Proceedings of the Bruges Colloquium

Legal Challenges for Protecting and Assisting in Current Armed Conflicts

20th Bruges Colloquium
17-18 October 2019

Actes du Colloque de Bruges

Les Défis Contemporains de la Protection et de l'Assistance dans le Conflits Armés Contemporains

20ème Colloque de Bruges
17-18 octobre 2019

College of Europe
Collège d'Europe
Brugge
Natolin

CICR

ICRC Delegation to the EU, NATO and the Kingdom of Belgium

Délégation du CICR auprès de l'UE, de l'OTAN,

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Collegium N° 50, Autumn/Automne 2020

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Opening Remarks

DISCOURS D'OUVERTURE

Walter Füllemann
Head of Delegation, ICRC Brussels

Monsieur le Recteur, Monsieur le Vice-Président, Excellences, Mesdames et Messieurs, chers collègues. C'est pour moi un grand plaisir de vous accueillir dans cette salle, au nom du Comité international de la Croix-Rouge, pour la 20ème édition du désormais célèbre Colloque de Bruges.

2019 est une année anniversaire pour le Colloque de Bruges et ce à un triple titre : 20ème édition du Colloque, 70ème anniversaire des Conventions de Genève de 1949 et 70ème anniversaire du Collège d'Europe !

20 ans de Colloque, ce sont 20 ans de beaux débats qui, je l'espère, ont fait progresser les réflexions juridiques et ont pu améliorer, de ce fait, la protection des victimes des conflits armés. Les échanges, qui ont eu lieu dans cette même salle tout au long des 20 dernières années, ont certainement permis de mieux comprendre, et peut-être même d'influencer, les positionnements juridiques de l'OTAN, de l'Union européenne, de certains États ainsi que d'autres organisations internationales telles que les Nations Unies ou encore le Conseil de l'Europe mais également de partager ces réflexions avec des ONG actives dans le domaine du DIH et je pense en particulier à Geneva Call ou Médecins sans Frontières.

Au début de l'année, nous avons mené une enquête auprès de participants réguliers au Colloque afin de voir dans quelle mesure la « formule de Bruges » est toujours pertinente. Les réponses étaient unanimes quant à l'intérêt du Colloque et la pertinence de telles rencontres. Beaucoup ont souligné l'esprit qui règne lors de ces rencontres permettant un dialogue ouvert et productif. Un esprit qui nous est cher et que nous entendons bien préserver ! Quelques suggestions de caractère organisationnel ont été émises et nous en avons tenu compte lors de la préparation de cette 20ème édition.

Les 70 ans des quatre Conventions de Genève de 1949 sont un autre événement majeur dans « l'année DIH 2019 ». Nous aurions pu nous tourner vers les 70 dernières années et discuter des progrès que les Conventions de Genève ont permis de réaliser sur le champ de bataille, ou dans les lieux de détention, mais nous avons choisi de regarder non pas derrière nous mais autour de nous et devant nous. C'est pourquoi nous vous proposons un programme axé sur les défis contemporains du DIH, les défis sur lesquels doivent se pencher les experts et les praticiens du DIH aujourd'hui mais très certainement demain également. Le Vice-Président du CICR, Gilles Carbonnier, développera un peu plus ces réflexions dans un instant.

Le troisième anniversaire nous amène à notre hôte, le Collège d'Europe, qui fête ses 70 ans d'existence. 70 ans d'un enseignement d'excellence et d'ouverture sur l'Union européenne mais aussi, plus largement, sur le monde. Le mot « ouverture » me paraît essentiel dans la relation que le Collège d'Europe et le CICR entretiennent.

Il fallait, en effet, faire preuve d'une grande ouverture quand, en 1999, le Collège, par l'entremise de son Recteur de l'époque, le Professeur Otto von der Gablentz, a été approché par le CICR. Le Collège n'avait pas de programme tourné vers les conflits armés ou la gestion des crises. Il n'était certainement pas évident de prédire que l'Union européenne allait subir une transformation telle que le DIH trouverait sa place légitime au sein de l'Union européenne et mériterait donc que le Collège d'Europe s'y consacre également. Et, pourtant, dans sa tradition d'ouverture et son côté visionnaire, le Collège a très rapidement répondu favorablement à la proposition du CICR. Je tiens ici, Monsieur le Recteur, à réitérer nos profonds remerciements au Collège d'Europe pour son soutien, sa collaboration et son engagement.

When the ICRC Legal Division and the Brussels Delegation started discussing the programme for this edition, we looked at those legal issues which have a direct impact on ICRC operations in the 80 countries where we are active. Out of these, we examined and prioritized the topics that form part of our discussions with the European Union and its member states as well as NATO and its Allies. The list we drew up contains a set of very interesting challenges that we are offering for debate today and tomorrow. Some issues have already been discussed at previous editions of the Bruges Colloquium, but some developments justify that we address the topic again, the evolution of new technologies clearly being one of them. Other topics are new and are on the programme for the first time, such as the protection of the natural environment or the complex question of "Foreign fighters and their families".

All have in common that they are priorities for the legal work of the ICRC and we are very keen to listen to your perspectives and insights, and look forward to exchanging thoughts among ourselves.

Dear colleagues, we will now embark on one and a half days of dense, intense, and at times quite technical discussions and debates. We eagerly await them, being confident that these kinds of gatherings are important, relevant and rewarding.

Allow me also to recall that behind the legal rules and principles lie human beings - and these include those who relate to autonomous weapons.

