donc de la République populaire de Chine. Dès lors, en cas de conflit armé, elle ne serait liée que par les traités qu'elle a acceptés, et comme Taïwan ne semble partie à aucun instrument important de droit international humanitaire, elle ne serait tenue que par les règles du droit international humanitaire coutumier.

Quid de la Palestine qui a été reconnue comme Etat par de nombreux Etats, en tant que membre à part entière, d'abord, de la Ligue des Etats arabes, en 1976, puis d'autres organisations régionales [17], ensuite, lors de sa proclamation

15 Pour plus de détails sur cette question, *ibid.,* §§ 1.141 ss.
16 Voy. www.gio.gov.tw/info/echos/27/p2.htm
17 SALMON, J., « La proclamation de l'Etat palestinien », *AFDI*, 1988, p. 52.

officielle, à Tunis, en 1988 [18] ? Le fait que les accords de paix conclus par l'Organisation de libération de la Palestine (OLP) avec Israël [19] ne la mentionnent pas comme Etat ne signifient pas qu'elle ait renoncé à ce statut.

In casu, l'application du droit international humanitaire à la Palestine ne soulève cependant pas de difficulté particulière eu égard aux nombreuses résolutions de l'Assemblée Générale des Nations Unies et du Conseil de sécurité demandant l'application, notamment de la quatrième Convention de Genève, aux territoires occupés [20].

A cet égard, on peut se demander si la Suisse n'est pas sortie de son rôle de dépositaire neutre en refusant de considérer comme « instrument d'adhésion » aux Conventions de Genève de 1949 et aux Protocoles Additionnels de 1977 la communication par laquelle l'Organisation de Libération de la Palestine (OLP) lui signifiait, en juin 1989, que

> « le Comité exécutif de l'OLP, chargé d'exercer les fonctions de Gouvernement de l'Etat de Palestine, par décision du Conseil National Palestinien, avait décidé en date du 4 mai 1989, d'adhérer aux 4 Conventions de Genève du 12 août 1949 et à leurs deux Protocoles Additionnels. » [21]

La Suisse fondant sa position sur " l'incertitude au sein de la communauté internationale quant à l'existence ou non d'un Etat de Palestine, " [22], avait inscrit " l'OLP ", et non la Palestine, à la fin de la liste des Etats parties.

Solution pourtant différente lorsque la Guinée-Bissau avait adhéré aux Conventions de Genève de 1949 le 21 février 1974 : la Suisse s'était alors bornée à déclarer qu'elle n'entendait pas " se prononcer sur le statut de la Guinée-Bissau au regard du droit international " [23], mais elle avait inscrit cet Etat sur la liste des Etats parties, tout en enregistrant les protestations du Portugal et du Brésil [24]. C'est la solution qu'elle aurait dû adopter pour la Palestine, dès lors que celle-ci n'était pas une entité fantaisiste.

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18 *Ibid.*, p. 37.
19 Texte des accords d'Oslo de 1993, du Caire de 1994, de Washington de 1995, de Wye River de 1998 et du Charm el-Cheikh de 1999 sur <medintelligence.free.fr/textip.htm>
20 Réf. *in* DAVID, op. *cit.*, § 1.82.
21 Texte *in* SCHINDLER, D. et TOMAN, J., *Droit des conflits armés*, Genève, CICR et Inst. H.-Dunant, 1996, p. 668.
22 *Ibid.*
23 *Ibid.*, p. 657.
24 *Ibid.*, pp. 677 et 702.

Mutatis mutandis, aux Nations Unies, lorsqu'on enregistre un traité auprès du Secrétaire Général, celui-ci se garde de se prononcer sur le point de savoir s'il s'agit ou non d'un traité ; à supposer qu'un différend naisse à ce sujet, le Secrétaire Général se borne à enregistrer les positions des parties sans trancher la question [25]. La Suisse aurait dû faire de même pour la Palestine.

Dans ces hypothèses particulières et complexes, le droit international humanitaire s'applique aussi aux autorités qui affirment être des Etats, soit en tant que droit international coutumier, soit éventuellement par succession d'Etats si l'on peut démontrer que l'entité en question est le produit ou le résultat d'un Etat prédécesseur qui, de son côté, était lié par un certain nombre de normes internationales de droit international humanitaire.
Le caractère non étatique des entités qui participent à un conflit armé n'est pas un obstacle à l'application du droit international humanitaire à ces dernières. Loin d'être un droit purement inter-étatique, le droit international humanitaire oblige et protège tout acteur d'un conflit armé, quels que soient ses statut et qualité. Pour paraphraser Archimède, les acteurs non étatiques sont, comme tout Etat plongé dans un conflit armé, soumis à une pression du droit international humanitaire au moins égale à celle de leur implication dans le conflit …

Summary

One can identify four broad categories of non-state actors: private citizens, armed or rebel groups, national liberation movements and international organizations. Non-recognized States can be added as a fifth category, because the application of international law to these entities can give rise to similar problems as when it is applied to non-state actors.

Private citizens should not be confused with military personnel because, even if the latter are individuals, they remain representatives or agents of the State. The issue under consideration is whether private citizens can, under international humanitarian law, directly be subjects of rights and obligations, whatever the type of conflicts.

The fact that international law can have direct effects by applying directly to

25 *Cfr.* les différences d'interprétation entre Qatar et Bahreïn à propos de la nature juridique des minutes d'une rencontre entre les deux Etats, minutes dont Bahreïn contestait la nature conventionnelle et que Qatar avait néanmoins fait enregistrer comme traité, *CIJ, Rec. 1994*, p. 122, § 28.

private citizens is nothing new, as demonstrated for instance during the Nüremberg trial. The incriminations of international law, including international humanitarian law, are applicable to private citizens regardless of their position as state agent. All it takes is for the international norm to directly confer rights and obligations and for the norm to be sufficiently precise, complete and unconditional. International humanitarian law, provided it confers them rights and obligations, applies directly to private citizens, no matter whether they are terrorists, members of irregular forces or common individuals.

The direct effect of international humanitarian law concerns both natural and legal entities. In France and Belgium for example, criminal law recognizes the criminal responsibility of legal entities. The same is true in international public law where different treaties, such as the European Convention of 27 January 1999 on corruption or the United Nations Convention of 10 January 2000 on the financing of terrorism, require States parties to prosecute legal entities involved in offences foreseen by these instruments.

From a legal point of view, certain categories of natural persons benefit from a more specific protection than others. The Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as the Convention of 20 November 1989 on the rights of children and its Optional Protocol of 25 May 2000, are amongst those legal instruments including particular provisions in favor of women and children.

When it comes to armed groups, rebel groups or similar forces, international humanitarian law applies in cases of non-international armed conflicts, as demonstrated by Article 3 common to the four Geneva Conventions, the second Additional Protocol, and Article 8 paragraph 2 of the Statute of the International Criminal Court.

Is it not strange that a group that did not participate in the elaboration of a rule can be bound by that rule? The legal answer is straightforward: the State is bound by the rule and the State includes not only the government but also the entire population that is made up of individuals and groups. Whether these groups are rebels or insurgents is irrelevant. As a component of the State, they are bound by the rule that binds the State. That is why international humanitarian law is applicable to these movements.

International humanitarian law as a whole applies to national liberation movements provided they accept it. This is the result of the political struggle for the

recognition of national liberation wars as international armed conflicts that was conducted during the sixties at the United Nations by developing countries and socialist States. Several resolutions of the UN General Assembly had recognized this qualification that was subsequently established in Article one paragraph four of the first Additional Protocol. This rule is no longer disputed and concerns what is largely today a historical situation, with only Palestine and Western Sahara perhaps still qualifying as national liberation wars.

Besides, the first Additional Protocol and the 1980 "Convention on prohibitions or restrictions on the use of certain conventional weapons that may be deemed to be excessively injurious or to have indiscrimate effects" gave national liberation movements the right to make an official declaration, whereby they agree to comply with the Geneva Conventions as well as the two above-mentioned instruments. If a national liberation movement makes such a declaration, it is bound by these instruments irrespective of the position of the other party to the conflict.

The debate on the applicability of international humanitarian law to international organizations is not new. It has been fueled by different theories and arguments, which were elaborated in order to demonstrate that these organizations can be bound by international humanitarian law. These reasonings have proven, however, to be unsatisfactory and have run into difficulties. It is easier to follow the conclusion of the International Court of Justice, according to which "an international organization is a subject of international law and, as such, is bound by all the obligations deriving from the general rules of international law".

Behind this conclusion of the International Court of Justice lies the idea that, when States create an international organization, they give birth to a new actor of international relations, whom they expect to behave according to the rules of the select "club" formed by the members of the international community. The logical consequence of this implicit commitment is that, even if an international organization is bound only by the treaties it accepts, it must, in addition to its constitutive act, also respect the entire body of customary international law.

In addition to customary international humanitarian law, international organizations must also abide by the headquarters agreement concluded with the State on whose territory they send forces, for instance peacekeeping troops. These headquarters agreements include, certainly as far as the United Nations is concerned, a clause specifying that the organization agrees to implement the "principles and spirit" of the Geneva Conventions and the Additional Protocols.

Along the same lines, there is also a circular of the UN Secretary General dated 6 August 1999 that establishes a core of fundamental rules to be implemented by UN troops in the field.

One can debate at length whether non-recognized States are non-State actors. Since there is, however, a doubt with regard to their status, let us treat them as less than fully-fledged States. In case of secession, as happened with Yugoslavia, the new entities, namely Croatia and Bosnia-Herzegovina, were not considered to be States by the Belgrade government as long as the latter had not recognized them. With the exception of special agreements concluded between the parties, the law applicable to the war was therefore the law of non-international armed conflicts. It is only when Yugoslavia recognized that the secessionist entities were indeed States that the conflict became international and the corresponding legal instruments applied.

But when we look to other situations. What happens with Palestine which was recognized as a State by numerous countries in 1976 within the framework of the Arab League and is a member State of several other regional organizations since 1988? The fact that the peace agreements concluded during the nineties between Israel and the Palestine Liberation Organization (PLO) do not mention Palestine as a State cannot be construed as a renunciation of that status by the Palestine Liberation Organization (PLO). The applicability of international humanitarian law to Palestine is not in dispute, given that numerous resolutions adopted by the United Nations General Assembly and Security Council call for the implementation inter alia of the fourth Geneva Convention to the occupied territories.

In this regard one can question Switzerland's attitude as a neutral depositary when it refused to consider as an instrument of accession the PLO's communication of June 1989. In this communication, the PLO stated that its "Executive Committee, acting as the Government of the State of Palestine and based on a decision of the Palestinian National Council, had decided on 04 May 1989 to accede to the four Geneva Conventions and their two Additional Protocols". Switzerland entered "the PLO" and not "Palestine" at the bottom of the list of States parties and justified its position by "the uncertainty prevailing within the international community as to the existence or non-existence of a State of Palestine". As happened in 1974 when Guinea-Bissau acceded to the Geneva Conventions, Switzerland should have entered Palestine on the list of States parties without commenting on its status as far as international law is concerned,

while recording as well possible subsequent protests linked to this entry. This is the procedure followed at the United Nations whenever a treaty is registered with the Secretary General.

In such specific and complex cases as those of Yugoslavia and Palestine, to which one can add Taiwan, international humanitarian law applies also to authorities that claim to be States. It applies either as customary international law or possibly through State succession if one can demonstrate that the entity concerned is the product or the result of a former State that was bound by certain rules of international humanitarian law.

The fact that certain entities taking part in armed conflicts are non-State actors does not mean that international humanitarian law is not applicable to them. On the contrary international humanitarian law, far from limiting itself to relations between States, gives rights and obligations to all actors in an armed conflict, regardless of their status or quality.

Highlights of the question time

Why does Palestine not figure on the list of States that have acceded to the Geneva Conventions and Additional Protocols, despite having officially sent an instrument of accession to that effect?

It is incorrect to say that Switzerland has not included Palestine on the list of States that have acceded to the Geneva Conventions and Additional Protocols. Switzerland, however, makes a clear distinction between it being a State party to the Geneva Conventions, on the one hand, and it being the State depository for these conventions, on the other hand. In this particular case, Switzerland did notify the accession of Palestine but with a note saying that, Switzerland being the depository, it cannot pronounce itself on whether Palestine is a State or not and that it is up to each State to individually define its own position on this matter. This is the official and public view of the Swiss government with regard to the accession of Palestine to the Geneva Conventions and additional Protocols. When it comes to international conferences there is a certain practice which is now established, namely that Palestine is also invited and, according to an informal agreement, Palestine is present in the conference room but it is, from an alphabetical point of view, at the end.

As far as Palestine is concerned all there is on the list of States party to the Geneva Conventions and the Additional Protocols quoted by the International Committee of the Red Cross (ICRC) is a note, which appears year after year, saying that "as of 21 June 1989 the Swiss Federal Department of Foreign Affairs received from the Permanent Observer of Palestine a letter informing the Federal Council that the Palestine Liberation Organization, entrusted with exercising the functions of the government of the State of Palestine [...], has decided to accede to the Geneva Conventions and their Additional Protocols". On 13 September 1989 the Swiss Federal Council informed the States that it was not in a position to decide whether this letter was an instrument of accession, "because of the uncertainty within the international community as to the existence or non-existence of a State of Palestine". So Palestine is not included in the above-mentioned list. Although the ICRC considers that the Palestinian Authority has expressed its willingness to commit itself, through a formal act, to abide by international humanitarian law, the above-mentioned note still appears explicitly on the list and in the International Review of the Red Cross.

Looking at the different categories of non-State actors that are bound by international humanitarian law, more particularly the entities called "non-recognized States", where does Kosovo fit? It is formally part of the Yugoslav Federation, but currently under a special regime and authority emanating from the United Nations (UN). Is there a legal obligation for this UN authority to comply with international humanitarian law?

There is currently no armed conflict in Kosovo. What we have is a situation of non-belligerence that, in addition, is accepted by the Yugoslav government despite probable reservations and second thoughts. It is, however, not such a straightforward case but rather a difficult question, because the presence of the United Nations together with the KFOR in Kosovo raises problems in terms of the adaptation of international humanitarian law to this particular situation. This topic will be dealt with in further details during another presentation.

Chechnya is an entity where we find both authorities and rebels. In which category of "non-state actors" would this situation fall and who would bear the responsibility towards international humanitarian law?

The Chechnya situation is a situation of armed conflict where private individuals are engaged in fighting. Therefore, like in all armed conflicts, these persons are

individually bound by the rules applicable in such cases, that is essentially common Article III and the second Additional Protocol as well as, perhaps, Article 8 of the Statutes of the International Criminal Court taken as an expression of current customary law with regard to international humanitarian law – this view has been stated in certain decisions of the International Tribunal for the Former Yugoslavia, and considers the Statutes to be the expression of the current will of States and an update of international humanitarian law. Armed groups and insurgents are definitely also concerned in the Chechnya situation, with the exception of national liberation movements. There is a precise definition of national liberation movements with regard to the concept of self-determination, as detailed in Resolutions 1514 and 1541 of the United Nations General Assembly, and the Chechen movement does not belong to this category. Neither is it an international organization or a non-recognized State. Chechnya remains a situation of purely internal armed conflict.

Today international organizations such as the United Nations (UN), the North Atlantic Treaty Organization (NATO), and the Economic Community of Western African States (ECOWAS) are involved in military operations. Perhaps tomorrow it will be the turn of the European Union (EU) to be engaged in such operations. Considering these facts and this possible development, is customary international law sufficient or do we need a more formal commitment, for instance a specific provision in the new EU treaty according to which this organization would agree to abide by international humanitarian law while implementing its defence and security policy?

It is true that more and more international organizations are engaged in armed conflicts. In the specific case of the EU, however, it is not yet an international organization. Rather it remains, at this stage, an association regrouping several States and deprived of legal personality. At some point in the future, when the EU has a legal personality, one could imagine that perhaps, within the framework of the growing European federalization process, the EU would accede to the instruments of international humanitarian law. The EU would then no longer be an international organization but a State as such. This is a distant prospect but, in the meantime, a formal commitment to abide by the Geneva Conventions and the Additional Protocols would be a positive development and a step in the right direction of a possible future accession to the instruments of international humanitarian law.

Le droit international humanitaire face à ces évolutions: un droit adapté ou adaptable?

Orateur: Professeur Eric David

Cette question aurait sans doute fait les délices des sophistes de l'antiquité grecque, mais elle ne devrait pas surprendre le juriste qui est quotidiennement confronté au problème de l'application de normes générales à des faits particuliers. Formulée en termes abstraits, une règle de droit est presque toujours une règle générale ; son application à une situation concrète implique, donc, nécessairement un effort d'adaptation de l'une à l'autre.

La différence entre « droit adapté » et « droit adaptable » doit toutefois être précisée. Une règle est "adaptée" quand elle peut s'appliquer directement à une situation de fait, sans soulever de difficulté particulière d'interprétation. Si ce n'est pas le cas, mais si on réussit néanmoins à appliquer la règle, on dira que celle-ci est "adaptable". L'application de la notion pénale de vol – "soustraction frauduleuse du bien d'autrui" – au vol d'électricité, au siècle dernier – une situation non envisagée par le Code pénal de 1804 –, en est un exemple classique.

On commencera par montrer que le droit international humanitaire (DIH) est, non seulement, un droit adapté, mais aussi, un droit adaptable à certaines situations (I.). On verra ensuite qu'il y a des situations pour lesquelles le DIH n'est pas réellement adapté quand bien même il serait adaptable (II.).

I. Un droit adaptable et adapté par la jurisprudence et la pratique plutôt que par la codification

On peut illustrer ce point à travers trois exemples qui constituent un simple échantillon des réalités d'un conflit armé. Ces exemples sont intéressants car deux d'entre eux apportent des réponses à des questions non résolues en DIH positif.

Les critères de transformation d'un conflit armé interne en conflit armé international ont été établis par la jurisprudence internationale. Dans l'affaire *Tadic*, la Chambre d'Appel du TPIY a montré qu'une intervention étrangère pouvait transformer un conflit armé interne en conflit armé international, lorsque l'Etat étranger apportait une aide aux insurgés sous la forme, par exemple, d'équipements ou de fonds, et lorsqu'il supervisait ou exerçait un contrôle général sur leurs opérations [1]. Ce genre de situations n'était pas codifié par le droit international public ou par le DIH. Si le CICR avait fait une tentative en ce sens durant la Conférence d'experts gouvernementaux en 1971-1972, conférence qui précédait la conférence diplomatique sur la réaffirmation et le développement du DIH (1974-1977), le projet élaboré n'avait pas été accepté par les experts [2]. C'est donc la jurisprudence qui a défini le seuil à partir duquel une intervention devenait suffisamment importante pour transformer une guerre civile en conflit armé international.

Le second cas concerne la poursuite pénale des violations graves du DIH commises dans des conflits armés non internationaux. Ici aussi, l'évolution qui a permis l'adaptation du droit pénal international aux situations de guerre civile résulte de la pratique. C'est le statut du TPIR (art. 4) adopté par le Conseil de Sécurité en 1994 et la décision *Tadic* de 1995 [3] qui ont permis que des crimes commis dans le cadre de conflits armés internes pussent être considérés comme des crimes de guerre à l'instar de ce qui était prévu classiquement pour le seul cas des conflits armés internationaux (*cfr.* CG de 1949, art. commun 50/51/130/147 et 1er PA de 1977, art. 85). Ceci fut entièrement confirmé par les Etats lors de l'adoption du Statut de la Cour pénale internationale (CPI) (Rome, 17 juillet 1998), à l'art. 8 § 2, c-f.

Le troisième cas concerne l'interdiction d'employer certaines armes. La Convention des N. U. du 10 octobre 1980 sur l'emploi de certaines armes de nature à causer des maux traumatiques excessifs interdit ou limite, en son Protocole 2, l'emploi des pièges et des mines. Si l'on appliquait correctement et de bonne foi ce Protocole, il serait à peu près impossible d'utiliser des mines antipersonnel: d'une part, leur dispersion au hasard, sans plan ni avertissement, d'autre part, l'absence d'élément métallique dans la mine permettant de la détecter et de déminer le terrain à la fin des hostilités aboutissent nécessairement à violer les art. 3-5, 7 et 9 du Protocole. Une interprétation honnête du

1 Aff. IT-94-1-A, 15 juillet 1999, §§ 99 ss.
2 CICR, *Rapport sur les travaux de la conférence*, vol. I, Genève, 1972, pp. 98 ss.
3 TPIY, app., Aff. IT-94-1-AR72, 2 octobre 1995, §§ 89 ss.

texte permettait donc de soutenir que les mines antipersonnel étaient déjà interdites par le DIH. Certes, il n'y avait pas d'interdiction directe d'employer ces mines, mais les modes d'utilisation aveugle des mines antipersonnel les faisaient tomber sous le coup du DIH. En ce sens, celui-ci était adaptable à ce type d'armes.

L'interdiction étant toutefois plus implicite qu'explicite, une partie de la communauté internationale a jugé préférable d'adopter des règles spécifiques aux mines antipersonnel, et c'est la raison pour laquelle on a, d'abord, modifié, le 3 mai 1996, le Protocole qui limite l'emploi de ces engins, puis, adopté, le 18 septembre 1997, la Convention d'Oslo-Ottawa qui établit une interdiction complète de l'emploi des mines antipersonnel.

Dans le cas des armes nucléaires, la Cour internationale de Justice, dans son avis consultatif du 8 juillet 1996, a reconnu par sept voix contre sept – avec la voix prépondérante du Président de la Cour – que l'emploi des armes nucléaires violait le DIH [4]. L'absence d'interdiction spécifique concernant l'utilisation de ces armes n'a pas empêché la Cour de conclure à l'illicéité de leur emploi en raison notamment de leurs effets indiscriminés et des souffrances inutiles qu'elles causent aux victimes [5].

L'adaptation du droit peut parfois entraîner des résultats décevants, sinon négatifs. Tel est le cas du Protocole 3 à la Convention précitée de 1980 qui limite l'emploi des armes incendiaires. Avant l'adoption de ce Protocole, l'emploi des armes incendiaires pouvait être considéré comme interdit par les règles classiques interdisant l'emploi d'armes de nature à causer des souffrances inutiles (Déclaration de Saint-Pétersbourg de 1868, Règlement de La Haye de 1907, art. 23, e, 1er PA, art. 35 § 2). Or, l'adoption du Protocole 3 à la Convention de 1980 aboutit à légitimer l'emploi de ces armes : en n'interdisant leur utilisation que contre la population civile, il justifie leur emploi contre les militaires. Lorsqu'on voit la nature des blessures causées par ces armes, il est difficile de prétendre, ici, que l'adaptation du DIH par la codification a conduit à un progrès.

4 *Licéité de la menace ou de l'emploi des armes nucléaires*, avis consultatif, 8 juillet 1996, *CIJ Rec.* 1996, p. 266, § 105 E.
5 *Ibid.*, p. 262, § 95.

II. Un droit inadapté mais adaptable selon la volonté politique des parties au conflit

Le DIH ne s'applique qu'en cas de conflit armé. Or, parmi les situations que le DIH ne réglemente pas clairement figurent les questions de seuil concernant le point de départ d'un conflit armé, et la fin de celui-ci. A partir de quel moment peut-on dire que l'on se trouve dans une situation de conflit armé, et à quel moment peut-on dire que celui-ci est terminé? Questions fondamentales puisqu'elles conditionnent l'applicabilité du DIH.

Le seuil d'existence des conflits armés non internationaux varie selon qu'il s'agit, soit, d'un conflit visé à l'art. 3 commun aux 4 CG de 1949, à l'art. 19 de la Convention de La Haye de 1954 sur les biens culturels, à l'art. 22 de son Protocole de 1999, à l'art. 1 § 2 du Protocole 2 de la Convention de 1980 tel que modifié en 1996, soit, d'un conflit visé à l'art. 8 § 2, f, du Statut de la CPI, soit enfin, d'un conflit visé à l'art. 1 § 1 du 2e PA. Dans le 1er cas (conflits visés à l'art. 3 commun, etc), le seuil est plutôt bas puisque, selon la pratique, le conflit ne requiert qu'une opposition ouverte entre les forces armées des deux parties [6]; dans le 2e cas (certains conflits visés par le Statut de la CPI), le seuil est plus élevé puisqu'il exige des hostilités de caractère "prolongé" (Statut CPI, art. 8 § 2, f). Quant au 2e PA de 1977, il prévoit un seuil encore plus élevé puisqu'il suppose un conflit entre insurgés contrôlant une partie du territoire et forces gouvernementales (2e PA, art. 1 § 1).

Dans quelle catégorie se situent certains faits graves de terrorisme ? Les attentats du 11 septembre 2001 perpétrés aux E.-U., à supposer qu'aucune Puissance étrangère ne se trouve derrière eux, seraient-ils constitutifs de conflit armé ? Question d'appréciation à laquelle il faut bien constater que le DIH ne donne pas de réponse précise.

Dans le cas des conflits armés internationaux, les commentaires de l'art. 2 commun aux 4 CG indiquent que ce type de conflits existe dès qu'il y a opposition armée entre les forces de deux Etats, quelle que soit l'intensité du conflit [7]. Un simple incident de frontière pourrait donc entraîner l'application des CG. L'invasion du Danemark par l'Allemagne en 1940, même sans coup férir, n'en était pas moins réputé conflit armé international au regard du DIH [8].

6 Réf. *in* DAVID, E., *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3e éd., §§ 1.71 ss.

7 *Les Conventions de Genève du 12 août 1949, Commentaire publié sous la direction de J. Pictet*, CICR, 1952, I, p. 34; 1959, II, p. 28; III, 1958, p. 29; 1956, IV, p. 26.

8 Réf. *in* DAVID, op. *cit.*, § 1.51.

Certaines situations n'en restent pas moins difficiles à qualifier. Les événements de Somalie en sont un exemple : lors du procès de soldats belges accusés d'exactions à l'égard de Somaliens, la Cour militaire belge s'est demandée s'il y avait, ou non, conflit armé en Somalie. S'il y avait conflit armé, alors la loi belge du 16 juin 1993 concernant les crimes de guerre s'appliquait à ces exactions, sinon, seules s'appliquaient les dispositions ordinaires du code pénal. Pour la Cour militaire, il n'y avait pas de conflit armé en Somalie, bien que 30.000 soldats de l'ONUSOM fussent présents sur le territoire somalien. La Cour a considéré qu'il y avait des incidents occasionnels liés au maintien de l'ordre, mais pas de conflit armé[9]. Conclusion curieuse, car pourquoi envoyer une force de 30.000 militaires lourdement armés dans ce pays s'il n'y régnait pas une situation de conflit armé? S'il s'agissait simplement de maintenir l'ordre, quelques centaines de policiers auraient aussi bien fait l'affaire. En l'occurrence, les juges belges ont refusé de voir la réalité.

Le même type de question s'est posée avec la présence de la Force internationale au Timor Oriental (INTERFET). L'Australie a considéré qu'il n'y avait pas de conflit armé au Timor Oriental et que, de ce fait, les prisons de l'INTERFET et les relations entre cette force et la population locale n'étaient pas soumises au DIH. La Nouvelle-Zélande, au contraire, estimait, que le DIH était d'application à ce type de situation[10].

Ces exemples montrent que le droit applicable aux forces de maintien de la paix dans le cadre de leurs relations avec la population locale soulève un réel problème. Si l'on peut soutenir que la présence de forces étrangères dans les deux exemples qui précèdent est constitutive d'occupation, selon le règlement de La Haye de 1907 ou la 4e CG de 1949, d'autres estiment que ce n'est pas le cas, et que le DIH ne devrait pas s'appliquer.

Quand le conflit armé prend-il fin ? L'exemple du conflit afghan, après les attentats du 11 septembre 2001, illustre la difficulté de la question. Kaboul est tombé le 13 novembre 2001. Toutefois, en mai 2002, des troupes américaines et britanniques menaient encore des opérations militaires en Afghanistan contre des groupes de Talibans[11]. Dès lors qu'il y avait à Kaboul un nouveau gouvernement

9 C.M., 17 déc. 1997, *Coelus en Baert*, II, 3, D, *J.T.*, 1998, 289; pour une critique voy. WEYEMBERGH, A., "La notion de conflit armé, le droit international humanitaire et les forces des N.U. en Somalie (à propos de l'arrêt de la Cour militaire du 17 déc. 1997)", *RDPC*, 1999, pp. 177-201.

10 Réf. *in* DAVID, *op. cit.*, §§ 1.112 et 2.354.

11 *Le Monde*, 4 mai 2002.

qui considérait que la guerre était finie entre l'Afghanistan, d'une part, les Etats-Unis et la Grande-Bretagne, d'autre part, quel était le droit applicable à ces combats de faible intensité? Ici aussi, le DIH n'offre pas de réponse spécifique. Il est tout à fait possible de soutenir que ces combats n'étaient pas constitutifs de conflit armé international, et l'on peut aussi bien affirmer le contraire: ces combats opposant des personnes provenant d'Etats différents et s'inscrivant dans la suite de la guerre entre les anglo-américains et les talibans afghans, on pouvait considérer que deux personnalités internationales continuaient à se faire la guerre et que leur relation conflictuelle était un conflit armé international soumis au DIH.

Le DIH n'est donc pas adapté à toutes les situations, même s'il est adaptable au prix de contorsions juridiques. Alors, droit adapté ou adaptable? Question de point de vue. Serait-ce faire preuve de totalitarisme que de dire que le DIH est applicable à toutes les situations? Pas nécessairement. Dans le roman de Pierre Louÿs, *Les Aventures du Roi Pausole*, le roi Pausole règne sur le tout petit royaume de Tryphême, coincé quelque part entre la France et l'Espagne, mais ne figurant sur aucune carte. La loi de ce royaume ne contient que deux articles. Le premier dipose "Ne nuis pas à ton voisin" et le second "Ceci bien compris, fais ce qu'il te plaît". Ce code suffit au roi Pausole pour rendre la justice sous un cerisier parce que celui-ci donne autant d'ombre qu'un autre arbre "et garde sur le chêne séculaire l'avantage de porter des fruits fort agréables en été" [12]. Quoi qu'il en soit des mérites respectifs du chêne et du cerisier pour rendre la justice, cet exemple montre que le droit reste, sans doute, toujours adaptable, mais qu'en dehors des romans, la sécurité juridique exige parfois qu'on procède à son adaptation.

Summary

It is not easy to determine whether international humanitarian law is adapted or adaptable. This said, one must remember that a rule of law is always, by definition, formulated in general and abstract terms. Hence the difficulty in knowing which general rule can apply to a specific situation. This is a reality that all legal experts are familiar with because they face this problem in their daily work.

The difference between "adapted law" and "adaptable law" is not entirely clear. One could say that a rule is adapted when it can be applied directly to a

12 Ed. du Livre de poche, p. 8.

particular situation, without any problem as far as its interpretation is concerned. If it proves difficult to directly apply a rule to a given situation, but nonetheless the obstacles are overcome and the rule is applied, then we can say that the rule is adaptable. The theft of electricity provides a good example in this regard. The definition of theft meant that a person had to take with his/her hands something belonging to another individual. The definition was thus not adapted to the theft of electricity. The judges, however, managed to interpret the notion of theft in such a way that it could be applied to a situation not envisaged in the criminal code at the time of its elaboration. In this case, the rule of law proved to be adaptable.

We shall see, first, that it is possible to argue that international humanitarian law is not only adapted but also adaptable to a number of situations. We shall then examine situations where international humanitarian law is not adapted, although it could be adaptable.

To illustrate the fact that international humanitarian law can sometimes be both adapted and adaptable, I will consider three different situations. The first is the transformation of an internal armed conflict into an international armed conflict. How can this happen? A solid answer to this question was provided by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic Case*. On 15 July 1999 the Chamber of Appeal of the ICTY declared that a foreign intervention could lead to the transformation of an internal armed conflict into an international armed conflict. The Chamber gave a definition of foreign intervention that includes two main elements. First, there has to be a general supervision by a foreign government or another State of troops actively participating in the civil war. Second, the foreign government or the other State has to support insurgents through the provision, for example, of funds or equipment. This kind of situations is absolutely not codified under international public law or international humanitarian law. We owe it to the above-mentioned precedent that there is now a kind of legal definition of the threshold that determines when a foreign intervention becomes sufficiently important to transform a civil war into an international armed conflict.

The second example showing that international humanitarian law can be at the same time adapted and adaptable concerns the prosecution, within the framework of an internal armed conflict, of crimes that are, technically speaking, only foreseen in case of international armed conflicts. Once again it is practice that has permitted the adaptation of criminal international humanitarian law to

situations of civil war. I refer in particular to the statutes of the International Criminal Tribunal for Rwanda, but also to the famous and fantastic verdict reached in the *Tadic Case* on 2 October 1995. Thanks to this jurisprudence, it is now established that crimes perpetrated during the course of an internal armed conflict can be considered as war crimes from a technical point of view. This development was confirmed in the Statutes of the International Criminal Court.
A third case illustrating that international humanitarian law is both adapted and adaptable is the prohibition of the use of certain weapons. A strict interpretation of the second Protocol to the 1980 "Convention on the prohibition of certain weapons causing unnecessary sufferings" gives valid reasons to maintain that antipersonnel mines were already forbidden. Indeed, if one had decided to implement the Protocol in a literal way, antipersonnel mines could not have been used. These mines were used, however, and it is this practice that led to the decision to modify the Protocol in 1996. This step was followed by the adoption of the Oslo-Ottawa Treaty in 1997 that completely prohibits the use of antipersonnel mines.

Another issue, and a particularly complex one, is nuclear weapons. In its advisory opinion of 8 July 1996, adopted by a technical majority of seven against seven thanks to the decisive vote of its President, the International Court of Justice (ICJ) recognizes that the use of nuclear weapons is a violation of international humanitarian law. What is really interesting here is that there was no general prohibition on the use of these weapons. The ICJ considered, however, that the prohibition of nuclear weapons under international humanitarian law derives from the prohibition of weapons having an indiscriminate effect or from the prohibition of weapons causing unnecessary sufferings or from the rules of the Martens Clause.

The adaptation of the law can sometimes lead to developments that are perhaps not negative but are at least disappointing. A telling example is the prohibition of incendiary weapons. Before the adoption of the 1980 Convention, the use of these weapons was prohibited by the classical rules dating back to the Saint-Petersburg declaration of 1868, reiterated several times since, because of the unnecessary sufferings they inflict. The adoption of the third Protocol to the 1980 Convention legitimated, in a way, the use of incendiary weapons. Whereas they cannot be used against civilians - this has been the case since 1868 - these weapons can now be used against military personnel under certain conditions. When one sees the type of wounds provoked by incendiary weapons, it is difficult to argue that we are dealing with a positive adaptation of international humanitarian law. It is, rather, an example of the contrary.

Let us now examine two examples of situations where international humanitarian law is naturally adapted to the reality of the field, whether through practice or the good will of the parties. These two cases concern the issue of the threshold. On the one hand, there is the beginning of a conflict: when exactly is it possible to say that we are in a situation of armed conflict? On the other hand, there is the end of a conflict: when can we say that a conflict is actually over? These two questions are fundamental because they condition the applicability of international humanitarian law.

Different thresholds can be envisaged in case of non-international armed conflicts, depending on which definition is taken into account. The threshold can be rather low if its definition simply mentions an active opposition between the armed forces of two parties as is the case, for instance, in the 1954 Hague Convention on cultural property. By contrast, Article 8 paragraph 2 of the Statutes of the International Criminal Court (ICC) foresees a higher threshold since the definition mentions the necessity of having "protracted hostilities" to trigger an internal armed conflict. The threshold envisaged in the first Article of Additional Protocol II is higher still, because it includes a mandatory criterion of territorial control. There has been an evolution and one can today argue that Article 1 of the second Additional Protocol has been implicitly replaced by Article 8 paragraph 2 of the ICC Statutes.

An international armed conflict exists as soon as the first shots are fired and, in that sense, a simple border incident could trigger the application of the Geneva Conventions. Actually, even in a situation where no fire at all is exchanged, we can have an international armed conflict. For instance, Denmark opposed no resistance to the German invasion of 1940 because it thought that it was pointless. The two States did not fight each other but international humanitarian law applied nonetheless to the situation.

