

Proceedings of the Bruges Colloquium

Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts

**19th Bruges Colloquium
18-19 October 2018**

Actes du Colloque de Bruges

Défis Légaux et Opérationnels Posés par les Conflits Armés Non-Internationaux Actuels

**19^{ème} Colloque de Bruges
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Collège d'Europe



Natolin



CICR

ICRC Delegation to the EU, NATO and the Kingdom of Belgium
Délégation du CICR auprès de l'UE, de l'OTAN, et du Royaume de Belgique

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PROCEEDINGS OF THE BRUGES COLLOQUIUM ACTES DU COLLOQUE DE BRUGES

Opening Remarks

WELCOME ADDRESS

Sieglinde Gstöhl

Director of Studies, EU International Relations and Diplomacy Studies Department of the College of Europe

Ladies and gentleman,

It is really a pleasure to welcome you to Bruges for the 19th edition of the Bruges Colloquium.

I am addressing you on behalf of the College of Europe. My name is Sieglinde Gstöhl and I am the rector of the European Union International Relations and Diplomacy Studies Department, which is one of the master programmes. I am also doing so on the behalf of professor Jorg Monar, who unfortunately could not be present today. As you may know, the College of Europe is a post-World War II product. It was established in 1949 and it has demonstrated its interest in peace, human rights and humanitarian issues, even more so after the end of the Cold War in the early 90s. We have established a second campus in Warsaw, Natolin where we also educate a large number of young people coming from more than 50 different countries, studying, working and living together on campus and experiencing the European Peace project and the European integration project at first hand.

I have to say that the College is very pleased with its long-standing cooperation with the International Committee of the Red Cross (ICRC). I would like to thank the ICRC for that as well and not just for the Colloquium today. In a few months' time, a second Colloquium is planned specifically for students to raise awareness of International Humanitarian Law (IHL) for young people. This will take place both here in Bruges and on the Natolin campus.

This year's Colloquium will address the legal and operational challenges raised by contemporary non-international armed conflicts. According to the Geneva Conventions, also dating from 1949, non-international armed conflicts are armed conflicts in which one or more non-State armed groups are involved with protracted armed violence between government authorities and organised armed groups, or even between such groups. These situations obviously raise a

number of important questions which this Colloquium will address, such as non-State armed groups' compliance with IHL, or the challenges which human stakeholders face in NIACS, just to name a few.

So on behalf of the College of Europe, which is very happy to host this event, I wish you an interesting two days, days with a lot of new insights, and new contacts maybe. Since I am here, I would like to seize the opportunity to thank Maureen Welsh for her organisation and her input on behalf of the College. I'm sure that a lot of people would like to thank the ICRC as well. And I would like now to pass the floor to my old friend Walter Füllemann, who is the head of delegation of the ICRC in Brussels.

Thank you.

OPENING ADDRESS

Walter Füllemann

Head of Delegation, ICRC Brussels

Thank you so much Sieglinde for hosting us and welcoming us.

Thank you Gilles Carbonnier, Vice-President, for being present for the first time, and I hope for many more to follow.

Dear Colleagues, dear friends, before I got into my French and English mix of welcome words, we were just talking about history and 1949 and we realised that the College of Europe was founded in 1949, the same year of the modern version of the Geneva Conventions. What is interesting is that the topic today is non-international armed conflicts (NIACs), but I would also like to point out that 2018 coincides with the 100th anniversary of the end of the First World War (WW I), which was an international armed conflict (IAC) *par excellence*. And because we are in Bruges, which is the capital of West Flanders, I have to say something about a place which is also in West Flanders, about 70 kilometers from here, called Ypres. Ypres was a very important place during WW I, so I just want to spend a minute on that.

It was the centre of what came to be called the battle of Ypres, the battle of West Flanders. The very first fighting of the battle started on the 19th of October 1914, the 19th October: tomorrow. But go back 104 years and during one of those battles, the second one, which started on April 15, there was the very first use in history of chemical weapons: poison gas. I am not a chemist but I understand that it turned out to be some kind of chlorine gas that was used for the very first time. Some people then called it mustard gas, you may have heard that, and then they actually called this substance Yprite, that was obviously related to the name of the city of Ypres. I am not only mentioning Ypres because of the first use of chemical weapons but also just to compare with NIACs if you compare the way that war was waged. The third battle, which took place between July and November 1917 led to no fewer than 500,000 casualties: 500,000 in four months. When we say casualties in war, we talk about people who were killed, wounded, imprisoned or missing. That was a lot of people in a very short period of time.

One interesting fact is, and I know we are in October and not December, but Ypres was one of the few places where there was a so-called unofficial Christmas truce between German and British forces in December 1945.

In conclusion, October 1945 was the end of the battle of Ypres. And I am very happy to learn that the College of Europe is today part of the peace initiative for Europe.

Now to commemorate the First World War, you can see downstairs, in the foyer, a little exhibition on the work of the Belgian Red Cross in the hospitals that were situated close to the frontline, as well as the work of the International Committee of the Red Cross (ICRC) who were visiting a number of prisoners of war and interned civilians in Belgium during that period.

Those were a few words on IAC, and I will now return to Bruges and our Colloquium.

Si le Colloque de Bruges peut être un moment où l'on se souvient en regardant en arrière, il est avant tout un moment prospectif. Il nous tient en effet à cœur de mettre le doigt sur les défis juridiques contemporains et les perspectives futures afin d'y répondre au mieux par un échange ouvert et franc que ce Colloque permet, depuis l'année 2000. Nous sommes donc à la 19e édition. Et il est vrai qu'aujourd'hui, si nous avons toujours quelques conflits armés internationaux, nous en avons bien plus de non internationaux. Et ceux-ci, vous le savez très bien, sont encadrés par nettement moins de normes que les conflits armés internationaux (CAI), et ces normes présentent bien plus de difficultés d'interprétation, ne facilitant donc pas la tâche de ceux concernés par la mise en œuvre du Droit international humanitaire (DIH), y compris des commandants militaires et de leurs conseillers juridiques. C'est donc, bien entendu, pour ces raisons que notre choix s'est porté aujourd'hui sur les conflits armés non internationaux, que j'appellerai par la suite les CANI.

Vous connaissez tous les raisons pour lesquelles les États n'ont pas souhaité adopter les mêmes normes en conflit armés internationaux qu'en CANI. J'en ai d'ailleurs évoqué certaines moi-même en ouvrant le Colloque de Bruges de l'année dernière, lorsque nous débattions des Protocoles additionnels de 1977. Vous en avez reçu les actes en arrivant ce matin. Mais cet état de choses est fâcheux, tant il est vrai que la souffrance humaine ne dépend pas d'une qualification juridique. Cependant la réponse à apporter, en termes de protection et d'assistance aux victimes, dépendra dans une large mesure de la qualification juridique.

Il est vrai que le Droit international humanitaire coutumier a permis de gommer un certain nombre de différences entre les deux régimes juridiques. En 2005, le CICR a publié son Étude sur le DIH coutumier. Et depuis lors, cette Étude est constamment mise à jour, afin de refléter au mieux l'état actuel du droit coutumier. Cette Étude a identifié 161 règles de DIH de nature coutumière. Et parmi ces 161, 146 s'appliquent aussi bien en CAI qu'en CANI. Ceci démontre que la pratique tend à réduire cette différence entre les régimes juridiques, mais ceci démontre également qu'une certaine différence persiste. Et ce sont précisément ces différences que nous discuterons pendant ces deux jours.

Il me tient à cœur de souligner ici, en particulier à l'attention de représentants étatiques et d'organisations internationales actives dans les conflits armés, qu'une qualification juridique

de conflit armé, et la détermination juridique de qui est partie à un conflit armé ne sont nullement des jugements. Il s'agit simplement de chercher à appliquer, le plus honnêtement possible, le régime juridique approprié à une situation qui est, par définition, difficile. Je comprends les contraintes politiques ou institutionnelles liées à une telle qualification, je comprends les craintes liées à l'image que peut avoir un gouvernement qui envoie ses forces armées « faire la guerre », mais ceci devrait passer en deuxième plan par rapport à la protection des victimes des conflits armés, mais aussi, d'ailleurs, à une détermination juridique et opérationnelle claire des limites dans lesquelles leurs forces armées conduiront leurs opérations. Il est en effet difficile et très peu confortable, pour un commandant d'opérations, d'avoir à mener une mission dans un cadre juridique et politique flou, ou qui ne correspond pas à la réalité du terrain. Nous avons tous été, trop souvent, le témoin des traumatismes que cela a pu laisser aux militaires qui se sont retrouvés empêchés d'agir dans des situations difficiles, et ce en raison d'un mandat ambigu. De telles prises de position politique ont ainsi mené à des tragédies qui auraient pu être évitées s'il y avait eu plus de courage et de détermination de la part de certaines autorités.

Ladies and gentlemen, in today's geostrategic world, which has become so complicated, we are witnessing numerous forms of non-international armed conflicts.

In its 2011 report entitled "International Humanitarian Law and the challenges to contemporary armed conflicts" that the ICRC presented at the 31st International Red Cross and Red Crescent Conference, we described a typology of six different kinds of armed conflicts, presenting different characteristics, but all of them fulfilling the required criteria for organisation of the parties and intensity of the fighting that are necessary to distinguish a NIAC from internal disturbances. I am sure that we will come back on this throughout the Colloquium and, especially, this morning in the first session. Maybe some of you, in the room, will have different views on this, and we welcome any open discussion. Indeed, not only the substantive norms of the law regulating NIAC can pose challenges, but already determining that a particular situation is a NIAC can be a challenge in itself.

I will not go into the programme of the Colloquium, the ICRC Vice-President will do this and set the scene for the following discussions. But I would like to raise one particular issue that the ICRC is working on with several authorities, States and international organisations. This issue is the one of support, of any kind, that States or international organisations are providing to warring parties in several armed conflicts, as we witness a lot in the Middle-East, but also in Afghanistan, In Ukraine, and in numerous situations in Africa. I am not referring especially to the support that would lead a supporting authority to become a party to an armed

conflict – that will also be specifically discussed during the first session – but I am referring to any support from political to financial one, or through the provision of equipment or advice.

This support comes with some responsibility to help the supported party to better comply with IHL. We can discuss at length the scope of the obligation to ensure compliance with IHL that is enshrined in Common Article 1 to the Geneva Conventions of 1949 and the Additional Protocol 1 of 1977, but this is not the aim here. There is evidently a certain degree of obligation to act – or refrain from acting – in order to help improve compliance with IHL, but there is certainly also a political, and a moral, obligation to do so.

In the discussions that we have with a number of States and international organisations, we are begging these authorities to use the leverage they can to help the parties they are supporting to better fulfil their own obligations under IHL. This can take different forms, from being extremely careful and selective when transferring weapons and ammunition, to helping States and non-States armed groups improve military doctrines and guidance, to strengthen IHL training, to building a political and legal environment conducive to the fight against impunity, or to exert some political pressure on the parties to be more responsible in the way they conduct operations, including detention operations.

Indeed, when supporting States and organisations seriously endeavour to apply some pressure on those who might be in the heat of a conflict in order to improve compliance with IHL, this can make a tremendous difference for the victims of armed conflicts around the world.

I would like to end by recalling the obvious, which is the aim of IHL: to bring protection and assistance to the combatant who are hors de combat and to the civilians. Indeed, we will discuss specific legal issues, and these discussions can be extremely dry sometimes. This is the nature of law, including of International Humanitarian Law. But in doing so, let us not forget the word ‘humanitarian’ in IHL. Let us not forget that human suffering does not depend on a legal qualification. Let us keep the aim of IHL in the very centre of the legal discussions.

Avant de céder la parole à Monsieur Gilles Carbonnier, Vice-Président du CICR, je voudrais remercier nos orateurs et modérateurs d’avoir accepté de venir partager leur expertise et confronter leurs idées lors de ce Colloque. Je voudrais également remercier notre partenaire, le Collège d’Europe, non seulement pour son hospitalité dans cette belle ville de Bruges, mais également, voire surtout, pour la confiance que le Collège nous a renouvelée cette année encore tant pour le Colloque annuel que pour les cours de DIH dispensés aux étudiants des deux campus du Collège.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons partager pendant ces deux jours qui s'annoncent très stimulants. Je rappellerai que, comme chaque année, les débats seront menés selon la règle bien connue de «Chatham House».

Avant de céder la parole à Gilles Carbonnier, puisque j'ai deux amis dans la salle, j'aimerais partager avec vous quelques éléments biographiques qui m'unissent à Gilles Carbonnier et à Sieglinde. Il s'avère qu'il y a 29 ans, Gilles Carbonnier et moi avons commencé ensemble au CICR, le même jour, au même endroit. Et nous voici de nouveau réunis dans la même salle 29 ans après. Il y a 30 ans, puisque nous sommes dans des réflexions historiques, en 1988, Sieglinde et moi avons fini nos études communes dans la même université et dans la même promotion. C'est donc un grand plaisir de les retrouver tous deux dans cette salle. Je dévoilerai également un petit secret que Sieglinde et moi partageons : nous sommes ici les deux citoyens de la Principauté de Liechtenstein. Ce qui me permet de remercier mes collègues du CICR, l'équipe du CICR de Bruxelles, sous le leadership de Stéphane, Olga, Maxime, David-Pierre, Elisabeth, et tous ceux qui ont œuvré pour organiser ce Colloque. Mais également mes collègues de Genève, Tristan, Tilman, Thomas et Pascal. Un grand merci à nos collègues venus de Paris et Moscou. Je propose que nous applaudissions les organisateurs, Stéphane en particulier. Et n'oublions pas nos interprètes, Nanaz et François qui, fidèlement, sont là aussi.

And last but not least, thank you to all participants present today.

Have a good Colloquium.

Gilles, the floor is yours.

Thank you.

KEYNOTE ADDRESS

Gilles Carbonnier

Vice-President of the ICRC

Dear Sieglinde and Walter, Ladies and Gentlemen,

It is a great pleasure to be with you. Let me first thank Walter for his very kind words, which do not make me feel any younger, but I must say that they are heartening. I also want to echo our words of appreciation to the College of Europe, through you Doctor Sieglinde, for co-organising the 19th edition of the Colloquium and for hosting us in this great city of Bruges.

As this is my first Bruges Colloquium, I feel it is fitting at the outset to mention my predecessor at the International Committee of the Red Cross (ICRC), Christine Beerli. To be honest, it is no easy task to follow in her footsteps at this particular event. This Colloquium was close to her heart and to her expertise and her passion as a trained lawyer. I, however, am 'just an economist'! That said, over the past 12 years I have greatly enjoyed daily cross-disciplinary exchanges with my international law colleagues at the Graduate Institute of International and Development Studies in Geneva. That is why it is both a great pleasure and a privilege to be with you and introduce the topics for discussion over the next two days.

This year, the Colloquium gives us the opportunity to explore a timely and fascinating topic: the legal and operational challenges raised by contemporary non-international armed conflicts (NIAC). Walter, let me thank you also for proposing that we refer to CANI in French and NIAC in English, even if it does not sound very nice! It is a helpful shortcut and in International Humanitarian Law (IHL) we are used to acronyms, so this is another acronym that we could use.

Many of these challenges arise from the nature – and consequences – of modern conflicts. After highlighting a few emerging trends, I will dwell on two key areas – detention and the conduct of hostilities – in particular in so-called 'partnered operations' – where we see pressing legal and operational challenges.

As you are all aware, many parts of the world are plagued by protracted armed conflict and spirals of violence. Conflicts tend to last for decades, if not generations. Political solutions remain elusive. National delivery systems of essential services often collapse.

In this context, ladies and gentlemen, let me highlight a trend that somehow defies the distinction between internal and international armed conflict: we now see local, regional and global stakeholders involved in protracted conflict. Foreign partners and allies are often involved in volatile coalitions of State and non-State players with boots on the ground.

It is shocking to witness the dramatic humanitarian consequences of such trends, which are often accompanied by a blurring of lines between civilians and militaries, and an unwillingness and inability to adequately protect those who are not participating in hostilities. Thousands of people are being detained, often outside any legal framework, and subject to inhumane conditions. The number of people going missing as a result of armed conflict is, likewise, dramatic. The devastating effects of violence are prompting more and more people to flee their homes, resulting in over 65 million people displaced, the highest number since the end of the Second World War (WW II).

The situation is compounded by the increasing fragmentation of armed groups and asymmetric warfare.

On the State side, the number of foreign interventions in many armed conflicts contributes substantially to the multiplication of actors involved. In many situations, third States or international organisations – such as the United Nations or the African Union – intervene, sometimes themselves becoming parties to the armed conflict. Such intervention – whether in support of States or of non-State armed groups – poses complex questions concerning conflict classification for IHL purposes. These questions often arise because of a lack of precise information about the nature of the involvement of third parties, but also when the latter simply deny any participation in the hostilities.

On the non-State side, we have of course the “classic” type of armed groups characterised by a well-structured and hierarchical organisation. Beyond this however, we frequently see increasing numbers of fragmented groups, whose loose structure and shifting allegiances are difficult to grasp. Ad-hoc alliances often turn sour and result in the formation of splinter groups, some of whom end up fighting against their mother groups or among themselves. Such situations pose a number of legal questions, notably on the circumstances and conditions under which such groups may qualify as parties to an armed conflict, with consequences for the determination of IHL applicability.

Ladies and Gentlemen, in 2017, the ICRC conducted many thousands of detention visits in more than 90 countries. These visits provide the organisation with unique insights into the often dire conditions and consequences of detention. Regardless of who is depriving people

of their liberty – or where – the ICRC all too often finds that detainees are subject to extra-judicial killing, enforced disappearance, torture and other forms of ill-treatment. Likewise, the ICRC frequently observes that detainees are held in inadequate conditions. They are not properly registered, or deprived of meaningful contact with the outside world. Our delegates also observe that people are detained arbitrarily, based on an unclear or non-existing legal framework, without effective review of their detention, and at times in secret or unofficial places of detention.

What does the law say about the severe humanitarian issues that many detainees face? I would submit that on a great number of points, the law provides adequate provisions to protect the fundamental rights and dignity of detainees. Thus, it is primarily the ignorance of – or failure to implement – existing law that leads to the inhumane treatment of detainees that we witness in our visits across the world. As an economist, let me add that the lack of dedicated resources and proper investment in infrastructure hampers adequate detention conditions.

However, on certain issues the ICRC is of the view that the scarcity of legal norms – especially in non-international armed conflicts – also constitutes an important obstacle to safeguarding the life, health and dignity of those detained.

There is indeed a significant disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflicts and the very basic rules that have been codified for NIACs. Although treaty and customary IHL contain vital protections, these are quite limited in comparison to what exists for international armed conflicts.

The lack of relevant guidance is acute when it comes, for instance, to grounds and procedures for internment. Contrary to international armed conflicts, there are no agreed rules on the grounds on which a person can be interned in NIACs, or on the procedures that must be followed to ensure that internment does not become arbitrary. This leads to very different practices by parties to armed conflicts, some of which are of grave humanitarian concern.

Another area in which IHL applicable in NIACs remains limited concerns the transfer of detainees from one authority to another. This normally occurs in a situation of extraterritorial NIAC, where foreign States and other forces support a host State in its fight against a non-State armed group. The relevant challenge then is: if a supporting State or other force captures somebody, under which conditions can it transfer the latter to the host State? In principle, transferring detainees is not unlawful. What we have seen time and again in practice, however, is that such transfers bring detainees into the hands of an authority that does not respect

their fundamental rights. In our view, IHL and Human Rights Law (HRL) prohibit any such transfer if there are substantial grounds to believe that the person transferred would be in danger of fundamental rights violations. In practice, however, numerous questions arise with regard to pre- and post-transfer procedures, which are essential to ensure that no one is transferred in contradiction with applicable IHL and HRL rules.

Ladies and Gentlemen, the package of IHL rules on the conduct of hostilities was one of the crowning achievements of the diplomatic process that led to the adoption of the 1977 first Additional Protocol to the Geneva Conventions. Over the years, most of these rules have won broad acceptance and become customary law. However, it is true that certain ambiguities in formulation have given rise to differences in interpretation, and, therefore, in their practical application. The changing face of warfare resulting, among other things, from constant development in military technology has also contributed to different readings of the relevant provisions. Among them are the definitions of military objectives, the principle of proportionality and the rules of precautionary measures.

Conflicts today are waged in the middle of densely populated areas with weapons designed for open battlefields. It is civilians who increasingly suffer the consequences, sometimes being used as human shields by belligerents.

A sober analysis of our working environment tells us that our humanitarian efforts to mitigate suffering will have limited success unless we make major efforts to shrink the needs in the first place. This will notably come from more stringent interpretations of what the fundamental principles of distinction, proportionality and precaution actually mean in practice.

In reality, we see a widespread and shocking lack of respect for the basic principles of IHL when it comes to the conduct of hostilities – the way war is being waged and the way in which weapons are being used. We see military strategies unfolding in which civilians become the primary object of attack rather than the primary object of protection.

It is essential to promote an interpretation of rules governing the conduct of hostilities that takes into account the delicate balance between the principle of humanity and military necessity. It is also essential to promote strict compliance with IHL basic principles.

In this regard, let us ask a few questions about compliance with the rules concerning the choice of means and methods of warfare. Let us ask ourselves, for instance, what Syrian, Yemeni or Libyan societies have gained or lost by belligerents' practice of directing attacks against civilians or indiscriminate attacks rather than restricted targeting of military person-

nel and objectives. What situations would exist there without the enforcement of blockades or sieges depriving the civilian population of essential supplies? What would be the fate of the population if fighters did not hide in civilian settings, or if explosive weapons were not used in populated areas without the required precautions?

The problem primarily stems from non-compliance with IHL rules, not from the rules themselves. Ladies and gentlemen, these rules serve as the primary guidance on how the parties to an armed conflict must behave. They are the product of generations of collective wisdom, and of the experience of those who came before us in an effort to codify the necessary balance between considerations of military necessity and the imperative of humanity. They reflect the values of all States in the attempt to humanise the conduct of military operations.

Since we were discussing history and we are speaking about humanising war, I just learned last week during a celebration of the 200th anniversary of the birth of Doctor Louis Appia, one of the five founders of the Red Cross and the ICRC, that he came back from a war in Schleswig where he was a surgeon and wrote these famous words which are still being read today: ‘as long as we are not able to prevent wars, we have a duty to try to humanise them as much as we can’.

However, no law – IHL included – can exert a normative function without support from the larger community within which it operates. Compliance with IHL, as with any other body of norms, depends on a range of factors, some of which are not legal in nature.

In this context, there is much we still need to understand about how to better influence behaviours and prevent IHL violations. A recent study conducted by the ICRC, entitled ‘The Roots of Restraint in War’, provides critical insights for action. More research drawing on recent advances in behavioural sciences would be helpful in this regard.

To ensure compliance with IHL, the ICRC always tries to engage with stakeholders directly involved in armed conflicts. Yet, this, in itself, is not good enough. We must also engage those who take part in so-called ‘partnered operations’, and those who can exert influence over military strategies and the conduct of hostilities.

Today no one fights alone. In many conflicts in the Middle East, Africa and beyond, coalitions pool their resources against common enemies. Armed conflicts are fought by proxy, through official and unofficial partnerships that offer comprehensive support, from advice, training, intelligence sharing or logistics support to military training, weapon sales, kinetic support, detention operations and more.

Some political and military stakeholders involved may see themselves as free from scrutiny or accountability processes. In this context, the ICRC encourages all States to consistently comply with their own obligations under IHL, including by ensuring that the warring parties that they directly and indirectly support do abide by IHL.

To put it plainly, allied and supporting States are responsible for making sure their partners are not taking cheap options. Allied States can take a range of measures to ensure compliance with IHL by their partners, such as vetting potential partners to ensure they have the capacity and willingness to apply IHL, and ensuring proper conduct of hostilities.

When it comes to arms trade, at its highest level since the end of the Cold War, States producing and selling weapons have a special responsibility. They must make sure that the weapons will not be used to commit IHL violations. I believe that there is a vast untapped potential for States to positively use their influence vis-à-vis warring parties they partner with or they directly or indirectly support.

Ladies and Gentlemen, now more than ever, contemporary NIACs also raise questions around the interaction between IHL and HRL. To what extent do IHL and HRL interact without clashing? How far can one contribute to a better understanding and interpretation of the other? How could we provide a mechanism of implementation for one which benefits the other, without endangering the integrity of both?

It is almost a given, at least in Europe, that IHL and HRL are distinct but complementary bodies of law. Their complementary nature is seen, for example, in their common underlying purpose, which is to protect the life, health and dignity of the individual.

This similarity of purpose is mirrored by the similar, albeit not identical, content of many of their norms. For example, fundamental judicial guarantees are a cornerstone of protection in peacetime and in armed conflict. This is confirmed by the wording of Article 6 of Additional Protocol II of 1977, which is applicable in NIACs, a provision clearly influenced by Human Rights Law. Similarly, the application of human rights standards may be used in NIACs in order to supplement IHL provisions governing (i) the use of force; (ii) the treatment and conditions in detention; and (iii) rights regarding a fair trial for persons deprived of liberty.

Therefore, the international community has at its disposal the tools to protect both States and individuals against threats arising from contemporary NIACs. As we know, the current situation has led to a re-examination of the balance between State security and individual liberty. Striking the proper balance is difficult. Perhaps it is unavoidable that current NIACs are

fought, but it would be self-defeating for that fight to lead to lower international standards of protection for the rights and liberties of individuals. Simply put, one of the crucial moral and legal challenges currently facing the international community is to fight this form of violence effectively while maintaining the safeguards for human dignity and life laid down in International Humanitarian and Human Rights Law.

Ladies and Gentlemen, the incapacity of the international system to maintain peace and security has had the notable effect of shifting the focus of international engagement from conflict resolution to humanitarian action. As a result, much energy has been spent on negotiations on humanitarian access, humanitarian pauses, local ceasefires, evacuation of civilians, humanitarian corridors or freezes, safe zones, and so on. Efforts to achieve consensus on humanitarian access and the provision of assistance to those in need are of course welcome. However, the political antagonism that commonly prevails in such debates risks undermining the very notion of impartial humanitarian action.

The same challenge arises with the ever-stricter measures taken by States and international organisations to counter perceived threats posed by individuals and groups designated as terrorist. Overall, it is increasingly difficult for impartial humanitarian organisations such as the ICRC to perform their humanitarian activities – which is unfortunately often in areas where they are most needed. Hence the need to react and explore ways to carve out and protect a humanitarian space in contemporary NIACs.

Ladies and Gentlemen, dear colleagues and friends, I am confident that the discussion over the next two days will be informed and substantial, and will go a long way in bringing more clarity to these controversial but fundamental issues. I look forward to these exchanges and to listening to your frank assessments and informed analysis on the issues just raised, which are vital for many people in armed conflict across the globe.

Let me also echo the thanks to all the organisers, both from the College of Europe and my colleagues from the ICRC. I wish you all an excellent Colloquium.

Thank you for your attention.

Session 1

Selected issues on the applicability of international humanitarian law in contemporary non-international armed conflicts

Chairperson: **Paul Berman**

Council of the European Union

THE CRITERIA FOR DETERMINING NOWADAYS NON-INTERNATIONAL ARMED CONFLICTS: TOWARDS A RELAXATION?

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Summary

Julia Grignon presents the different criteria for determining the existence of a non-international armed conflict (NIAC), and addresses the question of a potential relaxation of these criteria, as well as the possibility of such a relaxation. The subject is complex yet easy at the same time. Easy because today, it is well established that the two criteria for triggering a NIAC are the organisation of the parties to the conflict and the level of intensity of the hostilities. Difficult because the two criteria raise operational and legal questions. What is the precise meaning of these two criteria? Does their interpretation remain similar for the different types of NIACs? What are the consequences and implications resulting from a relaxation of these criteria, in particular regarding the qualification and the de-qualification of NIACs?

1. What are the criteria for qualifying a NIAC and where do they come from?

The criteria are not defined by the Geneva Conventions, their origin must be sought in the doctrine and in case law. In particular, the Boškoski case provides a comprehensive analysis of the two criteria and several indicators for each of them.

* L'auteure tient à adresser ses remerciements à Sophie Gagné, candidate à la Maîtrise en droit avec mémoire à la faculté de droit de l'Université Laval, pour avoir effectué certaines recherches préliminaires en préparation de cette conférence et pour avoir révisé le texte final présenté ici.

1.1. Organisation

There are five main groups of indicators to determine the organisation of the parties: a command structure; the possibility to carry out operations in an organised manner; the logistics of the armed group; the level of discipline and ability to ensure compliance with the basic obligations of common Article 3; the ability to speak with one voice.

1.2. Intensity

There are six main groups of indicators to determine the intensity of the hostilities: the nature of the weapons distributed; the methods employed; the results of the means and methods employed; the increase and spread of the fighting; the reaction of third States; the way in which the organs of the State use force.

A relaxation of the criteria would mean that they would be approached in a more flexible way, so that more situations of violence would qualify as NIACs. The doctrine generally pleads in favour of such a relaxation, but two limits need to be taken into account. A technical limit due to the multiple definitions of NIACs, and an inherent limit to the consequences of such a relaxation.

2. The distinction between NIACs and its consequences for the analysis of criteria: differentiated flexibility?

Common Article 3 is not the only source for the qualification of a NIAC. Additional Protocol II, the Rome Statute and the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law provide their own qualification of a NIAC. If in all cases organisation and intensity are the criteria to be used, each of these texts has a limit when it comes to considering a relaxation of the criteria.

2.1. NIACs under common Article 3

NIACs under common Article 3 are defined as opposed to international armed conflicts (IACs). Since the intensity criterion does not exist for IACs, this criterion should therefore not have a particularly high threshold when it comes to a NIAC under common Article 3. However, since the point of comparison of the level of organisation required is the organisation of a State's armed forces, it seems that the possibility of relaxing this second criterion is limited.

2.2. NIACs under Additional Protocol II

Additional Protocol II sets out three additional requirements to NIACs. First, the armed forces of the State on whose territory the hostilities are taking place must be engaged in the conflict.

Second, the non-State armed group must control a part of the territory so as to enable them to carry out sustained and concerted military operations. Finally, the non-State armed group must be capable of ensuring the implementation of Additional Protocol II. It stems from the requirement to be able to conduct continuous and coordinated operations that the level of intensity is higher for NIACs under Additional Protocol II.

2.3. NIACs under the Rome Statute

The Rome Statute has surprisingly reintroduced the notion of the prolongation of the violence, but according to the International Criminal Court (ICC) case law, the prolongation of the violence is not an additional requirement but rather an indicator of the two existing criteria. However, the consideration of the prolongation of the violence necessarily implies a tightening of the criteria.

2.4. The silence of the ICRC Study on Customary International Humanitarian Law

The ICRC Study on Customary International Law provides that of 161 rules, 140 apply to NIACs, but it does not define the types of NIACs to which they apply. It would seem that the customary rules identified in the Study apply equally to all types of NIACs. However, while armed groups should a priori always be able to comply with the requirements of common Article 3, they may not be able to comply with all the rules set out in Additional Protocol II, which are the basis for many of the rules in the ICRC Study.

Beyond these technical limits, which prevent a relaxation of the criteria required for the qualification of a NIAC, there are practical limits inherent to the relaxation of these criteria.

3. The challenges inherent in a flexible approach to the criteria

A flexible approach to the criteria has consequences on the speed with which a situation can be qualified as NIAC and on the difficulties for the de-qualification of a NIAC.

3.1. Qualification

A relaxation of the criteria would have the direct consequence of facilitating the establishment of their existence and, consequently, the existence of a NIAC. The transition from a situation of internal disturbance and internal tensions to a situation of NIAC triggers the application of IHL, and facilitating the qualification of a NIAC leads to facilitating the application of IHL and its regime of derogation from ordinary law. Hence, it is necessary to consider whether it is desirable for such flexibility to exist. Moreover, if a flexible and undifferentiated definition of NIAC is applied to all

situations of violence, this could lead to armed groups having to comply with obligations that they do not have the capacity to effectively comply with, namely judicial guaranties and detention.

3.2. De-qualification

The question of the elements leading to the de-qualification of a NIAC is not resolved today. Is it necessary to establish that the criteria of intensity and organisation have disappeared or to observe a decrease in the intensity of violence, or a certain disorganisation of the groups? Or should we wait for a 'return to peace'? If the first conception is applied, we would have too flexible an interpretation, leading to uncertainties. During a conflict, organisation and intensity can decrease and increase very frequently, which would lead to successive qualifications and de-qualifications of NIACs. However, the second conception may be too formalist and rigid. It would be advisable not to wait until a formal act, such as a ceasefire, is signed. It would rather be preferable to retain the general end of military operations as a criterion for de-qualifying a NIAC.

Many thanks, Mr. Berman.

First of all, I would like to thank warmly the organisers for inviting me to this promising Colloquium to speak about a topic that is so dear to my heart. It is indeed very pleasant to be invited to speak about a topic on which you have dedicated so much time. While saying this, do not be afraid, I will not give a lengthy technical speech about all the controversies that surround the classification of non-international armed conflicts in International Humanitarian Law. There is largely the substance for that, and that would be much interesting, but that is not the mandate that I have received. What I have been asked to present today are the criteria useful for the determination of non-international armed conflicts, which are intensity and organisation, and to address the question of a potential relaxation of these criteria. I have also been asked to give you the basics and to do so in 20 minutes. Therefore, please consider what follows rather as an introduction to the concepts, in other words as an attempt to give you the essence of the two criteria and the challenges related to their potential relaxation, and to open the discussion for further debate if you so wish. And like a convert to a new religion, I will make of myself a defender of the French language. So, as a good Quebecker, I will now turn to French for the rest of my presentation. But I will obviously be happy to answer any question you might have either in French or in English.

Voyons donc quels sont ces critères permettant de déterminer quand un conflit armé non international a été déclenché et si l'on peut constater une tendance à un assouplissement ; lequel, s'il existe, questionne sur son opportunité.

Comme c'est assez souvent le cas en Droit international humanitaire, la question des critères permettant de conclure à l'existence d'un conflit armé non international est à la fois simple et complexe. Simple parce qu'il semble bien établi aujourd'hui que ce sont les critères d'organisation des parties et de l'intensité de la violence qui permettent de déterminer l'existence d'un conflit armé non international. Complexe car une fois ce principe posé, un certain nombre de défis, juridiques comme opérationnels, peuvent se poser, ce qui ouvre la voie à la question de leur assouplissement. Au nombre de ces défis, on peut notamment faire mention du débat que peuvent susciter les critères eux-mêmes : Qu'entend-on par « organisation » ? Qu'entend-on par « intensité » ? Et ces critères sont-ils les mêmes pour tous les types de conflits armés non internationaux ? De même, la distinction entre les différents conflits armés non internationaux, qui peuvent relever soit de l'article 3 commun aux quatre Conventions de Genève de 1949, soit du Protocole additionnel II de 1977, soit du Statut de Rome portant création de la Cour pénale internationale, soit encore du Droit international humanitaire coutumier, emporte des conséquences dans l'analyse des critères. Enfin, certains enjeux sont inhérents à une appréhension souple des critères et ils produisent des effets sur la qualification et sur la déqualification des conflits armés non internationaux, et ce faisant, subsidiairement, sur la manière dont sont protégées les personnes affectées par les conflits armés. C'est autour de ces trois points que s'articulera ma présentation.

À cet égard, il existe au moins deux autres éléments qui pourraient, voire devraient, rentrer dans l'exercice de qualification, et donc dans l'examen des critères qui fait l'objet de cette présentation, mais que j'ai décidé d'exclure. Il s'agit d'abord des guerres de libération nationale qui, bien qu'elles opposent un groupe armé à un État, reçoivent depuis 1977 la qualification de conflits armés internationaux ; elles sont donc exclues du champ des conflits armés non internationaux qui sont l'objet de mon propos. Il s'agit ensuite des conséquences des interventions extérieures dans la qualification des conflits armés non internationaux, dont on a pu dire qu'elles étaient de nature à « internationaliser » un conflit armé non international, terme que le Comité international de la Croix-Rouge souhaite aujourd'hui abandonner en raison de la confusion qu'il porte¹, et dont Tristan Ferraro fera état dans sa présentation à suivre.

1. Quels sont les critères permettant de procéder à la qualification des conflits armés non internationaux et d'où viennent-ils ?

Ces critères pourraient être qualifiés de doctrinaux et jurisprudentiels. En effet, compte tenu de l'absence de précisions dans les textes conventionnels, c'est de leur interprétation que découle leur définition. Formulés d'abord en doctrine, ils ont été repris en jurisprudence, d'abord par les tribunaux pénaux internationaux *ad hoc*, puis par la Cour pénale internationale.

1 Voir Tristan Ferraro, « The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict », dans : *International Review of the Red Cross*, 2015, 97 : 900 RICR 1227.

Bien que l'on puisse en trouver l'expression dans de nombreux arrêts et articles de doctrine, c'est la classification établie dans le jugement de juillet 2008 dans l'affaire *Boškoski*² que je retiendrai ici. En effet, dans une leçon quasi professorale, le jugement reprend la doctrine et la jurisprudence antérieures, internationale comme nationale, pour offrir une excellente synthèse de ce que ces critères recouvrent. Grâce à cet exercice, il est possible d'appréhender les critères dans leur ensemble et d'en saisir la finalité, mais surtout le jugement nous livre des clés afin de faciliter tout exercice de qualification. Ainsi, des indicateurs ont été regroupés pour chacun des deux critères³. Et le terme « indicateur » doit ici être apprécié dans tout son sens, c'est-à-dire des éléments qui aident à l'exercice et qui ne sont pas cumulatifs, au contraire des critères d'organisation et d'intensité, qui eux le sont.

Ainsi, pour parvenir à la qualification de conflit armé non international, il est nécessaire de constater qu'un certain seuil d'intensité de la violence est atteint et que les parties en présence sont suffisamment organisées. Ce sont donc deux critères cumulatifs qui servent à l'analyse. Mais pour aider à documenter la réalisation de ces critères, on utilise une série d'indicateurs, qui eux ne sont pas cumulatifs et qui pourraient éventuellement être complétés par d'autres.

1.1. Organisation

Aux termes du jugement dans l'affaire *Boškoski*, cinq grands groupes de facteurs permettent de conclure à l'organisation suffisante d'un groupe armé⁴. Le premier groupe comprend les éléments permettant de constater l'existence d'une structure de commandement⁵. Parmi ceux-ci sont compris « la formation d'un état-major »⁶ ou « l'existence d'un règlement régissant l'organisation et la structure du groupe armé »⁷, dont découle un certain nombre d'autres

2 *Le Procureur c Ljube Boškoski*, IT-04-82-T, Jugement, 10 juillet 2008, Tribunal pénal international pour l'ex-Yougoslavie, Chambre de première instance II [*Boškoski*].

3 Éric David les a toutefois classés différemment : voir Éric David, « Internal (Non-International) Armed Conflict », dans : Andrew Clapham et Paola Gaeta, (dir.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, 353, pp. 356-362.

4 Pour davantage de détails relatifs à la typologie établie dans l'affaire *Boškoski*, voir Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge : Cambridge University Press, 2010, pp. 123-127 ; Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Genève : Schulthess, 2014, pp. 170-173. Au sujet de la manière dont la Cour pénale internationale s'est prononcée sur le critère d'organisation, voir également Isaline Wittorski *et al.*, « La qualification des conflits armés par le juge : premiers enseignements de la pratique de la Cour pénale internationale », dans : Julia Grignon (dir.), *Hommage à Jean Pictet*, Montréal, Yvon Blais, 2015, pp. 223-225.

5 *Boškoski*, *op. cit.* note 2, au paragraphe 199. Voir également Grignon, *ibid.* note 4, à la p. 171.

6 *Ibid.*

7 *Ibid.*

indicateurs. Le deuxième groupe est relatif aux « éléments qui donnent à penser que le groupe pourrait mener des opérations de manière organisée »⁸. Parmi ceux-ci le contrôle du territoire est avancé comme indicateur permettant de constater qu'un groupe armé est organisé, ce qui mérite d'être souligné puisque le contrôle du territoire est l'un des éléments limitativement énumérés à l'article premier du deuxième Protocole additionnel et contribue habituellement à distinguer un conflit armé non international relevant de l'article 3 commun seulement, d'un conflit armé non international relevant du deuxième Protocole additionnel. Lue de pair avec un autre type de contrôle – celui que les dirigeants du groupe armé exercent sur leurs membres afin qu'ils puissent s'assurer que les dispositions minimales contenues à l'article 3 commun sont respectées – la notion de contrôle du territoire est néanmoins utile à la détermination de l'organisation du groupe⁹. Le troisième groupe de facteurs identifié par le Tribunal concerne la logistique du groupe armé¹⁰. Le quatrième reprend les éléments démontrant « la discipline nécessaire pour faire respecter les obligations fondamentales découlant de l'article 3 commun, et l'aptitude à le faire »¹¹. Enfin, les facteurs énumérés au cinquième groupe sont ceux relatifs à la « capacité du groupe de parler d'une seule voix »¹².

1.2. Intensité

Le critère de l'intensité, lui, peut s'analyser au travers de six grands groupes d'indicateurs. Premièrement, les facteurs liés aux armes distribuées, tels que leur nature. L'emploi d'artillerie lourde¹³ laisse par exemple supposer que les parties au conflit se livrent à des affrontements d'un niveau d'intensité élevé. Deuxièmement, certains facteurs décrivent les techniques utilisées. À cet égard, la pratique du siège de villes ou de leur bombardement, la quantité de troupes déployées, l'existence d'une ligne de front, la fermeture de routes, ou encore la mobilisation ou le déploiement de forces gouvernementales dans une zone en particulier, participent de l'identification du niveau d'intensité requis à la qualification de conflit armé non international. Troisièmement, des facteurs ont trait au résultat engendré par l'emploi de ces armes et des techniques utilisées, tels que l'ampleur des destructions, les victimes, ou encore le fait que la population est contrainte de fuir certaines zones. Quatrièmement, certains facteurs liés aux affrontements dans leur globalité, tels que le sérieux des attaques examiné notamment au

8 *Ibid.*, au paragraphe 200. Voir également Grignon, *op.cit.* note 4, à la p. 171.

9 *Boškoski, op. cit.* note 2, au paragraphe 196 : « dans une utilisation extensive des commentaires de cette disposition délivrés par la Comité international de la Croix-Rouge. Voir en particulier la note de bas de page 786. » : Grignon, *op. cit.* note 4, à la note 598.

10 *Boškoski, op. cit.* note 2, au paragraphe 201. Voir également Grignon, *op. cit.* note 4, à la p. 171.

11 *Boškoski, op. cit.* note 2, au paragraphe 202. Voir également Grignon, *op. cit.* note 4, à la p. 171.

12 *Boškoski, op. cit.* note 2, au paragraphe 203. Voir également Grignon, *op. cit.* note 4, à la p. 171.

13 *Boškoski, op. cit.* note 2, au paragraphe 177. Voir également Grignon, *op. cit.* note 4, à la p. 173.

travers de l'augmentation des affrontements armés¹⁴ ainsi que l'extension des affrontements à travers le territoire et sur une période de temps¹⁵, sont également indicatifs du niveau d'intensité des événements. Cinquièmement, des facteurs relatifs à la réaction des États, et en particulier des États tiers, peuvent contribuer à déterminer si le niveau de violence atteint le seuil d'intensité requis. Il en va ainsi par exemple de la conclusion ou de l'imposition d'un cessez-le-feu, du fait que la situation attire l'attention des Nations unies ou que certains États s'impliquent pour chercher une solution au conflit. Enfin et sixièmement, les juges ont estimé dans leur jugement *Boškoski* qu'un élément systémique pouvait également être examiné.¹⁶ Plus que la réponse apportée par les forces armées gouvernementales, il s'agit d'observer comment les organes de l'État font usage de la force à l'encontre des opposants. Les règles d'engagement sont drastiquement différentes selon que la répression d'un événement est prise en charge par une opération de police ou par une opération militaire ; en particulier, les règles relatives à l'usage de la force sont diamétralement opposées dans l'une ou l'autre des situations. Dès lors, si les organes de l'État chargés de contenir les événements emploient la force, en ce compris la force létale, contre les opposants sans avoir d'abord recherché d'autres moyens pour ce faire, on disposera alors d'un indice que l'État considère lui-même la situation comme étant celle d'un conflit armé plutôt que comme une « simple » situation d'urgence, par exemple¹⁷.

Ainsi, grâce à l'analyse livrée en jurisprudence et aux commentaires abondants en doctrine, quiconque souhaite procéder à la qualification d'une situation de violence se trouve largement bien outillé. Qu'en est-il alors d'un éventuel assouplissement des critères propres à qualifier une situation de violence de conflit armé non international ? Un assouplissement des critères signifierait ici de les appréhender de manière plus flexible, afin que davantage de situations de violence entrent dans la qualification de conflit armé non international. À la lecture des différents documents produits par les instances amenées à procéder à l'exercice de qualification, il est possible, selon les situations, soit de constater un certain assouplissement, dans les cas

14 Voir *Le Procureur c Duško Tadić*, IT-94-1-A, Jugement (7 mai 1997) au paragraphe 565 (Tribunal pénal pour l'ex-Yougoslavie, Chambre de première instance) [Jugement *Tadić*]; *Le Procureur c Zdravko Mucić (Jugement Čelebići)*, IT-96-21-T, Jugement (16 novembre 1998) au paragraphe 189 (Tribunal pénal international pour l'ex-Yougoslavie, Chambre de première instance) [Jugement *Čelebići*]; *Le Procureur c Dario Kordić*, IT-95-14/2-T, Arrêt (17 décembre 2004) au paragraphe 340 (Tribunal pénal international pour l'ex-Yougoslavie, Chambre d'appel) [*Kordić*]. Voir également Grignon, *op. cit.*, p.174.

15 Voir Jugement *Tadić*, *op. cit.* note 14, au paragraphe 566; Jugement *Čelebići*, *op. cit.* note 14, au paragraphe 186; *Kordić*, *op. cit.* note 14 aux paragraphes 340 et s; *Le Procureur c Sefer Halilović*, IT-01-48-T, Jugement (16 novembre 2005) aux paragraphes 163 et suiv. (Tribunal pénal international pour l'ex-Yougoslavie, Chambre de première instance I); *Le Procureur c Fatmir Limaj*, IT-03-66-T, Jugement (30 novembre 2005) aux paragraphes 146 et 158 (Tribunal pénal international pour l'ex-Yougoslavie, Chambre de première instance II). Voir également Grignon, *op. cit.*, p.174.

16 *Boškoski*, *op. cit.* note 2. Voir également Grignon, *op. cit.* note 4, à la p. 174.

17 Voir également Wittorski, *op. cit.* note 4, aux pp. 222-223.

du Kosovo et de la Lybie par exemple¹⁸, ou au contraire la manifestation d'un regret qu'il n'ait pas été appliqué dans d'autres, dans les cas de la Syrie¹⁹ et du Yémen²⁰ par exemple. Mais en tout état de cause, de manière générale, la doctrine plaide pour que les critères soient maniés avec souplesse. En d'autres termes, il conviendrait de ne pas être trop strict au moment de constater leur réalisation²¹, et ce afin de ne pas aboutir à des situations qualifiées par certains d'absurdes²² lorsque certaines instances ont écarté l'applicabilité du Droit international humanitaire malgré une situation portant l'apparence manifeste d'un conflit armé.

Toutefois, il existe à mon avis deux limites qui méritent que l'on s'interroge sur la pertinence d'un assouplissement, avant d'affirmer que ce serait la tendance à suivre, à savoir une limite technique, résultant des définitions multiples de conflits armés non internationaux, et une limite inhérente à cet assouplissement en ce qu'il porte en lui certains enjeux résultant d'un constat trop rapide de l'existence des critères, ou à l'inverse de leur disparition.

2. La distinction entre les conflits armés non internationaux et ses conséquences dans l'analyse des critères : une souplesse différenciée ?

L'article 3 commun aux quatre Conventions de Genève de 1949, sur la base duquel la jurisprudence s'est développée, n'est pas le seul à déterminer la qualification de conflit armé non international. Il faut également prendre en considération le Protocole additionnel II et le Statut de Rome, auxquels s'ajoute l'étude du Comité international de la Croix-Rouge sur le Droit international humanitaire coutumier. Or, si dans tous les cas l'organisation et l'intensité sont les critères à utiliser, chacun de ces textes porte en lui une limite au moment de s'interroger sur un assouplissement des critères.

2.1. Les conflits armés non internationaux relevant de l'article 3 commun

Si les conflits armés non internationaux ont existé bien avant cela²³, c'est en 1949 qu'ils font leur entrée dans le Droit international humanitaire conventionnel, par le biais de l'article 3

18 Louise Arimatsu et Mohbuba Choudhury, « The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya », Chatham House, International law PP 2014/01, disponible en ligne sur: <www.chathamhouse.org>. Voir également Dapo Akande, « Classification of Armed Conflicts: Relevant Legal Concepts », dans : Elizabeth Wilmshurst (dir.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pp. 32-79.

19 Noam Zamir, « Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars », Northampton : Edward Elgar, 2017, à la p 66.

20 Louise Arimatsu et Mohbuba Choudhury, *op. cit.* note 18.

21 Zamir, *op. cit.* note 19, à la p 66.

22 *Ibid.*

23 Zamir, *op. cit.* note 19, aux pp. 24 et suiv.

commun aux quatre Conventions de Genève. Insérée dans les Conventions de Genève qui, à cette exception près, s'appliquent dans les conflits armés internationaux, la définition des conflits armés non internationaux résultant de l'article 3 commun doit se lire par opposition aux conflits armés internationaux. D'ailleurs, le premier alinéa de cette disposition se lit comme suit : « En cas de conflit armé ne présentant pas un caractère international [...], chacune des Parties au conflit... ». Bien que certains s'interrogent sur le fondement de cette formulation²⁴, qui ne pourrait en fait résulter que de la recherche d'un consensus au moment de sa rédaction lors de la conférence diplomatique, il n'en demeure pas moins que les conflits armés auxquels il est fait référence à cet article 3 se définissent par opposition aux conflits armés internationaux, lesquels font intégralement l'objet des quatre Conventions de Genève. C'est un point important car il produit un effet sur la compréhension que l'on doit avoir de la notion d'intensité. En effet, si les conflits armés non internationaux de l'article 3 commun sont définis par opposition aux conflits armés internationaux, cela signifie que le seuil d'intensité requis à leur qualification est relativement bas, dans la mesure où les conflits armés internationaux, eux, ne requièrent aucun seuil d'intensité pour être qualifiés : le premier coup de feu²⁵, ou le premier acte de violence²⁶ suffit pour déclencher un conflit armé international²⁷. Aussi, au moment de fixer l'intensité requise à la qualification d'un conflit armé non international relevant de l'article 3 commun, c'est un aspect qu'il faut garder à l'esprit. Ce constat va donc dans le sens d'un éventuel assouplissement. Toutefois, il a également une incidence sur le critère de l'organisation des parties. Premièrement, les conflits armés internationaux voient s'opposer des forces armées étatiques ; c'est donc l'organisation de celles-ci qui sert de point de référence, c'est-à-dire un haut niveau d'organisation²⁸. Ce qui est, deuxièmement, confirmé par le contexte dans lequel s'inscrit l'adoption de l'article 3 commun, à savoir la reconnaissance de belligérance. Émergent donc deux limites à un possible assouplissement du critère d'organisation aux termes de l'article 3 commun.

24 Marko Milanovic et Vidan Hadzi-Vidanovic, « A taxonomy of armed conflict », dans : Nigel White et Christian Henderson (dir.), *Research Handbook on International Conflict and Security Law: jus ad bellum, jus in bello and jus post bellum*, Cheltenham : Edward Elgar, 2013, p 256, aux pp. 11-12.

25 Conformément à la théorie de Jean Pictet exprimée dans ses commentaires des Conventions de Genève. Pour plus de détails à ce sujet, voir Grignon, *op. cit.* note 4, à la p. 70.

26 La capture, par exemple. Voir Grignon, *op. cit.* note 4, à la p. 53.

27 Voir le nouveau commentaire de l'article 2 commun aux paragraphes 236-244, International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge University Press, 2017, p. 1344. La version française est disponible en ligne sur : <<https://ihl-databases.icrc.org/ihl>>.

28 Ce constat est corroboré par les travaux préparatoires des Conventions de Genève de 1949, qui indiquent que certaines délégations ont bien voulu concéder un bas niveau d'intensité, à condition que le niveau d'organisation exigé demeure relativement haut.

2.2. Les conflits armés non internationaux relevant du Protocole additionnel II

L'adoption de l'article premier du Protocole additionnel II s'inscrit dans un contexte particulier qui a au moins deux conséquences sur la définition qu'il contient. En effet, d'une part les guerres de libération nationale étaient évacuées du débat puisque considérées comme des conflits armés internationaux, et d'autre part le constat s'imposait déjà, dès 1974, que la très grande majorité des conflits armés étaient de caractère non international. Il était donc urgent de compléter les dispositions contenues à l'article 3 commun. L'objectif de l'article premier était donc d'étendre les protections humanitaires offertes aux personnes affectées par les conflits armés non internationaux, sans pour autant reconnaître un droit de belligérance aux groupes armés non étatiques²⁹. Il en résulte la formulation suivante :

« [Le Protocole additionnel II] s'applique à tous les conflits armés [...] qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées et d'appliquer le présent Protocole. »

Si l'en ressort pas une définition claire de ce qu'il faut entendre par les termes « conflits armés non international », il en résulte toutefois un certain nombre de conditions à l'applicabilité du Protocole additionnel II.

Tout d'abord, l'État sur le territoire duquel se déroule le conflit armé doit être lié par le Protocole II. Ensuite, les forces armées étatiques de l'État sur le territoire duquel se déroulent les hostilités doivent être engagées dans le conflit ; ce qui constitue en outre une première distinction avec l'article 3 commun. Il est également nécessaire que le ou les groupes armés impliqués dans le conflit armé exerce(nt) un contrôle sur une portion du territoire. L'étendue de ce contrôle n'est pas précisée, mais il est largement agréé en doctrine que ce contrôle peut ne pas être très étendu géographiquement et/ou ne pas présenter de signe de grande stabilité. En somme, il suffit que le groupe armé soit en mesure d'empêcher les forces armées gouvernementales d'exercer son autorité sur la portion de territoire en question. Ce qui constitue une deuxième distinction vis-à-vis de l'article 3 commun puisque cette condition n'existe pas aux termes de cette disposition. Enfin, le groupe armé doit être en mesure d'appliquer les dispositions du Protocole additionnel. Compte tenu de ces conditions, qui sont strictement énoncées dans le texte conventionnel, on peut donc en conclure que les conflits armés non internationaux relevant du Protocole additionnel II sont des conflits de plus haute intensité. En effet, si l'article 3 commun se lit en miroir du conflit armé international et ne requiert donc pas une grande intensité pour trouver application,

29 Zamir, *op. cit.*, p. 44.

il sera nécessaire qu'un niveau de violence assez intense soit constaté pour que l'on puisse conclure notamment que les opérations militaires sont « continues et concertées ». D'ailleurs, ces conditions d'application peuvent mener à se poser la question de savoir si le Protocole peut jamais trouver à s'appliquer. Il s'agit donc en soi d'une limite à une interprétation assouplie des critères permettant de conclure à l'existence d'un conflit armé non international.

2.3. Les conflits armés non internationaux aux termes du Statut de Rome de 1998

Bien que ce texte ne soit pas un texte universel au sens où peuvent l'être les Conventions de Genève de 1949, le Statut de Rome présente l'intérêt de refléter la conception qu'avaient les États du conflit armé non international 40 ans après l'adoption des Conventions de Genève et 20 ans après l'adoption du Protocole additionnel II. Ce que l'on trouve dans le Statut de Rome est toutefois troublant, puisqu'est réintroduite la notion de prolongation de la violence, élément qui avait un temps été retenu en jurisprudence³⁰, avant qu'il ne soit précisé dans l'affaire *Haradinaj* que cette notion était en fait à considérer comme un indicateur de l'intensité de la violence³¹. Cependant, formulé comme tel dans le Statut de Rome³², et ce quelles qu'en soient les raisons, la question pouvait se poser de savoir si la prolongation de la violence, ou du conflit, constituait un critère additionnel à la qualification des conflits armés non internationaux³³. En ce qui concerne la jurisprudence de la Cour pénale internationale, il ressort que la prolongation de la violence demeure un indicateur témoignant de la réalisation des critères préexistants³⁴. Il n'y aurait donc pas une troisième catégorie de conflit armé non international.

30 *Le Procureur c Duško Tadić*, IT-94-1, Arrêt relatif à l'appel de la Défense concernant l'exception préjudicielle d'incompétence (2 octobre 1995), au paragraphe 70 (Tribunal pénal international pour l'ex-Yougoslavie, Chambre d'appel).

31 *Le Procureur c Ramush Haradinaj*, IT-04-84bis-T, Jugement (3 avril 2008) au paragraphe 49 (Tribunal pénal international pour l'ex-Yougoslavie, Chambre de première instance II). Pour davantage de détails sur cette évolution jurisprudentielle et pour l'introduction de cette notion dans le statut de Rome, voir Grignon, *op. cit.* note 4. Voir également Djemila Carron, *L'acte déclencheur d'un conflit armé international*, Genève : Schulthess, 2016, à la note 1396 ; Sabrina Henry, *La tendance à l'uniformisation des différents types de conflits armés non internationaux : Un défi pour le respect du droit international humanitaire par les groupes armés?*, essai non publié, 2015.

32 L'article 8 (2) (f) du Statut de Rome se lit comme suit : « L'alinéa e) du paragraphe 2 s'applique aux conflits armés ne présentant pas un caractère international et ne s'applique donc pas aux situations de troubles et tensions internes telles que les émeutes, les actes isolés et sporadiques de violence ou les actes de nature similaire. Il s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités du gouvernement de cet État et des groupes armés organisés ou des groupes armés organisés entre eux. » (Nous soulignons.)

33 Carron, *op. cit.* note 31, à la note 1396. Voir aussi Henry, *op. cit.* note 31.

34 Voir par exemple *Le Procureur c Thomas Lubanga Dyilo*, ICC-01/04-01/06, Jugement (14 mars 2012) aux paras 545-546 (Cour pénale internationale, Chambre de première instance I); *Le Procureur c Germain Katanga*, ICC-01/04-01/07, Jugement (7 mars 2014) aux paragraphes 1209 et 1217 (Cour pénale internationale, Chambre de première instance II).

Du point de vue de la question de l'assouplissement dans l'appréhension des critères, il faut toutefois noter que l'examen de la prolongation de la violence exige de considérer les critères donnant lieu à la qualification de conflit armé non international avec une certaine rigueur. En effet, intégrer un indicateur de prolongation implique nécessairement un certain resserrement des critères.

2.4. Le silence de l'étude du Comité international de la Croix-Rouge sur le Droit international humanitaire coutumier

Alors que sur les 161 règles que le Comité international de la Croix-Rouge a identifiées en 2005 comme relevant du Droit international humanitaire coutumier, plus de 140 sont réputées s'appliquer à la fois dans les conflits armés internationaux et les conflits armés non internationaux, l'étude ne dit pas quelle définition retenir des conflits armés non internationaux auxquels ces règles seraient applicables. Le premier réflexe serait de considérer que l'étude prend pour définition celle de l'article 3 commun, puisque ce dernier est réputé être dans son ensemble de nature coutumière. Toutefois, l'article 3 commun comprend quatre interdictions fondamentales, et l'étude propose autour de 140 règles coutumières applicables dans les conflits armés non internationaux, dont certaines sont issues du Protocole additionnel II. On pourrait donc penser que les règles coutumières identifiées dans l'étude s'appliquent indifféremment à tous les types de conflits armés non internationaux. Du reste, aux dires de l'un des auteurs de l'étude, cette omission serait intentionnelle et reposerait sur le constat que les États ne font pas, en pratique, la distinction entre les deux types de conflits armés non internationaux. Cette conclusion est toutefois insatisfaisante car elle produit une conséquence qui peut être rédhibitoire au respect du Droit international humanitaire. En effet, si les groupes armés devraient *a priori* toujours être en mesure de respecter les prescriptions de l'article 3 commun tant elles sont basiques, il se peut en revanche qu'ils ne soient pas en mesure de respecter toutes les règles énoncées dans le Protocole II et dont il est fait écho dans l'étude – et encore moins celles qui sont réputées de nature coutumière à la fois dans les conflits armés internationaux et les conflits armés non internationaux, sur la base du droit conventionnel applicable aux conflits armés internationaux. On peut penser notamment aux règles 100³⁵ et suivantes relatives aux garanties judiciaires, ou encore à la règle 115³⁶ relative à l'entretien des tombes, voire aux règles 118³⁷ et suivantes qui énoncent certaines conditions relatives à la privation de liberté.

35 La règle 100 se lit comme suit : « Nul ne peut être condamné ou jugé, si ce n'est en vertu d'un procès équitable accordant toutes les garanties judiciaires essentielles. »

36 La règle 115 se lit comme suit : « Les morts doivent être inhumés de manière respectueuse, et leurs tombes doivent être respectées et dûment entretenues. »

37 La règle 118 se lit comme suit : « Les personnes privées de liberté doivent se voir fournir de la nourriture, de l'eau et des vêtements en suffisance, ainsi qu'un logement et des soins médicaux convenables. »

Aussi, à la recherche d'un assouplissement dans l'appréhension des critères propres à qualifier les conflits armés non internationaux, une première série de contraintes se fait jour. D'abord le contexte historique de la compréhension de l'organisation aux termes de l'article 3 commun. Ensuite les conditions objectives strictes qui font des conflits armés non internationaux du Protocole additionnel II des conflits de plus haute intensité. Mais aussi les interférences qu'a pu produire la notion de prolongation des affrontements aux termes du Statut de Rome. Et enfin l'absence de définition et donc de conditions à la qualification des conflits armés non internationaux dans l'étude du Comité international de la Croix-Rouge, qui invite à la prudence car cette absence rendrait applicables des règles dont le respect pourrait s'avérer irréaliste pour certains groupes armés non étatiques.