Human beings are the ones called upon to apply the law when representing a party to an armed conflict. Mainly the military, but also others involved in fighting. Therefore, the laws must be realistic and practicable. If they are not, they are meaningless and useless outside this beautiful setting in Bruges.

Human beings are also those who will use the law as humanitarians: colleagues of the ICRC, the International Federation, National Red Cross and Red Crescent Societies across the world; the staff from UN agencies; NGO workers: their protection in armed conflicts relies on IHL. The law must allow impartial humanitarian organizations to do their work on the field, and, when I say "the law", I mean not only International Humanitarian Law, but all legal norms that can impact humanitarian organizations and humanitarian workers. I have in mind, for instance, counter-terrorism legislations or restrictive regimes that, as we discussed in this room last year, can negatively impact assistance and protection work in favor of victims of armed conflicts.

And finally, and most importantly, human beings are the ones who are the primary victims of armed conflicts, be they civilian or military. Since the Battle of Solferino, 160 years ago, all the IHL edifice was built for them, for these victims of international and, later, non-international armed conflicts. They must remain at the center of the preoccupation of IHL lawyers and practitioners when they develop, clarify or apply the law. The law must be protective enough to address the numerous vulnerabilities of victims of armed conflicts, be they prisoners of war or children – often orphans - of so-called "foreign fighters".

If we want to be serious about International Humanitarian Law, about preserving some humanity in the very inhuman situations created by armed conflicts, we need to work towards a legal framework that will be clear-sighted and practicable, but also protective, and that will also allow for the delivery of impartial humanitarian action. History has taught us the importance of keeping this aim above others, including above short-term political or security considerations.

Allow me, before I end, a more personal note about one of my own wishes for this 20th edition of the Bruges Colloquium, my last before I end my assignment:

I referred earlier to the "spirit" of the Bruges Colloquium. A spirit that encompasses openness, a willingness to share, a desire to learn, a true dialogue.

This is why the Chatham House Rules are applicable during our two days together. Let us seize the opportunities offered by a Colloquium in an academic setting, free from the political constraints of a diplomatic conference. I trust that this spirit shall prevail in all our discussions. It is a key strength of the Bruges Colloquium, let us preserve it, and do so for the next 20 years too!

Before officially opening our event, allow me to thank my colleagues who have been leading the organization of the Colloquium, under the stewardship of Stéphane Kolanowski and Eva Houtave, as well as our two interpreters, Nanaz Shahidi-Chubin and François Butticker.

Now, I am pleased to formally open the 20th Bruges Colloquium. I wish you interesting and stimulating discussions, and I hand over the floor to Mr. Gilles Carbonnier, Vice-President of the ICRC for a keynote address. Thank you!

KEYNOTE SPEECH

Gilles Carbonnier
Vice-President, ICRC

Dr Jörg Monar, Rector of the College of Europe,

Dear Walter Füellemann, head of the ICRC delegation in Brussels,

Excellencies, ladies and gentlemen,

It is my pleasure to join our host and co-organizers in welcoming you to this 20th *Colloque de Bruges* on international humanitarian law.

I noticed from the previous speeches that 2019 is a year of important anniversaries. As you have heard, we mark the 70th anniversary of the four Geneva Conventions and the 20th anniversary of the Bruges Colloquium. Allow me to add one anniversary to this list, leaving it up to you to judge whether of the same significance or not! Exactly 30 years ago, in 1989, Walter Fuellemann and I joined the ICRC as young delegates. Like him, I have had the chance to serve as an ICRC delegate in various conflicts including in Iraq, Ethiopia, and El Salvador. But I also had the chance to take a break, engage in research and start an academic career as a university professor. With this 'double hat', I see great value in the Bruges Colloquium. I believe that it is essential to bring together different communities to discuss the evolving humanitarian and legal challenges faced in armed conflict, including policymakers, representatives of international organizations, militaries, humanitarians, and academics.

Today, I wish to focus on specific legal and operational concerns in contemporary armed conflicts related to urban warfare, support relationships, and new weapons. But to start off – on the occasion of the 70th anniversary of the Geneva Conventions – I would like to suggest three lessons from their remarkable success. I hope that these lessons can guide and assist us in our discussions over the next two days.
First, it is possible to set clear limits to warfare. In 1949, only four years after the tremendous suffering of the Second World War, and notwithstanding the beginning of the Cold War, States negotiated the 429 Articles of the Geneva Conventions in less than 4 months. Since then, the Conventions have achieved universal ratification. To us, this is a compelling example of what can be achieved when States come together, driven by the common purpose never to allow

the unacceptable horrors of World War II to happen again, that is, to preserve a minimum of humanity even in the midst of armed conflict.
Second, IHL has a real impact. Of course, blatant violations of the law make the headlines almost daily. Some may thus wonder whether IHL is still relevant, and whether it is worth thinking about new rules. I am not convinced by narratives on the 'erosion' of IHL. While our colleagues in the field witness the horrors of armed conflict first hand, it is in these conflicts that we also see how IHL is respected! We see quiet, every day achievements: when a military takes care in its targeting to not fire on civilian buildings; when a wounded person is allowed through an 'enemy' checkpoint; when detainees are treated with humanity and able to send a message to their families. Respect for IHL does make a huge difference!
And third, we do not have to reinvent the wheel. The Geneva Conventions and other rules of IHL remain as relevant today as 70 years ago: IHL is up to the contemporary challenges. The law does not ask the impossible. States were not carried away by idealism when they negotiated the Geneva Conventions. They designed a body of law for extreme circumstances of armed conflict, striking a careful, pragmatic balance between military necessity and humanity.