The interpretation of certain situations is, from a legal point of view, particularly challenging. In 1993 a Military Court trying Belgian soldiers accused of having mistreated or even tortured Somalis decided that no armed conflict was underway in Somalia when the events took place. The Court described the situation prevailing at the time as "occasional incidents linked to a law enforcement operation". But then why send 30,000 military personnel with heavy weapons to Somalia? The consequence of the military court's decision was that the 1993 Belgian law on war crimes could not be applied in the case and the soldiers were tried under the ordinary provisions of the criminal court.

Another example of how difficult it can be to interpret the law is provided by the situation in East Timor, where Australia considered that there was no armed conflict. As a consequence, relations between the International Force in East Timor (INTERFET) and the local population were, according to Canberra, not governed by international humanitarian law. By contrast, New Zealand's position is that international humanitarian law is applicable to these kind of situations. The issue of which law is applicable to peacekeeping forces in the framework of their relations with the local population constitutes a real problem. There is no doubt that it is a situation of occupation, since we are dealing with foreign troops who have coercive powers vis-à-vis the local people. In that sense, one can argue that international humanitarian law is applicable, at least to some extent. It is, however, also possible to maintain that it does not apply. This is a difficult situation that appears to have no obvious solution. As a general rule, peacetime law should apply. If, however, even minor hostilities erupt between the local population and foreign peacekeeping troops, international humanitarian law should apply.

When does an international armed conflict come to an end? The current war in Afghanistan is a good example to answer this question. Although Kabul fell in November 2001, small-scale fighting between American and British troops, on the one hand, and groups of Taleban, on the other hand, was still ongoing in some parts of the country several months later. Taking into consideration that the new government sitting in the capital considered that the war was over, what was the law applicable to these limited armed confrontations? Again international humanitarian law does not give a specific answer. One can maintain, however, that international humanitarian law was applicable to the military operations conducted in the regions. Moreover, since the people participating in the combats were citizens of different States, it is possible to argue that the conflict was international and that the corresponding international humanitarian law should apply.

The general conclusion is that international humanitarian law is not always adapted, but it is always adaptable and therefore it can be applied to all situations. This is only a matter of opinion. Some people will deem such a statement to be totalitarian. Yet the interpretation and the implementation of the rules vary depending upon the circumstances and people, which means that the law is indeed always adaptable.

Discussion chaired by Professor Eric David

There has been a significant evolution in the position taken by many States with regard to antipersonnel mines. What has caused this change of mind?

With regard to antipersonnel mines, there has been a significant and interesting evolution that can be illustrated by the position taken by the United Kingdom (UK) on the issue. When the 1980 Convention was negotiated, the UK delegation was arguing for the military utility of antipersonnel mines, saying how important these weapons were in the military armoury and that, while the UK would be prepared to consider some restrictions on their use, there was no way that the UK would go along with a complete ban. That was probably the outcome of the first version of the Protocol which came out in 1980, namely no ban but some restrictions on use. A renewed version of that Protocol emerged in 1995 that further tightened the restrictions but did not amount to a complete ban on antipersonnel mines, which is why the Ottawa Convention was subsequently necessary to put the matter beyond any doubt. It is interesting to see the change in the reaction of the British forces over a period of about twenty years. Whereas in 1980 the UK was arguing for the military utility of landmines, less than twenty years later, when British forces were asked whether they could manage with the Ottawa Treaty, they answered that they would be happy to see these weapons removed from the battlefield and could perfectly well cope without them. The "Princess Diana effect" had probably a lot to do with this change of opinion.

What is the position of the International Court of Justice on the use of nuclear weapons? Has the International Court of Justice taken a firm and clear stand on the issue?

As far as nuclear weapons are concerned, even if one studies it carefully, it is hard to make any sense of the advisory opinion of the International Court of Justice (ICJ). The text seems to be all things to all men and can be interpreted in a variety of ways. It appears to leave open the possibility of use of nuclear weapons, although the ICJ did say that it could not really think of any circumstances where the use of such weapons could be justified. Nonetheless the judges left the door slightly open. Possibly there are some circumstances where the use of nuclear weapons might be justified. The ICJ concluded its advisory opinion with this rather curious statement at the end about leaving open the

possibility that, in the extreme case of national survival, it might be possible to use nuclear weapons. So the door seems to be left open in two places.

When does an armed conflict start? What are the elements required to say that a given situation is an armed conflict? How important is it to clarify this matter?

When does an armed conflict start? It is an important matter for lawyers, particularly military lawyers who are advising commanders, because they need to know what body of law applies to the situation. The experience of the United Nations Protection Force (UNPROFOR) period at any rate is that no sensible answers ever came from anybody, not from national governments and not from the United Nations (UN). So military commanders and their lawyers had to do the best they could on the ground and Colonel Duncan, who commanded a British battalion in the early stages of the operation, said very pertinently that "UNPROFOR were in a war but not at war". This is an important distinction. There was an armed conflict going on between various factions but the UN forces deployed on the ground were not engaged in that armed conflict and were not part of it. Therefore, in the opinion of the above-mentioned officer, international humanitarian law did not apply to the activities of the UNPROFOR.

There came a stage later on, however, after the fall of some of the so-called "safe areas", when the North Atlantic Treaty Organization (NATO) was called upon to use force and air strikes were used against Serb artillery positions near Sarajevo. There is no doubt that, once those NATO air strikes started, the nations involved in those air strikes became involved in an armed conflict and were bound by the rules of international humanitarian law. There is, however, a very grey area between an ordinary peacekeeping operation and what are labelled "peace enforcement" operations. Nobody is very sure really where the line can be drawn. One can argue about the position taken by the Belgian military court that said that there was no armed conflict, at least insofar as the Belgian soldiers were concerned. The fact is that they were not in Somalia in a fighting capacity but rather in a peacekeeping capacity, and it may be that some of the soldiers involved were guilty of mistreating Somalis but that did not convert their operation into an armed conflict. There has to be more than what amounts to ordinary criminal behaviour to bring about such a change.

Concerning Guantanamo, the United States (US) has consistently been saying that international humanitarian law does not apply to the people held there. That assertion rests on the assumption that the people concerned do not qualify for the status of combatant. This seems to leave a complete legal vacuum in Guantanamo because, if international humanitarian law does not apply there, what law then does apply? US law does not seem to apply and, in all likelihood, nobody would contemplate applying Cuban law to a situation like that. So what is the legal situation in Guantanamo and is international humanitarian law sufficiently adaptable or can it be adapted to cover that situation of legal vacuum?

To try to answer the question of what law does apply in Guantanamo is not an easy task because, in a sense, no law applies. The Treaty between the United States (US) and Cuba, which establishes the base, stipulates that Cuban law will not apply on the base. Under US law, however, Guantanamo is viewed as foreign territory and US law does not apply. Finally in the last year, since the detention centre was set up there, the US government has more or less decided that international humanitarian law will be applied à la carte or as it sees fit. Guantanamo has been described by an American military lawyer as one of the few locations on earth where there really is no law. A rule book has been set up to deal with events that might happen on the base, including punishments and infractions which can be adjudicated by some sort of a magistrate there, but this only affects the personnel of the base. It is no accident that the US government sent the detainees to Guantanamo. The US government has argued in a federal district court in Washington in June 2002 the very point that US domestic law does not apply and essentially, by executive order, the American authorities have determined that international humanitarian law only applies to the extent they wish to. Many observers think that this is a kind of cynical decision that is intended simply to reserve for the US government the right to do what they want to do. That being said, the current reality is not so bad. The US government is operating within the spirit of the third Geneva Convention in many regards. In many other aspects, however, its actions fall short of the requirements of that Convention.

Has there been any suggestion that international human rights law applies in a situation like that of Guantanamo? The question is relevant because there are indications from the European Court of Human Rights, at any rate in the Bankevic case, that human rights law may apply abroad outside the domestic jurisdiction if the State concerned has effective control of the area in question. Have there been any similar discussions in the United States?

Some cases, brought by attorneys for detainees, have come before United States' (US) courts. There are three groups of cases: one that involves some European detainees, a second that involves Kuwaiti detainees, and a third that involves detainees from other countries of the Gulf region. To some degree these three cases have been combined in different proceedings. Besides, in a way following in the footsteps of the European Court of Human Rights and its indications that human rights law may apply outside the national jurisdiction, the Inter-American Commission of Human Rights has actually decided that human rights law applies to the persons held in Guantanamo. The Commission has therefore asked the US to explain how they will apply human rights law and particularly the third Geneva Convention to those persons, because they see this Convention as a more precise formulation of human rights and better adapted to this kind of persons.

The answer of the US Government to this decision of the Inter-American Commission of Human Rights is that it is difficult for the Commission to ask such question because it falls outside the scope of its competence. Here the US Government refers to the Las Palmeras case and from a legal point of view the position of the US is quite convincing. To say that international humanitarian law does not apply in Guantanamo is, however, unacceptable because the persons held there were arrested in the framework of an armed conflict. As a result, there is no question that international humanitarian law should apply to this situation. In fact, in the case of Guantanamo, the US finds itself in a deadlock. There are only two options: either the detainees belong to a party to the conflict and are combatants, in which case they should be considered as prisoners of war regardless of the circumstances of their arrest – the US rejects this interpretation - or they are civilians in which case, according to Article 49 of the fourth Geneva Convention, they should have stayed in Afghanistan and not have been transferred to Guantanamo or anywhere else outside their country.

There is no place on earth where there is no law. Human rights law applies whenever someone is subjected to the jurisdiction of State agents, because

otherwise it would be possible to send out people to the high seas to torture them there or for a government to take people abroad and torture them there. So it is quite clear that human rights law should apply and it is not possible to have it both ways. If the people detained in Guantanamo are combatants, then international humanitarian law and in particular the third Geneva Convention applies and they must be liberated at the end of hostilities. If the detainees are "something else", then human rights law would apply as well. If they are unlawful combatants and have committed crimes, they must be tried for these acts with all due process as is provided for in Article 75 of the first Additional Protocol that the United States accepts as being customary international law. The situation is really quite confusing because the detainees are denied everything and there is, officially at least, a legal vacuum that should not exist.

Would it be possible to have more information on the case concerning the Belgian soldiers in Somalia? What was the reasoning behind the decision of the Court to declare that it was not an armed conflict? Perhaps this was due to the specific role of the Belgian forces in Somalia or maybe it was because of the general qualification given to the situation that it could not be called an armed conflict because of the lack of organization of the parties involved? One speaker said earlier that he could understand that the Belgian soldiers were not bound by international humanitarian law because they did not participate in an armed conflict, but then subsequently in the case of Afghanistan the same speaker stated that we would be confronted with a legal vacuum if the Guantanamo prisoners were not bound by any law. I would apply the same interpretation to the Somali case. You do not need to be a party to the conflict to be bound by international humanitarian law. Even if the Belgian soldiers were not a party to the conflict, they were at the very least still persons in a conflict situation. Even if one considers them to be civilians, civilians do not have the right to commit crimes and international humanitarian law should apply to this situation.

The reasoning of the Belgian military court was not very sophisticated. The court simply said that there was no armed conflict in Somalia because there were no fights. Its decision had nothing to do with the relation between the soldiers and the Somali people. The court considered that the general context was not one of war and one can agree or not with that opinion. Besides, although this maybe an over-legalistic view, most provisions of international humanitarian law apply when there is an armed conflict between parties to the treaties concerned. It is true that the general principles of customary law will apply in any event,

irrespective of this aspect. As far as Treaty law is concerned, however, there has to be an armed conflict between the high contracting parties for the conventional rules to apply.

Is there still an armed conflict going on today in Afghanistan? If we consider that that is the case, is it an international or a non-international armed conflict?

In the case of Afghanistan, there is a problem with regard to the question whether it is an international or a non-international armed conflict. More generally perhaps there should be a reflection on this distinction and its current relevance. If we say today that there is still an international armed conflict in Afghanistan, it is indeed very strange because the government of the United States (US) is no longer at war with the Government of Afghanistan. American soldiers are in Afghanistan with the explicit consent of the Afghan authorities, so how can we maintain that there is an international armed conflict? If, on the other hand, we say that there is a non-international armed conflict in Afghanistan, then again we come back to the issue of the persons detained in Guantanamo and what to do with these people. They have to be tried immediately or released.

Even if the government of Afghanistan considers that there is not any longer an international armed conflict, it is difficult to take a final stand on this question without necessarily making a kind of intervention in the internal affairs of the State because it would in a way be tantamount to saying that the government is right and that the rebels are wrong. While this may be acceptable from a political point of view, it is a more difficult matter from a legal point of view. The principle of non-intervention in the internal affairs of a State means just that and should not be confused with the internal affairs of a government. A State includes not only the government, but also the population. The population can have different trends and groups who do not automatically share the views of the government. And why should we prefer one party to the other? The principle of non-intervention requires that, even for "police actions" like those conducted in Afghanistan in May 2002, which remain military actions against a State, the approval of the government be secured.

Is the distinction between international and non-international armed conflicts still relevant? Could it be envisaged that both types of conflicts be covered in the same treaties?

Afghanistan is one example that demonstrates how difficult it is to answer this question and there are other complicated situations, such as Liberia and the Democratic Republic of the Congo where rebel groups operating in one country may cross borders and engage in fighting with the governments of other countries. In these two cases there is also a confusion concerning the international or internal nature of the conflict and the status that should be given to the persons captured in connection with these conflicts. The war in the former Yugoslavia provides another example of how the status of combatants can change over time, from mere rebels not allowed to participate in the conflict to lawful combatants who are entitled to participate in the conflict. This change of status was linked to the change in nature of the war itself, which evolved from it being a non-international armed conflict to becoming an international armed conflict.

For ninety percent of the problems that arise you get the same answers, whether the conflict is internal or international. That is because, applying the general principles of customary international law, one reaches the same conclusions. It is only in technical areas, such as prisoners of war status, where there is a problem that the treaties dealing with internal armed conflicts do not cover. It would be preferable to have one body of international humanitarian law that applies to all conflicts, irrespective of their nature. This would make life a lot easier for practitioners but whether countries will be willing to sign up to that remains to be seen. The experience of the 1974-1977 diplomatic conference suggests that they probably would not, but perhaps we have moved on a little bit since then and perhaps, in light of current events, people would be more open to this kind of suggestions. In this respect, two years ago when Switzerland was preparing for an international conference on a third Additional Protocol, an interesting document prepared by the Norwegian government probably in 1972-1973 surfaced, which outlined some elements for a convention or protocol on armed conflicts, whether international or non-international. It could be worthwhile to revisiting such ideas and papers that were drafted in the seventies. This said, even if the distinction between non-international and international armed conflicts is more and more blurred, this distinction still exists and the recent diplomatic conference on the International Criminal Court underlines this fact. There are different criminal offences in the case of international and non-international armed conflicts. So in the opinio juris of States, this distinction is still in force.

The trials involving the members of the Irish Republican Army (IRA) in relation to the situation in Northern Ireland are dealt with predominantly within the national legal system. Where does international humanitarian law come in these trials? Is it needed? Has international humanitarian law been invoked in any case? Experience shows that prosecutors will do anything to keep international humanitarian law outside. What would it add if it were to be invoked and relied on? Is there any case against the IRA as an organization? That is possibly the point where international humanitarian law may add something because, as a group, the IRA is recognized by international humanitarian law, whereas in national law they do not even exist as a legal entity and this prohibition makes it difficult to bring claims against the IRA.

All the cases involving the IRA are indeed being dealt with entirely under domestic law. The United Kingdom (UK) Government has always insisted that the events in Northern Ireland are not an armed conflict, because the threshold of violence is insufficient for the situation to be considered as such. That is why international humanitarian law does not apply and cases are being dealt with under domestic law. The existing domestic law had to be adapted in a number of ways and emergency legislation was introduced to deal with the situation. Perhaps it would have been a good idea to admit that the situation in Northern Ireland was an armed conflict and consequently international humanitarian law applied, because it would have been a way to get over the problem of internment. It would have been justified under international humanitarian law to intern people who were members of the opposing armed forces and to keep them interned until the end of hostilities. The thinking, however, was that it was not a good idea from a political point of view to accept that an armed conflict was going on because it indicates that the government does not have the situation under control. So it was mainly for domestic political reasons that this decision was taken. Irrespective of this factor, a legal argument can also be made in support of the decision that, for there to be an internal armed conflict, there has to be a certain threshold of violence, so far undefined, beyond which it becomes an armed conflict and below which it is not an armed conflict. In cases between States, you can have a situation of armed conflict without any fighting going on at all – this happened between September 1939 and June 1940 when France and the United Kingdom were technically at war with Germany without any fighting actually going on. Another example, also taken from World War II, is the invasion of Denmark by Germany. This is a clear case of armed conflict without armed violence because the Danes decided that it was useless to try to resist the German invasion and so no fighting took place. Things are, however, different in an internal armed conflict.

What happens when one does not apply international law? What are the implications of such a decision? Would it not be wiser to apply international law more widely?

In the case of Northern Ireland, it could have been a more convenient solution to say that it is an armed conflict and a lot of problems faced by the United Kingdom (UK) in internal law might have been avoided. Still, simply declaring that a situation is not an armed conflict is no guarantee that there will be no interference from international humanitarian law. The International Committee of the Red Cross (ICRC) has been visiting prisons in places where the government claims that there is no (armed) conflict. The ICRC has then offered its services on the basis that there were some "disturbances". In situations such as the one prevailing in Northern Ireland, but also in Algeria at the moment or in Spain before it declared that the events in the Basque region are only criminal activities, those political decisions saying that there is no armed conflict could be just hiding the reality that perhaps international humanitarian law is better adapted than internal law in those situations even if it does not seem to be the case at first sight.

This again raises the issue of Guantanamo and perhaps it would be in the interest of everyone to say that international humanitarian law is applicable, rather than defend the theory that it is a lawless place. It is difficult to understand how any reasonable lawyer can argue that American law is not applicable in Guantanamo, leaving aside the question of the persons who are there against their will. Two years ago, when the problem of terrorism was much less acute, if a journalist had gone there to write a paper on the base in order to inform the public abroad and had committed a crime, it is clear that the American authorities would have said that United States (US) law is applicable. There is certainly an internal domestic law applicable in Guantanamo, which is perhaps not very suitable for the current purposes of the US government. This is understandable but, at the same time, why not accept the idea that international law and, if there is a conflict, international humanitarian law as well are applicable?

Terrorisme et droit international humanitaire: certitudes et questions

Orateur : Professeur Yves Sandoz

Le terrorisme est une plaie ancienne, même s'il a une nouvelle actualité dans le contexte mondial actuel, notamment depuis les sanglants et spectaculaires attentats du 11 septembre 2001, ainsi que par le regain de pratiques terroristes dans le conflit israélo-palestinien et par les menaces constantes qui pèsent sur la société internationale dans le monde entier, comme le drame de Bali nous l'a tragiquement rappelé.

La question que nous nous poserons dans ce bref exposé est donc celle de savoir quelle est la relation entre le terrorisme et le droit international humanitaire, quelles sont les certitudes que nous pouvons avoir et les questions qui restent ouvertes. Le droit international humanitaire est-il adapté à la situation actuelle? Sert-il à la lutte contre le terrorisme et pourrait-il mieux le faire? Faut-il le modifier, y a-t-il une voie qui vaille la peine d'être explorée dans la lutte contre le terrorisme? Y a-t-il un remède efficace à rechercher dans le droit international humanitaire?

I. Le terrorisme dans le droit international humanitaire

Pour répondre à ces interrogations, il faut d'abord examiner la relation actuelle entre le terrorisme et le droit international humanitaire: le terrorisme est-il (clairement) interdit par le droit international humanitaire? En se posant cette question, on butte sur un premier problème, celui de la définition du terrorisme. En réalité, comme vous le savez et quoi qu'on y travaille beaucoup, il n'y a pas encore de définition universellement acceptée du terrorisme. Sur le plan juridique, le terrorisme est toutefois expressément mentionné dans certains

codes pénaux. Pour le code pénal français par exemple, des infractions sont qualifiées d'actes terroristes lorsqu'elles sont "intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation et la terreur".

Cette définition a trois composantes: l'utilisation effective de la violence, voire la menace de son utilisation; l'objectif de susciter un sentiment de peur ou d'insécurité, même si l'on ne terrorise pas forcément la population ou les groupes visés; et une ambition politique à plus long terme, la déstabilisation de l'ordre public. L'individu qui commet une série de crimes de sang ou de viols peut bien terroriser une population au sens où on l'entend ci-dessus, mais il n'entre pas dans le cadre de la définition dans la mesure où son action n'a pas de mobile politique. On pourrait par exemple se poser la question par rapport au sniper de Washington: avait-il ou non un mobile politique? Ce serait en fait cet élément qui le qualifierait de "terroriste" dans le cadre de cette définition, même si de toute manière il est évidemment un criminel.

Un autre problème est celui du terrorisme d'Etat et il est vrai qu'il serait malvenu d'exclure le terrorisme pratiqué par plusieurs régimes de sinistre mémoire, comme le national-socialisme de l'Allemagne hitlérienne en premier lieu, le stalinisme et autres multiples dictatures qui ont noirci l'image du vingtième siècle. C'est toutefois particulièrement sur cet aspect du terrorisme que buttent les tentatives d'adopter une définition internationale du phénomène. On peut d'ailleurs se demander s'il est vraiment utile d'avoir une définition internationale du terrorisme. On a pu dire avec ironie, en 1985 déjà, que "la recherche d'une définition du terrorisme international a été une activité populaire parmi les universitaires et d'autres personnes dans le secteur privé". Walter Laqueur, quant à lui, avait recensé 109 définitions différentes du terrorisme proposées entre 1936 et 1981; je ne sais pas à quel chiffre nous en sommes aujourd'hui!

Dès les années soixante par ailleurs, plusieurs conventions spécifiques ont été élaborées, souvent suite à l'émotion provoquée par des actes particulièrement odieux et spectaculaires, que ce soit la recrudescence d'attentats meurtriers contre des diplomates ou des aéronefs, des détournements d'avions ou des prises d'otages. Le Secrétaire Général de l'Organisation des Nations Unies (ONU) ne recense pas moins de douze conventions internationales à vocation universelle et sept conventions régionales relatives à la prévention et à la répression du terrorisme international. Pourtant, à y regarder de plus près, on constate que la plupart de ces conventions ne sont pas exclusivement liées au terrorisme, du moins si l'on conserve le motif politique dans la définition de celui-ci.

On ne le regrettera d'ailleurs pas car le but de chacune de ces conventions est de s'attaquer à un problème particulier, et il serait donc inutilement restrictif de vouloir limiter leur portée en fonction de l'effet de terreur plus ou moins grand qu'a provoqué un acte ou du mobile politique de celui-ci. Les actes mettant en danger la sécurité d'un avion doivent être de toute manière punis, même si celui qui détourne un avion n'a pas forcément une intention terroriste, comme par exemple la personne qui détourne un avion pour fuir un régime qui le persécute. Une prise d'otages purement crapuleuse est-elle moins condamnable que si elle s'accompagne d'une revendication politique? L'utilité de se focaliser sur le terrorisme dans la lutte contre celui-ci, et en particulier l'accent mis sur la définition du terrorisme et sur son incrimination, mérite donc un véritable débat.

On ne saurait en effet ignorer deux effets pervers que cela risque d'engendrer: celui de faire échapper à la répression internationale des crimes qui mériteraient d'être punis pour eux-mêmes, comme je viens de le dire ou, à l'inverse aussi, celui de mettre en danger certaines garanties, et notamment le principe du droit d'asile, sous le prétexte du terrorisme utilisé abusivement. Il s'agit en effet de rester attentif au risque de voir certains Etats utiliser n'importe quel prétexte pour "épingler l'étiquette terroriste", selon l'expression très pertinente de John Murphy, sur chacun de leurs opposants.

La complication inutile de vouloir qualifier certains crimes de "terroristes" avait d'ailleurs été bien comprise aux Etats-Unis lors d'un débat vieux d'une vingtaine d'années. En maintenant l'élément concernant la motivation politique, contenu dans la définition du terrorisme, l'on compliquait singulièrement la tâche du procureur qui, au-delà de l'acte lui-même, devait aussi prouver cet élément de la motivation politique. C'est la raison pour laquelle on a renoncé à aller dans cette direction à cette époque aux Etats-Unis. Ce raisonnement reste probablement pertinent, d'autant plus sur le plan international que les éléments de preuve y sont très difficiles à réunir.

Cela dit, on ne saurait prendre le prétexte de l'absence de définition pour ignorer un problème dont nous sommes tous conscients et il vaut la peine de se pencher sur le droit international humanitaire tant par rapport au noyau dur du terrorisme que par rapport aux actions aveugles commises contre des civils. Il ne fait de doute pour personne que les événements de Bali ou ceux du 11 septembre 2001 sont des actes terroristes.

Dans le droit international humanitaire, le mot "terroriste" est finalement très peu utilisé, que ce soit dans les Conventions de Genève ou dans leurs Protocoles

Additionnels. L'article 33 de la quatrième Convention de Genève mentionne le terrorisme à propos des peines collectives, soit en référence à des "mesures d'intimidation destinées à terroriser la population prises par les belligérants dans l'espoir d'empêcher des attentats". En fait, on pensait là en particulier à l'attitude de certains militaires allemands, dans les territoires occupés lors de la deuxième guerre mondiale, qui fusillèrent des civils pris au hasard en représailles aux attaques de maquisards.

L'article 4 paragraphe 2 du second Protocole Additionnel de 1977 mentionne les actes de terrorisme parmi les "actes interdits en tout temps et en tous lieux à l'encontre des personnes qui ne participent pas directement ou ne participent plus aux hostilités". Il est ajouté à la fin de cette liste que "la menace de commettre de tels actes est prohibée de la même manière". Ces actes de terrorisme ne sont toutefois pas définis. Le commentaire du Protocole Additionnel II établit cependant qu'il existe une filiation entre l'article 33 et l'article 4. Ce sont donc probablement aussi des actes du même type qui sont particulièrement visés dans ce cas. Il faut ajouter à cette courte liste l'article 51 paragraphe 2 du Protocole Additionnel I et l'article 13 paragraphe 2 du Protocole Additionnel II qui, en des termes identiques, interdisent tous deux "les actes ou les menaces de violence dont le but principal est de répandre la terreur parmi la population civile". Comme le dit le commentaire des Protocoles Additionnels, de tels actes sont en effet une forme particulière de terrorisme.

Les deux premières mentions restent tout à fait valables mais sont relativement marginales dans le débat qui nous occupe. Et c'est peut-être avec la troisième mention, qui concerne l'utilisation de la force armée, que l'on entre au coeur des préoccupations actuelles. La formulation de la disposition en exclut, comme le note le commentaire de celle-ci, les "actes commis avec une brutalité intentionnelle de manière à intimider les soldats ennemis et à les amener à se rendre". De tels actes constituent très certainement des violations du droit international humanitaire, voire des crimes de guerre dans certains cas, mais l'interdiction de terroriser ne s'applique qu'à l'égard des populations civiles. Cela nous oriente vers une qualification du terrorisme dans le cadre des conflits armés centrée sur la population civile et visant en premier lieu les actes délibérément commis à l'encontre de celle-ci.

II. La contribution du droit international humanitaire à la définition du terrorisme

On en revient donc à la question de savoir si le droit international humanitaire apporte une réponse claire à la définition d'un noyau dur d'actes terroristes interdits en toutes circonstances. La réponse reste nuancée. Elle est claire, on peut l'affirmer sans hésiter, pour les actes terroristes auxquels on pense le plus communément aujourd'hui. Il s'agit des actes aveugles commis contre des civils, voire aussi des actes commis contre des catégories de personnes en fonction de leur appartenance ethnique ou de leur conviction religieuse. Le droit international humanitaire interdit sans aucune ambiguïté d'attaquer la population civile en tant que telle, et il exclut toute discrimination raciale, religieuse ou autre. Même s'il faut s'interroger sur leur cause profonde, les attentats suicides visant aveuglément des civils, commis en Israël et dans les Territoires Occupés, sont donc clairement inclus dans ce noyau dur d'actes terroristes qu'aucune cause ne saurait justifier. Il faut le dire sans ambiguïté.

Le droit international humanitaire laisse cependant subsister deux zones d'ombre. La première le concerne directement et exclusivement car elle touche les règles applicables à la conduite des hostilités lors des conflits armés. Elle touche donc le terrorisme dans la guerre, mais n'a pas a priori beaucoup d'intérêt pour définir le terrorisme en tout temps. La seconde est inhérente aux limites de l'applicabilité du droit international humanitaire. Celui-ci ne donne pas de réponse à une éventuelle utilisation "acceptable" de la violence dans des situations exceptionnelles que l'on ne peut toutefois pas qualifier de conflit armé. Nous allons essayer de nous arrêter très brièvement sur ces deux questions.

Tout d'abord, la question du terrorisme dans la conduite des hostilités lors des conflits armés. A ce sujet, il faut rappeler en premier lieu qu'une guerre, en tant que telle, terrorise, au sens premier du terme, la population civile qu'elle affecte directement. Une récente étude effectuée par le Comité international de la Croix-Rouge (CICR) auprès de populations civiles affectées par les guerres nous le rappelle opportunément. Nous avons vu par ailleurs que la notion de terrorisme est, dans les conflits armés, restreinte à des atteintes à la population civile.

Ces rappels nous permettent d'établir deux limites à la définition du terrorisme: l'une concerne les victimes de l'acte, à savoir les civils, et l'autre le fait que doit être exclue la terreur générale provoquée sur ces victimes par les actes de guerre "normaux", c'est-à-dire les actes de guerre conformes au droit international

humanitaire. On peut à l'autre extrême qualifier sans hésitation de "terroriste" la violence délibérément utilisée contre les civils de même que la violence aveugle (sans discrimination). C'est donc dans la définition de la limite des dommages incidents (ou collatéraux) acceptables sur les civils que se situe aujourd'hui le problème. Il se manifeste concrètement par des hésitations sur la définition précise de l'objectif militaire, d'une part, et sur le contenu du principe de proportionnalité, soit des dommages civils proportionnels à l'avantage militaire attendu, d'autre part. Admettons que sur ces questions des clarifications restent nécessaires.

Une autre grande question qui reste ouverte est celle des armes nucléaires. La licité de l'emploi des armes nucléaires n'a jamais pu être abordée de front dans les travaux sur le droit international humanitaire. C'est cette difficulté qui a empêché d'introduire de manière substantielle des dispositions concernant la conduite des hostilités dans les Conventions de Genève de 1949. Quant aux Protocoles Additionnels de 1977, ils n'ont pu être élaborés qu'en acceptant précisément de ne pas traiter de front les questions liées aux armes de destruction massive et, tout particulièrement, la question des armes nucléaires. On est donc resté dans l'ambiguïté sur la question des armes nucléaires, ambiguïté nécessaire à la crédibilité des politiques de dissuasion nucléaire, qui impliquaient la menace d'utiliser l'arme nucléaire. Si on avait voulu approfondir la question, on aurait probablement dû reconnaître que cette menace était en fait une menace de violer le droit international humanitaire, ce que l'on voulait éviter.

Je ne m'attarderai pas sur cette question. Il faut reconnaître qu'il y avait là un problème politique extrêmement délicat. J'irai toutefois jusqu'à dire que l'on était là dans un domaine où le flou qui a été maintenu a probablement été utile pendant un certain nombre d'années, dans la mesure où la dissuasion nucléaire – certains le prétendent en tout cas – a empêché des conflits majeurs tout au long de la guerre froide. Je me pose tout de même la question de savoir si, aujourd'hui, cette ambiguïté utile de la dissuasion nucléaire ne se transforme pas à l'évidence en une ambiguïté dangereuse pour l'humanité. L'élargissement du "club nucléaire", réel ou potentiel, nécessite une nouvelle réflexion. N'oublions pas qu'Israël notamment, de même que l'Inde et le Pakistan, possèdent l'arme nucléaire, et que des menaces d'utiliser cette arme dans le conflit entre ces deux derniers pays ont même été émises.

Cette réflexion n'est pas sans lien avec la lutte contre le terrorisme. Si l'on peut à juste titre contester l'aspect terroriste de la menace nucléaire dans le cadre de

la politique de dissuasion, en tous cas depuis la fin de la guerre froide où le risque nucléaire avait beaucoup perdu de son acuité, une menace concrète d'utiliser cette arme dans les contextes évoqués ci-dessus aurait à l'évidence un aspect angoissant et terrorisant pour les populations, au sens premier du terme, comme toute utilisation d'armes aveugles, surtout dans des contextes où l'on n'a pas, et l'on n'aura très vraisemblablement pas, les moyens de protéger les populations des effets des radiations nucléaires.

La lutte contre le terrorisme ne peut pas faire l'économie de cette réflexion. Il est bien clair que si on laisse la porte ouverte à de telles hypothèses, il sera difficile de la fermer à ceux qui brandissent la menace d'attentats terroristes de toute nature, sous prétexte aussi de défendre l'autonomie d'un territoire, le droit à l'autodétermination ou toute autre cause. En ce sens, il est important que les Etats suivent la recommandation faite à l'unanimité par la Cour internationale de Justice dans son avis sur le sujet, de reprendre cette question sans tarder.

III. Le terrorisme et l'applicabilité du droit international humanitaire

La deuxième question qui nous préoccupe est la question du terrorisme par rapport aux "frontières" du droit international humanitaire. La qualification ou non d'une situation en tant que conflit armé met le doigt, pour une autre raison, sur le problème du terrorisme. En effet, un acte qui pourrait être qualifié de "terroriste" en temps de paix n'est pas forcément considéré comme tel en temps de guerre. Ce problème est d'autant plus important qu'il se reporte également sur les conflits internes. Le rebelle en armes n'est pas exempt de poursuites pour le seul fait d'avoir pris les armes certes, mais cela finalement ne regarde pas le droit international humanitaire, ni donc les autres Etats. En revanche, les violations graves du droit international humanitaire, même commises lors de conflits internes sont, depuis le virage pris par le Tribunal pénal international pour l'ex-Yougoslavie, considérées comme des crimes de guerre et poursuivies sur le plan international.

Il y a donc un palier très important entre la violence armée admise par le droit international humanitaire, par exemple l'attaque d'objectifs militaires, pendant les conflits armés, et celle qui ne l'est pas, notamment les attaques de civils, les viols, la torture, les exécutions sommaires. Or ce palier n'existe pas vraiment en dehors des conflits armés. Il s'agit donc de définir la violence qui doit être

internationalement poursuivie dans les situations non-couvertes par le droit international humanitaire.

On a vu tout à l'heure qu'une des composantes du terrorisme était son caractère politique au sens large, c'est-à-dire sortant du simple crime de droit commun. Est-ce à dire que toute violence armée à motivation politique, commise en dehors des conflits armés, doit entrer dans la définition du terrorisme contre lequel l'ensemble de la communauté internationale doit se mobiliser? On aimerait pouvoir l'affirmer, mais il est difficile de le faire sans examiner d'un peu plus près la légitimité de ceux contre lesquels se tourne cette violence. On perçoit à cet égard des hésitations, notamment dans de nombreuses résolutions des Nations Unies d'ailleurs, qui démontrent la difficulté fondamentale et persistante de ne pas exclure totalement, sous couvert de lutter contre le terrorisme, l'utilisation de la violence contre des régimes répressifs au sein desquels l'opposition démocratique ne peut pas s'exprimer.

Si la lutte atteint le niveau d'un conflit armé, la question est réglée par l'application du droit international humanitaire. Mais qu'en est-il si ce niveau n'est pas atteint? Certes, même s'il reste quelques cas où il est évoqué, l'argument des luttes de libération est moins percutant aujourd'hui dans la mesure où l'on est pratiquement sorti de l'époque coloniale. Il reste néanmoins des territoires dont l'autonomie est revendiquée au nom du droit des peuples à disposer d'eux-mêmes, ainsi que des minorités opprimées. Par ailleurs, des opposants politiques peuplent encore les prisons du monde. Peut-on dès lors écarter sans nuance le problème des régimes oppressifs contre lesquels la lutte armée peut paraître légitime? Doit-on considérer tous les "Robin des Bois" et "Zorro" de la planète comme des terroristes? La question mérite d'être posée.