Au-delà de ces limites techniques s'ajoutent un certain nombre de limites pratiques que je qualifierai d'« inhérentes » à l'assouplissement des critères. Dans le cadre de cette présentation, j'en retiendrai deux.

3. Les enjeux inhérents à une appréhension souple de critères

Adopter une approche souple des critères permettant de qualifier un conflit armé non international emporte au minimum une conséquence sur la rapidité avec laquelle une situation de conflit armé peut-être qualifiée et sur l'oscillation qui pourrait en résulter au moment de constater, ou pas, la fin du conflit.

3.1. Qualification

Assouplir l'évaluation des critères d'intensité de la violence et d'organisation des parties aurait pour conséquence directe que le constat de leur réalisation interviendrait plus rapidement. Autrement dit, on serait alors conduit à estimer très tôt que l'on se trouve face à un conflit armé, par opposition à des troubles intérieurs et des tensions internes, et par-là même à déclencher plus vite l'application du Droit international humanitaire. Malgré les protections offertes par ce corpus juridique, on peut toutefois s'interroger quant à savoir si cela est souhaitable. En effet, ce régime juridique, en même temps qu'il ouvre un grand nombre de protections au bénéfice des personnes affectées par les conflits armés, ouvre également un régime dérogatoire du droit commun applicable à un certain nombre de situations, telles que par exemple en matière d'usage de la force ou en matière d'internement – à considérer que cette possibilité existe dans le cadre des conflits armés non internationaux. Par ailleurs et plus fondamentalement encore, on peut douter qu'il soit favorable pour l'ensemble de la population d'un territoire affecté par une situation de violence de considérer qu'elle se trouve en situation de conflit armé.

In fine, l'assouplissement des critères pose également une question qui me semble cruciale : celle du respect du Droit international humanitaire. En effet, si l'on constate trop tôt l'exis-

tence d'un conflit armé, ou si l'on applique à toutes les situations de violence une définition indifférenciée des conflits armés non internationaux qui répond au franchissement du seuil de l'intensité de la violence et à l'organisation des groupes armés, calquée sur leur appréhension aux termes de l'article 3 commun, il semble inévitable d'arriver au constat que les groupes armés violent, peut-être alors systématiquement, le Droit international humanitaire. Un groupe minimalement organisé est facilement en mesure de respecter les prescriptions de l'article 3 commun : ne pas procéder au meurtre, ne pas porter atteinte à la dignité ou ne pas procéder à des prises d'otages est à la portée de tous, mais peut-on dire la même chose de toutes les prescriptions du Protocole additionnel II ou de toutes les règles de droit international humanitaire coutumier, qui selon l'étude du Comité international de la Croix-Rouge sont réputées s'appliquer dans les conflits armés non internationaux ? En ce qui concerne les règles relatives à la détention ou aux procédures judiciaires par exemple, ne faut-il pas nécessairement s'en tenir à une conception rigide du critère d'organisation pour en exiger le respect de groupes armés non étatiques ?

Enfin, si l'objectif d'amener l'application du Droit international humanitaire dans une situation est de garantir certaines protections humanitaires aux populations, ne peut-on pas trouver dans un autre corpus juridique, le Droit international des droits humains, matière à satisfaction dans les interactions qu'il offre avec le Droit international humanitaire ?

Ainsi, c'est avec prudence qu'il convient d'envisager un éventuel assouplissement des critères ou une interprétation souple de ceux-ci au moment de qualifier une situation de conflit armé non international. Il en va de même au moment de déqualifier une situation.

3.2. Déqualification

Pour traiter de cette question, il convient au préalable de souligner que la question des éléments permettant de conclure à la fin d'une situation de conflit armé non international n'est pas réglée : pour ce faire, faut-il constater une disparition des critères d'intensité et d'organisation ? Suffit-il de constater un franchissement au-dessous des seuils établis pour leur réalisation, c'est-à-dire une baisse de l'intensité de la violence ou une certaine désorganisation des groupes ? Ou bien faut-il attendre un « retour à la paix » ? Dans les deux premiers cas il s'agirait d'une approche souple des critères, dans le troisième d'une approche plus rigide.

Si c'est la première conception qui l'emporte, il se peut alors que soit provoquée une oscillation dans la disparition et la résurgence des critères. L'intensité de la violence peut baisser pendant certaines périodes et au contraire augmenter dans d'autres. De même, non seulement l'organisation des groupes peut-elle varier au cours d'un même conflit, mais il se peut que des groupes armés organisés ayant contribué à la qualification du conflit aient disparu et aient été

remplacés par d'autres au fil du temps. Cette oscillation de l'intensité de la violence et de l'organisation des parties au conflit provoquerait du même coup une oscillation dans l'application du Droit international humanitaire, au gré de la perte et de la réapparition des critères. Cette solution ouvrirait à mon sens trop d'incertitudes. C'est donc ici encore la prudence qui devrait gouverner au moment de se poser la question d'un assouplissement dans l'examen des critères.

Si c'est au contraire la seconde conception qui l'emporte, à savoir la pacification de la situation, cela renvoie plutôt à une approche rigide vis-à-vis de l'évaluation de l'intensité de la violence et de l'organisation des groupes. En effet, pour considérer qu'une situation est réellement pacifiée, il faudra redescendre largement en-dessous des seuils de qualification. Toutefois, il convient de souligner qu'il ne serait alors pas nécessaire d'attendre qu'un acte formel, tel qu'un cessez-le-feu par exemple, ne soit signé. À cet égard, il serait heureux que les juges pénaux internationaux, auxquels revient par défaut l'interprétation de certaines notions du Droit international humanitaire, réorientent quelque peu leur jurisprudence, ou en tout cas revoient leur phraséologie, puisque « [d]ans l'affaire *Lubanga*, la Cour a refusé que la diminution de l'intensité des hostilités mette fin à l'application du DIH. Elle a, par contraste, fait sienne l'approche exagérément formaliste retenue par le TPIY dans l'affaire *Tadić*, et qui consiste à lier la fin de l'application du DIH à l'acte de règlement pacifique. »³⁸ Ce sont les faits qui doivent être pris en compte, et dans l'exercice de déqualification des conflits armés non internationaux, une expression empruntée au droit des conflits armés internationaux pourrait être secourable. Il s'agit de la fin générale des opérations militaires – et non la fin des hostilités actives – qui selon moi pourrait constituer un test utile en la matière³⁹.

Ainsi, aux critères bien établis se pose légitimement la question d'une interprétation évolutive, laquelle devrait permettre selon certains plus de souplesse dans leur appréhension. Mais cette question doit être examinée dans son ensemble, en envisageant toutes les limites qu'elle porte, et non pas être analysée strictement au cas par cas, au risque de trouver autant d'interprétations qu'il n'y a de cas.

38 Wittorski, *op. cit.* note 4 à la p 223.

39 Voir Grignon, *op. cit.* note 4, aux pp. 245 et suiv.

A CLARIFICATION OF THE GEOGRAPHICAL AND PERSONAL SCOPE OF APPLICATION OF MULTINATIONAL NIACS

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Résumé

La présentation de Vaios Koutroulis concerne les champs d'application, territorial et personnel, du Droit international humanitaire (DIH) dans le contexte de conflits armés non internationaux (CANI) ayant une dimension multinationale. La présentation était divisée en trois points.

A. Le champ d'application personnel d'un CANI

Dans le cas où un État étranger intervient dans un CANI, dans quelle mesure devient-il une partie au conflit ? Seuls les cas d'opérations militaires directes sont envisagés ici. Les autres formes de soutien que peuvent apporter un État étranger seront abordées par Tristan Ferraro.

Le critère d'intensité doit-il être évalué indépendamment de l'État intervenant, sans tenir compte du CANI préexistant ? Dans le cas d'une réponse positive, cela signifierait que la première attaque menée n'est pas soumise aux règles du DIH. Une telle position n'a pas été adoptée par les États intervenants, et se révélerait en effet problématique car :

- *ce serait contraire à la réalité des faits sur le terrain ;*
- *cela ouvrirait la porte à des abus de la part de l'État invitant. Si cet État ne souhaite pas respecter le DIH dans le cadre d'une opération spécifique, il n'a qu'à la faire réaliser par une force nouvellement invitée ;*
- *cela peut se révéler problématique pour l'État invité, car si la phase initiale de ses opérations n'est pas couverte par le DIH, elle sera régie par les Droits de l'homme, dont les règles peuvent s'avérer plus contraignantes.*

La meilleure option est de considérer l'État intervenant comme partie au conflit dès le début des opérations. Dès lors que l'intervention est faite à la demande du gouvernement hôte, les deux États peuvent être considérés comme co-belligérants. Le seuil d'intensité peut donc être considéré comme atteint en raison des hostilités antérieures entre le groupe rebelle et l'État hôte.

B. Le champ d'application territorial

Selon le Tribunal pénal international pour l'ex-Yougoslavie (TPIY), le champ d'application territorial du DIH correspond à l'ensemble du territoire sous le contrôle des parties au conflit, quand bien même les combats ne s'y dérouleraient pas. Le champ d'application territorial n'est donc pas un critère autonome, il dépend du champ d'application personnel. La position du TPIY vaut-elle pour les CANI multinationaux ? Deux exemples illustrent les questions que cela soulève.

Premièrement, dans le cas d'une attaque de « l'Etat Islamique » (EI) à Bruxelles, étant donné que la Belgique est un territoire sous le contrôle d'une des parties au conflit en Irak et en Syrie, le DIH s'applique-il ? La pratique des États ne va pas dans ce sens ; ils préfèrent se baser sur le paradigme du maintien de l'ordre public plutôt que sur le DIH pour agir contre les individus affiliés à l'EI sur leur territoire. Cependant, Vaios Koutroulis considère que cela ne reflète pas l'opinio juris sur les règles applicables à cette situation. Il s'agit d'un choix politique de ne pas invoquer le DIH, bien qu'il aurait parfaitement pu s'appliquer en Belgique.

Le deuxième exemple est celui d'une attaque menée par un État intervenant en Irak et Syrie à l'encontre d'un combattant de l'EI dans un pays tiers. Selon le TPIY, le DIH ne s'appliquerait pas à une telle attaque. Si l'on considère que le DIH s'applique dans l'État tiers lors d'une attaque dirigée contre un combattant partie au CANI, cela mènerait à des CANI sans frontières, ce qui n'est pas sans rappeler le concept de « guerre globale contre la terreur ». Pourtant, la « guerre globale contre la terreur » a été rejetée par la communauté internationale et par le Comité international de la Croix-Rouge (CICR).

C. Le champ d'application personnel du DIH dans un CANI : le DIH s'applique-t-il à l'intérieur d'un même groupe armé ?

Le DIH pourrait-il s'appliquer aux relations entre les membres d'une même force armée ? Traditionnellement, la réponse est non. En effet, le DIH est considéré comme destiné à protéger les personnes tombées au pouvoir de l'ennemi. Néanmoins, la Cour pénale internationale (CPI) a nuancé cette position dans l'affaire Ntaganda.

M. Ntaganda a été accusé de plusieurs crimes, dont enrôlement et la conscription d'enfants soldats et leur participation active aux hostilités, ainsi que d'actes de viol et d'esclavage sexuel commis contre ces mêmes enfants soldats. La défense a affirmé que ces derniers ne tombaient pas sous le champ d'application du DIH, car ils faisaient partie du même groupe armé. La Chambre de première instance et la Chambre d'appel ont toutes deux rejeté cette position, considérant que le DIH ne contient pas de règle générale qui exclurait catégoriquement les membres

d'un groupe armé de la protection contre les crimes commis par des membres du même groupe armé.

Cela signifie-t-il que tout ce qui se passe entre soldats d'un même belligérant sera réglementé par le DIH ? Selon la CPI, non, l'exigence d'un lien avec le conflit est suffisante pour distinguer les crimes de guerre des crimes ordinaires. Toutefois, sur les cinq facteurs permettant de déterminer l'existence d'un lien entre un acte et un conflit, trois n'étaient pas remplis. Ainsi, les conclusions de l'affaire Ntaganda ont peut-être aussi affecté implicitement les critères qui sont pertinents pour établir le lien nécessaire avec un conflit armé.

D. Conclusions

Il est intéressant de noter l'interaction entre les champ d'applications, géographique et personnel, du DIH. Bien que le champ d'application personnel soit décisif pour l'application du DIH, le territoire a un rôle à jouer et peut s'avérer pertinent pour limiter le champ d'application du DIH, comme l'indique le rejet de l'idée d'un CANI global.

Plus fondamentalement, cette brève présentation fait apparaître une tension entre les critères qui peuvent être considérés comme pertinents pour déterminer le champ d'application du DIH. D'une part, nous avons des critères objectifs et facilement identifiables, comme le territoire d'un État partie à un conflit, le statut d'un État partie au conflit ou le statut des individus en tant que membres appartenant à une partie belligérante. Mais cette formule s'avère parfois trop rigide. C'est pourquoi il existe des propositions visant à adopter – soit en lieu et place des éléments susmentionnés, soit en combinaison avec eux – des critères plus souples, tels que le lien avec un conflit armé. Cette approche permet une application plus nuancée du DIH, probablement mieux adaptée aux réalités du terrain. Cependant, ce que l'on gagne en nuance, on le perd en certitude.

Although originally the discussion on the classification of armed conflicts revolved essentially around the material scope of application of International Humanitarian Law (IHL), this is no longer the case. Especially since the beginning of the “war on terror”, it has become apparent how important the geographical, temporal and personal scope of application are in order to correctly identify – and fix the limits of – the situations that are regulated by IHL.

This presentation will focus on the geographical and personal scope of multinational non-international armed conflicts (NIACs). The term ‘multinational NIAC’ is not a term of art and, to the best of my knowledge, has no generally accepted definition. In this context, it denotes a NIAC where third States intervene in favour of either the government or the rebels, in other

words, a NIAC where there is some kind of external intervention, be it by one State, by a coalition of States, or by an international organisation. I will deal with NIACs only and will not go into whether there is any international armed conflict triggered by the foreign intervention or any possible ‘internationalisation’ of the armed conflict due to such an intervention.¹ Given the limited time frame, I will discuss three main points. Firstly, in relation to the personal scope of a NIAC, when does an intervening third State become a party to a NIAC (A)? Secondly, is the geographical scope of a NIAC determined by its personal scope or is it independent (B)? Thirdly, turning to the personal scope not of a NIAC as such but of the application of IHL rules, I will look into whether these rules apply to intra-party relations (C).

A. Personal scope of a NIAC: the conditions for the existence of a NIAC are not evaluated separately with respect to the intervening State

In the case of a third State intervention, like Russia’s intervention alongside the Assad regime against the Syrian rebels or the Saudi-Arab coalition’s intervention alongside the government in Yemen against the Houthis, when does the intervening State become a party to the NIAC?

In order to avoid any overlap with Tristan’s presentation, I will not discuss interventions consisting in various ways of supporting a belligerent. I will only discuss direct armed foreign interventions in support of a State.²

The question here is whether the intensity criterion has to be fulfilled independently with respect to the intervening State or not. If one answers yes, this would in essence imply that the existence of a NIAC between, for example, Russia and the Syrian opposition would need to be evaluated separately. The consequence of such a construction would be that, unless Russia conducts directly a very lofty military operation, the first attacks by Russia would not be regulated by IHL, since the level of intensity would not be considered as having been reached. However, to the best of my knowledge, the intervening States themselves have not advanced such a position and rightly so. Indeed, this position seems problematic for at least three reasons:

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- 1 Generally on these issues, see for example ICRC, *Commentary on the First Geneva Convention*, Cambridge: CUP, 2016, pp. 146 sqq. (article 3) (hereafter: ICRC Updated Commentary GC I); E. DAVID, *Principes de droit des conflits armés*, 6th ed., Bruxelles: Bruylant, 2019, pp. 175 sqq.; N. ZAMIR, *Classification of Conflicts in International Humanitarian Law – The Legal Impact of Foreign Intervention in Civil Wars*, Cheltenham – Northampton: Edward Elgar Publishing, 2017, 288 p.; K. MACAK, *Internationalized Armed Conflicts in International Law*, Oxford: OUP, 2018, 320 p.
 - 2 Cases of direct armed interventions in favour of an armed rebel group raise the question of the internationalisation of the armed conflict and are thus outside the scope of this presentation; see references *op. cit.*

- it is completely counterintuitive to the reality of the facts on the ground since it would mean that part of the operation would be left outside the reach of IHL;
- it opens the door to abuse on the part of the inviting State. Indeed, if that State does not wish to apply IHL in a specific operation, all it has to do is to have it done by a newly invited force;
- it may also prove problematic for the invited State. If the initial stage of its operations is not covered by IHL, it will be regulated by Human Rights Law, whose rules may to some extent prove more constricting than IHL.

Therefore, the best option seems to be to consider the intervening State a party to the conflict directly from the beginning of its operations. After all, if the intervention is made at the behest of the host government, the two States can be viewed as co-belligerents. Thus, the intensity threshold can be considered as reached due to the previous hostilities between the rebel group and the host State.³

What about an intervention in a NIAC when the intervening State(s) pursue their own agenda and do not intervene alongside the government? In this case, the element of co-belligerency is missing and we are potentially seeing a new NIAC, independent from the pre-existing one in the territory of the host State. In this case, it is logical that the intensity criterion will have to be evaluated with respect to the intervening State(s) separately. Therefore, until the necessary threshold is reached, it will be difficult to claim that a NIAC between the intervening State(s) and the rebel group exists.

This does not mean, however, that the military operations of the intervening State(s) will not be regulated by IHL. In practice, if the intervention of a State against a rebel group in the territory of the host State is completely unrelated to an ongoing NIAC between the host State and the group, then the intervening State will probably operate without the consent of the host State. This means that the military intervention will trigger an international armed conflict with the host State⁴ and, as a result, the intervening State's military operations will come under the scope of application of IHL.

3 This view has been confirmed in the context of the coalition airstrikes against the Islamic State in Iraq; see V. KOUTROULIS, 'The Fight against the Islamic State and *jus in bello*', in: *LJIL*, vol. 29, 2016, pp. 832-833.

4 See ICRC *Updated Commentary GCI*, *op. cit.*, pp. 93-94; KOUTROULIS, *op. cit.* note 3, pp. 837-841.

B. Geographical scope of a NIAC: does a NIAC extend to whichever territory the belligerents are found in?

Does the identification of the parties to the NIAC also settle automatically the question of its geographical scope? In other words, does a NIAC automatically extend to whichever territory the belligerent parties are found in? This is the second question that will be examined in the context of this presentation.

When it comes to the geographical scope of an armed conflict and of the application of IHL, the relevant texts are silent. The starting point of the analysis comes from the International Criminal Tribunal for the former Yugoslavia (ICTY), which in the 1995 *Tadic* decision specified that ‘international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’⁵

This finding was confirmed, among others, in *Kunarac et al.*, with the important addition that the application of IHL is not limited to the territory where actual combat takes place:

‘There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there (...). A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place (...) It would be sufficient, for instance, (...) that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.’⁶

These findings reject an overly restrictive approach to the geographical application of IHL. This seems to put to rest views according to which IHL applies only to that part of the terri-

5 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 70, available at: <<http://cld.irmct.org/assets/Uploads/full-text-dec/1995/95-10-02%20Tadic%20Interlocutory%20Decision%20on%20Jurisdiction.pdf>>.

6 ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, Judgment, Appeals Chamber, 12 June 2002, §57, available at: <<http://cld.irmct.org/assets/filings/Judgement-Kunarac.pdf>>. For similar findings see, among many, ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Retrial Judgment, Trial Chamber II, 29 November 2012, paragraph 396, available at: <http://www.icty.org/x/cases/haradinaj/tjug/en/121129_judgment_en.pdf>; ICTY, *The Prosecutor v. Dario Kordic & Mario Cerkez*, Judgment, Trial Chamber, 26 February 2001, paragraph 27 (‘in order for norms of international humanitarian law to apply in relation to a particular location, there need not be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms part’), available at: <http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf>.

tory where the actual combat operations take place, leaving the rest of the territory outside the geographical reach of the law of armed conflict (sometimes referred to as a 'localised NIAC').⁷ However, the fact that, as the ICTY asserts, IHL is not limited to the area where the actual hostilities take place does not mean that IHL automatically applies to everything that is happening in the territory of a State party to a NIAC. One will still need to look to whether the specific facts have a link – a nexus – to the armed conflict. In any case, these pronouncements point to the 'whole territory under the control of a party to the conflict' as the decisive element for the geographical scope of a NIAC. In this respect, they seem to establish a direct connection between the personal and the geographical scope of a NIAC.

A similar connection seems to be established in the case of what has been termed a 'spill-over NIAC'. Indeed, when it comes to the geographical reach of a NIAC, based on State practice, the ICRC accepts the idea of a NIAC spilling over into the territory of a neighbouring State. According to the 2016 updated Commentary, provided that the territorial State does not object to the military operations, 'State practice seems to indicate that the crossing of an international border does not change the non-international character of the armed conflict'.⁸ Here again, it is the identity of the parties to the conflict – and not territory – that determines the character of the conflict.

Things however are not as straightforward in multinational NIACs as the following two examples will illustrate.

Firstly, the question arises as to whether IHL applies to the territory of a third State which intervenes against a rebel group in the context of a NIAC taking place in the territory of another State. More concretely, does IHL apply to attacks by (or attributed to) the Islamic State in Syria (ISIS) conducted inside the territory of Belgium or France? Leaving aside the issue of whether the persons involved belong indeed to the Islamic State, does IHL apply to an attack committed in the territory of Belgium? Belgium is a party to a NIAC against the Islamic State due to its participation in the airstrikes against the Islamic State in Iraq and Syria. If we apply the reasoning of the ICTY, the March 2016 attacks in Brussels took place in the territory 'under the control of a party' to the conflict and in connection to that conflict. If we stick to the link between the personal and geographical scope of the NIAC and we apply the letter of the pronouncements of the ICTY, then we should admit that IHL applies to the territory of Belgium.

7 For the rejection of the idea of such 'localised NIACs', see 'Guest Post from ICRC's Daniel Cahen Reponding to my Post on Syria/LOAC', 17 July 2012, *Lawfare*, available at: <<https://www.lawfareblog.com/guest-post-icrcs-daniel-cahen-responding-my-post-syrialoac>>.

8 ICRC *Updated Commentary GCI, op. cit.*, p. 171. Along the same lines, see K. SCHÖBERL, 'Chapter 4: The Geographical Scope of Application of the Conventions', in: A. CLAPHAM, P. GAETA and M. SASSOLI (eds.), *The 1949 Geneva Conventions: a commentary*, Oxford: OUP, 2015, p. 82.

However – and regardless of the vocabulary used by some heads of States – State practice indicates that these incidents have been treated under a law enforcement paradigm rather than under an IHL one. It is obvious that States are reluctant to use IHL as the legal framework of reference for actions undertaken within their territory. Does this practice indicate a legal belief on behalf of States that the geographical scope of a NIAC does not extend to the territory of the third States intervening in a NIAC abroad?

To my mind, it does not. The reaction by the States in question appears to be driven more by political concerns and it would be difficult to discern a genuine *opinio juris* with regard to the applicable law in this situation. Indeed, even if the Belgian authorities did consider that IHL were applicable in the context of the Brussels attacks, it is perfectly understandable that they would prefer to act under a law enforcement paradigm rather than launch a precision-guided missile against the apartment of the presumed ISIS combatant in Brussels, and then invoke the principle of proportionality to justify the potential collateral damage. The fact that States did not concretely apply IHL in the relevant situations does not mean that they reject, from a legal point of view, the possible applicability of IHL in their territory. Therefore, in my view, the practice of States intervening against the Islamic State in Syria cannot be considered as decisive in order to establish a limitation of the geographical scope of a NIAC.

The second case relates to the application of IHL to an attack by one of the intervening States in Iraq or Syria against a member of the Islamic State occurring in the territory of a third State unrelated to the conflict. If the personal scope of application of IHL determines its geographical scope of application, then the targeted individual is a member of the armed group which is a party to an existing NIAC and the attack takes place as a prolongation of this NIAC. In such a case, should we not admit that this attack should also be regulated by IHL? After all, this case is very similar to the ‘spill-over NIAC’⁹ the only difference being one of scale: instead of crossing a border in order to be in the territory of a neighbouring State, the targeted member(s) of the armed group have travelled further away and have reached the territory of a State which does not share a common border with the State on whose territory the NIAC takes place. Since we accept the extension of the geographical scope of the NIAC in the ‘spill-over’ scenario, why should we not do the same for other cases?

9 Sometimes distinguishing between the two scenarios is not easy; see for example Milanovic who defines a ‘spill-over’ NIAC as a conflict occurring in State A where ‘fighting crosses the border and spills over onto the territory of State B (normally, *but not necessarily*, adjacent to A), which itself may or may not join in the fighting’; M. MILANOVIC, ‘Chapter 2: The Applicability of the Conventions to “Transnational” and “Mixed” Conflicts’, in: A. CLAPHAM, P. GAETA and M. SASSOLI (eds.), *The 1949 Geneva Conventions: a commentary*, Oxford: OUP, 2015, p. 43 (emphasis added).

However logical this conclusion may seem, its application would mean that any member of an armed group would carry the NIAC with them anywhere around the world. This would practically lead to a NIAC without borders and without any territorial limitation. This view of a NIAC unhinged by territorial constraints – and reminiscent of the concept of the “global war on terror” – has been rejected by the majority of States as well as by the ICRC. Indeed, when it comes to the geographical reach of a NIAC, aside from the ‘spill-over’ scenario, the ICRC has adamantly rejected the possibility of invoking IHL for actions taking place in the territory of any other third State. Thus, for example, International Security Assistance Force (ISAF) members may apply IHL when pursuing a Taliban or Al-Qaeda fighter into the territory of Pakistan but not when they use a drone against a member of Al-Qaeda in the territory of a third State. For third States, the elements of intensity of hostilities and organisation of the parties should be evaluated from the beginning, distinctly from the hostilities occurring elsewhere.

The reason for the rejection of such a global NIAC seems to be grounded on the risk of abuse associated with the invocation of IHL in order to justify the targeting and killing of individuals abroad. This is eloquently explained by the ICRC as follows: ‘in practical terms it is disturbing to envisage the potential ramifications of the territorially unlimited applicability of IHL if all States involved in a NIAC around the world were to rely on the concept of a “global battlefield”’¹⁰

C. Personal scope of application of IHL in NIACs: intra-party application of IHL

The last point of this presentation relates to the personal scope of application of IHL in NIACs, more specifically to the applicability of IHL in the relations between members of the same party to the conflict. The traditional view is that IHL does not govern such relations. Indeed, IHL has been considered as relevant only for protecting persons who are found in the power of the enemy.

Here again, this view should be and has been nuanced. It is the International Criminal Court (ICC) that brought this issue into the spotlight in the *Ntaganda* case. Bosco Ntaganda was Deputy Chief of Staff and commander of military operations of the Patriotic Forces for the Liberation of the Congo (*Forces patriotiques pour la liberation du Congo* – FPLC). He was accused of several crimes, the list of which included enlistment and conscription of child soldiers and using them to participate actively in hostilities, as well as acts of rape and sexual slavery committed against the child soldiers. His defence team argued that the war crime of rape and

¹⁰ ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Document prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, October 2015, p. 15.

sexual slavery should be dropped because it concerned actions perpetrated by members of the armed group (FPLC) against members of the same group (the child soldiers) and, as such, these actions lay outside the personal scope of application of IHL.

Both the Trial Chamber and the Appeals Chamber of the ICC did not agree with this argument. Leaving aside the technical questions relating to the ICC Statute, I will focus on some general findings by the ICC Chambers. In its decision of 4 January 2017, the Trial Chamber found that ‘the protection against sexual violence under international humanitarian law is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians who are not directly participating in hostilities’¹¹ and thus that ‘members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery’.¹²

The Trial Chamber’s findings were limited to rape and sexual slavery. A few months later, in deciding on the defence’s appeal of the Trial Chamber’s decision, the Appeals Chamber made a much broader finding: ‘upon closer examination of the principles and the cases, the Appeals Chamber is persuaded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group’.¹³ A similar view is expressed, albeit in slightly more cautious terms, in the updated Commentary of Common Article 3.¹⁴

This finding of a ‘seemingly unprecedented nature’, in the Appeals Chamber’s own words,¹⁵ is inspired – justly so – by the object and purpose of IHL, that is to protect ‘vulnerable persons during armed conflict’ and to assure ‘fundamental guarantees to persons not taking active part in the hostilities’.¹⁶

11 ICC, *The Prosecutor v. Bosco Ntaganda*, Second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber IV, 4 January 2017, paragraph 53.

12 *Ibid.*, paragraph 54.

13 ICC, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the ‘Second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, Appeals Chamber, 15 June 2017, paragraph 63, available at: <https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF> (hereafter: *Ntaganda* 2017 Appeals Judgment).

14 ICRC *Updated Commentary GCI*, *op. cit.*, pp. 191-192.

15 ICC, *Ntaganda* 2017 Appeals Judgment, *op. cit.*, paragraph 67.

16 *Ibid.*, paragraph 57. This need for protection has also been underlined by scholars favourable to the application of IHL to members of a belligerent party’s own forces; see J. K. KLEFFNER, ‘Friend or Foe? On the Protective Reach of the Law of Armed Conflict – A note on the SCSL Trial Chamber’s Judgment in the Case of *Prosecutor v. Sesay, Kallon and Gbao*’, in: M. MATTHEE *et al.* (eds.), *Armed Conflict and International Law: In Search of the Human Face*, The Hague: T.M.C. Asser Press, 2013, pp. 300-301; T. RODENHÄUSER, ‘Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their “Own Forces”’, *Journal of International Criminal Justice*, vol. 14, 2016, p. 189.

Does this mean that everything happening between soldiers of the same force will be regulated by IHL? This was a point – and a danger – highlighted by the defence in the *Ntaganda* case.¹⁷ The ICC Appeals Chamber seemed aware of this risk and pointed to the need to exclude any unwarranted side-effects of this conclusion. According to the judges, ‘any undue expansion of the reach of the law of war crimes’ can effectively be prevented by having recourse to the element of the nexus to the armed conflict: ‘this nexus requirement (...) sufficiently and appropriately delineates war crimes from ordinary crimes.’¹⁸

Although this may theoretically seem reassuring, if we have a closer look at the factors that should be taken into account in order to establish that such a nexus exists, we can easily perceive that things may not be as straightforward. Indeed, according to the Appeals Chamber, the relevant criteria for establishing the existence of such a nexus are ‘the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.’¹⁹

This enumeration indicates that, in cases like *Ntaganda*, at least two out of the five factors considered as relevant in order to establish the required nexus – namely the fact that ‘the victim is not a combatant’ and the fact that ‘the victim is a member of the opposing party’ – will by definition not be met. A third one – the criterion relating to the fact that ‘the act may be said to serve the ultimate goal of a military campaign’ – may also prove problematic. Therefore, despite calls for a ‘rigorous application of the nexus requirement’, the finding in *Ntaganda* may also have implicitly altered the criteria which are relevant in order to establish the necessary nexus to an armed conflict. In any case, at least to the best of my knowledge, it is the first time that the ICC has had to deal with this question. Some fine-tuning will undoubtedly be required and it remains to be seen how this pronouncement will be applied in the future.

D. Conclusion

In conclusion, it is interesting to note the interplay between the geographical and the personal scope of application of IHL. Although the personal scope is – naturally – decisive for

17 ICC, *The Prosecutor v. Bosco Ntaganda*, Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Defence Team of Mr Bosco Ntaganda, 26 January 2017, paragraph 27: ‘Sexual violence committed by one soldier against another while deployed on mission could, accordingly satisfy the nexus requirement. Such sexual violence could even colourably fall within the jurisdiction of the Court prior to an international deployment.’

18 ICC, *Ntaganda* 2017 Appeals Judgment, *op. cit.*, paragraph 68.

19 *Ibid.*

the application of IHL, territory does have a role to play and can prove relevant particularly in limiting the scope of application of IHL, as the rejection of the idea of a global NIAC indicates.

More fundamentally, this brief survey of questions relating to the geographical and personal scope of NIACs points to a tension between the criteria which may be considered relevant for determining the scope of application of IHL. On the one hand, we have objective, easily identifiable criteria, like the territory of a State party to a conflict, the status of a State as a party to the conflict, or the status of the individuals as members belonging to a belligerent party. When such criteria are used, determining whether IHL applies in a certain situation or not becomes easier: IHL applies in the territory of a State party but not outside it; IHL applies in relation only to persons belonging to the adverse belligerent party, not to individuals belonging to a belligerent's own forces, etc. On the other hand, this formula proves in some cases too rigid. Which is why there are propositions for adopting – either instead of the above-mentioned elements or in combination with them – more flexible criteria, like the nexus to an armed conflict. This approach allows for a more nuanced application of IHL, presumably more adapted to the realities on the ground. However, what you gain in nuance, you lose in certainty.

MILITARY SUPPORT TO BELLIGERENTS: CAN THE PROVIDER BECOME A PARTY TO THE ARMED CONFLICT?

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Résumé

L'exposé de Tristan Ferraro porte sur le soutien militaire de plus en plus fréquent par des tiers aux belligérants impliqués dans un conflit armé non international (CANI) préexistant.

Les CANI contemporains se caractérisent par la multiplication des acteurs impliqués et la prolifération de coalitions qui peuvent prendre différentes formes : coalition d'Etats, d'Etats et de groupes armés non étatiques, coalition de groupes armés. De plus, le soutien militaire fourni par les forces d'intervention diffère en termes de nature, de fréquence et d'emplacement. Des questions importantes et difficiles en découlent : quel serait le statut juridique de ces acteurs qui apportent leur soutien en regard du Droit international humanitaire (DIH) ? Le DIH s'applique-t-il à leur action ? Si oui, quand et où le DIH s'applique-t-il ?

Les réponses à ces questions sont difficiles, car souvent le soutien apporté par les parties intervenant dans la coalition n'atteint pas à lui seul le seuil d'intensité requis par l'article 3 commun aux Conventions de Genève. Toutefois, le Comité international de la Croix-Rouge (CICR) défend une interprétation plus souple du champ d'application du DIH, basée sur l'ampleur du soutien dans la conduite des hostilités. C'est « l'approche fondée sur le soutien ».

1. La complémentarité de l'approche fondée sur le soutien

L'approche fondée sur le soutien ne remplace pas les critères d'applicabilité du DIH découlant de l'article 3 commun, elle ne fait que les compléter. Dans le cas d'une situation impliquant le soutien d'une partie intervenante, le CICR examinera d'abord les conditions classiques pour déterminer l'existence d'un CANI, et si elles ne sont pas remplies, le CICR observera ensuite l'implication de cette partie à travers le prisme de l'approche fondée sur le soutien.

2. Le fondement de l'approche

L'approche fondée sur le soutien n'est applicable qu'en cas de CANI préexistant. Elle se base sur l'idée que plus une partie intervenante est impliquée dans les opérations militaires d'un conflit préexistant, plus ses propres actions sont soumises au DIH. La partie intervenante de-

vient une nouvelle partie au conflit. Dès lors, il n'est pas nécessaire de déterminer si le critère d'intensité est rempli par la partie intervenante, ces conditions étant déjà remplies dans le CANI préexistant. L'approche fondée sur le soutien est donc centrée sur la nature des activités des parties intervenantes, pas sur l'intensité des hostilités.

3. Les conditions nécessaires à l'approche fondée sur le soutien

Selon le CICR, le DIH s'applique aux parties intervenantes lorsque les conditions suivantes sont remplies :

- *il existe déjà un CANI sur le territoire où les parties intervenantes apportent leur soutien ;*
- *ces parties satisfont au critère d'organisation aux fins du DIH ;*
- *leur intervention comprend des actions liées à la conduite collective des hostilités ;*
- *leurs actions sont menées à l'appui d'une ou de plusieurs parties au CANI préexistant ;*
- *ces actions sont entreprises à la suite d'une décision officielle de la partie intervenante d'appuyer l'un des belligérants impliqués dans le CANI préexistant.*

La référence au territoire ne fait que refléter le fait que les interventions à l'appui de belligérants se produisent généralement sur le territoire où se déroule le CANI. Toutefois, cela ne signifie pas que l'applicabilité du DIH soit limitée à ce territoire ; l'approche fondée sur le soutien ne modifie pas le champ d'application géographique du DIH.

Le critère de l'organisation des parties intervenantes est une conséquence du fait que l'approche fondée sur le soutien confère le statut de partie au CANI préexistant. Si ce critère est aisément rempli par les États et organisations internationales, ce ne sera pas forcément le cas des groupes armés non étatiques.

Le troisième critère est crucial. Pour qu'une partie apportant son soutien soit qualifiée de partie au conflit, ce soutien doit se traduire en actions apportant une contribution directe et effective à la conduite des hostilités et ayant un impact direct sur la capacité de la partie adverse à mener des opérations militaires. Il ne peut pas s'agir d'une contribution générale à l'effort de guerre ou d'autres formes indirectes de soutien. Il n'est cependant pas nécessaire que le soutien de la partie intervenante nuise directement à l'adversaire ; il peut aussi lui nuire par sa conjonction avec d'autres actions de la partie soutenue.

L'approche du CICR exige un lien clair entre la partie intervenante et le CANI préexistant. Le quatrième critère exige donc que le soutien aide objectivement une des parties de ce CANI. Une simple conjonction des objectifs politiques ou religieux entre différentes parties ne suffit pas ; il doit être évident, par ce qu'on observe sur le terrain, que la partie apportant son soutien met

en commun des ressources militaires ou coordonne ses actions avec les autres parties au CANI préexistant, dans le but de combattre un ennemi commun.

L'objectif de cette dernière condition est de prendre en compte les situations déjà observées dans le passé, par exemple dans le cadre d'opérations de paix en République démocratique du Congo (RDC), où les actions en question étaient le résultat de décisions prises individuellement au niveau tactique sans être approuvées au niveau stratégique.

4. La fin de l'applicabilité du DIH

Le DIH ne s'applique plus aux parties intervenantes dans deux situations :

- *la fin du CANI préexistant ;*
- *la fin ou le changement du soutien apporté.*

Le DIH ne s'applique plus à une partie apportant son soutien à une autre partie au sein d'un CANI préexistant si elle s'est désengagée de façon permanente de la conduite collective des hostilités. Ce désengagement peut se faire à trois niveaux : au niveau quantitatif (cessation complète du soutien), au niveau qualitatif (changement dans la nature du soutien), ou au niveau temporel (la cessation dure depuis suffisamment longtemps pour pouvoir être considérée comme effective, générale et définitive).

Le désengagement permanent de la conduite collective des hostilités n'est pas un critère autonome pour évaluer la fin d'un CANI ; il complète le critère retenu par le CICR, la cessation durable des affrontements armés sans risque de reprise de l'affrontement. Le désengagement permanent de la conduite collective des hostilités requiert donc non seulement que le soutien fourni ait cessé ou ait changé de nature, et ne participe ainsi plus à la conduite collective des hostilités, mais également que cette situation ait abouti à la cessation de la relation belligérante entre la partie intervenante et la partie au CANI préexistant, sans risque de reprise de l'engagement.

Toutefois, le DIH continue de s'appliquer lorsqu'un tiers se désengage de la conduite collective des hostilités ou du soutien à un belligérant, mais a continué à mener son propre combat ou a l'intention de le faire.

Introduction

The objective of this paper is to address and discuss the implications under International Humanitarian Law (IHL), for classification purposes, of one of the main features of current belligerency: the ever increasing provision of military support by third parties – State and non-State players alike – to belligerents involved in a pre-existing NIAC.

As already underlined by the Vice-President, Mr. Gilles Carbonnier, in his speech, modern non-international armed conflicts (NIACs) are increasingly characterised by the multiplication of stakeholders involved therein. Nowadays, the most important NIACs are not limited to a one-to-one belligerent relationship opposing the armed forces of a State and the forces of a rebel group.

Situations in Syria, Iraq, Yemen, Sahel, Afghanistan, Somalia, Lake Chad, to name only the most emblematic ones, demonstrate that coalition warfare is not a concept specific to International armed conflict (IAC) anymore.

In contemporary NIACs, we observe the proliferation of such coalitions, which may take various forms: coalition of States, of States and non-State armed groups (NSAG), coalition exclusively made of NSAGs themselves, often opposed to a State or to another NSAG, but also fighting against coalitions having similar characteristics.

In addition, the military support provided by intervening forces within the framework of these coalitions may differ in terms of nature (kinetic v. non kinetic operations, such as logistical support, provision of intelligence, participation in the planning and coordination of military operations), frequency (sporadic v. recurrent or continuous operations) and location (in one specific country to the benefit of one party v. spread over various States for the benefit on different parties).

All these elements put together complicate the determination of IHL applicability to such situations involving the provision of military support by third parties. Important and difficult questions arise: what would be the legal status of these support providers under IHL? Does IHL apply to their action? If yes, when and where does IHL apply? These are essential issues for the International Committee of the Red Cross (ICRC) as they will set the parameters of our confidential dialogue with all those involved – directly or indirectly – in NIACs, including support providers.

These questions are also difficult to answer because often the support provided by third parties does not in itself meet the threshold of intensity required for NIACs under the classic criteria stemming from common Article 3 to the Geneva Conventions of 1949.

In such instances, should we consider that each and every third party should meet individually the intensity criterion, limiting *de facto* and *de jure* the scope of IHL applicability to their actions? Or should we look at a more flexible determination, not necessarily focusing on intensity but rather giving more importance to the nature of third parties' involvement?

We think at the ICRC that the classic conditions pertaining to NIAC may not always be suitable to address the challenges raised by coalition warfare in NIAC. For this reason, the ICRC has developed over the years the so-called "support based approach" (SBA).

The ICRC's "support based approach"

About the complementarity

First, it is important to emphasise the complementary nature of the SBA. The SBA is not replacing the determination of IHL applicability based on the classic criteria derived from common Article 3 (CA 3). It only complements it. This means that for a situation involving the support of third parties, we will first look at the conditions for determining the existence of a NIAC, more particularly the intensity criterion. If the latter is not fulfilled, we will then observe third parties' involvement through the prism of the SBA. This is how at the ICRC we use the SBA in our process of classification of situations.

The SBA is therefore just another tool at our disposal in order to determine whether the support provided by a third party could trigger IHL applicability and therefore turn them into a party to the pre-existing NIAC.

SBA's rationale

One of the key elements of reference for the SBA is the prior existence of a NIAC. Indeed, the very rationale of this SBA is to link it to IHL third parties' actions that objectively form an integral part of that pre-existing NIAC.

In fact, the SBA revolves around one very simple principle: the closer third parties are to the military operations occurring in a pre-existing NIAC through their military support to one of the belligerents, the closer these third parties are to IHL applicability to their own actions and to the logical consequence of this situation: becoming a party to the pre-existing NIAC.

In such situations, it is not necessary in our view to assess whether the third parties' intervention or support fulfils *per se* the criteria for a NIAC, in particular the criterion of intensity, because these conditions have already been met in the pre-existing NIAC.

In such situations, the support provided by third parties should not be interpreted as a constitutive element of a potential new and independent NIAC. On the contrary, the support is part of the equation of the pre-existing NIAC.

It is for this reason that the SBA focusses on the nature of the activities performed in support of one of the belligerents and does not look at the intensity criterion. In a way, the SBA evidences a functional approach of IHL applicability to coalition warfare in NIAC.

The conditions necessary to trigger the SBA

While developing the SBA notion and delimiting its contours, the ICRC has identified five conditions whose cumulative fulfilment would trigger IHL applicability to actions undertaken by intervening/supporting third parties.

Under the SBA, it is submitted that IHL applies to intervening/supporting parties when the following conditions are met:

- there is a pre-existing NIAC ongoing in the territory where the third parties intervene/ provide their support;
- third parties must meet the organisation criterion for the purposes of IHL;
- the third parties' intervention includes actions related to the collective conduct of hostilities;
- the actions of third parties are carried out in support of one or several parties to the pre-existing NIAC;
- the actions in questions are undertaken pursuant to an official decision by the third party to support one of the belligerents involved in the pre-existing NIAC.

Let us now briefly discuss these cumulative conditions.

1. Requirement of a pre-existing NIAC

This condition is self-explanatory. As mentioned above, the rationale of the SBA requires that the military support in question be connected to the military operations taking place in an armed conflict whose existence has already been objectively established. If a pre-existing NIAC is absent, the SBA cannot be activated and the only way in which third parties could

become involved in a NIAC would be to fulfil the classic criteria derived from CA 3 of the Geneva Conventions (GC).

The territorial reference in that condition only reflects the fact that the third parties' intervention in support of a belligerent generally occurs in the territory where the NIAC originated. However, this does not mean that IHL applicability is limited to that territory. The support can also be provided outside the territory in which the conflict takes place (for instance if provided in high seas or in international airspace). In addition, according to the ICRC, once the supporting entity becomes a party to the pre-existing NIAC, IHL will also apply to its own territory or to the territory it controls. In this regard, the SBA does not alter the IHL's geographical scope of application.

2. Third parties' fulfilment of the organisation criterion

The SBA not only determines IHL applicability to support providers but also confers them the status of party to the pre-existing NIAC. Therefore, in order to apply the SBA to their actions, support providers must be sufficiently organised to qualify as party to an armed conflict. This is an easy task for States' and international organisations' forces as they are inherently organised. This however is less obvious for non-State players providing support. For their situation, we will need to undertake a careful assessment of their situation and observe whether they meet the organisation criterion. Should it not be the case, the SBA cannot be used.

3. Third parties' actions must be related to the collective conduct of hostilities

This third criterion is of great importance. Under the SBA, for IHL to become applicable to third parties in the context of a pre-existing NIAC, they must perform actions of a *nature* that would make them a party to that conflict within IHL meaning.

Under the SBA, not all forms of support can turn their providers into a party to the pre-existing NIAC. The decisive element in this regard is the *direct and effective* contribution made by the third parties to the collective conduct of hostilities. A general contribution to the war effort would not be sufficient, as it is too indirect an involvement in the pre-existing armed conflict, thus has no effect on the status of the support provider under IHL.

Therefore, under the SBA, a clear distinction must be made between the provision of support that has a direct impact on the opposing party's ability to carry out its military operations and more indirect forms of support which would only allow the beneficiary to build up its military capabilities. Only the former can turn the support provider into a party to the pre-existing NIAC.

In this regard, the situation is clear for third parties involved directly in kinetic operations. However, the assessment may prove more difficult for other types of support, short of the use of force.

For the SBA purposes, it is not necessary for the action carried out by third parties to cause *per se* direct harm to the enemy. Direct support also encompasses actions that have an impact on the enemy if in conjunction with other acts undertaken by the supported party. In that case, third parties' actions should be considered an integral part of specific, coordinated military operations carried out by the supported party which directly inflict harm on the enemy.

In other words, there must be a close link between the action undertaken by multinational forces and the harm caused to one of the belligerents by specific military operations. Third parties' actions must be in support of a party to the pre-existing NIAC.

There is also an important element that my colleagues within the ICRC's legal division tend to sometimes forget, giving the impression that third parties' intervention in a NIAC is presumed to be in favour of one of the belligerents. This is not necessarily the case.

For the SBA to apply, there must be a clear nexus between the third parties' actions and the pre-existing NIAC. Such nexus is observed when the actions of third parties are objectively carried out in support of a party to the pre-existing NIAC.

If some action might appear at first sight to pursue the same goal (e.g. to suppress a threat from the same enemy), this may not necessarily mean that third parties' actions are carried out in support of one of the parties to the pre-existing NIAC. *A fortiori*, shared political or religious views are not sufficient grounds for concluding that third parties' actions are conducted on behalf a belligerent involved in the pre-existing NIAC.

For this reason, determining the existence of such a nexus might prove difficult. The key issue will be that of identifying whether the actions carried out by third parties in the prevailing circumstances can reasonably be interpreted as actions designed to support a party to the pre-existing NIAC, in that they directly affect the adversary's military capabilities or hampers its military operations.

In other words, it must be evident from the action undertaken by third parties that they are pooling or marshalling military resources or coordinating actions with parties to the pre-existing NIAC in order to fight a common enemy. This cooperation or coordination among

the participants in hostilities would be sufficient proof of the collective nature of operations required by the SBA.

4. *A decision made by official authorities*

I will not dwell on this condition whose objective is to avoid triggering the SBA and its consequences when the actions under scrutiny are the result of a mistake or that appear to be *ultra vires*. The objective of this fifth condition is to take into account situations we have seen in the past in the context of peace operations in the Democratic Republic of the Congo (DRC) where the actions in question were the result of a decision taken individually at the tactical level without being approved at the strategic level.

All five conditions must be fulfilled in order to render IHL applicable to the third state(s)' actions in the context of a pre-existing NIAC.

In our view, the fulfilment of these criteria determines beyond reasonable doubt the existence of an objectivised belligerent intent on the part of the intervening State(s) since the situation objectively evidences their effective involvement in military operations or other hostile action aimed at neutralising the enemy's military personnel and assets, hampering its military operations or controlling parts of its territory.

In the ICRC's view, the SBA better delineates the contours of the notion of NIAC. It provides a modern interpretation of the notion of NIAC and the correlative IHL applicability. It also takes into account contemporary features of NIACs while being in line with IHL logic, with the imperative of not blurring the distinction between combatants and civilians, and of maintaining the principle of equality of belligerents.

The SBA also allows avoiding an illogical situation in which parties making a significant and effective contribution to military operations linked to a pre-existing NIAC, thus participating in the collective conduct of hostilities, would not be considered as belligerents and could still claim that their military personnel are protected against direct attacks and benefit from civilian status under IHL.

Eventually, it is worth mentioning that if the SBA has been mainly developed against the background of peace operations, there is however no reason for not applying it to other contexts characterised by the involvement of third parties – States and NSAGs alike – in pre-existing NIACs. The logic of the SBA would apply each time third parties graft their actions onto a pre-existing NIAC. In this regard, the SBA is now a key element of our classification process and

has been used frequently in the last years in order to determine the status under IHL of those States intervening in pre-existing NIACs.

The end of IHL applicability and SBA

There are two cases in which IHL applicability to support providers ends:

- the end of the pre-existing NIAC;
- the cessation or change of the support provided.

The first situation is quite rare nowadays, as NIACs tend to be more and more protracted, leading to a certain support providers' fatigue. They may therefore decide to stop their support or to carry it out differently.

When IHL applies to third parties involved in a pre-existing NIAC under the support based approach, IHL will no longer bind them once their "lasting disengagement" from the collective conduct of hostilities has been objectively observed. In other words, a lasting disengagement from the support that turned them into parties to the pre-existing NIAC.

Regarding NIACs involving third parties, we would submit that a prolonged cessation of the support previously provided to one of the belligerents engaged in the pre-existing NIAC would therefore be sufficient to determine that the support provider is no longer party to the conflict.

It can be argued in this regard that the notion of lasting disengagement from the collective conduct of hostilities has a threefold dimension: quantitative (complete cessation of the support provided to a party to the NIAC), qualitative (nature of the support provided) and temporal (the cessation of the support within SBA meaning: it must last for a sufficient lapse of time so one can reasonably consider that it is effective, general and definitive).

However, does this lasting disengagement from the collective conduct of hostilities constitute an independent criterion, distinct from the one used by the ICRC for determining the end of a NIAC?

The answer is no, it does not. As it is the case for the SBA, the lasting disengagement from the collective conduct of hostilities is not an autonomous criterion for assessing the end of a NIAC. The SBA test only complements and does not replace the classic criteria form NIAC. If this is true for assessing when a third party, by virtue of its support to a party to a pre-existing NIAC, has become a new belligerent, this should also be true for assessing when this support provider ceases to be considered a party to this ongoing NIAC.

Therefore, the lasting disengagement from the collective conduct of hostilities is in a way an expression of lasting cessation of armed confrontations with no risk of resumption, which is the test that the ICRC uses for determining the end of a NIAC.

In this regard, the lasting disengagement from the collective conduct of hostilities (which can be substantiated either by a stop of the support provided or a change in the nature of the support provided), when observed, must also result in a lasting cessation of armed confrontation with no risk of resumption when it comes to the belligerent relationship between the support provider and the enemy, and this even if the pre-existing NIAC endures.

Concerning those parties to a NIAC by virtue of the SBA, there would be a kind of double key test in order to assess whether they would have ceased to be considered as belligerents in the IHL meaning. Not only the support provided must have ceased or changed in nature to become short of involvement in the collective conduct of hostilities but this situation must result in the cessation of the belligerent relationship between the support provider and a party to the pre-existing NIAC, with no risk of resumption. This would determine whether the disengagement has ceased with a sufficient degree of stability and permanence so that the supporting party cannot any longer be considered as a party to the NIAC.

With this notion of lasting disengagement, IHL ceases to apply to the actions of the third parties concerned. However, IHL will still apply when a third party disengages from the collective conduct of hostilities or from the support to a belligerent, but continues to fight in its own right or intends to do so. In such situations, there is a disengagement from the support of the coalition but not from the hostilities; therefore, in such cases, the third party concerned would remain party to a NIAC, but a separate one.

Q&A SESSION

At the end of the panel discussion, a Q&A session allowed the audience to raise seven questions.

1. The legal basis of the support based approach

The first question asked was about the legal basis of the SBA. The participant noted that there was no clear State position on this notion, except perhaps the United States and its concept of “associated forces”. However, the notion of associated forces does not seem to reflect the SBA, given the nature of the support considered. The article published by Tristan Ferraro, which reflects the ICRC’s position, mentions several times the concept of “co-belligerency” but the participant doubted that this notion is the relevant legal basis. Finally, in view of the terminology used to determine the criteria for applying the SBA, the participant wondered whether the SBA could refer to the notion of “direct participation in hostilities”. These two concepts are of a different nature, but the concept of DPH could be adapted to the specific nature of the States’ participation addressed in the SBA.

Tristan Ferraro explained that the legal basis for the SBA is the notion of armed conflict itself and that this position remains in line with the logic and the underpinning principle of International Humanitarian Law. Indeed, it allows maintaining the *summa divisio* between civilians and combatants. The SBA ensures avoiding completely illogical situations in which, for instance in Afghanistan, States clearly involved in the hostilities claimed that they were not fulfilling themselves the criteria of intensity and, therefore, stated that their soldiers remained protected as civilians under IHL. Tristan Ferraro had discussions with the Taliban, who made it clear that they did not care who fulfilled the intensity criteria, as long as they were facing an international force. They asked not to expect them to examine each contingent to see whether it was a party to the armed conflict or not. The SBA is also in line with the principle of equality of belligerents. How can a State claim that it uses force in accordance with the rules governing the conduct of hostilities and, at the same time, invoke the protection enjoyed by civilians for its own forces? Concerning the DPH, it is true that the SBA is inspired by it. The concept of direct participation in hostilities has been adapted to cover acts, not of civilians, but of organised armed groups. Tristan Ferraro recalled that co-belligerency is a concept used by the United States in the fight against terrorism, or a concept specific to the Law of Neutrality. With regard to the references to co-belligerency in the SBA, it is mentioned only to illustrate the *de facto* situation, without any significance from a legal point of view.

2. The intervention of an armed group and the personal scope of IHL

A participant raised the question related to the personal scope of IHL in the case of a non-State armed group (NSAG) intervening in a pre-existing non-international armed conflict in the territory of a third State, for instance Hezbollah in Syria. Would the NSAG be a party to the pre-existing conflict?

Tristan Ferraro noted that the SBA applies to the support brought by NSAGs to a State or another NSAG. However, SBA does not apply within the framework of coalitions in an international armed conflict (IAC). Indeed, the SBA is a concept used to circumvent the issues linked to the criterion of intensity, a criterion which is not required for IAC.

Vaios Koutroulis explained that, regarding the personal scope of IHL in case of a foreign military intervention in a pre-existing NIAC, he could not find any justification to distinguish the case of intervention by a third State from the case of intervention by a NSAG. If the NSAG is invited by one of the parties to the pre-existing conflict, the intensity criterion will be assessed in relation to the overall military operations of the party inviting the NSAG. If the NSAG's intervention is not linked to the pre-existing NIAC, the intensity criterion must be assessed independently of the pre-existing NIAC and separately for the intervening NSAG.

3. A distinct analysis of the different relationships between armed groups and States

One participant pointed out that when it comes to qualifying conflicts such as in Syria or, if it is indeed a conflict, Mexico, people simply qualify the situation as NIAC. The participant asked whether a separate analysis of the different relationships between armed groups and States should not be made.

Vaios Koutroulis agreed that an analysis should be carried out from the point of view of each specific relation with each specific player with respect to the other.

4. Les seuils d'application distincts des règles coutumières

Un participant a commencé par affirmer que Jean Pictet avait largement assoupli les critères établissant l'existence d'un CANI, mais aujourd'hui les juristes hésitent à poursuivre sur cette voie, car ils estiment que cela permettrait aux États de justifier certains actes qu'ils ne peuvent commettre en période de paix. Toutefois, il soutient qu'il est faux de considérer que le DIH accorde une autorisation légale aux parties à un conflit d'adopter certains comportements, et que l'ensemble du débat sur l'assouplissement des critères est donc faussé. Finalement, il a demandé à Julia Grignon si elle considèrerait qu'il faudrait analyser, pour chaque règle coutumière individuellement, la pratique et l'*opinio juris* pour déterminer à quel type de CANI la

règle s'applique. Car s'il existe des CANI différents, répondant à des critères différents, ne doit-on pas considérer qu'une règle puisse être coutumière pour un CANI tel que défini par l'article 3 commun aux Conventions de Genève, et pas pour un CANI tel que défini par le deuxième Protocole additionnel ?

Julia Grignon a répondu qu'elle laisse à la jeunesse la tâche de répondre à cette question et d'établir une liste doctrinale. Elle a ajouté que de nombreuses choses peuvent être dites sur la méthodologie utilisée par le CICR dans l'étude sur le droit coutumier. Toutefois celle-ci analyse la pratique des États, or Julia Grignon s'intéresse à la pratique des groupes armés non étatiques.

5. Veiller au respect du Droit international humanitaire par certains groupes armés

Une personne dans le public a affirmé que dans un contexte tel que la région du lac Tchad, il est difficile d'invoquer les règles du DIH face à des groupes tels que Boko Haram. Comment peut-on envisager d'opposer à ce genre de groupe les règles du DIH, alors que les violations de ce droit font partie de leur *modus operandi* ?

Julia Grignon a apporté une réponse, tout en précisant qu'elle restait dans un cadre théorique, faute d'expérience concrète avec des groupes armés non étatiques. Elle reconnaît qu'il doit être très dur de convaincre des groupes tels que Boko Haram de respecter les règles de DIH, toutefois elle pense que ces groupes sont loin de faire la majorité. Le but politique de la majorité des groupes armés est de devenir eux-mêmes un État et d'accéder à la communauté internationale. Il semble plus facile de convaincre ces groupes que s'ils respectent les règles de DIH, ils bénéficieront d'une certaine légitimité. Julia Grignon pense que la majorité des groupes armés sont soucieux du respect du DIH dans la conduite de leurs opérations militaires.

Tristan Ferraro a noté que le fait que certains groupes armés violent systématiquement les règles du DIH n'offre aucune justification aux États pour dénier l'applicabilité du DIH à ce groupe. Il a signalé que l'interaction entre les mesures anti-terroristes et le DIH est l'un des dossiers majeurs pour le CICR.

6. The “cross-party support” and the overall control

A participant asked whether it was possible to clarify the applicability of the SBA to situations of “cross-party support”, i.e. the support from a State to an armed group and from an armed group to a State, assuming that the criteria could be fulfilled. She also asked about the relationship between the criteria of the “overall control” and the SBA when it comes to qualifying such a situation.

Tristan Ferraro explained that the SBA is clearly applicable in the case of a NSAG supporting a State involved in a pre-existing NIAC. However, the SBA will not apply in the case of a State supporting a NSAG involved in a conflict against the territorial State because the SBA does not apply to situations of international armed conflict. In response to the second question, the SBA assumes that the support provided does not consist of an “overall control”. The State that supports a NSAG becomes a party to the pre-existing conflict, alongside the group it supports. They therefore represent two distinct parties. If this support is transformed into “overall control”, there is an assimilation of the group to the controlling State, the NSAG becomes the agent of the State, and there remains only one party to the conflict.

7. The lack of acknowledgement of a NIAC by a State

The last question concerned the case where a State refuses to acknowledge the existence of a NIAC in which it would be involved, whereas the conflict does exist in practice. Although the absence of acknowledgement does not alter the applicability of IHL, what would be the effects, among other things, before a human rights body?

Julia Grignon agreed that this is a very difficult question. She also pointed out that, in her view, States may be wrong to be reluctant to establish IHL mechanisms. Indeed, without these mechanisms, it is up to the human rights bodies to apply IHL and International Human Rights Law (IHRL) in the context of armed conflicts. However, the latter may adopt a more restrictive approach to international law. It may be preferable for States to establish an IHL mechanism that examines its implementation and violations through the prism of IHL, and not through the prism of IHRL.

Tristan Ferraro remarked that this reminded him of discussions with States involved in the armed conflict in Afghanistan, refusing to acknowledge that they were party to a NIAC. They maintained this position until the day some cases were likely to be tried by their own courts, and they realised that it was in their interest to invoke IHL.

Vaios Koutroulis stated that a State that does not recognise the application of IHL and the existence of a NIAC does so at its own risk. Indeed, the International Criminal Court, for example, may objectively conclude that the State was bound by IHL and that its soldiers potentially committed war crimes. He also believes that when a State has to justify itself to a human rights body, this human rights body should take the State at its own words. If the State has not acknowledged the applicability of IHL, it should not be able to invoke *a posteriori* IHL in order to justify a potential violation of IHRL.

Session 2

Selected issues on detention in contemporary non-international armed conflicts

Chairperson: **Steven Hill**

NATO Legal Office

LEGAL BASIS, GROUNDS AND PROCEDURES FOR DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS

Tilman Rodenhäuser

ICRC Legal Division

Résumé

La présentation de Tilman Rodenhäuser aborde la question de la privation de liberté en conflit armé non international (CANI), qui est largement moins encadrée par le Droit international humanitaire (DIH) que la détention et l'internement dans un conflit armé international (CAI). Il se concentre sur trois questions principales : D'où découle l'autorité de détenir une personne en situation de CANI ? Sur quels standards doit-on se baser ? Quelle procédure faut-il respecter ?