These lessons should give us – and especially you as international law experts – encouragement to use the law to protect and to assist victims of armed conflict.

Now don't get me wrong: respect for IHL is far from perfect – parties to armed conflicts need to invest much more in implementing IHL. And existing rules are not always clear: we need lawyers in government and academia to interpret and clarify the law. One important occasion to do so is precisely here, in this colloquium.

Ladies and gentlemen,

Among the many humanitarian challenges posed by contemporary armed conflicts, one that is of greatest concern to the ICRC is **urban warfare** and the human suffering it entails. As we speak, bombs and shells are devastating urban centers in Syria and Libya. Some 50 million people are currently suffering from the impact of war in cities. When urban areas are bombed and shelled, the overwhelming majority of casualties are civilians. The fighting gravely impacts vital, interconnected services.

Alarmed at the devastating humanitarian consequences of urban warfare, the ICRC president and the UN Secretary General have recently appealed to States and all parties to armed conflicts to *avoid* the use of explosive weapons with a wide-impact area in populated areas, due to the significant likelihood of indiscriminate effects.

To some militaries, this appeal to embrace an avoidance policy may sound utopian: how can war be fought without using heavy explosive weapons? The reality is, however, that some armed forces have already put in place restrictions on the use of heavy explosives in populated areas. And more needs to be done, urgently.

Of course, the use of explosive weapons against military objectives in populated areas is not prohibited *per se* under IHL. Nevertheless, ensuring that such use complies with key rules of IHL regulating the conduct of hostilities is particularly challenging. In our view, the inherent inaccuracy of certain types of explosive weapon systems – such as many of the artillery, mortar and multiple-rocket launcher systems in use today – raises serious concerns regarding the prohibition against indiscriminate attacks. Moreover, we have significant doubts as to whether armed forces sufficiently factor in *reverberating effects* to their assessments under the rules of proportionality and precautions in attack.

It is against this backdrop that the ICRC is calling on all States and parties to armed conflicts to avoid the use of heavy explosive weapons in populated neighborhoods *unless* sufficient mitigation measures can be taken to reduce their wide area effects and the consequent risk of unacceptable levels of incidental civilian harm.

Let me now turn to what we call 'support relationships'. The ICRC has a long experience in working with the parties to armed conflicts – be they States or non-State armed groups – to protect and assist victims of armed conflict. In today's increasingly protracted and fragmented conflicts, however, this direct engagement becomes both complicated and insufficient. In Syria, Yemen, or the Sahel region, we see a multiplication of parties to the conflict.

To address this challenge, the ICRC has been increasing its engagement with those who support belligerents. In line with States' obligation to ensure respect for IHL, those who support parties to a conflict should not only assist their partners' military efforts but also their efforts to better respect IHL. We see that many actors have put in place measures to strengthen the capacity among the parties they support to protect civilians and those *hors-de-combat*. In the coming years, the ICRC intends to work with States to identify relevant good practices and develop concrete recommendations for supporting parties. For us, it is an operational and strategic priority to engage with all those who have the capacity and obligation to exert a positive influence for improved respect of IHL.

Ladies and gentlemen, we also need to keep a close eye on **new technologies** encroaching onto the battlefield. Cyber tools, autonomous weapons systems, and artificial intelligence are used in contemporary armed conflicts and their importance will increase.

In the ICRC's view, the potential human cost and legal implications of these means and methods of warfare deserve urgent attention. Technological advances may have positive effects on the protection of civilians, such as a more precise use of weapons; better informed military decisions; and military aims being achieved without the use of kinetic force or physical destruction. But importantly, new means of warfare also bring new risks for protected persons in armed conflict.

For example, the development of autonomous weapon systems, including some that incorporate artificial intelligence and machine learning, raises particular risks. For the ICRC, the primary concern regarding these weapons is a loss of *human control* over the use of force. Since a user of an autonomous weapon system is uncertain about the exact timing, location, and circumstances of the actual use of force, the effects are difficult to predict. This poses important risks for civilians in the area where this weapon system is used. And it also poses legal questions. In our view, it is humans who must comply with and implement IHL. This responsibility cannot be transferred to a machine or a computer program. Combatants need to retain a level of control that allows them to make context-specific legal judgements in particular attacks. Human control over the use of force must be maintained for both legal and ethical reasons.

Obviously, the legal and operational challenges of contemporary armed conflict do not stop here. Climate change and environmental degradation are just one example of other key challenges that you will address in this Colloquium.

While I must wrap up my remarks, I am glad to announce that the ICRC will soon publish its *report on IHL and the challenges of contemporary armed conflict*. You will find in it our views on the key issues we observe in today's conflicts.

To conclude, let me reiterate how delighted we are to see government experts, representatives of international organizations, militaries, humanitarians, and academics all in one room to discuss the legal challenges of contemporary armed conflicts. As I mentioned earlier, we have seen immense suffering in armed conflict in recent years. But we also witness, time and again, the positive impact of IHL on the lives and livelihood of people affected by war. Looking at this dichotomy, I think that we need in-depth conversations about how existing rules are interpreted, how they could be implemented, and whether new developments in warfare require new rules.

I wish you all an engaging and thought-provoking 20th Bruges Colloquium. Thank you.