Le noyau dur du terrorisme, celui qui est interdit même en temps de conflit armé contre des civils innocents, doit être réprimé en tous lieux et en toutes circonstances. Cela ne fait aucun doute et il faut être clair sur ce point. Mais en se limitant à cela, on pourrait donner l'impression que certains actes de violence commis en temps de paix ne sont pas des actes terroristes, alors qu'ils le sont bien évidemment lorsqu'on se trouve dans le cadre de régimes démocratiques. Toute la difficulté est précisément de définir certaines exceptions. Or cette difficulté est probablement pratiquement insoluble, car il faudrait implicitement reconnaître dans certaines situations des cibles, tels que policiers, militaires, membres du gouvernement, plus "acceptables" que d'autres, à l'image des combattants dans les conflits armés. Or les Etats répugnent à faire ce genre de

distinctions, de peur de légitimer certains types de violence et de donner une sorte d'honorabilité à des opposants recourant à la violence. On peut comprendre cette attitude car tous les opposants ne sont pas des héros au coeur pur et l'on a donc réellement un problème de définition, qui n'est pas du ressort du droit international humanitaire, mais qui se situe à la "frontière" de ce droit.

IV. Contribution du droit international humanitaire à la lutte contre le terrorisme

Le droit international humanitaire peut-il contribuer mieux à la lutte contre le terrorisme qu'il ne le fait aujourd'hui? Je ne l'exclus pas mais il convient surtout, aujourd'hui, de prendre garde aux faux remèdes, en particulier quant au traitement de présumés terroristes. N'oublions pas qu'une personne doit rester présumée innocente avant qu'on ait pu prouver qu'elle avait commis un acte criminel. L'interrogation des criminels est un problème dans tous les pays du monde. Il est véritable mais il n'est pas nouveau. Il faut donc rester vigilant pour éviter que le débat actuel sur le terrorisme ne rouvre pas le vieux débat de la torture, qui avait, notamment, été si vif pendant la guerre d'Algérie.

Le droit international humanitaire affirme que, même en temps de conflit armé - ceci est donc valable a fortiori en temps de paix - toute personne arrêtée en liaison avec un conflit armé doit bénéficier de garanties fondamentales. Ne touchons pas à cela. Il n'est pas populaire de visiter des détenus terroristes ou présumés tels, le Comité international de la Croix-Rouge (CICR) en a fait souvent l'expérience, mais il est essentiel de le faire pour éviter de tomber dans un cercle vicieux. En portant atteinte aux garanties fondamentales, on toucherait précisément aux valeurs que l'on défend quand on lutte contre le terrorisme, et l'on donnerait des arguments supplémentaires aux terroristes pour continuer leur action.

V. Evolution souhaitable du droit international humanitaire pour lutter contre le terrorisme?

L'évolution du droit international humanitaire pour lutter contre le terrorisme est-elle souhaitable? Je l'ai dit, certaines clarifications sont nécessaires, notamment concernant les méthodes et moyens de combat. Certains développements sont envisageables mais plutôt en marge, comme pour la question des armes

nucléaires, qui touche à la fois au droit international humanitaire et au désarmement. D'autres questions mériteraient certes d'être clarifiées ou développées dans le domaine du droit international humanitaire et il se peut que l'étude tant attendue du Comité international de la Croix-Rouge (CICR) sur le droit international humanitaire coutumier réponde à certaines d'entre elles. Je ne nie pas cela, mais je crois néanmoins que le centre du débat sur le terrorisme se situe ailleurs.

VI. Conclusions

Il s'agit avant tout d'identifier les vrais problèmes dans la lutte contre le terrorisme. Grotius l'avait dit: "toute nation, si forte soit-elle, a parfois besoin des autres". Je crois que cette remarque est aujourd'hui plus vraie que jamais. La lutte contre le terrorisme nécessite que des Etats viables et des gouvernements respectables forment une chaîne sans faille pour traquer les terroristes partout où ils se terrent. Or il y a encore aujourd'hui de nombreux gouvernements qui ne sont pas respectables et de nombreux Etats qui ne sont pas viables, trop de corruption, trop d'Etats où la démocratie n'a pas pris pied. A long terme, la lutte contre le terrorisme implique donc aussi de la part de la communauté internationale, progressivement bien sûr, une forte augmentation de ses exigences à l'égard des gouvernements et de sa sollicitude envers les endroits où règnent la misère et l'injustice.

Certes, il n'est pas facile de passer ce type de messages après la récente tragédie de Bali et les événements du 11 septembre 2001, quand la priorité est de lutter contre les réseaux terroristes. Personne ne nie qu'il est légitime et essentiel de lutter contre ces réseaux. Il est toutefois illusoire de penser que le problème du terrorisme se limite à cela et il est donc indispensable de s'engager dans une réflexion à long terme.

Le terrorisme est un iceberg et les réseaux terroristes ne sont que la pointe de cet iceberg. Si la masse qui est sous la mer continue d'augmenter, nous aurons beau couper la pointe, elle ressurgira continuellement et toujours plus grande. Autant que les actes terroristes, le soutien qu'ils ont rencontré auprès de larges populations doit nous faire réfléchir. Nous devons nous poser cette question fondamentale de savoir pourquoi tant de personnes ont pu crier leur joie à la vue d'actes aussi abominables. La cohérence des interventions armées internationales ouvre également un large champs de réflexion, avec en premier lieu le

souci de mieux appliquer la Charte des Nations Unies et de prendre plus au sérieux les grandes crises internationales qui menacent la paix. Je trouve personnellement que la communauté internationale a notamment été scandaleusement laxiste à l'égard du problème israélo-palestinien.

Par rapport à tout cela, cependant, le droit international humanitaire n'est, reconnaissons-le, qu'un problème très marginal. Je pense un peu à la fameuse fable de La Fontaine, les animaux malades de la peste. Penser qu'une réforme du droit international humanitaire permettra de résoudre le problème du terrorisme, reviendrait à admettre que le baudet de la fable est coupable de tous les maux. Certes, il faut clarifier ce droit et il est vrai aussi que le développement de certains domaines mérite réflexion. Toutefois, j'ai aujourd'hui deux soucis prioritaires: celui, tout d'abord, de préserver la distinction essentielle entre le jus ad bellum (ou droit de faire la guerre) et le jus in bello (ou droit des conflits armés). Tous ceux qui utilisent la force armée sur le plan international, quelles que soient leurs raisons ou motivations, sont tenus de respecter le droit international humanitaire. Si cette règle n'est pas respectée, nous donnerons beaucoup d'aliments aux terroristes. Mon second souci prioritaire est de tout faire pour défendre et préserver les principes du droit international humanitaire.

Ceux qui ont eu le malheur de m'entendre plus d'une fois, m'entendront répéter ce que je martèle depuis trois ans, date du cinquantième anniversaire des Conventions de Genève. Les principes du droit international humanitaire – la compassion pour ceux qui souffrent, le respect de la dignité de chacun, la solidarité – sont réellement le socle sur lequel le monde doit se construire au XXIème siècle. Nous pouvons bien réfléchir au droit international humanitaire, mais il est essentiel avant tout de tout mettre en oeuvre pour mieux le respecter et pour s'inspirer de ses principes dans tous les actes de la vie internationale.

Summary

Terrorism is an old plague which, since the bloody and tragic events of 11 September 2001, has come back to haunt us with renewed aggressiveness. In this context a number of issues have to be raised, the first being the relationship between terrorism and international humanitarian law. In other words, is terrorism (clearly) forbidden under international humanitarian law? This question immediately brings up the problem of the definition of terrorism and it is a fact that today, despite numerous efforts, there is no universally agreed definition of this scourge.

Terrorism is, however, explicitly mentioned in the criminal code of some countries. The French criminal code, for instance, gives a definition of terrorism that includes three elements: the effective use of violence or simply the threat to use violence; the objective to create fear or insecurity, even if one does not necessarily terrorize the population or specific groups; and a longer term political ambition, namely the destabilization of public order. The last component of the definition is particularly important, inasmuch as it allows to make a distinction between terrorism and criminality bringing about a feeling of terror amongst a community. The political motivation is in this case absolutely fundamental to label an act as "terrorist".

In the current attempt to define the phenomenon, it would be inappropriate to exclude terrorism as state policy, in particular when one considers the devastation caused for instance by Stalinism or National Socialism during the twentieth century. To take this aspect into account makes, however, the adoption of an international definition of terrorism more complicated. The importance to have a universally agreed definition of terrorism is anyway questionable, taking into account the significant number of (more specific) definitions of the phenomenon already available.

One should beware not to focus excessively on the definition of terrorism and, particularly, on the political element (to be) included in this definition. Indeed, this emphasis could have two perverse consequences: first, some crimes that deserve to be punished for themselves, regardless of whether they have a political aim or not, could escape punishment at the international level and, second, it could put some fundamental guarantees at risk by encouraging states to use the label "terrorist" indiscriminately. One must add that, whether at the national or international level, it is not easy to prove that an act was politically motivated.

Needless to say, the absence of a universally agreed definition of terrorism is no pretext for inertia and the relationship between international humanitarian law and terrorism must be examined. Whether in the Geneva Conventions or in the Additional Protocols, there are very few mentions of the word "terrorist". In the current debate, the most useful references can probably be found under article 51 paragraph 2 of Additional Protocol I and article 13 paragraph 2 of Additional Protocol II. In identical terms, these two articles prohibit "...acts or threats of violence the primary purpose of which is to spread terror amongst the civilian population..." Within the framework of armed conflicts, the prohibition to terrorize applies thus only to the civilian population.

Does international humanitarian law clearly define a hard core of terrorist acts that would be forbidden under all circumstances? The answer is a clear yes when it comes to blind violence directed against civilians or acts perpetrated against specific categories of persons because of their ethnic background or religious belief. International humanitarian law leaves no space for ambiguity here, as it is clearly stated that such acts are prohibited at all times. Although one should think about the underlying reason, suicide attacks blindly targeting civilians, such as the ones committed in Israel and the Occupied Territories, are included in this hard core of terrorist acts that no cause can justify.

International humanitarian law inherently establishes two limits to the elaboration of a definition of terrorism that would cover all circumstances. The first one has to do with the fact that, as we saw, the notion of terrorism applies, in case of conflict, only to acts directed against the civilian population. The second comes from the fact that, when we speak about terrorism in wartime, we should first of all remember that war as such terrorizes the affected civilian population. General terror caused by acts of war permitted under international humanitarian law cannot be included in a global definition of terrorism. At the other extreme, violence deliberately used against civilians as well as blind or indiscriminate violence can without hesitation be called "terrorist". Hence the problem today lies in the definition of acceptable collateral damage amongst civilians, and it manifests itself through hesitations on the precise definition of the concept of military objective, on the one hand, and on the content of the proportionality principle, on the other hand.

The question of (the use of) nuclear weapons remains open. Neither in 1949 nor in 1977, at the time of the elaboration respectively of the Geneva Conventions and the Additional Protocols, has it been possible to openly discuss the matter. One can even say that ambiguity was maintained on purpose because the threat to use nuclear weapons was essential to the credibility of nuclear deterrence. To further examine the issue would probably have led to the conclusion that the threat to use nuclear weapons was actually a threat to violate international humanitarian law and nobody was prepared to admit that. This ambiguity may have had its usefulness during the cold war era and some people claim that nuclear deterrence avoided major conflicts at the time. We live, however, in a different world today. The "nuclear club" counts more members, including India and Pakistan, two countries that possess nuclear weapons and have even threatened to use them within the framework of their bilateral conflict. The useful ambiguity of nuclear deterrence is perhaps becoming an ambiguity that is dangerous for mankind.

This issue has some links to the war against terrorism. One can rightly deny the terrorist aspect of the nuclear threat within the framework of the deterrence policy, at least since the end of the cold war when the risk became much less acute. It remains, however, that a concrete threat to use nuclear weapons, for instance on the Indian sub-continent, would create terror amongst people, particularly so because it is a context where the means to protect the population against nuclear radiations are lacking. If the door is left open to such a terrifying hypothesis, it will be difficult to close it in front of those who hold up the threat of terrorist acts in order to advance various causes. It is therefore important that the question of nuclear weapons be discussed again amongst states, as recommended by the International Court of Justice (ICJ).

An act that could be called "terrorist" in peacetime is not automatically considered as such in wartime, regardless of whether we are dealing with an internal or an international armed conflict. By the same token, there is an important threshold between the armed violence that is permitted by international humanitarian law - attacks against military objectives for instance - and the armed violence that is prohibited by the same law - summary executions or torture for example. This threshold does not really exist outside the framework of armed conflicts. The task facing us is therefore to define the violence that has to be prosecuted at the international level in situations where international humanitarian law does not apply.

We saw earlier that a component of terrorism is its political nature in the broad sense of the term. Does this mean that all instances of politically motivated violence, committed outside the framework of an armed conflict, fall within the definition of terrorism against which the entire international community should mobilize? Things are not so simple. There is, for instance, reluctance to totally outlaw the use of violence against repressive regimes that do not allow the expression of dissenting views by the democratic opposition. The colonial era is largely, but not completely, behind us and there are still movements that fight for the autonomy of territories in the name of self-determination. Likewise, minorities continue to be oppressed and political opponents continue to be jailed. We must take these facts into consideration when debating what constitutes (or not) an act of terrorism.

The hard core of terrorism, i.e. those acts that are forbidden against innocent civilians even in wartime, must be suppressed everywhere and under all circumstances. There is no doubt about this, but one has to go a step further. Indeed,

certain acts committed in time of peace are also to be considered as terrorist, when they take place within the framework of a democratic regime. The difficulty lies, however, precisely in the definition of these exceptions and is extremely hard to solve. It would require, in certain situations, that categories of persons such as policemen, military personnel or members of the government be recognized as more "acceptable" targets than other individuals, on the model of what happens with combatants in armed conflicts. States are reluctant to make this kind of distinction for fear that it would legitimize certain kinds of violence and give a form of respectability to opponents resorting to armed violence. This attitude on the part of states is understandable because not all opponents are heroes with a pure heart. So the problem of definition remains.

Can international humanitarian law better contribute to the war against terrorism? This is not to be excluded but, first and foremost, we should be careful not to apply false remedies particularly with regard to the treatment of supposed terrorists. A person is innocent until it is proven that he or she has committed a crime. The interrogation of criminals is a worldwide and true problem, but it is not new, and it would be unfortunate if the current discussion on terrorism would reopen the debate about torture. International humanitarian law states that, even in time of armed conflict, every individual arrested in connection with the armed conflict is entitled to fundamental guarantees. This is a fortiori true in time of peace. Let us preserve this right. To tamper with fundamental guarantees would be tantamount to weakening the very values we defend in the fight against terrorism, and we would give terrorists additional fuel to continue their actions.

Should we hope for an evolution of international humanitarian law in order to better tackle terrorism? Possibly yes, but the center of the debate lies elsewhere. We must first identify the true problems in the fight against terrorism. This fight requires that viable states and respectable governments cooperate together to hunt terrorists wherever they hide. We have not yet reached that stage. In today's world, we still have too many governments that are not respectable and too many states that are not viable. There is too much corruption and not enough democracy. In the long run the war against terrorism requires higher demands on states from the international community and more compassion towards places plagued by misery and injustice.

The essential and legitimate fight against terrorist networks is the immediate priority. It has to be coupled, however, with the indispensable long-term approach

that has been briefly outlined above. If all we do is tracking terrorist networks, we deal only with the tip of the iceberg. It is fundamental to look at what lies under the water and to deal with the causes of terrorism. Otherwise, as many times as we shall manage to cut the tip of the iceberg, it will resurface and grow bigger. Why does terrorism enjoy so much support in some parts of the world? We must address this question. There is also a need to better implement the United Nations (UN) Charter and to take more seriously the international crises that threaten peace. In this respect, the Israeli-Palestinian problem is a good example of a neglected international crisis.

Looking at this broad picture, one has to admit that international humanitarian law is only a marginal element. It would be unrealistic to believe that this law will allow us to solve the problem of terrorism. True, international humanitarian law has to be clarified and the development of a number of points deserves some thinking. There are currently, however, two major concerns. The first one is to maintain the crucial distinction between jus ad bellum - the right to make war - and jus in bello - the right governing armed conflicts. All those who use armed force at the international level, whatever their reasons or motivations, must comply with international humanitarian law. The second one is to defend, preserve, and implement the principles of international humanitarian law. These principles are the foundation on which we should build the world of the twenty-first century and they should guide the international community in all its endeavors.

Collective security operations and international humanitarian law

Speaker: Professor Marco Sassoli

1. International (humanitarian) law and non-state actors

Perhaps the greatest challenge when discussing non-state actors is to reconcile the fact that, whereas international reality is less and less state-centred, international law remains very much state-centred. Actors such as non-governmental organizations (NGOs), terrorist groups and multinational corporations have this point in common of being non-state actors with a rising impact on international reality; but at the same time international law does not really know what to do and how to deal with them.

International humanitarian law is in this respect better equipped than other branches of international law because it has, at least since 1949, specific rules for non-state actors engaged in non-international armed conflicts. I am referring to the law of non-international armed conflicts that is addressed to the State *and* to non-state actors fighting against the State or against each other. In addition, international humanitarian law comprises rules of criminal law that are addressed to the individual and these are obviously already rules dealing with non-state actors. Nevertheless, the rules applicable to conflicts in which non-state actors are involved are much more rudimentary than those governing inter-State conflicts, while non-state actors today create at least as many problems as States themselves.

2. Collective security operations and international humanitarian law: where is the problem?

From a conceptual point of view the subject of my presentation is related to the

difficulties international law has to deal with non-state actors, particularly with a very different kind of non-state actors: international organisations. My topic is, however, larger: "collective security operations and international humanitarian law". My starting point is that this is not a problem. Collective security is one of the more noble reasons why States and individuals make war and international humanitarian law is applicable to war. This means that "international humanitarian law and collective security operations" is as much a subject as "international humanitarian law and self-defence". I would like first to present why international humanitarian law, as a starting point, has to fully apply to collective security operations. The reason is the fundamental distinction between, on the one hand, *jus ad bellum*, that is the law on the legality of the use of force- and, on the other hand, the *jus in bello*, -that is the humanitarian rules to be respected when force is used. In a second part I shall nonetheless admit that there are some problems to apply international humanitarian law to some collective security operations, in particular if international organisations are involved.

3. Categorization of collective security operations

The first thing to clarify is the definition of a collective security operation and that is already very controversial. Is it an operation only aimed at maintaining or restoring international peace and security? Does the concept also comprise humanitarian interventions? Does it cover only an operation that is decided or authorized by the United Nations (UN) Security Council or do also certain forms of collective self-defence fall under it? Can there be peace enforcement not authorized by the UN Security Council? How far goes collective self-defence? All these are questions that have only an impact on the *jus ad bellum*, on the rules on the legality of the use of force.

4. Jus ad bellum: the prohibition of the use of force, collective security and peacekeeping

Let us very shortly repeat what the *jus ad bellum* says. Today it mainly prohibits the use of force. While it may sound unrealistic to mention it today, when so much is said about planning the use of force, the fundamental rule of contemporary international law since 1928 and certainly since the adoption of the United Nations (UN) Charter is that the use of force in international relations is

prohibited. There are some exceptions but the exceptions always only concern one side. Therefore, in every international armed conflict at least one side has clearly violated a fundamental rule of international law. The exceptions are individual and collective self-defence, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination –in this case as well once a people is fighting- it obviously has to respect international humanitarian law. We have to add the case of the consent by the territorial State because then it is formally not a use of force in international relations.

Beyond that, some players, like the North Atlantic Treaty Organization (NATO) in the Kosovo war, would claim that a "humanitarian intervention" is lawful even without an authorization of the UN Security Council. I very much doubt that this is true and I see great risks of such a theory in the present international society made up of equal and sovereign States, where there is no judge able to decide whether a humanitarian emergency is real and serious enough to justify the breach of such a fundamental rule as the prohibition of the use of force. Some people would add that there still is a possibility of armed reprisals. I would object reminding you that the only violation of international law to which you may today react by the use of force is the prohibition of an armed attack. This is called self-defence. Any other violation of international law may not be countered with the use of force by the individual State victim of the violation. Such violation may be a threat or a breach of international peace and security. This is a much larger concept than an armed attack. Such a qualification may however only be made by the UN Security Council and only the latter may react in that case by authorising the use of force.

Let us shortly look at the rules of the United Nations (UN) Charter on collective security. We have to distinguish Chapter VI on the peaceful settlement of disputes and Chapter VII on coercive measures. The peaceful settlement of disputes must always be based on consent and impartiality. The traditional forms are good offices, enquiry, mediation, arbitration, adjudication, etc. In the course of time another form has been added by UN practice – some call it chapter "six and a half": These are traditional peacekeeping operations of interposition between former belligerents, which have concluded a cease-fire. Such traditional peacekeeping is also based on consent and impartiality. A completely different situation, from a conceptual point of view, is Chapter VII of the UN Charter that permits coercive measures in case of threats to or breach of international peace and security. In theory these measures include military sanctions by the UN.

In practice, however, there is either an authorization given to a State or a group of States to use force or the Security Council sends hybrid so-called peace operations. The latter are not clearly a kind of peace enforcement but are not either traditional peace keeping operations. Besides, they are normally based on consent and impartiality, but the mandate authorizes also the use of force against one of the parties to defend not only the individual life of the peacekeepers but also the mandate or a protected zone or civilians. If such force is actually used, this means war and international humanitarian law is applicable to war.

5. The distinction and absolute separation between jus ad bellum and jus in bello

All these rules are more or less controversial or, at least, some experts and some States try to put doubts on these rules. Nonetheless, whatever the rules *of the jus ad bellum are*, we have to make a complete distinction and we have to absolutely separate this *jus ad bellum* on the legality of the use of force, on the one hand, and the *jus in bello*, the humanitarian rules to be respected in warfare, on the other hand. Historically this separation has not always been made. At the time of Grotius there was the concept of "just war" and the "just war" had to be just under *jus ad bellum* and, in addition, the *temperamenta belli* – restraints on the conduct of warfare – had to be respected in such a "just war". Otherwise it was not a "just war". By contrast the enemy, the one fighting an "unjust war", was not bound by such *temperamenta belli* because what he was fighting was anyway illegal.

War then became a fact of international life, like commerce or diplomatic relations, and it was logical that *jus in bello* applied to this fact of international life. Once the use of force became unlawful, it was essential, if one wanted to keep something like international humanitarian law, to separate this law completely from the prohibition of the use of force. Perhaps we will come back in certain respects to the idea of *temperamenta belli*, namely the idea that one side is bound by more restrictive rules on the conduct of warfare - that would be the side fighting for international legality - while the enemy would anyway be a criminal. Presently, for different reasons, there is the absolute distinction between *jus ad bellum* and *jus in bello*.

a) Reasons

There are logical reasons that explain this distinction. Once the primary regime prohibiting the use of force, that means the *jus ad bellum* which has become the *jus contra bellum,* has been violated, the subsidiary rules of *jus in bello* must apply, as they are foreseen precisely for such situations where the primary rules have been violated and they must obviously apply independently of the fact that the primary rules have been violated.

Secondly, there are also humanitarian reasons behind the distinction. The war victims are not responsible that their State has violated international law i.e. the *jus ad bellum*. They need the same protection whether they are on the right or the wrong side. I would even add that most of the war victims have very little influence on their State and it is not their fault or merit that their State violates or respects the *jus ad bellum*.

There are as well practical reasons for the distinction. International humanitarian law has to be applied during a conflict. During a conflict, however, the belligerents never agree on which among them has violated the *jus ad bellum*. They will not agree, for instance, on which side is the aggressor or which side is engaging in an illegal occupation. International humanitarian law has to apply during such a conflict. It, therefore, only has a chance to be respected if both sides have to apply the same rules.

Finally, we have a formal reason. The distinction is prescribed by preambular paragraph 5 of Additional Protocol I that reads: "the high contracting parties, reaffirming further that the provisions of the Geneva Conventions and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties of the conflict..." This principle has also been recognized as being part of customary law by the United States (US) Military Tribunal at Nüremberg in the following cases, namely the *Justice Trial, Alfred Krupp* and *Wilhelm List*. In these three cases the Prosecutor had argued that Germany, being the aggressor and having unlawfully occupied Belgium, France, Yugoslavia, Russia and so on, could not invoke the rights of an occupying power because that occupation was an illegal one. The tribunal rejected that argument of the prosecution.

b) Consequences

What are the consequences of the distinction between *jus ad bellum* and *jus in bello*? The first and most important one is the equality of all belligerents before

international humanitarian law. In all armed conflicts both sides have exactly the same rights and obligations, as far as international humanitarian law is concerned.

Secondly, international humanitarian law applies independently of the qualification of the conflict under *jus ad bellum*. So for instance in the Near East some Israelis invoke, in order to deny the applicability of the fourth Geneva Convention to the occupation of the West Bank and of the Gaza strip, arguments suggesting that in 1967 they had acted in self-defence, that the Occupied Territories were not legally territories belonging to Jordan or Egypt or that the Balfour Declaration or the Bible promises them those territories. All these are arguments of *jus ad bellum* and therefore, even if they were correct, they could not lead to the non-applicability of the fourth Geneva Convention to the territories Israel occupies. The same is true for their enemies, for the Palestinians. They often try to justify non-respect of international humanitarian law arguing that they are exercising the right to resist a foreign occupation. Even if they are exercising that right they have to do it by respecting the rules on warfare that include the prohibition of attacks against civilians and which do not permit civilians to use force against the occupying power.

Thirdly, arguments under *jus ad bellum* may not be used to interpret international humanitarian law. For instance, when you have to make apply the proportionality principle to an attack you have to make a balancing test between the military advantages of the attack and the risks for the civilian population. You may not include into the advantages the fact that you will liberate the civilian population of an occupied territory because for the occupier and for the one liberating an occupied territory the same rules must apply.

Fourth, the *jus ad bellum* may not render the application of international humanitarian law impossible. Self-defence cannot be used as an argument to violate international humanitarian law. Unfortunately, the International Court of Justice was ambiguous on this point in its *Nuclear weapons advisory opinion*, where it stated as a principle that "the threat or use of nuclear weapons would generally be contrary to the rules of international humanitarian law". The Court, however, added that it could not conclude definitely whether "the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of the State would be at stake". This is a very strange and dangerous theory because it would mean that normally international humanitarian law has to be respected but, when the survival of the

State is at stake, it may perhaps be violated. This would then not only apply to the use of nuclear weapons but also to the prohibition to attack civilians or to kill the wounded and sick. I agree again with the United States (US) Military tribunal at Nuremberg which clearly stated - in respect to some German defendants who invoked as a defence a state of necessity because they were at risk of losing the war – that, by definition, international humanitarian law applies to situations in which one side risks losing the war. If it were possible to invoke this risk to be released from the obligation to respect international humanitarian law, then this law would be perfectly useless.

Fifth, international humanitarian law may not render the application of *jus ad bellum*, for instance self-defence, impossible. This means, in particular for humanitarian organisations, that they may not try to develop international humanitarian law to the extent that it makes it impossible to make war. While this would obviously be the most humanitarian solution, it would never work in practice because it would be contrary to the *jus ad bellum* that permits, for instance self-defence. It is for this reason that the International Committee of the Red Cross (ICRC), before being able to launch its campaign against the use of antipersonnel landmines, had to prove that the use of antipersonnel landmines is not necessary to win a war. These are the consequences of the distinction between *jus ad bellum* and *jus in bello* in practice.

c) Threats to the distinction

Today we are confronted to additional or renewed threats to this distinction. First, there are concepts of "just" or even "humanitarian war". As such, the concept of "just war" does not imply that those invoking it are not ready to respect international humanitarian law. Nevertheless, the party which is convinced that it is fighting a "just war", that it is fighting for "the good" and against "the evil", will not appreciate that under international humanitarian law it is subject to the same rules than the enemy who is fighting for "the evil". Conceptually, some people say that today international armed conflicts become more and more something like international police actions, that they become law-enforcement actions directed by the international community or by those who represent it (or who at least claim to represent it) against "outlaw" States or "outlaws" like Milosevic or Saddam Hussein. Obviously once you speak about police actions you refer to the concept of internal law and in no internal law anywhere in the world are the police and criminals subject to the same rules. When bank robbers take hostages in a bank in Bruges the police may use force but the robbers may not. The police, when they use force, are not subject to the same

rules as the bank robbers. The police are subject to human rights rules, whereas the robbers are not subject to any rules applicable to their use of force. They may not use violence. If they kill a policeman this is legally as bad as if they had killed an innocent bystander.

The problem with qualifying contemporary conflicts as a kind of international police action is first that when you change enemy combatants into criminals you lower the chance that they will respect the law. There is no more law applicable to the behaviour of the criminals and I would add that in our contemporary world people have still less choice to join the armed forces of a State than they have to join a criminal gang. I would therefore suggest that the international reality and humanitarian needs do not yet correspond to this idealistic view of a kind of international law enforcement action. As long as the world is made up of sovereign States, the traditional concept of international humanitarian law and international armed conflicts, which treats both belligerents equally and which gives combatant status to those who fight for a belligerent, independently -whether that belligerent is fighting for "the good" or "the evil"- is still adapted to the international reality.

You will say that I am speaking all the time about the less frequent situation, namely international armed conflicts, while most armed conflicts, provoking most victims are non-international armed conflicts. You may argue that in such situations the distinction between *jus ad bellum and jus in bello* does not apply because international law does not prohibit non-international armed conflicts. I would however claim that there exists something similar to the distinction between *jus ad bellum* and *jus in bello*: it is the fact that internal law in every country of the world prohibits citizens to make war against the government. If they do it nevertheless, international humanitarian law applicable to non-international armed conflicts has, however, to be respected and has to be the same for both sides, independently of the fact that one side is fighting in violation of internal law. Therefore, the popular uprising against a dictatorial government has to be fought according to exactly the same rules as the repression of a terrorist movement by a democratic government.

I hope that I have succeeded to make a convincing case that we have to separate absolutely the *jus ad bellum* from the *jus in bello*, and that therefore the fact that one is fighting for collective security cannot mean that international humanitarian law is not applicable or that another international humanitarian law than for traditional international armed conflicts is applicable. This being said, I have,

nevertheless, to admit that there are some difficulties to apply international humanitarian law to some collective security operations.

6. Jus in bello: difficulties to apply international humanitarian law to some collective security operations

The first problem is to determine which rules are binding. At least the United Nations (UN) are not a party to the Geneva Conventions, they could not become party to the Geneva Conventions, and there are a good number of rules of the Geneva Conventions which could not be respected by an international organization but only by a State having a territory and a jurisdiction. Therefore the UN from the very beginning of its existence said that it will respect simply the "principles and spirit" of international humanitarian law. As always, the difficulty is to define what belongs to the "principles and spirit" of international humanitarian law. I remember a negotiation with the UN about "guidelines on international humanitarian law for UN forces", during which I suggested to include the very old rule of international humanitarian law according to which the wounded and sick have to be collected and cared for, "to whatever nation they belong". My interlocutors from the UN objected saying that, having a limited peace keeping force with limited medical services, they had to give priority to their own force. They added that if they had additional capacity then they would look after the local civilian population and perhaps even after the local combatants. That may be a reasonable argument as long as they are not involved in a conflict. If, however, they are involved, including if the enemy involves them in the conflict, then it is a war crime not to care for wounded and sick enemy soldiers.

This leads us to the "Guidelines of the United Nations (UN) Secretary General" that were adopted on 12 August 1999. As I mentioned, I was involved in the negotiations of these guidelines, but I must say that, after careful reflection, I am not so proud of these guidelines. They are a good instrument of dissemination for UN forces and they are important because they admit that many rules of international humanitarian law undoubtedly apply. However, at least in case of UN enforcement action they are too short. The guidelines cover only six pages of rules, while the Geneva Conventions and Additional Protocol I comprise hundreds of pages. Therefore the lawyers will necessarily argue that what is written in the guidelines applies, while those parts of the Geneva Conventions which were not taken over explicitly in the guidelines a contrario do not apply even to UN enforcement action.

Finally we have a problem with the 1994 "Convention on the Safety of United

Nations (UN) and Associated Personnel". This convention basically prohibits attacks on UN personnel, makes such attacks crimes and obliges all States to prosecute these crimes. This convention is incompatible with international humanitarian law as far as an international armed conflict against such UN forces is concerned because, under international humanitarian law, a combatant cannot be punished for having attacked another combatant. Article 2 of that convention says that it "will not apply to an UN operation authorized by the Security Council as an enforcement action under chapter VII (of the UN Charter) in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflicts applies". This can mean two things, and I would favour the first interpretation: it can mean that the law of international armed conflicts fully applies to United Nations (UN) enforcement actions in which any of the personnel are engaged as combatants against organized armed forces. This can be either because they have the mandate to do that or because the enemy attacks them. The aforementioned Article 2 can, however, also mean that the convention will not apply when these conditions are fulfilled and, in addition, the law of international armed conflicts applies. Many in the UN would claim that it does even in hostilities against organized armed forces most of the time not apply.

Now you probably wonder why I am concerned about the United Nations (UN). Today it is practically never the UN that engages in armed conflict. The problem is that the debate on the applicability to the UN has a certain spill over or contaminating effect on the debate over the applicability of international humanitarian law to actions by other international organizations, be they regional organizations or even the North Atlantic Treaty Organization (NATO). Some people would claim that NATO action is also a collective security operation. And whether it is authorized or not by the UN Security Council is a question of *jus ad bellum* that, as I told you, cannot change the applicability of *jus in bello*. Therefore as soon as you admit that, as far as the UN is concerned, international humanitarian law will not necessarily apply, even if there are armed hostilities with armed forces of a state, why should then international humanitarian law always apply when another international organization is engaged? That is the reason why I insist so much on the applicability of the Geneva Conventions even to the UN. The Geneva Conventions apply according to the facts, namely when there are armed hostilities, and not according to the legal status of those using force and to whether they have an authorization or what is their mandate and so on.

Obviously, for the Geneva Conventions to apply, we need an armed conflict. For that, a certain threshold of violence is necessary. There must be hostilities with organized armed forces belonging to the *de facto* government of an existing State. Besides, it must be a military operation and not a police operation. Police operations are not directed at combatants but against civilians. They are subject to human rights law and many more restrictions than hostilities. To mention but one example, the use of force against civilians is only the last measure after non-violent means were not successful in maintaining law and order, while you may immediately fire against combatants without having first to try to convince them to surrender. When dealing with a civilian you have first to try the latter.

If there are hostilities, however, then the legal basis of the use of force and the mandate of the international forces are irrelevant. Even if they have the mandate not to use force or to use force only in individual self-defence, if they are attacked by the enemy they have to decide whether to run away or to use force and then the law of international armed conflicts applies. It is like the case of a Swiss soldier who defends Switzerland against – let us take an unrealistic example – a French attack. The Swiss soldier has no will and no mandate to make war. He only wants to protect Switzerland but, once the French attack, then, independently of the fact that the Swiss soldier does not want that, the law of international armed conflicts applies and he becomes, under that law, a lawful target.

An additional difficulty appears to define who are the parties to the conflict. Is it the international organization itself or is it the member States of the organization contributing troops? In the case of the North Atlantic Treaty Organization (NATO) I think that it is clear, but there were nonetheless some controversies about the question of whether it is the member States which are engaged in an international armed conflict, for instance in the Kosovo war. In the case of the United Nations (UN) it is more difficult to accept such theory for those countries contributing to peacekeeping forces. For instance, Canada would be reluctant to admit that it was engaged in an international armed conflict against the Federal Republic of Yugoslavia in Bosnia once its troops would have for instance defended a protected area against Bosnian Serbs, who were defined by the *Tadic* Judgement of the International Criminal Tribunal for the former Yugoslavia as *de facto* agents of the Federal Republic of Yugoslavia.

The next difficulty is to determine whether the conflict is international or non-international. As you know many rules of international humanitarian law apply

only to international armed conflicts. Formally the answer is that if the United Nations (UN) or another international organization intervenes with the consent of the *de facto* government of the State concerned against insurgents, then the law of non-international armed conflicts applies. On the contrary, if the intervention is directed against the forces of a *de facto* government of an existing State, then the law of international armed conflicts applies. I think that we should not apply this distinction and personally I fully agree with the theory of Professor David who points out that the law of non-international armed conflicts is much more rudimentary than that of international armed conflicts, because the former has to respect the sovereignty of a State and the right of a government to act on its own sovereign territory with less restrictions than in international relations. The UN is however never fighting on its sovereign territory. Therefore one should say that it is always the law of international armed conflicts that applies when the UN is involved in an armed conflict against organized armed forces.