1. La réalité de la détention dans les conflits armés contemporains

Si la torture, les traitements inhumains et dégradants, les disparitions et les mauvaises conditions de détention sont des réalités bien connues, le Comité international de la Croix-Rouge (CICR) est également témoin de certaines autres tendances alarmantes. Premièrement, on observe une tendance des belligérants à éviter ou à ne pas avoir la capacité de prendre de prisonniers. Cela peut s'expliquer par le fait que certains combattent jusqu'à la mort, mais également parce que certaines parties aux conflits ne font pas de quartier. Deuxièmement, la détention, même massive, semble être de plus en plus utilisée à des fins symboliques et stratégiques, pour peser sur les négociations, et comme moyen de pression sur la population civile. Troisièmement, les États ont recours à des mesures telles que le contrôle systématique de la population et des réfugiés afin d'identifier les membres ou les sympathisants des groupes armés. Ces contrôles peuvent tellement traîner en longueur qu'ils finissent par s'apparenter à une détention. Finalement, la déshumanisation de l'ennemi pousse l'État à envisager la détention comme une mesure principalement punitive. Dans les conflits avec un nombre important de détenus, il pourrait être utile d'envisager d'aligner la détention en NIAC sur le type de privation de liberté prévu pour les prisonniers de guerre dans les CAI.

2. Le cadre légal pour la détention en conflit armé

Il existe deux types de privation de liberté durant un conflit armé. Premièrement, il y a la détention en raison d'une infraction, qui requiert les garanties d'un procès équitable. Deuxièmement – le plus fréquent en situation de conflit armé, il y a l'internement, une forme de privation de liberté basée sur la menace sérieuse que posent les activités de l'individu à la sécurité de l'autorité détentrice. En pratique, les États engagés dans des CANI extraterritoriaux, les forces multinationales et les groupes armés ont fréquemment recours à l'internement, ceci en raison de leur manque d'infrastructure, d'intérêt ou de cadre légal pour traduire en justice leurs adversaires capturés.

Deux logiques distinctes sous-tendent les deux régimes. Les motifs et les procédures qui leurs sont applicables sont donc différents. La détention à des fins de poursuite pénale est clairement encadrée par le droit international, contrairement à l'internement en NIAC. Toutefois ce régime requiert également une base légale, de reposer sur des motifs clairs, et de suivre des procédures bien définies.

3. La base légale pour l'internement

Ces dernières années, l'existence d'une base légale pour interner en CANI a fait l'objet de nombreux débats, particulièrement au Royaume-Uni. Dans un CAI, le DIH prévoit explicitement une base légale à l'internement des prisonniers de guerre ou des civils. Une telle base légale explicite n'existe pas dans les CANI, ce qui pose la question de savoir si le DIH fournit une base juridique pour l'internement. Pour de nombreux États, cette question est devenue cruciale en matière d'interaction entre le DIH et les droits de l'homme. Il existe plusieurs arguments permettant de soutenir que le DIH fournit effectivement une base légale à l'internement :

- *l'internement est une réalité et une nécessité opérationnelle et légale ;*
- *le DIH coutumier fournit une base légale en situation de CANI ;*
- *une autorisation de détenir son adversaire découle logiquement de l'autorisation de le tuer.*

Certains avancent des arguments s'opposant à l'existence d'une telle autorisation :

- *ni les traités, ni le droit coutumier ne prévoient explicitement une telle autorisation ;*
- *le DIH peut réglementer une pratique telle que l'internement sans pour autant l'autoriser.*

Le CICR est d'avis qu'il existe bien une autorisation en droit conventionnel et coutumier. Il se base sur le fait que l'internement est une situation courante en CANI, qu'il n'est pas interdit par l'article 3 commun et qu'il est réglementé par le deuxième Protocole additionnel. Cependant, en vertu du principe de légalité, le CICR considère qu'il est nécessaire que des motifs et des pro-

cédures soient explicitement prévus dans un instrument contraignant, tel que le droit national ou un accord entre les différentes parties à un conflit, ou encore dans des procédures standards d'opérations, elles-mêmes contraignantes.

4. Les motifs de l'internement

Ni les traités ni le DIH coutumier ne définissent les motifs d'internement en situation de CANI. Dans la pratique, il existe deux approches différentes. La première est l'internement basé sur des motifs liés au statut de l'individu, par exemple au simple fait qu'il soit affilié au groupe armé. La seconde approche consiste à se baser sur le comportement de l'individu, à l'instar de ce que prévoit la quatrième Convention de Genève. Un individu ne peut pas être interné simplement sur base de son affiliation au groupe armé, l'internement doit se justifier par rapport à la menace que pose son comportement à l'autorité détentrice. Cette seconde approche est la mieux adaptée aux complexités des CANI contemporains et semble être d'ailleurs la voie empruntée par la plupart des États.

5. Les procédures de l'internement

Le DIH, tant conventionnel que coutumier, ne définit pas les procédures requises pour l'internement dans un CANI. Celles-ci doivent être déterminées au cas par cas en tenant compte du DIH, des législations nationales et des droits de l'homme. On peut supposer que les exigences de base posées dans l'affaire Hassan s'appliquent également dans un CANI. Cela signifierait qu'un régime d'internement doit fournir des garanties suffisantes d'impartialité et une procédure équitable pour protéger contre l'arbitraire. Face au manque de clarté, le CICR a élaboré un ensemble de lignes directrices juridiques et politiques :

- *la personne doit être informée rapidement, dans une langue qu'elle comprend, des raisons de son internement ;*
- *le détenu interné doit avoir le droit de contester, le plus rapidement possible, la légalité de sa détention. Le contrôle de la légalité de l'internement doit être effectué par un organe indépendant et impartial, en présence du détenu. La décision d'internement doit être revue périodiquement, tous les six mois ;*
- *afin de permettre à la personne de contester efficacement la décision d'internement, certaines étapes pratiques sont importantes, notamment pour lui expliquer le processus de révision de l'internement, pour lui donner accès aux preuves à l'appui de la décision d'internement et pour lui permettre de demander et d'obtenir des preuves supplémentaires ;*
- *dans la mesure du possible, la personne doit également avoir accès à un avocat ou, à tout le moins, à une forme d'aide juridique spécialisée.*

6. Conclusions

Le manque de clarté sur ces questions constitue un véritable enjeu pour les personnes privées de libertés dans les CANI. Certains États interprètent ce flou comme une autorisation de jeter des individus dans des lieux de détention déjà surpeuplés. De plus, les niveaux de protection des prisonniers varient lors d'opérations multinationales selon l'État qui les détient, chaque État ayant son propre régime de détention. Ce statu quo est inacceptable, et pourtant il semble y avoir peu de volonté politique de changer les choses. En attendant, les juristes et les décideurs politiques doivent faire une différence subtile entre l'exigence vis-à-vis les parties des conflits armés d'une protection forte pour les détenus, et l'imposition d'exigences réalistes, afin que la détention reste une véritable possibilité.

Deprivation of liberty is a reality in armed conflict. The well-being of individuals captured and detained by enemy forces depends on the good will of their former adversaries. In light of this situation of vulnerability, States have concluded agreements on the protection of prisoners of war in conflicts between States. Indeed, International Humanitarian Law (IHL) provides detailed rules protecting prisoners of war and civilian internees in international armed conflicts.¹ Yet, no similarly comprehensive legal protection framework exists for persons deprived of their liberty in relation to non-international armed conflicts (NIAC). The lack of agreed IHL rules is particularly relevant with regard to questions of grounds and procedures of internment, and detainee transfers. This short presentation focuses on the legal basis, grounds, and procedures for detention in NIAC. Practically, this raises three concrete questions:

- where does the permission to deprive a person of liberty in NIAC come from?
- based on which standard may a person be detained in NIAC?
- what procedure has to be followed when a person is deprived of liberty?

Before examining these legal issues, it is important to recall some of the detention realities in contemporary NIACs.

Detention realities in contemporary armed conflicts

In the framework of its work on detention,² the International Committee of the Red Cross frequently witnesses, torture and other forms of ill-treatment, disappearances, and sub-standard

1 See Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War.

2 For an in-depth explanation of the ICRC's mandate and work on detention, see ICRC, 'Protecting people deprived of their liberty', in: *International Review of the Red Cross*, 2016, 98 (3), 1043–1066.

conditions of detention. These situations are extremely concerning – but also well known. But, there are additional, less known realities. While the following description of detention realities in contemporary armed conflict is by no means an exhaustive list, it does provide a snapshot of some of the issues that organisations such as the ICRC are confronted with in their operations.³

First, there are indications of an alarming trend of warring parties to avoid or be unable to take prisoners. In other words, in a number of larger battles of the past years, the ICRC has seen hardly any detainees, suggesting that many more persons died on the battlefield. While this can have many reasons, two should be recalled here: on the one hand, reports suggest that certain parties to armed conflicts decide ‘to fight to the death’.⁴ On the other hand, it also seems that some parties to recent conflicts show no mercy, in breach of what is required by IHL.⁵

Second, in some contexts detention of fighters and civilians, or even of larger parts of a population, has become as much strategic as symbolic. Certain warring parties seem to use detention as a show of power. For some, this is a way to gain status on the political level, for instance at the negotiation table. For others, taking detainees has become a means to control populations; detention is used in order to ensure that families keep quiet, making them understand that their behaviour may have real consequences for a detained family member.

Third, when control over a territory changes during armed conflicts, and especially when States retake territory previously held by a non-State adversary, States take measures to retain security and to identify members or supporters of the adversary. One such measure is the screening of civilians, including internally displaced persons, meaning operations in which entire populations are screened at checkpoints, for instance if they attempt to flee hostilities. In practice, due to poor planning, lack of staff and absence of procedures, screening operations may be exaggeratedly long and may, depending on how they are conducted, amount to deprivation of liberty.⁶

3 The issues presented in the following are taken from L. Saugy and T. Rodenhäuser, *5 operational realities of detention in contemporary armed conflict*, 2018, available at:

4 See, for instance: <<https://ctc.usma.edu/insurgents-again-the-islamic-states-calculated-reversion-to-attribution-in-the-syria-iraq-border-region-and-beyond/>>.

5 See Article 4(1) Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977. See also Rule 46 of the ICRC’s Study on Customary International Humanitarian Law.

6 For a legal assessment of this, see Jenks, *Analysis of a practical case: the legal framework for deprivation of liberty in the context of screening operations in times of NIAC*, 2018, available at: <<http://iihl.org/wp-content/uploads/2018/10/JENKS-REV-1.pdf>>. The present author disagrees, however, with Jenks’s finding that the question of whether or not screening amounts to detention depends on the screening party’s motivation or the principle of military necessity. Whether or not a situation amounts to deprivation of liberty is a factual assessment, not one of motivations.

Fourth, especially in the context of anti-terrorism operations, there is often a rhetoric that dehumanises and demonises the enemy or suggests that a particular adversary is ‘outside the bounds of humanity’. In these contexts, detention is approached primarily from a punitive angle, i.e. the intention to prosecute and punish the adversary for having participated in hostilities. Certainly, detention based on national criminal law is perfectly lawful in NIAC if it complies with applicable rules of international law, in particular fair trial guarantees. Yet, especially in large-scale conflicts with significant numbers of detainees, it might be worth considering alignment of NIAC detention to the type of deprivation of liberty that IHL provides for prisoners of war in international armed conflict – a type of provision conceived to address the challenges and realities of conflict situations. For prisoners of war, States agreed upon an “amnesty-like” approach, meaning that prisoners of war are generally interned in camps for the duration of hostilities and not individually prosecuted except for criminal offences.⁷

This last point, or maybe even the last two points, lead directly to the analysis of the legal framework for detention in contemporary NIAC.

Legal framework for detention in armed conflict

In armed conflicts, there are two types of deprivation of liberty that parties to the conflict may resort to.

First, there is detention on penal grounds, meaning detention with the objective of prosecuting the person for an alleged crime. Under IHL of international and non-international armed conflicts, as well as under Human Rights Law, such detention requires fair trial guarantees.⁸

The second form of deprivation of liberty is internment, which can be broadly defined as ‘non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority’.⁹ Internment has traditionally been a form of deprivation of liberty that is particularly prevalent in international armed conflicts.

7 See Convention (III) relative to the Treatment of Prisoners of War. See also Article 43(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As will be discussed below, grounds and procedures for internment in NIAC are not defined in IHL treaties and essential to protect detainees against arbitrary detention. Available at: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D92AB7AC378C4E61C12563CD0051AC29>>.

8 For fair trial obligations under IHL applicable in NIAC, see Article 3 common to the four Geneva Conventions; Article 6 APII, rule 100 ICRC Study on Customary International Humanitarian Law. See also ICRC, Commentary on the First Geneva Convention, 2016, paragraphs 674-695.

9 ICRC, Internment in armed conflict: Basic rules and challenges, 2014, p. 3.

It is important to underline that these are two very different ‘animals’. Detention on penal law grounds is the common form of deprivation of liberty under domestic criminal law: a person who allegedly committed a crime is prosecuted and a court decides whether the person is guilty or not. Especially in the context of armed conflicts, the sentence for murder or terrorism charges can be very severe, including long imprisonment or even the death penalty.

The logic of internment in armed conflict is different. An individual is not charged for a crime but deprived of liberty for security reasons. For example, prisoners of war are not detained as a form of punishment but deprived of liberty to ensure that they do not continue their participation of hostilities. Their internment must end at the cessation of active hostilities. Broadly speaking, this logic also applies to internment in NIAC.

In practice, internment is often resorted to by States engaging in NIAC extraterritorially as well as by multinational forces. For instance, States operating extraterritorially may not have the interest, the legal framework, or the infrastructure available to prosecute captured adversaries. Thus, they resort to internment. Likewise, United Nations peacekeeping forces will normally not be able to prosecute individuals whom they detain and whom they are unable to transfer to the host State. Internment may also be relevant in the context of detention by armed groups.¹⁰

In light of the different rationales behind criminal law detention and internment, the grounds and procedures that apply are quite different. Legal standards regulating criminal prosecution, namely fair trial guarantees, are well defined in international law. In contrast, no such clarity exists as regard internment in times of NIAC. In practice, this has led some to the misunderstanding that internment is a regime under which persons may easily be locked away. From a legal point of view, this is wrong: international law requires that any form of detention, including internment, should have a legal basis, should only be permitted on clear grounds, and should follow defined procedures.¹¹

These three issues are addressed in the following. The analysis is focused on internment, not on detention based on criminal law.

10 For a recent discussion of internment by armed groups, see Andrew Clapham, ‘Detention by Armed Groups under International Law’, in: 93 *International Law Studies*, 2017.

11 See, for instance, rule 99 ICRC Study on Customary International Humanitarian Law, which finds that arbitrary detention is prohibited during all forms of armed conflicts.

The Legal basis for internment

Over the past years, the issue of the legal basis for internment in NIAC has received significant attention from experts and courts, especially in the United Kingdom (UK).¹²

In international armed conflicts, IHL provides an explicit legal basis for the internment of prisoners of war or, in exceptional circumstances, of civilians. The Third Geneva Convention provides that States 'may subject prisoners of war to internment',¹³ and the Fourth Geneva Convention permits internment as a security measure that States may take with regard to civilians that pose an imperative security threat.¹⁴

There is no similarly clear legal basis for internment in IHL applicable in NIAC, which has led to a debate on whether or not IHL applicable in NIAC provides a legal basis for internment. For a number of States, this question has become particularly important with regard to the interplay between IHL and Human Rights Law.

Proponents of the view that IHL in NIAC provides a legal basis for internment normally advance one or more of the following arguments:¹⁵

- Internment is a reality in armed conflict and often necessary for operational reasons or even to comply with the law, for instance to show mercy. Following this view, suggesting that IHL does not provide a legal basis would be absurd and also raise significant protection concerns: not being able to detain risks leading to resorting to kinetic force.
- Proponents normally argue that customary IHL provides a legal basis for internment. In this respect, they may also refer to Resolution 1 of the 2015 International Conference of the Red Cross and Red Crescent.¹⁶
- In addition, it is argued that as IHL authorises the killing of adversaries, it must also be understood as authorising detention.

12 See, in particular, Judgment of a UK High Court in *Mohammed v Ministry of Defence & Ors* [2014] EWHC 1369 (QB), 2 May 2014; UK Supreme Court, *Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)*, [2017] UKSC 2, 17 January 2017.

13 Article 21 GCIII.

14 Articles 27, 41, 78 GC IV. Note that there is some debate on whether or not GC IV provides a legal basis for internment. In the ICRC's view, 'the Fourth Convention constitutes a sufficient legal basis for internment, which means that States do not have to enact additional domestic legislation to provide for a legal basis'. ICRC, 'Internment in armed conflict: Basic rules and challenges', 2014, pp. 5-6.

15 For a recent list of arguments of why IHL provides a legal basis for internment in NIAC, see John Swords, *Argument in favor of IHL providing a legal authority for deprivation of liberty in relation to NIAC*, 2018, available at: <<http://iihl.org/wp-content/uploads/2018/10/SWORDS-REV.pdf>>.

16 32nd International Conference of the Red Cross and Red Crescent, Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty, 2015, preamble.

In contrast, those opposing the view that IHL of NIAC provides a legal basis for internment usually advance the following arguments:¹⁷

- IHL treaty law does not explicitly provide a legal basis for internment, and neither does customary law. While they recognise that customary IHL may develop in that direction, they argue it is not there yet.
- moreover, they oppose the argument according to which IHL regulating internment implies that it also provides a legal basis; they emphasise that international law draws a difference between regulating and authorising conduct.

In the ICRC's view, treaty and customary IHL of NIAC provide an inherent power to intern and may, in this respect, be said to provide a legal basis for internment. The ICRC bases this view on the fact that internment is a common occurrence in armed conflict, that it is not prohibited under common Article 3, and that it is regulated by Additional Protocol II.¹⁸ Invoking such inherent power to intern *alone*, however, would not be sufficient to make internment lawful. In keeping with the principle of legality, the detaining power needs to have defined grounds and procedures for internment. In other words, for internment to be lawful, there needs to be not only a legal basis but also grounds and procedures that are spelled out in a binding instrument.

In traditional NIACs, such grounds and procedures would be defined in national law. When States operate extraterritorially, a binding instrument setting out grounds and procedures for internment could be an agreement among the parties involved, or the law of the intervening State, or binding Standard Operational Procedures (SOP).¹⁹

Grounds for internment

Neither treaty nor customary IHL define grounds for internment in NIAC.

In practice, parties to armed conflicts seem to follow one of the following two approaches.

The first approach can be described as status-based internment. This approach follows the logic of the internment of combatants in international armed conflict, who can be interned solely for being members of the adversary's armed forces. Some States have followed a similar approach for members of a non-State armed group.

17 For a recent list of arguments of why IHL would not provide a legal basis for internment, see Lawrence Hill-Cawthorne, *Argument against IHL providing a legal authority for deprivation of liberty in relation to NIAC*, available at: <<http://iihl.org/wp-content/uploads/2018/10/HILL-CAWTHORNE-REV.pdf>>.

18 For a full elaboration of this position, see ICRC, *Internment in armed conflict: Basic rules and challenges*, 2014, p. 7.

19 See *ibid.*, p. 8.

The second approach can be described as conduct-based internment. This approach follows internment of civilians as regulated on the Fourth Geneva Convention,²⁰ meaning that individuals may not be interned solely based on an alleged affiliation with an armed group but only if their individual behaviour poses an imperative security threat to the detaining power.

The second approach is more convincing. Permitting internment only for imperative reasons of security underlines the exceptional nature of this measure. In fact, taking a status-based approach to internment would be a form of cherry-picking: in IAC, while being subject to internment, prisoner of war status comes with significant privileges. This is presently not the case in NIAC. In addition, a conduct-based approach corresponds better to the complexities of contemporary NIACs in which it is often unclear who belongs to a non-State armed group. An approach that looks at the individual's behaviour and offers an individual review is not only preferred from a humanitarian point of view but also seems to be the avenue taken by most States.²¹

Procedures for internment

Under IHL of international armed conflict, there are no procedural safeguards for prisoners of war other than a possible status review. In contrast, the Fourth Geneva Convention sets out basic procedural safeguards for civilian internees, requiring that such internment needs to be reviewed, initially and periodically, by an appropriate court or administrative board.²²

When looking at the internment regime under the Fourth Geneva Convention from a European human rights perspective, the European Court of Human Rights held in the *Hassan* case that an internment regime established by a State in accordance with IHL would also need 'to protect the individual from arbitrariness' as understood under the European Convention on Human Rights (ECHR),²³ meaning that in order to also conform with Article 5 ECHR, 'sufficient guarantees of impartiality and fair procedure to protect against arbitrariness'²⁴ need to be provided.

20 See Articles 42 and 78 GC IV.

21 For some discussion on different grounds for internment used by States, see ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty: Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers*, 2014, pp. 14-19.

22 See Articles 42 and 78 GC IV.

23 European Court of Human Rights, Case of *Hassan vs. The United Kingdom*, Application no. 29750/09, 16 September 2014, paragraph 105.

24 *Ibid.*, paragraph 106.

Under IHL applicable in NIAC, procedural safeguards for internment are not defined. This does not mean that no procedural safeguards exist but that they have to be determined on a case-by-case basis, taking into account IHL, national law and Human Rights Law.

While the European Court of Justice has not yet tried a case of internment in the context of NIAC, it may be assumed that the basic requirements of the *Hassan* case would also be applied in NIAC situations. This would mean that an internment regime needs to provide sufficient guarantees of impartiality and a fair procedure to protect internees against arbitrariness.

In light of the lack of clarity on procedural safeguards in NIAC, more than 10 years ago the ICRC developed a set of law and policy guidelines, which it uses in its dialogue with various parties to armed conflicts.²⁵ These include:

- the person needs to be informed promptly, in a language he or she understands, of the reasons for his or her internment;
- the internee needs to have the right to challenge, with the least possible delay, the lawfulness of his or her detention. The review of the lawfulness of the internment must be carried out by an independent and impartial body, and with the presence of the detainee. If a person is kept in internment, that decision needs to be reviewed periodically, every 6 months;
- in order to enable the individual to effectively challenge the internment decision, certain practical steps are important, namely to explain the internment review process to the individual; to provide access to evidence supporting the internment decision; and enabling the person to seek and obtain additional evidence;
- whenever feasible, the person also needs to have access to legal counsel, or at least some form of legal expert assistance.

In essence, these guarantees are also found in the UK Supreme Court's *Serdar Mohammed* judgment, in which the Supreme Court sets out its view of what a fair procedure for internment reviews should look like.²⁶

25 See Jelena Pejic, 'Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence', in: *International Review of the Red Cross*, Vol. 87, 2005, pp. 375-391.

26 See UK Supreme Court, *Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)*, [2017] UKSC 2, 17 January 2017, paragraph 107.

Conclusion

The lack of defined grounds and procedures for internment in NIAC constitutes a real concern for persons deprived of liberty in this context. In practice, certain States seem to interpret the lack of clear guidance as an authorisation to simply dump individuals in already overcrowded places of detention. In addition, during multinational operations, different members of a coalition each have their own legal regimes or internments, some of which are more and some less protective.²⁷ As a result, the degree of protection of internees depends, to some extent, on the fact of which coalition member captures the individual. This *status quo* is unacceptable from a humanitarian point of view, and has created important legal issues for parties to armed conflicts, especially for States. While there is a real need to address the issue multilaterally and to define common rules or standards, there seems to be no political will to do so at this point.²⁸

Until States provide the needed clarity, lawyers and policy makers need to draw a fine line between demanding strong protection for detainees and posing realistic requirements to parties to armed conflicts. Indeed, as humanitarians we should have an interest to maintain detention as a real possibility for parties to armed conflicts – otherwise, we risk seeing more victims on the battlefield.

27 For a discussion of the challenges this poses to multinational operations, see Steven Hill, *Between international humanitarian law, human rights law and standards: challenges in conducting detention operations in non-international armed conflicts*, available at: <<http://iihl.org/wp-content/uploads/2018/10/HILL-REV.pdf>>.

28 For in-depth discussion of diplomatic work on strengthening IHL protecting detainees in NIAC, see Rodenhäuser, 'Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011', in: *International Review of the Red Cross* (2016), 98 (3), pp. 941-959.

TRANSFER OF DETAINEES IN MULTINATIONAL NON-INTERNATIONAL ARMED CONFLICTS: IMPLEMENTING THE PRINCIPLE OF *NON-REFOULEMENT*, AN IMPOSSIBLE TASK?

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Résumé

La présentation de Marten Zwanenburg aborde la mise en œuvre du principe de non-refoulement dans les conflits armés non internationaux (CANI) multinationaux, et pose la question de savoir si cette mise en œuvre est vraiment une tâche impossible. La question sera abordée du point de vue d'un État tiers participant à un tel conflit, en prenant les Pays-Bas pour exemple. La contribution aborde trois questions concernant le transfert et le non-refoulement que les conseillers juridiques aux Pays-Bas poseraient si ce pays envisageait d'intervenir dans un CANI.

1. *Que requiert le principe de non-refoulement dans un CANI ?*

1.1. *Le principe de non-refoulement*

Le principe de non-refoulement est consacré en droit des réfugiés mais également en Droit international humanitaire (DIH) et en Droit international des droits de l'homme (DIDH), mais ses contours font débat en raison du manque de clarté de chaque cadre juridique distinct et de leur interaction.

Le principe de non-refoulement est consacré à l'article 33 de la Convention sur les réfugiés. Le DIH ne prévoit aucune disposition explicite en matière de non-refoulement dans les CANI. Toutefois certains considèrent que ce principe découle implicitement de l'article 3 commun et de l'interdiction de la torture, ainsi que de l'article 5 (4) du deuxième Protocole additionnel. Le DIDH est pertinent dans les cas de CANI multinationaux, dans la mesure où il s'applique en situation extraterritoriale. C'est le cas pour les personnes détenues qui sont sous la juridiction d'un État partie à la Convention européenne des droits de l'homme (CEDH), tel que reconnu par la Cour européenne des droits de l'homme (CEurDH) dans les affaires Al-Skeini et Al-Jedda. Les limites aux transferts de détenus peuvent se retrouver dans les articles 2 et 3 de la CEDH, portant le droit à la vie et l'interdiction de la torture et de tout traitement inhumain et dégradant. L'affaire Al-Saadoon et Mufdhi c. le Royaume-Uni en est une illustration, bien qu'il ne soit pas clair dans quelle mesure ces deux articles puissent faire obstacle à un transfert. Dans cette affaire, la CEurDH a considéré que le transfert était possible si le Royaume-Uni avait obtenu de l'Irak des

« garanties contraignantes » que les détenus ne seraient pas passibles de la peine de mort, sans toutefois préciser la portée de ces « garanties contraignantes ». D'autres dispositions pourraient également entrer en ligne de compte, telles que le droit à un procès équitable en cas de décision d'extradition lorsqu'un détenu a subi ou risque de subir un déni flagrant d'un procès équitable. Finalement, d'autres instruments du DIDH pourraient apporter des limites supplémentaires à la possibilité de transfert. Par exemple, la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées, ainsi que la Convention contre la torture.

Il découle de ce qui précède qu'un État qui envisage de transférer une personne doit évaluer s'il existe un risque de violation de ses droits fondamentaux. Les droits fondamentaux qui interdisent le transfert s'il y a un tel risque ne sont cependant pas autonomes, ils sont liés à des obligations procédurales, qui reposent en partie sur d'autres droits de l'homme fondamentaux. Selon un commentateur, les garanties procédurales devant être assurées aux personnes confrontées à des transferts comprennent les éléments minimaux suivants :

- une fois que la décision de transférer une personne a été prise, celle-ci doit en être informée en temps opportun ;
- si elle craint de subir des mauvais traitements, le bien-fondé de ces craintes doit être examiné au cas par cas par un organe compétent indépendant de l'autorité qui a pris la décision ;
- ce réexamen doit avoir un effet suspensif sur le transfert ;
- la personne concernée doit avoir la possibilité de présenter des observations à l'organe de révision de la décision ;
- elle devrait être assisté d'un avocat ;
- elle devrait pouvoir faire appel de la décision de l'organe de recours.

1.2. La relation DIH – DIDH

L'application du DIH durant un CANI a-t-elle une incidence sur les limites que le DIDH impose au transfert des détenus ? Du point de vue des organes des droits de l'homme, la réponse est non. D'un part il semblerait qu'il y ait un consensus pour dire que le DIDH continue à s'appliquer en période de conflit armé et que l'application du DIH ne supprime pas celle du DIDH dans son entièreté. Dans l'affaire Hassan, la CEurDH a interprété l'article 5 de la CEDH à la lumière des règles du DIH applicables aux conflits armés internationaux en matière de détention des prisonniers de guerre et des civils. Toutefois, de telles règles explicites n'existent pas dans le régime applicable aux CANI. En situation de CANI, on pourrait donc conclure que l'on ne peut interpréter l'article 5 de la CEDH à la lumière du DIH.

2. Le principe de non-refoulement peut-il être mis en œuvre dans un CANI multinational ?

La mise en œuvre du principe peut être plus ou moins difficile, mais elle n'est pas impossible. Le degré de difficulté dépend, entre autres, des facteurs suivants. Premièrement, le niveau de connaissance de la mise en œuvre du DIDH par l'État hôte et les relations avec cet État. Plus le niveau de connaissance est élevé, plus on peut déterminer les risques en cas de transfert. Et plus la relation est bonne, plus facile il sera d'obtenir des « garanties contraignantes ». Deuxièmement, le nombre de détenus : plus il y en a, plus il sera difficile de traiter chaque cas individuel. Troisièmement, la rigueur de l'interprétation des obligations juridiques applicables et la mesure dans laquelle le fait que la détention a lieu dans un contexte d'affrontements armés influence cette interprétation. Quatrièmement, l'existence d'une alternative réaliste si le transfert est impossible, car dans le cas où un détenu ne peut être transféré, il existe deux options : le libérer ou continuer de le détenir soi-même. Toutefois, en suivant les conclusions de l'affaire Hassan, il semble que la CEurDH ne prévoit pas de base légale pour la détention dans le cadre d'un CANI conformément à l'article 5 de la CEDH. Si cela se confirme, cela place les États engagés dans un CANI multinational dans une position impossible, parce qu'ils doivent choisir entre soit violer la CEDH, soit libérer des détenus qui constituent une menace immédiate pour leur sécurité.

3. Que faire pour que la mise en œuvre du principe de non-refoulement dans un CANI multinational ne soit pas une tâche impossible ?

Il y a trois choses que les États peuvent faire. Premièrement, améliorer leur connaissance sur la situation des droits de l'homme dans le pays hôte. Deuxièmement, l'interprétation des obligations juridiques doit tenir compte des réalités des opérations militaires et des conflits armés. Il n'est pas réaliste de s'attendre à ce que les États engagés dans un CANI extraterritorial fassent la même chose que sur leur propre territoire en temps de paix. Troisièmement, il doit exister des alternatives réalistes au transfert des détenus. Il est important de trouver une solution pour réussir à concilier la détention pour des raisons de sécurité dans les CANI. Le raisonnement de la CEurDH dans l'affaire Hassan devrait pouvoir trouver à s'appliquer dans des CANI, car la détention pour des raisons de sécurité est une caractéristique acceptée du DIH. Si cette question n'est pas abordée, cela pourrait conduire les États à commencer à déroger à l'article 5 de la CEDH dans les futurs CANI multinationaux, comme le Royaume-Uni l'a déjà annoncé.

Pour conclure, la mise en œuvre du principe de non-refoulement dans les CANI n'est pas impossible et dépend de la manière dont les organes de surveillance du DIDH trouvent un moyen de tenir compte du DIH et de la situation de conflit armé pour interpréter les obligations en matière de droits de l'homme.

1. Introduction

In recent non-international armed conflicts (NIACs) in which third States were involved and in which they detained persons, these detainees were often subsequently transferred to the State in whose territory the conflict was taking place, in other words the host State. Such transfer raises a number of legal issues. This contribution focuses on one of these issues, namely the compatibility of such transfer with the principle of *non-refoulement*. More specifically, it addresses the question of whether implementing that principle in the context of the transfer of detainees in multinational non-international armed conflicts is an impossible task. It does not purport to give an exhaustive analysis, but rather offers a number of thoughts that may be relevant in answering this question.

In doing so, it is useful to start with defining a few of the terms used. First, non-refoulement is based on the French word *refouler*, which means “to force back, turn back, turn away”.¹ *Non-refoulement* as a legal term is the principle that precludes the transfer of persons from one State to another if they face a risk of violation of certain fundamental rights. This principle will be discussed in more detail below.

Second, for the purpose of this contribution a multinational non-international armed conflict is an armed conflict in which one or more States are fighting on the side of the armed forces of another State in a non-international armed conflict.²

This contribution will approach the topic from the perspective of a State that is planning its participation in a multinational NIAC. Because different States have different international obligations, it is useful to take the perspective of a specific State. The Netherlands will be taken as an example.

This contribution will address three questions concerning transfer and *non-refoulement* that legal advisors in the Netherlands would ask themselves when planning for a multinational NIAC.

- What does the principle of *non-refoulement* require in a NIAC?
- Can the principle of *non-refoulement* be implemented in a multinational NIAC?
- What can be done to avoid that implementing the principle of *non-refoulement* in a multinational NIAC becomes an impossible task?

1 Collins dictionary, at: <<https://www.collinsdictionary.com/dictionary/french-english/refouler>>.

2 See e.g. J. Pejić, ‘The Protective Scope of Common Article 3: More than Meets the Eye’, *International Review of the Red Cross*, Vol. 93, 1 (2011), p. 6.

2. What does the principle of *non-refoulement* require in a NIAC?

2.1. Content of the principle of *non-refoulement*

There is much confusion concerning the content of the principle of *non-refoulement*. Although the actual term '*refoulement*' is only found in refugee law, the prohibition is considered to also be part of International Humanitarian Law and of International Human Rights Law. The precise parameters of the principle, however, are the subject of debate. One reason for this is the lack of clarity of the rules in each separate legal regime. Another reason is the lack of clarity concerning the interplay between the different legal regimes. In particular the interplay between IHL and International Human Rights Law during an armed conflict.

These issues will be addressed briefly, without making any pretence of being complete or exhaustive. The relevant law and its interpretation have been discussed extensively in a number of publications.³ The purpose in discussing the law is primarily to demonstrate that there are a number of open questions and points which are not clear.

In refugee law, the prohibition of *refoulement* is set out in Article 33 of the Refugee Convention. Paragraph 1 of this article reads: 'No Contracting State shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

There are different views on whether the obligation in Article 33 applies extraterritorially. The United Nations High Commissioner for Refugees (UNHCR) argues it does, but some States reject this view.⁴

In International Humanitarian Law (IHL) governing NIAC, there is no rule that expressly relates to the transfer of detainees. Neither common Article 3 nor Additional Protocol II contain provisions referring to transfer. It has been suggested by certain authors, however, that common

3 See e.g. C. Droege, 'Transfers of Detainees: Legal Framework, non-refoulement and contemporary challenges', in: *International Review of the Red Cross*, Vol. 90, p. 669 (2008); E.C. Gillard, 'There's No Place Like Home: States' Obligations in Relation to Transfer of Persons', *International Review of the Red Cross*, Vol. 90, 2008, p. 703; J. Horowitz, 'Transferring Wartime Detainees and a State's Responsibility to Prevent Torture', in: *American University National Security Law Brief*, Vol 2, 2012, p. 42.

4 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, available at: <<http://www.unhcr.org/4d9486929.pdf>>, p. 19 ('therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction.'). For the US view see: <<https://www.justice.gov/file/23326/download>>.

Article 3, which applies in NIAC, contains an implied prohibition of transfer where there is a likelihood of torture.⁵ It is also suggested that limitations on transfer are implied by Article 5 (4) of Additional Protocol II.⁶ This article provides that '[I]f it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding'. The suggestion is that what applies for release must also apply for transfer. It is interesting to note that some of the State experts participating in a thematic consultation on strengthening the IHL protection of persons deprived of their liberty agreed with this interpretation of common Article 3.⁷ It must be noted however that experts from other States strongly disagree.⁸

The third branch of international law potentially relevant to the transfer of detainee, is International Human Rights Law. This will only be the case if human rights obligations apply to detention operations by States acting extraterritorially. This issue is still the subject of contention, with the United States in particular arguing that the International Covenant on Civil and Political Rights (ICCPR) is not applicable extraterritorially.

For the Netherlands, among different human rights treaties, the focus is principally on the European Convention on Human Rights (ECHR). This is at least in part because judgments of the European Court of Human Rights (ECtHR) are legally binding, unlike views of the Human Rights Committee under the ICCPR for example. Consequently, for the Netherlands an important question is whether the ECHR applies extraterritorially to persons detained by State agents abroad. This is the case if they fall within the jurisdiction of a State in the sense of Article 1 ECHR. The ECtHR has answered that question with a resounding 'yes' in its judgments in *Al-Skeini v. UK* and *Al-Jedda v. UK*.⁹

In the case of *Hassan v. United Kingdom*, the UK government tried to differentiate these cases before the Court, arguing that the basis of jurisdiction set out in *Al-Skeini* relating to detention did not apply to the active hostilities phase of an international armed conflict, where the agents of the contracting State in question were operating in a territory of which they were not the occupying power.¹⁰ In such a case, the conduct of the Contracting State would, instead, be subject to all the requirements of International Humanitarian Law. The Court was not willing to make this distinction, however.¹¹

5 J. Horowitz, *op. cit.*, p. 51.

6 *Ibid.*

7 ICRC, *Detention in non-international armed conflict – Second thematic consultation of government experts, 20-22 October 2014*, available at: <<https://www.icrc.org/en/document/detention-non-international-armed-conflict-second-thematic-consultation-government-experts>>.

8 Notes of the author of the second thematic consultation.

9 *Al-Skeini v. UK*, Appl. no. 55721/07, Judgment of 7 July 2011, paragraph 136; *Al-Jedda v. UK*, Appl. No. 27021/08, Judgment of 7 July 2011, paragraph 86.

10 *Hassan v. UK*, Appl. no. 29750/09, Judgment of 16 September 2014, paragraph 71.

11 *Ibid.*, paragraph 77.

The ECtHR is not formally bound to follow its earlier case law. In practice, however, it is very reluctant not to.¹² This means that a State party to the ECHR, whether it likes it or not, should now expect that the Court will hold that a person detained by the State abroad enjoys the protection of the Convention.

The ECHR contains a number of provisions that may impose limitations on the possibility of transfer of detainees. The ones that come to mind first are Articles 2 and 3, which set out the right to life and the prohibition of torture, inhuman and degrading treatment or punishment, respectively. How these provisions may limit the possibility of transfer is illustrated by the case of *Al-Saadoon and Mufdhi v. United Kingdom*.¹³

Al-Saadoon and Mufdhi were two Iraqi nationals.¹⁴ They were arrested by UK forces in Iraq in June and November 2003 respectively, initially for security reasons. Subsequently, they were reclassified as criminal detainees when they became suspected of the mistreatment and killing of two UK soldiers. The UK continued to hold them after 28 June 2004, when the occupation of Iraq ended. At some point in time, their case was then transferred to the Iraqi courts. They were charged by the Iraqi courts with crimes for which the death penalty could be imposed. The Iraqi courts requested that the men be transferred to Iraqi custody. The UK initially did not do so, while the applicants were fighting the decision to transfer them before British courts. Before these courts, the UK argued that it had no choice but to hand them over, because the United Nations authorisation for detention by UK forces would end on 31 December 2008. And on that day, the UK did transfer the two men to Iraqi custody.

The men appealed to the ECtHR. They argued that their transfer to the custody of the Iraqi High Tribunal exposed them to a real risk of the death penalty, in breach of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 to the ECHR.

The Court held that there had been a violation of Article 3 of the ECHR. This violation consisted of the fact that, through the actions and inaction of the United Kingdom authorities,

12 *Christine Goodwin v UK*, Appl. No. 28957/95, Judgment of July 11. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], No. 27238/95, ECHR 2001-I, paragraph 70).

13 *Al-Saadoon and Mufdhi v. UK*, Appl. No. 61498/08, Judgment of 2 March 2010.

14 For further analysis of the case, see e.g. P. Frumer, 'Le transfert de détenus dans le cadre d'opérations militaires multinationales : la peine de mort dans le collimateur de la Cour européenne des droits de l'homme (Cour eur. dr. h., 4ème sect., *Al-Saadoon et Mufdhi c. Royaume-Uni*, 30 juin 2009 et 2 mars 2010)', in: *Revue trimestrielle des droits de l'homme*, Vol. 21, 2010, p. 959.

the applicants had been subjected, since at least May 2006, to the fear of execution by the Iraqi authorities. Causing the men psychological suffering of this nature and degree constituted inhuman treatment, according to the Court.¹⁵

The Court did not consider it necessary to decide whether there had also been violations of the applicants' rights under Article 2 of the Convention and Article 1 of Protocol No. 13.¹⁶ Based on the reasoning of the Court, it is certainly possible that it could also have found a violation of the right to life. This is strongly suggested by the Court's statement that Protocol No. 13 came into force in respect of the United Kingdom on 1 February 2004. The Court considers that, from that date at the latest, the respondent State's obligations under Article 2 of the Convention and Article 1 of Protocol No. 13 dictated that it should not enter into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed.¹⁷

The Court did not consider as relevant the fact that after 31 December 2018 the UK no longer had a legal basis to detain the men. In this context, it was of the view that it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention. This principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty and the grave and irreversible harm risked by the applicants.¹⁸

This case illustrates that, at least for States party to the ECHR, the right to life and the prohibition of torture and inhuman or degrading treatment may pose an obstacle to transfer. The case law does not provide a hundred percent clarity on when exactly this is the case. For example, in *Al-Saadoon* the ECtHR implied that transfer would have been possible if a 'binding guarantee' had been obtained from Iraq that the men would not be subjected to the death penalty.¹⁹ What exactly is a 'binding guarantee'?

Other provisions in the ECHR may also stand in the way of transfer. The ECtHR has found that the issue might be raised under the provision guaranteeing the right to a fair trial by an extradition decision in circumstances where the detainee has suffered or risks suffering a flagrant

15 *Al-Saadoon and Mufdhi v. UK*, *op. cit.*, paragraph 144.

16 *Ibid.*, paragraph 145.

17 *Ibid.*, paragraph 137.

18 *Ibid.*, paragraph 138.

19 *Ibid.*, paragraph 142.

denial of a fair trial.²⁰ Although some might argue that the situation of extradition is different from the transfer to the host State in the territory of that State, it is doubtful that the ECtHR would follow that argument.

It is outside the ambit of this contribution to delve in detail into other human rights treaties that may limit transfer. It may be noted, however, that these potentially add to the grounds limiting the possibility of transfer. For example, the International Convention for the Protection of All Persons from Enforced Disappearance provides that States parties shall not expel, return (*'refouler'*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.²¹ Another example is the Convention against Torture, Article 3 (1) of which provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'²²

It follows from the above that a State planning to transfer a person to the host State must assess whether there is a risk of violation of his or her fundamental rights. The substantive rights that prohibit the transfer if there is such a risk are not freestanding, however. They are bound up with procedural obligations, which are partly based on other substantive human rights and partly have been developed in the case law of human rights monitoring bodies on expulsion. In the above-mentioned *Al-Saadoon and Mufdhi* case, the ECtHR found a violation of Article 13 ECHR because of the lack of an effective national remedy in relation to the transfer of the applicants.²³

According to one commentator, 'on the basis of the existing jurisprudence and other guidance from the human rights supervisory bodies, it can be concluded that at present the procedural safeguards to be ensured to persons facing transfers include the following minimum elements':

- once a decision to transfer a person has been taken, she or he must be informed of this in a timely manner;
- if she or he expresses concern that she or he may risk ill-treatment, the well-founded character of such fears must be reviewed on a case-by-case basis by a body that is independent of the authority that took the decision;

20 *Soering v. UK*, Appl. No. 14038/88, Judgment of 7 July 1989.

21 See in more detail Droegge, *op. cit.*, p. 673.

22 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Article 3 (1).

23 *Al-Saadoon and Mufdhi v. UK*, *op. cit.*, paragraph 166. Specifically, the Court found the effectiveness of any appeal to the House of Lords was unjustifiably nullified as a result of the Government's transfer of the applicants to the Iraqi authorities.

- such review must have a suspensive effect on the transfer;
- the person concerned must have the opportunity to make representations to the body reviewing the decision;
- she or he should be assisted by counsel; and
- she or he should be able to appeal the reviewing body's decision.²⁴

2.2. The Relationship between IHL and International Human Rights Law

It is clear from the above that International Human Rights Law imposes the most far-reaching limitations on the transfer of detainees in a NIAC. This raises the question of whether the fact that IHL also applies in a situation of armed conflict has any implications for those limitations. There are two reasons why, at least in the eyes of human rights monitoring bodies, this does not seem to be the case. First, there seems to be a general agreement among those bodies that in an armed conflict International Human Rights Law continues to apply.²⁵ They are thus unwilling to accept the proposition that is sometimes put forward, that IHL as a regime displaces the application of International Human Rights Law in its entirety.

In the case of *Hassan v. UK*, the ECtHR was confronted with a situation of detention in armed conflict in which there were provisions of both IHL and IHRL that were relevant.²⁶ The starting point of the approach that the Court took were the rules of treaty interpretation. Making use of these rules, the Court interpreted Article 5 ECHR, an approach in which it interpreted the applicable rule of International Human Rights Law in the light of the applicable rules of IHL. This led the Court to read a ground for detention into Article 5 ECHR which is not part of the text of that article. The Court added that: '[I]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.'²⁷

This is a somewhat surprising statement. It is true that the taking of prisoners of war is not an accepted feature of NIAC, for the simple reason that there are no prisoners of war in a NIAC. However, the detention of civilians who pose a threat to security appears to take place on a regu-

²⁴ Gillard, *op. cit.*, p. 736.

²⁵ See *inter alia* United Nations Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paragraph 11.

²⁶ For an analysis of the judgment, see *inter alia* M. Lippold, 'Between Humanization and Humanitarianization? Detention in Armed Conflicts and the European Convention on Human Rights', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 76, 2016, p. 53.

²⁷ *Hassan v. UK*, *op. cit.*, paragraph 104.

lar basis in NIACs. It is accepted and well established in NIACs as a matter of State practice.²⁸ It may be that what the Court actually meant to say is that it is only willing to follow this approach if there are explicit rules governing the issue in IHL. There are explicit rules in the IHL regime of NIAC that provide a legal basis for security detention in international armed conflict (IAC), but not in NIAC. If this is indeed what the Court meant, this would preclude the possibility of using the Court's interpretive approach to the issue of transfer in NIAC. As discussed above, there are no rules in the conventional IHL regime for NIACs that explicitly relate to detainees.

3. Can the principle of *non-refoulement* be implemented in a multinational NIAC?

Based on the brief description above of what the implementation of the principle of *non-refoulement* requires, an attempt can be made to answer the question as to whether it can be implemented in a multinational NIAC.

Implementation of the principle may be more or less difficult depending on the circumstances, but it is not impossible. Just how difficult it is in a particular operation will depend, among other things, on the following factors.

First, knowledge of the record of human rights compliance by the host State and the relationship with that State. The more knowledge there is, the easier it will be to determine whether or not there is a risk. And the better the relationship, the easier it will be to obtain a 'binding guarantee' concerning the death penalty, for example.

Second, the number of detainees. The more detainees there are, the more onerous it will be for the detaining State to make an individual determination of the risk that transfer entails for each individual detainee, and to fulfil the procedural obligations related to transfer.

Third, how strictly the applicable legal obligations are interpreted, and to what extent the fact that detention takes place in a conflict environment influences that interpretation. An example is the possibility of review of the decision to transfer by an independent body. What precisely does 'independent' mean in this context? It does not seem reasonable to require that this must be a judicial authority. But does it require that the body must be outside the military?²⁹

28 S. Aughey and A. Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohamed and the Limits of Human Rights Convergence', in: *International Law Studies*, Vol. 91, 2015, p. 107.

29 The commentary to the so-called 'Copenhagen principles and guidelines on the handling of detainees in international military operations' states that it does not. In: *International Legal Materials*, Vol. 51, p. 1364 (2012).

Fourth, is there a realistic alternative if transfer is not possible? The implementation of the principle of *non-refoulement* may lead to a determination that a particular detainee cannot be transferred. In that case the detaining State has two options: release or continue to detain itself. If the detainee is a security threat, release is not desirable. Whether continued detention is possible in such a situation depends on whether there is a legal basis for detention. In practice, the question is more specifically whether there is a basis for security detention. The ECHR does not provide for the possibility of security detention. In the *Hassan* case, the ECtHR read such a possibility into Article 5 ECHR, based on an interpretation of the article taking into account the IHL IAC regime . The Court implied however that it would not do so in the case of a NIAC. If this is indeed the direction the Court takes, this may place States in a multinational NIAC in an impossible position, because they must either breach the ECHR or release detainees who form an immediate security threat.

4. What can be done to avoid that implementing the principle of *non-refoulement* in a multinational NIAC becomes an impossible task?

This raises the question of what can be done to avoid that implementing the principle of *non-refoulement* in a multinational NIAC becomes an impossible task.

One thing detaining States can do is improve their knowledge of the human rights situation in the host State. Ways of doing this include focusing intelligence efforts on this issue, deploying specialised personnel alongside their troops, working with international and local non-government organisations, and monitoring the situation of detainees that have been transferred previously.

Second, an interpretation of legal obligations must take into account the realities of military operations and armed conflict. It is just not realistic to expect the same from States engaged in a NIAC abroad as on their own territory during peacetime. An example is the requirement that has been suggested by some that a detainee should be assisted by counsel when challenging the decision to transfer him. The ECtHR has read this requirement into Article 13 ECHR in the case of deportation proceedings.³⁰ It is very difficult to see how such a requirement can be realistically implemented in a multinational NIAC, especially in situations where there are large numbers of detainees.

Third, as mentioned above, it is important that if the principle of *non-refoulement* stands in the way of transfer, there is a realistic alternative. For this, it is important that a solution be found for accommodating security detention in a NIAC in Article 5 ECHR. The reasoning fol-

30 *Chahal v. United Kingdom*, Appl. No. 22414/93, Judgment of 15 November 1996, paragraph 154.

lowed by the ECtHR for accommodating security detention in an IAC is perfectly applicable in NIAC as well. In that case, important factors that the Court took into account were the lack of derogations by States in respect of detention in IACs, and the possibility to intern civilians under IHL. It is true that only the IAC regime of IHL expressly provides for the power to detain POWs and intern civilians, but this does not change the fact that also in NIAC security detention is an accepted feature of IHL, to use the words of the ECtHR.³¹ It is unfortunate that the process on strengthening IHL protection for persons deprived of their liberty, facilitated by the ICRC, has not been able to make much progress.³² This process could have helped to clarify this point. If this issue is not addressed, this may lead States to start derogating from Article 5 ECHR in future multinational NIACs, as the UK has already announced it may do.³³

In conclusion, the answer to the question in the title of this contribution is that it is difficult but not impossible. Just how difficult depends to a large extent on whether human rights monitoring bodies find a way of taking into account IHL and the situation of armed conflict to which it applies in interpreting human rights obligations.

31 *Hassan v. United Kingdom*, paragraph 104. See Landais and Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law', in: *International Review of the Red Cross*, Vol. 97, 2015, 1295, pp. 1308-1310.

32 For more on this process, see T. Rodenhäuser, 'Strengthening IHL Protecting Persons Deprived of their Liberty: Main Aspects of the Consultations and Discussions since 2011', in: *International Review of the Red Cross*, Vol. 98, 2016, 941.

33 UK Government, *Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations*, 4 October 2016.

LA DÉTENTION PAR LES GROUPES ARMÉS NON ÉTATIQUES : QUESTIONS JURIDIQUES ET DÉFIS OPÉRATIONNELS

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Summary

Annyssa Bellal's presentation focuses on three questions related to detention in non-international armed conflict (NIAC). Do armed groups have a right to detain? What are the obligations of these armed groups? What operational challenges do they face? It should be noted that there are many different types of non-State armed groups, each with different means and capacities to implement International Humanitarian Law (IHL) relating to detention.

1. Are armed groups entitled to detain?

Detention by non-State armed groups is an undeniable reality of NIACs, yet it is still illegal under national laws. The question therefore arises as to whether they have a right to detain under IHL. Otherwise, if the detention is still illegal, there would be no interest for these groups to detain their opponents rather than just kill them.

The rules applicable in NIAC situations do not explicitly provide a right to detain, so the doctrine remains divided on the existence of such a right. Annyssa Bellal agrees with the ICRC's position that there is an inherent right to detain, but considers that procedural guarantees must be further developed.

2. What are the obligations of armed groups?

It depends on the type of detention.

IHL of NIACs is silent on the procedural safeguards related to detention for security reasons. Several principles have been put forward by the doctrine, all based on analogous interpretations of IHL in international armed conflicts

- *each person must be able to challenge the lawfulness of his or her detention before an independent body competent to order the person's release;*
- *they must not be discriminated against on the grounds of their detention;*
- *detention must be duly justified, such as by the prevention of crimes, a serious threat to the security of the group, or the preparation of a disciplinary or criminal trial.*

The obligations of armed groups in the event of a criminal trial under common Article 3 have been clarified in various documents, including the Rome Statute. Criteria such as ‘a regularly constituted court’ or principles such as the principle of legality of sentences must be interpreted taking into account the specificities of armed groups.

Two other forms of detention can come into play.

First, detention for criminal offences unrelated to the current NIAC. Some raise the question of the applicability of human rights to armed groups. For some, human rights would be the relevant legal framework for the procedural guarantees of this type of detention. For others, human rights are not intended to apply to non-State armed groups. Yet, a consensus seems to be emerging today on the applicability of human rights to the de facto authorities.

Secondly, questions remain as to the law applicable to the detention of members of one’s own armed forces for disciplinary reasons, without any criminal offence or violation of IHL. There is no clear response today, but it seems doubtful that armed groups would put in place procedures as elaborate as those required by common Article 3 for this type of detention.

3. Operational challenges

Two operational challenges are mentioned by Annyssa Bellal.

First, there is a divergence in the interpretation of IHL rules related to detention between armed groups and lawyers. Understanding the practice and interpretations of these groups is essential to work on compliance and implementation of IHL.

Secondly, there is almost no tracking of decisions rendered by the courts of armed groups, nor any support and technical assistance for armed groups conducting fair trials and respecting minimum judicial guarantees, which poses an implementation problem.

4. Conclusions

The implementation of IHL by armed groups is a challenge in legal and operational terms. But there is one last point to consider. It is the nature of contemporary NIACs, which are characterised by different types of violence with poorly defined contours: war, organised crime, violence in the form of massive human rights violations.

Regulating and implementing international law with armed groups in poorly defined situations of violence is a major challenge. Since IHL does not apply to poorly organised groups and it is questionable whether International Human Rights Law and refugee law apply at all to non-State armed groups, there is an urgent need to clarify the legal framework that can protect people in the hands of different types of players.

Introduction

En mai 2012, Haisam Sakhan, un membre d'une faction du groupe armé de 'l'Armée syrienne libre' a exécuté sept membres de l'armée syrienne. Ces personnes ont été exécutées à la suite d'une décision prise par 'un conseil judiciaire' établi par l'Armée syrienne libre, composé de trois membres qui avaient tous été auparavant juges pour le régime syrien avant de rejoindre le groupe armé d'opposition. Haisam Sakhan n'était pas présent lorsque la peine de mort contre les sept soldats syriens, pour meurtre et viol, a été prononcée par ce conseil judiciaire. C'est lui toutefois qui a dû la mettre en œuvre contre les soldats déclarés 'coupables'. Tels sont les faits relatés par une cour de justice suédoise lors de la mise en accusation de Haisam Sakhan pour crime de guerre.¹ Devant ses juges, Haisam Sakhan a allégué qu'il n'avait accepté d'exécuter ces personnes que sous la présomption qu'elles avaient été condamnées après un jugement équitable. Or, environ 36 heures seulement s'étaient écoulées entre le moment de la capture des sept soldats et leur exécution. Sur la base de ces faits, la cour du district de Stockholm a finalement condamné Haisam Sakhan à la prison à perpétuité pour infraction grave au Droit international humanitaire, soit l'exécution de personnes hors de combat sans jugement équitable. C'est la première fois qu'une cour de justice nationale reconnaît la possibilité pour un groupe armé de pouvoir établir des cours judiciaires, même si en l'espèce, le jugement rendu par le groupe armé ne satisfaisait pas aux garanties minimales exigées par le droit international.

Cet exemple illustre les questions à la fois juridiques et opérationnelles que pose la problématique de la détention par les groupes armés : les groupes armés ont-ils le droit de détenir des membres de forces armées adverses, mais aussi des civils et des membres de leurs propres forces ? Quelles sont les obligations qui pèsent sur les groupes armés dans ce contexte, notam-

1 Voir notamment Jonathan Somer, 'Opening the Floodgates, Controlling the Flow: Swedish Court Rules on the Legal Capacity of Armed Groups to Establish Courts', in: *EJIL Talk*, 10 March 2017, disponible à : <<https://www.ejiltalk.org/opening-the-floodgates-controlling-the-flow-swedish-court-rules-on-the-legal-capacity-of-armed-groups-to-establish-courts/>>. Des extraits du jugement traduits en anglais sont disponibles également sur le site suivant : *How does law protect in war*, <<https://casebook.icrc.org/>>.

ment par rapport aux garanties procédurales, à l'interdiction de la détention arbitraire et au jugement équitable ? Et enfin, comment les groupes armés eux-mêmes comprennent-ils les normes internationales relatives à la détention, et ont-ils la capacité à les mettre en œuvre ?

A titre liminaire, il est important de souligner qu'il existe différents types de groupes armés, qui sans doute procèdent à différents types de détention. Par exemple, les groupes d'opposition ou séparatistes, qui combattent des gouvernements, ou d'autres groupes, comme les groupes kurdes en Syrie, seront amenés à détenir non seulement des membres des forces armées gouvernementales, mais aussi des membres d'autres groupes armés. Ils seront aussi sans doute amenés à détenir des personnes pour des raisons de sécurité. Des groupes armés qu'on peut qualifier d'autorités *de facto* ou d'États non reconnus, considérés également comme des acteurs armés non étatiques, vont détenir des personnes dans toutes sortes de contextes, par exemple des individus qui ont commis des crimes sans lien avec le conflit (escroquerie, vol, meurtre, etc.). Il y a aussi des groupes que l'on pourrait qualifier d'organisations criminelles, qui parfois peuvent être soumis au DIH, et qui pourraient détenir des personnes contre rançon, en d'autres termes commettre des prises d'otages. Certains groupes armés beaucoup moins organisés n'auront peut-être pas la capacité de détenir des personnes en respectant les règles de DIH, par exemple s'assurer que leurs prisonniers aient de quoi se nourrir ou aient accès aux soins.² Finalement, il faut rappeler que les membres d'un groupe armé peuvent, en théorie, bénéficier, si capturés, du statut de prisonnier de guerre, et par conséquent peuvent eux-mêmes détenir aussi des prisonniers de guerre. Il s'agit des mouvements dits « de libération nationale », auxquels le premier Protocole additionnel de 1977 aux Conventions de Genève de 1949 s'applique pour autant que les conditions de l'article 1, paragraphe 4 de ce même Protocole soient remplies. A ce jour, un seul groupe armé remplit ces conditions : le Front Polisario, dans le contexte du conflit qui l'oppose au Maroc au sujet du Sahara Occidental.

1. Les groupes armés ont-ils le droit de détenir ?

Il peut paraître à première vue curieux de se poser cette question. D'une part, la détention d'une personne par un groupe armé non étatique sera *toujours* illégale en droit *national*, puisque les groupes armés n'ont pas le droit de recourir à la force armée contre leur État et toute autre entité de manière générale. Ce qui est interdit en droit national ne l'est toutefois pas nécessairement en droit international.

2 Le droit international coutumier applicable dans les conflits armés internationaux et non internationaux exige que les civils et personnes hors de combat, y compris les personnes en détention, soient traités humainement (voir la règle 87 de l'étude sur le droit coutumier du CICR, disponible à l'adresse: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule87>).

D'autre part les groupes armés, qu'ils en aient le droit ou non, détiennent *dans les faits* des prisonniers, non seulement dans le contexte du conflit, comme l'exemple du cas syrien l'a montré, mais aussi dans des contextes plus larges, lorsqu'ils agissent notamment comme autorité *de facto* d'un territoire donné.

Il est donc important de poser la question de la légalité des détentions par les groupes armés, non seulement du point de vue de la protection des personnes qui sont détenues par ces groupes, mais aussi pour des questions de mise en œuvre du DIH : si l'on devait déterminer que toute forme de détention par les groupes était *ipso facto* illégale, les groupes n'auraient aucun intérêt à détenir leur ennemis plutôt que de les tuer.

Le problème vient notamment du fait que les bases juridiques autorisant les parties à un conflit à caractère non international à détenir des prisonniers ne sont pas explicites en DIH. En effet, contrairement au droit des conflits armés internationaux, par exemple en ce qui concerne les prisonniers de guerre ou en cas d'occupation, le droit des conflits armés non internationaux (l'article 3 commun, le Protocole additionnel II ou le Droit international coutumier) est silencieux sur cet aspect précis. Seules les garanties judiciaires minimales qui doivent être respectées en cas de jugement à caractère pénal d'une personne qui se trouve aux mains d'une des parties au conflit sont mentionnées.