Session 1
The increasing complexity of armed conflicts
Première Session
Complexification des conflits armés

CLASSIFYING CONTEMPORARY CONFLICTS: THE CHALLENGE OF COALITIONS OF NON-STATE ARMED GROUPS AND/OR STATES

Vaios Koutroulis
ULB

Résumé

Cette contribution se concentre sur les coalitions de groupes armés non-étatiques (GANE), une problématique qui remet en question la classification des conflits. L'impact des coalitions de GANE sur le début et la fin d'un conflit armé non-international (CANI) y est discuté.

Pour qu'un conflit armé soit qualifié de CANI en vertu de l'article 3 commun aux Conventions de Genève, deux conditions doivent être remplies. Premièrement, les hostilités doivent atteindre un certain niveau d'intensité. À côté de cela, le GANE doit posséder un certain niveau d'organisation. Cependant, les coalitions de GANE ajoutent de la complexité à cette question.

La question est de savoir si et dans quelle mesure les coalitions peuvent être considérées comme une seule partie au conflit. Cela relève du critère d'organisation des parties. La condition cruciale qui doit être remplie est l'existence d'une personne ou d'un groupe (par exemple, un conseil conjoint) qui exerce la coordination opérationnelle et l'autorité stratégique. Par coordination opérationnelle, on comprend la capacité de coordonner les activités militaires. Par autorité stratégique, on entend l'autorité de déterminer les objectifs militaires globaux et d'établir des règles internes.

Si une direction générale est exercée par un des groupes, une personne ou une autorité qui détermine la stratégie militaire globale, alors la « coalition » est factuelle. Par conséquent, aux fins de la qualification, ces groupes seront considérés comme une seule partie au conflit. Lorsque personne n'exerce la coordination opérationnelle et l'autorité stratégique, la coalition est un ensemble de groupes armés distincts pour le but de la qualification. Dans ce cas, l'existence d'un CANI doit être évaluée séparément pour chaque groupe armé.

En ce qui concerne la fin des CANI, deux théories principales ont été avancées. Selon une première théorie, pour avoir un CANI, deux conditions doivent être remplies, donc si l'une de ces conditions disparaît, alors le CANI disparaîtra également. La deuxième théorie préconise un critère plus stable pour parvenir à un « règlement pacifique » (tel que défini dans l'affaire Tadic du TPIY de 1995).

L'opinion de l'auteur est qu'il n'y a pas beaucoup de différences entre ces deux théories. Après tout, le premier point de vue admet que l'absence de ces éléments devrait avoir « un certain degré de permanence et de stabilité ». En outre, le critère de règlement pacifique n'implique pas l'existence d'un accord de paix formel qui mettrait fin au CANI ni l'existence d'un accord de paix formel alors que les hostilités continueraient sur le terrain. Par conséquent, on peut conclure que les deux théories prévoient un certain degré de stabilité.

Dans le cas de GANE, l'auteur suggère que le conflit ne prend fin que si la disparition de la principale figure ou structure centrale provoque l'effondrement des groupes ou entraîne une cessation durable des hostilités. Dans d'autres situations, lorsqu'une nouvelle autorité dirigeante apparaît peu de temps après ou lorsque les deux groupes armés, désormais distincts, poursuivent les hostilités séparément, il semble préférable de ne pas commencer à recompter à partir de zéro pour atteindre le niveau d'intensité nécessaire. Dans ce scénario, à condition que l'exigence de l'organisation soit satisfaite en ce qui concerne les groupes individuels restants, le CANI continuerait.

The classification of conflicts is an amazingly complex part of International Humanitarian Law. Even though there have been multiple scholarly writings on this subject, there are still aspects that remain insufficiently analyzed. One of these aspects are the coalitions of States and/or non-State armed groups and their influence on the classification of conflicts, which is why I am grateful to the organizers for their choice of topic.

With respect to coalitions of States, there is an on-going debate as to whether, and if yes, under which conditions, States participating in a coalition – but not actually conducting combat operations themselves – become parties to an armed conflict. I am referring here to the so-called "support based approach" put forth by the ICRC and Tristan Ferraro[1]. This question has

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1 This is how the ICRC has formulated the relevant criteria for the support-based approach applied to multinational forces intervening in the context of a non-international armed conflict (ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Report, 32nd International conference of the Red Cross and Red Crescent, 32IC/15/11, October 2015, p. 23, available at https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts):

gained prominence in the past few years and has already been examined by several scholars[2]. In view of this, and given the time constraints, I have decided to leave this question aside in order to focus on a topic that – with some notable exceptions[3] – has not received much scholarly attention but which is equally, if not more, challenging for the purposes of classification: coalitions of non-State armed groups and their impact on the existence of non-international armed conflicts (hereafter NIACs).

There is, of course, no legal definition of what a "coalition" is. It is thus not clear what this term covers exactly. It can however safely be said that the phenomenon of groups sharing a common ideology without any further organizational link, or a pledge of allegiance by one group to another without any further materialization of such allegiance[4], in terms of joint or

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"According to a support-based approach, IHL would apply to multinational forces when the following conditions have been cumulatively met: (1) there is a pre-existing NIAC taking place on the territory in which multinational forces are called on to intervene; (2) actions related to the conduct of hostilities are undertaken by multinational forces in the context of the pre-existing conflict; (3) the military operations of multinational forces are carried out in support (as described above) of a party to the pre-existing conflict; and (4) the action in question is undertaken pursuant to an official decision by the troop-contributing country or the relevant organization to support a party involved in the pre-existing conflict."