The next question, and it is a very delicate one, is whether the members of the international force are combatants. You know that under international humanitarian law it is very important to know who is a combatant and who is a civilian. Despite some new or renewed American theories I maintain that it is essential that everyone in an international armed conflict is either a civilian or a combatant and no one can fall between these two categories. Anyway, even President Bush would not say that a peacekeeper is an "unlawful combatant". Since they have uniforms and weapons and they are driving around in armoured personnel carriers I would submit that they look like combatants and must be combatants. The contributing States, however, do not like to recognize that their forces are combatants. Why? Because under international humanitarian law to be a combatant means that it is lawful for the enemy to attack you and this fact obviously is not appreciated by contributing States. Here again I would say that Switzerland does not either appreciate that, as a Swiss soldier, I am a combatant and therefore, as soon as – to take again the same unrealistic example – France attacks Switzerland I, as a Swiss soldier, become a lawful target and the French soldiers may kill me. Nevertheless, that is what international humanitarian law says.

Let me add that all other solutions are unrealistic. I remember an instance in the conflict in Bosnia when the North Atlantic Treaty Organization (NATO) was authorized by the Security Council to bomb Bosnian Serb positions. Here some NATO member States - the United States of America was not one of them -

claimed that the NATO pilots in the fighter planes were not combatants but United Nations (UN) experts on mission. Some of these pilots even had identity cards as UN experts on mission. Imagine the situation where these UN experts on mission bombed Bosnian Serb positions but the Bosnian Serbs would not have had the right to fire back and possibly shoot them down because that would have been an attack on a UN expert on mission. Besides, once they were shot down, the Bosnian Serbs would have been obliged to immediately release the NATO pilots as UN experts on mission. Does anyone believe that this could function? Indeed, as soon as two French pilots were shot down by the Bosnian Serbs, at least France changed its position and said that the third Geneva Convention applied and that these pilots were prisoners of war. Certainly if I were one of those pilots, I would prefer to argue with the Bosnian Serbs that I am a prisoner of war and that, whoever is right or wrong in this conflict, I am protected by the third Geneva Convention, that they may intern me but must treat me humanely, the International Committee of the Red Cross (ICRC) may visit me and I may contact my family, and so on and so forth. I would clearly prefer to make that argument rather than to tell them: "I am right and you are wrong, you are criminals by the sole fact that you shot me down and now release me immediately so that I can join again my forces and tomorrow I shall bomb you again". That will never work.

If the members of the international force are combatants, as soon as there are armed hostilities, then this must obviously also be true for their enemies. They are combatants as well and, once captured, they become prisoners of war and have to be treated in accordance with the third Geneva Convention. They may therefore not be punished for having attacked UN forces during armed hostilities.

The final question that arises, and it is perhaps the most delicate one, is whether the fourth Geneva Convention binds an international military force administering a territory or an international civil administration. The two examples we could think about, Kosovo and East Timor, are not really relevant because the international forces are present with the agreement of the former territorial State or administering State, namely the Federal Republic of Yugoslavia and Indonesia. One could, however, well imagine an international civil administration without the agreement of the former government. In that case, legally the fourth Geneva Convention would apply. I would also say that, even in Kosovo or East Timor, the fourth Geneva Convention would have provided useful and practical solutions for everyday problems faced by such a foreign military

administration over a territory. The main difficulty is that the law of belligerent occupation prohibits an occupying power to change the institutions of the occupied territory, while international forces in a peace-building effort will always try to constitute democratic institutions.

7. Conclusion: do we need a new international humanitarian law?

In conclusion we may ask ourselves whether we need a new, specific international humanitarian law for collective security operations. Some suggest a much more restrictive international humanitarian law for such operations, a much more expanded law that restricts the kind of acts that are lawful in such operations. For instance Professor Ove Bring has suggested in a recent article in the "Nordic Journal of International Law" that, in asymmetric interventional kinds of conflicts, additional restraints should apply and, for instance, the concept of military objective would be much more restricted and therefore it would be more frequently prohibited to attack certain targets if that target is not actually used for military operations. The idea is interesting. Obviously this would provoke a new difficulty to qualify a conflict because, in the beginning of every conflict, the parties would argue over the question of whether it is now an interventional conflict or another conflict. Probably it would also mean to abandon the idea of the equality of the belligerents, because the enemy of the one engaged in an interventional kind of armed conflict is not engaged in an interventional kind of armed conflict but will argue that it is engaged in self-defence. Obviously, international humanitarian law should then also provide some rights, perhaps even additional rights, to the enemy engaged in such a conflict. I wonder whether States will accept such a construction.

Others would say that we need an absolutely new international humanitarian law for a better world. We have to abandon the idea of the equality of belligerents in international humanitarian law because international armed conflicts today are a kind of law-enforcement operations. These operations represent international legality against international outlaws. If this were the international reality I would clearly agree that we need a different international humanitarian law but I simply would argue that we are not yet there. Those people want to make us believe that we already have something like a world State with a world government and a world police. Once we have a world police directed by a world government acting against international outlaws, then I shall as well agree that we have to abandon the traditional international humanitarian law and that we need a totally different international humanitarian law, a human rights-like law which would apply to (and put a lot of restraints on) such an international

police. Probably such a law could abandon the idea of the equality of the belligerents before the law and could even abandon the illusion that the international outlaws can be subject to any legal restraints.

I would, however, argue that we are clearly not yet living in such a better world. I would even fear that, during the last thirteen months, we have rather moved further away from this hypothetical world. The world today is much more a traditional world of inter-State wars to which the law of international armed conflicts and the Geneva Conventions are quite well adapted. For the time being international humanitarian law must be kept in its current form rather than be transformed or abolished altogether before the social phenomenon it governs disappears.

Résumé

Le défi majeur, quand on parle des acteurs non-étatiques, consiste probablement à concilier le fait que, d'une part, la réalité internationale tourne de moins en moins autour des Etats alors que, d'autre part, le droit international reste très centré sur les Etats. Il existe actuellement différentes catégories d'acteurs non-étatiques ayant un impact significatif sur la réalité internationale, mais le droit international ne sait pas vraiment que faire ni comment se comporter avec eux. De ce point de vue, le droit international humanitaire est encore la branche la mieux équipée puisque, au moins depuis 1949, elle dispose de règles spécifiques s'appliquant aux acteurs non-étatiques engagés dans des conflits armés non-internationaux. Il n'en reste pas moins que ces règles sont beaucoup plus rudimentaires que celles régissant les conflits entre Etats, quand bien même les acteurs non-étatiques constituent aujourd'hui une source de problèmes au moins aussi grande.

Parmi les acteurs non-étatiques figurent les organisations internationales, qui sont parfois engagées dans des opérations de sécurité collective. Cette implication peut d'ailleurs donner lieu à des problèmes de mise en oeuvre du droit international humanitaire, bien que ce droit devrait s'appliquer dans sa totalité à ces opérations. La raison pour laquelle cette mise en oeuvre est nécessaire réside dans la distinction fondamentale existant entre, d'une part, le *jus ad bellum* qui est le droit concernant la légalité de l'usage de la force et, d'autre part, le *jus in bello* qui sont les règles humanitaires à respecter lors du recours à la force.

La première étape, déjà sujette à controverse, consiste à définir clairement ce qu'est une opération de sécurité collective. Un certain nombre de questions se posent à cet égard mais, quelles que soient les réponses données, leur impact se limite au *jus ad bellum*. Rappelons que la disposition principale de ce droit est l'interdiction de l'emploi de la force dans les relations internationales, et ce certainement depuis l'adoption de la Charte des Nations Unies (NU). Les exceptions à cette règle sont la légitime défense individuelle et collective, une décision ou une autorisation du Conseil de Sécurité des NU, et les guerres de libération nationale, dans le cadre desquelles des peuples luttent pour le droit à l'autodétermination.

D'autres acteurs, comme par exemple l'Organisation du Traité de l'Atlantique Nord (OTAN) lors de la guerre au Kosovo, prétendent qu'une intervention militaire à vocation humanitaire est légale, même sans autorisation du Conseil de Sécurité des Nations Unies (NU). Dans la société internationale actuelle, composée d'Etats souverains et égaux, et où il n'y a pas de juge qui peut décider si une urgence humanitaire est telle qu'elle justifie l'emploi de la force, cette théorie est très risquée. En l'état actuel du droit international, seule une agression armée contre un Etat justifie l'emploi de la force par ce dernier dans le cadre de la légitime défense. La menace ou la violation de la paix internationale et de la sécurité est un concept beaucoup plus large, et seul le Conseil de Sécurité des NU est habilité à autoriser l'usage de la force en réponse à une situation qu'il aura identifiée comme telle.

En matière de sécurité collective, il faut faire la distinction entre les chapitres VI et VII de la Charte des Nations Unies (NU). Le premier concerne la résolution pacifique des conflits, et est toujours basé sur le consentement mutuel et l'impartialité. Quant au second, il traite des mesures coercitives parmi lesquelles figure l'emploi de la force. Au fil du temps est apparue une forme d'actions intermédiaires, les "opérations de paix", fondées elles aussi sur le consentement mutuel et l'impartialité. Toutefois, les troupes déployées dans le cadre de ces opérations peuvent faire usage de la force dans différentes circonstances.

Tout ceci est largement débattu et il n'y a pas de consensus absolu sur le sujet. Cependant, quelles que soient les règles du *jus ad bellum*, il faut faire une distinction complète entre celui-ci et le *jus in bello* bien que, historiquement, cela n'ait pas toujours été le cas. A l'heure actuelle, il y a plusieurs raisons qui expliquent cette distinction. Tout d'abord, sur le plan de la logique, le *jus in bello* entre en vigueur lorsque le *jus ad bellum* a été enfreint. Ensuite, d'un point de

vue humanitaire, les victimes de la guerre ont droit à la protection du *jus in bello*, même si elles sont citoyens de l'Etat qui a violé le *jus ad bellum*. En effet, il est très probable qu'elles ne sont pour rien dans la situation qui prévaut. La distinction se justifie aussi pour une raison pratique: le *jus in bello* doit s'appliquer de manière identique aux belligérants, alors même que durant les hostilités ils ne sont jamais d'accord sur qui a violé le *jus ad bellum*. La dernière raison est d'ordre formel puisque cette distinction figure au paragraphe 5 du préambule du premier Protocole Additionnel.

Quelles sont les conséquences de la distinction entre *jus ad bellum* et *jus in bello*? La plus importante concerne l'égalité de tous les belligérants qui, au regard du droit international humanitaire, ont exactement les mêmes droits et les mêmes obligations. Deuxièmement, le *jus in bello* s'applique indépendamment de la qualification du conflit selon le *jus ad bellum*. En conséquence, même si les arguments avancés au titre de celui-ci sont corrects, ils ne justifient pas la non-application du droit international humanitaire. En troisième lieu, des arguments relevant du *jus ad bellum* ne peuvent pas être utilisés pour interpréter le *jus in bello*. Quatrièmement, et bien que la Cour internationale de Justice ait créé une certaine ambiguïté sur ce point dans son avis consultatif sur les armes nucléaires, le *jus ad bellum* ne peut pas entraîner l'impossibilité de la mise en oeuvre du *jus in bello*. L'inverse est vrai aussi: le *jus in bello* ne peut pas rendre impossible l'application du *jus ad bellum*. C'est pourquoi le développement du droit international humanitaire a forcément des limites et ne peut empiéter sur le *jus ad bellum*. Par exemple, une mesure qui rendrait la légitime défense impossible ne fonctionnerait jamais dans la pratique.

Cette distinction est aujourd'hui menacée, en premier lieu par les concepts de "guerre juste" et de "guerre humanitaire". Certes, en tant que telles, ces notions ne signifient pas que ceux qui les invoquent ne sont pas prêts à respecter le droit international humanitaire. Il n'en reste pas moins que la partie qui est convaincue que sa cause est juste et qu'elle représente "le bien", n'appréciera pas d'être soumise aux mêmes règles de droit international humanitaire que son ennemi combattant pour "le mal". Certaines personnes affirment que, au plan conceptuel, les conflits armés internationaux actuels s'apparentent de plus en plus à des actions de police opposant la communauté internationale ou (ceux qui se prétendent être) ses représentants, d'un côté, et des Etats ou chefs d'Etat ou de gouvernement hors-la-loi, de l'autre côté. Parler d'actions de police signifie faire référence au droit interne et il n'y a aucun droit interne, où que ce soit dans le monde, qui mette les policiers et les criminels sur un pied d'égalité par

rapport au droit. La police doit respecter les droits de l'homme, alors que les criminels ne sont soumis à aucunes règles en ce qui concerne l'usage de la force.

Un autre problème se pose si l'on qualifie les conflits armés contemporains d'actions de police internationales, à savoir qu'en changeant le statut des combattants ennemis en criminels, la probabilité que ces derniers respectent le droit diminue, puisqu'on en fait des hors-la-loi. La réalité internationale ne correspond pas encore à une vision idéaliste d'actions de police visant à mettre en oeuvre le droit international. Tant que le monde sera composé d'Etats souverains, les notions traditionnelles de conflit armé international et de droit international humanitaire, mettant sur un même pied et accordant le statut identique de combattant aux différents belligérants, indépendamment du fait qu'ils se battent pour "le bien" ou "le mal", continueront d'être valables.

On peut dire que la distinction entre *jus ad bellum* et *jus in bello* s'applique aussi, par analogie, en cas de conflit armé interne. En effet, dans tous les pays du monde, le droit interne interdit aux citoyens de faire la guerre à l'Etat. Si toutefois des personnes bravent cette interdiction, le droit international humanitaire applicable aux conflits armés non-internationaux entre en vigueur et doit être respecté de manière similaire par les deux parties, bien qu'une de celles-ci combatte en violation du droit interne. C'est pourquoi une révolte populaire contre un régime dictatorial doit être combattue selon exactement les mêmes règles que la répression d'un groupe terroriste par un gouvernement démocratique.

La distinction indispensable entre *jus ad bellum* et *jus in bello* implique que, même lorsque l'on combat pour la sécurité collective, le droit international humanitaire des conflits armés internationaux traditionnels est d'application. Ceci dit, il faut quand même admettre que cette application, dans le cadre des opérations de sécurité collective, pose quelques difficultés. Tout d'abord, il s'agit de déterminer quelles règles sont obligatoires. Les Nations Unies (NU) ne sont pas partie aux Conventions de Genève et ne pourraient pas devenir partie à ces conventions. C'est pourquoi, depuis leur création, les NU disent qu'elles respecteront simplement "les principes et l'esprit" du droit international humanitaire. Encore faut-il définir ce que recouvrent "les principes et l'esprit" de ce droit.

Les Nations Unies (NU) sont tenues de respecter les "directives du Secrétaire Général des NU" adoptées le 12 août 1999. Ces directives sont importantes dans la mesure où elles admettent que de nombreuses règles de droit interna-

tional humanitaire s'appliquent. Elles sont cependant très limitées si on les compare aux Conventions de Genève et au Protocole Additionnel I. Le risque existe donc de voir les juristes argumenter que tout ce qui n'est pas explicitement inclus dans ces directives ne s'applique pas aux opérations de paix des NU. Un problème se pose également par rapport à la "Convention sur la Sécurité des NU et le Personnel Affilié" de 1994. Cette convention interdit les attaques contre le personnel des NU, les considère comme des crimes, et oblige les Etats à poursuivre ces crimes. Elle est incompatible avec le droit international humanitaire car dans le cas d'un conflit armé international impliquant des forces des NU un combattant ne peut être puni pour avoir attaqué un autre combattant.

La discussion sur l'applicabilité du droit international humanitaire aux opérations des Nations Unies (NU) a des retombées sur le débat plus large concernant l'applicabilité du droit international humanitaire aux actions d'autres organisations internationales, comme par exemple l'Organisation du Traité de l'Atlantique Nord (OTAN). Certaines personnes seraient d'avis qu'une action de l'OTAN est aussi une opération de sécurité collective. Dès lors, s'il est admis que le droit international humanitaire ne s'applique pas nécessairement aux NU, même en cas d'hostilités armées avec les forces d'un Etat, pourquoi n'en irait-il pas de même quand il s'agit d'une autre organisation internationale? C'est la raison pour laquelle il est important d'insister sur l'applicabilité des Conventions de Genève, qui est liée à des faits, à savoir, l'existence d'un conflit armé, et non à d'autres considérations.

Une difficulté supplémentaire consiste à définir les parties au conflit. S'agit-il de l'organisation internationale elle-même ou des Etats membres de l'organisation qui lui fournissent des troupes? Même dans le cas de l'Organisation du Traité de l'Atlantique Nord (OTAN) lors de la guerre du Kosovo, cette question a suscité des controverses. S'agissant des Nations Unies (NU), il est encore moins probable que les pays contribuant des forces acceptent l'idée qu'ils seraient engagés individuellement en tant qu'Etats dans un conflit armé international. Quant au fait de savoir si le conflit est international ou interne, le mieux serait de ne pas tenir compte de cette distinction et de considérer que c'est toujours le droit des conflits armés internationaux, nettement plus élaboré, qui s'applique quand les NU sont engagées dans une guerre contre des forces armées organisées.

Les membres de la force internationale sont-ils des combattants? Cette question est à la fois délicate et importante. En droit international humanitaire, il faut savoir qui est civil et qui est combattant et, lors d'un conflit armé international,

les personnes doivent impérativement appartenir à l'une ou l'autre catégorie. En toute logique, le personnel des forces de paix doit être considéré comme des combattants. Les Etats contributeurs n'aiment pas cette théorie, car elle fait de leurs contingents des cibles légitimes. Toute autre solution, et surtout celle consistant à dire que les pilotes de chasse de l'Organisation du Traité de l'Atlantique Nord (OTAN) sont des experts des Nations Unies (NU) en mission et non des combattants, comme ce fut le cas durant la guerre en Bosnie-Herzégovine, est cependant irréaliste. Si, dès qu'il y a des hostilités armées, les membres de la force internationale deviennent des combattants, il en va de même pour leurs ennemis. Selon la troisième Convention de Genève, ces derniers ne peuvent donc pas être punis pour avoir attaqué les forces des NU pendant des hostilités armées et, en cas de capture, ils doivent être traités comme des prisonniers de guerre.

Une force internationale administrant un territoire est-elle tenue d'observer la quatrième Convention de Genève? Les exemples du Kosovo et du Timor Oriental ne sont guère utiles pour répondre à cette question car, dans les deux cas, la force internationale est présente sur place avec le consentement de l'Etat qui précédemment administrait le territoire. On peut toutefois envisager le cas d'une administration d'un territoire par une force internationale sans l'accord du gouvernement antérieur. Dans cette situation, la quatrième Convention de Genève s'appliquerait d'un point de vue légal.

En conclusion, nous pouvons nous demander si nous n'avons pas besoin d'un nouveau droit international humanitaire spécifique aux opérations de sécurité collective. D'aucuns suggèrent un droit plus restrictif, qui limiterait les types d'actions considérées comme légales dans ces opérations. L'idée est intéressante mais, d'une part, elle soulève une nouvelle difficulté au niveau de la qualification des conflits et, d'autre part, elle pourrait signifier l'abandon de la notion d'égalité des belligérants. D'autres considèrent que nous avons besoin d'un droit international humanitaire absolument nouveau pour un monde meilleur. Ils estiment qu'il faut abandonner l'idée de l'égalité des belligérants car les conflits armés internationaux actuels sont une sorte d'opérations de mise en oeuvre du droit et représentent la légalité internationale face aux hors-la-loi internationaux.

La réalité internationale est différente. Nous n'en sommes pas (encore) au stade où nous avons un Etat mondial avec un gouvernement mondial et une police mondiale, qui permettraient la mise en oeuvre d'un droit international humanitaire tout à fait différent, calqué sur le droit des droits de l'homme. Nous nous

sommes même plutôt éloignés de cette perspective au cours des treize derniers mois. Tant que le monde continuera à être, comme c'est encore le cas aujourd'hui, le théâtre de guerres entre Etats, le droit des conflits armés internationaux et les Conventions de Genève resteront assez bien adaptés. Il faut donc conserver le droit international humanitaire dans sa forme actuelle, plutôt que de le modifier ou de l'abolir de façon prématurée.

Highlights of the question time

You mentioned several times the air war in Kosovo. Would you opt for a completely black and white picture and say that, since the North Atlantic Treaty Organization (NATO) intervened without a United Nations (UN) mandate, there was nothing legal to legitimate its action or, to put it otherwise, does the absence of a UN mandate automatically make the action illegal as far as international law is concerned?

That is the question of the day because, as you know, presently this is discussed in all circles about Iraq. Everybody agrees that it is a pure question of *jus ad bellum* and has nothing to do with international humanitarian law. The problem is that the Kosovo war had nothing to do with self-defence – there is a general consensus about this – so necessarily the air strikes were conducted in the name of good but not clearly defined reasons such as international legality, human rights, humanitarian intervention and so on. In the current international system, which is not ideal, there is, however, only one organ which may authorize such uses of force that go beyond self-defence and this is the UN Security Council. The Security Council is obviously not an ideal organ but it is the frail embryo of an organized international community. In this regard, I have to agree with the French position, as put forward by President Jacques Chirac in the New York Times approximately a month ago, that the Kosovo war has created a dangerous precedent in terms of preventive strikes, which may be exploited in the future for less valid reasons. In the Kosovo case, even if the preventive strikes were meant to stop a genocide, it was in reality rather the credibility of NATO which was at stake. The real problem of NATO was that it had to implement its threat, otherwise it would have lost credibility. If this is a justification for the use of force, then a lot of States could use force. Otherwise, you need to abandon the Westphalian system of sovereign and equal States because it means that if NATO can conduct air strikes, then so can the League of Arab States or the Association of South East Asian Nations. In my view, this would contribute more

to international anarchy and human suffering than the incomplete rule of the veto power. The veto power is obviously something that is frustrating because, when there is a threat to international peace and security, all it takes to prevent the use of force is that one of the five powers that have the veto right exercises it. This is frustrating, but the answer of international law must be that it is unlawful to use force against another State in such a situation where there is no mandate from the UN Security Council. I think that there were other possibilities to protect the civilian population in the case of Kosovo. As far as the credibility aspect is concerned, it should have been dealt with before expressing the threat. Nonetheless I admit that, with my solution, perhaps Milosevic would today still be in Belgrade and not in The Hague.

You said that, until approximately a year ago, there were no more international armed conflicts. How do you then qualify the war in the Democratic Republic of the Congo (DRC) where the armed forces of five different States are involved?

This statement of mine was exaggerated and it is my hope that I did not use those very words because it would be a scandal. I meant to say that there was a certain tendency, at least in academic conferences, to stress the view that today's armed conflicts are internal conflicts, whereas it is true that we still have international conflicts in the DRC and in the Near East. The vast majority of war victims, however, are victims of non-international armed conflicts. When we work on international humanitarian law we should, therefore, not focus excessively on Guantanamo, Iraq and the Occupied Territories because, from a quantitative point of view, non-international armed conflicts represent the biggest problem. I have the impression that there is, however, a change of direction, in the sense that until recently we believed that international armed conflicts were diminishing and that there was no future for these conflicts, whereas today there is a feeling that there is very much a future for international armed conflicts.

Coming back to Kosovo, I am really not clear about your reasoning because it is not the removal of Milosevic from power that motivated the intervention of the North Atlantic Treaty Organization (NATO). The issue that motivated everyone was rather that Kosovo Albanians were being expelled, forced into internal displacement or exiled in huge numbers. Whether or not Milosevic would have been in Belgrade now, there would have been no Kosovo Albanians left. I leave

it up to you, as legal expert, to define what violation of international law that is, but it seems to me that it is probably at least a crime against humanity if not more. That being the case, how could you advise that the international community simply should have watched what was going on and not have reacted to these events?

You are simply starting from other facts than mine. I am not an expert on Yugoslav history, so let us assume the facts were as you described them. No matter what, the answer of international law or *jus ad bellum* is that there is only one violation of international law that permits the use of force as a reaction and this violation is a use of force. In other words, only an armed attack permits as an answer the use of force. You want through an extreme example to add additional cases such as crimes against humanity. Who decides what is a crime against humanity? This is one of the difficulties. I may simply mention to you that there are non-governmental organizations (NGOs) that say that Canada perpetrates a crime against humanity in the way it treats indigenous people because of the social and economic conditions of these people. Would that now mean that Thailand or the United States or Russia or a coalition of States could attack Canada? What is the difference? Obviously there is a difference and all of us feel the difference. But who decides? Your rule would be a perfect rule in a community where there is a judge because the judge would, hopefully, say "yes" [to an armed intervention] in the case of Kosovo and "no" [to an armed intervention] in the case of Canada. In a community where there is no judge, however, you need very clear rules that make reference to clear facts. Armed aggression is a clear fact, whereas crimes against humanity are subject to interpretation, since the facts behind them are presented differently by different people. Even in the case of Kosovo, some people who cannot be suspected of defending genocide claim that Milosevic took advantage of the NATO bombings to expel the Kosovo Albanians. Violations of international humanitarian law were of course taking place, but this is also the case today in Chechnya and who is ready to bomb Moscow? You see the difficulty. In a community without a judge, who decides what is not serious and what is so serious that it justifies military action?

Are United Nations (UN) peacekeepers civilians or combatants?

There is an interesting and more satisfactory theory that says that they should be considered as combatants of a neutral country. To claim that they are civilians is weird since they wear uniforms and carry arms. So they could be considered as

combatants of a neutral country not involved in the armed conflict, which means that they cannot be attacked. Once these UN peacekeepers come under attack, the neutral country becomes involved in the conflict and international humanitarian law applies.

You said that theoretically a United Nations (UN) intervention against a de facto government would be an international armed conflict, whereas a UN intervention at the request of a government against insurgents would be a non-international armed conflict. Nonetheless you agree that, anyway, an intervention by the UN in another State would always be an international armed conflict. Could you clarify this?

When the UN intervenes in a State it should always be subject to the law of international armed conflicts. There are good arguments to defend this position because the UN technically never comes to a country at the request of that country, but rather because of a mandate given by the UN. By contrast, a State may intervene simply at the request of another State and so becomes an ally of the government to fight insurgents. In the case of the UN, it should have and has legally a different perspective from the one of the government that is fighting rebels. The perspective of the UN is that of a situation where it has to restore international peace and security. In the case of a foreign State, it is not important whether that foreign State would intervene in favour of the government or of the insurgents because, in both instances, the conflict would become international.

Is there a difference between an attack against the armed forces of a neutral country and an attack against United Nations (UN) peacekeepers?

There is not so much difference between the Swiss soldier attacked by France and the member of a UN peacekeeping force coming under fire because, in both cases, there will be a crime according to international law. In the second case it will be a crime according to the 1994 "Convention on the Safety of United Nations and Associated Personnel" whereas, in the first case, it will be a crime against peace. Theoretically this is true. The great practical difference, however, is that not every member of an armed force or not every State using force perpetrates a crime against peace, while everyone who shoots at a peacekeeper commits a violation of the above-mentioned convention.

Panel Discussion: New Dimensions of International Security and International Humanitarian Law

Chaired by Mrs Lara Van Dongen and with the participation of Gen. A. Rogers, Prof. E. David, Prof. M. Sassoli, Dr. Y. Sandoz

Jus ad bellum is in effect a breach of peace - legally or not - and, once peace has been broken, *jus in bello* takes over. We must do everything to protect that system of law. *Jus ad bellum* can never supersede that system or diminish it in any way. Along those lines, even with regard to collective self-defence, let us not forget that the basic principles of necessity and proportionality still remain. This means, on the one hand, that we have to see evidence that there is a necessity to fight back because of an imminent use of force or threat of force and, on the other hand, that the value to the attacker of the destruction of a military objective has to be weighted against the collateral damage it may cause to the civilian population. The main priority is the protection of the civilian population. Are we truly in a new situation? Have people since generations not used arguments in *jus ad bellum* for breaking peace? Is it just another way that we use words and play with them?

Human rights law is a relatively new development. People in general and the younger generation in particular have a tendency to think that human rights law have always existed, whereas this law has only been around for a very short amount of time, given the history of humankind. It is true that The Hague law is a little bit older than the Geneva law, but still this is all very new. What has happened is that, during the last twenty-five years, lawyers have become very clever in using the words and the language of the law to twist it in a way that makes it possible for them to do what they want and to not have to apply human rights law or international humanitarian law. We have peacekeeping efforts, police operations, wars of proxy, self-defence and excuses because of terrorism. We can look at many different kinds of language that have been used to excuse actions but in the end it comes down to one question, namely that

peace has been broken. After a while the reason for breaking peace really becomes less important than the reality of war. An armed conflict is going on and international humanitarian law must be applied. Any use of the language to get away from the implementation of international humanitarian law is simply not acceptable. Our role is to give, during those situations of armed conflict, the widest ground of protection to all victims in that armed conflict.

I fully agree – who would not? – that the civilian population must be protected at all costs. But what happens if the civilian population is not protected? I refer to the case of Angola where, after twenty seven years of conflict, four and a half million people are displaced, hundreds of thousand of them forcibly, half a million people are refugees, eight hundred thousand people for the last four years are denied access to any humanitarian aid, not to mention human rights which are pure theory in the Angolan context. What recourse do these people have in a situation where clearly, for economic, strategic or other reasons, and in the absence of an international criminal tribunal, nobody who committed crimes against the civilian population in Angola will ever be brought to justice? What use then is international humanitarian law if, on the ground, it does not work?

In situations of armed conflict, one possibility is that humanitarian workers will be able to do their job because fighters will show good will and let them fulfil their tasks. In such cases, hopefully international humanitarian law can be applied normally. Even in these situations, however, one may sometimes face a lack of resources. If this is the only problem preventing the normal implementation of international humanitarian law, then it is a pure scandal that the resources are not made available. The second case is a situation where the provisions of international humanitarian law cannot be applied, because humanitarian workers are not respected and, therefore, cannot operate efficiently, if at all. In this instance there is no other choice but to impose measures by force, and that kind of decisions falls within the mandate of the United Nations (UN) Security Council.

There is no rule of law in the international community, so we have to start somewhere. Law is always an aspiration and particularly so within the international community. No law corresponds to reality. In the Spanish train regulation, there is a highly ridiculous rule saying that "electric trains may only circulate on electrified lines". This is a rule that will always be respected but is completely useless. Legal rules will necessarily be violated and even more so in an internation-

al community where there is no rule of law, where most States do not care, or care very little, whether their actions comply with international humanitarian law but rather act according to all sorts of other criteria. It is not astonishing that, in such a society, rules applicable to the most anarchic situation one could imagine, namely armed conflicts, are most of the time not respected. On the contrary, it is rather surprising how often these rules are respected. If in a terrible war like the one between Iran and Iraq the International Committee of the Red Cross (ICRC) was able to visit more or less eighty thousand prisoners of war, that means eighty thousand instances of people who were not killed once they surrendered of fell into the hands of the enemy. Considering that you are fighting a war and you have in your hands one of these representatives of the evil who killed your loved ones, the fact that you will not kill that person but instead that you will respect that person is quite amazing.

Why did the United Nations (UN) Security Council not do something about Angola? Angola is not even the most extreme example. The most extreme example would be a case involving a permanent member of the UN Security Council because, by definition, the Security Council would be powerless to intervene in such a situation. What is needed is a better international order but, in such an order, international humanitarian law would no longer be needed. As long as we live in an insufficient world where there is insufficient respect, international humanitarian law will be needed.

International humanitarian law is of course far from perfect. We have no international police force to ensure compliance with it, but if international humanitarian law helps some people some of the time, it is definitely worth having. There are welcome signs at this stage of international support for international criminal tribunals, so at least some of the offenders are brought to trial. The introduction of the statutes of the International Criminal Court (ICC) is a big milestone in that process but there is still a long road that has to be travelled. This said, no one will dispute that there is often a lack of political will on the part of States. They pick and chose where, how, and why they will intervene. It is lamentable but to altogether throw away human rights and international humanitarian law systems, because they do not always work in situations where we would want them to work, would not improve the situation either.

During the presentation on collective security operations, the 1994 "Convention on the Safety of United Nations (UN) and Associated Personnel" was mentioned

and there is some widely shared concern as to the limitations of this convention and the problems it raises. In this connection, what do you suggest to protect UN personnel and would you recommend that States ratify this convention or not?

This is a difficult question to answer. Attacks against either UN peacekeepers or soldiers of a neutral country are not prohibited by international humanitarian law and it would probably not increase the protection of peacekeepers or soldiers belonging to the armed forces of a neutral country, if we had a convention saying that every soldier who participates in an aggressive war is a criminal. It would rather diminish the protection because, if people are labelled as criminals, they adopt a more criminal behaviour than if they are not labelled as criminals. Now it is undisputable that peacekeepers have to be respected as long as there are no armed hostilities and, under such circumstances, the 1994 UN Convention applies. This means that a member of an armed force, even belonging to a State that uses force against peacekeepers, commits a crime if he attacks a peacekeeper, except if it is the will of that State to engage in hostilities. If such is the will of that State, it is not through the 1994 UN Convention that the peacekeepers will be protected. In case of armed aggression, either the peacekeeper will flee or he will react with the use of force, which means that the situation becomes one of war in which international humanitarian law applies.

An attack against a soldier of a neutral country would be a crime against peace but it would also be an ordinary crime. Even if it is not explicitly prohibited by international humanitarian law, such an attack would be an ordinary offence and possibly also an act of terrorism depending on the circumstances. Such aggressions would definitely fall under the law. There are some provisions that are applicable to this type of crimes even if, within the framework of an armed conflict, international humanitarian law permits such attacks. The fact that an action is not expressly forbidden does not automatically mean that it is lawful. We can compare this situation to the *Alvarez Machain* case, in which a doctor was abducted in Mexico and brought to the United States (US). In this case, the reasoning of the US Supreme Court was that abductions were not prohibited by the extradition treaty signed between the two States. The dissenting judges of the minority said that the fact that abductions were not prohibited by the bilateral extradition treaty was no valid argument, because then torture could have been used because it was also not explicitly prohibited by the treaty. One should be careful not to implement a false logic.

In an international armed conflict, a State may not apply the provisions of its criminal code prohibiting murder and may not punish an enemy combatant who has killed its own combatant. In the case of United Nations (UN) peacekeepers, the rules of national law and any other rule of international law will be overridden if and when the peacekeeping force becomes a party to an international armed conflict, and that does not only depend on the will of the peacekeeping force but also on the will of the other party. If the other party wants to have the peacekeeping force as enemy and the peacekeeping force fights back, then the situation becomes one of international armed conflict. In this case there is no way how we could save international humanitarian law and nevertheless say that this is a special situation because it involves UN peacekeepers. Besides, what applies to the UN should be valid for the North Atlantic Treaty Organization (NATO) as well.

There are many different peacekeeping actions, taking place at different levels. It can be a peace enforcement operation, for instance, in which case there is no doubt that the United Nations (UN) soldier is a soldier. If peace enforcement measures are implemented against Iraq, the Iraqi soldier cannot be punished if he kills a UN soldier. The Iraqi combatant must, however, be punished if he does not respect international humanitarian law. If we consider a situation outside an armed conflict, such as the monitoring of a truce between parties or an election process, this is totally different. In those situations an attack against a UN soldier is indeed a crime as such, regardless of how you do it. Nonetheless, even if the UN defends the best possible cause it must, as long as it is involved in a peace enforcement operation, respect international humanitarian law. This is clearly understood without any doubt and the UN Secretary General fully agrees with this view.

If United States (US) soldiers played a role in atrocities committed against members of the Al-Qaeda group during the recent events in Afghanistan – the case was mentioned by Newsweek in June 2002 and Le Monde Diplomatique in September 2002 -, is there a possibility that at some point in the future these soldiers might be tried in front of an international court?

This is not a simple problem because one must demonstrate that these soldiers were accessories to a crime. One would have to prove beyond any doubt that the US soldiers helped in the perpetration of what amounts to a war crime. Indeed the way the Al-Qaeda people were left in containers without air and

water, resulting in an atrocious death, is definitely a war crime. The legal criterion to determine whether someone was party to a crime is the active assistance provided by the person to allow the perpetration of that crime. All the American soldiers can be blamed for, possibly, is their silence and the fact that they did not inform the authorities. It is worth mentioning that, in the latest "yearbook on international humanitarian law", there is a very interesting article on the responsibility of the Dutch soldiers in the *Srebrenica* case. The author argues very well, from a legal point of view and independently of the fact that the soldiers did not really have the necessary means to prevent what happened, that it is not possible to say that they are accessories to a war crime. This conclusion is perhaps disappointing but there is in legal terms a very clear definition of what being accessory to a crime means. By contrast, one can argue that there was a failure to assist someone who was in danger. This failure is, however, not a criminal offence under international law. For most States, it is a criminal offence foreseen in their national legislation and this is where legal proceedings could be undertaken. One has to realize that there are limits to what can be considered a war crime in international law.