Sans reproduire tout le débat à ce propos, il suffit de rappeler que la doctrine reste divisée sur le droit pour les groupes armés de détenir des personnes dans les conflits armés non internationaux. Pour certains, le DIH ne fournit pas aux parties au conflit d'un conflit armé non international le droit de détenir des personnes³. Pour d'autres auteurs, et d'après le commentaire du CICR de l'article 3 commun, toutes les parties à un conflit non international, y compris les groupes armés, ont le pouvoir inhérent de détenir des prisonniers dans le cadre du conflit, interprétation que je partage pour ma part, même si les garanties procédurales protégeant les détenus doivent être davantage élaborées.⁴

2. Quelles sont alors les obligations qui pèsent sur les groupes armés ?

Il faut ici distinguer plusieurs types de détention. Traditionnellement, il est fait référence à deux types de détention : celle liée à des motifs de sécurité (le groupe détient une ou des per-

3 Voir Andrew Clapham, 'Detention by Armed Groups under International Law', dans : *International Law Studies*, US Naval War College, vol. 93, 2017, pp. 1-43, disponible à l'adresse : <<https://digital-commons.usnwc.edu/ils/vol93/iss1/1/>>.

4 Voir le paragraphe 728 du Commentaire du CICR de 2016 de l'article 3 commun des Conventions de Genève de 1949, disponible à l'adresse suivante : <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169924>.

sonnes qui posent un risque au groupe), et la détention pour des motifs liés à une infraction à caractère pénal, y compris lorsque celle-ci a été commise par un membre du groupe armé lui-même.

Sur les garanties procédurales liées à la détention pour des motifs de sécurité, le DIH des conflits armés non internationaux est silencieux.

Plusieurs principes ont néanmoins été proposés par la doctrine, qui se basent notamment sur des interprétations par analogie avec le droit des conflits armés internationaux. Je vais en mentionner trois.

- Chaque personne détenue pour des raisons de sécurité doit pouvoir remettre en cause la légalité de sa détention devant un organisme indépendant compétent pour ordonner la libération de la personne.
- Les personnes détenues ne doivent pas être soumises à une discrimination par rapport aux raisons de leur détention.
- Les détentions pour des raisons de sécurité doivent être dûment justifiées, comme la prévention de crimes, la menace sérieuse à la sécurité du groupe, ou la préparation d'un procès disciplinaire ou pénal.⁵

Les obligations pesant sur les groupes armés en cas de jugement pénal découlant de l'article 3 commun ont, quant à elles, été précisées dans différents documents, notamment dans le statut établissant la Cour pénale internationale. La doctrine, et également le CICR dans son Commentaire, ont souligné que pour la mise en œuvre des obligations par les groupes armés, il était important de tenir compte de la spécificité de ceux-ci. Par exemple par « tribunal régulièrement constitué », il faut comprendre un tribunal « offrant les garanties essentielles d'indépendance et d'impartialité », des termes interprétés par les commentateurs à la lumière du Droit international de protection des droits de l'homme.⁶ D'autres auteurs ont également plaidé pour une interprétation nuancée du principe de légalité (*nullum crime sine lege, nulla poena sine lege* – pas de crimes sans loi, pas de peines sans loi). Il s'agirait alors de prendre en compte les « lois » adoptées par les groupes armés et non uniquement les lois formellement adoptées par les États.⁷

J'aimerais encore mentionner deux formes de détention par les groupes armés qui soulèvent des questions juridiques.

5 Voir Clapham, *op. cit.*, pp. 15 et suiv., et le Commentaire du CICR de l'article 3 commun, *op. cit.*, paragraphe 723.

6 Voir Commentaire du CICR de 2016 l'article 3 Commun, *op. cit.*, paragraphe 692.

7 Voir aussi Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts*, Oxford University Press, 2012, Chapitre 8.

Premièrement, il faut mentionner la détention pour des motifs d'infractions pénales, mais pas en lien avec le conflit armé, commises par des civils vivant sous le contrôle d'un groupe armé, par exemple pour meurtre, vol ou escroquerie.

Dans ce cas de figure se pose la question de l'applicabilité du Droit de la protection des droits de l'homme aux groupes armés, notamment en matière de jugement équitable. C'est un débat vaste et complexe, que je ne pourrai pas développer en détails dans le cadre de cet exposé. Une partie de la doctrine considère que tant la philosophie que la structure du Droit de la protection des droits de l'homme ne peuvent s'appliquer aux groupes armés.⁸ D'autres considèrent que dans la mesure où le DIH ne suffit pas à régler ce genre de scénario, ou ne pourrait simplement pas être applicable, le Droit international de protection des droits de l'homme serait donc le cadre juridique pertinent.⁹ Le débat est vif, mais une position plus consensuelle semble émerger en ce qui concerne l'applicabilité des droits humains aux groupes que l'on peut qualifier d'« autorités *de facto* ». ¹⁰ De nombreuses difficultés juridiques subsistent néanmoins : qu'est-ce qu'une autorité *de facto* ? Et quelles normes seraient précisément applicables ?

La dernière forme de détention identifiée par la doctrine est la détention par les groupes armés de leurs propres membres pour des raisons disciplinaires, qui ne constituent donc pas des infractions pénales ou des crimes de droit international.

Le groupe SPLA (*Sudan People's Liberation Army* – l'Armée de libération du peuple soudanais) par exemple, prévoit dans son acte constitutif de 2003 la détention de ses membres en cas d'absence non justifiée (*absence without leave*). Le code de conduite du groupe armé congolais Nduma Congo rénové, prévoit quant à lui qu'un combattant puisse être détenu s'il perd des munitions. Quel est le droit applicable à ces types de détention ? ¹¹ Il n'est pas possible de donner davantage de réponses à ce stade, mais on peut relever qu'il semble douteux que les

8 Voir notamment Lisbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, p. 54.

9 Voir Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, 2017; Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, 1 février 2010, p 24, disponible sur SSRN: <<http://dx.doi.org/10.2139/ssrn.1569636>>.

10 Annyssa Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Geneva Academy of International Humanitarian Law and Human Rights, p. 26, disponible sur : <https://www.geneva-academy.ch/joomlatools-files/docman-files/In-Brief7_web.pdf>.

11 Voir Ezequiel Heffes, 'Closing a Protection Gap in IHL: Disciplinary Detentions by Non-State Armed Groups in NIACs', dans : *EJIL Talk*, 3 juillet 2018, disponible sur : <<https://www.ejiltalk.org/closing-a-protection-gap-in-ihl-disciplinary-detentions-by-non-state-armed-groups-in-niacs/>>.

groupes armés mettent en place des procédures aussi élaborées que celles exigés par l'article 3 commun pour ce type de violations des codes internes.

3. Les défis opérationnels

Deux défis opérationnels peuvent être évoqués ici. D'une part, il n'est pas certain que les groupes armés interprètent les notions juridiques liées à la détention comme les juristes le souhaiteraient. Par exemple, les FARC (*Fuerzas Armadas Revolucionarias de Colombia* – Forces armées révolutionnaires de Colombie) différencieraient entre les procès disciplinaires et les procès juridiques, et aussi entre les détenus qui font partie de leurs rangs et les civils. En ce qui concerne le jugement de leurs propres membres, en cas de meurtre, espionnage ou viol, un « conseil de guerre » est établi, formé de combattants qui assument le rôle de juges. Les peines décidées par le Conseil peuvent être des services à la communauté et, dans les cas extrêmes, la peine de mort.¹² Dans le même contexte, pour les ELN (*Ejército de Liberación Nacional* – Armée de libération nationale), il serait permis de récolter des impôts de guerre et de détenir les personnes qui refusent de payer comme moyen de pression pour obtenir l'argent. Les ELN considèrent que ces formes de détention ne peuvent être considérées comme des prises d'otages, dans la mesure où ces personnes ne sont jamais utilisées comme boucliers de guerre pendant les hostilités.

Comprendre non seulement la pratique, mais aussi l'interprétation que les groupes armés ont des normes du DIH, comme celles relatives à la détention, semble par conséquent être un aspect essentiel de la mise en œuvre et du respect du DIH.

Deuxièmement, il existe très peu de suivi des jugements rendus par les cours des groupes armés. Ce manque de surveillance peut être expliqué par la crainte éprouvée par les organisations non gouvernementales (ONG) ou les organisations internationales de légitimer ces cours et les groupes eux-mêmes. Or, le manque d'informations précises sur la manière dont les groupes respectent ou non le droit pose un défi de mise en œuvre. En effet, il sera beaucoup plus facile pour un groupe de pointer la responsabilité de l'autre partie pour se dédouaner plutôt que de réformer ses propres agissements.

La crainte de légitimer les groupes armés, voire celle d'être jugé pour soutien à des groupes terroristes, pourrait aussi expliquer le manque de soutien et de support technique (*capacity building*) aux groupes armés quand il s'agit de mener des procès équitables qui respectent les garanties judiciaires minimales. Un représentant procureur d'un groupe armé actif en Syrie, par

12 Geneva Call, 'Administration of Justice by Armed Non-State Actors. Report from the 2017 Garance Talks', dans : *The Garance Series*, Issue 2, pp. 10-13, disponible sur : <https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf>.

exemple, a plaidé, lors d'une conférence organisée par l'Appel de Genève, pour l'obtention d'un soutien pour mettre en place des procédures de médecine légale pour être à même de pouvoir enquêter et assurer un procès pénal adéquat.¹³

Conclusion

La mise en œuvre du DIH par les groupes armés, en matière de détention, mais aussi de manière plus générale pour d'autres normes de DIH, est un défi lié à des questions juridiques et opérationnelles. Les problèmes peuvent s'expliquer par l'incertitude ou le manque de normes applicables, la capacité des groupes à les respecter et l'interprétation qu'ils en font.

Mais il y a à mon avis encore un dernier point à prendre en compte. Il s'agit de la nature des conflits armés non internationaux contemporains. Mary Kaldor a magistralement décrit les nouvelles formes de violence contemporaine. Selon elle, les « nouvelles guerres », sont caractérisées par différents types de violence aux frontières mal définies. Il y aurait :

- ce qu'on nomme communément « la guerre » (définie comme la violence entre États et groupes armés pour des motivations politiques) ; mais aussi
- le « crime organisé » (la violence par des groupes organisés pour des motivations « privées ») ; et
- la violence qui prend la forme de violations massives des Droits humains (violence unilatérale entreprise par des États ou des groupes armés contre des civils).¹⁴

L'agence Reuters a rapporté qu'en août 2017, un groupe armé empêchait les bateaux transportant des migrants de partir en Europe afin de les ramener de force en Libye. Ces groupes étaient composés de centaines de civils, policiers et anciens militaires. Selon l'agence de presse, ils auraient mis en place un centre de détention pour les migrants qui ont été forcés de revenir sur terre ou ont été capturés par les trafiquants. Une photo a été fournie à l'agence montrant les conditions de détention inhumaines et dégradantes des migrants détenus.¹⁵

Cet exemple illustre de manière explicite les difficultés à pouvoir réguler et mettre en œuvre le droit international auprès de groupes armés dans des situations de violence mal définies. Comme le DIH ne s'applique pas à des groupes peu organisés et qu'il est discutable que le Droit

13 Geneva Call, Positive Obligations of Armed Non-State Actors, Legal and Policy Issues. Report from the 2015 Garance Talks, dans : *The Garance Series*, Issue 1, p. 16, disponible sur : <https://genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf>.

14 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Cambridge : Polity Press, 2012, p. 2.

15 Aidan Lewis, Steve Scherer, *Exclusive: Armed group stopping migrant boats leaving Libya*, Reuters, 21 août 2017, disponible sur : <<https://www.reuters.com/article/us-europe-migrants-libya-italy-exclusive/exclusive-armed-group-stopping-migrant-boats-leaving-libya-idUSKCN1B11XC>>.

international de protection des droits de l'homme et le droit des réfugiés s'appliquent du tout aux groupes non étatiques, il devient urgent de clarifier le cadre juridique qui pourra protéger les personnes aux mains de types d'acteurs et dans des situations telles qu'on les connaît en Libye, situations qui peuvent très bien se reproduire dans des contextes de violence armée de plus en plus volatiles.

1. The criteria of arbitrariness

A participant asked Tilman Rodenhauer and Marten Zwanenburg whether the criteria of arbitrariness, to which the ECtHR referred in the *Hassan* case regarding the procedural regulation and the grounds for detention, was the ideal protection. He stated that this criterion waters down Article 5 of the ECHR because it offers a legal ground to detain that was not provided for by the Convention. The reference to arbitrariness is a broad and unclear standard while there is a need for legal clarity regarding the grounds for detention. The participant asked whether derogating from the ECHR would not be the best option. Since, at least, the resort to the derogation is strictly regulated.

Tilman Rodenhauer answered that, for him, arbitrariness was a good standard. Indeed, the criterion of arbitrariness requires that the trial be impartial and fair. He stated that, if we look at what the Court does with it, for example in the *Serdar Mohammed* case, the arbitrary criterion is a valid one.

Marten Zwanenburg does not believe that it is necessarily a mistake to derogate from the ECHR. But he does not think that the arbitrariness standard hinders the Court from having a role, as it continues to give substance to what arbitrariness means. On the other hand, he believes that the use of the derogation may serve as a stepping stone for some States to fully withdraw from the ECHR. He also wondered if it is the right signal to necessarily derogate in a situation of NIAC, when the ECtHR has shown that it is perfectly possible to accommodate IHL in the context of IAC.

2. The CCDH: Looking for a way forward

A participant started by indicating that she was one of the co-authors of the third-party intervention in the *Hassan* case, and that she has been thanked by a senior civil servant in the United Kingdom. She affirms that it was clear that in the context of an IAC, they would need to derogate in order to invoke IHL. Michael Fallon, the former Secretary of State for Defence has indicated that in the future, the United Kingdom will derogate. She also looked at the way forward. For her, it is clear that States do not intend to sit around a table and negotiate the subject. She suggested that the Steering Committee for Human Rights (CDDH) under the Council of Europe should do a study on the authority to intern outside national territory in a NIAC. It should be written in the study that there must be a draft text at the end. This text should be a draft resolution for the Committee of Ministers confirming that there is a custom-

ary authority to intern outside national territory in a NIAC, and that under customary law, the grounds for interment are imperative reasons of security. They would also confirm that under customary law, there must be a periodic review mechanism with regard to the lawfulness of the detention, and a requirement of due process guarantee. This document could be useful for the ECtHR if it has to deal with a case of internment in a NIAC. It could also be used to get traction within a wider community, for instance the OSCE (Organization for Security and Cooperation in Europe) or the United Nation General Assembly. Obtaining such a consensus would be crucial to moving forward.

Marten Zwanenburg reacted by saying that this is a good idea. However, he doubts that the CDDH, which deals with human rights, would be willing to address IHL issues, or would have the expertise to do so. He believes that we must remain open to any possibility, and that the ICRC can play a role as a facilitator.

3. The inherent power to detain

A participant explained that he appreciated the ICRC's position on the inherent power to detain in NIACs. However, he wished to have some clarification because he doubted that this ICRC doctrine was really helpful for armed groups. Indeed, although an inherent right would exist, the ICRC still requires that the law provide for legal basis and grounds for detention.

Tilman Rodenhauer asked what would be the alternative for the armed groups if they didn't have an inherent right to detain under IHL. Where would they get the power from? Could they give themselves the power to detain? Tilman Rodenhauer think that armed groups could produce documents that regulate internment and detention, so defining procedures and grounds. However, he believes that it would be extremely difficult for an armed group to give itself a legal authority to detain. For him, this is a good argument in favour of an inherent right under IHL.

Annyssa Bella agreed that it is not easy to determine what the ICRC's inherent right covers. However, in her experience with armed groups, this is not a question they ask themselves. In practice, armed groups simply detain, without questioning the legal basis. She said that in order to encourage armed groups to comply with IHL, the focus should not be on questions of legal basis. Emphasis should be placed on procedures to protect persons in detention and not put members of armed groups at risk of being prosecuted for war crimes. For instance, after prosecution in Sweden, there have been numerous requests from the Free Syrian Army to follow IHL training to avoid any risk of a conviction for war crimes.

Session 3

Selected issues on the conduct of hostilities in contemporary non-international armed conflicts

Chairperson: **Darren Stewart**

British Armed Forces

IDENTIFYING THE ENEMY: ARMED FORCES, CCF AND DPH IN LIGHT OF CONTEMPORARY NIACS

Sigrid Redse Johansen

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Résumé

La présentation de Sigrid Redse Johansen aborde le point de vue du commandant militaire devant faire face à un adversaire ne faisant pas partie des forces armées d'un État. Avant d'identifier l'ennemi, il est nécessaire de le définir, de vérifier qu'il correspond à la définition et finalement, de le reconnaître.

1. Identifier l'ennemi pour l'attaquer : le principe de distinction

Conformément au principe de distinction, les attaques ne peuvent être dirigées que contre des cibles légitimes. Ce principe reflète le droit coutumier applicable tant aux conflits armés internationaux (CAI) qu'aux conflits armés non-internationaux (CANI). Afin de mettre en œuvre le principe de distinction, il doit être pratiquement possible pour les commandants de distinguer ceux qui sont des cibles légitimes de ceux qui bénéficient d'une protection contre les attaques. Les cibles légitimes se limitent aux combattants, aux civils participant directement aux hostilités et aux objectifs militaires. Le défi principal dans les CANI contemporains en matière d'identification de l'ennemi résulte du fait que les personnes participant aux hostilités se mêlent souvent à la population civile et ne s'en distinguent pas.

Le régime applicable aux CANI ne fait pas mention d'un statut de combattant, mais renvoie à la notion de forces armées, par opposition à la notion de civil. Les membres des forces armées sont identifiés, définis et ciblés en raison de leur statut de membre des forces armées d'un État. Les civils ne peuvent devenir des cibles légitimes qu'en raison de leurs actes ou de leur fonction. Lorsqu'un civil perd son statut de personne protégée, il peut être pris pour cible à tout moment. Cependant la question dans les CANI, où les structures formelles sont moins nombreuses et où la

notion de combat formel n'existe pas, est celle des critères à appliquer pour définir une personne comme ayant perdu son statut de civil et membre d'un groupe armé organisé.

Dans son Guide interprétatif sur la notion de participation directe aux hostilités, le Comité international de la Croix-Rouge (CICR) propose que ne sont pas des civils les membres des forces armées d'un État et les individus ayant une « fonction de combat continue » au sein d'un groupe armé organisé. Toutefois, ce concept de « fonction de combat continue » est particulièrement contesté, entre autres en raison de l'avantage injuste que le point de vue du CICR conférerait aux groupes armés non étatiques. La position du CICR n'est pas retenue par certains États tels que les États-Unis ou la Norvège. Sigrud Redse Johansen conclut que la définition de « civil » que propose le CICR ne reflète pas le droit coutumier.

Quant au concept de participation directe aux hostilités (PDH), les considérations de nécessité et la protection de la population civile peuvent toutes deux bénéficier d'une interprétation raisonnablement large afin de rendre la distinction aussi claire que possible pour la population civile. Le commandant doit faire face à quatre défis lorsqu'il doit appliquer le concept de participation directe aux hostilités (PDH) :

- un acte n'est pas qualifié de PDH par référence à l'intention subjective du civil mais à la nature de l'acte ;*
- le commandant doit faire la distinction entre un acte lié au conflit armé et un acte criminel ordinaire ;*
- il doit déterminer le début et la fin d'un acte de PDH ;*
- la loi offre-t-elle aux individus une protection via l'effet « revolving door »*

La question de la durée de la perte de la protection et de l'effet « revolving door » sont aujourd'hui l'objet d'intenses débats.

2. Comment le « commandant raisonnable » identifie l'ennemi

L'identification de l'ennemi doit se faire conformément au critère du « commandant raisonnable ». Un « commandant raisonnable » doit satisfaire à deux exigences : agir de bonne foi et se fier à l'information raisonnablement disponible à ce moment-là. Les considérations rétrospectives sont donc exclues, et le commandant doit dès lors prendre toutes les mesures possibles pour avoir à sa disposition les informations pertinentes. Il faut cependant prendre en compte la confusion pouvant résulter du « brouillard de la guerre » et accepter qu'il existera toujours un certain niveau de doute.

3. La règle du doute

Le premier Protocole additionnel contient deux règles portant présomption du statut de civil, une pour les personnes et l'autre pour les biens. Les deux règles sont similaires mais pas identiques, et leur statut coutumier reste contesté. Ces règles n'exigent pas la certitude, comme le libelle pourrait l'indiquer, mais une conviction « raisonnable » que le bien ou la personne sont assurément un objectif militaire pour pouvoir les prendre pour cible. Par conséquent, ce ne sont pas tous les doutes théoriques qui libèrent la présomption de se trouver face à un civil, mais un doute raisonnable. Toutefois, quand la conviction est-elle « raisonnable » ? Le critère du raisonnable dépend du contexte. Par exemple, un homme qui tient une arme à feu à l'extérieur de sa maison peut indiquer qu'il participe aux hostilités ou qu'il protège sa maison conformément aux coutumes locales, comme c'est le cas en Afghanistan.

4. La vérification : effectuer l'identification conformément au droit

Le premier Protocole additionnel fait référence aux « précautions pratiquement possibles » dans ses articles 41 (3), 57 et 58. La notion de « précautions possibles » est comprise par un certain nombre d'États comme recouvrant « ce qui est réalisable ou pratiquement possible, compte tenu de toutes les circonstances du moment, y compris les considérations humanitaires et militaires ». Elle repose sur une « marge de jugement assez large » et sur les considérations de nécessité militaire, et est étroitement liée aux « circonstances prévalant à l'époque » qui font partie des éléments de la définition des objectifs militaires.

Les commandants, les planificateurs et les officiers d'état-major sont tenus de prendre toutes les mesures « possibles » pour vérifier que les cibles potentielles sont des cibles légitimes. Quelles sont donc ces mesures ? Premièrement, avant de procéder à une vérification, il est nécessaire de reconnaître un objet comme un objectif militaire. Cette reconnaissance peut être mise à mal par les ruses de guerre licites que l'autre partie peut mettre en œuvre, et nécessiter la recherche d'informations supplémentaires. Le CICR fait valoir que même s'il n'existe qu'un « léger doute » quant à savoir si un bien est un objectif militaire, des informations supplémentaires sont nécessaires. La référence au « léger doute » semble trop stricte en raison des inévitables incertitudes de la guerre.

Pour identifier son ennemi, le commandant doit être capable de prédire son comportement, de connaître son modus operandi. En matière de participation directe aux hostilités, le vrai défi est donc de tenir à jour les données disponibles sur le modus operandi des civils participant aux hostilités, afin qu'il soit possible de connaître (et donc reconnaître) son ennemi. Le comman-

dant doit savoir comment exploiter ses informations et mettre à jour en permanence sa liste de comportements prévisibles.

1. Introductory remarks

In order to enforce the rule on distinction and thus the protection of the civilian population, the notion of ‘identifying the enemy’ calls for remarks on the duty to take precautions in attack. In order to identify the enemy, we must *define* him or her, the commander must *verify* that the person or persons in front of him or her are those persons previously defined. My perspective in the following is that of the commander belonging to a regular State force, facing a non-State enemy.

A process of verification entails, in practice, *recognition*. Recognition, in turn, presumes that the commanders know their enemies. They must know what they are looking for in order to recognise what they see. We may say that they must have *mapped the landscape*. I shall pursue these three steps in this presentation – that identifying the enemy presumes: *definition, verification, and recognition*.

Furthermore, the commanders must know their enemies in a *non-International armed conflict (NIAC)* – which may be different to knowing their enemies in an international armed conflict (IAC). In an IAC the enemy may be identified by their status, as being the armed forces of the enemy State. They are being verified as lawful targets, to a certain degree, by area. As a point of departure, we may therefore introduce a shift from “where are they?” to “who are they?” and “what do they look like?” Obviously, these military operations are intelligence-driven. A starting point is to pose the following question: what do we require from conventional commanders when identifying the enemy in a NIAC?

I presume in the following that the threshold for NIACs is known.¹ I shall therefore only make one point at the outset with regard to their characteristics: NIACs range from a high degree of organisation to single individuals operating more or less on their own for the benefit of one of the parties. Often, it is difficult to keep track of the affiliation of groups and the feature of military operations as intelligence-driven can be emphasised.

1 In treaty law the threshold is expressed in common Article 3 to the four Geneva Conventions (GCs) and Article 2(1) and (2) of Additional Protocol II (AP II) to the Geneva Conventions.

2. Identifying the enemy in order to attack them: the rule of distinction

2.1. The basic rule of distinction under the Law of Armed Conflict governing NIACs

The principle of distinction is one of two cardinal principles (the other being the prohibition of unnecessary suffering) constituting the 'fabric of international humanitarian law', to use the words of the International Court of Justice in the Advisory Opinion of the Nuclear Weapons Case.²

Being a cardinal principle, its position as part of customary international law is uncontested today. The formulation of the customary rule of distinction appears in different guises. Here I use the one expressed in the Air and Missile Warfare Manual, which can be applied both in IACs and in NIACs: in accordance with the basic principle of distinction, attacks must be confined to lawful targets.³ The corollary of this rule is the protection of civilian persons and objects from attack. I shall now turn to the details of defining lawful targets.

2.2. Defining persons who are lawful targets

In order to implement the principle of distinction, it must be practically possible for commanders to actually distinguish those who are lawful targets from those who enjoy protection from attack.

Lawful targets are here referred to as combatants (being members of armed forces), civilians directly participating in hostilities, and military objects. This enumeration is not explicitly stated in a treaty provision, but stems from an overall reading of the first Additional Protocol (AP I), Articles 48, 51(3) and 52(2), which clearly express customary law on this point. While Article 52(2) does not mention combatants explicitly, Article 48 does, and Article 52(2)'s first sentence contains no limitation to objects (whereas the second sentence does).

The word 'combatant' has been used with two meanings: in the first sense as a reference to a person who actually engages in hostilities (and this is decisive for being a lawful target), regardless of whether that person is entitled to such participation; and in the second sense as a reference to only those who have the combatant's privilege, i.e. the *right* to participate in hostilities.⁴ An important remark is required: the formal notion of (lawful) combatancy does

2 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', in: *I.C.J. Reports* 1996, page 226 sqq., page 257, paragraph 78.

3 Program on Humanitarian Policy and Conflict Research Harvard University (HPCR), *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (AMW Manual), 2010, rule 10(a). See also rule 1 in the ICRC Customary International Humanitarian Law Study (CIHL), where the wording is slightly more demanding than in the AMW Manual.

4 The expression is found in AP I Article 43(2).

not exist in NIACs.⁵ The notion of privileged belligerency is a reciprocal construction which is only valid under IACs. We therefore have an asymmetry between *lawful combatants*, meaning those using force on behalf of a State, and *others* taking part in the armed conflict.

The definition of lawful combatants is tied to the rule of distinction in that it distinguishes those who are entitled to participate in hostilities from the civilian population who enjoy protection from attack. This distinction may however be jeopardised when combatants do not distinguish themselves. The necessity to direct attacks against them remains, but then at the expense of the civilian protection. Here we are at the core of the challenges with identifying the enemy in NIACs where persons participating in hostilities frequently blend in with the civilian population.

2.3. 'Armed forces' in NIACs

I stated above that combatants are members of armed forces – or *vice versa*: members of armed forces are combatants. This is surely true for IACs. Under IACs, civilians are defined negatively under AP I Article 50 as those who are not combatants. No parallel treaty rule exists for NIACs.

We do have, however, the notion of 'armed forces' in NIACs. Rule 4 of the Customary International Humanitarian Law (CIHL) states that the rule applies in IACs and NIACs 'as far as the principle of distinction is concerned', and furthermore, in rule 5, that – even in NIACs – members of armed forces are not civilians. This serves as (nothing more than) a point of departure. The details of who are actually members of organised armed groups and who are not, is a contentious matter. I shall address parts of these contentious issues in the following.

2.4. Addressing the problem of defining the enemy in a NIAC: from status based to conduct based targeting

States armed forces are identified, defined, and targeted, due to their status as members of the armed forces. They do not have to perform certain acts in order to be lawful objects of attack. Civilians, however, are only lawful objects of attack for such time as they directly participate in hostilities. They have to perform certain acts, or functions, in order to be lawful objects of attack. When civilians stop being civilians, the conduct-based approach to targeting also changes. From that stage onwards the persons in question can be attacked at any time, regardless of whether they are fighting, eating, sleeping or resting at the moment (and as long as they are not *hors de combat*). The pending question in NIACs, where formal structures are fewer and the notion of formal combatancy does not exist, is which criteria to apply for defining someone as having lost their status as a civilian. This is where we meet the notion of 'continuous combat function'.

5 In IACs there are two standards for lawful combatancy and Prisoner of War (POW) status. One in AP I Article 44 and one under the Third Geneva Convention Article 4, which reflects customary law.

2.5. Continuous combat function – is it required in the armed group?

Among the controversial issues discussed during, and after, the Interpretive Guidance published by the International Committee of the Red Cross (ICRC), was the question (introduced above) whether a person who takes a direct part in hostilities loses his/her status as a civilian and becomes an unlawful combatant, or whether the said person remains a civilian.⁶ In the Interpretive Guidance the concept of “civilian” encompasses all persons who do not belong to a State party to a conflict and all those who do not fulfil a continuous combat function in an organised armed group in a non-international armed conflict.⁷

This position is highly contested and even criticised for being ‘fatally flawed’.⁸ At the centre of the diverging views are the differing opinions over the threshold for comparing – or mirroring – the notion of armed forces (who are lawful targets at all times) to that of organised armed groups. Among the practical difficulties attached to the ICRC’s position is to identify, for example, fighting functions v. logistics and support functions on an individual basis.

Furthermore, a consequence of the ICRC’s view in the Interpretive Guidance is that members of non-State organised armed groups in an international armed conflict are considered as civilians, and do not lose their civilian protection on a continuous basis. This view may be criticised by referring to considerations of military necessity.

The ICRC’s view may arguably provide non-State armed groups with an unfair advantage to the detriment of a State’s regular armed forces. The United States (US) view is, for example, that persons belonging to a hostile, non-State armed group are not civilians, and are liable to attack unless they are rendered *hors de combat*.⁹

However, and as pointed out by the United States Department of Defence Law of Armed Conflict (US DoD LOAC) Manual, one may argue that these persons are still civilians, but nevertheless liable to attack on a continuous basis, due to their membership in an armed group which is engaged in hostilities as a form of taking a direct part in hostilities.¹⁰ This latter view is

6 Yoram Dinstein, ‘Distinction and Loss of Civilian Protection in International Armed Conflicts’, in: Michael D. Carsten (ed.) *International Law and Military Operations, International Law Studies*, Vol. 84, 2008: 183-198, at page 188-189.

7 ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (Interpretive Guidance), in: *International Review of the Red Cross*, Vol. 90, no. 872, 2008: 991-1047, at pages 997 and 1002.

8 William H. Boothby, *The Law of Targeting*, Oxford University Press, 2012, at page 150.

9 US Department of Defence (DoD) Law of War Manual, 2015, as amended 2016, Department of Defense Directive 2311.01E, DoD Law of War Program (May 9, 2006), at paragraph 5.7.3.

10 *Ibid.*

rather widely shared, and the position may be less limiting than the Interpretive Guidance in two aspects: first, in that the notion of armed groups may also encompass international armed conflicts, and secondly, in that it rejects (or waters down) the ICRC's requirement of continuous combat function.

As an example, the solution in the Norwegian Manual is to apply the same criteria for members of organised armed groups (not acting on behalf of a State) to both IACs and NIACs, and not to define their status as either combatants or civilians.¹¹ Furthermore, the ICRC's requirement of continuous combat function is upheld in the Norwegian Manual, but interpreted so widely that it resembles an actual reflection of the armed forces. Although the overall picture is not as clear as one could wish, it seems correct to state that the position in the Interpretive Guidance does not reflect customary law when it comes to the definition of civilians.

I will now turn to the definition of the enemy within the ambit of true conduct-based targeting, namely the concept of direct participation in hostilities.

2.6. Defining the enemy: direct participation in hostilities

The rule in AP I Article 51(3) states that 'civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.

An identical provision is found in AP II Article 13(3), and similar – but not identical – provisions are also found elsewhere in the Additional Protocols and the four Geneva Conventions, as well as in rules formulated to express customary LOAC.¹²

11 Forsvaret, *Manual i krigens folkerett*, (Oslo: Forsvarssjefen, 2013) (Norwegian Manual), at pages 58-59.

12 In AP I similar provisions are found in Article 8(a) and (b) with regard to the loss of protection for wounded, sick and shipwrecked when performing 'any act of hostility', and in Article 41(2) which prohibits making personnel 'hors de combat' the object of attack, provided that he 'abstains from any hostile act', as well as Article 42(2) granting descending airmen immunity from attack in order to be able to surrender unless 'it is apparent that he is engaging in a hostile act'. Then last (but not least practical) in the AP I are the rules in Articles 13(1) and 65(1) which prescribes the loss of protection from being the object of attack for medical units and civil defense organisations when they are performing 'outside their humanitarian function' 'acts harmful to the enemy'. Preceding provisions are also found in the GC I, Article 22 with regard to medical personnel (although not explicitly in this provision), GC II Article 34 with regard to hospital ships and sick bays, and GC IV Article 19 with regard to hospitals. In the Rome Statute the rule is reflected in Article 8(2)(b)(i), in the AMW Manual in rule 28, and in the ICRC CIHL rule 6. The positions also seems to be undisputed in legal literature. See for example Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', in: *Harvard National Security Journal*, Vol. 1, 2010: 5-44, at page 13.

There is no uniform approach to whether the notion of direct participation in hostilities (DPH) should be interpreted widely or more narrowly. Yet, both considerations of military necessity and humanity may actually align in favour of a broad interpretation of the notion of DPH. Indeed, while considerations of necessity certainly may favour a wide interpretation of DPH, the protection of the civilian population as such may also benefit from a clear and reasonably wide understanding of the concept of DPH, in order to make as clear as possible a distinction from the population at large. When it comes to the practical application of the rule, the commander has (at least) four obvious challenges.

1. Since the attacker's mind cannot be read, his or her subjective intent must be construed based on objective facts. The act in question must be *shaped* to cause the required threshold of harm, in support of a party to the conflict, to the detriment of the other. This requirement cannot be read as a reference to the subjective mind of the person, but to the design of the act.
2. To see the nexus to the armed conflict, and thus to distinguish acts linked to the armed conflict from mere criminality. The degree of the challenge may hinge on how strictly one understands the criterion of nexus.
3. To determine the beginning and end of participation.
4. And finally, does the law offer a "revolving door" of protection?

Challenges three and four are closely intertwined. In the ICRC's Interpretive Guidance it is argued that the essence of preparatory measures, which are also considered as DPH, are 'military operations preparatory to an attack' – a wording found in AP I Article 44(3).¹³ These acts can, however, only be seen as the core of preparatory acts, since DPH surely also covers acts which do not amount to an attack. Furthermore, geographical proximity is neither a necessary nor a sufficient criterion for a preparatory act. Particular issues in this regard may, for example, arise in the cyber context. The majority of experts in the Tallinn Manual hold that 'logic bombs' designed to activate at some future point, accrue the direct participation of the individual(s) for the same period as that of the delayed effect of the bomb.¹⁴

Whether the preparations themselves need to be proximate to the act has also been contested. While Boothby argues that concealing a weapon or assembling an 'improvised explosive device' (IED) with a view to using it is continued DPH, the Interpretive Guidance argues otherwise, specifically noting that the act of DPH typically may end when the individual is hiding

13 Interpretive Guidance, *op. cit.*, at page 1031.

14 Schmitt, Michael N. (general editor): *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn Manual), 2nd ed., Cambridge: Cambridge University Press 2017, commentary 9 to rule 97, at page 431.

a weapon and actually retreating from combat. The differing in opinion may lie in the understanding of 'hiding a weapon'. If the purpose of 'hiding' is only with the purpose of re-using the next day, considerations of military necessity strongly argue against limiting the notion of DPH in this regard. If, on the other hand, the weapon is hidden with the purpose of actual retreating from combat – and not only to go to sleep – the hiding of a weapon may indicate the end of DPH. This view is also compatible with military necessity: if a person in fact ceases his or her participation in combat, it is not necessary to direct an attack against that person. The latter view is emphasised by the US in the DoD Manual, where it is argued that civilians must not be made the object of attack after they have *permanently* ceased their participation because there would be no military necessity for attacking them.¹⁵ In other words it is the US view that the necessity of attacking civilians only ceases after their *permanent* withdrawal from hostilities.

The question of permanent v. temporary withdrawal from participation in hostilities is the essence of the issue on whether the law may offer a 'revolving door' of protection.

By this, it is referred to the situation where, for instance, a civilian is taking a direct part in active combat during the night, in order to return to his fields during daytime. If he is granted immunity from attack while doing farming in the daytime, AP I, AP II and the GCs grant him a 'revolving door' of protection. The question is whether this is the position of the law elsewhere.

The US has explicitly argued that this is not an option, that the law does not really provide a revolving door of protection: civilians lose their protection permanently unless they permanently cease their participation. Other States and commentators have less clear-cut interpretations, and argue that civilians will lose their protection permanently if they participate in hostilities on a regular basis.¹⁶ The opposite view is that the wording of AP I clearly offers a 'revolving door' of protection in some situations. This latter position entails that the scope of loss of protection is twofold: protection is lost on a permanent basis for members of an organised armed group in a non-international armed conflict, whereas for all others, protection is lost only for the duration of each specific act.

While State armed forces are lawful targets at all times, the notion of DPH does not reflect this. If the opposing forces consist of civilians opting in and out of protection, planning procedures for one's own forces may become seriously hampered. If a person may be the object of attack only while caught in a specific act, the long-term perspective disappears and so

15 US DoD Manual, at paragraph 5.8.4.1.

16 See for example the Norwegian Manual, page 57.

does the ability to take proper precautions in attack. The risk of collateral damage may actually increase, since the planning of military operations may turn into split-second decisions. A revolving door of protection may imply to try to redefine war as something which it is not.

I shall now turn from the definition of the enemy to the person performing the task: the commander. And to my initial question: what can we require from the commander?

3. The reasonable commander identifying the enemy

The enemy has to be identified by the commander. The actual assessment done by the commander is subject to the yardstick of the *reasonable* commander.

The Tribunal in the *Hostage* case found that no military necessity had actually existed, but nevertheless held that “we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal”.¹⁷

The content of this passage has later been labelled ‘the *Rendulic* Rule’ and given widespread acceptance – arguably also outside the scope of criminal law.

When re-cited in the *Galic* case, the comparison to what a ‘reasonably well-informed person’¹⁸ under the same circumstances would have assessed, is also referred to as a standard of ‘the reasonable military commander’.¹⁹

A ‘reasonable commander’ must live up to two requirements: acting in good faith and relying upon information reasonably available at the time. In the *Blaskic* case, the International

17 *United States v Wilhelm List and others*, (Hostage Case), Judgement of 19 February 1948, *Law Reports of Trials of War Criminals*, (London: Published for the United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949) Volume VIII, case No. 47, at pages 68-69. Emphasis added.

18 *Galic Case*, Trial Chamber Judgment, Case No. IT-98-29-T, 2003, at paragraph 58.

19 In the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 2000 (OTP Report) at the International Criminal Tribunal for the former Yugoslavia (ICTY), available at: <<http://www.icty.org/x/file/Press/nato061300.pdf>>. At paragraph 49, it is stated with regard to the proportionality rule that: ‘It is suggested that the determination of relative values must be that of the “reasonable military commander”. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.’

Criminal Tribunal for the former Yugoslavia (ICTY) stated, with regard to the border between acts lacking ‘sound military judgment’ and criminal acts, that

‘the nature of the attack of 18 July 1993 cannot be categorically defined as that of a criminal act, in that there was still the presence of a considerable number of ABiH soldiers in *Stari Vitez* at that time. The operation itself may have been a wilful one lacking sound military judgement, but that wilful aspect of the attack does not make it a crime in terms of the Statute.’²⁰

It seems safe to say that the quoted passages and standards are easy to state and difficult to apply. Good faith is, obviously, the opposite of ignorance of fact or ‘turning a blind eye’ to apparent circumstances. However, the distinction between excusable and culpable lack of information may be a fine line in practice. The requirements of good faith and information reasonably available are thus connected and partly overlapping.

The emphasis placed on what information is reasonably available ‘at the time’ rules out considerations of hindsight. This point is often specified to be ‘not on the basis of hindsight’.²¹ Assessment based on ‘information reasonably available at the time’ relates to all decisions during the conduct of hostilities.²²

Furthermore, assessment relates in practice to the commander’s decision cycle,²³ which, as a minimum, consists of three phases: assessment, decision and action. Applying the rule of distinction is often referred to by scholars as a two-step task: first the gathering of information and then decision-making based on the gathered information (leaving out the evident: ‘action’).²⁴ But what information, under the circumstances, is ‘reasonably available’ at the time? The answer to the question obviously relies (among other things) upon what available

20 ICTY, *Blaskic Case*, Appeals Chamber Judgment, Case No. IT-95-14-A, 2004, at paragraph 463.

21 Quoted from Michael Bothe, Karl Joseph Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed. (revised by Michael Bothe), Leiden/Boston: Martinus Nijhoff Publishers, 2013, at pages 351-352. The same point is emphasised in the US DoD Manual at page 193.

22 See for example the US DoD Manual, at page 192 and Brian J. Bill, ‘The Rendulic “Rule”: Military Necessity, Commander’s Knowledge, and Methods of Warfare’, in: *Yearbook of International Humanitarian Law*, Vol. 12, 2009: 119-155, at pages 137 and 138.

23 In military literature often referred to as the OODA-loop; “Observe, Orient, Decide and Act”. A concept developed by the American military strategist John Boyd.

24 John Merriam, ‘Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters’, in: *Virginia Journal of International Law*, No.56, 2016: 83-145, at page 106 ff. Boothby, *The Law of Targeting*, at page 80 and Ian Henderson, *The Contemporary Law of Targeting*, Martinus Nijhoff Publishers, 2009, at page 237.

assets for information surveillance and reconnaissance (ISR) the commander possesses. In the notion of 'reasonably available', it is not possible to deduce a duty to exploit all potential assets his or her State possesses. On the other hand, the State is obliged to have assets which are capable of abiding by the law. Furthermore, it appears reasonable to require that the commander actually *knows* what ISR collection assets he or she can benefit from, and how they are used. In many cases the threshold of what information is 'reasonably available at the time' coincides with the duty to do everything 'feasible' to verify that the target is a military objective.²⁵

The commander ought to possess basic knowledge about his or her own forces' capacities and capabilities, as well as that of the enemy, in order to assess potential military advantages and/or necessities.²⁶ The commander should have an initial understanding of the enemy's basic strength and vulnerabilities. For example, if intelligence shows that the enemy's most critical asset is their northern fleet, this information must be presumed known to the rest of the command group. Accordingly, the commander must possess an initial knowledge of where an attack may be presumed to produce the greatest advantage. Having said this, the expected level of available information must allow for the confusion stemming from the 'fog of war'. Naturally, intelligence may prove wrong due to the enemy's deception. Finally, the expected level of available information does not rule out that decisions during combat will necessarily be made under a certain level of doubt. In the end, any decision during combat is a 'qualified best guess'.

The rule of doubt

AP I contains two rules with a presumption of civilian status, one for persons and one for objects. AP I Article 50(1) states that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian". Article 52(3) states that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used".

The two rules are similar – but not identical – and difficult in many aspects. While the rule in Article 50 (1) by wording applies to all persons, 'presumption of civilian use' in Article

²⁵ AP I Article 57(2)(a)(i).

²⁶ The *Joint Doctrine Manual, Law of Armed Conflict at the Tactical and Operational Levels* (Canadian Manual), B-GJ-005-104/FP-021, (Office of the Judge Advocate General, Canada, 2001), may also be read in support of this view. See paragraph 415, at page 4-4 where it is stated that 'A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.'

52(3) does not apply – as the wording indicates by the phrase “normally dedicated to civilian purposes” – to objects which normally have a significant military use or purpose.²⁷ For example, if there is doubt whether a school is used as an ammunition storage, the school must be presumed to maintain its civilian status. Objects that are military by nature, however, do not fall within the ambit of the rule.

The customary status of both rules is contested.²⁸ In fact, it is difficult to grasp the difference (if any) between the accepted customary rule and the treaty rules as understood with interpretive reservations. The treaty rules do not require certainty (as the wording could indicate),²⁹ but a reasonable belief (as does customary law) that the object or person is actually a military objective.³⁰ Certainty would, for all practical matters, rule out doubt altogether. Hence, not every theoretical doubt will release the civilian presumption, but a *reasonable* doubt.³¹ As always, the notion of reasonableness hinges on the specific circumstances embracing the commander’s assessment. Furthermore, the devil lies in the details of the practical application of the rule. The recurring question for practical purposes appears to be: when is the belief ‘reasonable’?

With regard to persons, applying the rule may depend upon the adversary’s compliance with the duty to distinguish themselves. Repeated perfidious behaviour may degrade the presump-

27 Bothe, Partsch and Solf, *New Rules*, at page 368. Boothby, *The Law of Targeting*, at page 71.

28 With regard to objects, see the account given in Bothe, Partsch and Solf, *New Rules*, at page 368 with regard to the disagreement over ‘objects in the contact zone.’ On the same matter, see as well the ICRC CIHL, commentary to rule 10. When it comes to States, critique is raised by the US with the argument that: ‘A legal presumption of civilian status in cases of doubt may demand a certain degree of certainty that would not account for the realities of war.’ (US DoD Manual, paragraph 5.4.3.2, at page 201). The same position has also been upheld by the US previously. See for example Final Report to Congress, page 616, where a similar statement is made: ‘This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat.’ Upon ratification, the UK made the reservation with regard to Article 50(1) that it ‘applies only in cases of substantial doubt still remaining after the assessment referred to at paragraph (c) above has been made (...) UK reservation to AP I.’ The UK view has gained widespread support.

29 The AP I Commentary, page 638, at paragraph 2034 uses the word ‘certain’ with regard to buildings normally used for civilian purposes, even if they are in the contact zone.

30 AMW Manual at page 87 in Commentary. Boothby, *The Law of Targeting*, at page 107. Chris De Cock, ‘Operation Unified Protector and the Protection of Civilians in Libya’, in: *Yearbook of International Humanitarian Law*, Vol. 14, 2011, at page 231, argues that ‘PID is the reasonable certainty that at given object is a valid military objective’. In the *Galic* Case, the ICTY stated that: ‘The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action’, at paragraph 51.

31 Tallinn Manual, commentary 3 to rule 95, at page 424. Dinstein, *Conduct of Hostilities*, at page 113. Michael Schmitt, ‘Targeting and International Humanitarian Law in Afghanistan’, in: Michael Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, *International Law Studies*, Vol. 85, 2009: 307-339, at page 320, refers to ‘substantial doubt’.

tion.³² A particular issue arises when the enemy largely consists of civilians taking part in hostilities, who thus lose their civilian protection. Whether or not a person behaves in a way that would qualify as direct participation in hostilities may rely on the cultural-contextual facts. For example, a male individual holding a gun outside his house may indicate participation in hostilities, and it may indicate that he is protecting his home according to local custom.³³ Whether the doubt is reasonable relies on the expected knowledge of the commander. Carrying weapons has for example been a common feature among Afghan men and this fact should be presumed to be known to military commanders. Hence, when spotting a man carrying a weapon, this fact alone should raise substantial doubt as to whether there is sufficient nexus to the armed conflict.

4. Moving to verification: performing the identification according to the law

4.1. Feasibility in general

The notion of ‘feasibility’ appears in three articles in AP I. Article 41(3) places a duty to take “all feasible precautions” in order to ensure the safety of prisoners of war who have fallen into the power of an adverse party under unusual conditions. Articles 57 and 58 prescribe the duty to take precautionary measures for those who plan or decide upon an attack and for those liable for attack. The duty to take feasible precautions against the effects of attack thus applies both ways: on the attacker and on the attacked. The headings reflect this: ‘Precautions in attack’ (Article 57) and ‘Precautions against the effects of attacks’ (Article 58). In Article 57, feasibility relates to two core duties incumbent upon the military commanders: that of properly identifying a military objective as a lawful target, and that of avoiding or minimising collateral damage.

The word ‘feasible’ simply refers to something that is “possible to do easily or conveniently”. The notion of ‘feasible precautions’ is understood similarly, by a number of the ratifying States, to encompass “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.

Recalling that the yardstick of the commander’s assessment in all situations is that of the ‘reasonable commander’, the question of feasibility with regard to precautionary measures coincides with reasonableness in many aspects. Furthermore, the core of the concept of feasi-

32 Bothe, Partsch and Solf, *New Rules*, at page 336.

33 See the Norwegian Manual at page 32 and Schmitt, ‘Targeting and International Humanitarian Law in Afghanistan’ at page 319, for similar points.

bility relies both upon a “fairly broad margin of judgment” and (within this) the considerations of military necessity.³⁴ The expectation of what is reasonably available at the time is closely linked to “the circumstances ruling at the time”, which is among the elements of the definition of military objective, as seen in the passage in the Canadian Manual: “Commanders, planners and staff officers are required to take all ‘feasible’ steps to verify that potential targets are legitimate targets. However, such decisions will be based on the ‘circumstances ruling at the time’”.³⁵

What then, are feasible measures to verify that potential targets are legitimate targets? How can the commander see, or recognise (see below) the notion of causality (direct v. indirect) as well as the causal strength – the proximity between the act and the outcome? I argue that strict logic is unsuited to delimit acts as DPH or not. The notion of ‘integral part of combat operations’ (US DoD Manual) is better.

4.2. ‘Feasible to verify’

The notion of feasibility is expressed in the ICRC’s Commentary on IHL, rule 15. The rule in AP I Article 57(2)(a)(i) contains two elements: feasibility and verification, where the one affects the other. The rule is of paramount practical importance in setting the standard for commanders’ concrete ‘firing guidance’ to subordinate forces. What measures ought to be prescribed by commanders under specific circumstances in order to make sure that their attacks in fact are directed at lawful targets?

The ordinary meaning of the verb ‘to verify’ is to confirm or prove that the target is what it is presumed to be. This must, however, not be confused with a specific level of certainty, which is addressed elsewhere, as the ‘doubt rule’. The rule in Article 57 addresses reasonable measures to make the decision as certain as possible, not the level of doubt. However, the two issues will naturally be considered together in practice.

The ‘feasible to verify’ rule is often applied by the military as the so-called ‘positive identification’, (PID). The jargon is a linguistic pleonasm and as such not ideal to describe a rule. Identification is identification, the adverb ‘positive’ does not add clarity, but it might give a psychological illusion of being ‘even more sure’, in addition to drawing upon military terms and expressions like ‘positive’ and ‘affirmative’ in order to confirm something. In a legal context, however, the phrase ‘positive identification’ does not add more than what is already

34 AP I Commentary to Article 57, at paragraph 2210. See also Elmar Rauch, ‘The Concept of Military Necessity in the Context of the Law of War’, in: *Military Law and the Law of War Review* Vol. 19, 1980, English version), at page 21.

35 Canadian manual, paragraph 418(2) at page 4-5.

accounted for, namely that an objective is verified as military. I will stick to the labelling of the treaty text in the following.

The very concept of 'verification' presumes some sort of recognition. You cannot verify that you have found a military objective unless you know what you are looking for. In cases concerning enemy military materiel this recognition is, at least at the outset, easy. The use of stealth functions and advanced military camouflaging equipment may obviously make the recognition more difficult. Creating such difficulties lies at the core of the method of ruses of war, which is a lawful deceptive manoeuvre – all contributing to the totality of the 'fog of war', and eventually calling for the commander's reasonableness. In cases where objects that are normally used for civilian purposes are being used for military purposes, these may be even harder to 'recognise', and additional information may be required. Eventually, the need for additional information in such cases align with the rules on presumption of civilian status for objects normally used for civilian purposes.

The ICRC argues that even if there is only a 'slight doubt' as to whether an object is a military objective, additional information is required. The reference to 'slight doubt' appears too strict, and at odds with the acknowledgement of the inevitable uncertainties of warfare. One may easily foresee cases where there is a slight doubt, yet it is 'reasonable' to attack and 'not feasible' to make further verifications on the status of the object. Ideally, intelligence should be collected from the 'inside' of an object, for example by the use of human sources inside a building. In many cases, security reasons preclude this option – it is not feasible. Problems thus arise in cases where, for example, an object is being used for the first time as an effective contribution to military action. In these cases, recognition is not truly possible, and unavoidable uncertainties arise. This is within the frame of reasonableness. Then, when enemy behaviour at a certain stage becomes familiar, the 'map of recognisable conduct' needs an update. Such update is a continuous puzzle and a military commander's challenge and duty. If he or she lags too far behind this continuous update, the limits of reason – and of his or her freedom to assess – are reached.³⁶

Among the different measures and circumstances that affect whether feasible precautions have been taken to identify the target are: the time and resources available, the risk to one's

36 The ICRC argues: "The evaluation of the information obtained must include a serious check of its accuracy, particularly as there is nothing to prevent the enemy from setting up fake military objectives or camouflaging the true ones. In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide."

It is true that humanitarian and military interests coincide – up to a certain point: The point where the potential danger meets the doubt in question, in other words where time gets critical.

own forces, the potential military advantage of attacking the target at the time, the possible collateral damage anticipated, the weather, the topography and the relative positioning of forces in order to possibly keep 'eyes on target' etc.

4.3. 'Persons directly participating in hostilities'

The military commander must identify the enemy based on what can be reasonably expected from him or her from a foresight perspective. In NIACs (particularly in NIACs, but also in IACs) the foresight perspective is really *foresight based on hindsight*. Here we are at the core of my point of 'knowing your enemy', and the fact that verification implies recognition. In practice this means that predicting enemy behaviour is based on combat experience. If armed group A is known for arranging their attacks in a certain way, it is also reasonable to expect that they will do so in the future. Furthermore, those individuals known to take part in the combat wing of group A are not civilians and are targetable at all times. The problem is that also the facilitation – the combat service support and logistics – of the armed wing has to be affected in order to weaken your enemy.

In addition to knowing the *modus* of the enemy, feasible verification of persons will, among others, hinge on the following:

- proximity to target – hereunder the feasibility of accessing the target;
- the degree of control over the area;
- the sources available (human intelligence, signal intelligence, image intelligence, biometrics, etc.)

When it comes down to boots on the ground, the enemy will always consist of individuals. It is thus the context just referred to that will determine what kind of enemy is being faced. When facing the enemy, what a commander will meet is: a person with a certain equipment, a certain outfit, a certain *modus*, pattern of life and human expression. The real challenge, therefore is to keep the knowledge about the *modus* as updated as possible, so it is possible to know (recognise) your enemy. The commander must know how to exploit his or her sources, when such exploitation is feasible and continuously update his or her map of recognisable conduct.

WHAT IS THE PROBLEM WITH IHL'S PRINCIPLE OF PROPORTIONALITY?

JANINA DILL

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Résumé

La présentation de Janina Dill apporte une réflexion sur les limites qu'il existe aujourd'hui au principe de proportionnalité. Le principe est à l'origine de nombreux désaccords entre experts, et ne trouve pas d'écho chez les neophytes du Droit international humanitaire (DIH). Janina Dill soutient que ces limites sont le résultat d'une discordance entre la règle légale et le principe moral correspondant. Si cette différence peut être justifiée, cela ne va pas sans un certain coût, tant moral que légal.

Le principe juridique de proportionnalité est consacré à l'article 51(5)-b du premier Protocole additionnel. Il est reconnu comme coutumier dans les conflits armés internationaux ainsi que dans les conflits armés non internationaux. Il exige que les attaquants déterminent la proportionnalité des pertes incidentes de vies ou de dommages civils auxquels on peut s'attendre par rapport aux avantages militaires concrets et directs en jeu.

Cette règle découle de la doctrine morale du « double effet », qui énonce le principe selon lequel il peut être permis de tuer un innocent si l'on veut éviter un plus grand mal moral. Deux conditions doivent être remplies : premièrement, sa mort ne doit pas être intentionnelle (même si elle est prévisible); deuxièmement, elle doit être proportionnée à l'impact positif qui en est escompté. Sur un plan moral, l'équilibre à réaliser entre l'avantage militaire et la perte de vie civile est donc celui entre le bien et le tort causé.

Le principe moral de proportionnalité permet donc de tuer involontairement des civils dans la mesure où ce préjudice moral est proportionnel au bien moral résultant de la contribution qu'une attaque apporte à la réalisation des justes objectifs de la guerre. Si un belligérant poursuit un but moralement injuste, le principe ne permet pas qu'un civil soit blessé accidentellement. Les attaques qui contribuent à la réalisation d'un but injuste ne produisent pas un bien moral, seulement du mal.

La règle légale de proportionnalité se distingue du principe moral, dès lors que le DIH s'applique de manière égale entre les parties au conflit, sans égard aux causes défendues par celles-ci. La proportionnalité d'une attaque ne peut donc pas s'évaluer par référence au bénéfice moral qui en découle.

La mesure permettant d'évaluer une attaque est le succès militaire, étroitement défini. Les objectifs économiques et politiques d'une attaque, tout comme sa valeur morale, ne sont pas pris en

compte. Le seul cadre de référence approprié pour évaluer un avantage militaire est ce que Janina Dill appelle la « victoire militaire générique ». En revanche, les dommages causés aux civils ne peuvent être exprimés de manière cohérente en termes de valeur militaire ou de nuisance militaire, ce qui est la seule mesure appropriée pour mesurer un avantage militaire. Il n'existe pas de mesure commune pour évaluer une attaque par rapport au dommage civil incident. L'exercice de mise en balance exigé par le principe légal de proportionnalité est donc impossible.

Cette absence de mesure commune pose problème d'un point de vue juridique, car le principe de proportionnalité échoue à fournir des consignes pratiques ou à accroître la justiciabilité de la conduite en temps de guerre. De plus, le respect de la règle ne garantit pas que le préjudice causé aux personnes ou aux biens civils soit justifiable sur le plan de la morale.

Finalement, l'absence de mesure commune a également des implications stratégiques. Le respect du DIH par les acteurs du conflit repose sur une adéquation entre ce qui est perçu par eux comme juste et ce que le droit requiert. Si une norme juridique n'est pas perçue comme juste auprès des individus devant l'appliquer, elle sera moins susceptible d'être respectée.

Il n'existe pas de solution facile à ce problème. Si la règle de droit doit correspondre davantage à la doctrine du « double effet », cela a également des conséquences négatives sur le plan du droit comme sur celui de la morale. Exiger que les dommages civils accidentels soient proportionnels à la contribution qu'une attaque apporte à la réalisation des objectifs moraux de guerres justes ne débouche sur aucune consigne pratique plus claire. Il est difficile pour un commandant de déterminer si sa guerre est juste, et il est pratiquement impossible d'évaluer la valeur morale d'une attaque isolée par rapport à la contribution de cette attaque à l'importance morale d'atteindre les objectifs de cette guerre.

En l'absence de mesure commune entre l'avantage militaire et le préjudice causé aux civils, il est impossible de faire la mise en balance que requiert la règle juridique du principe de proportionnalité. Pour des raisons épistémiques, le DIH n'offre aucune règle encadrant les dimensions métaphysiques de l'action militaire. En effet, s'il est théoriquement possible de mettre en balance la valeur morale d'une attaque et celle du dommage causé, un combattant devrait être omniscient pour être capable d'évaluer cet équilibre. Janina Dill ajoute qu'une règle qui subordonne la licéité d'un comportement à la justesse de sa cause est susceptible d'être ignorée par au moins une partie dans chaque conflit. Une telle règle donnerait une justification aux actes d'une partie au conflit qui considère, à tort, que sa cause est juste et importante.

Elle conclut que le principe juridique de proportionnalité est la meilleure option pour donner un sens aux « dommages collatéraux » dans les opérations militaires contemporaines. Il est toutefois important d'en comprendre les limites.

The principle of proportionality in International Humanitarian Law (IHL) demands that the attacker weigh the anticipated military advantage against the incidental civilian harm expected to arise from an attack. It is widely appreciated that human life and military gain are incommensurate or “dissimilar values”¹. It is equally common for scholars and practitioners to acknowledge that for this reason it is challenging to apply Article 51(5) b of the first Additional Protocol (API) to real world cases.² Scholars suggest that even experts frequently disagree about the legal status of incidental civilian harm.³ When policy makers and lawyers comment on the human costs of armed conflicts, references to proportionality often entrench diverging positions rather than adjudicate between them.⁴ Furthermore, recent empirical studies have demonstrated that legal rules for the conduct of hostilities, such as distinction and precautions in attack, are reflected in popular preferences for how wars ought to be waged.⁵ In contrast, the core demand of the principle of proportionality – the requirement that the civilian harm that an attack will likely cause should be balanced against the concrete military advantage at stake – fails to resonate with lay respondents.⁶

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- 1 See, amongst others, Michael N. Schmitt, *Ethics and Military Force. The Jus in Bello* (Carnegie Council on Ethics and International Affairs, 2002), p. 8; Jason D. Wright, ““Excessive” Ambiguity: Analysing and Refining the Proportionality Standard”, in: *International Review of the Red Cross*, Vol. 94, 2012: 886, p. 853.
 - 2 For instance, Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949*, Brill/Nijhof, 2013, paragraph 2.6.2; Program on Humanitarian Policy and Conflict Research (HPCR), *Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, 2013, p. 98, paragraph 7; International Committee of the Red Cross (ICRC), *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law* (International Expert Meeting, 22-23 June Quebec, 2018), p. 51 sqq. US Department of Defense, *Law of War Manual*, 2015, paragraph 5.12.4.
 - 3 Charles J. Jr. Dunlap, *Law and Military Interventions, Preserving Humanitarian Values in 21st Century Conflicts*, Working Paper, 2001, p. 17; William J. Fenrick, ‘The Prosecution of Unlawful Attack Cases before the ICTY’, in: *Yearbook of International Humanitarian Law*, Vol. 7, 2004: 153, p. 189. For the first systematic empirical studies to have shown how widely experts diverge in their proportionality judgements of hypothetical cases of incidental civilian harm, see Daniel Statman, Raanan Sulitzeanu-Kenan, and Stephen De Wijze, ‘Unreliable Protection: Proportionality in Warfare Put to the Test’ (under review).
 - 4 See, for instance, the divergent proportionality assessments of cases related to Israel’s 2014 military campaign in Gaza. Amnesty International, *Israel/Gaza Conflict: Questions and Answers*, 25 July 2014, at: <<https://www.amnesty.org/en/latest/news/2014/07/israelgaza-conflict-questions-and-answers/>> (last accessed 9 April 2019); Michael Schmitt and John Merriam, ‘A Legal and Operational Assessment of Israel’s Targeting Practices’, in: *Just Security*, 24 April 2015, at: <<https://www.justsecurity.org/22392/legal-operational-assessment-israels-targeting-practices/>> (last accessed 9 April 2019).
 - 5 Yitzhak Benbaji, Amir Falk and Yuval Feldman, ‘Commonsense Morality and the Ethics of Killing in War: An Experimental Survey of the Israeli Population’, in: *The Law and Ethics of Human Rights*, Vol. 9, 2015: 195; Scott D. Sagan and Benjamin A. Valentino, ‘Revisiting Hiroshima in Iran. What Americans Really Think About Using Nuclear Weapons and Killing Noncombatants’, in: *International Security*, Vol. 42 2017: 41; *ibid.*, ‘Not Just a War Theory: American Public Opinion on Ethics in Combat’, in: *International Studies Quarterly*, Vol. 62, 2018: 548.
 - 6 Janina Dill and Livia Schubiger, ‘Popular Attitudes Towards War: Instrumental Imperatives, Moral Principles and International Law’ (under review).