See also, ICRC, *International humanitarian law and the challenges of contemporary armed conflicts – Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, Report, 33rd International conference of the Red Cross and Red Crescent, 33IC/19/9.7, October 2019, p. 59, available at https://rcrcconference.org/app/uploads/2019/10/33IC-IHL-Challenges-report_EN.pdf: "Under IHL, those who support parties to armed conflicts may themselves become party to that conflict and thus be bound by IHL, notably by contributing to the collective conduct of hostilities by another party against an armed group…"; Tristan FERRARO, "The applicability and application of international humanitarian law to multinational forces", *IRRC*, vol. 95, 2013, pp. 583-587; 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", *IRRC*, vol. 97, 2015, pp. 1230-1233.

2 See, for example, the remarks on the support-based approach by Marten Zwanenburg, Legal Counsel, Ministry of Foreign Affairs, the Netherlands and Mona Khalil, Senior Legal Officer, office of the Legal Counsel, United Nations, in "Peace forces at war: implications under international humanitarian law", *ASIL Proceedings*, 2014, pp. 152, 157, 158; Raphaël VAN STEENBERGHE and Pauline LESAFFRE, "The ICRC's 'support-based approach': A suitable but incomplete theory", *Questions of International Law, Zoom-in 59*, 2019, pp. 5-23; Terry D. GILL, "Some thoughts on the ICRC Support Based Approach", Questions of International Law, Zoom-in 59, 2019, pp. 45-53; both available at http://www.qil-qdi.org/category/zoom-in/the-qualification-of-armed-conflicts-and-the-support-based-approach-time-for-an-appraisal/; Noam LUBELL, "Fragmented Wars: Multi-Territorial Military Operations against Armed Groups", *International Law Studies Series*, US Naval War College, vol. 93, 2017, pp. 242-243.

3 Tilman RODENHÄUSER, *Organizing Rebellion: Non-State Armed Groups under international Humanitarian Law, Human Rights Law, and International Criminal Law*, OUP, 2019.

4 See, for example, LUBELL, *op. cit.*, *supra* note 2, p. 243. For example, armed groups that proclaim to follow Al-Qaeda ideology and use its name without being in contact with the core Al-Qaeda leadership. See Gloria GAGGIOLI, "Targeting Individuals Belonging to an Armed Group", *Vand. J. Transnat'l L.*, vol. 51, 2018, pp. 908-909.

coordinated military activities for example, cannot be considered as sufficient to establish a true "coalition" of armed groups. Here are some examples of coalitions of non-State armed groups that have been considered as such by international bodies: the Seleka and anti-Balaka coalitions involved in armed conflicts in the Central African Republic[5], armed groups such as the Libya Dawn coalition involved in the NIAC in Libya[6], or the Lendu and Ngiti militia (or "Forces de résistance patriotique de l'Ituri") operating against, among others, the Union of Congolese Patriots ("Union des patriotes congolais") in Ituri, DRC.

This contribution will focus on two main points: the impact of the existence of such coalitions among non-State armed groups on the beginning (A) and end (B) of a NIAC.

A Impact of coalitions of non-State armed groups on the beginning of NIACs

As it is well established, in order for a situation to be classified as a NIAC under common article 3, two conditions need to be fulfilled:

(a) the hostilities must reach a certain level of intensity;

(b) there must be at least two identifiable parties to the conflict; in other words, the non-State armed groups must have reached a certain level of organization.

These conditions have been extensively analyzed[7]. The case law of the international criminal tribunals and the International Criminal Court have identified a number of elements that help us determine whether they are met[8]. Yet, despite all the existing analysis, practice and prec-

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5 For example, the UN High Commissioner for Human Rights describes the Séléca as "a coalition of rebel groups (…) comprising the Union des forces démocratiques pour le rassemblement (UFDR), the Convention patriotique du salut du Kodro (CPSK), the Convention des patriotes pour la justice et la paix (CPJP – Fondamentale) and the Union des forces républicaines (UFR)"; Human Rights Council, *Situation of human rights in the Central African Republic*, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/24/59, 12 September 2013, p. 5, §8 and note 2.

6 Human Rights Council, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016, p. 19, §§61-62.

7 See, among many, Eric DAVID, *Principes des droits des confltis armés*, 6th edition, Bruxelles, Bruylant, 2019, pp. 136-155; Marco SASSOLI, *International Humanitarian Law*, Cheltenham – Northampton, Edward Elgar Publishing, 2019, pp. 6.31-6.39; Sandesh SIVAKUMARAN, *The Law of Non-International Armed Conflict*, Oxford, OUP, 2012, pp. 164-180.

8 Here again, see among many, ICTY, *The Prosecutor v. Fatmir Limaj* et al., IT-03-66-T, judgment, Trial Chamber II, 30 November 2005, §§84-90, available at http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf; ICTY, *The Prosecutor v. Ramush Haradinaj* et al., IT-04-84-T, judgment, Trial Chamber I, 3 April 2008, §§37-60, available at https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf; ICTY, *The Prosecutor v. Ljube Boskoski and Johan Tarculovski*, IT-04-82-T, judgment, Trial Chamber I, 10 July 2008, §§175-205, available at https://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf; ICTY, *The Prosecutor v. Vastimir Dordevic*, IT-05-87/1-T, judgment, Trial Chamber II, 23

edents, it still remains notoriously difficult to identify the exact moment when a situation is transformed from one of "simple" internal disturbances and civil strife to a NIAC. As if things were not complicated enough, coalitions of non-State armed groups add further complexity to this issue: how do we evaluate the beginning of a NIAC when we are confronted with a coalition of non-State armed groups?