This said, regardless of the real difficulty to determine the facts and whether they are or not international crimes, the current tendency is that war crimes have to be punished. The investigation of these crimes is first and foremost the responsibility of the State. In the case of Afghanistan, it is the United States (US) that is responsible to investigate the above-mentioned facts. At another level we have the international criminal justice, whose aim is to make sure that culprits will not escape punishment even if legal proceedings do not take place at the national level. Unfortunately some States are not party to the International Criminal Court (ICC) and this obviously creates a problem. Besides, we are all well aware of the recent representations undertaken by the US to ensure that their soldiers will not be prosecuted by the ICC. The current trend is, however, very clearly that war criminals must not escape justice and it is primarily the responsibility of States to bring these people to trial. In addition, there are specific international tribunals and there is an international jurisdiction that must fill the possible gaps of the States.

It is also important to underline what is not a war crime because, if everything becomes a war crime, then the real war criminals are somehow absolved. We must therefore be careful not to blur the concepts of war crime and war criminal. This is why scepticism can be expressed concerning some extensions of the notion of war criminal made by the International Criminal Tribunal for the

Former Yugoslavia (ICTY). The ICTY is in a way applying the theory of common purpose whereby, even if a combatant does not contribute to a crime, it is enough for this combatant to know that his comrades-in-arms will commit a crime to be also responsible for that crime. That goes quite far in armed conflicts and it is preferable to concentrate accusations of war crimes on those who actually committed those crimes. Therefore one can also be quite critical of some humanitarian organizations which try to extend the concept of war criminal so that it will include the likes of Kissinger, Bush, Chirac, and so on. The result is that you water down the concepts of war criminal and war crime. War crime is an individual criminal responsibility and obviously something very serious. So the simple fact that a person knew that others were about to perpetrate a war crime should not, even if that person had the possibility to intervene, be considered a war crime.

In this connection it is interesting to mention as an aside that, amongst the instructions given to the United States (US) military personnel in the field, there is the obligation to report on violations of international humanitarian law that soldiers could witness. It remains to be seen how this type of rules works practically in the field but, in principle, it is one of the obligations that soldiers have to fulfil.

How can we bring non-State actors into the regime of international humanitarian law? In the precise case of Afghanistan, which is one of the recurrent themes in our discussions, what efforts did the International Committee of the Red Cross (ICRC) undertake to bring the various actors, namely the Taleban, the Northern Alliance, and Al-Qaeda into the regime of international humanitarian law? It appears that whatever efforts were made did not succeed and it would be interesting to know why.

The ICRC made official representations with regard to the conduct of hostilities. These representations were made with all parties to the war, with the exception of Al-Qaeda that was nonetheless perhaps reached indirectly through the Taleban. Apart from Al-Qaeda, the actors of the conflict were reminded that international humanitarian law was applicable and that they had to abide by its rules. There were some problems when the issue of the use of nuclear weapons was raised, in the sense that it caused displeasure to some governments and especially to the American government. Apart from these official representations, the ICRC acted in the field. Unfortunately the ICRC was not present when

the crimes took place and therefore the ICRC's knowledge of what happened is limited to what has appeared in the media or the information that delegates were able to collect. The ICRC was not a direct witness of violations of international humanitarian law, unless you consider that the bombing of the ICRC warehouses in Kabul was a crime. Some people actually do consider that it was a crime, but it may as well have been a mistake. The official representations were made with everybody in order to ask specifically for respect of international humanitarian law. The specific role of the ICRC is to remind the parties that they must comply with international humanitarian law, but it is not to qualify a fact as a war crime or something else. The qualification of certain facts or events as crimes is the role of the courts.

Did you approach the Americans after the revelations about the killing by suffocation of Taleban prisoners and in some way represent to the Americans that, under international humanitarian law, they have an obligation to somehow investigate and assist in shedding light on what actually happened?

This kind of interventions would rather belong to the very confidential ones. If the ICRC had valid reasons to make representations in connection with this case, it would definitely proceed and bring the matter to the attention of the United States (US) authorities.

To what extent should international humanitarian law be applicable to international organizations?

There is an understanding that, in collective defence organizations such as the North Atlantic Treaty Organization (NATO), national military personnel, by fighting or using force under the banner of NATO, do not lose their national legal responsibilities. Indeed all the NATO plans, whether they are for peacekeeping or actually fighting a war, always make the supposition that the law of armed conflicts will be applied. In addition, the rules of engagement which are used in peace support or crisis management operations for instance all make it very clear that, while nineteen countries have said that national contingents under a collective banner can use various types of force to complete the mission, nothing in those rules makes them do anything that would violate their national law. That national law stays with these soldiers at all times, whether they operate under the United Nations (UN) or NATO. At least to that extent there really is no

need to ask the question whether international humanitarian law applies to this kind of international organizations, because the answer is a very clear yes. There is no lacuna in this regard in collective defence organizations.

Some military operations were carried out outside the framework of Article 5 of the Washington Treaty. These operations, which took place outside the territory of the North Atlantic Treaty Organization (NATO), are therefore not concerned with self-defence. What are the implications in terms of the individual responsibility of each member State and the responsibility of the organization? What happens when NATO conducts peace enforcement operations following a resolution of the United Nations (UN) Security Council? Does NATO itself as an organization, in addition to its member States which are clearly bound, have to respect international humanitarian law?

It is true that there are officials, the Secretary General for example, who are international within NATO. The Secretary General, however, works with a council that is composed of nations. NATO is not supra national. The organization only represents, when it decides to use force, the collective will of the nineteen member countries that their people, and those they are associated with, may use force if they so desire. It is highly improbable that for instance the Secretary General, who is carrying out in an administrative sort of way the will of the nations, somehow runs a risk of implicating himself as a war criminal for acts that happen when force is used. So there is no need for NATO to sign up to some formal declaration, other than the one already included in all the military plans that are drawn up and according to which nobody intends to violate the law of armed conflicts. The problem is that the nineteen member States individually have signed up to some different laws. Not all of them have acceded to all the instruments representing the law of armed conflicts. There is no homogeneity and this is why the rules, even in peacetime operations, say that no soldier is going to be required to do something that would violate his national legal obligations, even if there would be a contrary order. The military personnel at all levels have to know what their national law is. There is even an ad hoc working group at NATO that deals with peace keeping in general, and more precisely with the fact that not everybody involved in a military operation has the same obligations.

Looking at the United Nations (UN), the situation is somewhat different. When the UN has command and control over an operation, the national contingents

are not responsible for what they do within the framework of such an operation. This can be confusing when it comes to prosecuting criminals. The criminal responsibility of individuals remains always in their national legal system, at least in the case of UN operations and probably as well within the context of NATO operations. When it comes to the civil and collective responsibility of the States taking part in a UN operation, however, the organization has a very formal responsibility. This responsibility holds even if lines are crossed, actions are taken which fall outside the mandate, and instructions are not followed. In all these cases the UN is responsible first and it is only when a State intervenes in the command and control structure of the UN that the State raises its own responsibility at the national level. This is, however, quite exceptional.

The North Atlantic Treaty Organization (NATO) recognizes that there is civil responsibility for international organizations just as there is State responsibility. So when an operation is taking place in the field, if members of that operation commit damage to the person or property of civilians, these kinds of damages are compensated. Coming back to international humanitarian law, one could in theory even imagine that a legal action be brought against NATO. The European Court for Human Rights (ECHR) might permit an action against some international organization that did not properly supervise the people under its control, but we are not yet at this stage at least as far as NATO is concerned.

Even if the North Atlantic Treaty Organization (NATO) has legal personality, it does not mean that the organization becomes automatically responsible in case of violations of international humanitarian law that would be perpetrated by individual member States. On the other hand, however, it does not prevent NATO from perhaps being held co-responsible for these violations, if one can prove that NATO played some role in the violations of international humanitarian law concerned. The establishment of this possible co-responsibility will depend on the facts.

There are conceptual problems when it comes to the respective responsibility of international organizations and their member States. Perhaps in the future the European Union (EU) could become a supra-national organization. If this happens, the question of attribution to the organization could be raised and it would no longer be possible to attribute acts directly to the member States. For the time being, however, international humanitarian law is still very much State-centred while reality has always happened through individuals. It is an intellectual process of the lawyers to attribute what individuals do to States, because

the clear subjects of international law are basically, and this is especially true in international humanitarian law, States. At the same time those who act are always non-State actors; they are individuals. If these individuals are members of the armed forces, it is easy to attribute. If they are civilians, they could be de facto agents. Pending new interesting solutions we should, even if the international organization also has some influence, attribute the act to the State. In that case indeed, since the State is without any doubt bound by international law, then it is clear that the act is ruled by international law. This is not something new or revolutionary. The State itself is a fiction but, under international law, it is this fiction that is the subject. One should therefore always look at what happens in the world and say, from a legal perspective, that it is a State which acted because only a State is bound by most of the rules of international law.

In the case of Afghanistan, is it true that there will be an investigation into the events that led to the death of a significant number of Taleban prisoners only if President Karzaï asks for one? Knowing the close relationship between President Karzaï and the United States (US), is it realistic to believe that such a request will ever be introduced?

There are other ways to bring about such an investigation. Article 1 common to the four Geneva Convention stipulates that "the High Contracting Parties undertake to respect and to ensure respect for" the provisions of these conventions. This means that any State that is party to the Geneva Conventions can, or even must, try to induce an investigation in order to shed light on the very serious violations of international humanitarian law that were perpetrated. Each State has an individual responsibility to ensure respect for international humanitarian law, inter alia through the establishment of facts.

Ways to bind non-state actors to international humanitarian law Afghanistan: a case study

Speaker: Roy Gutman

Afghanistan is the pure case of non-state actors turning into major actors on the world scene. This tragic country provides a case study that should be preoccupying us for some time to come: the war itself which went on for twenty years, the attitude of the international community as it proceeded, using it at times to achieve strategic goals, abandoning it, trying to contain it, and finally being surprised by it. Amongst other things Afghanistan is, in my view, an example of a massive failure of the international system, not just of one or two components of the system. It is amongst other things a failure of diplomacy, which does not mean that Mr. Brahimi and others were not up to the task but they had nobody backing them as they were trying to end the war in the 1990s. It is clearly a failure of development because there has been no development, and there is a big question now as to whether and how development will proceed. It may also be a failure of international humanitarian law. I do not think that anyone can dispute President Bush's own remarks that there was a mistake made by his father's government in walking away from Afghanistan after the Russian forces had been withdrawn. It is, however, not only a failure of American leadership but really a failure for everyone.

Moreover, Afghanistan is an example of what one might call a small, far away, war that may indeed look small and far away but proves that there is no such thing. Small wars grow into big wars and provide the cover for crimes, war crimes, crimes against humanity and genocide. Small wars are swamps that provide the nutrient mix in which monsters can grow. One can safely say that every small war contains the potential to cause immense problems, be it a bigger war or other problems as we have seen.

I think that Afghanistan is also a case study in non-state actors who disregard and dismiss and even, in some ways, attempt to destroy international humanitarian law. The actors I have in mind are the obvious ones. First the Taliban themselves who committed more than their share of crimes during the internal conflict and who were in some ways a State actor, but were never recognized as such by most members of the international community and were treated as a militia by the United States and other countries. Second there is Al-Qaeda, Osama Ben Laden's group, the pure case of an international conspiracy based in a State that is not a State actor. Third we have Pakistan that was operating secretely as a prime sponsor of the Taliban. Finally the Northern Alliance backed by Iran, Russia, Uzbekistan, India, and others, which claimed to be the State but actually was, certainly until 11 September 2001, not the acting government of Afghanistan.

If one looks at Afghanistan as a phenomenon, we ought to be asking two questions: what can we learn from the events of the last twenty years? What are the lessons for international humanitarian law and for handling other small far away wars? One of the problems we face if we ask those questions is first of all to find out what really happened during the Afghan conflict. I shall give my first of many *mea culpas* as a journalist because I do not think that the news media covered that war more than sporadically and without much depth. Our first obligation should be to reconstruct what happened, certainly during the last decade of the Afghan war.

I can give a few milestones of the record of what I think is the failure of the international community. In this regard, I have to go back to my own visit to the headquarters of the International Committee of the Red Cross (ICRC) in mid-1997 when I was deciding which case studies to choose for the book on war crimes I intended to produce. The case studies had to be stories of systematic war crimes leading to a typology of wars where war crimes develop as a pattern. Following a fine set of talks with numerous desk officers at ICRC Headquarters, I decided to reject Afghanistan as a potential "candidate" for an article. Why? Because it was the judgement of the ICRC officials, based on their own gathering of facts, that, despite many violations, Afghanistan at that time was not an appropriate case study in systematic and grave violations on the order of Bosnia-Herzegovina, Iran-Iraq, or Colombia for instance.

Why? Because at that time up until mid-1997 there was more or less an observance of many of the rules of international humanitarian law not always as such

but rather as local customary law, the parallel code of self-restrictions in fighting wars that exists in practically every culture. More specifically and most tellingly in a way is how prisoners, captured soldiers, were treated. On the whole the pattern in Afghanistan was, until mid-1997, one of humane treatment and repatriation. There were exceptions, but it was the overall pattern. This behaviour changed dramatically in 1997, following events on which more light should be shed if possible, namely the Taliban capture of Mazar-e-Sharif in the course of their military offensive.

The Taliban seized the town in a very familiar way, i.e. by buying the allegiance of one of the warlords, in this case General Malik, who switched sides and overthrew General Dostum who fled. The Taliban subsequently marched into Mazar, provoking a popular uprising. Malik decided that he had made the wrong calculation and switched sides yet again - a very typical Afghan development. The Taliban found themselves trapped and thousands of them were forced to surrender, rounded-up and killed or executed in various ways. The most interesting thing to develop out of that horrible event is that Taliban officials approached a United Nations (UN) official - I cannot be more specific here - a short time later and asked for an investigation to take place in order to find out what had happened. Since the Taliban were the victims, they wanted very much to be shown as such but it was actually, as far as I can see, an attempt to call for an investigation. The tragedy is - the source for this information is Klaus Brederheim from the Harvard School of Public Health - that it took the UN two full years before that investigation was launched. By that time it was too late because, in the interim in 1998, the Taliban had seized Mazar and killed the troops they captured as well as an enormous number of non-combatants. The overall dimensions are on the order of a Srebrenica, though it was not reported as such at the time. I think that a huge moment was lost and the international community should find out what happened and why.

1998 was also the year when in a sense the entire situation in Afghanistan went out of control. It was the year during which Osama Ben Laden organized the strikes against two United States (US) embassies in Eastern Africa, killing not that many Americans but more than 200 Kenyans and Tanzanians. The US then responded with Cruise missile strikes against, amongst other places, a camp in Khost in Eastern Afghanistan. But the US failed to find Osama and to kill him or remove him from the scene or in fact change its policy. Rather than fighting what one might say was a legitimate conflict or organizing whatever kind of operations had to be organized, there was a decision by the Clinton

administration in 1998-1999 that Afghanistan is a really messy place and that the US would build a fence around that country. A policy of "containment" was put in place at that time.

The other developments that occurred in that period have a link with Pakistan. From 1994 to 2001 Pakistan was the prime outside supporter of the Taliban. In my opinion, Pakistan's failure during that period was that it did not have any kind of control over its proxy and did not prevent them from committing violations of international humanitarian law or treating the Afghan population, not only women but everybody, inhumanely in any other way. Pakistan repeatedly promised, both in public and in private, to support a diplomatic solution but in the meantime was sending logistics, trained officers, canon fodder, and in every way helping direct the Taliban offensives.

In 2001 we had the assault on the World Trade Centre and the United States' response of an intervention in Afghanistan, but also the failure of the US to achieve its main objective that was the elimination of Osama Ben Laden and Al-Qaeda. What happened instead was essentially that, prior to the Tora-Bora offensive in November 2001, most of the Al-Qaeda people escaped. The number of those who escaped must be on the order of one thousand, as far as I can tell. Finally 2001 was the year of the overthrow of the Taliban and of what we in Newsweek, with a lot of data to back us up, have concluded is a serious war crime. I am referring here to the Taliban who were captured following the capture of Mazar-e-Sharif and then Kunduz. These prisoners were rounded up and by the hundreds were shipped to prisons in containers. According to the United Nations as many as a thousand prisoners would have suffocated. I do not know and cannot explain the role of the United States in this event. Is there complicity? I cannot say but what I do know is that US forces were with the Northern Alliance when the surrender was negotiated, they were at the prison where the prisoners were supposed to arrive, they were embedded in the headquarters of General Dostum, and they have every reason to have some knowledge or some ability to find out what really happened. What troubles me right now is the deafening silence. I think I can accept the denial of direct US involvement, because I cannot imagine the opposite. On the other hand, the question remains of what the US knows about the event. Somebody in the US government should share this information.

Today I find that there is a serious situation as far as the attitude of the United States Administration towards international humanitarian law is concerned. I am

not just referring to the attitude towards the third Geneva Convention, the formal attitude that it does not apply because the US have invented a kind of a new term of "unlawful combatant" and decided that everybody is either an "unlawful combatant" or not a combatant at all or a "terrorist". These are the formal legal issues. What troubles me, and I can say this as the journalist who has brought the story out, is that the US has seized and is holding individuals at Guantanamo who were never combatants – I can vouch for only six out of six hundred, but I can vouch for them. When I and my colleagues researched this on the scene a few months ago, the attitude of the US Government was basically "so what, we are the Government, we will hold them as long as we see fit". Moreover, they have knowingly assigned the detainees to Guantanamo, a location where neither US nor Cuban law apply, and they have found ways through their own legalistic methods of deciding that international humanitarian law applies only *"à la carte"*.

I am not saying that the US does not observe the spirit of the Geneva Conventions. In general the detainees are very well fed and will come out fat, if not happy. The prisoners are not given sufficient exercise, however, and everybody is held in a kind of penitentiary style of detention. The problem to me is that all prisoners are treated in the same way. I do not care so much about the treatment of the cold-blooded killers, to use the description of Georges Bush and Donald Rumsfeld, but my magazine has demonstrated that a group of prisoners now in Guantanamo were seized in Pakistan, sold to the Pakistani army for a bounty, and then transferred to the Americans. Their individual stories are those of hapless individuals. There is no evidence of combat activity in their backgrounds and they were not captured anywhere close to the battlefield. To all evidence, these persons are non-combatants.

My chronology began with what was a crisis of impunity in 1997. Impunity is still the characteristic in Afghanistan. I can only conclude by showing you the picture of a mass grave in Dasht-e-Leili in Northern Afghanistan, where the Taliban prisoners were buried in the dozens or hundreds or even up to one thousand according to the United Nations - the numbers are not known precisely. Dasht-e-Leili is also the place where the earlier mass graves from 1997 are, which means that there are layers of mass graves and atrocities there. The story of Dasht-e-Leili and of these mass graves in a sense is the story of impunity and of violations of international humanitarian law. Every now and then a story has an effect. This story has had an effect, although a minimal one, namely that even General Dostum, following a demand by Mr. Karzai and Mr. Brahimi, has agreed

that these graves will be exhumed. It remains to be seen when. Let us hope that it will happen and that the United States (US) will provide the protection. Also, as the major outside player, let us hope that the US will see to it that these graves are indeed exhumed and that the layers of crimes can be exposed and that some accountability can be brought.

Résumé

L'Afghanistan constitue un exemple classique d'acteurs non-étatiques qui deviennent des acteurs importants sur la scène mondiale. C'est aussi un exemple d'échec flagrant de la part de la communauté internationale qui a adopté une attitude fluctuante et tout à fait incohérente vis-à-vis de l'Afghanistan au cours des vingt dernières années. L'échec se situe dans les domaines de la diplomatie, du développement, et du droit international humanitaire. L'abandon de l'Afghanistan après le retrait des forces soviétiques fut une erreur non seulement de l'Administration américaine de l'époque, mais aussi de la communauté internationale dans son ensemble.

L'Afghanistan est aussi un cas qui illustre le phénomène suivant: il n'y a en fait pas de "petites guerres éloignées". Les "petites guerres" deviennent grandes et constituent un terreau fertile favorisant l'apparition de monstres et la perpétration de crimes de guerre, de crimes contre l'humanité, et de génocides. Chaque "petite guerre" possède le potentiel pour créer d'immenses problèmes et pour dégénérer en un conflit plus vaste. Il est donc illusoire de penser qu'une "petite guerre éloignée" va le rester.

L'Afghanistan est enfin un exemple classique d'acteurs non-étatiques qui n'ont aucune considération pour le droit international humanitaire, le violent systématiquement et, d'une certaine façon, tentent de le détruire. Ces acteurs sont les *Taliban* dont le mouvement, bien qu'ayant certains attributs d'un Etat, ne fut pas considéré comme tel. Nous avons en second lieu le groupe Al-Qaeda, formé de conspirateurs basés sur un territoire contrôlé par un acteur non-étatique. Troisièmement, nous trouvons l'Alliance du Nord qui prétendait représenter l'Etat, ce qui n'était certainement pas le cas avant le 11 septembre 2001.

A partir du moment où l'on considère l'Afghanistan comme un phénomène, il faut se poser les questions suivantes: que pouvons-nous apprendre des évènements des vingt dernières années et quelles sont les leçons à tirer, tant pour le

droit international humanitaire que pour la gestion d'autres "petites guerres éloignées"? Pour éventuellement pouvoir répondre à ces interrogations, il faut avant tout savoir ce qui s'est réellement passé au cours du conflit et, à cet égard, les media doivent faire leur *mea culpa* car les reportages sur la guerre en Afghanistan ont été sporadiques et superficiels. Il faut donc essayer de retracer les évènements, du moins ceux de la dernière décennie.

Jusque vers la moitié de l'année 1997, il y avait encore une certaine observance de nombreuses règles du droit international humanitaire, pas en tant que telles mais plutôt en vertu du droit coutumier local qui, comme dans presque toutes les cultures, impose des restrictions à la conduite de la guerre. Par exemple, les prisonniers étaient, en général, traités humainement. Il y a eu un changement radical à cet égard en 1997, suite à un évènement sur lequel il conviendrait de faire plus de lumière, à savoir la prise par les *Taliban* de la ville de Mazar-e-Sharif.

Les *Taliban* prirent la ville grâce au retournement d'alliance d'un chef de guerre local, mais leur entrée dans Mazar-e-Sharif suscita une révolte populaire. Le chef de guerre en question se rendit compte qu'il avait commis une erreur et changea à nouveau de camp. Les *Taliban* se retrouvèrent pris au piège. Plusieurs milliers d'entre eux durent se rendre ou furent capturés, et furent ensuite exécutés de différentes manières. La chose la plus intéressante à retenir de cet horrible évènement est que les *Taliban* demandèrent aux Nations Unies l'ouverture d'une enquête. Malheureusement, deux ans passèrent avant qu'elle ne soit lancée et, à ce moment-là, il était top tard puisque, entre-temps, les *Taliban* avaient pris Mazar-e-Sharif et commis des atrocités similaires à celles qu'ils avaient subies en 1997. La communauté internationale a donc perdu une occasion de savoir ce qui s'est passé et pourquoi.

La situation en Afghanistan dérapa complètement en 1998. Suite aux attentats contre les ambassades américaines en Afrique de l'Est, les Etats-Unis répondirent en lançant des missiles contre l'Afghanistan. Les Américains ne réussirent cependant pas à neutraliser Osama Ben Laden et décidèrent de changer leur fusil d'épaule. Plutôt que de s'engager dans un conflit que l'on pouvait qualifier de légitime ou de mener divers types d'opérations, l'Administration Clinton estima qu'il était préférable de "contenir" l'Afghanistan en établissant une barrière autour de ce pays réellement problématique.

Les autres développements qui se produisirent durant cette période ont un lien avec le Pakistan. De 1994 à 2001 cet Etat fut le principal soutien extérieur des

Taliban. Durant cette période, le Pakistan n'a absolument pas contrôlé les actes des *Taliban*, et ne les a pas empêchés de commettre des violations du droit international humanitaire ou de maltraiter la population afghane de manière générale. Alors que le Pakistan promettait de soutenir une solution diplomatique, il a continué à fournir un appui notamment logistique aux *Taliban* et à les aider dans la conduite de leurs offensives militaires.

L'année 2001 fut celle de l'intervention américaine en Afghanistan, suite aux attaques contre New York et Washington D.C. Elle marqua aussi l'échec de la tentative des Etats-Unis d'éliminer Osama Ben Laden et Al-Qaeda, puisque de nombreux membres de ce mouvement réussirent à s'échapper. C'est aussi en 2001 que les *Taliban* furent évincés du pouvoir et que se produisit un évènement qui, de toute évidence, est un sérieux crime de guerre. Il s'agit de la mort par suffocation dans des conteneurs, lors de leur transfert vers une prison, de plusieurs centaines – un millier selon les Nations Unies – de *Taliban* capturés suite à la prise des villes de Mazar-e-Sharif et Kunduz.

Il est difficile de savoir quel fut le rôle des Etats-Unis dans cette affaire et s'il y a ou non complicité de leur part. Par contre, il est clair que des forces américaines se trouvaient avec l'Alliance du Nord quand la reddition des *Taliban* fut négociée. Par ailleurs, ces forces étaient présentes non loin de la prison qui devait accueillir les prisonniers, ainsi que dans le quartier général du chef de guerre Rashid Dostum. Elles devaient donc avoir une certaine connaissance des faits ou étaient au moins en mesure de chercher à les connaître. Le problème est le silence assourdissant qui règne actuellement autour de cet épisode tragique, après que les Etats-Unis avaient nié toute implication. La question est de savoir de quelles informations le gouvernement américain dispose sur cette affaire, informations qui devraient être rendues publiques.

Aujourd'hui l'attitude des Etats-Unis vis-à-vis du droit international humanitaire est préoccupante. Il ne s'agit pas seulement de leur refus d'appliquer la troisième Convention de Genève, sous prétexte que des personnes capturées sont des "combattants illégaux" ou des "terroristes". Plus grave est le fait que, parmi les personnes détenues à Guantanamo, se trouvent au moins six individus qui n'ont jamais combattu. D'autre part, le gouvernement américain fait preuve d'arbitraire en déclarant que la détention de ces personnes est tout simplement une de ses prérogatives. Enfin, ce n'est pas un hasard si les prisonniers ont été transférés à Guantanamo, où ni le droit américain ni le droit cubain ne s'appliquent. On constate une mise en oeuvre "à la carte" du droit international humanitaire

par les autorités américaines. Ceci ne veut pas dire qu'elles ne respectent pas l'esprit des Conventions de Genève, mais le problème vient du fait qu'elles traitent tous les prisonniers de la même manière. Il y a pourtant parmi ces derniers quelques malheureux individus qui furent capturés au Pakistan, remis à l'armée pakistanaise contre rançon, et ensuite livrés aux Américains. Il n'y a aucune preuve que ces personnes ont participé à des combats, elles ne furent pas capturées près du champ de bataille et donc, en tout état de cause, elles ne sont pas des combattants.

Le début de cette chronologie mentionnait l'impunité qui a prévalu autour des évènements qui se sont déroulés en 1997 dans le Nord de l'Afghanistan. L'impunité continue d'être une caractéristique aujourd'hui dans ce pays. Dasht-e-Leili est un endroit qui illustre bien la situation puisque c'est le lieu où non seulement sont enterrés les *Taliban* morts étouffés en 2001, mais c'est aussi le lieu où se trouvent des personnes tuées en 1997. Il y a donc des fosses communes plus anciennes et d'autres plus récentes, qui cachent des atrocités plus anciennes et d'autres plus récentes. L'histoire de Dasht-e-Leili et de ces fosses communes souligne, d'une certaine manière, l'impunité dont bénéficient les violations du droit international humanitaire. Un accord existe maintenant entre les parties pour examiner le contenu de ces fosses. Il reste à voir si cela va effectivement se faire et quand. Espérons que les Etats-Unis, en tant que principal acteur extérieur, pousseront dans ce sens, ce qui permettra peut-être de faire la lumière sur tous ces crimes à jour et de déterminer certaines responsabilités.

Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law

Speaker: Dr Jean-Marie Henckaerts*

Introduction

This presentation seeks to identify the main legal impediments that exist to apply humanitarian treaty law to armed opposition groups involved in non-international armed conflicts. To emphasize the acuteness of the situation, for each impediment a brief comparison is made with the situation in international armed conflicts. In each instance some solutions are suggested, with particular attention to how customary international law might address shortcomings in the application of international treaty law.

Most armed conflicts today are of a non-international (or internal) nature and involve one or more armed opposition groups fighting government forces. The conflicts in Angola, Colombia, Georgia (Abkhazia), Nepal, Russia (Chechnya), Sri Lanka and Sudan, to name but a few, testify to this reality. Nevertheless, only a very limited number of treaty provisions out of the vast body of treaty law that makes up international humanitarian law (IHL) is applicable to such non-international armed conflicts. In the codification process of IHL, States have chosen to make a clear distinction between rules that apply to international armed conflicts and rules that apply to non-international armed conflicts. In so doing, they have not been able to agree on as detailed and as extensive rules for non-international armed conflicts.

The most notable treaty provisions applicable to non-international armed conflicts are Article 3, common to the four Geneva Conventions of 1949 and the Second Additional Protocol of 1977, being the first and only treaty exclusively

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regulating non-international armed conflicts. There are some other treaties that can be mentioned, for example the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Article 19) and its Second Additional Protocol of 1999 (Article 22); the 1993 Chemical Weapons Convention; and last but not least the 1998 Statute of the International Criminal Court (Article 8(2)(d)–(f)). This presentation will focus, however, on Article 3, common to the four Geneva Conventions of 1949 (common Article 3) and the Second Additional Protocol of 1977 (Additional Protocol II).

There are at least five legal impediments in seeking to apply IHL treaties to situations of non-international armed conflicts.

1. Lack of ratifications by States

First and foremost, there is a problem of applicability that derives from the simple fact that treaties apply only to those States that have ratified them. This means that different humanitarian treaty law may apply to different non-international armed conflicts depending on which treaties the country in which the conflict is taking place has ratified. In particular, Additional Protocol II is only applicable in armed conflicts taking place on the territory of a State that has ratified it. While some 150 States have ratified Additional Protocol II, countries such as Angola, Nepal, Sri Lanka and Sudan are not among them although these are some of the States where application of Additional Protocol II would matter most. In these non-international armed conflicts a single provision of humanitarian treaty law, namely common Article 3, applies.

This is not a situation unique to non-international armed conflicts. A similar problem exists in the case of international armed conflicts. Additional Protocol I is applicable only between parties to a conflict that have ratified it. Although there are some 160 States party to Additional Protocol I today, its efficacy is limited because several State that were involved in international armed conflicts have has not (yet) ratified it. For example, Additional Protocol I was not applicable in the Iran-Iraq War because neither Iran nor Iraq had ratified it. It was not applicable in the 1991 Gulf War because neither Iraq, nor the United Kingdom, nor the United States had ratified it at the time. It was not applicable during the latest war between the United States and Afghanistan because neither country has ratified it.

In the case of international armed conflicts, however, we can fall back on the vast body of the four Geneva Conventions of 1949, ratified by all States. So there is a substantial body of "common" IHL applicable to international armed

conflicts. This is obviously not the case for non-international armed conflicts where we can only fall back on common Article 3. While lack of ratification may affect both international and non-international armed conflicts, in practice it affects the regulation of non-international armed conflicts more profoundly.

One approach to this problem is to determine, on the basis of research into State practice, what rules of customary IHL exist. Rules of (general) customary international law bind all States without the need for formal adherence through ratification. And in case of customary rules applicable to non-international armed conflicts, they bind all parties to such conflicts, if so defined in State practice. For example, if an article of Additional Protocol II were to be customary then the rule contained therein would apply to an internal conflict irrespective of whether the State in question has ratified the Protocol.

This explains why an Intergovernmental Group of Experts for the Protection of War Victims, meeting in Geneva from 23 to 27 January 1995 to make recommendations aimed at enhancing respect for international humanitarian law, proposed that:

> The ICRC be invited to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[1]

Subsequently, in December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially entrusted the ICRC with the task of preparing a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.[2]

To determine the best way of fulfilling this task, the ICRC consulted a group of academic experts in IHL who formed the Steering Committee of the study.

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1 Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23–27 January 1995), Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

2 International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims, Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 3–7 December 1995), *International Review of the Red Cross*, No. 310, 1996, p. 58.

The Steering Committee adopted a Plan of Action in 1996 and research started in earnest at the beginning of 1997. Pursuant to the Plan of Action, research was conducted using both national and international sources reflecting State practice. Research into these sources focused on six areas of IHL identified in the Plan of Action:

- Principle of distinction
- Methods of warfare
- Use of weapons
- Specific protection regimes
- Treatment of persons
- Accountability and implementation

To ensure the study will enjoy optimal credibility, the ICRC has spared no effort in its research and consulted the Steering Committee and additional experts throughout the process. In 2003, after several years of intensive work, the study will be published and circulated to the participants to the 28th International Conference of the Red Cross and Red Crescent (Geneva, 2–6 December 2003). The study will comprise two volumes. Volume I will contain the rules of IHL found to be customary, along with a commentary indicating sources and methods used to arrive at the conclusions that were reached. Volume II will contain a summary of State practices collected to back up the conclusions in Volume I. The study will overcome the problems posed by the lack of ratification of both Additional Protocols by key players to the extent that it identifies those rules that have become customary, and as such, binding upon all parties to all conflicts [3]

2. Impossibility of ratification by armed opposition groups

As mentioned above, treaties apply only to States that have ratified them. Armed opposition groups cannot ratify treaties but are nevertheless bound, in theory, by the treaties ratified by the State in which they operate because they are subject to that State's law. While this may be a satisfactory legal explanation on the theoretical plane, it is unsatisfactory in practice. Armed opposition groups resort to organised armed violence in order to overthrow a government and tend to have little respect for the established legal order. How can it be expected that insurgents comply with a treaty that has been ratified by a government

3 See also Jean-Marie Henckaerts, Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology, *International Review of the Red Cross*, No. 835, 1999, p. 660 and Jean-Marie Henckaerts, Importance actuelle du droit coutumier, in Paul Tavernier and Laurence Burgorgue-Larsen (eds.), *Un siècle de droit international humanitaire: Centenaire des Conventions de La Haye et Cinquantenaire des Conventions de Genève* (Brussels: Bruylant, 2001), p. 21.

they do not recognise and which they try to overthrow? For example, when approaching the Revolutionary Armed Forces of Colombia (FARC) to require them to respect Additional Protocol II because the Colombian government has ratified it, one may expect that the FARC reject applicability of Additional Protocol II to them on this basis alone. The fact that one party to a non-international armed conflict is formally required to apply a treaty that has been consented to only by the other party to the conflict obviously raises questions.

In comparison, in international armed conflicts this problem does not exist because any treaty would only apply among those States involved in the conflict that have ratified that treaty. No party to an international armed conflict is required to apply a treaty it has not freely consented to.

Solutions to this problem include, first and foremost, unilateral declarations made by armed opposition groups to the effect that they will abide by IHL, or at least, the fundamental rules of IHL. This does overcome the problem of the impossibility for the group to express its acceptance of IHL by ratifying relevant treaties but it does not change the applicable legal regime as such. Armed opposition groups are bound by common Article 3, possibly Additional Protocol II, and customary international law whether or not they have made such a unilateral declaration. A second solution, therefore, is the possibility of concluding special agreements between the parties to a non-international armed conflict, as foreseen under common Article 3, by which the application of the Geneva Conventions and Additional Protocol I, or parts thereof, can be declared applicable to the conflict. In so doing, the parties can extend the applicable rules beyond what is formally required by treaty law.