At the same time, it is not unusual for the law to demand comparisons between incommensurate values for the purpose of judging the proportionality, excessiveness or equity of outcomes. This raises the question: what is the problem with the principle of proportionality in IHL? Why does its capacity to make legal sense of what we sometimes refer to as ‘collateral damage’ appear to be so limited? Why are experts at a loss when asked to concretise it? Why do intuitions about what its application looks like in the real world diverge so widely? In this brief talk, I argue that the primary – though not the sole – reason for why determining the legal proportionality of incidental civilian harm is so difficult is that the legal rule departs from the corresponding moral principle.⁷ This divergence makes it logically impossible to determine what is – on the law’s own terms – proportionate incidental civilian harm. I will suggest that there are good moral and legal reasons for why the legal rule does not more closely resemble the underlying moral proposition. However, this divergence has moral and legal costs.

To recall, the legal principle of proportionality is enshrined in Article 51(5) b AP I. It is widely deemed to be applicable also in non-international armed conflicts and it has the status of an established rule of customary international law.⁸ As adumbrated, the rule demands that attackers determine the proportionality of expected incidental loss of civilian life or damage to civilian objects compared to the concrete and direct military advantage at stake. The text features the term ‘excessive’ rather than ‘disproportionate’ when prohibiting certain types of attack, but it is widely understood to refer to the principle of proportionality. This principle descends from a moral doctrine called ‘double effect’. This doctrine puts forward that it can sometimes be permissible to kill an innocent bystander, i.e. a person who is not themselves threatening and has done nothing to attract moral liability to harm. This can be permissible if it is to prevent a greater moral evil.⁹ Two conditions have to be fulfilled for the moral permissibility of killing an innocent bystander: first, their death has to be unintended (though it can be foreseen). Second, it has to be proportionate or commensurate to the intended good effect of the killing.

From a *moral* point of view, the task of an attacker is hence to translate the intended good effect of an attack (the military advantage) and its unintended bad effect (the loss of civilian lives) into the common metric that is moral good and/or harm. A military advantage creates a moral good if it signals progress towards achieving a morally important war aim, such as

7 This argument is developed in detail in Janina Dill, ‘Do Attackers have a Legal Duty of Care? Limits to the ‘Individualisation of War’’, in: *International Theory*, Vol. 11, 2019: 1.

8 ICRC, *Customary International Humanitarian Law Database*, Rule 14, at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14> (last accessed 11 April 2019).

9 Alison McIntyre, ‘Doctrine of Double Effect’, *The Stanford Encyclopaedia of Philosophy*, 2019, at: <<https://plato.stanford.edu/entries/double-effect/#Bib>> (last accessed 10 April 2019).

saving an innocent group of civilians from their genocidal government or defending a community against an unjust outside aggressor. As Thomas Hurka puts it, “a war has certain just aims (...); the goods involved in achieving those aims count toward its proportionality”.¹⁰ If we assume that civilians are innocent bystanders, their deaths constitute a moral harm. The moral principle of proportionality permits unintentionally killing civilians to the extent that this moral harm is proportionate to the moral good associated with the contribution an attack makes to achieving the war’s just aims.¹¹ If a belligerent pursues a morally unjust aim, the principle does not permit any incidental civilian harming. Attacks that contribute to the achievement of an unjust aim do not yield a moral good, only harm.

How is the *legal* principle of proportionality different? The Preamble to the first Additional Protocol spells out that IHL has to be applied “without regard to the causes espoused by or attributed to the parties to the conflict”. IHL applies equally to all parties to the war, meaning its rules have the same concrete implications for what is permissible conduct and what are prohibited attacks for all belligerents, regardless of their aims. The legal proportionality of an attack can thus not be determined with reference to “the moral good involved in achieving those aims”. Whether a belligerent resorted to force in violation of Article 2 (4) United Nations Charter (UNC) or under the cover of Article 51 UNC, whether a party to the war seeks to defend a community against genocide or whether it has set out to unlawfully conquer territory across its boarder, IHL’s principle of proportionality remains unaffected. Soldiers fighting for the sake of lawful or unlawful, morally just or unjust war aims all have equal licence to inflict incidental civilian casualties when they face similar circumstances on the battlefield. Moral good or harm is unavailable as a common metric into which we can translate military advantage and loss of civilian life in order to determine their legal proportionality.

If not with regard to the contribution of an attack to the morally just aims of a war, how should we then measure military advantage for the purposes of IHL? The Commentary to the first Additional Protocol states that “military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces”.¹² In this reading, the only appropriate metric for weighing a military advantage is military progress narrowly defined. The Interpretive Guidance on the principle of proportionality, recently issued by the ICRC, likewise holds that “despite the fact that the use of military force is often a means for a political end – the military advantage has to be articulated separately from the political or economic context of

10 Thomas Hurka, “Proportionality in War”, in: *Philosophy and Public Affairs*, Vol. 33, 2005: 34, p. 40.

11 This is the dominant approach to *in bello* proportionality judgments among revisionist just war theorists, for instance, Cecile Fabre, *Cosmopolitan War*, Oxford University Press, 2012, p. 6; Jeff McMahan, *Killing in War*, Oxford University Press, 2009, p. 1.

12 ICRC, *Commentary on the First Additional Protocol to The Geneva Conventions* (1987), paragraph 2218.

the conflict.”¹³ In other words, the political or economic aims of a war, like its moral aims, are not appropriate frames of reference for determining military advantage. Given the impotence of IHL from all considerations that concern the resort to force, the only appropriate frame of reference for weighing a military advantage is what I call ‘generic military victory’; ‘generic’ because it can be defined independently from the political, economic or moral victory that belligerents may also seek in a specific case.¹⁴

As military progress is the only measure in which we can appropriately appraise military advantage, this must be our common metric for determining proportionality. Can we translate incidental civilian harm into military progress in order to determine its proportionality? Under IHL, civilians are immune from attack on the assumption and the condition that they do not directly participate in hostilities, i.e. that they do not directly contribute to the military struggle. IHL casts the killing of civilians as militarily neutral. As soon as civilians directly contribute to the fighting and their deaths become militarily relevant, they are permissible targets of deliberate attack and their harming is no longer subject to the principle of proportionality. It follows that IHL does not envisage that we measure incidental civilian harm and injury to civilians in terms of its military value. Of course, even if IHL permitted the estimation of incidental civilian harm in terms of military progress, if it turned out that killing civilians was militarily useful, there would still not be a true balance between military advantage and civilian harm because both would have a ‘positive value’.

Instead, if they were to be “balanced against” the military advantage anticipated to arise from an attack in a proportionality judgement, incidental civilian casualties would have to have a negative military value. Harming civilians would have to be an impediment to generic military victory. Although it is doubtlessly true that killing civilians can be militarily problematic in certain contexts, for instance in counterinsurgency campaigns, this is not always the case.¹⁵ Yet, IHL clearly envisages that incidental civilian harm is counted against the proportionality of an attack even if civilian casualties do not impede the achievement of military victory. The conclusion is inescapable that civilian harm cannot coherently be expressed in terms of

13 ICRC, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, (International Expert Meeting, 22-23 June Quebec, 2018), p. 16.

14 The concept of “generic military victory” is developed in greater detail in Janina Dill, *Legitimate Targets? Social Construction, International Law and U.S. Bombing*, Cambridge University Press, 2015, p. 106.

15 David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, Oxford University Press, 2009; John A. Nagl, ‘Learning to Eat Soup with a Knife: British and American Army Counterinsurgency Learning During the Malayan Emergency and the Vietnam War’, in: *World Affairs*, Vol. 161, 2009: 193; U.S. Department of the Army, *Counterinsurgency Field Manual 3-24 and Marine Corps Warfighting Publication 3-33.5*, 15 December 2006; U.S. Department of Defense, Government Interagency Counterinsurgency Initiative. Counterinsurgency Guide, 13 January 2009.

military value or disvalue, i.e. the only appropriate metric for measuring military advantage. We lack a common metric into which we can translate both civilian casualties and military advantage. On IHL's own terms, the balancing exercise demanded by the legal principle of proportionality is logically impossible.

That the legal principle of proportionality resists concretisation as a result of its departure from the moral principle is legally costly. The principle fails to afford action guidance or add to the justiciability of conduct in war. Its open-endedness goes some way towards explaining why even experts, in many cases, struggle to determine the proportionality of incidental civilian harm, as mentioned above. The moral cost arising from this divergence is that a good faith attempt at compliance with the legal principle does not guarantee that civilian harm is morally justified. If moral intuitions inform our expectations of what is legitimate conduct in war, a good faith attempt at compliance with the legal principle also fails to vouchsafe that civilian casualties are perceived as legitimate or acceptable. This may have strategic implications. International law draws for its compliance pull on the perceived association between legal and legitimate conduct.¹⁶ If a substantive legal demand fails to resonate with crucial audiences, the corresponding legal rule may be less likely to be obeyed.

At the same time, there is no easy way to remedy this problem. The reason is that there would be significant moral and legal costs if IHL's principle *did* more closely reflect the moral doctrine of double effect. What would happen if, in Article 51(5) b API, IHL repeated the moral proposition that incidental civilian harm has to be proportionate to the contribution that an attack makes to the achievement of a war's just moral aims? The provision would not necessarily become more action-guiding than its current version. It is genuinely difficult for the individual attacker in war to determine the justice of their cause. Even if they were aware of the moral value of their war's overall aims, it would likely exceed the cognitive capacity of most reasonable commanders to determine the moral value of an individual attack with reference to the attack's contribution to the moral importance of achieving these aims.

I suggested above that there is no true balance between military advantage and loss of civilian life if we seek to translate both into progress/regress towards generic military victory. IHL lacks action guidance for a metaphysical reason. In contrast, in the midst of battle, when an attacker contemplates whether or not to release their weapon, there is a true balance between the expected moral bad associated with killing innocent bystanders (incidental civilian harm)

16 Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law*, Cambridge University Press, 2010, 271 sqq.; Ian Clark, Sebastian Kaempf, Christian Reus-Smit and Emily Tannock, 'Crisis in the Laws of War? Beyond Compliance and Effectiveness', in: *European Journal of International Relations*, Vol. 26, 2017: 109.

and the moral good associated with progress towards the achievement of a war's just aims (military advantage) that an attack promises. However, an attacker would have to be close to omniscient to determine what this balance looks like. The moral principle lacks action guidance for epistemic reasons.

Even more importantly, if the law repeated the moral principle of proportionality, and it asked that attackers refer to the moral importance of achieving their war's overall aim when establishing the proportionality of civilian casualties, the rule would likely fail to attract compliance. An asymmetrical IHL that connects the permissibility of conduct in war to the justice of a war's cause is likely to be ignored by at least one side in each war. In order to fulfil its legal function of guiding action, the law first needs to be drawn upon. Alternatively, a law that demanded reference to a war's overall just aim might perversely empower soldiers who mistakenly believe their cause to be just and important.¹⁷ In order to fulfil its moral function of protecting civilians, IHL needs to first attract compliance and then it needs to meaningfully restrain conduct taking account of the volitional constraints on soldiers' decision-making on the battlefield.¹⁸ It seems then that the current version of the legal principle of proportionality is our best bet to make sense of 'collateral damage' in contemporary military operations. It is important, however, that we understand its limitations.

17 For this argument, see Janina Dill and Henry Shue, 'Limiting Killing in War: Necessity and the St. Petersburg Assumption', in: *Ethics and International Affairs*, Vol. 26, 2012: 311.

18 I develop this argument in more detail in Janina Dill, 'Towards a Moral Division of Labour between IHL and IHRL During the Conduct of Hostilities', in: Ziv Bohrer, Janina Dill, Helen Duffy: *Law Applicable to Armed Conflict*, Cambridge University Press, Max Planck Trialogues on the Law of Peace and War, forthcoming.

LEGAL CHALLENGES RAISED BY ARMED/EXTRATERRITORIAL OPERATIONS IN URBAN AREAS

Claire Legras

Ministère des Armées

Summary

Claire Legras' presentation focuses on the conduct of military operations in densely populated areas. This presentation focuses on four main challenges: the level of intelligence that must be sufficient to guide the decision; the application of the principle of distinction; the scope of the principle of proportionality; and the use of a certain category of weapons – explosive weapons – in a particularly vulnerable environment.

1. The challenge of intelligence for an enlightened decision-making

The decision to strike is dependent on the ability of the command to identify the nature of the targets. Some States believe that military commanders should take their decisions on the basis of available information, others refer to reasonably available information. According to Claire Legras, the highest requirement must be applied, although the obligation remains an obligation of means.

In order to take all feasible precautions, the armed forces deploy a range of means, such as satellite images, drones, local human 'sensors', full motion videos. This allows them to gather and analyse the information necessary to conduct a strike at the right time, and with the appropriate means, and to cancel the strike if necessary.

2. The challenge of compliance with the principle of distinction: in the fog of urban warfare, which civilians and civilian objects should be protected from attacks?

In situations of non-international armed conflict, individuals are divided into two categories: on the one hand, civilians in principle protected except when they take a direct part in hostilities; and on the other hand, members of armed forces and members of organised armed groups, who may be attacked at any time. These concepts are poorly defined, so it is up to States to define their content. Some activities are also problematic. While it is traditionally considered that the role of religious police, recruitment and indoctrination are acts of indirect participation in hostilities, what about the training and education of combatants?

Also, the dual use of certain objects renders the determination of military objectives particularly difficult. Precise understanding of the adversary is required to determine whether and to what extent such objects make an effective contribution to the enemy's military action and the precise military advantage expected from the destruction or neutralisation of the object.

3. The scope of the principle of proportionality: to what extent should the assessment of damage be extended?

In accordance with Article 51 of the Additional Protocol, the damage to be taken into account in an attack is not only direct incidental damage, but also indirect foreseeable damage such as medium- or long-term social effects, the destruction of critical infrastructure and of cultural heritage, and the psychological damage caused to individuals. Moreover, it is important to determine how, in the future, to apply the principle of proportionality in cyber-attacks on civilian networks and infrastructures. In order to assess such incidental damage in the absence of troops on the ground, it is necessary to use sophisticated means. For example, in the Sahel, French forces deployed various imagery techniques to assess the damage and to promptly carry out the necessary repairs.

As for the expected military advantage, it should not be measured in terms of the direct and immediate consequences of the attack but in considering the overall advantage expected for the success of the military operation. In all cases, the French armed forces are assigned the objective of not causing any collateral damage.

4. Does the principle of precaution in attack necessarily imply the exclusion of certain categories of weapons?

For France, the answer to this question is 'no'. It is true that explosive weapons can have a devastating effect when used indiscriminately. The insufficiently discriminated nature of the use of these weapons in urban areas may be due to the wide radius of their destructive impact, their insufficient accuracy or their design consisting of the delivery of multiple munitions over a large area. However, all weapons used by the coalition against the Islamic State fall into these categories, if interpreted broadly. A ban on these weapons would therefore equate to a ban on the use of force.

These weapons are not per se prohibited by IHL, and a regime banning or severely restricting their use is neither effective nor desirable, according to Claire Legras. Indeed, this would only reduce the options available against belligerents who do not comply with IHL and who are responsible for most of the civilian victims.

The real challenge is therefore to ensure a proportionate and precautionary use of these weapons in urban areas. This requires three elements: an organisation enabling compliance with IHL; clear operational rules of engagement applying IHL; and the diffusion of IHL to combatant forces, including making IHL compliance a condition for the support to the State.

These reflections call for two major questions for the future. Is it necessary to codify good practices related to urban warfare? If not, should State doctrine on urban analysis be strengthened? Military doctrines applicable to international armed conflicts have led to the development of different tactics for the defence and capture of urban centres. But these doctrines remain silent on contemporary commitments without deployment of ground troops.

Finally, while France always tries to limit the fight as much as possible, sometimes strikes in urban areas are inevitable and IHL must be scrupulously respected. Non-lethal means such as psychological operations or cyber-actions should be developed and updated.

Conflicts in urban areas require a rethinking of military strategies. War cannot be won by the systematic destruction of cities but by a combination of human intelligence, targeted neutralisation while preserving the lives of civilian populations, and a comprehensive approach aimed at not alienating the inhabitants.

Mesdames, mesdemoiselles, messieurs,

Je suis très heureuse de participer pour la première fois à cette manifestation prestigieuse qui me conduit au cœur des enjeux qu'affrontent les forces armées françaises dans un contexte d'une intensité particulière, ce à un triple titre : des engagements extérieurs qui sont à un point haut depuis le second conflit mondial, dans des conflits qui ont tous le caractère de conflits armés non internationaux ; un système multilatéral mondial qui traverse une passe difficile ; une évolution technologique accélérée dont la portée stratégique, le questionnement éthique et l'encadrement juridique posent des questions redoutables – tout en ouvrant peut-être des perspectives favorables au respect de l'humanité dans la guerre.

Les premiers intervenants de cette table ronde ont illustré la variété et la complexité des questions juridiques auxquelles les armées sont confrontées, s'agissant de l'identification de l'ennemi et de l'appréciation des dommages collatéraux. Autant d'exigences cardinales pour assurer le respect intransigeant des principes de distinction et de proportionnalité.

Réfléchir sur les défis juridiques posés par les opérations extraterritoriales armées en zones urbaines, dans un contexte marqué par les nombreux combats urbains, qui resteront un trait distinctif de la guerre au Levant, est urgent et relève d'un impératif autant éthique que juridique.

Lieux de pouvoir politique et économique, de symboles et d'histoire et ce, ô combien, en Syrie et en Irak, où notre civilisation a pris racine, les villes ont, hier et aujourd'hui, été au cœur des enjeux stratégiques. Que l'on pense aux guerres de l'antiquité, réelles ou mythiques, au sac de Rome par les barbares, à la bataille de Stalingrad, au martyr de villes tombées durant les guerres de Yougoslavie, telles Sarajevo ou Vukovar, longue liste complétée aujourd'hui par les noms devenus obsédants d'Alep, Homs, Raqqa ou Mossoul.

La densification urbaine des espaces est un phénomène commun à tous les continents ; elle s'amplifie. En 1700, la population mondiale était d'environ 650 millions de personnes, dont 7 % de citadins. En 2011, la population mondiale a franchi le seuil des 7 milliards d'individus, dont la moitié (53 %) vivait dans les villes. Deux personnes sur trois habiteront probablement dans des villes ou d'autres centres urbains d'ici 2050, selon de données des Nations unies (mai 2018). En 2030, l'espace urbain devrait avoir triplé de surface et gagné 1,2 million de kilomètres carrés (étude publiée en 2012 dans *les Proceedings of the National Academy of Sciences* (Washington, Etats-Unis).

Dans ce contexte, l'actuel essor des combats en milieu urbain apparaît comme une tendance systémique et les défis en résultant, en termes d'application du droit international humanitaire, doivent être identifiés et donner lieu à une réflexion approfondie.

Cette tâche est d'autant plus importante que certaines des principales caractéristiques des conflits d'aujourd'hui – l'asymétrie entre les combattants, un degré de violence très élevé et une extrême variété des moyens et méthodes de guerre utilisés – ont pour effet d'accroître considérablement la vulnérabilité des populations civiles en général, et des populations urbaines en particulier.

A titre d'exemple, en 2011, au cours de l'opération de l'OTAN *Unified Protector*, les civils furent directement et délibérément exposés au danger par les forces armées libyennes. Des objectifs militaires avaient été positionnés à proximité de bâtiments résidentiels quand d'autres étaient protégés par de larges boucliers humains. D'importants moyens militaires avaient, par ailleurs, été déployés à proximité immédiate d'infrastructures civiles telles que la Grande rivière artificielle¹, des oléoducs ou des pylônes électriques.

1 Il s'agit du réseau de canalisations souterraines qui achemine l'eau puisée dans les nappes phréatiques du Sahara vers les villes côtières de Libye.

Dans ce contexte, la conviction de la France est que le Droit international humanitaire (DIH) recèle en son sein les outils devant permettre de régir les combats en zone urbaine, ce malgré leur forte spécificité. Mais l'application du DIH en milieu urbain est soumise à de nombreux et importants défis : le défi, tout d'abord, d'une information qui doit être suffisante pour éclairer la décision ; les défis, ensuite, liés à l'application du principe de distinction et à la portée du principe de proportionnalité ; les défis, enfin, au regard du principe de précaution dans l'action, liés à l'emploi d'une certaine catégorie d'armes – les armes explosives – dans un milieu particulièrement vulnérable.

Le défi de l'information pour une prise de décision éclairée

L'incertitude inhérente à la conduite de la guerre est poussée à un point haut en milieu urbain.

La décision d'attaquer ou de frapper est, comme en toute autre circonstance, subordonnée à l'aptitude du commandement à identifier la nature des cibles envisagées. Mais cette exigence est sujette à débat quant à sa portée. Certains États estiment que les responsables militaires doivent prendre leurs décisions sur la base des informations disponibles² au « moment opportun » ou au « moment de la décision ». D'autres se réfèrent aux « informations raisonnablement disponibles »³ au moment opportun, c'est-à-dire à la fois disponibles, suffisamment précises, récentes et cohérentes dans le temps.

Le recours à l'une ou l'autre de ces formulations aura un effet direct sur la nature de l'arbitrage qui sera fait en cas d'incertitude, et sur la décision qui sera finalement prise, d'attaquer ou de renoncer à l'intervention. L'exigence la plus forte me semble ici devoir prévaloir et être mise en rapport avec l'idée d'un commandement éclairé et responsable de ses choix. L'obligation dont il est ici question demeure cependant une obligation de moyens. L'exigence, dès lors, permet, de réduire le risque d'erreur. Elle ne saurait cependant le faire disparaître.

2 Algérie, Australie ('on the basis of their assessment of the information from all sources, which is available to them at the relevant time'); République fédérale d'Allemagne ('on the basis of all information available to him at the relevant time'); Italie ('on the basis of their assessment of the information from all sources which is available to them at the relevant time'); Etats-Unis ('on the basis of an honest and reasonable estimate of the facts available to him'). Voir : 'Proportionality and Precautions in attack: The reverberating effects of using explosive weapons in populated areas', dans : *International Review of the Red Cross*, Vol. 98, Number 901, April 2016, p.135. Cette livraison de la Revue est accessible en ligne à l'adresse suivante : <<https://www.icrc.org/en/international-review/war-in-cities>>.

3 Canada ('on the basis of their assessment of the information reasonably available to them'); Irlande ('on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time'), cf. *ibid.*

En pratique, pour des forces armées modernes, « prendre toutes les précautions possibles » consiste à déployer une gamme de moyens permettant de disposer d'un renseignement intégré et performant, fondé sur l'utilisation de technologies de pointe mises en œuvre par un personnel entraîné. La France déploie d'importantes ressources à cet égard, afin de bénéficier en toutes circonstances d'une autonomie de jugement et, quand elle intervient en coalition, de contribuer à des décisions éclairées.

Une attaque planifiée est ainsi minutieusement préparée par la collation et l'analyse d'une quantité importante de renseignements provenant de sources fiables et recoupées, de nature humaine ou technique (images satellites, drones, « capteurs » humains locaux). Ces moyens sont encore mobilisés pendant l'attaque, pour suivre précisément l'évolution de la situation (*full motion video*). Les frappes peuvent ainsi être déclenchées au moment le plus opportun, de même que peuvent être utilisées les munitions les plus adaptées, demain peut-être leur réglage étant optimisé pour délivrer l'effet exactement attendu. Ces informations devront également permettre, ainsi que le prévoient nos règles opérationnelles d'engagement, de décider d'une interruption de la frappe en cours.

Cette exigence d'une information riche et pertinente innervent toutes les questions relatives à la bonne application du Droit international humanitaire en zone urbaine, comme l'illustre en premier lieu l'application du principe de distinction entre civils et combattants.

Le défi du respect du principe de distinction est considérable : dans le brouillard de la guerre urbaine, quels civils et quels biens civils faut-il protéger des attaques ?

- a) Ce défi renvoie à une première question : qui est l'ennemi ?
- b) La prohibition des *attaques délibérées contre les civils* et les biens civils implique un travail affiné de catégorisation dont la difficulté est décuplée en milieu urbain.

Les catégories juridiques pertinentes sont, en situation de CANI, clairement identifiées. Elles sont au nombre de trois : d'une part, les « personnes civiles », en principe protégées sauf lorsqu'elles participent directement aux hostilités ; et d'autre part, les « membres des forces armées » et les membres de groupes armés organisés, susceptibles d'être attaqués à tout moment.

Pour autant, ces catégories demeurent mal définies. Les notions de « membres de groupe armé organisé » et de « participation directe aux hostilités » ne sont, en effet, pas clairement fixées alors qu'elles revêtent un rôle cardinal lorsque des forces armées opèrent en zone urbaine contre des individus sans uniforme, participant parfois seulement de manière ponctuelle ou

indirecte à l'action de forces armées non étatiques, structurées de manière particulièrement élaborée et complexe et dont la branche armée n'est pas la seule à mener des actions de combat ou d'ailleurs des actes de violence contre la population civile. Il revient, dès lors, aux États de préciser le contenu des notions en cause. Il s'agit, par exemple, de déterminer si l'exercice des fonctions de guetteur, la transmission de renseignements militaires, la propagande en faveur d'une partie à un conflit, ou encore la fourniture d'armes sont ou non constitutifs d'actes de participation directe aux hostilités. Il peut également s'agir de déterminer les conditions d'appartenance d'un individu à un groupe armé organisé, en particulier à sa branche armée.

En outre, la qualification de certaines activités, plus spécifiquement urbaines, est parfois très délicate. Qu'en est-il, par exemple, de la police religieuse et de celle qui s'occupe de traquer les déserteurs, le cas échéant de son lien avec des tribunaux d'exception participant à une répression active ? Qu'en est-il, également, des personnes engagées dans des activités de recrutement ou d'endoctrinement du personnel de la branche armée d'une partie non-étatique à un conflit ? Elles sont habituellement considérées par la doctrine comme relevant d'une participation seulement indirecte aux hostilités. Mais qu'en est-il si ces activités s'étendent en fait à la formation et à l'entraînement des combattants ?

- c) Outre la question de l'identification de l'ennemi, se pose celle de l'identification des objectifs militaires et des biens civils à préserver des frappes.

L'utilisation duale de nombreux biens en milieu urbain y rend particulièrement difficile la détermination des objectifs militaires.

Cette opération nécessite une connaissance précise de l'adversaire, de son organisation, de son réseau et de ses méthodes de guerre, pour apprécier, au cas par cas, sur la base des faits et indices collectés, si et dans quelle mesure le bien considéré contribue à l'action militaire de l'ennemi. Cela revient, en pratique, à poser deux questions. La première porte sur la finalité des activités en cause : le bien considéré apporte-t-il une contribution effective, suffisamment directe, à l'action militaire de l'ennemi, c'est-à-dire à des actes ou des activités qui, par leur nature ou par leur but, sont destinés à frapper concrètement des objectifs militaires ? La seconde porte sur les effets attendus d'une éventuelle frappe : quel est l'avantage militaire attendu associé à la destruction ou à la neutralisation de l'objectif ?

Une fois franchi l'obstacle de l'identification de l'objectif militaire, apparaît un nouveau défi, majeur : l'application du principe de proportionnalité en milieu urbain. Défi que l'on pourrait expliciter sous la forme de la question qui suit.

Jusqu'à quel point l'évaluation des dommages doit-elle être poussée, le risque encouru étant de trop systématiquement devoir renoncer au recours à la force ?

L'obligation tirée des articles 51 et 57 du premier Protocole additionnel met en rapport, d'une part, les dommages pouvant être causés par une opération et, d'autre part, l'avantage militaire qui peut en être retiré. Les pertes en vies humaines, les blessures aux personnes et les dommages aux biens civils, ne doivent, en effet, pas « être excessifs par rapport à l'avantage militaire concret et direct attendu ». Et il va sans dire que la violation du DIH par l'ennemi, notamment par le recours aux boucliers humains, est sans incidence sur les obligations qui pèsent sur nos armées en termes de respect du principe de proportionnalité.

Ce principe et l'obligation qui en découle prennent un relief particulier en milieu urbain, ce qu'un bilan des dégâts matériels de la bataille de Mossoul permet d'illustrer. L'intérêt stratégique, mais aussi humanitaire de la reprise de la deuxième ville d'Irak était manifeste. Pour autant, l'ampleur des dommages pousse à la réflexion. Tous les bâtiments de la vieille ville ont, en effet, été détruits ou partiellement détruits⁴. Le cœur historique de la cité est fait d'un labyrinthe d'étroites ruelles. Au mois de juillet 2018, sur les 5.536 bâtiments identifiés dans ce quartier, 490 sont complètement détruits, 3 310 sévèrement endommagés et 1.736 modérément endommagés.

Ce bilan matériel permet d'illustrer le principe de proportionnalité au-delà de la nécessité de limiter les pertes en vies humaines. Ce principe exige, en effet, la prise en compte non seulement des dommages incidents directs⁵, mais également des dommages induits⁶ raisonnablement prévisibles au moment de l'attaque⁷. Ces dommages doivent, si l'on se réfère aux termes de l'article 51 du premier Protocole additionnel (PA I), être appréciés de manière à anticiper les effets à moyen ou long terme. Ainsi faut-il envisager, au-delà du nombre des victimes civiles, les effets sociaux de moyen ou long terme sous l'angle de la perte de capital

4 Source : Institut des Nations unies pour la formation et la recherche, cité par France Info TV, à : <https://www.francetvinfo.fr/monde/proche-orient/mossoul/carte-irak-visualises-l-ampleur-de-la-destruction-de-la-vieille-ville-de-mossoul_2275260.html>.

5 Dommages directement et immédiatement causés par l'attaque.

6 Voir 'Proportionality and Precautions in attack : The reverberating effects of using explosive weapons in populated areas', dans: *International Review of the Red Cross, Volume 98, Number 901, p.107, April 2016*, à : <<https://www.icrc.org/en/international-review/Article/proportionality-and-precautions-attack-reverberating-effects-using>>.

7 Pour les responsables militaires (commandant de force, officiers de planification ou de renseignement, etc.), il s'agit de tenir compte de l'ensemble des informations disponibles, de requérir, le cas échéant des informations supplémentaires lorsque les moyens et le temps le permettent, de les interpréter de manière raisonnable et de bonne foi, en fonction de leurs compétences, de leur connaissances, et de leur expérience acquise.

humain. Et les dégâts matériels seront d'autant plus graves qu'ils consisteront en la disparition d'infrastructures sensibles. Dans le même ordre d'idées, il nous semble que les dommages psychologiques causés aux individus devraient également être pris en considération. Et de manière un peu plus prospective, on pourra s'interroger sur la manière dont devront, demain, être mesurés, dans l'hypothèse d'attaques cybernétiques d'ampleur, les dommages qui pourront causés aux réseaux et infrastructures d'aux ou purement civils.

Au titre de ces dommages, une attention particulière doit être portée à la sauvegarde du patrimoine en péril. C'est une vaste exigence qui appelle outre une précaution extrême dans l'action militaire, une action préventive qui va de la cartographie fine des sites à la publication des recherches et à la numérisation des archives.

Comment bien faire en pratique ? L'évaluation de ces dommages incidents est, en l'absence de présence systématique de forces au sol près des cibles militaires, fragile et exposée à un risque de contestation ou de manipulation. Evaluer suppose de recourir à des méthodes éprouvées qui ne sont pas toujours à disposition ou pas au niveau voulu. Les moyens sophistiqués que nous déployons au Sahel, qui incluent l'usage de techniques d'imagerie diverses, ainsi que notre capacité à y évaluer les dommages dans un délai très bref après leur réalisation, permettent de mettre en œuvre des réparations rapides et performantes des dommages imputables à nos armées.

Maintenant, nous l'avons dit, l'évaluation des dommages doit être mise en regard de celle de l'avantage militaire escompté. Cet avantage doit être « concret et direct ». Selon nous, pour autant, il doit être mesuré non au regard des conséquences directes et immédiates de l'attaque mais, au-delà, en considération des effets attendus du succès de l'opération militaire dans sa globalité. La ligne de crête, vous l'aurez compris, est étroite car l'avantage escompté ne doit évidemment pas être trop vague ni lointain. Un juste milieu s'impose.

En prélude à nos débats à venir sur ce sujet, je veux souligner enfin que, dans leurs « dossiers d'objectifs » de cibles, les forces armées françaises s'assignent l'objectif de ne provoquer aucun dommage collatéral. Notre armée témoigne ainsi de ce que le seuil de l'application du principe de proportionnalité peut, malgré les difficultés, être placé à un niveau très élevé.

Nous ne chercherons pas, cependant, à éluder une véritable difficulté qui, nous le savons bien, suscite de fortes inquiétudes de la part des acteurs humanitaires. Je veux parler de la question de l'usage, en milieu urbain, des armes explosives.

Autrement dit, le principe de précaution dans l'attaque implique-t-il nécessairement l'exclusion de certaines catégories d'armes ?

Pour la France, la réponse à cette question est clairement négative. L'emploi de munitions précises couplé à des procédures de ciblage rigoureuses doit permettre d'éviter les effets indiscriminés et de limiter les dommages incidents.

Il est vrai que les conflits en Syrie et au Yémen mettent en évidence l'effet dévastateur des armes explosives, lorsqu'elles sont utilisées sans discernement – c'est-à-dire en violation du DIH – dans des zones densément peuplées. Elles sont une cause majeure de décès, de souffrances et de blessures graves pour les populations. Elles engendrent des dommages importants pour les habitations et les infrastructures civiles, perturbant ainsi de manière significative la fourniture de services essentiels comme les soins de santé, la distribution d'eau, ou l'accès de l'aide humanitaire. L'emploi des armes explosives en zones peuplées accroît, par conséquent, le risque de déplacement des populations – déplacement pouvant être regardé comme forcé – dont les habitations et les infrastructures essentielles (écoles, hôpitaux, etc.) ont été endommagées ou détruites ainsi que le risque lié aux restes explosifs de guerre auquel les populations civiles demeurent exposées bien après leur retour dans leurs quartiers, une fois l'attaque passée ou les combats terminés.⁸

Le caractère insuffisamment discriminé de l'emploi de ces armes en milieu urbain peut tenir à la largeur de leur rayon de destruction eu égard à leur puissant effet de souffle et à leur large rayon de fragmentation⁹, dans le cadre des mortiers à gros calibre, des missiles guidés de grande puissance, mais également à l'insuffisante précision de leur système de transport sur l'objectif¹⁰, ou encore à une conception consistant à délivrer de multiples munitions sur un large périmètre.

8 La Stratégie humanitaire pour les années 2018-2022 de la France reconnaît les conséquences dommageables de l'emploi indiscriminée de ces armes, et promeut les mécanismes de renforcement du respect du DIH et de lutte contre l'impunité des crimes commis en violation du DIH dans les conflits, en particulier au Moyen-Orient. Dans cette perspective, la répression des violations au DIH que constitue notamment l'emploi disproportionné et indiscriminé d'armes explosives en zones peuplées est envisagée comme un moyen d'améliorer la protection des civils en situation de conflit armé et d'inciter à la mise en œuvre de procédures respectueuses du DIH. Disponible à : <https://www.diplomatie.gouv.fr/IMG/pdf/strategie_humanitaire_web_cle023719.pdf#page8>.

9 A l'instar des bombes de forte puissance (y compris nucléaires), des mortiers ou roquettes de gros calibre, des missiles guidés de grande puissance et des projectiles d'artillerie lourde.

10 Il s'agit généralement d'armes à feu indirect (mortiers, roquettes, artillerie) et des bombes non guidées larguées par aéronef.

Mais en pratique, c'est la quasi-intégralité, si ce n'est la totalité, des systèmes d'armes utilisés par les forces armées des États appartenant à la coalition contre l'État islamique en appui des troupes au sol (air-sol, sol-sol, mer-sol) qui entrent dans cette catégorie, si elle est largement entendue ; et ceci comprend les munitions précises, telles que les bombes guidées par laser ou GPS. Renoncer aux armes dites explosives, ce serait donc s'exposer à devoir renoncer au principe même du recours à la force.

Ces armes en elles-mêmes ne sont pas contraires au Droit international humanitaire et la réponse aux problèmes qu'elles posent ne peut selon la France être trouvée dans un régime interdisant ou restreignant fortement leur emploi. Pour les populations civiles, un régime d'interdiction n'améliorera pas les choses dans la mesure où la plupart des victimes civiles dans les conflits actuels sont causées par des belligérants qui ne respectent pas le DIH. D'un point de vue opérationnel, une telle démarche pourrait priver les forces armées assaillantes de munitions précises leur permettant de minimiser les pertes civiles et réduiraient nettement les options à leur disposition dans la conduite des hostilités, y compris lorsqu'il s'agit de mettre un terme à des exactions subies par les populations civiles.

L'enjeu essentiel réside donc dans l'emploi proportionné et précautionneux des armes explosives en milieu urbain. Celui-ci passe par trois éléments essentiels : une organisation permettant de respecter le DIH, notamment via une chaîne de commandement des opérations composées de différents niveaux décisionnels avec des prérogatives et des responsabilités croissantes, via l'exercice d'un contrôle national quand on agit en coalition, et la présence de conseillers juridiques opérationnels ; deuxièmement, des règles opérationnelles d'engagement claires, déclinant rigoureusement le DIH ; troisième exigence essentielle, la diffusion du DIH aux forces combattantes, en allant jusqu'à conditionner au respect du DIH le soutien qu'elles apportent à un État. Nous pourrions revenir dans la discussion sur la manière dont la France assume ses obligations résultant de l'article 1^{er} commun aux conventions de Genève à cet égard.

La réalité des conflits armés conduit en effet à penser que des progrès substantiels dans la protection des civils peuvent être recherchés dans la création d'un environnement plus favorable au respect du droit, notamment par la diffusion des meilleures pratiques dans l'emploi de la force, qu'il s'agisse de la définition de règles opérationnelles d'engagement à la main d'un commandement responsable et comptable de l'application du DIH, ou encore de processus de décision et de ciblage mettant en œuvre de façon scrupuleuse le DIH. Autant de mesures envisageables si les forces combattantes des parties à un conflit sont être formées, entraînées et compétentes. L'intégration du DIH aux cursus de formation des militaires, sa diffusion aux partenaires, et le conditionnement du soutien des États aux parties à un conflit au respect

du DIH sont ainsi une priorité cardinale pour répondre au défi des frappes indiscriminées et à l'usage de tels systèmes d'armes.

Ces quelques réflexions appellent, me semble-t-il, deux questions majeures pour l'avenir :

- faudra-t-il codifier, d'une manière ou d'une autre, les bonnes pratiques afférentes à la guerre urbaine, dès lors que, comme nous avons pu le noter, les principes cardinaux du DIH sont mis à l'épreuve et appellent des seuils élevés avant toute action militaire ?
- faudra-t-il, à défaut, renforcer la doctrine des États en matière d'analyse de ce milieu particulier que constitue la ville ?

Les doctrines militaires applicables aux conflits armés internationaux ont donné lieu à l'élaboration de différentes tactiques pour la défense et la prise de centres urbains, que l'on peut répartir en deux grandes catégories : les attaques concentriques ou les encercllements donnant lieu à des « nettoyages », c'est-à-dire la suppression progressive et systématique de poches de résistance, quartier par quartier, par des forces spéciales et leurs tireurs d'élite, en misant sur leur capacité à conduire des opérations rue par rue et maison par maison.

Mais ces doctrines demeurent silencieuses sur les engagements contemporains sans déploiement de troupes au sol. Si la France cherchera toujours à limiter au maximum le combat urbain, en visant prioritairement le dispositif de soutien des opérations militaires adverses en amont des centres urbains, il est essentiel, lorsque des frappes en zones urbaines seront inévitables, de poursuivre l'application de règles de ciblage traduisant une conception exigeante du DIH. Au-delà, la réflexion sur les moyens non létaux qui peuvent être mobilisés – opérations psychologiques ou actions cybernétiques, notamment – et sur leurs conséquences sur les populations civiles mérite un approfondissement et surtout une actualisation au contexte des conflits asymétriques contemporains.

La ville de demain, ses réseaux et sa dépendance numérique doivent nous conduire à repenser la stratégie et la protection des personnes civiles et des humanitaires. On ne gagne pas, en effet, le combat urbain par la destruction systématique de zones urbaines, mais bien par une combinaison d'actions : renseignement humain, neutralisation ciblée tout en préservant la vie des populations civiles, et approche globale visant à ne pas s'aliéner les habitants.

Je vous remercie pour votre attention.

Q&A SESSION

At the end of the panel discussion, a Q&A session allowed the audience to raise three questions:

1. La formation et le respect du Droit international humanitaire (DIH) par les forces locales :

Une première question a été posée à Claire Legras concernant la responsabilité de la France dans la formation des forces locales et le respect du DIH par ces forces. Comment cette responsabilité peut-elle être mise en œuvre lorsqu'il n'y a pas de forces présentes au sol ?

Claire Legras a répondu que la France prend très au sérieux son obligation de diffusion du DIH. Premièrement, la France conclut avec les États auprès desquels elle intervient de véritables accords contraignants contenant des stipulations extrêmement précises sur le respect du DIH et du Droit international des droits de l'homme, par exemple en ce qui concerne le transfert de personnes détenues par les forces armées françaises vers l'État hôte. Ces accords prévoient également un droit de visite au bénéfice des délégués du CICR. Deuxièmement, la France déploie un effort de formation important à l'égard de ses forces partenaires, qu'elles soient déployées sur le terrain ou non. Dans le cadre des forces du G5 Sahel, cela s'est illustré en organisant des sessions de formation pour les officiers, en déployant des conseillers juridiques auprès de l'état-major de cette force et en diffusant le DIH au moyen d'instruments très pédagogiques. Finalement, la France se tient prête à dénoncer les éventuelles violations du DIH et à développer des conditionnalités dans sa participation aux opérations, afin d'exercer une pression maximale sur les pays soutenus. Les forces armées françaises disposent de règles opérationnelles d'engagement qui déterminent la réaction à adopter lorsqu'elles sont témoin d'exactions.

2. The perception of the principle of proportionality among the soldiers

The second question was addressed to Janina Dill. The participant asked whether, in the view of the person conducting the attacks, the moral principle of the rule of proportionality was perceived as more acceptable than the legal principle?

Janina Dill answered that her research included interviews of military practitioners from the US Army, the British armed forces, the Israel Defence Forces and the Afghan National Security Force. The moral principle of proportionality did not seem to play a similar role in the narrative that emerged with military practitioners as it does with civilians. However, the narrative of people with a combat experience is also of interest. Some believe that the principle

of proportionality is fulfilled once you have done everything possible to mitigate incidental harm to the civilian population. In Afghanistan, when the Afghan National Security Force was operating among its own people, Janina Dill also often encountered indignation at the notion that the legal principle of proportionality allows the foreseeable incidental killing of civilians. Finally, she encountered acceptance and the welcoming of the indeterminacy of the principle, especially among some of the US military practitioners. Where you have a foreseeable risk of incidental civilian harm, these practitioners will rely on the rules of engagement and the chain of command. Yet, the actual balancing remains a subjective assessment based on their culture, training, religious belief. For several practitioners, this indeterminacy, this subjective assessment is somehow the beauty of the law. It allows flexibility and shields soldiers from *ex post facto* responsibility.

3. Bonnes pratiques et action de déminage

Un participant a rappelé qu'aujourd'hui en Syrie, on recense chaque jour une personne arrivant à l'hôpital, blessée par des fragments d'engin explosifs ou de mines disposées par l'Etat islamique. Et ceci ne prend pas en compte toutes les personnes qui n'arrivent pas jusqu'à l'hôpital. Le participant a donc demandé à Claire Legras dans quelle mesure les bonnes pratiques mettent en place des actions systématiques de déminage.

Claire Legras a répondu que les forces armées françaises étaient conscientes de la question du déminage. Le Président de la République a débloqué des sommes très importantes pour mener des actions de reconstruction, notamment dans le nord de la Syrie. Bien qu'il n'y ait aujourd'hui pas de déploiement au sol en Syrie, il n'est pas exclu que des spécialistes du déminage soient envoyés dans une phase ultérieure.

Panel Discussion

The interaction in International Human Rights Law and International Humanitarian Law in non-international armed conflicts (the case of use of force and detention)

Chairperson: **Françoise Hampson**

University of Essex

Panelists:

Peter Kempees, *ECtHR*

Marco Sassòli, *University of Geneva*

Darren Stewart, *British Armed Forces*

Résumé

Ce panel ne consiste pas en une discussion académique sur l'interaction entre le Droit international humanitaire (DIH) et le Droit international des droits de l'homme (DIDH). Il aborde la question de la mise en pratique de cette interaction par les organes des droits de l'homme. L'hypothèse de départ de ce panel est que les organes des droits de l'homme sont compétents pour connaître les situations traitées, et que le DIH s'applique.

1. Dans quelles circonstances un organe des droits de l'homme pourrait ou voudrait-il prendre en compte le DIH ?

Peter Kempees commence par rappeler qu'il n'y a pas qu'un seul organe des droits de l'homme, et que selon l'organe, les approches peuvent être différentes. En matière de détention et de droit à la vie, la Convention européenne des droits de l'homme (CEDH) requiert une dérogation à l'article 15 pour invoquer le DIH, bien que l'affaire Hassan ai rendu les conclusions incertaines en matière de détention. Le Pacte international relatif aux droits civils et politiques (PIDCP), lui, se base sur la notion d'« arbitraire » plutôt que sur une liste rigide de raisons légitimes.

Marco Sassòli affirme que pour le PIDCP et la Charte africaine des droits de l'homme (CADH), le terme « arbitrairement » en matière de droit à la vie et droit à la liberté doit être interprété à la lumière des autres règles du droit international, y compris le DIH. Toutefois, il n'existe pas de règles en DIH relatives au droit à la vie et à la liberté, et le DIDH reste la lex specialis dans un conflit armé non international (CANI). Les organes des droits de l'homme ne peuvent donc prendre en compte que les circonstances de fait d'un conflit armé. Pour la CEDH, l'existence d'une liste exhaustive de bases légales pour la détention et l'usage de la force létale ne permet pas

d'interpréter le DIDH au regard du DIH. Il faut donc se référer au principe de la lex specialis. Il considère qu'en conflit armé international (CAI), le DIH est bien la lex specialis et doit donc être pris en compte. Par contre, dans un CANI, le DIH ne donne pas d'autorisation à détenir ou à user de la force létale. Le DIDH est donc la lex specialis applicable aux CANI, et seuls les éléments factuels du conflit doivent être pris en compte.

Darren Stewart considère qu'il faut distinguer les CANI territoriaux et les CANI extraterritoriaux. Pour les premiers, le DIDH est le paradigme applicable. Pour les deuxièmes, le DIDH reste applicable mais le DIH doit être pris en compte dans les circonstances où il s'applique. Il pense qu'il ne devrait pas être requis qu'un État invoque explicitement le DIH devant un organe des droits de l'homme pour que cet organe puisse lui-même prendre en compte les règles de DIH. Il pense également que dans un CANI, une dérogation formelle devrait effectivement être requise pour procéder à une détention. Dans le contexte d'un CANI extraterritorial, même lorsque l'État hôte refuse de reconnaître l'existence d'un CANI sur son territoire, comme c'était le cas en Afghanistan, Darren Stewart explique que l'État intervenant est tenu de respecter ses propres obligations en matière de DIDH. Ceci influe sur le cadre et le déroulement de la campagne militaire.

2. Comment un organe des droits de l'homme prend-il en compte le Droit international humanitaire ?

Peter Kempees explique qu'aujourd'hui, peu de gens au sein du Greffe de la Cour européenne des droits de l'homme (CEurDH) ont une bonne connaissance du DIH, mais cela change progressivement. Lorsqu'il est amené à traiter une question relative au DIH, Peter Kempees affirme qu'il faut d'abord, avant de prendre en compte le DIH, déterminer s'il y a une violation de la CEDH et s'il y a une dérogation valide. Il pense que rien ne s'oppose à ce qu'un organe des droits de l'homme prenne en compte le DIH.

Marco Sassòli considère que les organes des droits de l'homme doivent appliquer le DIH coutumier, mais ces règles coutumières ne sont pas similaires en CAI et en CANI. Il remet également en doute l'existence d'une autorisation légale conférée aux belligérants par le droit coutumier en matière de détention.

Darren Stewart dit qu'il est difficile pour les organes des droits de l'homme d'appliquer le DIH aux CANI car la majorité des règles applicables relatives à la conduite des hostilités découlent du droit coutumier. Or, il n'existe pas de consensus sur la teneur de ces règles coutumières. Il considère que le DIH n'interdit pas aux belligérants de faire usage de la force létale. En accord avec Marco Sassòli, il pense que les organes des droits de l'homme doivent prendre en compte le DIH sur la base du principe de la lex specialis.

3. Que déciderait un organe des droits de l'homme si des personnes étaient prises pour cible sur base de leur appartenance ?

Dans le cas où un État en assistant un autre sur le territoire de ce dernier, dans le cadre d'un CANI, tuait des individus uniquement sur la base de leur appartenance à un groupe armé, Peter Kempees pense que la CEurDH accepterait comme légitime que ces individus soient pris pour cible.

Marco Sassòli affirme qu'un organe des droits de l'homme devrait alors déterminer si le concept de « fonction de combat continue » adoptée par le Comité international de la Croix-Rouge (CICR) est la bonne interprétation du DIH.²

Darren Stewart pense que le concept de « fonction de combat continue » n'est pas la bonne interprétation du DIH, et qu'il pose de sérieux problèmes d'un point de vue pratique.

Françoise Hampson conclut que les problèmes semblent provenir des incertitudes propres au DIH, pas du DIDH. Elle doute également que, dans un CANI, la CEurDH puisse tolérer que des individus soient ciblés sur la seule base de leur appartenance à un groupe armé, sans prendre en compte leur comportement. Toutefois, elle pense que les conclusions seraient différentes dans un CAI.

Françoise Hampson opened the round-table discussion by providing some clarifications on the theme of the debate. She emphasised that the panel was not an academic discussion on the relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) but rather a debate focused on how to operationalise the relationship between these two bodies of law. If it is obvious that States are bound by their obligations under IHRL and IHL, it is slightly different for human rights bodies whose only mandate is to determine whether or not a violation of IHRL has occurred. But in some circumstances, they may have to take IHL into account.

Françoise Hampson wanted to make certain points clear about the panel. First, the panel was covering both territorial and extraterritorial non-international armed conflicts (NIACs). Second, when looking at IHRL, the focus was set on treaty bodies and most notably the European Convention on Human Rights (ECHR) and the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR). However this does not mean that these are the only relevant ones. Finally, for this panel, it was assumed that human rights bodies have jurisdiction and that IHL applies to the situation.

In what circumstances will or should a human rights body take account of IHL?

Françoise Hampson started by asking the panellists a first question. In what circumstances will or should a human rights body take IHL into account (which is not the same as taking account of the facts of an armed conflict)? Is there a top-down or one-size-fits-all answer, for example whenever IHL is applicable to the situation?

Peter Kempees answered that there is no one-size-fits-all solution and added that there is also not one single body of IHRL. There are of course the ECHR and the ICCPR, but also regional bodies such as the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights, each with their commissions and courts which supervise them, and their own approach to IHRL.

The ECHR, the ICCPR and the ACHR have a derogation provision that allows States to suspend some of their obligation, for the ECHR and the ACHR in case of war. For Peter Kempees, there is no mention of war in the ICCPR derogation clause because under the United Nations (UN) concept there was never supposed to be another war. Concerning the provisions from which a State may derogate, they are also different in the various systems.

Under the ECHR, the right to life under Article 2 can be derogated from only in respect of lawful acts of war in accordance with Article 15, however defined. Under the ICCPR, the right to life under Article 6 cannot be derogated from but this article says that nobody should be arbitrarily deprived of their life. That raises the question: 'what is arbitrary deprivation of life?' which is a completely different question from 'when is an act of war lawful?' Peter Kempees considers that under the ECHR, in case of war, deprivation of life requires a derogation from the Convention, in accordance with Article 15, which is not necessarily the case under the ICCPR, which may follow different lines of reasoning.

In a similar way, regarding detention, Article 5 of the ECHR provides a limited enumeration of permitted grounds for detention: detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing them before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent them committing an offence or fleeing after having done so; etc. This list had always been considered by the European Court of Human Rights (ECtHR) a strictly limited enumeration of grounds under which detention is permitted, until the *Hassan* case muddied the waters. For example, security detention was already outlawed in the *Lawless* case, the very first case ever adjudicated by the Court in 1968, about the detention of an Irish Republican Army (IRA) member in Ireland. Similar conclusions had been drawn by the Court since, until the *Hassan* case. In contrast, in the ICCPR the test for legal detention is arbitrariness rather than compliance with a strict list of permitted grounds. Peter Kempees concluded from this once again

that under the ECHR, in order to detain lawfully, the State had to derogate in accordance with Article 15, while it could be different under the ICCPR.

Françoise Hampson clarified that, in relation to the *Lawless* case, the Court did not say that the State could not intern, but that in order to intern lawfully, it had to derogate. She also recalled that in the *Hassan* case, which concerned a situation of international armed conflict (IAC), the ECHR did not require the United Kingdom to derogate in order to invoke IHL. However, she considers that, over time, the ECHR will also require States to derogate from the Convention if they wish to invoke IHL before the Court. She therefore asked whether it was still necessary today to derogate in an IAC situation, or whether it was only necessary to derogate in NIAC situations.

Peter Kempees affirmed that it remains possible to derogate in IACs. Until *Hassan*, a derogation was always required for detention based on a reason different to those set out in Article 5. But the *Hassan* case findings are strictly limited to IACs and do not encompass NIACs. This may change in the future, but not as a consequence of the *Serdar Mohammed* case before the United Kingdom Supreme Court, as the applicant's lawyers have lost contact with him.

Marco Sassòli started by saying that the real question that should be asked is: what should a State, or a soldier do in a situation of NIAC? Both IHRL and IHL apply to these situations. How do we reconcile those two? Because if it is understandable that human rights bodies and IHL bodies such as the International Committee of the Red Cross (ICRC) have their own knowledge and legitimacy to speak about it, the crucial question for the victims is the applicable law to a concrete situation. Indeed, in the *Hassan* case the Court stated that the United Kingdom had not needed to derogate but had at least had to invoke IHL before the Court. If we take the concrete example of a soldier on the ground, they will not know for several years whether their behaviour complies with the obligations of their State, depending on whether their State invokes IHL in front of the Court.

On the first question of this panel, Marco Sassòli believes that there is a distinction to be made between ECHR, ICCPR and ACHR. Under the ICCPR and the ACHR, the term 'arbitrarily' is used both for the right to life and the right to personal liberty, and this term should be interpreted in the light of other rules of international law, including IHL in NIACs. But according to his interpretation, there is no such rule in IHL for NIACs, which means that the human rights bodies cannot interpret 'arbitrarily' in the light of IHL, only in the light of the factual circumstances of the armed conflict. He believes that IHRL is the *lex specialis* in NIACs, and therefore a *habeas corpus* is required. However, in view of the factual circumstances of the existence of a conflict, the Court will have to interpret the requirement of *habeas corpus* less strictly than in peacetime. *Habeas corpus* should be limited at the requirement of an independent court, which would lead to the same result as the ICRC's approach based on IHL. For the use of force, for instance in the case of a Chechen combatant in Vladivostok, human rights bodies and States should consider that IHL applies, but that IHRL prevails.

Marco Sassòli considers that the advantage of the ECHR is the existence of an exhaustive list of grounds for detention and use of lethal force, and so, we cannot interpret the authorisation in the light of IHL: it is no longer a question of interpretation but of *lex specialis*. In IAC, as in the *Hassan* case, there are explicit IHL rules which are made for prisoners of war (POW) and civil internees, these rules are *lex specialis* and have to be taken into account. Even if the difference between the *lex specialis* and the systemic interpretation would not be very significant in practice.

For NIACs, Marco Sassòli stated again that, in his opinion, there is no authorisation to detain in customary law nor by analogy with the law of IAC. The consequence is therefore that the IHRL remains the *lex specialis* and that the ECHR can only apply IHRL, taking into account the specificities of the reality of armed conflicts. And then there should be a difference between a fighter arrested while fighting in the middle of the battlefield and someone who is arrested in the middle of the night in their house. For the former, the procedural guarantees in *habeas corpus* have to be watered down while for the latter, stricter procedural safeguards may be required. It is a matter of adapting to the reality of the situation.

Darren Stewart declared that there is a top-down or one-size-fits-all answer: when IHL is applicable to the situation. But he also said that in certain circumstances, the distinction between territorial and extraterritorial NIACs is very relevant. In his sense, the human rights paradigm is the proper paradigm applicable in the territory of a State in a situation of a territorial NIAC inside the geographical frame of the ECHR, as in Northern Ireland.

In the context of an extraterritorial NIAC, when a multinational or bilateral alliance supports a State at its request, when there are questions related to the actions of the agents of a supporting State that engage the human rights obligations of that State, the context has absolutely to be considered, beyond the circumstance analysis that the human rights bodies would normally engage in. The opposite could not make sense for States engaged in multinational NIACs where they ensure that there is a broad reference to the rule of law. In the United Kingdom's position, it is well established that every individual detained in extraterritorial armed conflicts, especially in extraterritorial NIACs because there is no prisoner of war status, the human rights paradigm applies as well. For Darren Stewart, it is absolutely clear that the detaining State has human rights obligations, but he agreed with Marco Sassòli on the *lex specialis*. When there is a specific body of law like IHL that is applicable to certain circumstances, such a body of law has to be considered. So Darren Stewart welcomes the conclusions of the *Hassan* case.

Concerning the question of whether a State should invoke IHL for the human rights bodies to take it into account, he agreed with Marco Sassòli that such a requirement should not exist, because it would be impractical for the soldiers on the ground and because the local situation might change and evolve, and even move from a situation of internal violence to a NIAC situation. On the question of the requirement for derogation, Darren Stewart believes that in NIAC situations, the requirement of a derogation is an ideal solution. The British Government has followed this policy for Northern Ireland and has dero-

gated from its human rights obligations regarding detention and the right to a fair trial. But there is little political appetite to derogate from human rights obligations in the current political context.

Françoise Hampson asked what the impact for the assisting States is if the hosting State denies the existence of a NIAC, where there is objectively no doubt that the threshold of an armed conflict is crossed, as for example in Afghanistan, bearing in mind that Darren Stewart suggested that in internal NIACs the human rights law paradigm prevails.

Darren Stewart believes it creates challenges associated with the operational and campaign design to support the hosting State. In Afghanistan, many factors have led to delays in the Afghan judicial system, which is the corollary of the human rights paradigm that applied. Part of that was a capacity question about the Afghan State being able to deliver a functioning justice system. Another issue was that of *non-refoulement* and obtaining guarantees in relation to the treatment of detainees. The transfers were made under very strict judicial review, under strictly controlled agreements, and transfers were suspended in case of issues related to the treatment of detainees once they were to be transferred back to the Afghan national authorities. And even when the British forces allowed transfer, they were required to undertake a post-transfer monitoring arrangement until such time as those individuals had been processed into the Afghan justice system. A Detention Oversight Team was instituted to ensure that the conditions of detainees in the Afghan prisons systems met minimum standards. So, the fact that the Afghan government was denying the existence of a NIAC within its borders did not necessarily completely hamper the ability of assisting States to work within their human rights obligations. However, it also created frictions about the articulation within the international coalition, particularly with the forces of the United States, but the international coalition managed to overcome these problems.

How does a human rights body take account of the Law on Armed Conflict?

Françoise Hampson turned to the second question. Assuming that a human rights body took account of LOAC: how would it? Does it make a difference between treaty law and customary law? Does LOAC replace the human rights paradigm with regard to a particular rule? How are human rights bodies going to be equipped when they apply LOAC? The majority of human rights bodies, in good faith, will take account of IHL but with a 'human rights accent'. Any limitation of a State's conduct has to be interpreted extensively, and any right of the State to act in prejudice of a human right has to be interpreted narrowly. That is not how LOAC works. Not to mention the obvious risk that human rights bodies will use human rights interpretation of proportionality when applying the IHL principle of proportionality.

Peter Kempees started by saying that very few members of the ECtHR have experience and knowledge of IHL. This is changing, some are being trained, but it remains limited to the level of the Registry, and it remains for the Registry to stay abreast of the judges. The problem may be that 'where you stand

depends on where you sit'. For instance, in the *Hassan* case, there was a majority but there was also a strong dissent by Judge Roberto Spano, joined by other judges. There are also pending cases in ECtHR, for example *Georgia/Russia* number two and *Ukraine/Russia* cases, which are arguably IHL cases, depending on where you are coming from. For Russia they are not, for Ukraine and Georgia they are.