As always when dealing with the interpretation of IHL rules – and this applies to classification also – one must be mindful of two main things:

- first, what is at stake when we choose a specific classification? Accepting that there is a NIAC triggers the application of IHL. What does this mean in terms of applicable law? This may lead governmental forces to resort more easily to lethal force than under a law enforcement paradigm – which in turn means that, concretely speaking, individuals on the ground may be better protected under a law enforcement paradigm than under an IHL one – at least if we operate under the premise, as many States do, that IHL gives more leeway to use lethal force.
- second, it is important to keep in mind the underlying opposing tensions within a classification: on the one hand, if we expand too much the notion of armed conflict and the scope of application of IHL, we may end up subjecting individuals to a less protective regime than the one applicable during peacetime. On the other hand, if we restrict the scope of armed conflict too much, then we end up with a utopian definition that will not be followed because it will be in contradiction with the facts on the ground.

With these considerations in mind, let us come to the classification of conflicts involving coalitions of non-State armed groups.

I would suggest that the starting point is whether, and to what extent, coalitions can be considered as one single party to the conflict.

This brings us back to the organization of the non-State armed groups. An armed group does not need to have a centralized, hierarchical organization and structure in order to be considered as a party to a NIAC[9]. Indeed, armed groups with a decentralized structure have

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February 2011, §§1522-1526, available at https://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, judgment pursuant to article 74 of the Statute, Trial Chamber I, 14 March 2012, §§537-538, available at https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF; ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, judgment pursuant to article 74 of the Statute, Trial Chamber II, 7 March 2014, §§1184-1187, available at https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

9 RODENHÄUSER, *op. cit.*, *supra* note 3, pp. 75 ff.

been considered sufficiently organized to be parties to an armed conflict. In this respect, the distinction between an armed group with a decentralized structure and a coalition of armed groups operating jointly under a common structure may become evanescent.

This is clearly shown by the treatment of the Ngiti militia in the *Katanga* case before the ICC. The militia emerged through the creation of self-defense groups in late 2000/early 2001. The various groups had autonomous camps, did not wear the same attire or uniforms, but had common goals (to recover Ituri and eliminate common enemy groups) and some commanders had already emerged as prominent figures among the groups. In view of these elements, Katanga's Defense had claimed that the Ngiti militia could not be considered as a group for the purposes of establishing the existence of an armed conflict. The ICC Trial Chamber disagreed and concluded that they constituted one single armed group, citing the following elements of organization: "its constituent troops were spread among several camps placed under the authority of various commanders; they had various means of communication and weapons and ammunition were available to them. Lastly, the members of that militia pursued common objectives and conducted joint military operations over a protracted period"[10].

Along the same lines, the warrants of arrest issued in November 2018 in the context of the second situation in the Central African Republic treat the Séléka movement as one single identifiable armed group, while accepting that is was essentially "a coalition of several previously uncoordinated political factions and armed groups"[11]. The same reasoning was applied to the "anti-Balaka" movement, which consisted of "self-defense groups (…) gathered (…) in western CAR and organized into a military-like structure"[12].

In general, it has been convincingly argued that the crucial element is to have a person or a group (e.g. a joint council) that exercises the overall leadership of the groups in terms of operational coordination and strategic authority[13]. If this is the case, then for the purposes of classification, we can consider that the coalition is one single party to the conflict. Once we have reached this conclusion, evaluating intensity becomes less problematic: since the coalition is essentially one single party, then all the violent incidents in which its components have

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10 ICC, Katanga judgment 2014, *op. cit.*, *supra* note 8, §1209 (footnotes omitted).

11 ICC, *The Prosecutor v. Alfred Yekatom*, Public redacted version of "Warrant of Arrest for Alfred Yekatom", ICC-01/14-01/18-1-US-Exp, 11 November 2018, Pre-Trial Chamber III, ICC-01/14-01/18, 17 November 2018, §6, available at https://www.icc-cpi.int/CourtRecords/CR2018_05412.PDF; ICC, Public redacted version of "Warrant of Arrest for Patrice-Edouard Ngaïssona", Pre-Trial Chamber II, ICC-01/14-02/18, 13 December 2018, §6, available at https://www.icc-cpi.int/CourtRecords/CR2019_00986.PDF.

12 Warrant of arrest for Alfred Yekatom, *op. cit.*, *supra* note 11, §7; Warrant of arrest for Patrice-Edouard Ngaïssona, *op. cit.*, *supra* note 11, §7.

13 RODENHÄUSER, *op. cit.*, *supra* note 3, pp. 84, 103.

been implicated can be taken into account in order to evaluate whether the requisite threshold of intensity of hostilities has been reached.

What if this element is missing? What if a coalition does not have someone exercising operational coordination and strategic authority?

In that case, the coalition is merely an ensemble of separate armed groups for the purposes of classification. In this case, the existence of a NIAC must be evaluated separately with respect to each armed group.

The main difference is the following:

(a) if the coalition is considered as one single group, then all the violence produced by its members will be counted towards reaching the required level of intensity;

(b) if the coalition is not one single group, then the existence of a NIAC will have to be evaluated separately for each member of the group, which in turn means that the intensity of hostilities and of organization of the parties will also have to be appreciated separately. The result may be that a NIAC may exist for some groups but not for others[14].