A third, more fundamental but more difficult, solution consists in giving armed opposition groups a role in the negotiation of treaties and a formal possibility to adhere to them. An important precedent for this approach is the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH) which took place in Geneva from 1974 to 1977 and which adopted both Additional Protocols. The CDDH, in its Resolution 3 (I) decided to invite the national liberation movements recognised by the regional intergovernmental organisations concerned to participate fully in the deliberations of the Conference and its main committees, as observers, it being understood that only delegations representing States were entitled to vote. About a dozen national liberation movements accepted the invitation and participated in the Conference, alongside representatives of

governments they were trying to oust from their countries. These were the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Angola National Liberation Front (FNLA), the Mozambique Liberation Front (FRELIMO), the Palestine Liberation Organization (PLO), the Panafricanist Congress (PAC), the People's Movement for the Liberation of Angola (MPLA), the Seychelles People's United Party (SPUP), the South West Africa People's Organization (SWAPO), the Zimbabwe African National Union (ZANU) and the Zimbabwe African People's Union (ZAPU). Three of these organisations, namely the PLO, PAC and SWAPO, also signed the Final Act of the Diplomatic Conference. National liberation movements are given, in Article 96(3) of Additional Protocol I the authority to address a unilateral declaration to the depositary to express their undertaking to apply the Geneva Conventions and Additional Protocol I, thus making the conflicts in which they fight international in nature and giving their combatants the right to prisoner-of-war status. This was maybe a unique situation in history and it may be hard to envisage States inviting armed opposition groups to diplomatic conferences today. First of all, it can be expected that not many diplomatic conferences will be held in the future because the codification of IHL is largely over. Secondly, it would be almost impossible to reach agreement over which groups should be invited.

The impossibility for armed opposition groups to ratify IHL treaties obviously does not affect the operation of customary rules of IHL because such rules are binding on parties to a conflict without formal ratification and thus enjoy more legitimacy as a universal standard of behaviour. This is so because customary international law is based on the general practice of nations and if armed opposition groups want to overthrow a government or secede from a State and join the international community of nations, they have to abide by the laws of that community. Customary international law is based on a representative, widespread and consistent practice. So no matter what their political, religious or cultural background, armed opposition groups have to abide by customary international law because it represents the common standard of behaviour within the international community and it will not be acceptable that any party to any conflict applies different rules. The argument would even be stronger if the practice of armed opposition groups could be taken into account in the formation of customary rules of international humanitarian law applicable in non-international armed conflicts. Under current international law, only State practice can create customary international law. The practice of armed opposition groups formally counts only if the group is successful in its rebellion and becomes the new government. This theoretical perspective denies the reality that armed opposition

groups are important actors in non-international armed conflicts and could play a role in the creation of the rules that apply to such conflicts. To achieve this, States could recognise that armed opposition groups can contribute to the formation of customary law, just as international organisations can contribute to the creation of international rules applicable to international organisations.

3. Threshold of application

The third impediment is very specific to non-international armed conflicts and concerns the threshold of application. This is to say that IHL only applies once the threshold of armed conflict has been reached. This requires that the conflict reach a certain level of intensity, and possibly duration. There are no precise criteria to define this intensity and duration. What is clear is that situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence do not constitute armed conflict and, as a result, are not covered by IHL. Hence, the determination of whether a certain situation amounts to armed conflict and triggers the application of IHL depends largely on a factual assessment. In this respect, the government involved in a non-international conflict (armed or not), having all the facts at its disposal and dealing with an "internal" problem, is in a strong position to deny the existence of an armed conflict and application of IHL. So there may exist situations in which the facts more or less clearly point to the existence of an armed conflict but where IHL will not be applied because the government denies the existence of a non-international armed conflict. Governments relying on this type of argument, rightly or wrongly, often assert that the armed violence perpetrated inside their countries is committed by "criminals" or "terrorists" and has to be dealt with under domestic criminal law, not IHL.

By comparison, in international armed conflicts the situation is much more straightforward because no specific level of intensity of armed violence between States is required. As soon as there is any armed violence between States, as soon as the first shot is fired, there is armed conflict, IHL applies and the States involved have an interest in its application. First and foremost, applicability of IHL, including the Geneva Conventions, is the basis for protection for their combatants: they must be searched and cared for in case they are wounded or sick; they must be treated humanely in case of capture; they must be treated with respect in case of death etc. Since each party to an international armed conflict has a similar interest in seeing its combatants treated correctly, there is some kind of balance of interest in seeing IHL being applied. This balance is not always present in non-international armed conflicts because States can rely on their own domestic legislation to regulate the conflict rather than IHL. In fact States

tend to prefer this in order to deny any standing to armed opposition groups; standing which they allegedly would gain from when IHL is applied to them. The fact that common Article 3 states that its application "shall not affect the legal status of the Parties to the conflict" does not change much in practice. The scrutiny of human rights monitoring bodies has made it difficult for any country to keep any serious situation of conflict out of the realm of international concern and, as a result, international law, be it IHL or human rights law.

The ideal solution would consist of having a world judicial authority, for example the International Court of Justice, issue a finding in each instance whether an armed conflict exists and, hence, whether IHL applies. In practice, however, the political organs of the United Nations, namely the Security Council and the General Assembly have indirectly been making such findings in a large number of situations by calling upon parties to conflicts to apply IHL, thus implying that the situation amounted to armed conflict. This does not mean that the Security Council of the General Assembly has systematically made such findings in all cases of armed violence within a country. Nor does it mean that the governments in question have complied with the findings when they were made. Regional international organisations as well as the ICRC and NGOs can also play an important role in this respect. The International Criminal Court can also become an incentive to apply IHL and thus to recognise its applicability.

The ICRC study on customary international law does not solve this problem as it identifies rules that are applicable once there is armed conflict. What is missing is a study to arrive at a clearer definition of armed conflict, in particular non-international armed conflict. Such a study should look at past practice in order to identify the specific elements determining whether or not there is armed conflict. What is needed is indicators that are generally accepted so that States can no longer deny there is an armed conflict when the criteria are met.

Another approach is to moot the question of whether or not there are armed conflict by identifying fundamental standards of humanity, i.e. rules which are applicable at all times and in all circumstances, whether in peace time, internal disturbances and tensions or in non-international and international armed conflicts, such as, for example, non-derogable human rights provisions. A proposal to this effect was drafted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990[4]. It was

4 Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, *International Review of the Red Cross*, No. 282, 1991, p. 330.

then submitted by Norway to the United Nations Commission of Human Rights where it has been on the agenda for a number of years and is now treated only every other year. It has thus become a lesser priority at the Commission and it is still questionable whether States will ever be able to agree on what these fundamental standards of humanity are or should be and whether every aspect of violence can be covered in sufficient detail in such rules. Opponents argue that fundamental standards of humanity, being only a limited number of minimum guarantees, would undermine (or divert attention from) the more detailed rules that already exist in international human rights and humanitarian law. Advocates argue that without such rules, there are too many situations that are neither covered by IHL (because the government denies it is applicable) nor (properly) by human rights law (because too many derogations are invoked).

4. Lack of rules ("normative gap")

The fourth impediment, that would arise even if a government had ratified Additional Protocol II and even if both it and the armed opposition recognised its applicability to a specific conflict, is a lack of rules. Protocol II contains less than thirty Articles, whereas Additional Protocol I includes more than one hundred. Numbers may not be very important, but nonetheless they show that there is a significant difference in terms of regulation between international and non-international armed conflicts, with the latter category suffering from a lack of rules, definitions, details, and requirements. This is the prevailing situation, despite the fact that today the majority of conflicts are non-international.

Specifically, Additional Protocol II contains only a very rudimentary regulation of the conduct of hostilities. Article 13 provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack, … unless and for such time as they take a direct part in hostilities". Unlike Additional Protocol I, Additional Protocol II does not contain the following:

- Definition of civilians and fighters
- Prohibition to attack civilian objects
- Definition of civilian objects and military objectives
- Prohibition of indiscriminate attacks
- Definition of indiscriminate attacks
- Prohibition of disproportionate attack
- Definition of disproportionate attacks
- Obligation to take precautionary measures in attack
- Obligation to take precautionary measures against the effects of attack

Common sense would suggest that such prohibitions and obligations, and the limits they impose on the way war is waged, should be equally applicable in international and non-international armed conflicts. The fact that the 1980 Convention on Certain Conventional Weapons was recently amended and its scope extended to non-international armed conflicts – previously only its 1996 Amended Protocol II on the use of landmines, booby-traps and other devices was applicable to non-international armed conflicts – is evidence that this idea is taking root in the international community.

The customary law study provides further evidence of this reality and shows to what extent State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflict. In particular, the gaps in Additional Protocol II with respect to the conduct of hostilities have largely been filled through States' own behaviour which led to the creation of rules parallel to those we find in Additional Protocol I, but applicable as customary law to non-international armed conflicts. [5]

This development of customary international law on the basis of State practice has taken place, mainly because treaty law has insufficiently dealt with the issue of non-international armed conflicts.

5. Lack of status for fighters

Finally, fighters who participate directly in the hostilities are criminals under domestic law and have no specific status under international law, other than being war criminals if they violate IHL. In international armed conflicts, captured combatants, members of the armed forces, are entitled to the status of prisoners of war, meaning that they can neither be judged nor condemned for their participation in the hostilities or for their lawful acts of war. By contrast in non-international armed conflicts IHL only goes as far as to require that "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" (Article 6(5) Additional Protocol II and customary international law). In both international and non-international armed conflicts, war criminals are, of course, excluded from this amnesty and must be prosecuted.

5 See Jean-Marie Henckaerts, The Conduct of Hostilities: Target Selection, Proportionality and Precautionary Measures under International Humanitarian Law, in *Protecting Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice* (The Hague: Netherlands Red Cross, 2001), p. 11.

The fact that members of armed opposition groups are thus subject to prosecution for their mere participation in the rebellion raises the question: "What incentive is there to abide by IHL if they are criminals anyway, whether they violate IHL or not?" One solution could consist in changing the optional system of amnesty into a mandatory system of amnesty at the end of non-international armed conflicts. But it is highly unlikely that such a change would be acceptable to States. Nor may it be necessary for two reasons, one legal and another political. First, IHL does provide for the possibility of amnesty for having taken part in hostilities, while it excludes such a *possibility* for serious violations of IHL because it imposes an *obligation* to prosecute war criminals. Secondly, the political dynamics of internal armed conflicts are such that if armed opposition groups want to achieve their goals they need the sympathy of the local population and support from other countries or international organisations. In order to obtain this, they have to be respectable and abide by IHL. Governments will be far less inclined to negotiate with a group that is known to adopt ruthless tactics and will not be able to make concessions, let alone grant an amnesty, to such groups than to groups that are known to show respect for IHL. Armed opposition groups have every reason to fight it right, even if they will always be criminals according to domestic law. If they want to be respected, they have to show some respect.

Respect for IHL, then, is an important way for armed opposition groups to achieve some standing. The more they comply with IHL, the more they will gain in recognition. Here is a sample recipe:

- Make a declaration of intent to respect IHL
- Take prisoners, rather than execute them
- Attack only military objectives and combatants
- Do not use terror tactics
- Issue instructions to fighters
- Install a system of command responsibility
- Punish violators of IHL in fair and regular trials

Third states can also play a role in this regard. For example, if armed opposition groups are not able to hold fair and regular trials they can ask for the extradition of the accused to try them. They can act as a sort of "Protecting Power" of an armed opposition group to try to ensure its respect of IHL and thus increase the chances of arriving at a peaceful settlement of the dispute.

Conclusion

This presentation has identified five legal impediments in applying treaty law to armed opposition groups involved in non-international armed conflicts, namely lack of ratification, impossibility of ratification, threshold of application, lack of rules in treaty law applicable to non-international armed conflicts and lack of status for fighters. Some of these problems can be addressed to some extent by relying on customary rules of IHL rather than treaty rules. This is why the ICRC has undertaken the study on customary IHL, the result of which will be published in 2003. Others will require great diplomatic skill and perseverance of the international community, i.e. third States, international organisations and the ICRC, into pressuring armed opposition groups, as well as governments, into compliance with IHL. For in the end, as paradoxical as it may sound, compliance with the law of war is the best guarantee for peace.

Résumé

Dans son intervention, l'orateur identifie les obstacles juridiques principaux que l'on rencontre dans l'application du droit international humanitaire aux groupes d'opposition armés impliqués dans un conflit armé non-international. En effet, la plupart des conflits armés contemporains sont de caractère non-international, et les Etats, dans le processus de codification du droit international humanitaire, ne se sont pas mis d'accord sur un régime juridique aussi développé pour les situations de conflits internes qu'il ne l'est pour les situations de conflits internationaux.

Un certain nombre de normes ont été cependant spécifiquement élaborées pour couvrir des situations de conflits internes, et l'on pense plus spécifiquement à l'article 3 commun aux quatre Conventions de Genève, au Protocole II additionnel à ces mêmes Conventions, ainsi qu'à certains articles de conventions particulières telles que la Convention de 1954 sur les biens culturels et son Protocole de 1999, la Convention de 1993 sur les armes chimiques, et bien entendu le Statut de la Cour pénale internationale.

Le Dr Henckaerts relève cinq obstacles principaux dans l'application du droit humanitaire aux groupes d'opposition armés impliqués dans un conflit interne.

Le premier, et le plus évident, est l'absence de ratification des traités internationaux. En effet, en vertu du principe de l'effet relatif des traités, différents

traités de droit humanitaire s'appliqueront à différents acteurs non-étatiques en fonction des traités auxquels est partie l'Etat sur le territoire duquel le conflit se déroule. Par exemple, alors que la quasi-totalité des Etats ont ratifié les quatre Conventions de Genève, et donc leur article 3 commun, seul 150 d'entre eux ont ratifié le Protocole II de 1977.
Une approche intéressante face à ce problème est de déterminer quelles règles relèvent du droit coutumier, en basant ses recherches sur la pratique des Etats. A cet égard, il a été demandé au Comité international de la Croix-Rouge (CICR) de mener une étude de grande envergure sur l'état du droit coutumier en droit international humanitaire. Cette étude, qui sera présentée en décembre 2003 examine, sous l'aspect de leur caractère coutumier ou non, des questions telles que le principe de distinction, les méthodes de guerre, l'utilisation des armes, le régime des protections spécifiques, le traitement de certaines personnes, la responsabilité et la mise en oeuvre. L'intérêt de cet étude est bien entendu de mettre en évidence les normes qui, indépendamment de la ratification ou non de certains traités, sont applicables à tous les belligérants.

Le deuxième obstacle relève de l'impossibilité de la ratification des traités par les groupes d'opposition. La ratification de traités n'est en effet pas ouverte aux groupes d'opposition armés, mais ces derniers sont néanmoins tenus de respecter ceux ratifiés par l'Etat sur le territoire duquel ils opèrent, parce qu'ils en sont sujets. Ce raisonnement, parfaitement valable sur le plan juridique, n'est pas aussi évident dans la pratique. En effet, les groupes d'opposition armés, qui ont recours à la force pour renverser un gouvernement en place, ont tendance à montrer relativement peu de respect pour l'ordre établi.
Certaines solutions sont envisageables face à ce problème. La première consiste en une déclaration unilatérale émanant du groupe d'opposition armé et indiquant qu'il s'engage à respecter le droit international humanitaire, ou du moins ses règles fondamentales. Cela étant dit, ces groupes d'opposition sont de toute manière liés par l'article 3 commun, éventuellement par le Protocole additionnel II, et tenus de respecter les normes considérées comme relevant du droit coutumier.
La deuxième solution se retrouve dans l'article 3 commun aux quatre Conventions de Genève qui encourage la conclusion d'accords bilatéraux entre parties à un conflit.
Enfin, mais cela s'avère plus difficile, les groupes d'opposition armés pourraient jouer un rôle dans la négociation des traités, et obtenir la possibilité d'adhérer à ces derniers. Cela a été le cas, par exemple, à l'occasion de la conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés qui s'est tenue à Genève de 1974

à 1977 et qui a adopté les deux Protocoles additionnels. En effet, la Conférence, dans sa Résolution 3 décide d'inviter les mouvements de libération nationale reconnus par les organisations régionales intergouvernementales concernées à participer pleinement aux délibérations de la Conférence et de ses Commissions principales, en tant qu'observateurs, étant entendu que seuls les délégations représentants des Etats avaient le droit de vote. Une douzaine de mouvements de libération nationale ont accepté cette invitation et ont participé aux côtés des représentants des gouvernements qu'ils entendaient chasser du pouvoir. Il s'agit là, cependant, d'un exemple probablement unique et qui aurait, vraisemblablement, peu de chance de se voir répéter dans les contextes que l'on connaît aujourd'hui.

Cela étant dit, l'impossibilité pour les groupes d'opposition armés de ratifier un traité n'empêche en rien l'application du droit coutumier à ces conflits, les normes coutumières s'appliquant indépendamment d'une ratification. Notons cependant qu'en l'état actuel du droit international, seul la pratique des Etats peut contribuer à la formation de la coutume, et non la pratique des entités non-étatiques, négligeant, par là, le rôle important que ces dernières jouent sur la scène internationale.

Le troisième obstacle, quant à lui, est lié au seuil d'applicabilité du droit humanitaire. En effet, alors que le droit humanitaire sera applicable, dans un conflit armé international, dès le premier coup de feu - avec une intention belliqueuse -, il ne le sera, dans un contexte de conflit interne, que moyennant la rencontre d'un certain nombre de critères. De fait, il revient dans ce cas à l'Etat concerné de déterminer si la situation en question peut être qualifiée de conflit armé. Il y a là un certain déséquilibre entre les protagonistes que l'on ne retrouve pas dans le cas des conflits armés internationaux.
L'étude sur le droit coutumier évoquée précédemment ne sera ici d'aucun recours, celle-ci s'intéressant aux règles coutumières applicables dans un conflit et non pas à la définition de cette notion.
Certains auteurs ont cherché à éluder la question de la définition du conflit armé en suggérant d'édicter des normes minimales humanitaires qui seraient applicables en temps de paix comme en temps de guerre.

L'absence de normes peut également constituer un obstacle à l'application du droit humanitaire aux groupes d'opposition armés. Le droit applicable aux conflits internationaux est en effet beaucoup plus développé que celui couvrant les conflits internes. Ainsi, on ne trouve pas, dans le droit applicable à ces derniers

conflits, de définition du civil et du combattant, de définition du bien de caractère civil et d'objectifs militaires, d'interdiction d'attaque indiscriminée, par exemple. Le bon sens voudrait que les interdictions et obligations que l'on trouve dans le cadre de conflits internationaux et les limites imposées à la conduite des hostilités soient les mêmes dans un contexte de conflit interne. L'étude du CICR sur le droit coutumier démontre, fort heureusement, que la pratique des Etats va, à cet égard, plus loin que les textes conventionnels.

Enfin, dernier obstacle relevé par l'orateur, le manque de statut juridique pour les combattants. Dans un conflit interne, ceux qui participent directement aux hostilités seront considérés comme des criminels par leur droit national, et n'auront aucun statut en droit international, autre que celui de criminel de guerre s'ils violent le droit humanitaire. Il en va tout autrement dans le cadre d'un conflit international, dans lequel, ceux qui combattent ne pourront pas tomber sous le coup d'une sanction pénale, à moins qu'ils ne respectent pas les règles du droit des conflits armés. Le Protocole II, applicable au conflit interne, se limite à demander aux autorités d'accorder la plus large amnistie possible à la fin des hostilités à ceux qui y auraient participé ou se retrouveraient privés de leur liberté pour une raison liée à ce conflit.

La question vient alors tout de suite à l'esprit: comment peut-on inciter ces groupes d'opposition armés à respecter le droit humanitaire si quel que soit leur comportement leurs membres seront considérés comme des criminels?
L'on peut envisager de changer le caractère volontaire de l'amnistie en caractère obligatoire, mais il est vraisemblable que cela ne sera pas acceptable pour les Etats. Cependant, il est un fait que pour atteindre leur objectif, ces groupes ont besoin d'asseoir leur légitimité, et de conquérir le soutien de la population concernée. A cette fin, ils ont tout intérêt de se montrer respectueux d'un certain ordre, et entre autres, de respecter le droit humanitaire. C'est ainsi qu'ils vont pouvoir gagner leur reconnaissance. Des Etats tiers, ou des organisations régionales ou internationales, peuvent en ce sens jouer un rôle très important.

L'auteur conclut en résumant les cinq obstacles majeurs à l'application du droit humanitaire aux groupes d'opposition armés, et en soulignant l'importance des résultats de l'étude sur le droit international humanitaire coutumier. Il relève enfin que, même si cela peut paraître paradoxal, le respect du droit de la guerre est la meilleure garantie pour un prompt et solide retour à la paix.

Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations

Speaker: Professor Michel Veuthey

I shall speak only about armed parties in this presentation, but one could definitely also include multinational corporations, and even humanitarian non-governmental organizations (NGO) and para-statal entities, because there are some States that actually use non-state actors as agents in their own country or in foreign countries. I shall deal successively with Article 3 common to the four Geneva Conventions, Additional Protocol II, special agreements, accession to the Geneva Conventions, the denial of applicability, and actual compliance without any reference to existing law because it happens that people abide by the rules and principles without mentioning them. Finally I shall talk about external factors because those so-called internal wars are often very much influenced by such factors.

Considering common Article 3, the first case of application of this article was Guatemala in 1954 when its ruler General Arbenz was overthrown in a coup[1]. The first case of clear recognition of applicability by insurgents was in Hungary in 1956 when the Györ Committee, during the revolt against the communist regime, agreed to abide by the Geneva Conventions[2]. It was, as you know, a short-lived insurgency but it was nonetheless interesting that such a statement was made. In Algeria the Front de Libération Nationale (National Liberation Front) in 1956 acknowledged that Article 3 was applicable. Actually it was at that time that Pierre Mendès-France, who was the cousin of the International Committee of the Red Cross (ICRC) delegate posted in Paris, called him and said

1 ICRC. *Rapport d'activités 1954*, pp. 36-38 ; Dietrich Schindler, *Die Anwendung der Genfer Abkommen seit 1949*, Annuaire Suisse de Droit International, XXII, 1965, pp. 75 ff., especially p. 88.

2 Isabelle Voneche Cardia. *Hungarian October: between Red Cross and red flag: the 1956 action of the International Committee of the Red Cross*, Geneva, ICRC, 1999, 178 p. (French edition published by Bruylant, Brussels, 1996, 183 p.)

"I am going to resign in one week, can I do anything for you?" The answer of the ICRC delegate was "Yes, recognize the applicability of Article 3" and the French Prime Minister granted the ICRC delegate his wish. I mention this anecdote to stress the role of the human factor and how personal links can sometimes lead to positive developments. Cuba with Fidel Castro in 1958, Lebanon in 1958, Congo and the province of Katanga in 1960, as well as the Dominican Republic in 1965 with the joint action of the ICRC and the Organization of American States (OAS) provide other examples of the recognition of the applicability of common Article 3.

As far as Additional Protocol II is concerned, there are two clear cases where both the government and the insurgents recognized its applicability: El Salvador in 1988 and the Philippines in 1991. I would say that in the case of El Salvador it was not only the negotiations by the delegate of the International Committee of the Red Cross (ICRC), but also the pressure on both parties from some members of the United Nations Sub-Committee on Human Rights who adopted a resolution in Geneva, which led to the recognition of applicability of Additional Protocol II in that country. In the case of the Salvadorian Government, the first concrete step following the recognition was the inclusion of the second Additional Protocol in military instructions. Colombia is a separate case, which I mention just in passing, because there were many special agreements, many recognitions of the applicability of international humanitarian law that, however, excluded the prohibition of hostage taking.

Turning to special agreements, they existed even before common Article 3. During the Spanish Civil War for example, both the Government of General Franco in Madrid and the Republican Government in Burgos were contacted by two International Committee of the Red Cross (ICRC) delegates and both sides recognized the applicability of the 1929 Geneva Conventions[3]. In Palestine also, at the time of the British mandate, although the status of this conflict is a bit unclear, both the General Council (*Vaad Leumi*) of the Jews in Palestine and the Arab League agreed to abide by the 1929 Geneva Conventions in response to a request by the ICRC[4]. In Yemen in 1962[5] and in Nigeria in 1967[6], it is

3 See Dr. Marcel Junod, *Warrior Without Weapons*. Translated from the French *Le Troisième Combattant* by Edward Fitzgerald. London, Jonathan Cape and New York, Macmillan, 1951, 318 p. and Frédéric Siordet, *Les Conventions de Genève et la guerre civile*, Geneva, ICRC, pp. 9-10.

4 See Jacques de Reynier, *1948 à Jérusalem*, Geneva, Georg, 2002, 175p.

5 See ICRC, *Annual Report 1962*, p.29, and K. Boals, *The Internal War in Yemen* in Richard A. Falk (Ed.) *The International Law of Civil War*, Baltimore, Johns Hopkins Press, 1971.

6 ICRC, *Rapport d'activités 1967*, p.37, and John Stremlau, *The International Politics of the Nigerian Civil War*, Princeton, NJ, Princeton University Press, 1977.

interesting to note that both parties agreed to abide by the 1949 Geneva Conventions. These two examples show that we are wrong when we think that Article 3 is a European invention. Rather there were good ICRC delegates on the spot who managed to win the trust of the parties involved and secure these agreements, as well as to visit prisoners and provide protection and assistance to civilians on both sides [7].

Afghanistan is an interesting case where no special agreement would have been possible without the intervention of the International Committee of the Red Cross (ICRC). The two parties involved, namely the Soviet-backed government and the Afghan resistance movement (*mujahedeen*), were unwilling to even sign on the same sheet of paper. The same text was therefore signed on two different documents between, on the one hand, the ICRC and the *mujahedeen* and, on the other hand, the ICRC and the Soviet-backed government. The agreement was limited to the treatment of prisoners. The ICRC could receive the Soviet prisoners and bring them to Switzerland for a two-year internment in military barracks, at the end of which period the prisoners were sent back to Russia. The other side of the agreement was that the ICRC could visit the captured *mujahedeen* in the Pul-e-Sharki prison in Kabul where they were detained by the Soviet-backed government.

Another example of the conclusion of special agreements is Yugoslavia where actually the Federal Government was quite happy to acknowledge the applicability of Article 3, whereas the separatist Republics were claiming that it was from the very beginning an international armed conflict. Nevertheless, here as well the International Committee of the Red Cross (ICRC) succeeded in having special agreements by leaving in doubt the legal standing of the conflicts and of the special agreements [8]. In Somalia – hard to believe but true – General Aideed

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7 See Pierre Boissier, *History of the International Committee of the Red Cross. From Solferino to Tsushima*, Geneva, ICRC, 1985 and Roger Durand, *History of the International Committee of the Red Cross. From Sarajevo to Hiroshima*, Geneva, ICRC. Jean-Daniel Tauxe, *Faire mieux accepter le Comité international de la Croix-Rouge sur le terrain*, Revue internationale de la Croix-Rouge, No. 833, p.55-61, 31 mars 1999.

8 On the former Yugoslavia, see
- Jean-François Berger, *The humanitarian diplomacy of the ICRC and the conflict in Croatia (1991-1992)*, Geneva, ICRC, 1995, 70 p.
- Mark Cutts, *The Humanitarian Operation in Bosnia, 1992-1995: The Dilemmas of Negotiating Humanitarian Access*, New Issues in Refugee Research, Working Paper No. 8 Geneva: UNHCR, May 1999, pp.10-25. (Available in PDF format at www.jha.ac/articles/u008.pdf)
- Christophe Girod and Angelo Gnaedinger, *Politics, military operations and humanitarian action: an uneasy alliance*, Geneva, ICRC, 1998, 29 p.

agreed to let the ICRC visit one United States (US) prisoner. This was perhaps a short-lived agreement, but for a while the ICRC could visit that detainee. In the case of Sudan, a cease-fire agreement reached in December 2001 in Switzerland contains a humanitarian provision. It must be kept in mind that, when humanitarian issues are not dealt with during the course of a conflict, they will anyway have to be addressed at the end of the conflict, because the plight of civilians and prisoners is obviously a very important part of the final peace settlement. There were other kinds of special agreements with insurgents, like the so-called "protected areas" - Srebrenica is not one such example (with the consequences we are all aware of [9]) - but we can mention Jerusalem in 1948, Dhakka in 1971, and Nicosia in 1974. Also more recently Jaffna in 1990, Dubrovnik in 1991, and a hospital in Osijek in 1991 received the status of "protected area" [10].

As a footnote to what was said in the previous presentation, I want to say that at least some provisions of Additional Protocol I were accepted by even the United States (US) during the 1991 Gulf War. Indeed, the American Government agreed that the International Committee of the Red Cross (ICRC) could include some provisions relating to the protection of the civilian population in a previously negotiated appeal to all parties to the conflict, as it was not specifically mentioned that these articles were drawn from the Protocol. Still there was actually an agreed upon document including such provisions. This case illustrates the fact that the "special agreement approach" can be used not only with non-state actors and has a scope that could go beyond civil wars [11].

The last kind of special agreements is the one that binds non-state actors. For instance, humanitarian organisations and armed opposition groups can conclude such bilateral agreements. Examples include the International Committee of the Red Cross (ICRC) in Bosnia in 1992, the United Nations Children's Fund (UNICEF) in Sudan in 1995, and the United Nations Office for the Coordination

9 See the United Nations and the Dutch official reports on Srebrenica:
- *The fall of Srebrenica*, A/54/549, 15 November 1999, available [Accessed 7 January 2003]: http://www.hri.ca/fortherecord1999/documentation/genassembly/a-54-549.htm
- Netherlands Institute for War Documentation (NIOD), *Srebrenica. Een "veilig" gebied. Reconstructie, achtergronden en analyses van de val van een Safe Area. (Srebrenica. A "safe" area. Reconstruction, background, consequences and analyses of the fall of a safe area.)* Summary and order form of the Dutch original and English translation available at http://www.srebrenica.nl/ [Accessed 7 January 2003]

10 See Jean-François Berger, *op. cit.*

11 See Michel Veuthey, *De la Guerre d'Octobre 1973 au Conflit du Golfe en 1991: les appels du CICR pour la protection de la population civile*, in Delissen, Astrid J.M. & Tanja, Gerard J. (Editors), *Humanitarian Law of Armed Conflict. Challenges Ahead*, The Hague, Martinus Nijhoff, 1992, pp.527-543.

of Humanitarian Affairs (UNOCHA) in the Democratic Republic of Congo in 1998. These special agreements are very important because they allowed humanitarian organizations to do their work in these specific situations.

Let us now look at the accession to the Geneva Conventions through the Algerian and Palestinian cases. Two years before the independence of Algeria in 1960 the *Gouvernement Provisoire de la République Algérienne* (Provisional Government of the Algerian Republic) was able to accede to the Geneva Conventions thanks to the mediation of the Libyan Ambassador in Bern. This accession was also the result of the request introduced earlier by the Algerian *Front de Libération Nationale* (National Liberation Front) that common Article 3 be made applicable within the framework of the independence war and, in a way, the result too of their failure to negotiate a special agreement to that effect with the French Government. The Algerians eventually decided to "go all the way", so to speak, and to try to accede to the Geneva Conventions themselves, which they succeeded to do in 1960, two years before the Evian Agreement granted them formal independence [12].

The case of Palestine represents in my view a missed opportunity because in 1989 the Palestine Liberation Organization (PLO) sent to the Swiss Government a declaration of accession to the Geneva Conventions that was not accepted. The declaration was probably a move by the moderate wing of the PLO *inter alia* to try to bring extremists under control, and a rejection of this move could only weaken moderates. The reason for the non-acceptance, as mentioned in the official Swiss text, was "the uncertainty within the international community as to the existence or non-existence of a State of Palestine". Leaving this aside, something should be done to have a commitment by every party to a conflict, especially perhaps in such an important conflict, to abide by humanitarian rules. Without entering into details, I think that we would all benefit from a Palestine accession to international humanitarian law today.

There was a series of other statements of which two, by the African National Congress (ANC) and the South West African People's Organization (SWAPO), were made to the International Committee of the Red Cross (ICRC). The first

12 Mohamed Bedjaoui, *La Révolution algérienne et le droit*, Bruxelles, Association des Juristes Démocrates, 1961, pp. 191 to 201 ("Mémorandum sur l'adhésion de la République algérienne aux Conventions de Genève et instruments d'adhésion de la République algérienne aux Conventions de Genève du 12 août 1949"). See also A. Fraleigh, *The Algerian Revolution as a Case Study in International Law* in Richard Falk (Ed.), The International Law of Civil War, Baltimore, 1971, pp.179 ff.

statement took place during a visit by the ANC to the then President of the ICRC, Alexandre Hay, with the ANC Foreign Minister declaring that his organization was acceding to the Geneva Conventions and Additional Protocol I. SWAPO followed suit soon afterwards. As for the Kurdistan People's Party (PKK), it was during a press conference in Geneva in 1995 that Mr. Abdullah Öcalan declared that his movement henceforth agreed to abide by the Geneva Conventions and Additional Protocol I. Then there was the case of the National Democratic Front of the Philippines (NDFP) who used another way to try and be a party to the Geneva Conventions, namely through a declaration of intent as foreseen in article 96 paragraph 3 of Additional Protocol I. The Zimbabwean People's Union (ZAPU), the liberation movement led by Mr. Josuah Nkomo, also made such a move. In my view these statements are, however, bound to fail because no government will be happy to recognize that it is fighting a war against a national liberation movement. A more general statement, not referring to article 96, might be more acceptable and, consequently, more useful.

Denial of applicability is not automatically synonymous to blocking the activities of the International Committee of the Red Cross (ICRC). The position of the United Kingdom against the applicability of common Article 3 not only in Northern Ireland, but also in Aden, Cyprus, and Kenya did not prevent the ICRC from visiting prisoners. In these cases, however, the ICRC had no contacts with insurgents. In Cambodia, as soon as the Red Khmer conquered Phnom Penh they expelled the ICRC delegate who was based there and, as long as they were in power, we can say that there was a "black hole of humanity" with a total absence of the Red Cross, a complete disregard for the Geneva Conventions, and the perpetration of a genocide. In Sierra Leone we can say that the Revolutionary United Front (RUF) was not very keen to abide by humanitarian principles. It is only now that the establishment of a Special Court for Sierra Leone will possibly bring some international humanitarian law into force. Sri Lanka was for so many years a merciless war and it is only in the year 2000 that the ICRC was finally able to visit a few prisoners. This humanitarian gesture was the first sign of the opening of a dialogue between the government and the rebels. In Colombia, all parties to the conflict will claim that they abide by international humanitarian law but non-state actors will argue that they need to take hostages in order to finance their struggle. I do not need to elaborate on the Chechen case, but it is clear that during the second war the Russians are saying that they are fighting terror, that ordinary criminal laws or special laws against terrorism are applicable, and therefore international humanitarian law has little place, even if the applicability of Additional Protocol II to Chechnya was

discussed before the Russian Constitutional Court[13]. This uncertainty on the status of the conflict - and the security conditions prevailing in Chechnya - did, however, not prevent the ICRC from conducting a few of its activities.
To illustrate cases of actual compliance by non-state actors, I would like to mention Mao Zedong who in 1947, without knowing anything about international humanitarian law, found very convenient, not only for the discipline of his own troops but also for the credibility of his struggle and the conduct of his military operations, to instruct his troops to behave correctly with the civilian population and to treat prisoners humanely. Indeed Mao was releasing prisoners whom he could not detain, and those former prisoners were subsequently detained by Tchang Kai Tchek who found these releases very suspicious.

External factors can have a very big influence on the behaviour of non-state actors, as illustrated by the example of the Palestine Liberation Organization (PLO). In 1970, at the time of "Black September" and hijackings of planes, the Saudis sent a very clear message saying that hijackings had to stop or funding would be interrupted. The second message came from the Soviets who told the PLO to stop hijackings or arms would no longer be provided. This is a very convincing way of making someone abide by international humanitarian law. In Angola in 1983, the International Committee of the Red Cross (ICRC) faced a difficult situation when Jonas Savimbi, leader of the Union for the Total Independence of Angola (UNITA), declared that he was launching a general offensive and could not control the "enthusiasm" of his troops, meaning that not even ICRC delegates were safe. Only when the ICRC produced two letters, one by United States (US) Assistant Secretary of State for African Affairs Chester Crocker and the other by Professor Rieben of Lausanne who was a teacher of Savimbi when the latter studied in Switzerland, did UNITA's leader say that he understood the ICRC's concern and would try to give different instructions.

In Sri Lanka, after a merciless war that lasted for many years, why is it that the plight of prisoners and peace are now being discussed? There are (at least) two actors behind this change of attitude: the Norwegian Government and the Tamil diaspora. The latter is favourable to the cause but is worried about its image abroad, which explains its request to the rebels that they stop their war without mercy. The same pressure, although for different reasons, is also applied by Oslo. So we see that the external factors can be States giving support, whether it is weapons, funds or asylum, or diasporas.