Françoise Hampson asked if, when Peter Kempees uses an IHL framework, he asks himself a human rights question or an IHL question. Does he ask a human rights question and search for an IHL answer? Peter Kempees answered that the first question is always: is there a violation of the Convention? The second question is whether there is a valid derogation. If the derogation is valid, IHL will be the common denominator and the last question will be how to apply IHL properly. On the question of whether a human rights body would apply customary IHL, Peter Kempees answered that they would indeed. For instance, in the case *Van Aannat v. Netherlands*, the Court interpreted Article 7 in the light of customary IHL on the prohibition of chemical weapons. The Court also used customary IHL in the case *Kolk and Kislyiy v. Estonia*.

Marco Sassòli stated that human rights bodies should apply customary IHL, but it is important to keep in mind that customary law in IACs is not necessarily similar to customary law in NIACs. Marco Sassòli believes that for detention, for instance, there is no legal basis in customary law in NIACs because there are an insufficient number of States which detain without relying on their own internal legal bases. Even in extraterritorial NIACs, assisting States want to hand over their detainees because they do not believe that they have the authority to detain. There is no general practice or *opinio juris*. But he considers that when a customary rule exists, human rights bodies should take it into account.

Marco Sassòli considers that if a human rights body has to interpret the concept of direct participation in hostilities, it will take into account the ICRC concept of continuous combat function, and if a member of a non-organised armed group with a continuous combat function is targeted, it has to take into account that it is a lawful act under IHL. But the general question that needs answering is: why do you need an authorisation? Because of Human Rights Law? Does IHL give an authorisation? Or is IHL simply not violated? For Marco Sassòli, the conclusion of the *Hassan* case is correct: IHL authorises the detention of POWs and the internment of civilians in IACs. But he does not think that such authorisation exists for NIAC.

Following Marco Sassòli, the ICRC disagrees on that but they both reach the same conclusion, because for the ICRC, grounds for detention and procedure must be laid down in a legal basis as a consequence of the principle of legality, which is a human rights principle. The ICRC agrees that an additional legal basis is required, and such legal basis can be provided by domestic laws, international agreements, a Security Council resolution or military orders.

Françoise Hampson emphasised that Human Rights Law is not in opposition to the prohibitions under the Geneva Conventions or the limitations in the conduct of hostilities. The problem stems from when

an action is authorised under the conduct of hostilities paradigm but is prohibited under Human Right Law, especially when the action is originally based on customary law. Customary law is not to grant permission because according to the *Lotus* case, everything that is not prohibited under international law is permitted. So customary norms are normally expected to be prohibitory norms. Are such actions acceptable under IHL or authorised?

Marco Sassòli first pointed out that there are exceptions to that, as certain customary laws can give authorisation for, e.g., the detention of POWs, but they are only exceptions. For him, it is unimaginable that IHL should provide a right to kill, firstly because it would mean that a combatant should tolerate that another combatant can kill him. Secondly IHL could not give a right to kill because if the act is a violation under *ius ad bellum*, there is no right to act. So Marco Sassòli believes that IHL does not provide a legal basis for killing in NIACs that prevails over other obligations, as IHL is rather the *lex specialis*. Except in the case of a derogation under Article 15, he agreed with the International Court of Justice's Advisory Opinions on Nuclear Weapons and on The Wall: concerning the right to life, IHL constitute the *lex specialis* when it comes to acts of hostilities.

Darren Stewart said that a part of the challenge associated with a human rights body being able to implement and apply IHL is that the majority of the conduct of hostilities rules in NIACs are customary. However there is no agreement in the IHL community in terms of what constitutes the relevant customary rules in NIACs. The ICRC Study has made considerable and helpful work to try to document these customary rules, but there is still some controversy and some States disagree with them.

In terms of the ability to take a life in NIACs, when a State is confronted with a civilian directly participating in hostilities and if the three criteria are satisfied – and he emphasised that the ICRC Interpretative Guide is not unanimously accepted – Darren Stewart believes that the State might target the civilian as a combatant, as happens in Syria or Iraq for example, with Islamic State in Iraq and the Levant (ISIL) members. As to whether IHL authorises killing, or whether killing is simply not a violation of IHL, Darren chooses the second answer, and supports Marco Sassòli's argument that human rights bodies should take account of IHL on the basis of the *lex specialis* principle. Darren Stewart explained that the majority of scenarios of the use of force with soldiers engaged in NIACs are through the self-defence paradigm, not the targeting paradigm. The targeting paradigm is very much informed by intelligence pictures and information to ensure that individuals targeted are clear legitimate military objectives.

What would a human rights body decide on targeted killing based on membership?

Françoise Hampson moved to the third question, giving a specific scenario and asking the panellists what the reaction of a human rights body would be. The scenario was: State A, a European State that has ratified the ECHR, derogates to the Convention with regards to lawful acts of war. State A as-

sists State Z in an internal NIAC and proceeds to the targeted killing of a person alleged to be a member of an organised armed group. State A acknowledges disagreeing with the ICRC's continuous combat function concept because it believes that this concept is impracticable to apply. State A proceeds to targeted killings in State Z based on the membership, not on the behaviour, given that the targeted persons are not nationals of State A. How would a human rights body react?

Peter Kempees asked if NIACs could be considered as war, in the sense of Article 15 and lawful acts of war. If yes, Peter Kempees considers that targeted killings on the base of membership would be acceptable for the ECtHR.

Marco Sassòli stated that it would depend on which is the correct rule of IHL. So the human rights body would have to decide if the continuous combat function is the correct interpretation of IHL, although the human rights body would probably consider that IHRL remains in the background on other issues such as the duty of inquiry. Marco Sassòli believes that a human rights body would probably copy-and-paste the legal regime for inquiry in peacetime, even if it is not realistic in a situation of armed conflict. Françoise Hampson remarked that if the concept of continuous combat function was not considered as reflecting customary IHL, members of organised armed groups would have all the disadvantages of being combatants, without any of the advantages.

Darren Stewart answered that war is not fair, and it has to be unfair for one of the two parties to the conflict to be victorious. He does not think that the concept of a continuous combat function is a correct interpretation of IHL. The requirement that the activity be continuous is a problem when you imagine the case of an Afghan farmer during the day who takes up arms after dark, or in the case of a bomb maker who runs a bomb factory and who pops down the road to have a cup of coffee. When asked whether workers in the United Kingdom's arms factories are also legitimate targets, he replied that there is a difference between being a bomb maker in an insurgency context and being an ammunition worker in a factory. But Marco Sassòli considered that it is against the equality of belligerents, and that both sides have to be treated the same way, or else the entire IHL construction collapses.

Françoise Hampson concluded that the problem seems to stem from the uncertainties in IHL, which is not an IHRL problem. She also declared that she doubts that the ECtHR would tolerate a targeted killing in a NIAC on the sole basis of membership, without any element of behaviour. In contrast, she believes that the Court would accept it in a situation of IAC, by analogy with the conclusions in the *Hassan* case because such acts are clearly covered in IHL. Françoise Hampson also explained that she has a problem with the way ECtHR uses IHL vocabulary and concepts without applying IHL to the case. This may dilute the protection provided by IHRL. Peter Kempees and Marco Sassòli expressed their agreement with this remark.

Q&A SESSION

At the end of the panel discussion, a Q&A session allowed the audience to raise two questions.

1. The legal gap of IHL and the non-applicability of human rights standards to non-State armed groups

A person in the audience asked how the gap in IHL was supposed to be resolved when it comes to non-State armed groups. It seems in fact that there is a general agreement that IHRL does not bind non-State armed groups. He also remarked that UN bodies apply the human rights standards to armed groups in their reporting. But in the applicability of the legal protection in NIAC of those who are detained and interned, how should the law be developed?

Marco Sassòli answered that in his personal opinion, IHRL does apply to non-State armed groups, but it is not the majority opinion. If IHRL does not apply to non-State armed groups, then for targeting, this group would only have to comply with IHL, even in a situation where capture would be preferable to death. The armed group will not be bound by human rights standards as a State would be. But if IHRL applied to non-State armed groups, Marco Sassòli believes that *the lex specialis* determination would be different for a State because three aspects have to be taken into account. First, there is no equality of belligerents under IHRL, so the rules might differ between the different parties of a conflict. Second, non-State armed groups do not have jurisdiction. And finally, an armed group has many more difficulties to legislate and ensure, for instance, *habeas corpus*.

Marco Sassòli said that the ICRC Customary Law Study provides that arbitrary detention is a rule of customary IHL, so it also applies to armed groups, but he believes that 'arbitrary detention' can be determined differently for armed groups than for States. So the *lex specialis* determination might be different for armed groups than for States. But he also recalled that, in all cases, detention by non-State armed groups remains prohibited by national legislation.

Françoise Hampson emphasised that, even if non-State armed groups are not subject to the authority of human rights bodies, a distinction has to be made, for the determination of the *lex specialis*, between an organised fighting group and an unrecognised State with a *de facto* authority. When an organised fighting group does not have this authority, Marco Sassòli's factors should come into play.

Darren Stewart affirmed that from a State's perspective, an organised armed group is engaging fundamentally in criminal activities and has no legitimacy to act. Even if there are cases where there is a degree of self-determination or where foreign States might provide support to armed groups, in many circumstances the State will not give an entry ticket for armed groups to bodies organised for States. Darren Stewart recognised the good work of Geneva Call to make a compelling moral argument

for armed groups to comply with the human rights standards without any mechanism. However, he believes that in most cases, the moral argument seems insufficient to encourage armed groups to comply with these rules.

2. The impact of the *lex specialis* principle on the *jus ad bellum*

The second question was rather a remark. The participant agreed with Marco Sassòli's point of view that, in the *Hassan* case, there are explicit IHL rules which are made for prisoners of war and civil internees, so it is no longer a question of interpretation of an exception but a question of *lex specialis*. But he disagreed with the conflict that an authorisation under IHL may generate over *jus ad bellum*. If IHL gives permission to detain or kill, there is an impact on human rights rules because there is a relationship of *lex specialis* between the two bodies of international law. But such relation does not exist between *jus ad bellum* and *jus in bello*, so an act authorised under IHL can be a violation of *jus ad bellum* without any consequence in IHL. He stressed that Article 33 of the first Additional Protocol provides equally for both parties that combatants have the right to participate in hostilities, therefore, even for the party to the conflict that violated the Charter of the United Nations.

Marco Sassòli agreed that there is a separation between *jus ad bellum* and *jus in bello* and explained that the contradiction that he mentioned was just an argument against the idea that IHL gives an authorisation to kill. The issue of the legal basis for detention is different, but for him, there is at best a strong authorisation to kill in IHL, a legal regulation, but not a legal basis.

Françoise Hampson reacted by saying that this discussion highlighted the difference between the issue of detention and the issue of killing under IHRL. Contrary to detention, IHRL does not provide a legal basis for killing, it only distinguishes between lawful and unlawful killings. She said that it ought to be easier to accommodate the use of lethal force under IHL and under IHRL than it is in the area of detention, provided that the provisions of IHL are clear, and given the absence of combatant status in NIACs, which, according to the ICRC, is a status determination, which Françoise Hampson opposes.

Peter Kempees agreed that *jus ad bellum* and *jus in bello* may well govern the two different aspects of Article 2 of the ECHR separately, the substantive aspect and the procedural aspect.

Session 4

Compliance with international humanitarian law in contemporary non-international armed conflicts

Chairperson: **Elżbieta Mikos-Skuza**

Warsaw University and College of Europe

TOWARDS A BETTER COMPLIANCE FOR IHL IN NIACS: A ROLE FOR STATES AND INTERNATIONAL ORGANIZATIONS PROVIDING SUPPORT TO PARTIES TO NIAC

Thomas de Saint Maurice

ICRC Legal Division

Résumé

Thomas de Saint Maurice's presentation addresses the role that States and international organisations can play in promoting compliance with IHL by non-State armed groups.

In recent years, many States and international organisations have formed coalitions, supporting each other, but also non-State armed groups or local militias. In addition, there has also been an increase in the number of non-State armed groups forming alliances, fragmenting, disappearing and resurrecting as conflicts unfold. All this contributes to fuelling conflicts and diffusing the responsibility of conflict players, and may result in further violations of International Humanitarian Law (IHL).

On the other hand, such foreign interventions in conflicts can also create new opportunities to positively influence the parties to the conflict and lead them to better compliance with IHL.

The International Committee of the Red Cross (ICRC) considers that this role derives from a legal obligation enshrined in common Article 1 of the Geneva Conventions, which stipulates that States must comply with and ensure compliance with the Geneva Conventions. This rule applies to both international armed conflicts (IACs) and non-International armed conflicts (NIACs), and also in peacetime for all States. This rule reflects customary international law and is therefore binding also for international organisations.

Common Article 1 has an internal dimension – respect for IHL by one's own troops – and an external dimension – respect for IHL by others. This second dimension is divided into a positive

obligation and a negative obligation. The negative obligation consists in the obligation to refrain from encouraging, supporting or assisting the commission of IHL violations. This is an obligation of result. The positive obligation is an obligation to 'ensure respect for IHL'. However, this is an obligation of means, of 'due diligence'. It implies that States and organisations take all measures that are reasonably within their power to influence the parties to better comply with IHL. This ability to influence is particularly strong for those who directly support parties, particularly in coalition structures.

Common Article 1 does not provide any details on the concrete measures that should be taken to influence the parties, but the 2016 Commentary proposes a non-exhaustive list: diplomatic pressure; retaliation measures; initiation of criminal investigations; suspension of arms deliveries; referral to the United Nations Security Council; directly addressing military officials suspected of violations, etc.

Support from a State or an international organisation can take different forms: technical advice; training; equipment; arms transfers; information sharing; logistical support; joint military operations; kinetic support; support in detention operations. Support can be an excellent opportunity to positively influence the behaviour of the parties to the conflict, provided that it is accompanied by certain mechanisms to ensure compliance with IHL by these parties.

Through its dialogue with States and international organisations, the ICRC has identified several good practices and mechanisms potentially efficient to ensure the respect of IHL in international coalitions:

- *precision in the roles and responsibilities and clear identification of the chain of command within the coalition;*
- *preparation, instruction and training for compliance with IHL;*
- *strict selection of new recruits in armed groups (vetting processes);*
- *preventing and prohibiting arms transfers to areas where there is a risk that they will be used to commit IHL violations.*

Arms transfer is the perfect illustration of the impact of States' support in armed conflict. The Arms Trade Treaty and the European Union Common Position on arms exports control which prohibit the exportation of weapons to areas where there is a risk that they will be used to commit IHL violations are perfect examples of this. However, according to the Stockholm International Peace Research Institute, it is in the areas most affected by armed conflict that the increase in arms transfers has been most significant. For instance, the Middle East accounts for one third of global arms imports. There is a clear disconnection between States' engagements and States' actions with regard to arms exports.

At the level of international organisations, we can cite positive initiatives and decisions that aim to improve compliance with IHL. For example, the EU Guidelines on Promoting Compliance with IHL, which aim to ensure that Member States act to ensure compliance with IHL by third States and by non-State organisations. The United Nations and the African Union have also adopted several instruments related to the promotion of compliance with IHL by parties to conflicts in which these organisations are involved, for instance the United Nation Human Rights Due Diligence Policy or the African Union's Compliance Framework.

The ICRC tries to ensure compliance with IHL by non-State armed groups through direct dialogue with the groups themselves and those who have an influence on them.

Thomas de Saint Maurice concludes by mentioning the report Roots of Restraint in War published by the ICRC. It provides a valuable analysis of the various factors influencing non-State armed groups. Understanding these factors can be a key tool not only for the ICRC, but also for States and international organisations to adapt their support and take appropriate measures to ensure that IHL is abided by. This report highlights the importance of establishing a dialogue with conflict stakeholders in order to be able to influence them. The proliferation of anti-terrorism legislation may prevent this dialogue by criminalising it. One concrete measure that States can take is not to adopt legislative measures that hinder dialogue, in order to allow the ICRC to influence armed groups towards better compliance with IHL.

La question du rôle des États – principalement, mais aussi des organisations internationales – dans le respect du Droit international humanitaire (DIH) par les parties aux conflits est très ancienne. Elle date au minimum de 1949 et l'adoption de l'article 1 commun aux Conventions de Genève.

Mais il y a un phénomène qui s'amplifie depuis de nombreuses années dans les conflits armés contemporains, en particulier en Afrique ou au Moyen-Orient, mais également en Afghanistan : de plus en plus, les États et des organisations internationales forment des alliances et des coalitions, se soutiennent mutuellement et soutiennent des groupes armés non étatiques ou des milices locales qui sont parfois utilisés dans des guerres par procuration.

Non seulement on voit une multiplication des interventions étrangères dans les conflits armés, mais on constate également une multiplication des groupes armés non étatiques, eux-mêmes formant des alliances, se fragmentant, disparaissant et renaissant sous d'autres formes au gré notamment des soutiens reçus ou interrompus en fonction de la dynamique des conflits.

Ces phénomènes contribuent à alimenter les conflits et à les prolonger, et les États et organisations soutenant les parties risquent de fournir les moyens par lesquels des violations du DIH peuvent être commises.

Cette multiplication d'acteurs contribue également à rendre les responsabilités diffuses, ce qui à son tour facilite les violations du DIH et donc génère de graves conséquences humanitaires dont nous sommes malheureusement témoins tous les jours.

Mais il y a également des opportunités à saisir du fait qu'un grand nombre d'États et d'organisations s'impliquent, sous différentes formes, dans les conflits armés contemporains. Bien que le soutien apporté aux parties aux conflits armés constitue un risque, il donne également la possibilité d'exercer une influence sur les parties. Aujourd'hui, le Comité international de la Croix-Rouge (CICR) estime qu'il y a là un rôle à jouer pour les États et les organisations qui soutiennent les parties, en particulier dans le cadre d'alliances ou de coalitions, pour s'assurer que ces parties respectent le DIH, ou pour conditionner certaines formes de soutien au respect du DIH.

Il incombe aux États et organisations de faire en sorte que leur implication ne contribue pas à la diffusion des responsabilités, mais au contraire que ce soutien aux parties soit utilisé positivement, afin de les amener à un meilleur respect du DIH. Du point de vue du CICR, ceci est non seulement une nécessité éthique et un impératif humanitaire, « *it's the right thing to do* », mais il s'agit également pour les États et les organisations de se conformer à leur obligation de faire respecter le DIH.

Cette obligation provient de l'article 1 commun aux Conventions de Genève de 1949 : « Les Hautes Parties Contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances ». Cette disposition constitue en partie la base juridique adéquate pour aborder le sujet du rôle des États et des organisations internationales qui soutiennent des parties aux conflits armés. En particulier concentrons-nous sur l'obligation de « faire respecter le Droit international humanitaire » *qui vient s'ajouter à celle de* « respecter le Droit international humanitaire ».

On peut commencer par noter que la disposition s'applique à « la présente Convention ». Le champ d'application des Conventions de Genève comprend les conflits armés tels que définis dans leurs articles communs 2 et 3, c'est-à-dire les conflits armés internationaux (CAI) et – pour l'article 3 commun – les conflits armés non internationaux (CANI).

Deuxièmement, la disposition s'applique « en toutes circonstances » et s'adresse aux « Hautes Parties Contractantes ». L'article 1 commun s'applique donc non seulement en situation de conflit armé mais également en temps de paix. Elle ne s'applique donc pas uniquement aux parties à un conflit armé mais à tous les États.

Enfin, le CICR défend l'opinion que cette obligation de faire respecter le DIH s'est cristallisée dans le droit international coutumier. Ainsi, d'après cette obligation coutumière, les États, mais également les organisations internationales comme sujets de droit international, doivent faire respecter le DIH par les parties.

Si l'on aborde maintenant la substance de cette disposition, en se concentrant sur l'obligation de « faire respecter », nous y voyons plusieurs niveaux. L'obligation se décline en une dimension interne et une dimension externe.

La dimension interne est l'injonction de s'assurer que ses propres troupes, ses propres agents respectent le DIH. La dimension externe, qui nous intéresse dans notre discussion aujourd'hui, est l'obligation de faire respecter le DIH par d'autres. Cette dimension externe est elle-même divisée en une composante négative et une composante positive.

La composante négative consiste en l'obligation de ne pas encourager, aider ou assister aux violations du DIH. Il s'agit d'une obligation de résultat. Un État ou une organisation internationale doivent stopper tout soutien à une partie à un conflit armé s'ils peuvent s'attendre à ce que ce soutien soit utilisé en violation du DIH.

Il y a également une obligation positive de « faire respecter le DIH ». Il s'agit là en revanche d'une obligation de moyen, de « diligence raisonnable » (*due diligence*). Elle implique que tous les États et organisations, chacun à leur niveau, prennent des mesures pour influencer les parties à mieux respecter le DIH. Tout ce qui est raisonnablement dans le pouvoir d'un État ou d'une organisation internationale doit être mis en œuvre dans le but de faire cesser et de prévenir les violations du DIH par les parties à des conflits armés. L'étendue de ce qui peut être mis en œuvre, la capacité d'influence sont évidemment fortement variables d'un État à l'autre.

Nous suggérons que cette capacité d'influencer est particulièrement grande pour ceux qui soutiennent directement des parties, notamment dans le cadre de coalition, de partenariats et d'alliances.

Néanmoins, il est aussi important d'admettre les limites de cette disposition : elle ne donne aucun détail sur les mesures précises qui devraient être prises pour influencer les parties. En

fonction de leur position et de leurs capacités, les États ont latitude de choisir parmi une palette de mesures possibles.

Dans son Commentaire actualisé en 2016 de l'article 1 commun, le CICR propose une liste non exhaustive qui va des pressions diplomatiques aux mesures de rétorsion (pause dans des négociations commerciales, etc.), du lancement d'enquêtes pénale à la suspension de livraison d'armes, de la saisine du Conseil de Sécurité des Nations-Unies à l'intervention directe auprès des responsables militaires soupçonnés de violations, etc.

Revenons au titre de cette présentation, qui se réfère au rôle des États et organisations internationales « qui soutiennent » des parties à des conflits armés. Ce soutien peut prendre plusieurs formes et en partie croiser – ou contredire – les mesures possibles à adopter en conformité avec l'obligation de faire respecter le DIH : conseils techniques, formations, équipement, transferts d'armes, partage de renseignements, soutien logistique, opérations militaires conjointes, soutien cinétique ou soutien dans des opérations de détention.

Ce soutien apporté par des États et les organisations peut constituer un excellent vecteur d'influence sur les parties soutenues, mais uniquement s'il est accompagné de bons mécanismes pour s'assurer du respect du DIH par les parties soutenues. De plus, certains types de soutien – en premier lieu le transfert d'armes – devraient être conditionnés au respect du DIH.

Du côté du CICR, nous souhaitons développer un dialogue plus poussé avec les États et les organisations qui le souhaitent, afin d'identifier les pratiques existantes, les mécanismes mis en place dans le cadre de soutiens à des parties à des conflits armés – en particulier lors de la mise en place de coalitions. Nous avons identifié certaines pratiques comme étant potentiellement très utiles dans un objectif de faire respecter le DIH, notamment :

- préciser les rôles et responsabilités, et identifier clairement les chaînes de commandement entre partenaires de coalition ;
- préparer, instruire et former les partenaires au respect du DIH dans la conduite des hostilités, mais également en matière de la détention, de transferts de personnes et de garanties judiciaires et procédurales ;
- sélectionner rigoureusement les recrues dans les groupes armés (« *vetting processes* ») ;
- mettre en œuvre des garanties pour la fourniture de l'équipement et en particulier ne pas transférer des armes s'il existe un risque que ces armes soient utilisées pour commettre des violations du DIH.

Ce dernier point mérite qu'on s'y attarde.

En effet, de tous les actes de soutien à des parties aux conflits armés, la fourniture d'armes est celui qui est le plus tangible et celui qui a l'impact le plus important sur les populations qui vivent dans les zones de conflit. Car bien souvent, les armes sont la cause de leur mort, de leur blessure, de la destruction de leur maison, de leur centre de santé ou de leur approvisionnement en eau potable. Et ces armes, elles ont une provenance.

D'après le Stockholm International Peace Research Institute (SIPRI), c'est dans les zones les plus affectées par les conflits armés que l'augmentation des transferts d'armes a été la plus significative. Le Moyen-Orient représente un tiers des importations d'armes mondiales et la croissance des importations dans cette région est de plus de 100% sur les cinq dernières années par rapport à la période 2008-2012.

Il existe des règles, au-delà de l'article 1 commun qui s'applique spécifiquement aux transferts d'armes : le Traité sur le commerce des armes et – puisque nous sommes au Collège d'Europe – la Position commune de l'Union européenne sur le contrôle des exportations d'armes. Ce type d'instruments joue un rôle crucial pour protéger les civils et *in fine* sauver des vies. Mais les chiffres du SIPRI démontrent à quel point les armes continuent d'inonder les zones de guerre, y compris là où de nombreuses violations du DIH sont commises. Parmi les plus grands exportateurs d'armes, près des deux tiers sont aussi parties au Traité sur le commerce des armes qui érige en critère le respect du DIH.

Il y a donc une déconnexion entre d'une part ce que les États proclament, leurs engagements, et d'autre part leurs actions. Il y a un déficit de crédibilité qui a un impact réel sur le terrain. Ce déficit de crédibilité contribue d'ailleurs aussi au climat généralisé de déresponsabilisation de tous les acteurs impliqués dans un conflit. Il est crucial que les États renforcent le poids de la protection des civils et réduisent le poids des intérêts économiques dans leurs processus décisionnels.

Pour revenir à la question plus générale qui nous occupe : que peuvent faire les États et les organisations internationales ? Nous avons évoqué différents types de mesures que certains États mettent en œuvre ou devraient envisager. Spécifiquement au niveau des organisations internationales, nous pouvons citer des initiatives et décisions positives qui vont dans le sens d'efforts menés en vue d'un meilleur respect du DIH.

A titre d'exemple, citons les Lignes directrices de l'Union européenne concernant la promotion du Droit international humanitaire, qui visent à ce que les États Membres agissent pour « le respect de ce droit par les États tiers et, le cas échéant, par des acteurs non étatiques », et le document indique qu'il y a « un intérêt tant politique qu'humanitaire à faire mieux respecter

le droit international humanitaire dans le monde entier ». Il est intéressant aussi de noter les efforts menés séparément et conjointement par les Nations unies et l'Union africaine pour se doter d'instruments et de mécanismes afin de renforcer le respect du DIH par les parties aux conflits dans lesquels ces organisations interviennent, par leurs États membres et par les missions militaires qu'elles déploient elles-mêmes ou autorisent et qui, pour certaines, peuvent devenir parties à des conflits armés. A ce titre, citons notamment la *Human Rights Due Diligence Policy* des Nations unies qui se base sur la responsabilité des membres des Nations unies de respecter, promouvoir et inciter au respect du DIH et autres corps de droit ; et le *Compliance Framework* de l'Union africaine en cours de développement et ayant pour but d'opérationnaliser son obligation de faire respecter le DIH à travers un certain nombre de mesures. Ces mesures consistent notamment au *screening* des responsables de missions de paix et sécurité, au soutien aux formations en DIH pour les États contributeurs de troupes et à la mise en place de mécanismes indépendants de contrôle et d'enquête.

Bien qu'aujourd'hui le sujet de notre discussion était le rôle des États et organisations *qui soutiennent* les parties aux conflits armés, du côté du CICR, nous nous concentrons en premier lieu à nous engager dans un dialogue direct avec les parties aux conflits elles-mêmes, étatiques et non étatiques. Dans le cadre des CANI, qui constituent l'écrasante majorité des conflits armés actuels, il est particulièrement important pour nous de développer ce dialogue avec les groupes armés non étatiques. En plus de cela – et non à son détriment – nous essayons de développer un dialogue avec ceux qui ont une influence sur ces parties. Notamment dans le but de promouvoir l'échange et le développement de bonnes pratiques, mais également afin de mieux comprendre et reconnaître les enjeux et les défis que posent l'identification et l'adoption de mesures visant à mieux faire respecter le DIH.

Pour conclure, j'aimerais dire un mot sur l'étude récemment publiée par le CICR et intitulée « Contenir la violence dans la guerre : les sources d'influence chez le combattant » (« *Roots of Restraint in War* »). L'étude tente d'identifier non seulement les facteurs qui incitent à commettre des violations, mais surtout de mettre en exergue les cas où des limites ont été adoptées par des groupes. Cela s'est avéré difficile car il s'agit d'identifier les décisions de ne pas entreprendre une action qui serait en violation du DIH.

Elle montre que ces facteurs d'influence varient beaucoup selon le type de groupes. Pour les groupes moins structurés, il est suggéré de travailler sur les sources d'influence et les systèmes normatifs *informels*, alors que l'approche par l'intégration du DIH dans les règles et les doctrines reste pertinente pour les groupes plus centralisés. L'étude montre également que plus un groupe est décentralisé, plus il est influençable par des acteurs externes. Les facteurs d'influence et les comportements varient aussi selon que le groupe est local, actif et inscrit

dans sa communauté ou s'il est une greffe de l'extérieur sans lien avec la communauté dans laquelle il évolue. En l'occurrence, les communautés locales auront moins d'influence sur le comportement des combattants dans ce dernier cas.

Connaître ces facteurs, avoir des clés pour comprendre la manière de fonctionner des groupes et des combattants qui les composent peut permettre, non seulement au CICR, mais également aux États et organisations dont c'est le rôle, de calibrer leur soutien, de prendre les mesures adéquates afin de faire respecter le DIH.

Enfin, ce rapport insiste sur la démonstration qu'il est possible d'influencer – de différentes manières – le comportement des groupes armés, mais que pour ce faire, il est nécessaire de les approcher, de les contacter, de leur parler, d'instaurer un dialogue et une relation. Or ce que nous craignons aujourd'hui c'est la multiplication de législations – qui ont légitimement pour objectif de lutter contre le terrorisme – qui criminalisent au passage les contacts ou certaines activités avec des groupes armés. Pour conclure, une mesure concrète que les États et organisations peuvent prendre pour améliorer le respect du DIH par les parties aux CANI est de ne pas adopter de dispositions législatives susceptibles d'entraver notre travail d'influence sur ces groupes armés dans le but d'atteindre un meilleur respect du DIH.

CAN NON-STATE ARMED GROUPS COMPLY WITH IHL IN TODAY'S ARMED CONFLICTS?

Pascal Bongard

Geneva Call

Résumé

Dans sa présentation, Pascal Bongard traite des défis liés au respect du Droit international humanitaire (DIH) par les groupes armés non étatiques et des facteurs pouvant influencer leur comportement sur le champ de bataille, tel qu'il en ressort de l'expérience de l'Appel de Genève.

Avant toute chose, il faut garder à l'esprit trois éléments importants. Premièrement, sur les 69 conflits armés existant en 2018, au moins 51 étaient des conflits armés non internationaux (CANI), impliquant des groupes armés, avec généralement l'intervention d'États tiers. Deuxièmement, il existe une grande variété de groupes armés, allant de groupes rebelles et des milices paramilitaires jusqu'aux autorités de facto et aux États non reconnus. Leur intérêt et leur capacité à respecter le DIH varient autant. Troisièmement, les groupes armés ne sont pas nécessairement les auteurs de la majorité des violations du DIH : dans certains cas, les groupes les respectent davantage que certains États.

1. Les défis liés au respect du DIH

Les raisons liées au manque de respect du DIH sont diverses. Parfois, les groupes armés refusent d'appliquer le DIH pour des raisons idéologiques ou stratégiques, par exemple dans les cas de nettoyage ethnique ou de génocide, ou pour des considérations militaires, tels que le recrutement d'enfants soldats pour compenser les pertes de combattants.

Il arrive également que les groupes armés manquent de connaissance en DIH, comme en a souvent été témoin l'Appel de Genève. De nombreux groupes armés interrogés par l'Appel de Genève présentaient de sévères lacunes concernant la compréhension des règles relatives à la protection des biens culturels ou de l'accès humanitaire. Il existe également une méconnaissance des mécanismes tels que le Mécanisme de surveillance et de communication de l'information (MRM) des Nations unies ou les Directives pour la protection des écoles et des universités contre l'utilisation militaire.

Un autre facteur peut trouver sa source dans l'absence d'incitation au respect du DIH par les groupes armés. En effet, les membres d'un tel groupe peuvent être poursuivis pénalement pour le

simple fait d'avoir pris part aux hostilités, quel qu'ait été leur respect du DIH. Certaines obligations sont également plus lourdes pour eux que pour les États, par exemple en termes d'âge de recrutement des enfants. . De plus, les groupes armés ne peuvent pas devenir parties à des traités internationaux, ni participer à leur élaboration. Ces facteurs ne les incitent pas à respecter ou à se sentir formellement tenus par les règles du DIH, malgré qu'ils le soient.

Finalement, de nombreux groupes armés ne disposent pas des capacités nécessaires à la mise en œuvre de leurs obligations en vertu du DIH, comme par exemple l'administration de la justice et les garanties d'un procès équitable pour les personnes qu'ils détiennent.

2. Les engagements à respecter le DIH

Ces dernières décennies, de nombreux groupes armés ont exprimé leur adhésion à certaines règles du DIH, et ce à travers différents moyens.

- **Les déclarations unilatérales** sont des engagements pris par les groupes armés à respecter soit le DIH en général, soit certaines règles spécifiques. Il peut s'agir d'une déclaration unilatérale telle que prévue par l'article 96 (3) du premier Protocole additionnel aux Conventions de Genève ou d'un Acte d'engagement proposé par l'Appel de Genève. Les Actes d'engagement existent pour les mines anti-personnel, la protection des enfants, l'interdiction des violences sexuelles et l'élimination des discriminations de genre, ou encore la protection des services de santé.
- **Les règlements et codes de conduite internes** sont des mesures mises en place par les groupes armés pour contrôler le comportement de leurs membres et, dans certains cas, de la population civile vivant dans les zones sous leur contrôle. Ils peuvent refléter ou faire expressément référence au DIH.
- **Les accords bilatéraux ou multilatéraux** sont des accords formels entre les parties à un conflit. Ces accords peuvent prendre la forme d'accords spéciaux tels que prévus par l'article 3 commun aux Conventions de Genève, ou encore de traités de paix ou de cessez-le-feu. Dans certaines situations, des accords humanitaires ont été passés avec des agences de l'ONU ou avec des organisations non gouvernementales (ONG).

Ces accords ne doivent pas être écartés en raison du fait qu'ils émanent de groupes armés. Au contraire, ils doivent faire l'objet d'un examen attentif. Par exemple, les groupes armés signataires des Actes d'engagement ont pris de nombreuses mesures concrètes pour les mettre en œuvre, comme la destruction de leurs stocks de mines anti-personnel ou la démobilisation d'enfants soldats. Dans la grande majorité des cas, aucune violation n'a été à déplorer. Ces accords ont également servi d'exemple positif pour les autres parties au conflit, qu'il s'agisse d'États ou d'autres groupes armés.

3. Conclusion

L'expérience de l'Appel de Genève suggère que les groupes armés peuvent effectivement se conformer au DIH, du moins à certaines normes. De nombreux facteurs sont à l'origine du comportement de ces groupes et de leurs variations, et il est, dès lors, difficile de tirer des généralités. Pascal Bongard conclut sa présentation en affirmant qu'il est indispensable de comprendre ces différents facteurs si l'on souhaite promouvoir un meilleur respect du DIH par les groupes armés non étatiques.

Introduction

Compliance by non-State armed groups with International Humanitarian Law (IHL) is a central challenge in today's armed conflicts. Increasingly, humanitarian and human rights organisations have to grapple with how to influence their behaviour on the battlefield. This contribution draws from the experience of Geneva Call, a non-governmental organisation (NGO) that has been engaging armed groups to enhance their compliance with IHL over the past 20 years.

Before addressing the actual question I was tasked with, let me remind you of some basic facts to put the topic into perspective. First, non-State armed groups are involved in most armed conflicts today, either fighting government forces or other armed groups. According to the *War Report*¹, of 69 armed conflicts occurring worldwide in 2018, 51 were non-international armed conflicts (NIACs). These conflicts often involve third States, either directly or indirectly supporting the host State or armed groups. Second, armed groups differ greatly in terms of size, goals, organisational structure, *modus operandi*, resources, degree of territorial control, support base, etc. They include a variety of stakeholders, including rebel movements, paramilitary groups, self-defence militia, armed gangs as well as *de facto* authorities and non-recognised States, which have established a civilian administration and exercise effective authority over some portions of the national State's territory. Their interest and capacity to comply with IHL may equally differ. Third, it is a commonly held view that armed groups are by definition the worst violators of international law. There is however no fixed pattern. In some conflicts, certain armed groups are responsible for most violations. This is illustrated by the Revolutionary United Front (RUF), which, according to the Truth and Reconciliation Commission of Sierra Leone, perpetrated the majority of abuses during the conflict.² But in other situations, most

1 Annyssa Bellal (ed.), *The War Report, Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights, 2019, p. 19.

2 See Olivier Bangerter, 'Disseminating and implementing international humanitarian law within organized armed groups. Measures armed groups can take to improve respect for international humanitarian law', in: *International Institute of Humanitarian Law, Non-State Actors and International Humanitarian Law. Organized armed groups: a challenge for the 21st century, 32nd Round Table on Current Issues of International Humanitarian Law*, Sanremo, 11-13 September 2009, Franco Angeli, pp. 190-191.

violations were committed by State forces. A striking documented example is the case of Guatemala, where post-conflict investigations credited State forces with 93% of abuses.³ This is also true of armed groups in the same conflict. In Peru for instance, the Truth and Reconciliation Commission found that the Shining Path was responsible for 54% of civilian deaths during the conflict while the Movimiento Revolucionario Túpac Amaru (MRTA) accounted for only 1.5%.⁴ Compliance with IHL thus does not depend on the nature of a party to a conflict. While certain armed groups have, at a given moment, breached some norms of international law, others have shown some degree of commitment to respecting IHL. This contribution looks at some of these variations in behaviour and the factors behind them, as witnessed by Geneva Call.

Challenges to compliance

The reasons for the lack of compliance with IHL by armed groups are known to be diverse. A number of groups may reject IHL, or some of its rules, for ideological, military or other strategic reasons. For example, some groups have goals that constitute grave breaches of IHL such as the forced removal of an ethnic group from a given territory⁵, ethnic cleansing or genocide.⁶ Other groups tend to engage in deliberate attacks against some categories of civilians they consider as legitimate targets (such as ‘settlers’ in occupied territory, informers, certain State officials or collaborators, etc.)⁷ In other cases, non-compliance with IHL could be more linked to military tactics, for example child recruitment to compensate losses of fighters, or indiscriminate use of anti-personnel (AP) mines for self-defence. Sometimes, armed groups may simply lack the knowledge or understanding of the law. For example, all the armed groups Geneva Call interviewed in the context of a recent study on cultural heritage⁸ admitted to lacking knowledge of the legal framework, having at best a basic awareness of the general rules of IHL, such as the principle of distinction. Most groups had never heard about the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the landmark treaty on the subject, nor the Blue Shield emblem, which was devised to signal protected cultural property. Several military commanders interviewed shared doubts as

3 *Ibid.*

4 *Ibid.*

5 Carla Ruta, Heloise Ruaudel and Pascal Bongard, ‘The Guiding Principles and armed non-State actors’, in: *Forced Migration Review, Twenty Years of the Guiding Principles on Internal Displacement*, No 59, October 2018, p. 39.

6 Olivier Bangerter, *op. cit.*, p. 191.

7 Marina Mattiolo, Stuart Caslen and Alice Priddy, *Reactions to Norms Armed Groups and the Protection of Civilians*, Geneva Academy of International Humanitarian Law and Human Rights, 2014, pp. 13-14 and 32.

See also Ben Saul, ‘Improving Respect for International Humanitarian Law by Non-State Armed Groups’, in: *Humanitarian Engagement with Non-State Armed Groups*, Chatham House, 2016, p. 45.

8 Marina Lostal, Kristin Hausler and Pascal Bongard, *Culture under Fire: Armed non-State actors and Cultural Heritage in Wartime*, Geneva Call, 2018.

to what qualified as cultural heritage and the circumstances under which they could use cultural sites for military purposes or target them if used by enemy forces. Geneva Call witnessed similar lack of knowledge on other norms such as the rules governing humanitarian access, for instance.⁹ This ignorance of the law significantly impedes efforts to increase compliance with IHL and regulate the behaviour of the parties to the conflicts.¹⁰ Beyond the legal framework, many armed groups are also not familiar with processes or mechanisms that are highly relevant for them, such as the UN Monitoring and Reporting Mechanism (MRM) or the Guidelines for Protecting Schools and Universities from Military Use.¹¹

Another challenge to compliance is the lack of incentives to respect the norms. A case in point is the prisoner of war (POW) status. Under the law of non-international armed conflicts, members of armed groups are not entitled to POW status and consequently they may be punished for their mere participation in hostilities, even if they comply with IHL.¹² This leaves little incentive for armed groups to abide by IHL in practice. Some armed groups have also criticised the fact that some treaties impose more stringent standards on them than on States, for example the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC) regarding the age for voluntary recruitment (18 for armed groups compared to 16 for State armed forces).¹³ More generally, as they are not entitled to become parties to international treaties and are precluded from participating in norm-making processes, armed groups may lack ownership over international norms and sometimes argue that they do not feel bound to abide by rules that they have neither put forward nor formally adhered to.¹⁴

9 See Ashley Jackson, *In Their Words: Perceptions of Armed non-State Actors on Humanitarian Action*, Geneva Call, 2016.

10 Michelle Mack (with contributions by Jelena Pejic), *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, 2007, p. 12.

11 Geneva Call, *Armed non-State Actors share their Policies and Practice with regards to Education in Armed Conflict*, Geneva Call, 2017, p. 13.

12 Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law', in: *Journal of International Humanitarian Legal Studies*, 2010, Vol. 1, No. 1, p. 23.

13 Geneva Call, *Armed non-State actors speak about child protection in armed conflict. Meeting report*, Geneva Call, 2017, p. 5. See for concrete examples Elisabeth Decrey Warner, Jonathan Somer and Pascal Bongard: 'Armed Non-State Actors and Humanitarian Norms: Lessons from the Geneva Call Experience', in: Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, University of British Columbia Press, Vancouver, 2012, p. 81.

14 Annyssa Bellal and Stuart Maslen, *Rules for Engagement. Protecting Civilians through Dialogue with Armed non-State Actors*, Geneva Academy of International Humanitarian Law and Human Rights, 2011, p. 6. See also

Sandesh Sivakumaran, 'The ownership of international humanitarian law: non-State armed groups and the formation and enforcement of the rules', in: Benjamin Perrin (ed.), *ibid*, pp. 88-91.

Finally, in some contexts, armed groups may lack the capacity or resources to abide by the requirements of certain IHL rules, such as, for instance, the administration of justice and fair trial guarantees.¹⁵ The case of the Kurdish-led local administration in Syria and affiliated Syrian Democratic Forces (SDF) is telling in this regard. The SDF detain thousands of suspected members of the Islamic State group, including foreign fighters whose home countries are reluctant to take them back. They have admitted that they are unable to maintain prisons, investigate the crimes they are implicated in and prosecute them in accordance with international standards without external support. Human Rights Watch expressed its concerns by affirming that those detainees would face unfair procedures: 'It shall be noted that we are talking about a rather rudimentary judicial system: there is no right to defence nor court of appeals'.¹⁶ Similar criticisms have been presented with respect to the lack of trained prosecutors and judges.

Commitments to comply with IHL

Over the past decades, a wealth of armed groups have expressed their adherence to IHL. They have done so through various means, which include unilateral declarations, internal regulations and bilateral or multilateral agreements.

- **Unilateral declarations or statements** are public undertakings made by armed groups in which they pledge to abide by IHL in general or specific rules.¹⁷ They include unilateral declarations made under Article 96(3) of Additional Protocol I to undertake to apply the Geneva Conventions and Additional Protocol I.¹⁸ The Geneva Call's *Deed of Commitment* is a standardised unilateral declaration, which allows armed groups to undertake to abide by specific humanitarian norms. To date, such documents have been developed on four themes: the ban on anti-personnel (AP) mines, the protection of children, the prohibition of sexual violence and elimination of gender discrimination, and the protection of health-care in armed conflict.¹⁹ All *Deeds of Commitment* reflect international standards. They are

15 See Geneva Call, *Administration of Justice by Armed non-State Actors. Report from the 2017 Garance Talks*, Geneva Call, 2018, pp. 7-9.

16 *Ibid*, p. 6 .

17 See Michelle Mack, *op. cit.* note 10, p. 20 and Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, pp. 113-124.

18 Such declarations can be made only by an authority representing a people involved in a fight falling under Article 1(4) Additional Protocol I, i.e. an armed conflict in which peoples are fighting against colonial domination, alien occupation or racist regimes. So far only the declaration made by the Polisario Front regarding its conflict with Morocco over Western Sahara has been accepted by the depositary of the Geneva Conventions, the Swiss Federal Council. See Katharin Fortin, *Unilateral Declaration by Polisario under API accepted by Swiss Federal Council*, available at: <<https://armedgroups-internationalallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>>.

19 See <www.genevacall.org>.

signed by the leadership of the armed group and countersigned by Geneva Call and the Canton of Geneva, which serves as custodian.

- **Internal regulations** are measures put in place by armed groups to control their members' behaviour and in some cases the civilian population living in areas under their control. They include oaths of allegiance, codes of conduct, command orders, military manuals, decrees, legislations, penal or disciplinary codes. They often reflect rules consistent with international law and sometimes expressly refer to IHL or human rights.²⁰
- **Bilateral or multilateral agreements** are formal agreements concluded between parties to a conflict. Among them are special agreements pertaining to common Article 3 of the Geneva Conventions, which encourages parties to an armed conflict to bring into force, by means of special agreements, all or part of the Geneva Conventions.²¹ Reference to IHL have also been included in a number of peace or ceasefire accords. Such accords frequently contain commitments by the parties to allow humanitarian access, facilitate mine clearance and/or release detainees.²² In some contexts, armed groups have signed humanitarian agreements with UN agencies and/or NGOs, such as Action Plans to end the recruitment and use of children.²³

Concrete examples of all the above types of commitments are available on Geneva Call's database www.theirwords.org.²⁴ Such commitments should not be automatically dismissed out of hand because they emanate from armed groups. Their actual implementation should be examined carefully. For example, the overall record of compliance with the *Deeds of Commitment* has been quite strong. Signatory groups have taken concrete measures to enforce their commitments, such as the destruction of their stockpiled AP mines and the demobilisation of child soldiers. They have also provided or facilitated aid and care activities such as health-care, education, and humanitarian mine action in areas under their control. There have been

20 For a thorough analysis of internal regulations and codes of conduct of armed groups, see Olivier Bangerter, *Internal Control. Codes of Conduct within Insurgent Armed Groups*, Small Arms Survey, 2012. See also Michelle Mack, *op. cit.*, pp. 22-23 and Sandesh Sivakumaran, *op. cit.*, pp. 133-140.

21 On special agreements, see Ezequiel Heffes and Marcos D. Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime' in: *International Review of the Red Cross*, Vol. 96, number 885/886, 2014, pp. 1195-1224. See also Michelle Mack, *op. cit.*, pp. 16-18 and Sandesh Sivakumaran, *op. cit.*, pp. 124-133.

22 See Michelle Mack, *op. cit.*, pp. 24-26.

23 See <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/>.

24 The database contains more 500 documents made by 230 armed groups worldwide. Documents include unilateral declarations, statements, codes of conduct, command orders, internal penal codes, legislations, decrees, *Deeds of Commitment*, action plans, memorandums of understanding, special agreements, peace and ceasefire agreements, etc. As part of a research project on the practice and interpretation of IHL by armed groups, Geneva Call, together with the Geneva Academy of International Humanitarian Law and Human Rights, is currently analysing these documents.

compliance issues with the *Deeds of Commitment's* prohibitions but, except in a few cases, no conclusive evidence of violations has been found. Nearly all signatory groups have cooperated with Geneva Call in the monitoring of their obligations, including through field verification visits.²⁵ Moreover, humanitarian commitments made by armed groups may positively influence the policies of both State and other armed groups. A case in point is Sudan, where the signing of the *Deed of Commitment* banning AP mines in 2001 by the Sudan People's Liberation Movement/Army (SPLM/A) was instrumental in Khartoum's decision to ratify the AP Mine Ban Treaty two years later.²⁶ Armed groups may also influence one another. A number of signatories have introduced Geneva Call to other groups and promoted their adherence to humanitarian norms. Interestingly, armed groups may also maintain their commitment while they come to power. For example, when South Sudan became a new State, and the SPLM/A its ruling government, the first humanitarian treaty to which it joined was the AP Mine Ban Treaty.²⁷

Conclusion

Geneva Call's experience suggests that armed groups can indeed comply with IHL, at least with some norms. Armed groups' behaviour can be linked to several factors, such as ideology and aims, leadership, degree of organisation and control over members, relationships with communities and constituencies, etc. There are various theories that seek to explain why some armed groups comply and others do not.²⁸ I think it is difficult to make generalisations: armed groups are not uniform nor monolithic, their sources of influence and attitude towards IHL may change over time, depending on the conflict situation, the enemy's attitude, the group's internal dynamics, etc. In a single conflict, we may see examples of compliance as well as violations. As a recent study from the ICRC stresses, 'there is considerable variation in the patterns of violence and restraint between and within armed organizations.'²⁹ It is thus important to understand these variations, why restraint happens in one context but not in another. This would help us to better promote compliance with IHL by armed groups in armed conflict situations.

25 Pascal Bongard and Jonathan Somer, 'Monitoring armed non-State actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call Deed of Commitment', in: *International Review of the Red Cross*, Vol. 93, number 883, 2011, pp. 673-706.

26 Pascal Bongard, 'Engaging armed non-State actors on humanitarian norms: reflections on Geneva Call's experience' in: *Humanitarian Practice Network, Humanitarian Negotiations*, number 58, July 2013, p. 11. According to the former Director of the UN Mine Action Service: 'it is clear from conversation with senior officials of the Government that they would not have felt able to ratify the Treaty if the SPLM/ A had not already made a formal commitment to observe its provisions in the territory under its control'.

27 See <<https://genevacall.org/south-sudan-geneva-call-deed-commitment-ottawa-convention/>>.

28 See for example Jo Hyeran, *Compliant Rebels. Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015.

29 ICRC, *The Roots of Restraint in War*, ICRC, 2018, p. 10.

COMPLIANCE WITH THE LAW IN CONTEMPORARY NIACS: THE CONTRIBUTION OF THE ECHR

Peter Kempees

ECHR

Résumé

La présentation de Peter Kempees aborde la question de la contribution de la Cour européenne des droits de l'homme (CEurDH) au respect du Droit international humanitaire (DIH) dans les conflits armés non internationaux (CANI).

Peter Kempees a commencé par souligner que la CEurDH n'a identifié qu'une seule fois une situation comme un CANI : l'insurrection de Budapest en 1956. Les États ne sont généralement pas enclins à reconnaître l'existence d'un CANI sur leur territoire, même lorsque les faits leur donnent tort. Il a également fait remarquer que la Convention européenne des droits de l'homme (CEDH) s'adresse aux États, et non aux groupes armés. Finalement, Peter Kempees a expliqué que les États ne dérogent généralement pas à la CEDH en application de l'article 15. Bien qu'ils puissent déroger à la CEDH en raison d'autres motifs que la guerre, ils ne font généralement pas usage de l'article 15 et restent tenus de respecter les standards imposés par les droits de l'homme.

1. Article 2

La CEDH n'interdit pas le recours à la force en toutes circonstances : elle prévoit expressément le recours à la force létale lorsque cela est absolument nécessaire à des fins de maintien de l'ordre. L'usage de la force doit être strictement proportionnel au but poursuivi, et il doit faire l'objet d'un encadrement légal et administratif afin de s'assurer que des garanties efficaces contre l'arbitraire et l'abus de la force existent. La Cour considère ces exigences comme faisant partie intégrante du « devoir primaire de l'État de garantir le droit à la vie ». Cependant, comme de nombreux cas de jurisprudence l'ont illustré, il est souvent difficile d'établir les faits pour évaluer ces critères. Il existe également une obligation positive de protéger le droit à la vie des personnes sous sa juridiction.

L'obligation de protéger le droit à la vie implique également qu'il devrait y avoir une forme d'enquête officielle lorsque des personnes ont été tuées du fait de l'utilisation de la force. Ces enquêtes doivent pouvoir évaluer si le cadre législatif et administratif mis en place pour protéger le droit à la vie est correctement appliqué et assurer que toute violation de ce droit soit réprimée

et sanctionnée. Les violations de l'article 2 en situation de CANI résultent généralement de cette obligation procédurale. L'enquête doit être effective, ce qui signifie qu'elle doit être :

- adéquate, elle doit pouvoir conduire à l'établissement des faits et, le cas échéant, à l'identification et à la sanction des responsables ;
- indépendante de toute personne impliquée ou susceptible d'être impliquée dans les événements ;
- accessible à la famille de la victime et au public.

2. Article 3

L'article 3 de la CEDH interdit la torture et autres formes de traitements inhumains ou dégradants. Tout recours à la force qui n'a pas été rendu strictement nécessaire par le comportement de la victime et qui porte atteinte à sa dignité humaine constitue en principe une atteinte au droit énoncé à l'article 3 de la CEDH. Le fait que la personne refuse de délivrer des informations ou que des vies soient en jeu ne changent en rien l'interdiction.

3. Article 5

Toute personne arrêtée et détenue devrait normalement avoir accès à sa famille ou à un autre réseau de soutien. Il devrait y avoir une supervision par un juge ou un fonctionnaire qualifié qui a le pouvoir d'ordonner la mise en liberté. L'accès à un juge, à un médecin ou à un avocat contribue à prévenir toute forme de torture.

4. Article 8

Peter Kempees a également mentionné l'article 8, qui garantit à toute personne le droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance. Ce droit est particulièrement pertinent pour les personnes détenues. Ces personnes continuent de jouir de tous les droits et libertés fondamentaux, à l'exception du droit à la liberté. Les détenus gardent donc le droit d'avoir des contacts avec le monde extérieur et des visites familiales, sauf en cas de restriction justifiée conformément à la CEDH. Le respect de la vie privée et familiale signifie également que le gouvernement doit normalement remettre le corps d'un insurgé qui a été tué au plus proche parent pour être enterré.

5. Jurisdiction

L'article 1 stipule que tous les États reconnaissent à toute personne relevant de leur juridiction les droits et libertés prévues par la CEDH. Le concept de juridiction est avant tout territorial.

Comme le confirme l'arrêt Al-Skeini, un État peut également exercer sa juridiction en dehors de son territoire dans deux situations : premièrement à travers l'autorité et le contrôle d'un de ses agents, par exemple un soldat détenant un individu ou faisant usage de son arme ; deuxièmement lorsque, à travers ses propres forces ou une administration subordonnée, il exerce un contrôle effectif sur une région en dehors de son territoire national, suite à une action militaire. Cette dernière situation peut correspondre à une occupation belligérante, mais peut également être pertinente en cas de mission de maintien de la paix.

6. Conclusion

Bien que la CEurDH n'ait pas vraiment été confrontée à des situations de CANI, elle nous a prodigué certains enseignements.

Premièrement, les États peuvent déroger à la CEDH, conformément à l'article 15. Cela a pour effet de soumettre le conflit uniquement aux règles du DIH. Les standards de la CEDH ne s'appliquent dès lors plus, à l'exception des droits ne pouvant pas faire l'objet d'une dérogation.

Deuxièmement, en l'absence de dérogation formelle, l'ensemble de la CEDH et des règles en matière de maintien de l'ordre public restent applicables. Bien que la CEurDH puisse parfois faire référence à des concepts propres au DIH dans ses jugements, cela ne signifie pas que la Cour applique le DIH.

There are two remarks to be made before I begin.

The first remark is that the European Court of Human Rights only very rarely identifies a situation as a non-international armed conflict (NIAC). States do not admit that a disturbance on their territory amounts to a NIAC, most likely because that would constitute an admission that they have lost control over part of their territory to an armed group under a responsible command. It is more convenient for governments to refer to their opponents as a bunch of thugs and terrorists. As it is, only one NIAC has been recognised in the case law of the Court so far: that was the Hungarian uprising in 1956.¹

That is not to say that NIACs do not occur. The Partiya Karkerên Kurdistanê (PKK) insurgency in south-east Turkey and the fighting going on in Chechnya are arguably NIACs. In Chechnya, for example, the Russian air force has used ground attack aircraft to bomb targets from the air. The same might be said about the separatist fighting in eastern Ukraine, where the insur-

1 *Korbely v. Hungary* [GC], No. 9174/02, ECHR 2008.

gents are said to be armed with tanks, artillery and surface-to-air missiles and have managed to gain control over two provinces – but the Ukrainian government still says it is engaged in an antiterrorism operation.² And of course it is possible that a peacekeeping mission abroad may turn into involvement in a NIAC on foreign territory if the fighting gets out of hand. It was suggested by the applicant in *Hassan v. UK*³ that this was the case in Iraq, but the Court preferred to follow the Government and called it an international armed conflict (IAC) instead.

The second remark is that the European Convention on Human Rights (ECHR) is addressed to States. It does not directly impose obligations on non-State stakeholders. How non-State armed groups can be bound by Human Rights Law is an academic question.⁴ The most effective solution in practical terms would probably be to persuade them to abide by human rights of their own accord but as far as I know there is no organisation like Geneva Call that propagates Human Rights Law.

As it is, insurgents tend not to play by the rules: the PKK in Turkey has 30,000 deaths to answer for⁵ and we all remember the hostage-taking by Chechen separatists in the *Dubrovka* theatre in Moscow⁶ and the school in Beslan.⁷

States tend not to derogate under Article 15 of the Convention in respect of NIACs. There have been only two examples to date. The first is Albania, which derogated in 1997 during the pyramid scheme crisis when it spun out of control, but that has not given rise to any case law of the Court. The second is Ukraine, which has a derogation in place in respect of eastern Ukraine but, as I mentioned, does not call it a NIAC; there is an interstate case pending between Ukraine and Russia,⁸ which suggests an IAC rather than a NIAC. And of course there is no judgment yet.

2 Derogation contained in a *Note verbale* from the Permanent Representation of Ukraine, dated 5 June 2015, registered at the Secretariat General on 9 June 2015, accessible on the web site of the Council of Europe Treaty Office.

3 *Hassan v. the United Kingdom* [GC], No. 29750/09, ECHR 2014.

4 On which, see, for example, Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002; Katharine Fortin, *the Accountability of Armed Groups under Human Rights Law*, diss. Utrecht 2015; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Bloomsbury, 2016; Nicolás Carillo-Santarelli, *Direct International Human Rights Obligations of Non-State Actors: A Legal and Ethical Necessity*, Wolf Legal Publishers, 2017.

5 *Öcalan v. Turkey (No. 2)*, Nos. 24069/03 and 3 others, 18 March 2014.

6 *Finogenov and Others v. Russia*, Nos. 18299/03 and 27311/03, ECHR 2011 (extracts).

7 *Tagayeva and Others v. Russia*, Nos. 26562/07 and 6 others, 13 April 2017.

8 *Ukraine v. Russia (re Eastern Ukraine)*, No. 8019/16.

I would suggest that it would be open to States to derogate in respect of a NIAC. If they do not want to acknowledge the existence of a NIAC, they can call the situation an ‘emergency threatening the life of the nation’ rather than a ‘war’. But since they do not, they remain bound by ordinary peacetime human rights standards, the same that apply to ordinary law enforcement.⁹

I will now look at some relevant articles of the ECHR.

Article 2

The European Convention on Human Rights does not prevent the use of force in all circumstances: it makes express provision for the use of lethal force where such is absolutely necessary for law enforcement purposes.¹⁰ On the whole the Court will try to avoid second-guessing the actions of the law enforcement agents on the spot as long as there is a proper regulatory framework in place, the planning and control of the operation are designed to avoid the use of lethal force, the actual decision to use force is reasonable and the force used is not disproportionate. This is apparent from *McCann and Others*, the case of the killing in Gibraltar of Provisional Irish Republican Army (IRA) operatives by the British Special Air Service (SAS),¹¹ and confirmed by the multitude of judgments and decisions in which the Court had to consider the use of lethal force by police. The Court will normally avoid second-guessing the actions of domestic law enforcement or service personnel and is prepared to make allowances for mistakes made in good faith.¹² It is comparatively rare for the Court to find a violation on account of the actual use of force in a genuine violent confrontation unless there is evidence of bad faith or of serious deficiencies in planning and control.¹³

9 Among other authorities, *Isayeva and Others v. Russia*, Nos. 57947/00 and 2 others, 24 February 2005.

10 Article 2 paragraph 2 of the Convention.

11 *McCann and Others v. the United Kingdom* [GC], No. 18984/91, §§ 192-193, Series A, No. 324.

12 See, for example, *McCann and Others*, paragraph 200; *Bubbins v. the United Kingdom*, No. 50196/99, paragraph 139, ECHR 2005-II; and *Giuliani and Gaggio v. Italy* [GC], No. 23458/02, paragraphs 178-179, ECHR 2011

13 See, for example, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, paragraph 288, ECHR 2007-II; *Mulder-van Schalkwijk v. the Netherlands* (dec.), No. 26814/09, 7 June 2011; *Finogenov and Others v. Russia*, Nos. 18299/03 27311/03. For examples of violation, see *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, ECHR 2005-VII, and *Tagayeva and Others v. Russia*, Nos. 26562/07 14755/08 49339/08 49380/08 51313/08 21294/11 37096/11, 13 April 2017. See generally Clare Ovey, ‘Application of the ECHR during International Armed Conflicts’, in: *The UK and European Human Rights: A Strained Relationship?* (Katja S Ziegler, Elizabeth Wicks and Loveday Hodson, eds.), Hart Publishing, 2015, pp. 225-245 at pp. 233-237.