However, in this last case, if there is a NIAC between the State and one of the groups, then the existence of the coalition may draw other members of the coalition into the NIAC, especially those directly involved in hostilities. Indeed, if there is a NIAC between a State and group A and a second armed group joins in the fighting alongside group A, then the second group becomes a party to the conflict, without there being a need to evaluate the intensity of hostilities separately with respect to the second group. In this scenario, the classification mirrors the one applied when a State intervenes in a NIAC alongside another State[15]. The ICC adopted this view in the judgment handed down in July 2019 in the *Ntaganda* case with respect to the Lendu fighters, which were self-defense groups similar to the Ngiti militia. While it is not clear whether the Lendu constituted an organized armed group (according to the Court, "it is

14 Or no NIAC at all if the armed groups are insufficiently organized or the violence they have produced insufficiently intense. In this case, States cannot claim that there is a NIAC based solely on the hostilities evaluated collectively.

15 For an application of this classification in the context of the coalition airstrikes against the Islamic State in Iraq in support of the Iraqi government, see Vaios Koutroulis, "The Fight against the Islamic State and *jus in bello*", *LJIL*, vol. 29, 2016, pp. 832-833. For a similar view, see Rogier BARTELS, "When do terrorist organisations qualify as "parties to an armed conflict" under international humanitarian law?", *Military Law and Law of War Review*, vol. 56, 2017-2018, p. 473; LUBELL, *op. cit.*, *supra* note 2, pp. 242-243. If the second group does not directly participate in the fighting but merely offers substantial military or logistical support to the first group (such as transportation of troops, provision of intelligence used directly in hostilities, etc.), then the second group could be considered as being a party to the NIAC if we apply the "support-based approach" mentioned above.

unclear whether they belonged to a single unified entity" and it was thus doubtful whether they could be autonomously involved in a NIAC), they fought alongside other groups opposing Ntaganda and their actions were therefore taken into account in the existence of a NIAC[16]. So, the end result is not substantially different from the case where the coalition is considered as one single group.

B. Impact of coalitions of non-State armed groups on the end of NIACs

The end of NIACs is another notoriously difficult area of IHL, especially since there are no IHL treaty provisions regulating when NIACs come to an end. Two main theories have been advanced in this respect:

(a) since two conditions need to be fulfilled in order for a NIAC to exist (a minimum level of organization and hostilities reaching a certain level of intensity), if one of these conditions disappears, then, logically, the NIAC also ceases to exist[17]. This first theory has been charged with generating too much confusion and uncertainty in identifying when IHL ceases to apply: for the reasons explained above and in view of the fluctuating nature of NIACs, it is difficult to safely determine when the intensity of hostilities or the organization of a rebel group drop below an acceptable level.

(b) the second theory advocates for a more stable criterion of reaching a "peaceful settlement" of the conflict. This is also supported by the case-law of the ICTY, since it was the 1995 *Tadic* decision that first formulated it[18]. The criticism levelled against this criterion is that it is too strict and introduces a degree of formalism into a question that should be driven by the facts on the ground[19].

I suggest that the difference between these two views should not be exaggerated. Firstly, I do not think that the peaceful settlement criterion of *Tadic* obliges us to have a formal peace agreement in order to end a NIAC, nor that it would posit the end of a NIAC due to the formal existence of such an agreement even if the hostilities on the ground continue. Secondly, even those in favor of the first view (a NIAC disappears when one of its constituent elements

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16 ICC, *The prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, judgment, Trial Chamber IV, 8 July 2019, §712, available at https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF.

17 Marco Milanovic, "End of IHL application: overview and challenges", in *Scope of Application of International Humanitarian Law*, Proceedings of the 13th Bruges Colloquium, 18-19 October 2012, Bruges, ICRC – College of Europe, 2013, p. 90.

18 ICTY, *The Prosecutor v. Dusco Tadic*, Decision on the Defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, §70, available at https://www.icty.org/x/cases/tadic/acdec/en/51002.htm: "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."

19 ICRC, *2015 Practical challenges report*, *op. cit.*, *supra* note 1, p. 10.

ceases to exist) accept that the absence of these elements should have "a certain degree of permanence and stability". In the ICRC's words, there must not be any "real risk of resumption of hostilities"[20], either because the party has been defeated, is permanently disorganized or because there has been a stable cessation of hostilities. Thus, we end up being close to the idea of a peaceful settlement anyway.

The first theory indeed has logic on its side. However, this logic is in reality not fully applied: if you need two components to create a NIAC and one of your two components goes missing, then the NIAC must cease to exist independently of whether the component is missing for one day, one week, one month or one year. The fact that you need a degree of stability in the absence of one of the components shows that ending a NIAC is not as simple as applying an equation where the result is different as soon as the numbers change.

Be that as it may, let us see how coalitions of non-State armed groups affect the determination of the end of a NIAC.

In concrete terms, if the NIAC opposes a government and a coalition that is considered as one single party to the conflict, what happens if this coalition splits up? If the leader that ensured operational coordination and strategic authority is killed? Does the original NIAC split up in two or more separate ones (like a Lernaean Hydra: for each head chopped off, two new heads grow) or does it come to an end?