13 See Paola Gaeta, *The Armed Conflict in Chechnya before the Russian Constitutional Court*, EJIL, Vol.7, No. 4, available online at http://www.ejil.org/journal/Vol7/No4/art7.html

In the case of the conflict in El Salvador the European Community played a very important role, because it was in the middle between the United States supporting the government and Cuba backing the insurgents. The matter was then dealt with at the United Nations (UN) General Assembly in New York in October and at the Human Rights Committee in Geneva in February. Regional actors, whether at the African, American, or European level, definitely could influence non-state actors if they wished to do so. That is also true of universal actors such as the UN Security Council, as demonstrated for instance by the adoption of a resolution on monitoring the illegal trade of diamonds precisely to stop feeding a war in Western Africa. Non-state actors are sometimes represented in human rights mechanisms and this gives an opportunity to lobby them, as shown in the above-mentioned example of El Salvador among other cases.

The International Committee of the Red Cross (ICRC) tries to influence the behaviour of non-state actors not only via its protection role, but also through the training of these actors in the fundamental principles of international humanitarian law. Non-governmental organisations (NGO) such as Human Rights Watch, or the Sant'Egidio Community especially in Mozambique, can exert some influence. And if, as was stated yesterday, peace was bought in Mozambique, why not buy it in other places as well? Peace does not come cheap, but it is less expensive than fighting a war or having to rebuild a war-torn country. Even the NGO *Médecins Sans Frontières* (Doctors Without Borders), who for a long time was unwilling to get involved in international humanitarian law, is now trying to make sure that protection is not excluded from its activities. Spiritual leaders could definitely play a role as well. States Parties to the Geneva Conventions must also participate in this effort not just by adopting resolutions at the United Nations. Indeed the monitoring of radio communications and satellite pictures has proven in some conflicts to be a very effective means to collect evidence and to apply pressure on non-state actors, so that they would not think that they can do anything they want because they are in the middle of nowhere. Another way to apply pressure is through training and instructing, as it was unfortunately not shown in the case of the *contras* who were operating in Nicaragua.

I want to finish by quoting Albert Camus who was writing at the time of the Algerian War and said "*...se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend*" ("...to fight for a truth without destroying it by the very means used to defend it"). This quote raises the question of the legitimacy of the struggle of any non-state actor and the simultaneous

necessity to abide at least by humanitarian principles. All the instruments that I have mentioned are at our disposal. Remedies[14] could be used more frequently to promote a better implementation of international humanitarian law by non-state actors. Both legal instruments and remedies could be used precisely to bring some humanity in very difficult situations today and tomorrow as they did in the past.

Résumé

Cette présentation portera uniquement sur le cas des groupes armés, mais l'on pourrait aussi inclure d'autres acteurs non-étatiques tels que les sociétés multinationales, et même les organisations non-gouvernementales ou les entités para-étatiques, tant il est vrai que certains Etats font parfois de ces autres acteurs des agents dont ils se servent sur leur propre territoire ou à l'étranger.

En ce qui concerne l'article 3 commun aux quatre Conventions de Genève, il s'appliqua pour la première fois dans le cadre du coup d'Etat organisé au Guatemala en 1954, coup qui entraîna la chute du Général Arbenz. Quant au premier cas de reconnaissance explicite de l'applicabilité de cet article par des insurgés, il se produisit en Hongrie en 1956 lorsque le Comité Györ, durant la révolte contre le gouvernement communiste, déclara qu'il allait se conformer aux Conventions de Genève. C'est également en 1956 que le Front de Libération Nationale (FLN) reconnut l'applicabilité de l'article 3 dans le cadre de sa lutte pour l'indépendance de l'Algérie. Les évènements de Cuba et du Liban en 1958, ainsi que ceux du Katanga au Congo en 1960, fournissent d'autres exemples de la reconnaissance de l'applicabilité de l'article 3 commun aux quatre Conventions de Genève.

Quant au second Protocole Additionnel, il y a deux cas où tant le gouvernement que les rebelles ont clairement admis son applicabilité: le Salvador en 1988 et les Philippines en 1991. Dans le cas du Salvador, la reconnaissance fut le résultat non seulement des efforts du Comité international de la Croix-Rouge (CICR),

14 On remedies, see:
- C.F. Amerasinghe, *Local Remedies in International Law*, Cambridge, Grotius Publications, 1990, 410 p.
- Dinah Shelton, *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 1999, 550 p.
- Michel Veuthey, *Remedies to Promote the Respect of Fundamental Human Values in Non-International Armed Conflicts*, The Israeli Yearbook on Human Rights, Vol. 30 (2001), pp. 37-77.

mais aussi des pressions mises sur les deux parties au conflit par certains Etats membres de la Sous-Commission des Droits de l'Homme des Nations Unies. Suite à cette reconnaissance, la première mesure concrète prise par les autorités salvadoriennes fut l'inclusion du Protocole Additionnel II dans les instructions militaires.

Les accords spéciaux ont existé avant même l'article 3 commun. C'est ainsi que, par exemple, durant la guerre civile espagnole, suite à l'intervention de deux délégués du Comité international de la Croix-Rouge (CICR), les gouvernements franquiste et républicain reconnurent l'applicabilité des Conventions de Genève de 1929. En Palestine également, à l'époque du mandat britannique, la Ligue Arabe et le Conseil Général (*Vaad Leumi*) des juifs de Palestine acceptèrent de se conformer aux Conventions de Genève de 1929 à la demande du CICR, et ce bien que le statut de ce conflit ne soit pas très clair. Au Yémen en 1962 et au Nigeria en 1967, les parties s'engagèrent aussi à respecter les Conventions de Genève de 1949.

L'Afghanistan est un cas intéressant et la conclusion d'un accord spécial n'y aurait pas été possible sans l'intervention du Comité international de la Croix-Rouge (CICR). En effet, les deux parties impliquées, à savoir le gouvernement soutenu par les Soviétiques et le mouvement de résistance afghan, ne voulaient même pas voir leurs deux signatures figurer sur le même document. Un texte identique fut donc signé sur deux documents différents, l'un portant la signature du gouvernement et du CICR et l'autre portant la signature du mouvement de résistance afghan et celle du CICR. L'accord portait uniquement sur le traitement des prisonniers de part et d'autre.

Des accords spéciaux furent aussi conclus par l'entremise du Comité international de la Croix-Rouge (CICR) lors de la guerre en ex-Yougoslavie, malgré le fait que les parties au conflit avaient des vues divergentes sur la qualification juridique du conflit. En effet, si le Gouvernement fédéral était volontiers disposé à reconnaître l'applicabilité de l'article 3 commun, les républiques séparatistes qui maintenaient, depuis le début des hostilités, qu'on se trouvait en situation de conflit armé international, voulaient la reconnaissance de l'applicabilité des Conventions de Genève dans leur totalité. D'autres types d'accords spéciaux furent conclus avec des groupes insurgés, notamment ceux portant sur des "zones protégées" telles que Jérusalem en 1948, Dhakka en 1971, et Nicosie en 1974. Plus récemment, Jaffna en 1990, Dubrovnik en 1991, et un hôpital à Osijek en 1991 reçurent aussi le statut de "zone protégée".

L'approche consistant à conclure des accords spéciaux peut se révéler être efficace pas seulement avec des acteurs non-étatiques et pas uniquement dans le cadre des conflits armés internes. Le protocole d'accord bilatéral conclu entre les Etats-Unis et le Comité international de la Croix-Rouge (CICR) à l'occasion de la guerre du Golfe en 1991 en fournit une illustration, puisque ce document a permis l'inclusion de certaines dispositions du Protocole Additionnel I concernant la protection de la population civile sans référence explicite à ce protocole. Il existe aussi des accords spéciaux qui lient des acteurs non-étatiques entre eux, par exemple un groupe rebelle et une organisation humanitaire internationale. Ils sont importants car ils permettent à ces organisations de remplir leur mission dans un contexte spécifique.

Examinons le processus d'adhésion aux Conventions de Genève à travers les cas de l'Algérie et de la Palestine. En 1960, deux ans avant que l'Algérie ne devienne un Etat indépendant, le Gouvernement Provisoire de la République Algérienne put adhérer aux Conventions de Genève grâce à la médiation de l'Ambassadeur de Libye en Suisse. Cette adhésion fut aussi le résultat de la demande introduite antérieurement par le Front de Libération Nationale (FLN), qui souhaitait l'application de l'article 3 commun dans le cadre de la guerre d'indépendance. Suite à l'échec des négociations visant à la conclusion d'un accord spécial avec la France, les Algériens décidèrent alors de tenter d'adhérer aux Conventions de Genève elles-mêmes, ce qu'ils réussirent à faire en 1960, deux ans avant la signature des accords d'Evian reconnaissant l'indépendance de l'Algérie.

A l'inverse, le cas de la Palestine constitue une occasion ratée. En 1989 l'Organisation de Libération de la Palestine (OLP) envoya au Gouvernement suisse une déclaration d'adhésion aux Conventions de Genève, mais celle-ci ne fut pas acceptée. La raison invoquée pour ce rejet fut "l'incertitude au sein de la communauté internationale quant à l'existence ou la non-existence d'un Etat de Palestine". Cette décision est d'autant plus regrettable que la déclaration d'adhésion émanait sans doute de l'aile modérée de l'OLP, notamment pour mettre les extrémistes sous l'éteignoir. D'une manière générale, il est important d'obtenir un engagement de respect du droit international humanitaire dans le chef de toutes les parties à un conflit. Cette remarque s'applique certainement au conflit israélo-palestinien, et il est probable que tout le monde profiterait aujourd'hui d'une adhésion de la Palestine aux instruments de droit international humanitaire.

Il y a eu d'autres déclarations d'adhésion dont deux, celles du Congrès National Africain (ANC) et de l'Organisation du Peuple du Sud-Ouest Africain (SWAPO),

furent faites au Comité international de la Croix-Rouge (CICR). Citons aussi les cas du Parti Populaire du Kurdistan (PKK), du Front Démocratique National des Philippines (NDFP), et de l'Union Populaire du Zimbabwe (ZAPU) qui, de différentes manières, annoncèrent leur intention de se conformer aux Conventions de Genève et au premier Protocole Additionnel. Ces déclarations en vertu de l'article 96 du Protocole I sont cependant vouées à l'échec, dans la mesure où aucun gouvernement ne souhaite admettre qu'il combat un mouvement de libération nationale. Une déclaration plus générale serait sans doute plus acceptable et utile.

Nier l'applicabilité du droit international humanitaire à une situation donnée ne signifie pas automatiquement bloquer les activités du Comité international de la Croix-Rouge (CICR). Par exemple, le fait que le Royaume-Uni rejette l'applicabilité de l'article 3 commun n'a pas empêché le CICR de visiter des détenus en Irlande du Nord même s'il est vrai aussi que, dans ce contexte, l'organisation n'a pas eu de contacts avec les insurgés. En Tchétchénie, bien que les autorités russes clament haut et fort qu'elles combattent le terrorisme, que les lois spéciales destinées à combattre ce fléau s'appliquent, et que le droit international humanitaire a donc très peu à voir avec la situation, le CICR est malgré tout en mesure de mener certaines activités.

Par contre, dès que les Khmers Rouges ont pris Phnom Penh, ils ont expulsé le délégué du Comité international de la Croix-Rouge (CICR), et la période durant laquelle ce mouvement a exercé le pouvoir au Cambodge a été marquée par une absence complète de la Croix- Rouge, un manque de respect absolu pour les Conventions de Genève, et la perpétration d'un génocide. La Sierra Leone et le Sri Lanka sont deux autres exemples de conflit où, pendant des années, le respect du droit international humanitaire a laissé beaucoup à désirer et ce n'est que récemment que la situation a commencé à s'améliorer.

Les facteurs externes peuvent avoir une grande influence sur le comportement des acteurs non-étatiques et les exemples ne manquent pas pour illustrer cette réalité. En 1970, au moment de "Septembre Noir", tant l'Arabie Saoudite que l'Union Soviétique firent pression sur l'Organisation de Libération de la Palestine (OLP) pour qu'elle cesse de procéder à des détournements d'avion, l'une menaçant de couper le financement et l'autre de cesser les livraisons d'armes. Si aujourd'hui des négociations de paix ont lieu à propos du Sri Lanka, c'est parce que le Gouvernement norvégien, d'une part, et la diaspora tamoule, d'autre part, insistent, notamment auprès des rebelles, pour qu'il soit mis fin à cette

guerre. Dans le cas du conflit impliquant la Sierra Leone, le Libéria, et la Guinée, c'est le Conseil de Sécurité des Nations Unies qui cherche à influencer les acteurs non-étatiques par l'adoption d'une résolution sur le trafic illégal des diamants, trafic qui constitue une des principales sources de financement de cette guerre. Les facteurs externes pouvant influer sur l'attitude des acteurs non-étatiques sont donc essentiellement les Etats qui les soutiennent, les organisations internationales, et les communautés de l'extérieur.

Le Comité international de la Croix-Rouge (CICR) essaye aussi d'avoir un impact sur le comportement des acteurs non-étatiques, non seulement à travers ses activités de protection mais aussi en formant ces acteurs au droit international humanitaire. Les organisations non-gouvernementales (ONG) peuvent également jouer un rôle en la matière. C'est ainsi par exemple que Médecins Sans Frontières (MSF) qui, pendant longtemps, a refusé toute implication avec le droit international humanitaire, commence maintenant à inclure la protection parmi ses activités.

Les dirigeants spirituels pourraient aussi inciter les groupes rebelles ou insurgés à respecter les principes humanitaires essentiels. Les Etats Parties aux Conventions de Genève de 1949 et à leurs Protocoles Additionnels de 1977 devraient contribuer à l'effort de mise en oeuvre des règles de manière plus convaincante. Non seulement par des démarches diplomatiques, mais aussi en suivant et en documentant, grâce aux technologies de reconnaissance et d'écoute dont ils disposent, les faits et gestes des acteurs non-étatiques. Et en poursuivant ces derniers en justice en cas de violations du droit international humanitaire. Les moyens de pression ne manquent donc pas pour amener les acteurs non-étatiques à accorder une certaine place à l'humanité dans des situations de conflit. Et les expériences faites ces dernières années devraient montrer que toutes les parties aux conflits, quelles qu'elles soient, doivent, selon la formule d'Albert Camus "se battre pour une vérité en veillant à ne pas la tuer des armes mêmes dont on la défend".

Accountability of non-state actors in international law

Speaker: Liesbeth Zegveld

There is a huge contrast between international practice qualifying non-state actors as violators of international law on the one hand and international practice actually holding these actors accountable for their acts on the other hand. Accountability or responsibility is a logical consequence of breaches of international law. The invasion by a non-state actor of the interests of another actor, be it state or non-state, creates - rationally speaking - its responsibility. However, it is not that simple. The international order is unfavourable towards according international legal status to non-state actors. States do not wish to attribute government-like qualities to these actors. International responsibility is commonly considered to be a state-like feature, as the main subjects of the law. But the question is in essence broader and should include every political organization that acts as an effective factor in international relations, counting also non-state actors.

It is easily seen how this is done on the government side, that means in traditional international law. Then there are three levels of accountability. At the first and lowest level, individuals who actually committed a crime can be held accountable. At the second level, superiors are potentially accountable on the basis of the principle of command responsibility. At the third level, the state itself may be held accountable, in that it is responsible for acts committed by its agents. My concern is to discuss the extend to which there is, or can be, a parallel chain of accountability on the insurgent side, which is a counterpart to the one just outlined, applicable to the government side. The first question then is whether members and leaders of non-state groups can be held criminally accountable for violations of international law, the first two levels of accountability. The third level of accountability will be the accountability of the non-state groups as such.

Now, let us start with the lowest two levels of accountability: members and leaders of non-state groups. Let me first say that the role of leaders in violations of humanitarian law is far more important than the role of their subordinates. The role of the leader is decisive in order to avoid a fatal gap between the obligations of the non-state group as a collectivity and the conduct of its individual members. Superiors can be held criminally responsible for acts committed by their subordinates. Ordinary members, on the other hand, can be held responsible only for their own acts.

The principle of command responsibility for leaders of armed forces of the state is well established in traditional international law. One of the leading cases being the *Yamashita* case decided by the United States Supreme Court after the Second World War. But the question of command responsibility of non-state leaders has not come before international tribunals prior to the events of 1990. The international Tribunals at Nüremberg and Tokyo only dealt with government or ruling party officials. Furthermore, until recently, no international treaty existed imposing international criminal responsibility onto individuals not connected with the state.

The establishment of the Yugoslavia and Rwanda Tribunals has changed the legal situation.

These two tribunals are open to criminal responsibility of non-state leaders. In fact, it appears that the status of the superior - state agent or member of a non-state group - is immaterial to the question of superior responsibility. In the same line, these Tribunals show that the nature of the conflict, international or internal, is irrelevant for the question of superior responsibility.

The *Aleksovsky* case of 1999 before the Yugoslavia Tribunal provides evidence of command responsibility of non-state leaders. *Aleksovsky* belonged to the Bosnian Croats operating in Bosnia Herzegovina. The case concerned the treatment of Bosnian Muslim detainees held by the Bosnian Croats (the accused) in a prison in Bosnia-Herzegovina. In this case the Defence claimed that the principle of command responsibility did not apply. In particular, it asserted that existing precedents concerned commanders operating in international conflicts, whereas this conflict was internal. The Yugoslavia Tribunal found that "any person acting de facto as a superior may be held responsible under article 7(3) of the Statute." It based its finding on customary international law. Apparently, the Tribunal considered the nature of the conflict - internal or international - to be

irrelevant to the question of superior responsibility. More significantly, the Tribunal paid no attention to the status of the accused, whether he was a state actor or a non-state actor.

The Rome Statute of the International Criminal Court contains similar rules. Article 28 of the Statute recognizes the responsibility of "*a military commander or person effectively acting as a military commander*" [for failure to restrict the unlawful conduct of subordinates]. Perhaps you do not want to call non-state leaders 'commanders', reserving this term for leaders of state armies. Then leaders of non-state groups are in any case covered by the phrase "person effectively acting as a military commander". Furthermore, as the Statute also applies to internal conflicts, it is reasonable to accept the responsibility of non-state agents under the Rome Statute. So the legal principle - that is command responsibility of non-state agents - has been established.

However, when it comes to enforcement the prospects are far less promising. So far, there have been few trials charging leaders of non-state groups with international crimes. The focus of the Yugoslavia and Rwanda Tribunals has been primarily on state agents. In fact, until the present day, the *Aleksovsky* case of 1999 has been the only case in which the Yugoslavia Tribunal in the first instance held an individual - who was in effect a non-state leader - criminally responsible on the basis of command responsibility. The prosecutor of the Yugoslavia Tribunal declared some time ago that she was considering prosecuting the political and military leadership of the Kosovo Liberation Army.

Yet, nothing came out of this so far. The Rwanda Tribunal on its turn has focused on the genocide committed by the Rwandan State and individuals connected to the state. The Rwanda Patriotic Front (RPF) has escaped the Tribunal's attention so far. One cannot escape from the conclusion that these international criminal tribunals have been established for the purpose of prosecuting superiors linked to the state, rather than leaders of non-state groups. The International Criminal Court may be expected to concentrate on state agents also, because this Court will first and foremost fill the gap in domestic prosecution of state agents, a gap that exists to a much lesser extent with regard to non-state leaders.

The establishment of the special court for Sierra Leone may fill the gap that exists in prosecution of non-state agents in part. It envisages prosecution of the leadership of the Revolutionary United Front (RUF) involved in the 11-year civil war in Sierra Leone. In particular, the court will aim at the conviction of Foday

Sankoh, the leader of the RUF and main culprit of the war. The Court was set up in March 2002 by a treaty between the government of Sierra Leone and the United Nations. It has a three-year mandate to find, arrest, try and convict those guilty of war crimes in Sierra Leone since November 1996. David Crane, the United States prosecutor arrived in Sierra Leone six weeks ago to visit the areas most affected by the war. The special court for Sierra Leone may therefore be the first international court to try and convict a non-state leader.

Even with the promising developments at the international level, in any case, prosecution for international tribunals will be a rare event. The question is therefore reasonable: Are there - in addition to international tribunals - other avenues for prosecuting non-state leaders?

A second option would be prosecution of the individual wrongdoers by the non-state group to which they belong. However, international practice provides little support for the prosecutions by non-state groups of their own members. The general feeling is that it is difficult to conceive of humanitarian law giving non-state groups the authority to prosecute and try authors of violations.

A third possibility may be the prosecution of the actual wrongdoers by the territorial state. Human rights treaties generally oblige states to prosecute and try crimes committed on its territory. Humanitarian law is slowly moving towards a similar obligation. Of course, this obligation cannot be absolute, it depends on the actual capability of the state to prosecute. Further, the risk exists that the territorial state will be inclined to prosecute non-state actors for treason rather than for international crimes.

A fourth and final possibility is for third states to prosecute non-state leaders for violations of humanitarian law on the basis of universal jurisdiction. This would entail, in effect, expanding the grave breaches enforcement regime to cover internal conflicts.

The development of international criminal law is promising for prosecution of non-state individuals. However, the prospects should not be overestimated. The crimes committed by them are unlikely to be prevented. Nor will compliance with the relevant provisions of international law be significantly improved through punishment of one single individual. Therefore the most challenging level of accountability is the accountability of the non-state group as such, as a collectivity. Indeed, the acts that are labelled as international crimes find their bases in the collectivity.

In contrast to responsibility of the individual members of non-state groups, making non-state groups themselves accountable under international law raises a host of legal problems. Let me first say that the principle that non-state groups may be held accountable for wrongful acts committed by them, has been recognised. The International Law Commission's draft Articles on State Responsibility, as they were provisionally adopted in 1996, contain article 14 paragraph 3, reading "[the non-responsibility of the state for acts of insurgents] is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law."

This provision has been deleted in the latest version of articles on state responsibility recently presented to the General Assembly. According to the Special Rapporteur, James Crawford, the reason is that this provision was concerned with movements that are not states. It therefore fell outside of the scope of the Articles on state responsibility. The Rapporteur observed that the responsibility of non-state groups can nevertheless be envisaged, for example for violations of international humanitarian law. However, in his view it would be sufficient to deal with it in the Commentary to the Draft Articles rather than in the Articles themselves.

One wonders whether the heavy focus on the territorial state of the International Law Commission (ILC) Articles on State Responsibility is still appropriate to modern conditions. In my view, they do not take sufficient account of the consequences of the breakdown of the traditional state system, nor of its replacement by a new system, which is slowly taking shape before our very eyes. In this new arrangement, international responsibility can be attributed to entities, which are not deemed states. It is a system in which the interests of the international community as a whole are to be balanced against the traditional sovereignty of the states.

Yet, as noted, the International Law Commission (ILC) has recognized the legal principle of responsibility of non-state groups. A number of difficulties still remain to be resolved, however. For one thing, rules on attribution of acts of non-state actors have not been defined in international law. Responsibility under traditional international law, that means state responsibility, arises when there is a breach of an international rule that is attributable to the state.

Attribution of breaches to non-state groups raises in the first place the question of which persons or agencies are capable of giving rise to the responsibility of the non-state groups. In many civil wars, there is not one source of evil. You will not find clear lines dividing different groups, government and rebels, order and chaos. Often, all is grey.

The only rule that can be found in international practice is that 'members' of non-state groups can engage the responsibility of such groups. Reference is often made to the "members of Al Qaeda". But who are these members? Should persons have subscribed to the group concerned in order to be a member? Must they carry identity cards with them? Are only persons who actually participate in the hostilities members of non-state groups? Or can civilians also be counted to the membership? If civilians can qualify as members of non-state groups, what contribution must they make in order to qualify as a member so that they can trigger the responsibility of the non-state groups as a whole? International law has provided no criteria that can be applied to identify members of non-state groups.

So international practice and treaty rules on attribution of conduct to non-state groups is absent. The question arises: can the law on state responsibility be applied by analogy to non-state groups? This question is legitimate in view of the fact that a degree of similarity exists between non-state groups and states. Both are collective entities with a certain degree of organisation. Further, non-state groups resemble states in that they pursue the exercise of political power. They commonly aim to become the new government or form a new state.

Does this imply that agencies of non-state groups can be equated with organs of the state for purpose of the application of the law on state responsibility? Some groups can be said to have 'organs' as states do. An example is provided by the *Taliban* as they existed before 2001. A White House executive order of 4 July 1999, imposing sanctions on the *Taliban* for refusing to extradite Osama Bin Laden, defines the Taliban as '*the political/military entity, headquartered in Kandahar (Afghanistan), that as of the date of this order exercises de facto control over the territory of Afghanistan [...],its agencies and instrumentalities, and the Taliban leaders*' (Executive Order of 4 July 1999). This order carefully avoids characterising the *Taliban* agencies as "organs", a term generally used for the state. Nevertheless, the description of the *Taliban* makes clear that the movement has certain factual characteristics of a state.

Difficulties may arise, however, when applying state responsibility law to smaller armed groups, lacking a clear organisational structure. These groups will generally lack territorial control. International practice suggests that responsibility of these groups is based on the effective control over persons rather than on control of territory or a predetermined concept of internal organisation.

For example, in its Third Report on Colombia, the Inter-American Commission on Human Rights established numerous violations of international humanitarian law by the Colombian non-state groups. It recommended that these groups should "*through their command and control structures, respect, implement and enforce the rules governing hostilities set forth in international humanitarian law*". This statement suggests that attribution of acts or omissions to smaller non-state groups is based on their actual control over individuals, rather than on the existence of a defined state-like structure.

Another important question when analysing the matter of attribution and the relevance of the law on state responsibility, is: can acts committed by individual members outside the competence or contrary to instructions be attributed to the group? As we know, for the state disobedient agents do not bar its responsibility. International practice suggests that a similar rule does not exist for non-state groups. Perhaps this is a logical consequence of the inability to define these groups, and thus to make out who is and who is not bound by its instructions. It would mean, however, another serious gap in the international responsibility regime. It would mean that illegal acts that are committed by local units acting without official sanctions, and not representing a coordinated policy of the non-state groups, would fall outside the international responsibility regime.

A final remark on attribution. It should, of course, be noted that, when non-state groups have formed a state or an established government, they can be held responsible for the acts committed in their earlier careers as non-state groups. The law on state responsibility prescribes rules to this effect. However, in particular when dealing with terrorist groups, this situation will not be a common one, since such groups will generally not become governments or states. Another obvious difficulty is, of course, one of timing. It is necessary to await the successful outcome before a state can be held responsible under international law for the acts of non-state groups.

Then, a final problem to be dealt with when considering the accountability of non-state groups as a collectivity: is there a forum in which a claim against them

can be prosecuted? No. No international body is expressly mandated to monitor compliance by non-state groups with the applicable law. States have been reluctant to supplement the relevant rules with any means of scrutinizing compliance. They feared that supervision might provide a basis for international interference.

Although not explicitly so mandated, several international bodies on their own initiative have extended their mandates to actions of non-state groups, however. These are the UN Security Council, the UN Commission on Human Rights, and the Inter-American Commission on Human Rights. However, and not surprisingly the absence of a formal and explicit mandate to review acts of non-state groups seriously restricts the operation of these bodies.

An example. On its own initiative, the Inter-American Commission has included in its reports on the human rights situation in various countries also violations of humanitarian law committed by non-state groups. But, the procedural framework within which it operates has remained unchanged. This means that the procedural means necessary for the implementation of its findings on accountability of non-state groups for violations of international law are absent.

For example, the Regulations of the Inter-American Commission state that, after a draft report has been approved by the Commission, it shall be transmitted to 'the government of the member state in question' for observations. The purpose of this norm is that the state may have additional knowledge of the facts contained in the report. Also, consultation with the state will enhance its acceptance of the report and its willingness to comply with the Commission's recommendations. Similar norms for the execution of its competence relating to non-state groups are absent.

Not surprisingly, the Commission has indicated that it encounters significant procedural problems in implementing its competence with regard to armed groups. However, it is unlikely that it will adjust the relevant rules. The following observation of the Commission is illustrative in this respect: "*If the Commission, in violation of its mandate, were to agree to process a denunciation involving some alleged acts of terrorism, in doing so it would implicitly place terrorist organizations on an equal footing with governments, as the Commission would have to transmit the denunciation to the subversive organization which allegedly is responsible for the act and request that it make such observations as it deems appropriate. Undoubtedly, such organizations would be very pleased to be dealt with as if they were governments. But, what gov-ernment in the hemisphere*

could tolerate an implicit recognition of quasi-governmental status for an organization of this kind?" Clearly, this position makes the prospects for further development of international accountability of non-state groups very small indeed.

By way of conclusion, let me make the following five points. In this decade, international law has developed towards criminalization of acts committed by non-state agents in internal armed conflicts. This development is of great importance as it is in fact the only means to hold non-state actors accountable for violations of humanitarian law.

However, while the legal principle of individual criminal responsibility of non-state actors is established, the actual application of the principle stays somewhat behind, however. There have been few trials actually prosecuting and convicting non-state actors. Prosecution by non-state groups themselves, or third states may be interesting options that deserve further development.

The swift development of individual criminal responsibility should not replace the accountability of non-state groups as a collectivity. Some form of legal accountability of non-state groups would be an important advance in international law. An important argument supporting this proposition is that while international law centres on states, the international political order emerges through a huge variety of actors from multinational companies to indigenous and tribal groups, including non-state groups operating in armed conflicts. Non-state groups sometimes negotiate with territorial governments and participate in peace conferences organised by the United Nations. The international legal and political orders thus do not operate along parallel lines. When there is no law to implement political decisions, or when political agreements deviate from judgements, resolutions or reports on legal issues, the effectiveness of both international law and international politics in dealing with the problem of non-state groups is likely to be low. Modern international law should encompass every political organization that acts as an effective factor in international relations.

It may be considered therefore whether or not the law on state responsibility should be reformed or expanded so as to include other international actors that play a dominant role in international relations.

Finally, it should be understood that the absence of international bodies formally mandated to review acts of non-state groups accounts in part for the primitive status of accountability of these groups under international law.

Résumé

Il y a un énorme contraste entre, d'une part, la pratique internationale qui qualifie les acteurs non-étatiques de violateurs du droit international et, d'autre part, la pratique internationale qui tient ces acteurs pour responsables de leurs actes. La responsabilité est la conséquence logique des violations du droit international, mais la réalité est moins simple. En effet, les Etats sont les principaux sujets du droit international et ils rechignent à ce que la responsabilité, qu'ils considèrent comme un attribut étatique, soit accordée aux acteurs non-étatiques.

Dans le chef des Etats et gouvernements, la responsabilité peut s'exercer à trois niveaux. Tout d'abord, les individus qui ont commis un crime peuvent être tenus pour responsables. Ensuite, les supérieurs hiérarchiques sont potentiellement responsables des crimes de leurs subordonnés. Enfin, les Etats eux-mêmes peuvent être rendus responsables des actes commis par leurs agents. Pourrait-il y avoir une chaîne de responsabilité parallèle du côté des groupes insurgés qui s'appliquerait à leurs membres de base, à leurs dirigeants, ainsi qu'aux groupes eux-mêmes? Le rôle des dirigeants de ces groupes est, en termes de violations du droit humanitaire, beaucoup plus important que celui des simples membres. En effet, les supérieurs hiérarchiques peuvent être tenus pour responsables de leurs propres actes et des actes de leurs subordonnés. Par contre, les simples membres ne sont responsables que de leurs propres actes.

Le principe de la responsabilité du commandement dans le chef des dirigeants des forces armées étatiques est fermement établi en droit international traditionnel. Au contraire, la question de la responsabilité du commandement dans le cas des dirigeants de groupes non-étatiques n'a été soulevée devant des instances pénales internationales que depuis 1990. La création des tribunaux pour l'ex-Yougoslavie et la Rwanda a en effet changé la situation juridique, puisqu'ils admettent la responsabilité pénale des dirigeants non-étatiques. C'est ainsi que dans le cas *Aleksovsky* jugé en 1999 par le Tribunal pénal international pour l'ex-Yougoslavie, les juges ont considéré que le statut étatique ou non-étatique de l'accusé n'avait aucun rapport avec la question de la responsabilité du supérieur. Ils ont également considéré que la nature, interne ou internationale, du conflit au cours duquel les actes avaient été commis, ne devait pas être prise en considération. Le statut de la Cour pénale internationale, qui s'applique aussi aux conflits armés internes, confirme cet état de choses, puisque son article 28 reconnaît la responsabilité de "personnes agissant effectivement comme commandants militaires". Ce terme peut s'appliquer aux dirigeants des

groupes non-étatiques, et on peut donc conclure que le principe légal de la responsabilité du commandement de ces dirigeants est maintenant établi.

Les perspectives sont moins brillantes en ce qui concerne la mise en oeuvre et, jusqu'à présent, il y a eu très peu de mises en accusation de dirigeants de groupes non-étatiques pour des crimes internationaux. C'est ainsi que, par exemple, les tribunaux pour le Rwanda et l'ex-Yougoslavie se sont essentiellement concentrés sur les crimes commis par des agents étatiques. Il est d'ailleurs permis de penser que c'est surtout dans ce but qu'ils ont été créés, car il existe de sérieuses lacunes en droit national pour ce qui a trait à la poursuite de ces agents. On peut donc s'attendre à ce que la Cour pénale internationale traite aussi essentiellement de cas impliquant des agents étatiques. Par contre, le Tribunal spécial pour la Sierra Leone permettra peut-être de combler en partie le fossé qui existe en termes de poursuites d'agents non-étatiques. Il se pourrait que ce tribunal international soit le premier à mettre en accusation et condamner un dirigeant non-étatique en la personne de Foday Sankoh, chef du Front Unifié Révolutionnaire.

Si l'on part du point de vue que les poursuites de dirigeants non-étatiques par les tribunaux internationaux seront rares, il faut poser la question de savoir quels sont les autres moyens de traduire ces personnes en justice. Une option consiste à mettre en accusation, par le groupe non-étatique dont ils font partie, des membres individuels soupçonnés d'avoir commis des violations. Cette possibilité semble toutefois peu réaliste, car on voit mal le droit humanitaire accorder une telle autorité à ces groupes. Les Etats peuvent aussi se charger de traduire en justice les membres de groupes non-étatiques, puisque les traités de droits de l'homme obligent en général les Etats à punir les crimes commis sur leur territoire. Dans ce cas de figure, il y a cependant un risque de voir l'Etat poursuivre les acteurs non-étatiques pour trahison plutôt que pour crimes internationaux. Une dernière possibilité consiste en la poursuite des agents non-étatiques par des Etats tiers, sur base de la juridiction universelle.

Quoi qu'il en soit la traduction en justice d'individus, simples membres ou dirigeants, appartenant à des groupes non-étatiques, est moins importante que l'établissement de la responsabilité de ces groupes en tant que tels, puisque les actes qualifiés de crimes internationaux trouvent leur base dans la collectivité. Ceci n'est pas une tâche aisée. Effectivement, en droit international, tenir les groupes non-étatiques eux-mêmes pour responsables de leurs actes, soulève différents problèmes juridiques, bien que le principe de cette responsabilité ait été admis.

Un premier problème est celui des règles d'attribution des actes commis par des groupes non-étatiques, règles qui n'ont pas été établies. L'attribution de violations soulève tout d'abord la question de savoir quelles personnes peuvent faire naître la responsabilité du groupe non-étatique. La seule règle qu'on peut trouver sur ce sujet dans la pratique internationale mentionne que les "membres" des groupes non-étatiques peuvent engager la responsabilité de ces groupes. Son utilité reste toutefois limitée puisque le droit international ne fournit pas de critères permettant d'identifier les "membres" concernés.

En l'absence de pratique internationale et de règles conventionnelles sur l'attribution d'actes aux groupes non-étatiques, la question suivante se pose: peut-on, par analogie, appliquer le droit de la responsabilité des Etats aux groupes non-étatiques? Il existe en effet une certaine similarité entre eux, ce qui justifie cette interrogation. Ces points communs – entité collective possédant un certain degré d'organisation, poursuite ou exercice du pouvoir politique, etc. – impliquent-ils que les structures des groupes non-étatiques peuvent être mises sur le même pied que les organes de l'Etat, pour ce qui concerne l'application du droit de la responsabilité des Etats? Si l'on prend comme exemple les *Taliban*, on peut dire que ce mouvement possède certaines caractéristiques factuelles d'un Etat. Certains groupes armés sont par contre moins structurés et ne contrôlent pas de territoire. Dans ce cas, la responsabilité de ces groupes découlera, selon la pratique internationale, plutôt de leur contrôle effectif sur des personnes.