The test, as required by the words ‘absolutely necessary’, is one of strict proportionality to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.¹⁴ It is therefore required that there be an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards. In line with the principle of strict proportionality, the national legal framework must make recourse to firearms dependent on a careful assessment of the situation. Furthermore, the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accidents. The Court sees these requirements as part and parcel of the ‘primary duty on the State to secure the right to life’.¹⁵

It is often difficult for the Court in Strasbourg to establish the facts when things go wrong. There have been several cases coming out of south-east Turkey, such as *Kaya* and *Ergi*, in which the applicants claim that people were deliberately killed by security forces but which in reality were probably about unfortunate non-combatants caught in crossfire.¹⁶ But we also have cases in which the security forces really did do the wrong thing, as when a purported ‘warning shot’ hit the victim in the neck and killed him.¹⁷

From Russia we have the *Tagayeva and Others* case,¹⁸ which came out of the Beslan hostage-taking. In this case there were serious problems with planning and control. Once the Chechen war band was inside the school and had taken everybody hostage, it was not clear who was responsible for what and information did not reach the people who needed it. Even the hostage takers’ demands and the number of hostages was not clear to the people on the spot. The result was that there were no effective negotiations and it took several days for effective action to be taken. The Court has had to find that the number of victims was a consequence of that. By the time the decision was taken to attack, the terrorists had wired up the whole school with explosives. Eventually the attackers went in with overwhelming force, using tanks, grenade launchers and thermobaric weapons. This also caused deaths among the hostages. Although the Court finds a violation on this point, it is not about second-guessing difficult operational decisions that have had to be taken by a field commander, it is about the government forces painting themselves into a corner by poor planning and control.

14 See *McCann and Others*; more recently and among many other examples, *Giuliani and Gaggio v. Italy* (GC), No. 23458/02, ECHR 2011.

15 *Giuliani and Gaggio*, *ibid.*

16 *Kaya v. Turkey*, 19 February 1998, Reports of Judgments and Decisions 1998 I; *Ergi v. Turkey*, 28 July 1998, Reports of Judgments and Decisions 1998 IV.

17 *Oğur v. Turkey* [GC], No. 21594/93, ECHR 1999 III

18 *Tagayeva*, *op. cit.*

There is also a positive obligation on the State to safeguard the lives of persons within its jurisdiction. Again, this was developed in an ordinary policing context¹⁹ but it also applies in what we would call a non-international armed conflict (NIAC). That is another thing that went wrong in the Beslan hostage case: there was advance information that there was a Chechen war band on its way to cause trouble but no action was taken either to stop them or to protect potential targets.²⁰

Article 2 does not end there. The obligation to protect the right to life requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State (or by anyone else for that matter).²¹ The State must therefore ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.²² Moreover, where there has been a use of force by State agents, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances. An effective enquiry is one that is:²³

- adequate: that is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible. This means decent police work: all reasonable efforts must be made to collect the evidence needed, and the evidence must be properly assessed. In particular, the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements;
- independent: that is, from anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence;
- accessible: that is, to the victim’s family and to public scrutiny. This does not mean that the victim’s family and the public should have access to the investigation file whenever

19 *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998VIII

20 *Tagayeva, op. cit.*

21 *McCann and Others, op. cit.*

22 *Armani da Silva v. the United Kingdom* (GC), No. 5878/08, § 230, ECHR 2016.

23 Useful summaries are given in *Mustafa Tunç and Fecire Tunç v. Turkey*, No. 24014/05 25 June 2013, and *Armani da Silva v. the United Kingdom* (GC), No. 5878/08, ECHR 2016. See generally D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd edition, OUP, 2014, pp. 214-218; Clare Ovey, ‘Application of the ECHR during International Armed Conflicts’, in: (Katja S Ziegler, Elizabeth Wicks and Loveday Hodson, eds.), *The UK and European Human Rights: A Strained Relationship?*, Hart Publishing, 2015, pp. 225-245 at pp. 237-239; and Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, C., *Jacobs, White, and Ovey, The European Convention on Human Rights*, 7th edition, OUP, 2017, pp. 168-177.

they like, but it does mean that there should be a procedure for them to be properly informed and for their interests to be properly protected.

There is a considerable amount of court case law on this subject, again, most of it developed in the context of ordinary policing, but not all. Experience shows that when a violation of Article 2 has to be found in what we might call a NIAC the problem, more often than not, is with the investigation that followed the use of lethal force. An example, again, is the *Beslan* hostage case, in which the cause of death of a third of the victims could not be established – again, because of poor preparation – so that it was not known whether they had been murdered by the hostage takers or caught in the crossfire. Worse, perhaps, there was not even a record kept of the number and type of weapons used and how they were used.²⁴

An example worth mentioning of compliance with investigative obligations under Article 2 is the case of *Mustafić-Mujić and Others*. The case concerned attempts by surviving kin of some of the victims of the Srebrenica massacre to have the leadership of the Dutch peacekeeping force prosecuted as alleged accomplices of the Bosnian Serb perpetrators. The Dutch court refused to order any prosecution, finding the facts to be such that convictions were highly unlikely to result.

In dismissing the applicants' complaints against this refusal, the Court found that it was 'not possible for the Court to find that the investigations [had been] ineffective or inadequate'. The information available included a report on the Srebrenica massacre by the Secretary General of the United Nations, several International Criminal Tribunal for the former Yugoslavia (ICTY) judgments convicting Bosnian Serb accused, a report of the debriefing of all returning Dutch military personnel who had lived through the events, a parliamentary enquiry, an extensive and detailed report by an independent domestic body, the NIOD Institute for War, Holocaust and Genocide Studies, running to thousands of pages; and evidence produced by the applicants themselves in parallel civil proceedings.²⁵ This decision illustrates that an investigation satisfying the procedural requirements of Article 2 does not have to be carried out under the sole responsibility of the authorities of the Convention party concerned: it is acceptable to rely on information obtained by a competent international body. Nor does it have to be specifically criminal in nature, as long as it is independent and thorough and yields the necessary facts.

²⁴ *Tagayeva, op. cit.*

²⁵ *Mustafić-Mujić and Others v. the Netherlands* (dec.), No. 49037/15, 30 August 2016.

Article 3

Article 3 of the Convention, which in the present redaction of the Convention bears the title 'Prohibition of torture', is in actual fact wider in scope than that: it forbids torture or inhuman or degrading treatment or punishment. The Court's classical formulation, frequently repeated, is that any recourse to physical force which has not been made strictly necessary by the victim's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.²⁶

The fact that the victim is in possession of information that he or she refuses to disclose does not constitute 'conduct' justifying the use or threat of force. In *Gäfgen* the Court reinforced the absolute nature of Article 3 to the point of finding that it prevented the use of torture even when human life was at stake.²⁷ The case was one in which police subjected a suspected kidnapper to treatment contrary to that provision in the sincere but mistaken belief that his victim, a young child, was still alive and forcing him to divulge the child's whereabouts might save the child's life. On occasion the Court has held that a confession or a witness statement extracted under torture cannot be used as evidence in a trial.²⁸

Article 3 imposes procedural obligations as Article 2 does. The principles are, to all intents and purposes, identical.

Article 5

For anyone arrested and detained, there should normally be access to family or some other support network. There should be supervision by a judge or a similarly qualified functionary who has the power to order release. *Habeas corpus* is basic to every civilised detention system, but supervision by a judge also helps to prevent, for example, torture. So does access to a doctor or a lawyer. Both were found lacking in *Aksoy*, the first case, in fact, in which the Court found that there had been torture as distinct from 'ordinary' inhuman or degrading treatment, and in *Çakıcı* where the unfortunate victim was arrested and disappeared without trace.²⁹

26 See, among many other authorities, *Ribitsch v. Austria*, No. 18896/91, Series A, No. 336; *Selmouni v. France* (GC), No. 25803/94, ECHR 1999-V; *El-Masri v. 'the Former Yugoslav Republic of Macedonia'* (GC), No. 39630/09, ECHR 2012; and *Bouyid v. Belgium* (GC), No. 23380/09, ECHR 2015.

27 *Gäfgen v. Germany* (GC), No. 22978/05, ECHR 2010.

28 *Harutyunyan v. Armenia*, No. 36549/03, ECHR 2007-III; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012.

29 *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Çakıcı v. Turkey* [GC], No. 23657/94, ECHR 1999IV.

These are two examples among many coming out of south-east Turkey but the same sort of thing has happened in Russian cases. I will mention *Imakayeva* and *Bitiyeva*.³⁰

Article 8

The last substantive Article of the Convention I would like to mention is Article 8, which guarantees the right to respect for private and family life, home and correspondence.

The Court has said much about the right to respect for home in the context of hostilities and belligerent occupation, all of it in connection with IACs – in Northern Cyprus, Armenia and Azerbaijan (coming out of the Nagorno-Karabakh conflict) – and no doubt there is more still to come out of the Georgia-Russia conflict. If the view is taken that the fighting in eastern Ukraine is a NIAC then there will be case law coming out of that in the future. I mention all this for the sake of completeness but of course this is not the time or the place to dwell on any of it.

‘Private and family life’ may be relevant to contacts with prisoners. It is standing case law that prisoners continue to enjoy all fundamental rights and freedoms save for the right to liberty; that means, including contacts with the outside world and family visits. There may of course be restrictions imposed on these but they must be justified in the normal way in terms of Article 8 paragraph 2 of the Convention – prescribed by law, legitimate aim, and necessary in a democratic society for the legitimate aim in question. I can mention a Russian case in which all of this is to be found, *Khoroshenko*,³¹ which was about a life sentence convict whose contacts were subject to extreme automatic limitations; but the general case law is in my opinion capable of being transposed to prisoners taken in a NIAC.

‘Respect for private and family life’ also means that the Government should normally hand back the body of an insurgent who has been killed to the next-of-kin for burial. The Court has had occasion to find a violation on this point with respect to the body of the Chechen leader *Aslan Maskhadov*.³²

The concept of jurisdiction

I will now take you briefly through what is really the first question, namely the extent to which the European Convention applies.

30 *Imakayeva v. Russia*, No. 7615/02, ECHR 2006XIII (extracts); *Bitiyeva and Others v. Russia*, No. 36156/04, 23 April 2009

31 *Khoroshenko v. Russia* [GC], No. 41418/04, ECHR 2015.

32 *Sabanchiyeva and Others v. Russia*, No. 38450/05, ECHR 2013 (extracts); *Maskhadova and Others v. Russia*, No. 18071/05, 6 June 2013.

Article 1 of the Convention makes the contracting States promise to secure the rights and freedoms to ‘everyone within their jurisdiction’.

When the Convention was being negotiated back in 1949 and 1950, the first draft held the promise of the contracting States to guarantee human rights to their nationals; then to everyone ‘domiciled’ in their territory; later this was widened to ‘residents’, later still ‘all persons within the territory’. The formulation ‘within their jurisdiction’ was copied from an early draft of an International Covenant on Human Rights. It was accepted apparently without discussion.³³

What precisely the expression meant was not defined. It was left to the Court to construe it.

The Court has tried to construe ‘jurisdiction’ in accordance with general international law. That means, obviously, that the concept is primarily territorial.³⁴ It is clear that the United Kingdom exercises jurisdiction in Northern Ireland, Russia in Chechnya, and Turkey in its south-east where the PKK is active. Those are States acting within their own territory and a problem of jurisdiction does not arise.

But it is of course conceivable that a State party to the Convention may become a party to a NIAC outside its own territory, perhaps through participating in a peacekeeping force, perhaps by active intervention on the side of one of the parties.

There is no case law of the Court on this kind of situation. At the moment, we have Ukraine accusing Russia of interfering in Ukrainian territory, which Russia denies.

The state of the case law at this time is defined by *Al-Skeini and Others*.³⁵ The facts of *Al-Skeini* relate to the occupation of Iraq, which was recognised in another judgment as an IAC, but I think it worth mentioning nonetheless. The judgment divides the situations in which Article 1 jurisdiction can exist extraterritorially into two main categories: firstly, State agent authority and control, and secondly, effective control over an area.

A State exercises extraterritorial jurisdiction through ‘State agent authority and control’ by way of ‘acts of its authorities which produce effects outside its own territory’. That can mean keeping someone detained, but it can also mean something as basic as a soldier aiming a rifle at someone. Both of these happened in *Al-Skeini*.

33 Collected edition of the *Travaux Préparatoires*, Article 1, Cour (77) 9.

34 *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], No. 52207/99, ECHR 2001XII.

35 *Al-Skeini and Others v. the United Kingdom* [GC], No. 55721/07, ECHR 2011.

Article 1 jurisdiction also exists when, as a consequence of military action (which may be lawful or unlawful), a Convention State exercises effective control of an area outside that national territory. Such effective control may be exercised directly, by one's own forces, or via a subordinate administration, or even by propping up the administration in place. A situation like this may of course amount to a belligerent occupation and therefore to an IAC, but I can see the potential relevance to peacekeeping in particular.

Conclusion

It may seem unsatisfactory that the Court has not dealt with NIAC in so many words, but there are some lessons to be drawn nonetheless.

The first lesson is that States may choose to derogate from the Convention under Article 15.³⁶ We went into the detail of that yesterday. The effect is, at maximum, to subject the conflict to IHL only except in so far as the rights protected by the Convention are non-derogable. The non-derogable rights are the right to life (Article 2), except in respect of deaths 'resulting from lawful acts of war'; the prohibition of torture (Article 3); the prohibition of slavery (Article 4 paragraph 1); *nullum crimen sine lege* (Article 7); *ne bis in idem* (Article 4 of Protocol No. 7); and the prohibition of the death penalty (Protocols 6 and 13).³⁷ The choice to derogate may be an interesting one for States to make in that it may reduce the procedural burden imposed by Article 5 (detention) and Article 6 (fair trial guarantees) and – provided that the State is prepared to admit that there is a war going on rather than a mere emergency – the procedural requirement of Article 2.

The second lesson is that under Convention law as it currently stands, as long as there is no derogation under Article 15, the applicable paradigm is one of law enforcement and the Convention applies in its totality. Admittedly you may spot IHL language creeping into a judgment of the Court from time to time, for example expressions like 'targeting'³⁸ and 'civilians',³⁹ but it does not follow that the Court is applying IHL. That means that there is guidance to be found in the case law developed by the Court in relation to day-to-day policing.

36 I have written more extensively on this subject in my brief monograph *Thoughts on Article 15 of the European Convention on Human Rights*, Wolf Legal Publishers, 2017.

37 As to the prohibition of the death penalty with respect to Convention States that have not ratified one or other of Protocols 6 and 13, see *Öcalan v. Turkey* [GC], No. 46221/99, ECHR 2005IV, and *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, ECHR 2010.

38 E.g. *Akkoç v. Turkey*, Nos. 22947/93 and 22948/93, ECHR 2000X.

39 *Isayeva v. Russia*, No. 57950/00, 24 February 2005.

Q&A SESSION

At the end of the session discussion, a Q&A session allowed the audience to raise three questions.

1. Human rights obligations for non-State stakeholders

A participant raised a question about the human rights obligations for non-State stakeholders. Although the European Convention on Human Rights (ECHR) does not have a direct effect, case law exists on State responsibility for human rights violations committed by non-State armed groups on its own territory, for instance with regards to the situation in Cyprus and Moldova. The person asked Peter Kempees if he could provide some insight regarding this point.

Peter Kempees pointed out that States cannot be expected to guarantee absolute security for all at all times. However, in the case *Osman v. the United Kingdom*, the European Court of Human Rights (ECtHR) held that the United Kingdom should have taken measures to protect the life of an individual, provided it had information that the person's life was in danger. The Court also concluded a violation of the Convention in *Tagayeva and Others v. Russia* because the Russian government had not taken any measures to protect the victims. Indeed, while it had information indicating the approach of a terrorist group from Chechnya and its harmful intentions, but it had not taken any measures to protect the victims. States are expected to take reasonable actions based on reasonable information.

2. The concept of jurisdiction and the *Banković* case

On a question regarding the extraterritorial jurisdiction and the *Banković* case, Peter Kempees began by recalling that the *Banković* case concerned a NATO-led air strike against a television station in Belgrade. The strike took place during the night, in order to avoid incidental civil damage. However, collateral damage was nevertheless reported. The question of the extraterritorial jurisdiction that could have been exercised by the States involved in the strike was therefore raised. The Court concluded in this case that there was no extraterritorial jurisdiction. Peter Kempees believes that this decision is compatible with the *Al-Skeini* case, it is only a matter of jurisdiction.

He explained that the jurisdiction can be divided into two aspects. First of all, there is the general international law aspect of jurisdiction. It refers to the exercise by the State of legislative, executive and judicial power within its own territory, or lawfully outside its territory, for example, when a State grants a visa through its consulate. That is the exercise of jurisdiction by the State as a matter of law. The second aspect of the jurisdiction refers to the Article 1

of the ECHR. States party to the ECHR are required to guarantee the rights contained in the Convention for any situation falling under their jurisdiction. States have both a responsibility and a right to act. So when it comes to the extraterritorial jurisdiction, when a State acts through its authorities, for example when a soldier points a rifle at an individual, it is the assertion of the power of this State on the individual. In this sense, it is the extraterritorial exercise of the jurisdiction.

In the *Banković* case, there is no assertion of the power of the State on individuals. NATO took all possible measures to avoid collateral damage, as acknowledged by the ICTY Prosecutor's Office. It was not a question of exercising power over these individuals, NATO's action was designed precisely to avoid any exercise of their jurisdiction extraterritorially on the individuals in the television station. That is the difference with the *Al-Skeini* case. In this case, and in other cases where the Court found that a State had exercised extraterritorial jurisdiction, the victims had been directly and deliberately detained or targeted by the State. In the *Banković* case, NATO deliberately took all measures to avoid harming the victims. Peter Kempes concluded that the mere fact of being a victim of the actions of a State party to the ECHR does not imply *de facto* that the State has violated the ECHR.

3. The indicators to assess compliance with IHL

One audience member welcomed the conditioning of support for compliance with International Humanitarian Law (IHL). However, she believes that it is necessary to go beyond this stage and push further. Although these conditions are increasingly being implemented, there are still no indicators to assess whether the supported party to the conflict is actually complying with IHL. This person took part in an exercise at the World Humanitarian Summit that aimed to establish indicators to assess compliance with IHL by States party to a conflict. The two indicators considered were the voluntary funding for the International Criminal Court (ICC) and the number of civilian casualties resulting from the conflict. It seemed very clear to her that these indicators were not relevant for assessing compliance with IHL by the parties to the conflict. She asked Pascal Bongard and Thomas de Saint Maurice for their opinions on the development of such indicators to guide the States that condition their support to a party to the conflict to compliance with IHL.

Thomas de Saint Maurice shared the participant's opinion that it is essential to determine indicators to assess compliance with IHL. Within the armed forces, such evaluation mechanisms often exist, either through monitoring, reporting or after action review procedures. However, the reliability of these mechanisms is questionable. Therefore, such mechanisms will inevitably be even less reliable when it comes to assessing compliance by another armed force that is being supported. The ICRC would like to work on this issue today. Thomas de Saint Maurice also

recalled that the assessment of IHL compliance is also carried out by external organisations which monitor IHL violations and can then inform States supporting a party to the conflict by commenting on violations of the Law of War.

Pascal Bongard explained that Geneva Call faced two major problems when it came to assessing the compliance of armed groups with their commitments. First, while it is possible to evaluate compliance with absolute prohibitions such as the prohibition to recruit or use child soldiers, or the prohibition to use anti-personnel mines, it is extremely difficult to evaluate compliance with relative prohibitions. For example, forced displacement of the civilian population is prohibited, except in cases of military necessity or for the own safety of civilians. How to assess the legality of the movement? Which indicators are relevant? The second problem concerns compliance with positive obligations. Geneva Call generally tries to promote negative obligations to armed groups to prevent them from violating IHL. However, these armed groups sometimes commit themselves to fulfilling positive obligations, such as supporting access to healthcare, distributing supplies, and supporting education. How to assess the compliance with these obligations? After all, they are obligations of means, not of result. For example, the Polisario Front has signed a Deed of Commitments banning anti-personnel mines. The Deed of Commitments stated that the Polisario Front should destroy all its mine stockpiles, without specifying a deadline. It took them twelve years to destroy the stocks. Was that a violation? Was it insufficient compliance? Or was it compliance? There is no indicator to answer this question.

Panel Discussion

Humanitarian actors and contemporary challenges in non-international armed conflicts

Chairperson: **Pascal Daudin**

ICRC

Panelists:

Adela Kabrtova, *DG ECHO*

Emanuela-Chiara Gillard, *University of Oxford*

Françoise Bouchet-Saulnier, *British MSF*

RESTRICTIVE MEASURES (SANCTIONS) AND PRINCIPLED AND EFFECTIVE DELIVERY OF HUMANITARIAN ASSISTANCE

ADELA KABRTOVA

DB ECHO

Résumé

La présentation de Mme Adela Kabrtova se concentre sur la compréhension de la nature des mesures restrictives, également appelées « sanctions », ainsi que sur les effets indésirables de ces mesures restrictives sur la conduite efficace et impartiale de l'action humanitaire. Étant donné la multiplication de ces mesures, il est crucial pour les acteurs humanitaires de comprendre leur origine et leur fonctionnement.

1. Les sanctions des Nations unies

Le Conseil de sécurité peut adopter des sanctions en application du Chapitre VII de la Charte des Nations unies (ONU), dans le but de maintenir ou rétablir la paix ou la sécurité internationale. Il existe aujourd'hui 14 régimes de sanctions. Ces régimes visent de plus en plus souvent des personnes ou entités considérées comme terroristes, et consistent généralement en des restrictions financières. Ces mesures interdisent que des fonds ou ressources économiques puissent être mis à la disposition de ces personnes et entités, directement ou indirectement, ou être utilisés à leur profit. Ce sont les mesures que la communauté humanitaire juge les plus efficaces, car cette interdiction peut s'étendre au paiement de sommes nécessaires pour leur fournir une assistance, ou parce que certains partenaires préféreront ne pas s'engager à fournir une telle assistance par crainte de ne pas respecter ces dispositions.

Il est toutefois important de s'assurer que le langage des Résolutions du Conseil de sécurité ne comporte pas d'ambiguïtés, afin d'éviter que celles-ci aient pour effet regrettable de mettre en péril l'action humanitaire. Il faut donc mettre en œuvre les exemptions humanitaires prévues dans les textes. Les directives des Comités des sanctions peuvent également clarifier les parties ambiguës des Résolutions ou expliquer les procédures d'application des exemptions humanitaires si elles nécessitent une autorisation.

2. Les sanctions de l'Union européenne

Les sanctions peuvent soit découler d'une sanction des Nations unies, soit être propre à l'Union européenne (UE) (« autonomes »), soit être « mixtes ». L'UE est tenue de transposer les régimes de sanctions adoptés par le Conseil de sécurité dans la législation européenne, et ne peut les modifier que de manière marginale. En tout état de cause, l'UE ne peut descendre en deçà de ce qui est imposé par le Conseil de sécurité, elle ne peut qu'adopter des mesures plus strictes. Lorsqu'elle le fait, le régime de sanctions sera qualifié de « mixte ». Dans le cas où le Conseil de sécurité n'accorde aucune exemption humanitaire, l'UE ne peut pas en inclure lorsqu'elle transpose la mesure dans sa législation.

Les régimes de sanctions autonomes de l'UE sont un outil central de la Politique étrangère et de sécurité commune européenne et visent à modifier la politique ou le comportement des individus ou entités visés afin de promouvoir les valeurs européennes ou de protéger les intérêts et la sécurité de l'UE. Ces sanctions peuvent cibler les gouvernements, les entités, les groupes ou les individus, et peuvent consister en des restrictions financières interdisant que des fonds ou ressources économiques puissent être mises à disposition de ces personnes et entités, ou leur profiter. Ces régimes de sanctions peuvent prévoir des exemptions humanitaires et/ou des dérogations afin de minimiser leurs éventuelles conséquences néfastes, tel que c'est le cas pour le régime de sanctions de l'UE à l'encontre de la Syrie.

3. Le niveau national

C'est au niveau national que les sanctions internationales ou régionales sont mises en œuvre et appliquées. Il est important de bien identifier la chaîne des sanctions, afin de s'assurer que le régime prévoit, dès les Résolutions de l'ONU, les garanties nécessaires pour mener les activités humanitaires. Dans le même temps, il convient de veiller à ce que ces garanties (exemptions) soient transposées en droit communautaire et national et ne se perdent pas dans cette transposition.

Certains pays adoptent unilatéralement leurs propres régimes de sanctions, tels les Etats-Unis, dont les sanctions semblent avoir un grand impact, et pas seulement sur les activités des organisations humanitaires.

4. Les tensions entre les sanctions et l'action humanitaire

S'il est important de reconnaître l'importance des objectifs des régimes de sanctions, il faut pouvoir garder un équilibre entre ces mesures et la possibilité de mener des actions humanitaires. De nombreux acteurs ont effectivement mis en lumière de nombreux effets involontaires néfastes des régimes de sanctions sur l'action humanitaire. La communauté humanitaire doit renforcer son expertise sur la question, afin d'aborder efficacement le problème et d'éviter de manquer des opportunités en ne prenant pas en compte la nature précise du régime de sanctions et en simplifiant à outrance la question.

Les régimes de sanctions ne devraient pas s'appliquer à l'aide humanitaire et devraient donc prévoir explicitement des exemptions humanitaires. Il semble aujourd'hui y avoir un consensus selon lequel les textes légaux doivent préciser les exemptions de façon bien explicite. En contrepartie, la communauté humanitaire a l'obligation de veiller à ce que l'aide ne soit fournie qu'aux bénéficiaires finaux et qu'il existe suffisamment de mécanismes de « diligence raisonnable » et de suivi pour éviter tout détournement de l'aide.

5. L'approche de la DG ECHO

Concernant les sanctions propres à l'UE, la DG ECHO (Directorate-General for European Civil Protection and Humanitarian Aid Operations of the European Commission – Direction Générale protection civile et opérations d'aide humanitaire européennes) travaille avec les autres services de la Commission, les institutions de l'UE et les États membres afin d'assurer une cohérence politique et d'obtenir que les régimes de sanctions ne brident pas l'aide humanitaire. La DG ECHO entretient avec les différents intervenants un dialogue ouvert sur les conséquences négatives de ces sanctions.

La DG ECHO soutient l'inclusion des exemptions humanitaires dans les régimes de sanctions. Toutefois ces régimes sont une matière de la Politique étrangère et de sécurité commune, qui relève de la décision unanime des États membres, qui peuvent avoir des points de vue différents sur le choix des exemptions. Il est donc important de continuer le dialogue, de démontrer sur une base factuelle l'effet dissuasif des sanctions, et d'expliquer l'importance des exemptions dans les régimes de sanctions, en conformité avec le Droit international humanitaire et les actions humanitaires.

Thank you for inviting me for the 19th edition of the International Committee of the Red Cross (ICRC) – College of Europe Colloquium that focuses on the legal and operational challenges raised by contemporary non-international armed conflicts. In the panel discussion focusing on humanitarian organisations and contemporary challenges in non-international armed conflicts, I would like to speak about the unintended consequences of restrictive measures ('sanctions') on principled and effective delivery of humanitarian aid. Sanctions have been an issue I have been working on in the last three years. I am therefore a practitioner, rather than an academic.

First of all, let me say that there has been a significant increase in restrictive measures legislation in the last years, be it on international, regional or national level, responding to different emerging threats and crises around the world. I believe that this evolution will continue, and therefore it is important that the humanitarian community understands what sanctions are, how they are adopted and by whom, and what impact they might have on the delivery of humanitarian assistance. This is crucial to carry out targeted advocacy efforts.

I will first address United Nations (UN) sanctions, then proceed to European Union (EU) autonomous sanctions, and the implementation at national level. I will finish with what activities the Directorate-General for European Civil Protection and Humanitarian Aid Operations of the European Commission (DG ECHO) undertakes in order to mitigate the unintended consequences of sanctions on the delivery of humanitarian assistance.

What do we mean when we are talking about restrictive measures (sanctions)?

1. UN sanctions

At the international level, sanctions can be adopted by the UN Security Council to maintain or restore international peace or security under Chapter VII¹ of the United Nations Charter. At the moment, there are 14 sanctions regimes² that support political settlement of conflicts, tackle nuclear proliferation or counter-terrorism. Sanctions offer the Security Council an important instrument to enforce its decisions without resorting to force.

1 Under Article 41: *'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'* Even though Article 41 does not mention sanctions specifically, it is clear that the list is not exhaustive.

2 Each regime is managed by a sanctions committee chaired by a non-permanent member of the Security Council. There are 10 monitoring groups, teams or panels that assist 11 of the 14 sanctions committees.

The sanctions measures vary from regime to regime, depending on the goal they pursue. In general there has been a shift from comprehensive sanctions (comprehensive trade embargoes, such as was the case in Iraq) to targeted or smart sanctions focusing on the root causes or persons and entities responsible for threatening peace and security. This was to avoid adverse or unintended consequences on the civilian population.³ Such targeted measures can include arms embargoes, travel bans, financial or trade restrictions.

Sanctions are not punitive, but rather they should apply pressure on a State, person or entity to comply with the objectives set by the Security Council without resorting to the use of force. Such UN Security Council Resolutions imposing sanctions are mandatorily implemented by UN Member States, which also need to establish appropriate penalties for the infringements of such measures (through domestic legislation, e.g. through criminal, civil or administrative law).

Sanctions measures that are the most relevant for the humanitarian community are financial restrictions, which entail that no funds or economic resources can be made available, directly or indirectly, or for the benefit of such targeted persons and entities ('sanctions lists'). The objective is to cut access to financial resources by such targeted persons or entities, together with an asset freeze. Given that such persons and entities can also be present in countries where populations are in need of humanitarian aid, it can, however, have an impact on the implementation of aid programmes. Such measures can cause difficulties in delivering aid, as such prohibition can extend to paying fees for access to a designated group, to taxes imposed by designated groups in a certain territory, or to using designated banks or contractors to deliver assistance. Some partners will prefer not to engage in providing such assistance out of fear of breaching such provisions, which means that assistance will not reach those in need.⁴ Equally, a requirement by donors to vet final beneficiaries of humanitarian assistance against sanctions lists, or the consideration that provision of medical care to those in need could constitute provision of economic resources, that requirement would absolutely not be in line with international humanitarian law and humanitarian principles. Sanctions measures can also

3 See e.g. Michael Brzoska, 'From Dumb to Smart? Recent Reforms of UN Sanctions', in: *Global Governance*, Vol. 9, No. 4, 2003, pp. 519-535; Thomas Weiss, 'Sanctions as a Foreign Policy Tool', in: *Journal of Peace Research*, Vol. 36, No.5, 1999, pp. 499-509, or Thomas Weiss, David Cortright, George Lopez and Larry Minear (eds.) *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (New York: Rowman & Littlefield, 1997).

4 See e.g. *Norwegian Refugee Council: Principles under Pressure: the impact of counterterrorism measures and preventing/countering violent extremism on principled humanitarian action*, at: <https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles_under_pressure-report-screen.pdf>.

lead to over-compliance by banks to transfer humanitarian payments to such jurisdictions⁵. Furthermore, certain export bans, such as of dual-use goods, could also impact on the delivery of humanitarian assistance, as such products could be needed for humanitarian projects (e.g. chlorine tablets for clean water).

Such sanctions lists are always publicly available; in the case of the UN, there is a Consolidated United Nations Security Council Sanctions List.⁶

At the UN level there are also two counter-terrorist sanctions regimes, known as the 1267 regime and the 1373 regime. The 1267 Al-Qaida sanctions regime was first established by Resolution 1267(1999) in conjunction with the sanctions imposed on the Taliban.⁷ The measures include financial restrictions prohibiting making funds or economic resources available to the listed persons or entities, as well as imposing an asset freeze on them. The other main counter-terrorism sanctions regime was set up by the United Nations Security Council Resolution 1373(2001) following the 11 September 2001 attacks. It obliges States to impose domestic measures to criminalise the support of terrorism and to establish their own counter-terrorism sanctions regimes.

The remaining sanctions regimes are country-specific (not terrorist-related), such as the Somalia sanctions regime⁸ that is widely known to the humanitarian community for its broad humanitarian exemption⁹. This sanctions regime was established in response to the deterioration of the conflict in Somalia, the heavy loss of life and the widespread material damage in the country, which the United Nations Security Council considered a threat to international peace and security.

At the UN level, it is important to identify the relevant stakeholders that have influence over the language of the UN Security Resolutions and their implementation. In that regard, it is important to highlight that the language of the Resolutions needs to be clear to avoid ambiguity, to make sure that Member States are aware of the potential consequences of such measures on the

5 See e.g. J. Walker, *Study on Humanitarian Impact of Syria-Related Unilateral Restrictive Measures*, a study prepared for the United Nations Economic & Social Commission for Western Asia (ESCWA), 2016.

6 <<https://www.un.org/securitycouncil/sanctions/un-sc-consolidated-list>>.

7 In 2011, the UN SC Resolution 1988(2011) split the regime into two.

8 Established by UN SC Resolution 733 (1992).

9 'the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organisations having observes status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners', UN Security Council Resolution 1916(2010), paragraph 5.

principled and effective delivery of humanitarian assistance, and that humanitarian exemptions for the delivery of humanitarian assistance are included in the text, such as was the case in the Somalia sanctions (always together with financial restrictions and export bans that could be relevant for humanitarian assistance). Recommendations in this regard are in the Compendium of the High Level Review of United Nations Sanctions.¹⁰ Guidance by the UN sanctions committees can also be useful: they clarify ambiguous parts of the Resolutions or explain processes for the application of humanitarian exemptions if they require an authorisation¹¹.

2. EU sanctions

At the EU level, sanctions adopted can be UN-based, EU autonomous or mixed. In case of a new UN Security Council Resolution imposing or amending sanctions, the EU transposes the Resolution on behalf of its Member States. The transposition is done in the following way: first, a Council Decision is adopted pursuant to Article 29 of the Treaty of the European Union (Common Foreign and Security Policy (CFSP) Decision), followed by a Council Regulation adopted pursuant to Article 215 of the Treaty on the Functioning of the European Union. The CFSP Decision is binding on Member States, whereas the Regulation is directly applicable in the Union, to all persons and entities. These acts are in reality adopted by consensus. EU sanctions are usually adopted in the following way: a political mandate is obtained by the geographical working party in the Council, followed by expert work in the Working Party of Foreign Relations Councillors (RELEX Working Party), endorsed by COREPER (*Comité des représentants permanents des états membres* – Committee of Permanent Representatives of Member States) and adopted by the Council.

The EU needs to adhere to the measures imposed by the Security Council, i.e. it has a limited margin to modify such measures. Certainly, it cannot go below the measures imposed by the Security Council, however it can include additional, or stricter measures in its legal acts.¹² If the EU adds additional measures, then the regime becomes ‘mixed’ (UN and EU autonomous measures). This means that if the UN Security Council does not provide a humanitarian exemption in the Resolution, such an exemption cannot be provided at EU level, nor consequently on the national level. Therefore, it is necessary to carry out advocacy already at UN level.

Concerning EU autonomous sanctions, they are an essential EU Common Foreign and Security Policy tool used by the EU as part of an integrated and comprehensive policy approach. EU

10 <http://www.hlr-unsanctions.org/HLR_Compndium_2015.pdf>.

11 Such as for DPRK; at: <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1718_implementation_assistance_notice_7.pdf>

12 Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, point 3, at: <<https://data.consilium.europa.eu/doc/document/ST-11205-2012-INIT/en/pdf>>.

restrictive measures serve to safeguard the EU's values, fundamental interests, and security.¹³ Again, sanctions are different from criminal law, as they are not intended to punish. Rather, sanctions seek to bring about a change in the policy or conduct of those targeted, with a view to promoting the objectives of the CFSP. They can target governments, entities, groups or organisations and/or individuals. They can include financial restrictions entailing that no funds or economic resources are made available to, or for the benefit of, persons or entities designated under restrictive measures, as well as travel bans, arms embargos, sectoral measures, etc.

EU autonomous sanctions are targeted, and developed in such a way as to minimise adverse consequences for those not responsible for the policies or actions leading to the adoption of sanctions. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries.¹⁴ EU sanctions regimes may include humanitarian exemptions and/or derogations which should minimise such adverse consequences. They are developed in such a way as to minimise adverse consequences for those not responsible for the policies or actions leading to the adoption of sanctions. All restrictive measures adopted by the EU are compliant with obligations under international law, including those pertaining to human rights and fundamental freedoms.

The EU Syria sanctions regime contains a number of humanitarian derogations and exemptions. It provides for a ban to purchasing and transporting petroleum products (which includes fuel) and it prohibits payment to listed persons and entities. At the same time, it includes an exemption for the purchase of fuel and payment to a listed entity in the case of a public body, legal person, entity or body which receives funding from the Union or a Member State in order to provide humanitarian relief or assistance to the civilian population in Syria (Article 6a (1) and Article 16a (1) of Council Regulation 36/2012). If they do not fall within this category (they receive non-governmental funding, or they receive funding for projects in a neighbouring country – not in Syria itself), but provide humanitarian relief or assistance to the civilian population in Syria, they can ask for an authorisation from a competent authority to purchase and transport petroleum products (Article 6a (2) of the Regulation). In the event they would have to pay a designated person for such petroleum products, they must request a separate and additional authorisation to do so (Article 16a (2) of the Regulation).¹⁵

13 For more detail, see the Guidelines, *Ibid.*

14 Basic Principles on the Use of Restrictive Measures (Sanctions), p. 6, at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010198%202004%20REV%201>>.

15 See the European Commission Frequently Asked Question on EU restrictive measures in Syria, at: <https://ec.europa.eu/fpi/what-we-do/sanctions/eu-restrictive-measures-syria---faqs_en>.

It is important to include such humanitarian exemptions or derogations (that require an authorisation) in the sanctions regimes, as well as to make sure that there is sufficient awareness about them amongst the relevant stakeholders and that they are properly used.

All the EU sanctions regimes (including the transposition of UN sanctions) and listed individuals and entities are available at: <www.sanctionsmap.eu>. More information on EU sanctions can be found at: <<https://www.consilium.europa.eu/en/policies/sanctions/>>

3. National level

Domestic legislation plays a crucial role, as this is where international or regional sanctions are implemented and enforced by national authorities. Therefore, the national authorities need to adopt appropriate and dissuasive penalties and need to make sure that infringements of the sanctions regulations are investigated and punished. This can include criminal penalties.

It is therefore important to tackle the sanctions chain at its roots, i.e. if the basis are UN sanctions, then the Resolutions should already include appropriate guarantees to ensure that humanitarian assistance is not impeded, and can be delivered in line with International Humanitarian Law and humanitarian principles. At the same time, it needs to be ensured that such assurances (exemptions) are transposed into EU and national law, and do not get lost in translation. It is also useful if national administrations provide guidance on the interpretation of sanctions and enforcement of such cases¹⁶.

Certain countries also adopt unilateral sanctions, such as the United States (US). US sanctions seem to have a significant impact in the world, not only for humanitarians, due to their extraterritorial application, and where advocacy efforts might be necessary.

4. Tensions between sanctions and principles, and effective delivery of humanitarian assistance

Firstly, it is important to acknowledge the importance of the objectives that sanctions are pursuing. At the same time, it is necessary to find the right balance between such measures and the ability of humanitarian organisations to serve people in need and access civilian populations living in areas controlled by designated groups in a principled and effective manner.

Recently, a number of stakeholders have raised the issue of unintended consequences that restrictive measures have or may have on humanitarian action, including by limiting the

¹⁶ Such as e.g. FAQ guidance for the charity sector by the HM Treasury OFSI, at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653168/OFSI_Charity_FAQ_web.pdf>.

space in which humanitarian actors operate to respond to the needs in a principled manner or by restricting the possibility to transfer funds for humanitarian purposes due to de-risking practices of banks.¹⁷

The humanitarian community needs to enhance its expertise on sanctions and counter-terrorism measures. It seems that it is focusing mostly on counter-terrorism measures, however it often refers to measures which are not terrorist-related. Even though it is clear that it is the combined effect of many regulatory requirements (sanctions, counter-terrorism, or anti-money laundering legislation, etc.) causing adverse or unintended consequences on the delivery of humanitarian assistance, oversimplifying the nature of such measures can lead to missing opportunities, not targeting the right players and thus failing to effectively address the basis of such measures.

As is clear, this is not an easy exercise, however it is important to bring the debate on a more targeted and concrete level, as different measures might require a differentiated approach, even though they need to be part of a holistic one. It is important therefore to undertake a stocktaking exercise of the unintended consequences and to ask ourselves questions as to where these measures come from (e.g. UN, Financial Action Task Force, EU, national measures?). Often, even if such measures stem from an international organisation, further issues can result in the improper implementation of such measures on the national level. At the same time, we often cannot address problems at national level without addressing the legal instruments at international or regional level that are transposed on the national level.

Concerning humanitarian exemptions, there seems to be agreement in the humanitarian community now that explicit exemptions in the legal texts are the way forward. It is important to note that there are different types of humanitarian exemptions and it is important to be precise about the scope of such exemptions¹⁸. Humanitarian assistance is never prohibited *per se* by the sanctions regimes, however financial restrictions or sectoral measures can have an impact on the delivery of humanitarian assistance (dual-use goods, for example). It should therefore be made clear in the text that such restrictions *shall not apply* to the delivery of

17 <<https://www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf>, http://www.voltairenet.org/IMG/pdf/Humanitarian_Impact_of_Syria-Related_Unilateral_Restrictive_Measures.pdf>.

18 Humanitarian exemption can be also understood as an exemption to satisfy the basic needs or medical expenses of the listed persons. In some contexts an exemption can also be understood as, subject to an authorisation by the Sanctions Committee or by Member State competent authority. Such authorisation procedures from my experience do not work very well, are lengthy and cumbersome. In the context of this presentation, an exemption means that the prohibition does not apply to the provision of humanitarian assistance.

humanitarian assistance to civilians in need. This is in line with international law and humanitarian principles. The ambiguity between the relations between sanctions and delivery of humanitarian assistance seems to have been rather damaging in the past, therefore it would be advisable to have explicit humanitarian exemptions in the sanctions regimes.¹⁹ Furthermore, references in the sanctions regimes to International Humanitarian Law and humanitarian principles in the recitals would be also useful so that this is not put in doubt.

It is self-understood that at the same time there is an obligation on the side of the humanitarian community to make sure that assistance is delivered only to the final beneficiaries and that there are sufficient due diligence and monitoring mechanisms in place to avoid aid diversion.

5. The DG ECHO approach

On the EU level, the unintended consequences have been subject to continuous discussions with Member States within the format of RELEX sanctions formation, with the Service for Foreign Policy Instruments in the lead. In that context, Frequently Asked Questions on EU Restrictive Measures in Syria²⁰ were published by the European Commission, which should facilitate an understanding of sanctions and humanitarian exemptions in Syria to the non-profit and financial sector. Guidance is always helpful, especially as sanctions regulations can be very technical and complicated.

With regards to EU autonomous sanctions, DG ECHO works with other Commission services, EU institutions and Member States in order to raise and ensure policy coherence and limit negative humanitarian impact of sanctions regimes. DG ECHO also supports dialogue and awareness-raising between donors (through e.g. the Good Humanitarian Donorship initiative), policy-makers and regulators (through the Council RELEX sanctions formation) and other relevant stakeholders (e.g. financial institutions – European Banking Federation), and its partners (e.g. DG ECHO annual Partners' Conference). DG ECHO supports an open dialogue with its partners about the unintended consequences of sanctions.

Furthermore, DG ECHO always supports the inclusion of humanitarian exemptions in EU sanctions legislation. However the legal acts are, as a matter of CFSP policy decisions, decided unanimously by EU Member States, which might take different stances on when an exemption is warranted. It is important to explain to the sanctions community that restrictive measures need to be designed in line with international law, including International Humanitarian Law,

19 Katie King, Naz Modirzadeh and Dustin Lewis, 'Understanding Humanitarian Exemptions: U.N. Security Council Practice and Principled Humanitarian Action', in: *Harv. L. Sch. Prog. on Int'l L. & Armed Conflict Working Group Briefing Memorandum*, April 2016.

20 <https://ec.europa.eu/fpi/what-we-do/sanctions/eu-restrictive-measures-syria---faqs_en>.

and allow for humanitarian action to remain principled. A reflection of this should be the insertion of humanitarian exemptions in the legal acts as a standard approach.

Furthermore, it is important to note that it is still important to build up an evidence base on the potential chilling effects of restrictive measures to support the advocacy of limiting the unintended impact of sanctions on effective and principled humanitarian action, as this seems to be questioned at times.

Lastly, there is still a need for dialogue and awareness-raising between donors and policy-makers or regulators, operational players and other relevant stakeholders (e.g. financial institutions) by, for example, organising stakeholder meetings and exchange of best practices in order to provide greater understanding and clarity on restrictive measures obligations and principled humanitarian aid, and the possible unintended consequences.

HUMANITARIAN STAKEHOLDERS AND CONTEMPORARY CHALLENGES IN NON-INTERNATIONAL ARMED CONFLICTS²¹

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Résumé

Emanuela-Chiara Gillard présente quelques défis propres aux conflits armés non internationaux (CANI) auxquels sont confrontés les acteurs humanitaires. S'il est vrai que d'un point de vue opérationnel, ces conflits posent aux organisations humanitaires des défis tels que la multiplication des groupes armés non étatiques, ou encore la politisation de l'aide humanitaire, Emanuela-Chiara Gillard se concentre sur les questions légales. En particulier les problèmes soulevés par l'interaction entre les mesures anti-terroristes, les sanctions et l'action humanitaire.

1. La source du problème

Couper les ressources financières des groupes terroristes peut se faire au moyen de sanctions financières qui ont pour objet de geler les ressources financières d'individus ou d'un groupe, ainsi que d'interdire de leur fournir tout soutien matériel. Le deuxième moyen, ce sont les mesures pénales, qui rendent punissable le fait d'apporter une assistance financière ou tout soutien matériel, directement ou indirectement, à un groupe terroriste.

2. Le problème

Les groupes visés par ces mesures sont généralement impliqués dans un conflit armé non international (CANI), contrôlant une partie de la population dans le besoin. Le problème découle du fait que le soutien matériel est interprété très largement. Il existe donc un très grand risque que les transactions et activités réalisées par les acteurs humanitaires dans les zones contrôlées par de tels groupes tombent dans le champ d'application des restrictions. Par exemple, des personnes ont été sanctionnées par les Nations unies pour avoir apporté une assistance médicale aux membres d'un groupe terroriste, et plusieurs procédures pénales sont ouvertes dans différents pays sur des bases semblables. D'autres mesures, telles que celles adoptées par l'UE envers la Syrie, ont posé de nombreux problèmes aux acteurs humanitaires, par exemple l'interdiction d'acheter du pétrole brut ou des produits pétroliers, les sanctions à l'encontre de la seule compa-

²¹ The research leading to these results has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement No [340956 - IOW].

gnie aérienne permettant de se rendre dans l'est de la Syrie, ou encore les sanctions à l'encontre du seul opérateur téléphonique dans les zones d'opération des acteurs humanitaires. Les restrictions et obligations que les donneurs institutionnels incluent dans leurs accords de financement ont également parfois eu un effet similaire à celui des régimes de sanctions.

3. Les conséquences sur l'action humanitaire impartiale et neutre

La transposition de ces régimes de sanctions et de mesures anti-terroristes ne s'est pas faite de manière uniforme entre les différents pays. Certaines activités sont considérées comme des infractions dans certains pays mais pas dans d'autres. De plus, avec la juridiction extraterritoriale de nombreux États, plusieurs lois distinctes peuvent s'appliquer au même endroit pour les mêmes activités. Le cadre juridique devient donc de plus en plus complexe, poussant les organisations humanitaires à un respect excessif des règles et à limiter leurs opérations pour éviter toute responsabilité pénale ou civile.

4. Les restrictions du secteur bancaire

Le secteur bancaire est également tenu de respecter les régimes de sanctions et les mesures anti-terroristes. Ils ne peuvent donc pas fournir de soutien matériel, direct ou indirect, entre autres au travers du financement des organisations humanitaires. L'idée que le secteur de l'humanitaire est un secteur vulnérable aux abus, et le fait que les organisations humanitaires ne soient pas des clients rentables pour le secteur bancaire ont amené les banques à réduire drastiquement leurs services pour de telles organisations, services parfois indispensables pour la bonne conduite des opérations.

5. Réduire les tensions

Il existe un moyen pour réduire les tensions entre action humanitaire, régimes de sanctions et mesures anti-terroristes : l'inclusion systématique d'une clause d'exemption humanitaire. Tous les acteurs clés de l'humanitaire sont favorables à cette solution.

6. Un paysage juridique en évolution constante

Le paysage juridique est en évolution constante. Par exemple, plusieurs procédures ont été lancées aux États-Unis contre deux ONG sur la base du False Claims Act. Cette loi permet à un « lanceur d'alerte » de poursuivre un bénéficiaire de financements gouvernementaux pour usage frauduleux des fonds. Lorsqu'une organisation humanitaire demande des fonds à USAID (United States Agency for International Development), elle est tenue de certifier ne pas avoir fourni

de soutien matériel à tout individu ou entité impliqués dans des actions terroristes dans les dix dernières années. Les termes de cette restriction étant particulièrement larges, les risques de poursuites sont élevés. En cas de condamnation, l'organisation peut être tenue de reverser une somme équivalant au triple des fonds reçus.

Cependant il y a des évolutions positives, entre autres l'opportunité pour les États d'introduire des exemptions humanitaires lorsqu'ils seront amenés à réviser leurs législations anti-terroristes en application de la Résolution 2178 du Conseil de sécurité. Le Royaume-Uni, en transposant la Résolution 2178 dans la Counter Terrorism and Border Security Bill, a criminalisé le fait pour un ressortissant britannique de se rendre ou de séjourner dans un pays ou une région soumis à des sanctions. Toutefois, un amendement pourrait établir une exception pour ceux qui entrent ou séjournent dans une telle région pour apporter une aide d'une nature humanitaire. Au niveau de l'Union européenne, le régime de sanctions syrien relatif au pétrole a été amendé afin d'inclure une exemption humanitaire. Une clause de sauvegarde pour l'action humanitaire a également été insérée dans le préambule de la Directive relative à la lutte contre le terrorisme de 2017.

7. La voie à suivre

Au niveau des Nations unies, il est nécessaire de maintenir la sensibilisation afin de mettre systématiquement le problème en évidence et convaincre les États membres d'inclure des exemptions humanitaires. Les États membres et les institutions de l'UE sont réceptifs aux enjeux des sanctions pour l'action humanitaire. Des recherches devraient être menées sur la manière dont l'UE a traité cette question, et un dialogue soutenu devrait être mené auprès des responsables politiques à Bruxelles. Au niveau national, les États devraient être encouragés à inclure explicitement la clause de sauvegarde, par exemple lors de la transposition de la Directive européenne de 2017 en droit interne.

In my presentation I will spend a few minutes setting the scene, and then allow the other panellists to discuss in greater detail some of the challenges I have flagged.

Humanitarian stakeholders face numerous *operational* challenges responding in contemporary conflicts, some of which are specific to non-international armed conflicts (NIACs). These include, for example, the multitude of organised armed groups active in certain contexts, with whom humanitarians must engage in order to operate and to do so in relative safety; and the fact that humanitarian assistance has been particularly politicised in a number of NIACs.

My presentation will focus on some *legal* questions raised by humanitarian action in contemporary NIACs. In particular, I will highlight challenges raised by the interplay between counter-terrorism measures, sanctions and humanitarian action.

The source of the problem

Choking financing to groups designated as terrorist is a key element of international and national counter-terrorism strategies. As a matter of law, this is achieved by two principal means: first, by financial sanctions against groups designated as terrorist. These sanctions require their assets to be frozen, and prohibit providing them, directly or indirectly, with funds, financial assets or economic resources, or financial or other related services – colloquially referred to as ‘material support’. The second means are criminal counter-terrorism measures, which make it an offence to carry out a range of activities that may provide financial assistance or other forms of material support to designated groups directly or indirectly.

Country-specific sanctions adopted by the United Nations (UN) Security Council and regional inter-governmental bodies, such as the European Union (EU) impose similar asset freezes against designated groups, in order, *inter alia*, to promote compliance with International Humanitarian Law (IHL).

The problem

The groups designated under counter-terrorism measures or sanction regimes are frequently organised armed groups party to non-international armed conflicts with control over civilian populations in severe need. These include *Al Shabaab* in Somalia, *Al Qaeda* in Yemen, and *Boko Haram* in Nigeria – three contexts identified as at risk of famine in 2017. Other examples are the Islamic State in Syria (ISIS), and *Hamas* in Gaza.

Problems arise because the prohibited ‘material support’ has been interpreted extremely broadly. There is a real risk that transactions and activities carried out by humanitarian actors may fall within the scope of the restrictions. These can include incidental payments that humanitarian organisations may have to make to designated groups as part of their humanitarian operations; or humanitarian relief consignments that may be diverted, and end up in the hands of the designated groups. More alarmingly, individuals have been listed under UN sanctions, among other things for having provided medical care to members of designated groups, and criminal investigations have been conducted in a number of States on these grounds.¹ This is

1 See Marine Buissonniere, Sarah Woznick and Leonard Rubenstein, with Julie Hannah, *The Criminalization of Healthcare*, 2018, at: <<https://www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf>>.

a particularly troubling development as the entitlement to receive medical care and the protection of those providing it is a founding principle of International Humanitarian Law (IHL).

Attention has focused principally on prohibition to providing material support to designated entities. However, there are other ways in which sanctions can adversely impact humanitarian organisations' capacity to operate, and to do so in a principled and safe manner. The EU Syria sanctions provide a number of such examples. As initially adopted, the sanctions prohibited the purchase of crude oil or petroleum products, a restriction that significantly impeded humanitarian organisations' operations.² Following constructive engagement between EU Member States and humanitarian organisations, in December 2016 the prohibition was revoked for humanitarian organisations that receive public funding from the EU or its Member States to provide humanitarian relief to civilians in Syria.³ This was not the only element of the sanctions which raised difficulties: at a time when the only safe way for humanitarian staff to travel to the far east of Syria was by air, the sole company that served that route was designated. Similarly, the only telephone company that provided reliable mobile phone coverage in parts of the country where humanitarians were trying to operate was also designated.

Funding agreements between humanitarian actors and institutional donors also frequently include restrictions and obligations aimed at ensuring that no material support is provided, directly or indirectly, to designated groups. The effects of these restrictions on humanitarian organisations' capacity to operate in a principled manner, and in particular, with the principle of impartiality that requires response to be prioritised on the basis of need alone, can be the same as those of sanctions and counter-terrorism measures. I will not enter into this dimension in any detail now, but later will flag a problematic legal development that affects such agreements.

The consequences on principled humanitarian action

The approach States have adopted in giving effect to obligations under counter-terrorism measures and sanctions in national law is by no means uniform. Some States have broadened the scope of the offences, or designated different persons and entities. This means that support to a group that may be permissible under the law of one State may be criminal under that of another. Moreover, as many States have granted their courts extraterritorial jurisdiction over these offences, more than one State's laws may be applicable.

2 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 Art 6(b).

3 Council Regulation (EU) 2016/2137 of 6 December 2016 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.

These restrictions give rise to an extremely complex legal landscape that humanitarian organisations and their staff must navigate to avoid civil or criminal liability. Concerns about falling foul of the prohibitions have frequently led to over-compliance with the law, and placing unwarranted limits on humanitarian operations. Some humanitarians have curtailed their operations in certain areas, despite the existence of severe needs. This opens humanitarians to allegations of not operating in a principled manner, and leaves people in need without the assistance they require.

Banking sector restrictions

The problem is aggravated by the fact that it is not just humanitarian organisations that must comply with counter-terrorism measures and sanctions. Banks must also do so, freezing the assets of designated individuals and groups, and not providing material support, to them, directly or indirectly, including via the humanitarian organisations to whom they provide banking services.

Fears of violating these measures, coupled with a perception – fuelled to a significant degree by the Financial Action Task Force – that the ‘non-for profit’ sector as a whole is vulnerable to abuse; the reality that humanitarian organisations are rarely profitable clients, and the de-risking practices conducted by banks has led to a significant restriction in the financial services they provide to such organisations.⁴

International non-governmental organisations operating in what banks consider ‘high-risk jurisdictions’, i.e. in or near areas where designated non-State armed groups or faith-based – mainly Muslim – humanitarian organisations are based or operate, have been particularly affected. They are experiencing significant difficulties in accessing the financial services that are crucial to their capacity to fundraise, and disburse funds, and thus operate. There has been an increase in regulatory compliance and disclosure requirements, with banks demanding increasingly detailed information about the organisations, their transactions and their programmes. More damagingly, humanitarian organisations have been unable to open accounts, receive donations or transfer funds, have experienced delays or significantly increased charges, or have had their accounts closed.

4 See Tom Keatinge and Florence Keen, *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, (2017), Royal Institute of International Affairs, at: <<https://www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos>>.

In the words of a representative of a large and well-established British international non-governmental organisation, the extent of the banking restrictions has become so significant that ‘increasingly banks are dictating where we can operate’.

Reducing the tensions

The tensions between sanctions, counter-terrorism measures and humanitarian action can be avoided by including exemptions in sanctions regimes and exceptions in counter-terrorism measures. Exemptions would reduce the risk of liability and provide reassurance to banks.

At present, however, at UN level only one sanction regime (Somalia) includes an exemption for humanitarian action. There is no substantive justification for this, as the same problems can arise in all contexts where asset freezes have been imposed on designated groups that exercise effective control over people in need. What is required is a concerted effort to raise awareness of the problem and to press for the systematic inclusion of exemptions.⁵

The present panel offers an important opportunity to publicly put to rest a misconception that has been perpetuated in the discussions of this topic for a number of years. There have been suggestions that not all humanitarian organisations support exemptions for humanitarian action. While some may have expressed concerns about the *scope* of such exemptions and their precise formulation, all key humanitarian stakeholders – UN agencies, funds and programmes, international non-governmental organisations and the International Committee of the Red Cross – now support the inclusion of such exemptions.

A constantly evolving legal landscape

The tensions are not a new problem, and the legal landscape is constantly evolving. Some developments perpetuate or exacerbate the problems. For example, in the United Kingdom (UK) Parliament is considering the Counter Terrorism and Border Security Bill. If adopted, this will introduce a new provision giving the Home Secretary the power to ‘designate’ a country, or region thereof, and making it an offence for UK nationals and residents to enter or remain in this area. At the time of writing, the House of Lords had introduced an amendment to the Bill that would create an exception to the offence for those entering or remaining in a designated

5 For suggestions on how to do this at UN level, see Emanuela-Chiara Gillard, *Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action*, 2017, Royal Institute of International Affairs, at: <<https://www.chathamhouse.org/publication/recommendations-reducing-tensions-interplay-between-sanctions-counterterrorism-measures>>.

area for a number of purposes, including ‘providing aid of a humanitarian nature’.⁶ It is unclear whether this exception will be retained.

In the US proceedings have been brought against recipients of US government funding under the False Claims Act. These are ‘whistle blower’ proceedings brought by a third party ‘on behalf’ of the US Government in cases of fraudulent use of government funds. When applying for USAID (United States Agency for International Development) funding, humanitarian organisations must certify *inter alia* that to their knowledge they have not provided material support or resources to any individual or entity involved in acts of terrorism within the previous ten years. This certification is extremely broad in terms of time frame, activities – as it is those funded by *any* donor – and scope in view of USAID’s definition of ‘material support’.⁷ In the two cases that have been made public to date the claimant asserted the recipients of USAID funding had violated the certification and, thus, defrauded the US Government.

The two cases that have been made public were brought by the same claimant and had a clear political dimension.⁸ It is unclear whether other claims will be filed. The possibility raises serious concerns. This new line of litigation significantly changes the dynamics relating to restrictions and obligations in State funding agreements. Any leeway that recipients may have been granted by USAID in the past has been removed. If claims are brought the Government *must* investigate them. Moreover, courts are entitled to award punitive damages of three times the amount received by the respondent organisation from the relevant US Government agency.

Despite new hurdles such as these, there have also been some positive developments, most notably at EU level. As already mentioned, in 2017 the Syria oil sanctions were amended to include an exemption for humanitarian action. In the same year, a safeguard clause for humanitarian action was included in the preamble to the 2017 EU Directive on Combating Terrorism. This states that ‘[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do

6 Counter-Terrorism and Border Security Bill [as amended on report], 17 December 2018, Section 4, at: <<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0153/18153.pdf>>.

7 The definition of ‘material support or resources’ is based on the US Anti-terrorism (Effective Death Penalty) Act as amended and covers ‘currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets, except medicine or religious materials’.

8 IRIN, A Q&A with the pro-Israel lawyer rattling NGOs on counter-terror compliance, 25 September 2018, at: <<https://www.irinnews.org/interview/2018/09/25/qa-pro-israel-us-lawyer-rattling-ngos-counter-terror-compliance>>.

not fall under the scope of this Directive, while taking into account the case law of the Court of Justice of the European Union.⁹

The way forward

I would like to conclude with some suggestions for reducing the tensions: concerted action is required at the global, EU and national level.

At the global level, and by this I mean at the UN level, a significant amount of awareness-raising is still necessary, to systematically highlight the problem, and to persuade Member States to, equally systematically, include exemptions for humanitarian action in sanctions.¹⁰

Much of the attention to date has focused on the UN. However, the same problems also arise at EU level, when the EU adopts sanctions or counter-terrorism measures. The recent developments just mentioned give cause to hope that EU Member States and institutions are receptive to the challenges faced by humanitarian organisations, and are willing to explore ways to reduce the tensions. Research should be conducted into how EU restrictive measures – a far more complex regulatory framework than UN sanctions – have addressed this issue; and sustained engagement should be conducted with policy-makers in Brussels.

Finally, the same issues need to be tackled with States at the domestic level, when they are giving effect to UN and EU measures. By way of example, EU Member States should be encouraged to expressly include the safeguard clause when giving effect to the 2017 EU Directive in domestic law.

9 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, preambular paragraph 38.

10 See Gillard, *Recommendations for Reducing Tensions*, *op.cit.*

HOW CT MEASURES AND OTHER SANCTIONS ARE CONCRETELY IMPACTING HUMANITARIAN ACTION?