Mais que se passe-t-il lorsque les actes commis par des membres sont contraires aux instructions en vigueur dans le groupe? Peut-on, dans ce cas, malgré tout attribuer ces actes au groupe dans son ensemble? La responsabilité de l'Etat est effectivement engagée quand bien même ses agents ont désobéi. Dans le cas des groupes non-étatiques, la pratique internationale suggère qu'il n'en va pas de même. Ceci est peut-être la conséquence logique de l'absence de définition précise des groupes non-étatiques et de la difficulté d'identifier leurs "membres". Quoi qu'il en soit, ceci constitue une autre lacune dans le régime de la responsabilité internationale, puisqu'en sont dès lors exclus tous les actes commis par des unités locales qui n'ont pas reçu l'approbation officielle du groupe et ne correspondent pas à sa politique globale.

Le droit de la responsabilité des Etats prévoit spécifiquement que si le groupe non-étatique réussit à se constituer en Etat ou gouvernement, il peut à ce moment-là être poursuivi pour des actes commis durant la période antérieure. Se pose ici la question du temps qui va s'écouler avant de pouvoir éventuelle-

ment entamer la procédure pénale, puisqu'il faut attendre le "résultat positif" avant de pouvoir traduire l'Etat ou le gouvernement en justice pour les actes commis par le groupe non-étatique qu'il a remplacé. Un autre problème qui se pose à cet égard concerne les groupes terroristes, puisqu'en général ils ne deviendront ni Etat ni gouvernement.

Par rapport à la responsabilité des groupes non-étatiques en tant que collectivité, existe-t-il une instance auprès de laquelle une réclamation contre ceux-ci peut être introduite? La réponse est négative: il n'existe pas d'instance internationale qui soit expressément mandatée pour vérifier le respect du droit applicable par les groupes non-étatiques. La faute en incombe aux Etats qui, par crainte d'interférence, rechignent à compléter les règles existantes par l'adoption de moyens de vérification. Certains organismes internationaux ont, malgré cela et de leur propre initiative, étendu leur mandat aux actes commis par des groupes non-étatiques. Il s'agit du Conseil de Sécurité des Nations Unies, de la Commission des Droits de l'Homme des Nations Unies, et de la Commission Inter-Américaine des Droits de l'Homme. Cependant, et ce n'est pas vraiment une surprise, l'absence d'un mandat formel et explicite leur permettant de passer en revue les actes des groupes non-étatiques limite sérieusement le travail de ces organismes.

Prenons l'exemple de la Commission Inter-Américaine des Droits de l'Homme. La Commission a, de sa propre initiative, également inclus, dans ses rapports sur la situation des droits de l'homme dans différents pays, des violations du droit humanitaire perpétrées par des groupes non-étatiques. Toutefois, le cadre procédural est resté inchangé et, de ce point de vue, la Commission ne dispose donc pas des moyens nécessaires pour la mise en oeuvre de ses conclusions quant à la responsabilité des groupes non-étatiques pour leurs violations du droit humanitaire. La Commission est consciente de la situation mais il est improbable qu'elle adapte la procédure. En effet, dans ce cas précis, l'adaptation signifierait accorder implicitement aux groupes armés un statut quasi-gouvernemental, ce qui ne serait pas acceptable pour les Etats. Cette position rend donc improbables de plus amples développements sur la question de la responsabilité internationale des groupes non-étatiques.

Ceci est d'autant plus regrettable que l'ordre politique actuel est composé d'une grande diversité d'acteurs, entre autres les compagnies multinationales ou les groupes indigènes et tribaux ainsi que, bien entendu, les groupes non-étatiques impliqués dans des conflits armés. Ces groupes sont parfois amenés à négocier

avec des gouvernements et à participer à des conférences de paix organisées par les Nations Unies, ce qui indique clairement que les systèmes politique et juridique n'opèrent pas sur des lignes parallèles. Malheureusement, quand il n'y a pas de droit permettant la mise en oeuvre des décisions politiques ou quand les accords politiques ne prennent pas en compte les aspects juridiques, ni le droit international ni la politique internationale ne peuvent aborder la question des groupes non-étatiques de manière satisfaisante. Le droit international moderne devrait inclure toutes les organisations politiques qui jouent un rôle significatif dans le domaine des relations internationales, et c'est pourquoi il faudrait examiner si oui ou non le droit de la responsabilité des Etats devrait être réformé ou étendu afin d'inclure les autres acteurs importants.

Panel Discussion: Ways to bind Non-State Actors to International Humanitarian Law

Chaired by Mr Roy Gutman and with the participation of Dr. L. Zegveld, Prof. M. Veuthey, Prof. M. Sassoli, Dr J.-M. Henckaerts

What did agreements negotiated by the International Committee of the Red Cross (ICRC) with different non-state actors achieve? It is one thing to have non-state actors sign up, but some leaders or movements do not abide by their written commitments. How does one justify agreements that are later disregarded by a party that signed them? What are the lessons to be learned for the future?

The former Yugoslavia is a good example to try to answer this question. The main problem faced by the ICRC was that the Federal Republic of Yugoslavia considered that the situation was an internal armed conflict, whereas Croatia argued that it was an international armed conflict. The ICRC tried, by bringing the parties together, to eliminate the debate on qualification from the agenda and instead to focus on concrete issues. This strategy worked and it worked to a large extent thanks to Lord Carrington. The ICRC visited Lord Carrington in London at the time when he was chairing the conference on Yugoslavia to see with him what could be done in order to limit the damage. It was October 1991 and, at least from a humanitarian point of view, the situation on the ground was quite tragic. Following Lord Carrington's suggestion, the ICRC submitted a very concrete proposal, namely a couple of lines whereby the leaders of the different factions committed themselves to respect international humanitarian law. The status of the various entities was, by contrast, not mentioned in the document prepared by the ICRC. The next session of the conference on Yugoslavia, that took place in The Hague a week later, basically ended with the collapse of the conference. The only point on which the parties agreed were the few lines concerning respect for international humanitarian law that the ICRC had submitted to them.

The International Committee of the Red Cross (ICRC) subsequently built up on this commitment, calling on the parties to designate plenipotentiaries and inviting them to a first meeting that took place a few days after the events in Vukovar. The two-day meeting took place despite what had happened in Vukovar and the discussions, after some initial reluctance, proved to be quite open. The ICRC tried to eliminate all references to politics and the parties probably realized that they could gain something out of the meeting. It appears that the participants were rather proud to have reached an agreement that was not, or only to a small extent, controversial in terms of internal politics. For the Serbs, coming back to Belgrade with an agreement saying that the prisoners held by the Croats would be freed and repatriated was something positive. The same was true for the Croats. What did it mean for the victims? This is difficult to evaluate. Clearly, at the same time, some grave violations of international humanitarian law were perpetrated in Vukovar, but it is also a fact that quite a large number of people were spared.

The International Committee of the Red Cross (ICRC) tried to conduct the same exercise with and obtain a similar commitment from the parties to the Bosnian conflict in 1992. In this context, it was initially very important for the ICRC to have some kind of basis, especially in the field, and to be able to refer to some kind of commitment at the top in order to reach some results. This effort was abandoned because the ICRC felt that the gap between the possible theoretical commitment and the reality on the ground was too wide for the attempt to make sense. Meanwhile the organization had been able to capitalize on the personal relation established with certain persons who were individually very committed to the process. This meant that, even after ending the process, there remained a number of interlocutors here and there who proved helpful in solving some punctual problems.

The fact that non-state actors sign up to the rules and principles of international humanitarian law is not a panacea. At very best, it may be a kind of band-aid and it may in fact bring only marginal improvements. So some scepticism is in order when it comes to the efficiency of such commitments on the part of non-state actors. Are we too optimistic about trying to bind non-state actors? Should the International Committee of the Red Cross (ICRC) pursue its efforts to obtain commitments from non-state actors wherever and whenever it can?

Maybe we should deal with the use of armed force in the following way: is it

used by a state or against a state? When a state uses its armed force, it should have to abide by a certain set of rules. Likewise whenever anybody tries to use armed force against a state, beyond just minor criminal activity, those organisations should be faced with the choice of either signing up and recognizing a certain set of rules or being treated as criminals. Perhaps states will not like to change the character of these people from criminals to legitimate combatants, because this would mean that there would be no retribution for acts such as killing military personnel in an attempt to overthrow the state. By the same token, however, if you can get these non-state actors to limit their acts to combatants and not target the civilian population, the police, cultural property and so on, perhaps this in and of itself would have some salutary effect.

We have to have optimism and we must keep trying to convince non-state actors to respect international humanitarian law. We cannot give up on these efforts but, at the same time, we have to be realistic in our ambitions as to how fast these commitments are going to transform things. Perhaps the diplomatic convention that led to the elaboration of Additional Protocols I and II did the world a disservice, because it really divided the use of armed conflicts into two boxes. The result then allowed states, on the one hand, and non-state actors, on the other hand, to play games with these terms and with the distinction between international and internal armed conflicts. All lawyers are a little bit sceptical and we wonder whether the glass is half full or half empty. We should not be excessively hopeful but nonetheless we should continue by all possible channels, whether diplomatic or via non-governmental organizations (NGOs) or the International Committee of the Red Cross (ICRC), to try and get people to behave in a proper way.

When the International Committee of the Red Cross (ICRC) goes out in the field and tries to negotiate agreements with non-state actors, the organization should not feel that it is on its own and that it is out there as the only entity holding the lantern. On the contrary, since the ICRC is carrying everybody else's water for them, it should really have the backing of all the major parties. ICRC delegates should feel that, when they are negotiating with non-state actors, they are doing so not only on behalf of their organization but also on behalf of the international community. The ICRC acts as if it were negotiating on behalf of the international community, and yet states do not back the organization up and do not treat actions against ICRC personnel in the field as crimes. Very often states consider such acts as odd events happening in the middle of nowhere.

The International Committee of the Red Cross (ICRC) should not be alone. To begin with, what it is doing was supposed to be the job of the United Nations (UN) Security Council. The ICRC, however, has the wonderful advantage that it is trusted as being non-political. The UN Security Council, whenever it acts and this will remain so for at least the near future, does not have the neutrality that the ICRC has. So clearly the ICRC or any other organization that tries to broker respect for international humanitarian law should be vigorously supported. This does, however, not exonerate the organization that was set up to provide world peace and security from its responsibility in this respect. We all know why for decades the UN was not in a position to do this job. Now we see that things are going better and hopefully the situation will keep improving.

What are the ways and means that can be used in order to convince non-state actors that they should comply with the rules and regulations of international humanitarian law? Can the International Committee of the Red Cross (ICRC) do something in order to bring about compliance from non-state actors?

This suggestion is probably anecdotal but perhaps some more publicity should be given to the example of Mao Zedong, who was during the Chinese civil war encouraging his troops to respect at least some rules of international humanitarian law. Indeed Mao was a rather successful *guerrilla* leader and, if one can persuade people that it is actually effective as a method of *guerrilla* warfare to follow certain rules, then that may be worth quite a lot of people signing treaties. So if the rebels in Nepal call themselves Maoists, somebody ought to be persuading them that they will do even better if they follow Maoist teachings. The point is not completely a joke. Maybe there would be some way of getting this message through. Mao Zedong possibly deserves a little bit more credit than he sometimes gets.

The example set by Mao Zedong was subsequently followed by various *guerrilla* movements. Mao himself, however, was simply imitating Sun Tsu who, in the "Art of War", said that one should "build a golden bridge to the fleeing enemy". By the same token, counter-insurgency warfare was most successfully conducted by humanitarian-minded leaders, like the British during the emergency in Malaysia. Lessons could be drawn from these situations and replicated in other cases. There are also examples of low-level agreements between counter-insurgency troops and local *guerrillas*, be it during World War II between Italian partisans and German occupation forces or between Portuguese troops

and liberation movements in Africa. These agreements were obviously not known in the capitals, because they were against the rules that said that terrorists had to be purely and simply eliminated. Nonetheless these examples illustrate that, beyond the scope of law, the practicality of humanitarian gestures is well known by people battling in the field because eventually they recognize that it is wise to abide by certain principles.

Non-state actors are in a very weak position. More than anything else they need recognition. No one is going to recognize them as a state, and in particular it would be difficult to get the United Nations (UN) Security Council to recognize them, but perhaps some kind of deal can be made such as giving these groups some kind of limited recognition as combatants in exchange for doing certain things. That would include allowing observers in, perhaps allowing Cable News Network (CNN) in because they are as good an observer as anybody else. Some kind of intermediate form of recognition would be delivered not by governments or the UN Security Council but by some neutral technocratic body, such as perhaps the International Committee of the Red Cross (ICRC) although this would entail taking political decisions. In exchange for that recognition, non-state actors would get certain rights and certain obligations. Anybody who failed to apply for that status would have no rights at all. The consequence would be that the members of these groups would not be considered as combatants and, if captured, would be sent to lawless places like Guantanamo.

The basic issue is that in the current situation there is a tendency to deal with irregular groups as actors that have obligations only. We look at non-state actors and think that we have to restrain them as much as possible because they are dangerous, which amounts to treating them as criminals. We also look at them as mere individuals rather than as a collective entity whose aim is to get as much recognition as possible. These groups actually get this recognition on the political scene every now and then. Legally speaking, this means that non-state actors get not only obligations but also rights. Individuals can be held criminally responsible for committing crimes, but much more than that is expected from groups. They are expected to organize fair trials for example. Since you expect them to behave like an organized entity, you cannot merely deal with them as individuals who are not allowed to commit crimes. Obligations imply rights and the recognition implies for instance that they make their own rules – see the example of Mao Tse Tung.
States will have difficulties even with this concept and will question the fact that non-state actors make their own rules since we have common article III to the

Geneva Conventions. Clearly a problem appears if the two sets of rules are not completely matching. A good idea would be to have irregular groups agree with the rules that are applicable to them. If they do not accept these rules, non-state actors will then be seen and treated as individuals. In the opposite case, they will be treated as an entity with some responsibility. Non-state actors have to show active signs that they consider themselves bound. An independent "verification entity" would not be sufficient to implement this system. One would also have to involve the state directly concerned or perhaps even the states in the region. In other words, irregular groups should not only associate with a piece of paper but actually announce what their own rules are and incorporate them into their own system. The international side, be it the International Committee of the Red Cross (ICRC) on its own or preferably with the backing of the international community, would then denounce the violations of those who do not observe the rules and penalize them.

The International Committee of the Red Cross (ICRC) will not be involved in a "deal", whereby a non-state actor would accept to implement rules of international humanitarian law in exchange for something in return. The ICRC has a different perception of the situation: it considers that the proper behaviour should be enforced for whatever reason a party is holding arms in a given part of the world. The ICRC does not bargain and either give something in return for proper behaviour or withdraw something as a penalty for bad conduct. Perhaps the United Nations (UN) can act in such a way but not the ICRC, which considers that what really maters is the implementation of the rules of international humanitarian law. Besides it is not a good solution to say to non-state actors that, if they fail to comply with certain obligations, they automatically become total outlaws and lose all rights. As a matter of fact even criminals have rights, but anyway the approach that consists in criminalizing non-state actors may not be a very productive one.

Can the different points of view be reconciled? There is some obligation on the part of non-state actors signing up to various agreements because, in order to be recognized as lawful combatants, they need to have a proper command and disciplinary structure that inter alia requires compliance with the law of armed conflicts. This is one of the big grey areas in the law of armed conflicts as it currently stands. It is assumed that members of the regular forces will comply with the law of armed conflicts and so no such requirement is attached to them. Certainly with regard to irregular forces, this requirement is present. How can one establish that this requirement is being fulfilled? Supposedly, if there are

disciplinary lapses and steps are taken to punish those concerned, then there is evidence of compliance. If on the other hand there is a general lack of regard for international humanitarian law, then the world community will not consider the group concerned to be lawful combatants because they are not behaving in accordance with the law of armed conflicts. It is important that non-state actors formally accept to comply with international humanitarian law for instance through the signature of agreements, but they also have to be made aware of what this entails in terms of practical and concrete obligations.

Can we consider non-state actors as a homogeneous category? Do all non-sate actors pursue the same kind of objectives?

If we deal only with non-state actors that are organizations wishing in some way to become states, either because they are making secession from an existing state or because they are insurgents who think that their idea of the state is better than the existing one, we fail to see the full range of the problem. Those groups want to become states. This means that they have at least a vague idea of some rules that they want to respect, because they want to become the legal rulers of their country. In addition many of these organizations, the communist ones for instance, are thinking of the state such as we know it. There are, however, other categories of non-state actors. We see movements who have a completely different cultural background. They do not believe that the state as it exists is a legitimate representative of people and they are convinced that it should be replaced by a totally different society. There are also non-state actors that have no ambition to become states or governments, such as commercial companies. Some of these companies are nevertheless sometimes behaving like combatants or recruiting combatants in some parts of the world. They enforce law and order in some areas, even taking prisoners with whom they deal more or less properly. The discussion about these non-state actors has to be conducted in other terms because they fall in a different category of non-state actors.

The International Fact Finding Commission (IFFC), whose competence stems from the first Additional Protocol to the Geneva Conventions and so really relates to international armed conflicts, so far has not been formally required to do any fact finding. It has also made itself available for other situations if people are prepared to accept its involvement. For instance, the IFFC could have been called upon to shed light on the successive massacres that took place in

Northern Afghanistan. This would have been an ideal situation for the IFFC to investigate. Why is there such reluctance to use its services? Is it because the IFFC is not known? Is it because people do not really understand what its jurisdiction is? Is it that people do not want outside interference in what they see as their internal affairs?

In 1991 when the International Committee of the Red Cross (ICRC) had meetings with representatives of Yugoslavia and Croatia in connection to the events of Vukovar, a suggestion was made to call upon the International Fact Finding Commission (IFFC). When informally approached on a possible involvement, the President of the IFFC expressed his readiness to look into the matter should he receive an official request. The process went rather far but, at the last minute, Yugoslavia changed its mind. If at that stage Yugoslavia had agreed to the procedure, this could have changed what happened not only in the war between Croatia and Yugoslavia but also in the Bosnian conflict. With regard to other mechanisms provided for in international humanitarian law, for instance protected areas, the objections to establish them came from the international community that preferred to resort to other "structures" with the result that we all know. Had a proper approach taking into account existing instruments been chosen, the outcome might possibly have been different.

The International Fact Finding Commission (IFFC) is an instrument that should be better and more frequently used than is currently the case. In the end, as we have seen with the human rights system, it is the victims who can look best after their interests. As long as there is no reporting system and no individual complaints system for international humanitarian law violations, the IFFC represents the best solution. There is a mystery as to why states are so reluctant about voluntary reporting systems and why they do not propose a third Additional Protocol with an individual complaints mechanism, whereas this already exists in human rights law. This mechanism was very much resisted in the beginning but gradually it has caught on and now all the victims of armed conflicts apply to the human rights mechanisms because it is the only recourse available to them. We should definitely move away from the existing concept of state-centred international humanitarian law and towards a victim-orientated international humanitarian law.

Although accountability was not listed as an important external element of pressure or leverage to obtain compliance with agreements, we should hold non-state actors responsible for their violations of international humanitarian law. In this regard, one of the key arguments that can be impressed upon them is that applying the law during an armed conflict is a good thing otherwise it can come back and hit you after the war. In this respect what is the role of the International Committee of the Red Cross (ICRC) and of the universal jurisdiction that is starting to take root around the world?

A step in the right direction may be to treat non-state actors like governments, namely to name and shame them whenever they perpetrate violations of international humanitarian law. Human Rights Watch (HRW) already proceeds in this way. There is an additional tool that the organization frequently uses with governments: persuasion. This is more difficult with non-state actors. At the moment, the challenge we face is to find a way of naming and shaming that matters to the irregular groups. One example is a controversial, powerful and elaborate report on suicide bombings in Israel prepared by HRW and due to come out soon, that may have some impact in naming and shaming some of the groups involved.

What else needs to be done by the international community? The International Committee of the Red Cross (ICRC) is very reluctant to get into the game of naming and shaming and most probably should stay out of that game, because other organizations already do this. There are three levels at which actions should continue to be undertaken: the public naming and shaming, the work of the ICRC, and further regulation via legal instruments. There are no other means available. The truth of the matter is that some of these developments, for instance the naming and shaming of non-governmental entities by the human rights movement, are rather new. Human Rights Watch (HRW) started alone fifteen years ago and Amnesty International ten years ago. It has been a shy and slow moving process, but we are going in the right direction.

The international community needs to address the issue of the legal status of non-state actors. After all, the United States (US) position is that there is such a notion as the one of unlawful combatant. This is an unsatisfactory situation. If there is a need to look into the Geneva Conventions and into the existing treaty law basis because some rules have to be adapted, this should be done without procrastinating. This is a huge challenge facing the international community but it is about time to address it. The International Committee of the Red Cross

(ICRC) will have hesitations and difficulties but should also take the lead in this endeavour. The ICRC should actually have done so a long time ago.

There is a need to look again at international humanitarian law and see if it has to be elaborated. Are we, however, not opening a Pandora's box if we do that? How can one reconcile the different views held within the international community in this regard? Is there a way to make specific agreements and beyond that, international humanitarian law in general, take hold with non-state actors?

There is no question that certain aspects of international humanitarian law could be developed. Unfortunately the current discussion revolves rather around a possible "downgrading" of international humanitarian law as far as certain issues are concerned. Those who want to adapt international humanitarian law to present realities say, for instance, that it is unrealistic to treat members of Al-Qaeda as prisoners of war. This would mean that for the first time in history international humanitarian law would, through a new development, shrink instead of expand. This is a distinct possibility. There are, however, many other issues where international humanitarian law could be developed.

This said, everyone agrees that the real problem is the implementation of the existing law. This phenomenon is not limited to the fact that non-state actors do not sign up to additional obligations or that we cannot prove that everything is customary law. Ninety per cent of the suffering existing today in the world as a consequence of non-international armed conflicts results from the violation of article 3 common to the four Geneva Conventions that are accepted by everyone. The existing law, in this case article 3 and the second Additional Protocol, applies independently of the will of those who do not want to commit themselves personally. Except for pedagogical and diplomatic reasons, signing up has a sense only if you accept more than what you are bound to: for instance the acceptance of the whole of the Geneva Conventions in an international armed conflict or parts of the Geneva Conventions in a non-international armed conflict. If an armed movement declares during a press conference that its members will respect the entire content of the Geneva Conventions, it would be more realistic to suggest that the group limit its first objective to the respect of common article 3. Later on, if and when this is achieved, the movement can make a more ambitious declaration. Statements are easy to make and, unfortunately, there are groups that are unwilling to respect anything but try to get some legitimacy through grandiose declarations.

Customary international law is obviously very important to supply the law of treaties but it remains more difficult to enforce. States refused, during the diplomatic conference of 1974 to 1977, to accept certain obligations when it comes to non-international armed conflicts and they keep refusing these obligations today. To try to impose them through customary international law may not be very realistic and effective because international law still depends largely on the will of states. If states reject something, it will not work even if it is firmly grounded in customary international law.

Concluding remarks

The value of "good old" article 3 common to the four Geneva Conventions is indisputable. In every armed conflict it could provide a lot of comfort to all parties involved, including irregular armed movements. There is a general agreement that these groups are bound by common article 3. This is, however, the theory and in practice they very often do not abide by their obligations. Why is this so and how can we solve existing problems, without questioning the relevance and applicability of article 3?

In international armed conflicts we are dealing with combatants, whereas in internal armed conflicts the state is dealing with criminals who, at the same time, should comply with common article 3. This does not work so how do you go about it? Non-state actors should be freed from this "criminality status" and this implies some kind of recognition. During the cold war it was always easy because the parties were backed either by the West or the East and it was possible to ask one of the two sides to lean on the rebels so that they would behave more correctly. The situation has of course changed and we are now confronted with rebel groups that fund themselves through different criminal activities.

There could be more creative ways of implementing international humanitarian law, for instance in the case of multinational companies. Some of them, like British Petroleum in Colombia or Shell in Nigeria, have learnt, the hard way so to speak, that it is good for their image to be humanitarian and we should capitalize on this interest. Generally speaking it is important to look for other external factors that would enable us to improve implementation of international humanitarian law. Perhaps there are no internal armed conflicts because there is always an international involvement of some sort, whether it is through the provision of weapons or funds. If one can get to the suppliers, then one can actually enforce the rules.

How can we make the rules, which the International Committee of the Red Cross (ICRC) tries to get non-state actors to sign up to, work? There has to be a role for the states and the international community, but they have to find a way to achieve this objective without prejudicing the work of the ICRC in the first place. This is a real challenge and one that should be addressed as a matter of priority. To make the rules work, one has to make the rules known. The teaching and knowledge of international humanitarian law is an obligation enclosed in the Geneva Conventions and governments must respect this obligation. This implies perhaps a more active attitude towards disseminating international humanitarian law. As far as the ICRC is concerned, it very much wishes to obtain a strong commitment from the European Union (EU) at the next International Red Cross and Red Crescent Conference with regard to the dissemination of international humanitarian law within the school system of the EU. The dissemination of international humanitarian law is not only of concern for countries at war. Rather it is a general obligation for all states parties to the Geneva Conventions.

Relevance of International Humanitarian Law to Non-State Actors **Bruges Colloquium**

25th-26th October 2002

DAY 1 - Friday 25th October 2002

09.00 Welcome and registration

09.30 Opening address by **Prof. P. Demaret**, Director of Legal Studies Department, College of Europe
Opening address by **Prof. A. Petitpierre**, Vice-President of the ICRC

PART I: NEW DIMENSIONS OF INTERNATIONAL SECURITY AND INTERNATIONAL HUMANITARIAN LAW

Topic 1: International Humanitarian Law (IHL) challenges in the new trends in international security

10.00 *Asymmetric Warfare: some personal reflections:*
Major General A. Rogers (Retd) - Former Director of the Army Legal Service, UK Ministry of Defence

10.30 *IHL and Non-State Actors: synopsis of the issue:*
Prof. E. David - Université Libre de Bruxelles

11.00 Coffee break

11.30 Discutant: **Prof. E. David** - Université Libre de Bruxelles:
Le Droit international humanitaire (DIH) face à ces évolutions: un droit adapté ou adaptable?

12.00 Discussion chaired by Prof. E. David

Topic 2: Terrorism, collective security and IHL

15.00 *Terrorisme et DIH: certitudes et questions:* **Prof. Y. Sandoz** - Ancien Directeur du CICR, Chargé de cours à l'Université de Genève

15.30 *Collective security operations and IHL:* **Prof. M. Sassoli** - Université du Québec

16.00 Coffee break

16.30 Discussant: **Mrs L. Van Dongen**, Expert in IHL, chairing a panel discussion on *new dimensions of international security and IHL* with Gen. A. Rogers, Prof. E. David, Prof. Y. Sandoz, Prof. M. Sassoli.

18.00 End of session

19.30 Dinner at *Provinciehuis*, the official Residence of the Governor of the Province of West Flanders, with as guest speaker **Mr R. Cooper**, Director General DG E External Relations - General Secretariat of the Council of the European Union

DAY 2 - Saturday 26th October 2002

PART II: BINDING NON-STATE ACTORS TO RESPECT INTERNATIONAL HUMANITARIAN LAW:

09.00 Welcome and coffee

09.15 *Afghanistan: a case study* by **Mr R. Gutman**

09.30 *Binding Non-State Actors through treaty law and custom:* **Dr J.-M. Henckaerts** - ICRC Legal Advisor

10.00 *Learning from History: Accession to the Conventions, Special Agreements, Unilateral Declarations:* **Prof. M. Veuthey** - Fordham University

10.30 *Accountability of Non-State Actors in International Law:* **Dr L. Zegveld** - Attorney in Amsterdam, Expert in IHL

11.00 Coffee break

11.30 Discussant: **Mr R. Gutman** - Journalist "Newsweek", chairing a Panel discussion on *Ways to bind Non-State Actors to IHL* with Dr L. Zegveld, Dr J.-M. Henckaerts, and Prof. M. Veuthey.

12.30 Concluding remarks by Mr R. Gutman

Curriculum Vitae des Orateurs

Speakers' Curriculum Vitae

Le Professeur Paul Demaret est Licencié en sciences économiques et Docteur en droit de l'Université de Liège, où il également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux USA, et est titulaire d'un Master of Laws de l'Université Columbia et d'un Doctorate of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin, et Coimbra, ainsi qu'à l'Académie de Droit Européen de Florence et au Colegio de Mexico. Il est actuellement professeur ordinaire à la Faculté de droit de l'Université de Liège, Directeur des études juridiques au Collège d'Europe de Bruges, et Directeur de l'Institut d'études juridiques européennes de l'Université de Liège.
Spécialiste des aspects économiques et juridiques de l'intégration européenne, le Professeur Demaret est l'auteur de plusieurs ouvrages et de nombreux articles sur ces questions. Son expertise en matière de commerce international est régulièrement sollicitée par diverses institutions, dont l'Organisation Mondiale du Commerce.

Le Professeur Anne Petitpierre possède un diplôme de l'Ecole de Traduction et d'Interprétariat de Genève. Elle est aussi Docteur en Droit de l'Université de Genève, où elle est actuellement Professeur de droit commercial et de droit de l'environnement. Elle exerce comme avocate au barreau de Genève depuis 1970 et a publié de nombreux ouvrages juridiques. Le Professeur Petitpierre a été membre du Parlement cantonal de Genève. Pendant neuf ans, dont six passés à la présidence, elle fût membre du Comité Suisse du Fonds Mondial pour la Nature.
Le Professeur Petitpierre a été élue en 1987 Membre du Comité international de

la Croix-Rouge (CICR), avant de devenir Membre du Conseil Exécutif de l'institution de 1989 à 1997. Elle est depuis 1998 Vice-Présidente du CICR.

Major General Anthony Rogers holds a Masters of Law degree and gained his qualifications as a solicitor at Liverpool University. He joined the British Army Legal Services in 1968, was awarded the Order of the British Empire in 1985, and was appointed Director of the Army Legal Services in 1994. He retired in 1997 after a thirty-year career as military lawyer.
As a writer, lecturer and consultant on the law of war, Major General Rogers is Honorary President of the International Society for Military Law and Law of War in Brussels. He is a Member of the International Fact-Finding Commission. Major General Rogers is a Fellow of several academic institutions, including Cambridge University Lauterpacht Research Center for International Law and the University of Essex Human Rights Center. He is the author of several publications, amongst which a 1996 prize-winning book on the law of war.

Le Professeur Eric David enseigne entre autres le droit international public et le droit des conflits armés à l'Université Libre de Bruxelles (ULB), domaines dans lesquels ses différentes publications font autorité. Il a dirigé le Centre de Droit International de l'ULB et est actuellement Directeur du diplôme d'études spécialisées en droit international de la faculté de droit de cette même université.
Eric David est régulièrement consulté par des Etats et des organismes publics belges ou internationaux, et préside depuis 1996 la Commission consultative de droit international humanitaire de la (section francophone de la) Croix-Rouge de Belgique. Membre de plusieurs tribunaux d'arbitrage internationaux, il est intervenu en tant que Conseil dans de nombreuses affaires soumises à la Cour de Justice Internationale de La Haye.

Le Docteur Yves Sandoz a obtenu une licence puis un doctorat en droit de l'Université de Neuchâtel. Délégué du Comité international de la Croix-Rouge (CICR) sur le terrain de 1968 à 1973, il a effectué des missions notamment au Nigéria, en Israël et dans les territoires occupés, au Bangladesh et au Sud-Yémen. Attaché au siège du CICR à Genève de 1975 à 2001, il a occupé pendant dix-huit ans le poste de Directeur du droit international et de la doctrine, puis aussi de la communication, avant de devenir Conseiller spécial de la Direction du CICR. Le Docteur Sandoz a aussi été membre de la Commission Permanente de la Croix-Rouge et du Croissant Rouge pendant douze années.
Yves Sandoz est un spécialiste du droit international humanitaire. Il a enseigné cette matière à l'Institut International des Droits de l'Homme à Strasbourg ainsi

qu'à l'Académie des Droits de l'Homme de La Haye. Il est l'auteur d'une centaine de publications dans ce domaine. Après avoir contribué à sa conception et mise en place, Yves Sandoz est actuellement membre de la Direction provisoire du Centre Universitaire de Droit International Humanitaire créé en 2002 par l'Université et l'Institut Universitaire des Hautes Etudes Internationales de Genève. Il a récemment été élu Membre du CICR, poste qu'il occupera à partir du 1er novembre 2002.

Le Professeur Marco Sassoli, Docteur en droit et avocat, enseigne le droit international public à l'Université du Québec à Montréal depuis janvier 2001. Auparavant, il a été greffier au Tribunal fédéral suisse de Lausanne et Secrétaire Exécutif de la Commission Internationale de Juristes à Genève. Marco Sassoli a également travaillé pendant treize ans au Comité international de la Croix-Rouge (CICR), où il a été notamment Coordinateur des activités de protection en ex-Yougoslavie, Chef de Délégation en Jordanie et Syrie, et Chef adjoint de la division juridique au siège à Genève.
Le Professeur Sassoli a publié une thèse de doctorat sur la théorie des sources du droit international, un manuel d'enseignement du droit international, ainsi que de nombreux articles sur le droit international humanitaire, le droit international des droits de la personne, le droit international pénal et le droit constitutionnel suisse.

Mrs Lara Van Dongen holds a Bachelor of Arts in international relations from the University of the Pacific and a Master's Degree in fine arts from Goddard College. She completed her Law Degree at New York University School of Law, where she specialized in the interaction between humanitarian, human rights and refugee law as well as the individual and state responsibility for human rights violation. Mrs Van Dongen has worked on legal matters for several international organizations including the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, the United Nations Center for Human Rights and the Organization for Security and Cooperation in Europe (OSCE).
From May 1997 until June 1999 Mrs Van Dongen was Director of the Foundation on Inter-Ethnic relations, a body established in 1993 by the High Commissioner on National Minorities of the OSCE. She worked until recently as a Consultant to the Minister for Development Cooperation in the Netherlands Ministry of Foreign Affairs. Mrs. Van Dongen has published two books and a number of articles, mostly dealing with human rights issues.

Mr Robert Cooper holds a Bachelor of Arts in philosophy, politics, and economics from Oxford University Worcester College and completed his Master of Arts in international relations at the University of Pennsylvania. He had a very long diplomatic career at the service of the United Kingdom's Foreign and Commonwealth Office, where he occupied inter alia the posts of Head of Far Eastern Department and Director for the Asia-Pacific region. Mr. Cooper was also Political Counsellor and then Minister at the British Embassy in Bonn, Head of defense and Overseas Secretariat at the Cabinet Office and Special Representative for the British Government on Afghanistan.
Robert Cooper is currently Director-General for External and Politico-Military Affairs at the Council of the European Union in Brussels. He has contributed different articles and reviews in several journals of international relations.

Mr Roy Gutman holds a Bachelor of Arts in history from Haverford College and a Master's of Science in international relations from the London School of Economics. He received an honorary Doctor of Letters' degree from Haverford College in 1995 and is a former president of "Overseas Writers", the oldest association of diplomatic writers in Washington D.C..
Roy Gutman has a journalistic career spanning more than three decades with a focus on East-West relations. He is currently a Senior Fellow at the US Institute of Peace and a Newsweek correspondent. His reports on ethnic cleansing in Bosnia-Herzegovina, including the first documented accounts of Serb-run concentration camps, won the Pulitzer Prize for international reporting in 1993 as well as other awards. In 1999 Roy Gutman co-edited a book that converts the main precepts of international humanitarian law to a set of tools journalists can use in reporting conflicts.

Doctor Jean-Marie Henckaerts successively obtained a Bachelors' Degree from the School of Law at the University of Brussels, a Masters' Degree from the School of Law at the University of Georgia and a Doctorate of Juridical Science from George Washington University Law School. A Legal Adviser of the International Committee of the Red Cross (ICRC) since 1996 he was previously a Postdoctoral Research Fellow at the Brussels University School of Law and at the same time a Legal Assessment Commentator on the American Bar Association Central and East European Law Initiative.
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