FRANCOISE BOUCHET-SAULNIER

MSF

Summary

Ms. Françoise Bouchet-Saulnier's presentation addresses the impact of anti-terrorism legislation and sanctions on humanitarian action, and more specifically on the protection of medical missions. In recent years, there have been a large number of security incidents where States rather than armed groups are responsible. The medical mission is now under a regime of criminalisation due to anti-terrorism legislation without exemption, and no longer under a regime of protection as provided for by International Humanitarian Law (IHL). We are now in a pre-Solferino phase in non-international armed conflicts (NIAC), and this can be explained by two factors: The omissions by States and the confusion they have.

1. The deliberate omissions by States

The first factor is the failure of States to ratify the Additional Protocols. Many of the incidents encountered by Médecins sans frontières (MSF) on the ground are due to the fact that some States such as Syria and Iraq have not ratified them. These are problems that cannot be countered simply by referring to customary law, as it does not operate in the same way when it comes to obstructing the national law of a given State. For States that have ratified the Protocols, the integration of rules into military manuals has yet to be completed, especially in NIACs. Because, in the absence of the proper integration of the rules into the internal order of States, there remains a very strong impression that non-State armed groups are criminals to be dealt with under domestic criminal law rather than under IHL. As a consequence, wounded combatants belonging to non-State armed groups, and the medical care given to them by impartial humanitarian organisations often falls into the criminal sphere of material support to criminals or terrorists. This tendency is aggravated by the poor integration of NIAC IHL into domestic law. Numerous domestic military manuals are not specific enough for NIAC. This leads to misunderstandings as medical facilities treating wounded enemies are assimilated to military medical facilities that are not to be taken into account in the calculation of civilian damage during the precaution and proportionality assessment. Although the Protocols have unified these categories with that of civilian medical personnel hospitals and wounded in both IAC and NIAC, a number of States' military manuals have not done so. This is of greater concern in NIAC for States who have not ratified Protocol II, but also for countries who have ratified the Protocols but not yet incor-

porated this into their domestic legal systems. These omissions finally translate into security incidents in the field.

2. The confusions of States

The second factor is the confusion between the status of protected person in IHL and the status of criminals in national criminal law. Concepts of IHL such as direct participation in hostilities are confused with terms specific to anti-terrorism legislation such as material support to terrorism. This paves the way to the criminalisation of humanitarian action, notably when such offences require no specific element of intent or knowledge. The impact of such confusion is such that there is a risk of being targeted rather than investigated and prosecuted. Indeed, many doctrines are emerging today to allow the use of lethal force against persons likely to be terrorists or to supply material support to a terrorist group. As a result we see the basic IHL distinction between civilian and combatant replaced by criminal criteria of distinction opposing innocent on one hand and suspect criminal or terrorist on the other hand. The civilian and humanitarian space created by IHL is being transformed into a criminal space over the entire globe, and therefore no longer a space of legal protection. MSF has witnessed several cases of wounded or medical personnel targeted because they were considered material support for terrorism.

3. Conclusion

The solution to this problem is the enactment of humanitarian and medical exemption clauses in counter-terrorism regulation at international and national level. This is not only possible but mandatory under existing IHL. The Geneva Conventions and their Additional Protocols already contain an exemption clause granting criminal immunity to medical personnel. It is essential to work on the integration of this clause and on the interaction between criminal law and IHL in order to rebuild a humanitarian space.

Aujourd'hui, nous ne sommes pas simplement confrontés à des défis soulevés par les conflits armés non internationaux, nous sommes face à un problème grave pour maintenir, dans des contextes où le contre-terrorisme prévaut, la protection juridique de l'action humanitaire prévue par le Droit des conflits armés. Ces nouveaux modes de gestion des conflits risquent d'aspérer l'action humanitaire, et on voit aujourd'hui le danger que l'action humanitaire soit assimilée à du soutien matériel au terrorisme et que donc l'interdiction de l'action humanitaire devienne une méthode de guerre acceptée dans ces conflits.

Il est frappant de constater qu'il y a quelques années, la sécurité était un problème généré majoritairement par les groupes armés non étatiques dont on sait qu'ils n'ont pas de statut officiel de combattant dans le droit humanitaire et qu'ils sont respectueux du droit international. Toutefois ce n'est plus la seule réalité des organisations humanitaires telles que Médecins sans frontières (MSF). Lorsque l'on regarde la tendance actuelle des incidents de sécurité, on voit un renversement de schéma. Les responsables des incidents de sécurité ne sont plus seulement les acteurs non étatiques mais bien les États. Et c'est une tendance lourde en termes de pertes humaines dont nous sommes témoins dans la vie de tous les jours, notamment en raison du recours aux bombardements aériens. Cela se manifeste lorsqu'un État bombarde un de nos hôpitaux, où lorsqu'un État arrête l'un de nos collègues, en dépit de toute reconnaissance de son activité humanitaire. Aujourd'hui dans les contextes anti-terroristes, les règles et les pratiques des États entravent l'action humanitaire impartiale sur le terrain. Concernant les règles anti-terroristes, ce ne sont pas simplement quelques règles juridiques qui nous sont opposées, c'est un régime juridique tentaculaire qui s'est déployé depuis le 11 septembre 2001 et qui continue à se déployer sans prendre en compte l'articulation avec le Droit international humanitaire (DIH), particulièrement celui applicable aux conflits armés non internationaux. Et plus ce régime anti-terroriste se déploie, moins il y a d'action humanitaire. Nous connaissons la solution à ce problème. Elle suppose la reconnaissance d'exemptions humanitaires reconnaissant clairement que les soins médicaux et le secours humanitaire ne rentrent pas dans la définition du soutien matériel au terrorisme. La mise en œuvre de cette solution n'est toutefois pas simple car elle exige que les États acceptent une restriction à leurs méthodes de guerre contre le terrorisme. Si l'on considère l'action médicale dans les conflits armés non internationaux, nous sommes aujourd'hui à un point de rupture absolu. L'action médicale a un régime de protection en Droit international humanitaire. Mais devrions-nous dire « avait » ? Car l'action médicale ne semble plus sous un régime de protection internationale, mais plutôt sous un régime de criminalisation indifférenciée généré par les États dans le cadre de leur lutte contre le terrorisme. Sous la pression internationale, les pays affectés par des conflits armés mettent en œuvre et révisent régulièrement des législations anti-terroristes afin de montrer aux Nations unies (ONU), à l'Union européenne (UE) et à la communauté internationale qu'ils combattent le terrorisme avec zèle et respectent leurs engagements dans ce domaine.

Mais dans la plupart des pays les législations anti-terroristes n'intègrent pas les obligations du droit humanitaire applicable aux conflits armés non internationaux et n'imposent aucune exemption humanitaire ou médicale. Pire, le terrorisme et le soutien matériel au terrorisme sont définis d'une manière tellement large que toutes les activités humanitaires et médicales sont susceptibles d'être affectées.

Cette situation est aggravée par l'asymétrie juridique des conflits armés non internationaux dans lesquels la partie non étatique au conflit est soumise à des obligations en droit humanitaire mais a un statut criminel en droit national. Ainsi donc, toute opération de secours humanitaire ou médical au bénéfice de personnes et populations situées sous le contrôle d'un acteur armé non étatique relève d'un flou juridique entretenu par les États dans les CANI et aggravé par les lois anti-terroristes. Ce flou a des conséquences importantes puisqu'il impacte le caractère licite ou criminel des secours au titre de la complicité ou du soutien matériel au terrorisme. Cela me mène à conclure que du point de vue du droit humanitaire nous sommes malheureusement aujourd'hui dans une phase pré-Solferino concernant le secours médical aux blessés et malades appartenant aux groupes armés non étatiques, mais également aux populations vivant sous leur contrôle. Il ne s'agit pas d'un simple défi mais d'un problème pour lequel la volonté et la responsabilité des États doit être mise en cause. Deux éléments permettent d'expliquer cette situation juridique et devraient donc aussi permettre d'y remédier. Ces éléments juridiques concernent par nature les États qui ont le monopole de la création du droit, même si les acteurs armés assument leur part de violations. La vulnérabilité du droit humanitaire face à la lutte contre le terrorisme découle d'un mélange d'omissions délibérées et de confusions entretenues par les États sur le statut du droit humanitaire dans les conflits armés non internationaux.

1. Les omissions délibérées des États

Sur le premier point, ce que beaucoup oublie, c'est que le DIH ne s'applique pas tout seul. Il y a une étape fondamentale, qui est la ratification et l'intégration des règles du DIH dans le droit national. Lorsque MSF travaille, c'est dans un pays donné avec un cadre juridique donné. Le problème est l'articulation entre le DIH tel qu'il est censé s'appliquer en général, et le DIH tel qu'il s'applique effectivement dans ce pays donné. J'entends les progrès majeurs réalisés avec le droit coutumier, mais ces progrès ne règlent pas les problèmes que rencontrent les acteurs sur le terrain en lien, notamment, avec le droit pénal des États et le contenu de leurs manuels militaires.

Je pense aussi que nous sommes trop complaisants vis-à-vis des États qui n'ont pas ratifié les Protocoles additionnels aux Conventions de Genève et trop frileux pour dénoncer les conséquences dramatiques d'une non-ratification du deuxième Protocole additionnel (PA II) dans les conflits actuels. Je trouve scandaleux que l'on ne dise pas que l'un des problèmes rencontrés par les acteurs de secours médicaux et humanitaire en Syrie est lié au fait que la Syrie n'a pas ratifié le PA II et que ces secours n'ont pas de cadre juridique international solide face à la criminalisation imposée par l'État. Il est étrange que dans une assemblée de juristes, on puisse laisser penser que la non-signature d'une convention internationale est secondaire. En Syrie, il a été demandé au gouvernement de prendre des engagements juridiques sur les armes

chimiques, mais personne n'a soulevé le fait que, si la Syrie avait ratifié le PA II, cela aurait pu changer la manière dont les secours auraient pu être apportés à la population syrienne située dans des territoires disputés à l'État. En Syrie, et en Irak aussi, nous sommes face à des problèmes qui ne peuvent pas être réglés par le droit coutumier, car celui-ci ne s'applique pas de la même manière lorsqu'il s'agit de faire obstacle au droit national du pays concerné et particulièrement son droit pénal et anti-terroriste.

Cela ne veut pas dire que tout va bien dans les pays qui ont ratifié les Protocoles. Dans ces cas-là on constate des omissions et des ambiguïtés récurrentes dans la façon dont ils les ont intégrés dans leurs manuels militaires. Cela peut sembler être un détail, mais non. Car lorsqu'un collègue est arrêté, il est arrêté dans le cadre d'une procédure pénale ou dans le cadre d'une procédure militaire. Donc, malgré que les Protocoles soient signés et ratifiés, ils doivent encore être transcrits dans l'ordre juridique interne, car le juge *in fine* se repose sur ce qui est inscrit dans son code pénal.

Par exemple nous avons un collègue qui purge une peine de prison sur base du code pénal militaire d'un pays africain en conflit pour avoir eu des contacts avec des groupes armés dans le cadre de la négociation d'activités humanitaires. Dans le droit pénal national, le contact avec ces groupes criminels est interdit alors qu'il est nécessaire pour les activités de secours et légitimé par l'article 3 commun des Conventions de Genève dans les conflits armés non internationaux. Je suis surprise du laxisme des juristes face à ces défaillances d'intégration du droit humanitaire dans le droit national. On a l'impression que la communauté humanitaire se rassure en répétant comme un mantra que tout va bien avec le DIH, le seul problème est sa mise en œuvre. Non, tout ne va pas bien avec le DIH, sa mise en œuvre dépend d'abord de sa réconciliation avec le droit national et de son intégration effective dans celui-ci.

Si on prend l'exemple du Nigéria, qui a ratifié le PA II, on pourrait donc penser que MSF travaille dans un cadre légal clair de secours aux populations dans les zones de conflit avec Boko Haram. C'est seulement après le bombardement d'un camp de déplacés à Rann, le 17 janvier 2017, où MSF est parmi les victimes, qu'MSF s'interroge sur le contenu des manuels militaires du Nigeria. On se rend compte alors que le PA II a bien été ratifié mais que le manuel militaire nigérian n'a pas été mis à jour pour autant. Ainsi donc, il n'est pas clair que le conflit avec Boko Haram entre dans le cadre de ces manuels ni si ces manuels s'appliquent explicitement aux CANI. S'agit-il donc d'opérations militaires régies par le DIH ou d'opérations sécuritaires contre des criminels régies par d'autres règles ? La distribution des secours est-elle considérée comme humanitaire ou comme soutien matériel aux groupes criminels ? Les blessés et les victimes sont-ils considérés comme civils et intégrés au calcul de proportionnalité concernant les dommages collatéraux de l'attaque ou comme combattants illégaux ou complices des crimi-

nels ? Or, si les manuels de guerre ne sont pas très explicites pour ce qui concerne les CANI, le schéma des conflits armés internationaux reste très imprégné dans la pensée des militaires et les manuels militaires continuent, par exemple, à faire référence à la distinction entre blessés civils et blessés militaires, aux hôpitaux et au personnel soignant civil ou militaire. Ainsi, malgré le fait que toutes ces distinctions aient été unifiées avec la ratification des Protocoles additionnels, cela n'a pas été unifié dans les codes du Nigéria. Cela s'est également illustré au Yémen lors des attaques menées par la coalition Saoudo-Emirati. La coalition a demandé à MSF de déplacer ses hôpitaux pour les tenir éloignés des objectifs militaires. Lorsque nous avons répondu que l'on ne pouvait pas bouger un hôpital, nous avons entendu l'argument selon lequel nous ne pouvions donc pas nous plaindre des dommages collatéraux. Cet argument est incorrect au regard du DIH au sens strict, mais il reflète l'idée qu'un hôpital proche des lignes de front est un hôpital qui reçoit des combattants et qui ne bénéficierait donc pas de la même protection en termes de proportionnalité qu'un hôpital civil. Ce problème d'intégration du droit humanitaire n'est donc pas marginal, car c'est sur lui que repose la protection effective des infrastructures sanitaires, du personnel et des malades. Les éventuelles différences d'interprétation du DIH entre militaires et humanitaires ne finissent pas devant les tribunaux, mais plus fréquemment en incidents sécuritaires pour les acteurs humanitaires.

2. Les confusions des États

Le deuxième phénomène que j'aimerais présenter est celui de la criminalisation de l'action humanitaire en raison des législations anti-terroristes. Si la question de la criminalisation peut sembler restreinte à la problématique des sanctions pénales lorsque l'on travaille à Bruxelles ou à New-York, la réalité est tout autre pour les personnels de secours sur le terrain. Car lorsque l'on est considéré comme terroriste ou soutien du terrorisme dans un contexte de conflit armé, ce sont nos chances de survie qui sont drastiquement diminuées avant même de considérer le risque d'arrestation et de procès. Cette criminalisation indiscriminée se traduit en réalité par un risque d'attaque pour les acteurs de secours, mais aussi pour les blessés et malades. Nous trouvons une illustration claire de ce phénomène lorsque nous abordons la question de la protection des personnes blessées. Le cadre juridique du DIH est clair, le blessé et le malade appartenant à l'ennemi est protégé s'il a besoin de soins médicaux et s'il s'abstient de toute participation aux hostilités. Mais sous le régime anti-terroriste, la qualification criminelle vient s'ajouter au critère de participation aux hostilités. Quelle est donc le régime de protection d'un blessé terroriste, du personnel et de l'hôpital qui les prend en charge ? Qui a travaillé sur ces confusions, ces ambiguïtés autour du statut du blessé combattant ou civil criminel ? En sachant que dans le droit pénal national, le combattant membre d'un groupe armé blessé est toujours considéré par l'État comme un criminel blessé.

L'impact du droit pénal et anti-terroriste national couplé aux doctrines d'assassinats ciblés génère une grande insécurité pour la mission médicale en situation de conflit en « légitimant » des actions ciblées contre des blessés et malades considérés comme criminels ou terroristes dans le cadre du *search and capture*, ou de *capture or kill* qui se traduit en pratique par des attaques létales. Nous observons une évolution et une porosité entre des notions propres au DIH et le droit pénal, tels que la participation directe aux hostilités, les actes nuisibles à l'ennemi, le soutien matériel et la criminalisation directe du terrorisme, qui finissent par former un continuum pour les individus. La distinction fondamentale du droit humanitaire entre civil et combattant continue d'exister, mais dans de nombreux contextes ce principe est affaibli par la montée en puissance d'un principe supérieur de distinction qui oppose d'une part les innocents et d'autre part une catégorie subjective de suspects regroupant criminels, terroristes et tous leurs soutiens. C'est un nouvel espace criminel qui recouvre l'intégralité de la surface du globe entraînant une quasi-disparition de l'espace humanitaire. L'affaiblissement de l'espace civil conduit à une fragilisation de la protection juridique contenu dans le Droit international humanitaire aux victimes des conflits ainsi qu'aux organisations de secours. Il ne reste qu'un espace d'autorisation d'emploi à la force au nom de la sécurité contre des individus ou des groupes suspects, y compris de complicité ou de soutien matériel criminel.

MSF a été témoin de nombreux cas où des blessés étaient ciblés ou des cas d'acteurs de secours ciblés dans un contexte de lutte anti-terroriste couplé à un CANI. Cela inclut notamment des faits liés à la communication par ou avec des individus et groupes criminels. Selon le DIH, un blessé qui continue à maintenir une communication avec une partie au conflit peut perdre sa protection, ce qui est l'interprétation de certains États de l'article 41 PA I. Selon le droit pénal et anti-terroriste, toute communication ou facilitation des communications avec un groupe terroriste peut être assimilée à une infraction criminelle. Mais dans le monde d'aujourd'hui, où la communication est omniprésente et les interceptions téléphoniques sont la base des services de renseignement civils et militaires, comment faire la différence entre ce qui est un soutien matériel, une participation aux hostilités et un blessé ou un soignant qui appelle une famille qui se trouve dans une zone du conflit, pour donner des nouvelles de l'état de santé du blessé ? MSF a demandé aux États si pour protéger les hôpitaux des attaques il fallait interdire les téléphones portables comme on l'avait fait pour les armes. Il n'existe aucune règle ni aucun consensus à ce sujet. Et pourtant, c'est sur base d'interceptions téléphoniques que certains hôpitaux ont pu être pris pour cibles. Je ne peux pas dire que c'est le cas partout mais c'est une tendance lourde dans la pratique de renseignements utilisés pour le ciblage des objectifs. Nous avons également le cas d'un employé MSF condamné à 10 ans de prison, dont le dossier judiciaire contenait comme preuves matérielles des numéros d'appels de son téléphone correspondant aux interlocuteurs de MSF.

Enfin il est intéressant de voir à quel point notre façon d'aborder le problème du contre-terrorisme est centrée principalement sur la question du financement par les bailleurs de fonds occidentaux. On s'interroge sur l'effet dissuasif de ces législations pour les bailleurs de fonds et sur leur impact dans le financement des organisations de secours et l'alourdissement des contraintes administratives. Il n'est pas discutable que ces mesures ont un effet dissuasif, mais aucun employé humanitaire n'est mort à cause d'ajustements financiers. Et finalement, le secteur bancaire, qui est lui aussi impacté, a su se mobiliser contre les lourdeurs des vérifications administratives liées au risque de financement du terrorisme. Mais l'impact de ces lois va bien au-delà de la dissuasion financière puisqu'il affecte directement la conduite des hostilités et la criminalisation des civils et des secours humanitaires. Si on en revient à la question de la criminalisation, on voit par exemple que certains pays considèrent que toute population restée sous le contrôle de groupes terroristes pendant plus de six mois est assimilée à des terroristes. Mais cela signifie concrètement qu'il n'y a plus de civils, ni de secours humanitaires protégés par le DIH dans les zones contrôlées par Boko Haram au Nigeria ou par l'opposition en Syrie. Qui réagit là-dessus ? Que reste-il du DIH dans ces cas-là ?

3. Conclusions

Ce nouveau régime juridique créé par les lois anti-terroristes est aujourd'hui en opposition directe avec le respect des principes du Droit international humanitaire dans les conflits armés non internationaux. Ce régime juridique spécial qui, sous prétexte d'arrêter le mal, s'étend à l'échelle planétaire, est un problème, car il affaiblit directement l'espace humanitaire et le statut des civils dans les conflits. La solution commence avec ce diagnostic et le rétablissement des principes et exemptions prévues par le droit humanitaire. Concernant les missions médicales, les deux Protocoles additionnels sont allés plus loin que l'exemption en prévoyant une immunité pénale pour le personnel soignant. C'est le seul sujet autour duquel les Conventions et leurs Protocoles mêlent droit de la guerre et droit pénal, et c'est justement en travaillant sur cette interaction entre le droit de la guerre et le droit pénal que nous pourrions recréer un espace humanitaire. Je pense donc que c'est important que tous les excellents juristes qui travaillent sur le contre-terrorisme et qui souhaitent contribuer à plus de sécurité sur le terrain s'attèlent à réintégrer ces éléments fondamentaux du droit humanitaire dans les lois anti-terroristes. Il faudra encore poursuivre ces efforts pour que ces immunités concernant le personnel médical dans les conflits soient transposées dans le droit pénal des États, y compris dans leur législations anti-terroristes. En effet, avec sa modeste expérience, MSF n'a trouvé mention de cette immunité médicale dans aucun code pénal national. Cela fait partie des petits oublis qui ont un grand impact quand il s'agit de transposer au sein de l'ordre interne les obligations du DIH auxquelles nous tenons tous.

Q&A SESSION

At the end of the panel discussion, a Q&A session allowed the audience to raise three questions.

1. A way forward to improve the protection of medical personnel

One audience member suggested two ways to improve the protection of medical personnel. The first proposal suggested that an organisation such as the Geneva Academy could collaborate with the Committee under the International Covenant on Economic, Social and Cultural Rights to develop general comments, which would be a useful tool to require States to provide exemption clauses to legitimise sanctions regimes. The second suggestion was to collect examples from human rights bodies with regards to the protection of medical personnel, for instance case laws such as *Gül v. Turkey*, *Özkan v. Turkey* and *Kaya v. Turkey*. In these cases, the Court recognised the need for the injured to obtain appropriate medical treatment, without taking into account other criteria such as their membership of an armed group. The general comments and jurisprudence of human rights bodies could provide examples on the issue of the protection of medical personnel and serve as a useful tool in this regard.

2. Risks of diversion from cash transfer programmes

A second question was raised about the new trend in humanitarian assistance pushed by donors: cash transfer programmes and the possible risks of diversion. The person wanted to know if it presented a greater risk than the traditional assistance actions. Ms. Emanuela-Chiara Gillard stressed the fact that the name ‘cash transfer programme’ was misleading and that these programmes did not involve the transfer of large amounts of money in cash but generally the provision of credit cards to allow recipients to purchase the things they need. Awareness-raising is needed among lawyers because operational people are more and more familiar with the different modalities. Ms. Emanuela-Chiara Gillard believes that the increase of operations with cash is one of the key elements. Ms. Adela Kabrtova answered that from a sanctions compliance perspective, the biggest issue is not the last beneficiary of cash transfer programmes but the chain. For instance, in contexts where formal banking channels are not available, informal banking channel such as *Hawala* are used. The lack of control over funds through this channels leads to an increased risk of diversion, the focus should therefore be on this aspect.

3. The OPCW experience and the prosecution of humanitarian organisations

A participant shared her experience of restrictive measures when she used to work for the Organisation for the Prohibition of Chemical Weapons (OPCW). Many programmes on chemi-

cal weapons in Syria required payment to companies responsible for the storing of chemical weapons production facilities. However, due to the sanctions, not one single bank agreed to make the payments. All the banking had to be done outside the country and the money had to be – literally – walked through the border. The problem does not only affect the humanitarian sector but also other organisations such as OPCW or UN agencies.

The auditor also asked whether there have been any prosecutions of humanitarian organisations, and what the outcomes of these cases were. Ms. Françoise Bouchet-Saulnier stated that the number of cases is quite impressive but not always well known as it does not always end up with a prosecution. In many cases, there is no trial, the person is simply killed, because you do not survive being a suspected criminal on the battlefield. MSF staff are under investigation, under pressure, or killed, and it is difficult to know if it is because of their MSF activities, or because they breached the sanction regime or domestic law. There is no case today in MSF where someone has been prosecuted exclusively for providing medical assistance, but, for example, illegal entry into a number of countries has become a terrorist offence and it affects humanitarian and medical personnel. The risks of criminalisation and being associated with a terrorist are therefore very real notably for humanitarian national staff, and once you are associated with a terrorist, your life does not last long. And IHL does not come into play in such situation because IHL needs to go down the line of domestic law and needs to be reconciled with criminal law, which is unfortunately not the case now. Ms. Françoise Bouchet-Saulnier said that the chilling effect of the criminalisation of individuals is huge. MSF traditionally used to state that, while risks exist for its workers, it is the organisation that bears all the responsibility. But with the current trend this is no longer the case, MSF cannot go to prison instead of its workers. Ms. Emanuela-Chiara Gillard reported several cases in the Gaza Strip, as well as in the USA under the False Claims Act. Ms. Adela Kabrtova mentioned a report published by the United Nations Economic and Social Commission for Western Asia (UN ESCWA) and sponsored by the Swiss Agency for Development and Cooperation, written by Justine Walker, on the humanitarian impact of restrictive measures and possible solutions. She also raised the point that the banking sector needs to be more involved in the current debate because, even if exemption clauses are adopted, the banking sector will still be able to refuse its services for commercial or reputational reasons. And there is no way to force them.

CONCLUDING REMARKS

Walter Füllemann

Head of Delegation, ICRC Brussels

Dear friends, dear participants, dear colleagues,

The time has now come to close this 19th Bruges Colloquium. We have discussed many challenges and problems linked to the law of non-international armed conflicts (NIAC) for the last one and a half days, and concluding this rich Colloquium is a challenge in itself.

It will be impossible to summarise all the debates, and I promise I will not be long, be reassured. But I would like to highlight a few considerations thoughts that I will take with me from our discussions.

While discussing the issue of applicability of International Humanitarian Law (IHL) for NIAC, a speaker called, from a doctrinal point of view, for some flexibility in the application of indicative criteria to classify or de-classify a situation of violence as a NIAC, but conscientiously and taking into account some important limits. A key question, for example, is to examine – after having determined that IHL applies – whether imposing unrealistic obligations on non-state parties to the armed conflict could really improve protection in NIAC.

Similarly, we have seen that improving protection means that the geographical and personal scope of application of the law of NIAC should also be understood wisely, including when looking at the application of IHL within one armed group. I liked the statement of one of our experts: “What you gain in nuance, you lose in certainty”.

As life in the middle of an armed conflict cannot be simple, the involvement and implication of support providers in the general conduct of hostilities also raises complex questions related to the status under IHL of the support provider. In order to cope with the challenges raised by determining IHL applicability to coalition warfare in NIACs, the ICRC therefore developed its “support based approach” designed as a complementary tool to help classify situations within the framework of the criteria presented yesterday morning. A tool that the ICRC now uses almost on a daily basis. I have heard a lot about it over the last day and a half, and I can guarantee that you will hear a lot about it again in the days, months and years to come.

Detention is an expected and lawful occurrence in armed conflict. But as we have seen, it raises so many legal problems that detention operations are becoming extremely complicated.

There are a number of problems that need to be addressed, from the legal grounds for detention to the issue of detainee transfers. Experts have shared their experience and views with us, highlighting the difficulties, but also expressing some hope for positive solutions. As one example of a way forward, a speaker made an appeal to lawyers to look beyond IHL to authorities able to support the process – facilitated by the ICRC – of strengthening the legal protection of persons deprived of their liberty.

If these questions are already intricate for detention by States, imagine how more complex they become for non-State armed groups, as we have seen with examples from Colombia and elsewhere. A lot remains to be done on these issues in order to ensure that armed groups know the law, understand it, and apply it. In this respect, we heard various speakers urging that IHL, and international law more widely, need to be realistic. For instance, the law would have only a small chance of being applied if it made it essentially impossible for armed groups to keep detainees while complying with their legal obligations.

When I opened the Colloquium yesterday morning, I referred to the Battle of Ypres, where many aspects of the fighting were extremely daring and challenging, though not the identification of the enemy. And we have heard how identification of the enemy has become a huge challenge nowadays, impacting, of course, the protection of civilians as well as the protection of humanitarians and medical mission. Today, the debate around direct participation in hostilities or the continuous combat function is very much alive, as we have seen. Not everyone agrees on all the points included in the ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, but I feel that its publications has triggered many debates among, and with, States and international organisations, which is already positive and encouraging.

The discussions around collateral damage also highlighted a number of very interesting points while addressing not only legal issues and military constraints, but also, and that was very useful, moral perspectives and other dimensions.

100 years ago, Ypres was already the victim of heavy fighting in the city. If you visit the Flanders Field museum, you will see pictures of Ypres in 1918 after the battles: completely flattened, just as we can see in some contemporary armed conflicts taking place in urban environments. The big difference between now and then is that both the law and warfare have evolved tremendously. Today, many more concerns come into play when looking at military operations in urban settings, bringing many challenges, as illustrated by the consequences of the battle of Mosul. I would personally plea for a more thorough discussion with States, international organisations and non-state organised armed groups on the issue of the use of explosive weapons with a wide area impact in populated area.

Yesterday's panel on the interaction between Human Rights Law and IHL has been an occasion to witness a beautiful and lively confrontation between experts from different backgrounds and experience. If we had to summarise it, we could say that there is no "one-size-fits-all" approach, but at the same time, we need legal certainty.

That tension and friction between flexibility and legal certainty raises many difficulties, such as understanding those "speaking LOAC with a human rights accent" when addressing both detention and the use of force.

Compliance is obviously central. And, however, it is precisely here that IHL is not strong enough... When I opened the Colloquium, I already mentioned the dialogue we have with State authorities who support parties to armed conflict, an initiative that was recalled this morning. The importance of engaging with non-state armed groups as well as the requirement to consider them as serious players in the implementation of IHL, despite all the obstacles, was also discussed with welcomed positive examples.

Similarly, as we have seen, the role of a human rights regional courts can be helpful, even if States have a natural reluctance to call a NIAC by its name.

I will not come back to the last panel, which is still very fresh in our minds and that contained so many stimulating developments. But, as you have heard, delivering humanitarian assistance and carrying out protection work has become not only extremely challenging and demanding, but actually very dangerous, as we saw earlier this week in the Lake Chad region. But the challenges can also come as side effects from the application of other legal regimes, like the counter-terrorism one, if those are not carefully crafted and drafted. We have mentioned banks, I have discovered the notion of Financial Action Task Force and we heard the words criminalisation, exemptions of humanitarian actors and actions, money laundering, impact of sanctions. I think it is very important as humanitarians to demonstrate what is an operation that should be exempted from the sanctions and counter-terrorism measures. We have also heard a lot about the importance of implementation at the national level, and here I advertise for our own consultative services at the ICRC, which translate and put into national realities what is adopted at the international level.

Dear colleagues, ladies and gentlemen, these are just a few points from the Colloquium discussions. Fortunately, there will be, for a more comprehensive overview, proceedings that will be published for further reference to our debate and expressed positions. I would encourage you, if you do not have time to go to West Flanders and visit Ypres, to go down to the foyer and

have a look at the exhibit that shows the work of the ICRC for the prisoners of war in Belgium, and also the work of the Belgian Red Cross during the First World War.

I personally enjoyed this 19th Edition of the Bruges Colloquium, I appreciated the spirit, the perspectives, the diversity, the frankness, and this is exactly what the Colloquium aims to achieve.

I want to thank once again Stéphane, Maxime, Olga and everybody else in the Brussels delegation involved in the preparation of the Bruges Colloquium. I would also like to thank and to specifically extend a personal invitation for the next edition to Tristan Ferraro who accompanied us through the process of preparing the Colloquium. I would like to thank my colleagues in the other delegations, our speakers, our experts, and every participant. Finally, I would also like to thank François and Nanaz, our interpreters for having managed again to accompany us through this marathon.

Before formally closing the 19th Bruges Colloquium, I already invite all of you to come back next year, and celebrate with us the 20th edition of the Bruges Colloquium that will be held in this same room on 17 and 18 October 2019. There will be many legal and operational challenges to NIACs and IACs to discuss, as well as some political challenges. As humanitarians, we are of course not politicians. But I think that we have to be aware of the political realities.

Thank you all, take care *et à la prochaine*.

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Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts

19th Bruges Colloquium, 18-19 October 2018

Simultaneous translation into French / English

Traduction simultanée en anglais/français

DAY 1: Thursday, 18th October

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Mrs Sieglinde Gstöhl**

Director of Studies, EU International Relations and Diplomacy Studies
Department of the College of Europe

9:40 – 9:55 **Welcome address by Mr Walter Füllemann,**

Head of Delegation, ICRC Brussels

9:55 – 10:15 **Keynote address by Mr Gilles Carbonnier, Vice-President, ICRC**

Session One: SELECTED ISSUES ON THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY NON-INTERNATIONAL ARMED CONFLICTS

Première Session : Questions choisies sur l'applicabilité du droit international humanitaire dans les conflits armés non-internationaux actuels

Chairperson: **Paul Berman**, Council of the European Union

10:30 – 10:50 **The criteria for determining nowadays NIACS: towards a relaxation?**

Speaker: **Julia Grignon**, University of Laval

10:50 – 11:10 **A clarification of the geographical and personal scope of multinational NIACs?**

Speaker: **Vaios Koutroulis**, Université libre de Bruxelles

11:10 – 11:30 **Military support to belligerents: can the provider become a party to the armed conflict?**

Speaker: **Tristan Ferraro**, ICRC Legal Division

11:30 – 12:15 **Discussion**

12:15 – 13:45 **Sandwich lunch**

Session Two: SELECTED ISSUES ON DETENTION IN CONTEMPORARY NON-INTERNATIONAL ARMED CONFLICTS

Deuxième Session : Questions choisies sur la détention dans les conflits armés non-internationaux actuels

Chairperson: **Steven Hill**, NATO Legal Office

13:30 – 13:50 **Legal basis and grounds for detention in multinational non-international armed conflicts**

Speaker: **Tilman Rodenhauer**, ICRC Legal Division

13:50 – 14:10 **Transfer of detainees in multinational non-international armed conflicts: implementing the principle of non-refoulement, an impossible task?**

Speaker: **Marten Zwanenburg**, Dutch Ministry of Foreign Affairs

14:10 – 14:30 **Detention by non-state armed groups: legal issues and practical challenges**

Speaker: **Annyssa Bellal**, Geneva Academy of IHL and Human Rights

14:30 – 15:00 **Discussion**

15:00 – 15:15 **Coffee break**

Session Three: SELECTED ISSUES ON THE CONDUCT OF HOSTILITIES IN CONTEMPORARY NON-INTERNATIONAL ARMED CONFLICTS

Troisième Session : Questions choisies sur la conduite des hostilités dans les conflits armés non-internationaux actuels

Chairperson: **Darren Stewart**, British Armed Forces

15:15 – 15:35 **Identifying the enemy: Armed forces, CCF and DPH in light of contemporary NIACs**

Speaker: **Sigrid Redse Johansen**, Norwegian Defense College

15:35 – 15:55 **Collateral damage in contemporary non-international armed conflicts: legal, military and moral perspectives**

Speaker: **Janina Dill**, University of Oxford

15:55 – 16:15 **Legal challenges raised by armed/extraterritorial operations in urban areas**

Speaker: **Claire Legras**, Ministère des Armées

16:15 – 16:45 **Discussion**

16:45 – 18:00 **PANEL DISCUSSION: THE INTERACTION IN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS (THE CASE OF USE OF FORCE AND DETENTION)**

Table ronde : L'interaction entre le droit international des droits de l'homme et le droit international humanitaire dans les conflits armés non-internationaux (le cas du recours à la force et la détention)

Moderator: **Françoise Hampson**, University of Essex

Panellists:

Peter Kempees, ECHR

Marco Sassòli, University of Geneva

Darren Stewart, British Armed Forces

228 | 19:30 – 22:30 **Dinner (registration required)**

DAY 2: Friday, 19th October

Session Four: COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY NON-INTERNATIONAL ARMED CONFLICTS

Quatrième session : Le respect du droit international humanitaire par les acteurs non-étatiques

Chair person: **Elżbieta Mikos-Skuza**, Warsaw University and College of Europe

9:00 – 9:20 **Towards a better compliance for IHL in NIACs: a role for States and International Organizations providing support to parties to NIAC**

Speaker: **Thomas de Saint Maurice**, ICRC Legal Division

9:20 – 9:40 **Can non-State armed groups comply with IHL in nowadays armed conflicts ?**

Speaker: **Pascal Bongard**, Geneva Call

9:40 – 10:00 **Compliance with the law in contemporary NIACs: the contribution of the ECHR**

Speaker: **Peter Kempees**, ECHR

10:00 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: HUMANITARIAN ACTORS AND CONTEMPORARY CHALLENGES IN NON-INTERNATIONAL ARMED CONFLICTS**

Table ronde : Les acteurs humanitaires et les défis contemporains dans les conflits armés non-internationaux

Moderator: **Pascal Daudin**, ICRC

Panellists:

Adela Kabrtova, DG ECHO

Emanuela-Chiara Gillard, University of Oxford

Françoise Bouchet-Saulnier, MSF

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**

Walter Füllemann, Head of Delegation, ICRC Brussels



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SPEAKERS' BIOGRAPHIES CURRICULUM VITAE DES ORATEURS

Welcome Addresses and Keynote Speech

Allocutions de bienvenue et discours introductif

Sieglinde Gstöhl has since September 2010 been Director of the Department of EU International Relations and Diplomacy Studies at the College of Europe. She has been a full-time Professor at the College of Europe in Bruges since April 2005. Before joining the College she was Assistant Professor of International Relations (1999-2005) at the Institute of Social Sciences at Humboldt University Berlin and post-doc researcher (1998-99) at the Liechtenstein-Institut in Barendorn. In 1992-93 she was 'International Institutions Fellow' at the Center for International Affairs at Harvard University, Cambridge, MA. Professor Gstöhl holds a Ph.D. in political science as well as an MA in International Relations from the Graduate Institute of International and Development Studies in Geneva and a degree in Public Affairs (lic.rer.publ. HSG) from the University of St. Gallen. She has also acquired professional experience in European affairs (e.g. EFTA Secretariat, national referendum campaign).

Walter A. Füllemann has been with the International Committee of the Red Cross since 1989. His field missions include Nicaragua (1989-1990), Peru (1991), South Africa (1992-1994), as well as Croatia and Bosnia-Herzegovina (1994-1995). He served as Head of the ICRC delegation in Baku, Azerbaijan, from 1996 to 1997. Between 1997 and 1999, he worked as delegate and spokesperson for the ICRC delegation to the United Nations in New York. At ICRC Headquarters in Geneva, he headed the operational desk for the former Yugoslavia from 1995 to 1996. From 1997 to 2002 he worked as Deputy Head of the External Resources Division (donor relations and fundraising), and from 2002 to 2009 as ICRC Deputy Director of Operations. During the period 2009-2014 he served as Permanent Observer of the ICRC to the United Nations in New York. Since October 2015, he has been the ICRC Head of Delegation to the EU, NATO and the Kingdom of Belgium in Brussels. He holds a master's degree in International Relations from the University of Saint-Gallen, Switzerland.

Gilles Carbonnier is the Vice-President of the International Committee of the Red Cross (appointed in 2018). Since 2007, Dr Carbonnier has been a professor of development economics at the Graduate Institute of International and Development Studies (Geneva), where he also served as Director of Studies and President of the Centre for Education and Research in Humanitarian Action. His expertise is in international cooperation, the economic dynamics of armed conflict, and the nexus between natural resources and development. His latest book, published by Hurst and Oxford University Press in 2016, is entitled *Humanitarian Economics: War, Disaster and the Global Aid Market*. Prior to joining the Graduate Institute, Dr Carbonnier worked with the ICRC in Iraq, Ethiopia, El Salvador and Sri Lanka (1989–1991), and served as an economic adviser at the ICRC’s headquarters (1999–2006). Between 1992 and 1996, he was in charge of international trade negotiations (GATT/WTO) and development cooperation programmes for the Swiss State’s Secretariat for Economic Affairs.

Session One: The applicability of International Humanitarian Law in contemporary non-international armed conflicts

Première Session : L’applicabilité du Droit international humanitaire dans les conflits armés non internationaux contemporains

Paul Berman joined the Legal Service of the Council of the European Union in 2012 where he is currently the Director for External Relations. He holds degrees from the Universities of Oxford and Geneva and is qualified as a barrister in England and Wales. Paul joined the legal cadre of the British Diplomatic Service in 1991. As well as working in the Foreign and Commonwealth Office in London, he has served as Legal Adviser in the International Humanitarian Law Advisory Service of the International Committee of the Red Cross in Geneva, as International Law Adviser to the UK Attorney General, as Legal Counsellor at the UK Permanent Representation to the European Union in Brussels and as Director of the UK Cabinet Office European Law Division. He is a member of the Advisory Board of the Centre for European Law at King’s College London and a Visiting Professor at the College of Europe in Bruges.

Julia Grignon est professeure agrégée à la faculté de droit de l’Université Laval (Québec), et directrice des programmes de 2^{ème} et 3^{ème} cycles, où elle enseigne le Droit international humanitaire, le Droit international des droits de la personne et le Droit international des réfugiés. Elle est l’une des codirectrices de la Clinique de droit international pénal et humanitaire et l’une des cofondatrices du Centre interdisciplinaire de recherche sur l’Afrique et le Moyen Orient. Julia Grignon s’intéresse à toutes les branches du droit international relatives à la protection de la personne, mais son domaine de spécialisation est le Droit international humanitaire qui a été son champ de recherches privilégié depuis plus de 10 ans. Elle est l’auteure de l’ouvrage *L’applicabilité temporelle du droit international humanitaire* (Genève:

Schulthess, 2014) et elle a dirigé l'ouvrage *Hommage à Jean Pictet* (Cowansville/Genève: Yvon Blais/Schulthess, 2016). Julia Grignon mène actuellement un projet de recherche individuel portant sur l'application extraterritoriale du Droit international des droits humains en contexte d'opérations militaires extérieures, financé par le Conseil de recherche en sciences humaines du Canada. Elle est également co-chercheuse au sein du Partenariat canadien pour la justice internationale. Julia Grignon est membre du Comité pour le Concours Jean-Pictet depuis 2008 (présidente du comité de pilotage 2013, 2015 et 2016). Elle est actuellement membre du Conseil scientifique de l'Institut de Recherche Stratégique de l'École Militaire (France).

Vaios Koutroulis has been a Senior Lecturer at the International Law Centre of the Université Libre de Bruxelles (ULB) since 2013, teaching, among other things, public international law, law of armed conflict and international criminal law. He studied law at the University of Athens and the Université Libre de Bruxelles. He received his PhD in 2011 for a thesis on the relations between *jus contra bellum* and *jus in bello*, for which he received the George Tenekides prize from the Hellenic Society of International Law and International Relations. Vaios acted as an adviser to the Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. His publications focus mainly on *jus in bello* and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris).

Tristan Ferraro is Senior Legal Adviser at the Legal Division of the ICRC (HQ Geneva). He is the in-house responsible for legal issues relating to multinational forces/coalition warfare, occupation (head of the ICRC project on occupation), protection of civilians and the notion of armed conflict (establishing ICRC positions on legal issues aimed at classifying/declassifying situations of armed conflict). He is also in charge - among others - of the files relating to humanitarian access, protection of humanitarian personnel as well as to IHL and terrorism. Before coming back to the Legal Division at the ICRC HQ in 2007, he had served with the ICRC for some years in the field - in particular as Legal Coordinator - in Afghanistan, Pakistan and Israel/Palestinian occupied territory. Prior to joining the ICRC in 2002, Tristan Ferraro worked as a Senior Lecturer at the University of Nice-Sophia Antipolis (France), teaching *inter alia* public international law, including International Humanitarian Law. He holds a Doctor of Laws degree from the University of Nice-Sophia Antipolis (France).

Session Two: Detention in contemporary non-international armed conflicts

Deuxième Session : La détention dans les conflits armés non internationaux contemporains

Steven Hill was appointed as the Legal Adviser and Director of the Office of Legal Affairs at NATO Headquarters in Brussels in February 2014. In this role, Mr. Hill is Secretary General Jens

Stoltenberg's Chief Legal Adviser. He leads the multinational legal team in the Office of Legal Affairs, which provides timely legal advice on policy issues, develops consensus solutions for compliance with multinational legal requirements, and promotes and defends the Organisation's legal interests in numerous internal and external venues. He also represents NATO in external legal bodies such as the Council of Europe's Committee of Legal Advisers and conducts regular engagements with NATO allies, partners, and other international organisations as well as the general public. Prior to joining NATO, Mr. Hill served as Counselor for Legal Affairs at the United States Mission to the United Nations, where he participated in multinational negotiations on the rule of law, sanctions, counter-terrorism, peacekeeping, and the protection of civilians. He was also a member of the Management Committee for the Special Tribunal for Lebanon, the Principal Donors Group for the Extraordinary Chambers in the Courts of Cambodia, and the U.S. observer delegation to the Assembly of States Parties of the International Criminal Court. Prior to his work in New York, he led the legal unit at the International Civilian Office / European Union Special Representative in Kosovo and was a Visiting Professor of Law at the Hopkins-Nanjing Center in China. Mr. Hill began his legal career in the Office of the Legal Adviser (L) at the U.S. Department of State. In a series of assignments, he focused on diplomatic property law, economic sanctions, International Humanitarian Law, and human rights law. He represented the U.S. in numerous United Nations human rights-related committees and treaty bodies as well as before the International Court of Justice and the Inter-American Commission on Human Rights. From 2004 to 2005 and again in 2007, he served as a legal adviser at the U.S. Embassy in Baghdad. Mr. Hill graduated from Yale Law School and Harvard College and is a member of the New York bar.

Tilman Rodenhauer is a Thematic Legal Adviser at the International Committee of the Red Cross headquarters in Geneva, Switzerland. He provides legal and policy advice on detainee transfers (non-refoulement) and on private military and security companies. Tilman is also responsible for the ICRC's study on Strengthening IHL Protecting Persons Deprived of their Liberty. Prior to joining the ICRC in 2016, Tilman worked with the German Red Cross, DCAF, the NGO Geneva Call, and the United Nations, with missions in Africa and the Middle East. Tilman holds a PhD from the Graduate Institute of International and Development Studies in Geneva and recently published the monograph 'Organizing Rebellion: Non-state armed groups under international humanitarian law, human rights law, and international criminal law' (OUP, 2018). He has also published various articles in renowned international journals and received different awards for his work.

Marten Zwanenburg is a Legal Counsel with the international law division of the Ministry of Foreign Affairs of the Netherlands, where he advises *inter alia* on international law concerning the use of force and International Humanitarian Law. He previously worked in the Directorate

of Legal Affairs of the Ministry of Defence. He also teaches a course on UN peacekeeping in the Master of Advanced Studies in International Public Law program at Leiden University. Marten has published widely on International Humanitarian Law and collective security law.

Annyssa Bellal is a Senior Research Fellow and the Strategic Adviser on International Humanitarian Law and at the Geneva Academy of International Humanitarian Law and Human Rights. She is also a Senior Lecturer in international law at Sciences Po, Paris. In the past years, she worked as a legal adviser for the NGO Geneva Call, the UN Office of the High Commissioner for Human Rights, the International Committee of the Red Cross and the Swiss Department of Foreign Affairs. In 2012, she was an Assistant Professor in public international law at the Irish Centre for Human Rights in Galway. Dr Bellal was awarded several fellowships for her research, notably from McGill University (O'Brien Fellow in Residence), New York University (Hauser Global Law School research fellow) and the Graduate Institute of International Studies and Development (Albert Gallatin Research Fellow). She edited and authored the War Report 2014 (Oxford University Press, 2015), 2016 and 2017 (Geneva Academy) and is the author of several articles on various IHL and human rights law issues.

Session Three: Conduct of hostilities in contemporary non-international armed conflicts
Troisième Session : La conduite des hostilités dans les conflits armés no -internationaux contemporains

Darren Stewart has served in a number of appointments during his career in the Army Legal Services including operational, prosecution and training posts. He deployed to Kosovo in 1999 as the Legal Adviser to Commander British Forces. Over the period 2000 - 2003 whilst serving at the UK Permanent Joint Headquarters, Brigadier Stewart saw further operational duty in Sierra Leone, the Balkans, the Middle East and Afghanistan, acting as the Legal Adviser to Commanders of British Forces in each of these theatres. Brigadier Stewart was posted to SHAPE in 2003 as the Assistant Legal Adviser (UK) with responsibility for providing legal advice on Host Nation and Logistic matters across NATO, including participating in the production of various NATO policy documents and negotiating a Strategic Airlift MOU with the Russian Federation. From 2005 to 2006 he also served as the Commander Legal, Headquarters Northern Ireland where he was heavily involved in legal issues associated with the normalisation process in Northern Ireland, including the development of UK legislation relating to enduring military support to civil authorities. In August 2006 Brigadier Stewart was posted to Headquarters Allied Rapid Reaction Corps (HQ ARRC) and deployed to Afghanistan as the Chief Legal Adviser, HQ International Security Assistance Force for Afghanistan (ISAF) from August 2006 – March 2007. In 2009 Brigadier Stewart was appointed Director of the Military Department, International Institute of Humanitarian Law, San Remo Italy. Brigadier Stewart served as Chief

of Staff, Directorate of Army Legal Services at Army Headquarters Andover and subsequently Assistant Director Administrative Law from 2012 to 2015. He was appointed Deputy Assistant Chief of Staff – Legal, Headquarters Field Army in November 2015. Brigadier Stewart assumed his current appointment as Head of Operational Law for the British Army in October 2016. In May 2012 Brigadier Stewart was appointed on a part-time basis to the judicial appointment of Assistant Coroner for Inner West London (Westminster) and in September 2015 he was appointed an Assistant Coroner for the County of Surrey. Brigadier Stewart was elected to the Council of the International Institute of Humanitarian Law in March 2017 and to the International Society of Military Law and the Law of War (ISMLLW) in 2018.

Sigrid Redse Johansen is the acting Judge Advocate General for the Norwegian Armed Forces and head of the Norwegian Military Prosecution Authorities. She has worked for more than ten years at the Norwegian Defence Command and Staff College, teaching the Law of Armed Conflict to all levels of military command, as well as doing research. She has a PhD in international law, on military necessity and the commander's assessment of necessity during the conduct of hostilities. She has been a member of the Ethical Council for the Norwegian Defence sector and published books and articles on military law in general and, most recently, on autonomy and the Law of Armed Conflict in particular. Prior to working for the Armed Forces, she worked as a lawyer (advocate) with her own company.

Janina Dill is the John G. Winant Associate Professor of U.S. Foreign Policy at the Department of Politics and International Relations (DPIR) of the University of Oxford. She is also a Professorial Fellow at Nuffield College and a Research Fellow of the Oxford Institute for Ethics, Law and Armed Conflict (ELAC). Her research concerns international law and ethics in international relations, specifically in war. Her current work investigates the legal, moral and military implications of "collateral damage". She specifically focuses on U.S. military practices. More generally, she is interested in how legal and moral imperatives interact with strategic thinking and technological developments to explain conduct in war and the development of armed conflict. She also works on IR theory, specifically constructivism and the intersection of explanatory IR theories with normative political theory. She was previously employed as an Assistant Professor of Normative Political Theory at the Department of International Relations of the London School of Economics and Political Science. She holds a bachelor's degree 'with Honors' from the Technical University Dresden in Germany and she has undertaken graduate studies in Cambridge, Princeton, and Oxford. Her doctoral research was supported by the German Academic Foundation, the German Academic Exchange Service and Merton College's Domus Scholarship. The resulting dissertation has won two academic awards, the Lord Bryce Prize for the Best Dissertation in International Relations and Comparative Politics and Oxford University's Daztursada Jal Pavry prize for an outstanding thesis in the area of international

peace and understanding. Her first book appeared with Cambridge University Press as part of the series Cambridge Studies in International Relations in 2015. The book was runner-up for the Birks Prize for Outstanding Legal Scholarship of the Society of Legal Scholars in 2016, and it has received an Honourable Mention by the Theory Section of the International Studies Association. Her second (co-authored) book is forthcoming with Cambridge University Press as part of the series Max Planck Trialogues on the Law of Peace and War.

Claire Legras a été nommée Directrice des affaires juridiques du ministère des Armées lors du conseil des ministres du 2 août 2017. Elle succède à la conseillère d'État Claire Landais, qui occupait la fonction depuis le mois d'août 2012. Claire Legras est diplômée de l'École des hautes études commerciales (HEC Paris), d'une maîtrise de philosophie à l'université de Paris IV, de l'Institut d'études politiques de Paris et de l'École nationale d'administration (ENA, promotion Cyrano de Bergerac). À sa sortie de l'ENA en 1999, elle devient rapporteur à la sixième sous-section du Conseil d'État, puis rapporteur à la section des finances. En 2003, elle occupe une fonction de conseiller au cabinet du ministère de la Santé, de la Famille et des Personnes handicapées, puis du cabinet du ministère de l'Emploi, du Travail et de la Cohésion sociale en 2004. En 2005, elle rejoint le cabinet du Premier ministre en qualité de conseiller. En 2007, elle retourne au Conseil d'État en qualité de Commissaire au gouvernement puis de Rapporteur public près la section du contentieux. Depuis septembre 2014, Claire Legras occupait le poste de Premier conseiller à l'ambassade de France à Londres. Claire Legras a été membre du Comité consultatif national d'éthique de 2008 à 2016.

Panel discussion: The interaction in International Human Rights Law and International Humanitarian Law in non-international armed conflicts

Table ronde : L'interaction entre le Droit international des droits de l'homme et le Droit international humanitaire dans les conflits armés non internationaux

Françoise Hampson is an Emeritus Professor of Law at the University of Essex. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and regularly teaches on the courses at the International Institute of Humanitarian Law, San Remo. From 1998 to 2007, she was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the representation of Kurdish applicants, was awarded Human Rights Lawyer of the Year in 1998 jointly with her colleague from the Human Rights Centre, Professor Kevin Boyle. More recently, together with her colleague Professor Noam Lubell, she has submitted third party interventions to the European Court of Human Rights on the relationship between Law of Armed Conflicts and the European Convention on Human Rights (ECHR) in the cases of

Hassan v. UK and Georgia v. Russia (No.2). She has taught, researched and published widely in the fields of armed conflict, International Humanitarian Law and on the ECHR.

Peter Kempees is Head of Division in the Registry of the European Court of Human Rights. He was admitted to the Bar of The Hague in 1986 and has been a member of the Registry of the European Court of Human Rights since 1992. Intermittently, between 1997 and 2001, he was seconded to the Human Rights Chamber for Bosnia and Herzegovina to serve as its Registrar. He has an LLM awarded in 1985 by Leiden University.

Marco Sassòli is Director of the Geneva Academy of International Humanitarian Law and Human Rights and professor of international law at the University of Geneva. From 2001 to 2003, he was professor of international law at the Université du Québec à Montreal, Canada, where he remains an Associate Professor. He is also commissioner and alternate member of the Executive Committee of the International Commission of Jurists (ICJ) and *pro bono* Special Advisor on International Humanitarian Law of the Prosecutor of the International Criminal Court. Marco Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. He worked from 1985 to 1997 for the International Committee of the Red Cross, at the headquarters, *inter alia* as Deputy Head of its Legal Division, and in conflict areas, *inter alia* as Head of Delegation in Jordan and Syria and as protection coordinator for the former Yugoslavia. He has also served as registrar at the Swiss Supreme Court. He has published on International Humanitarian Law, Human Rights Law, international criminal law, the sources of international law and the responsibility of States and non-State actors.

Session Four: Compliance with International Humanitarian Law in contemporary non-international armed conflicts

Quatrième session : Le respect du Droit international humanitaire dans les conflits armés non internationaux contemporains

Elżbieta Mikos-Skuza is an Associate Professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw, director of NOHA (Network on Humanitarian Action) master studies and Director of postgraduate studies on humanitarian aid at the same university. She served as Faculty's Vice-Dean in 2008 – 2012. She is also a visiting professor at the College of Europe in Natolin. Dr E. Mikos-Skuza has been volunteering with the Polish Red Cross for thirty years, mainly in the field of dissemination of IHL. In 2004 – 2012 she was a Vice-President of the Polish Red Cross. She is also a member and First Vice-President of the International Humanitarian Fact Finding Commission established under 1977 Protocol Additional I to the 1949 Geneva Conventions and of the San Remo International Institute of Humanitarian Law. She is the author and co-author of numerous publications on Public Inter-

national Law and International Humanitarian Law, including a collection of IHL documents published in the Polish language.

Thomas de Saint Maurice is Head of the Operational Legal Advisers Unit at the International Committee of the Red Cross. He joined the ICRC in 2001, working both in the field (Africa) and at the headquarters where he occupied several positions dealing with humanitarian action and International Humanitarian Law and policy. He notably worked as a Legal Adviser to operations for five years (covering Near East and Africa) and as an adviser in the Policy Unit for three years. He also worked for two years in the Arms Unit as a Legal Adviser, focusing on the use of explosive weapons in populated areas and their humanitarian impact. He has a degree in political sciences (Institut d'Études Politiques de Lille), an LLM in public international law (Université Libre de Bruxelles) and a MA in international relations (University of Kent).

Pascal Bongard has been working with Geneva Call since 2000. He has occupied a variety of positions within the organisation, and is currently Head of the Policy and Legal Unit. He has published widely on issues related to humanitarian engagement with armed non-State actors and Geneva Call's experience in particular. Before joining Geneva Call, he worked with the Swiss Federal Department of Foreign Affairs in Bern and the United Nations High Commissioner for Refugees in Ethiopia. He holds a Bachelor of Arts in History and Journalism from the University of Fribourg and master's degrees in International Relations from the Graduate Institute of International Studies in Geneva and in Comparative Politics from the London School of Economics and Political Science.

Panel discussion: Humanitarian actors and contemporary challenges in non-international armed conflicts

Table ronde : Les acteurs humanitaires et les défis contemporains dans les conflits armés non internationaux

Pascal Daudin is currently Senior Policy Advisor at the International Committee of the Red Cross (ICRC). After a short career as free-lance journalist, he joined the ICRC in 1986 and has occupied various positions of line manager, protection expert, HR policies as well as humanitarian action specialist. During this term with the organisation he was deployed in major conflict situations such as Pakistan, Afghanistan, Lebanon, Iraq, Iran, Central Asia, Caucasus, Saudi Arabia and the Balkans. After leaving the ICRC in 2002, he worked as Senior Analyst and Deputy-Head of a counter-terrorism unit attached to the Swiss Ministry of Defence. In 2007, he joined Care International as Global Director for safety and security affairs attached to the International Secretariat of the organisation. In 2011, he was requested by the ICRC to create a Policy Unit attached to the Multilateral Diplomacy division. Since 2014, he has cooperated

closely with Inter-Agency Center of Competence on Humanitarian Negotiation (CCHN) and represents the ICRC in this institution. He holds a master's degree in International Relations and has obtained various diplomas in human rights, humanitarian law as well as on public administration. He has published various scientific articles on humanitarian policy area and security topics. Since 2010, he is associated to the Geneva Centre for Security Policy (GCSP).

Adela Kabrtova is working at Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO) as Legal Officer in Unit D/1 (Policy Coordination, International and Multilateral Relations, Legal Affairs). Her previous professional experience includes the Service for Foreign Policy Instruments of the European Commission (FPI), where she focused on EU restrictive measures, and the Norwegian Refugee Council, where she worked in the advocacy team. She has gained significant expertise in design and implementation of CT/sanctions, and its implications for the delivery of humanitarian aid. She is a College of Europe alumnus.

Emanuela-Chiara Gillard is a Senior Research Fellow at the Oxford Institute for Ethics, Law and Armed Conflict, a Research Fellow at the Individualisation of War project at the European University Institute, and an Associate Fellow in Chatham House's International Law Programme. From 2007 to 2012 she was Chief of the Protection of Civilians Section in the Policy Development and Studies Branch of the United Nations Office for Coordination of Humanitarian Affairs. The Section worked with the United Nations and other key players to promote and enhance the protection of civilians in armed conflict. For seven years prior to joining OCHA, Emanuela was a Legal Adviser at the International Committee of the Red Cross. There she was responsible for providing advice to headquarters and field on legal issues relating to the protection of civilians in armed conflict, children, assistance, multinational forces, civil/military relations, occupation and private military/security companies. Before joining the ICRC in 2000, Emanuela was a Legal Adviser at the United Nations Compensation Commission, in charge of government claims for losses arising from Iraq's invasion and occupation of Kuwait. From 1995 to 1997 she was a Research Fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge. Emanuela holds a B.A. in Law and an LL.M. from the University of Cambridge. She is a Solicitor of the Supreme Court of England and Wales. Her research interests include International Humanitarian Law, with a particular focus on the protection of civilians and mechanisms for promoting compliance, the role of the Security Council in enhancing the protection of civilians, counter-terrorism, and principled humanitarian action.

Françoise Bouchet-Saulnier, a Doctor of Law and a magistrate, is Director of the Inter sectional Legal Department of *Médecins sans Frontières*. She is the author of several books and articles on humanitarian action, humanitarian law and international justice, in particular the Practical Guide to Humanitarian Law (Rowman littlefield ed. 2013, translated in eight lan-

guages). She is involved in framing the rights and responsibilities of MSF humanitarian and medical activities in situations of armed conflict or internal tension, as well as medical rights and duties when treating sick, wounded, victims of violence and sexual violence and interacting with judicial systems. In the past 20 years, she has been involved in developing key MSF policies and public positioning on humanitarian action and mass crimes, military intervention and international criminal justice as well as advancing the framework protecting humanitarian access and medical mission in armed conflict and other emergency situations. She teaches humanitarian law and international security at the Paris Institute of Political sciences, the Paris Catholic Institute and La Sorbonne University. She is also a member of the Editorial Committee of the International Review of the Red Cross and of the Editorial Committee of the historical publication of MSF Speaking Out Case Studies.