Again, there is no easy answer to this question. The indication that we get from both theories relating to the end of NIACs is that we need to have achieved some stability before we can claim that a NIAC has ended. The ICTY and the few scholars that have written on this question point to the same direction: "conflicts should not be declassified lightly"[21]. So, I would suggest that the conflict comes to an end only if the disappearance of the central leading figure or structure causes the groups to collapse or entails a durable cessation of hostilities. In other situations, when a new leading authority arises shortly or when the two – now distinct – armed groups continue the hostilities, it seems to me that the better view is that you do not start counting from zero in order to achieve the necessary level of intensity: provided that the organization requirement is met with respect to the remaining individual groups, the NIAC continues. Again, the CAR arrest warrants offer an interesting precedent in this respect.

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20 *Ibid*.

21 ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, T-04-84bis-T, Judgment, 29 November 2012, para. 396, available at: www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf; RODENHÄUSER, *op. cit.*, *supra* note 3, p. 109; Gabriela VENTURINI, The Temporal Scope of Application of the Conventions", in Andrew CLAPHAM *et al.*, *The 1949 Geneva Conventions: A Commentary*, Oxford, OUP, 2015, §27.

Conclusion

One word of caution as a conclusion: since these are yet unsettled matters, reasonable people and reasonable actors may disagree. As was pointed out above, every interpretation will have to find a way to reconcile two opposing tensions: on the one hand, sticking to the realities on the ground and not suggesting solutions that seem resolutely utopian and, on the other hand, offering the best protection possible to the victims of the conflict in accordance with the main object and purpose of IHL.

In this respect, it is also imperative to keep in mind that classifications may vary depending on who does the classification. Different actors may put forth different classifications of the same facts depending on their interests, viewpoints, and policy. For example:

- where the Ministry of Defense of a State involved in the conflict may seek to broaden the scope of a NIAC in order to be able to conduct its operations according to IHL and not human rights;
- the courts of the same State may deny the existence of a NIAC, if the existence of such a NIAC implies that the members of the armed groups cannot be prosecuted as terrorists[22];
- and, if the same facts come before the International Criminal Court, its chambers may want to broaden the scope again, in order to be able to charge the individuals brought before the court for war crimes.

We can strive to make classification as objective as possible, but, in the end, it may very well be that the armed conflict, much like beauty, lies in the eyes of the beholder.

22 Cf. Vaios Koutroulis, "How have the Belgian courts dealt with the interplay between IHL and counter-terrorism offences?", in *Terrorism, Counter-Terrorism and International Humanitarian Law*, Proceedings of the 17th Bruges Colloquium, 20-21 October 2016, Bruges, ICRC – College of Europe, 2017, pp. 107-118.

ADDRESSING THE THREAT POSED BY COALITIONS OF NON-STATE ARMED GROUPS: A STATE PERSPECTIVE

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Résumé

Des coalitions de groupes armés non-étatiques (GANE) peuvent se former dans différentes situations. Premièrement, il peut exister une situation dans laquelle un conflit armé non-international (CANI) préexistant entre un État et un GANE (« A ») a lieu et un autre GANE (« B ») commence à coopérer avec le GANE A, sans être dans un CANI préexistant avec l'État en question. Dans cette situation, la question est de savoir à quel moment le GANE B devient partie au CANI préexistant entre l'État et le GANE A. Une autre situation implique différents CANI entre des GANE distincts avec un seul et même État. Dans cette situation, les différents CANI peuvent « fusionner » en un seul CANI si les GANE coopèrent.

Concernant la première situation décrite, trois approches se retrouvent dans la littérature. La première approche est appelée « approche basée sur le soutien ». Cette théorie est développée par le CICR. Quatre conditions doivent être remplies. Premièrement, il doit y avoir un CANI préexistant sur le territoire. Deuxièmement, les actions du groupe armé intervenant doivent être entreprises dans le contexte du conflit préexistant. Troisièmement, les opérations militaires du groupe armé intervenant doivent être menées à l'appui de l'une des parties au CANI préexistant. Enfin, les actions doivent être entreprises suite à une décision officielle de l'acteur intervenant de soutenir une partie impliquée dans le conflit préexistant. Un élément important est que le GANE B ne doit pas entrer en hostilités conjointement avec le GANE A contre l'État pour devenir partie au même conflit.

La deuxième approche est « l'approche de la belligérance », qui exige que le GANE B engage des hostilités contre l'État. Ainsi, ce deuxième critère fixe un seuil plus élevé car il exige que les deux GANE engagent des hostilités « en association » contre l'État.

La troisième approche est basée sur la « participation directe aux hostilités » (PDH), il s'agit du critère selon lequel un civil perd sa protection lorsqu'il participe à une attaque (article 51 (3) AP I et article 13 (3) AP II). Le terme n'étant pas défini par les traités du DIH, le CICR a élaboré un guide interprétatif sur la question.

Pour constituer une participation directe aux hostilités, un acte spécifique doit remplir les critères cumulatifs suivants. Premièrement, l'acte doit être susceptible de nuire aux opérations militaires ou à la capacité militaire d'une partie à un conflit armé, ou alors l'acte doit être de nature à causer des pertes en vies humaines, des blessures et des destructions à des personnes ou à des biens protégés (seuil de nuisance). Deuxièmement, il doit exister une relation directe de causalité entre l'acte et les effets nuisibles susceptibles de résulter de cet acte ou d'une opération militaire coordonnée dont cet acte fait partie intégrante (causalité directe). Troisièmement, l'acte doit être spécifiquement destiné à causer directement des effets nuisibles atteignant le seuil requis, à l'avantage d'une partie au conflit et au détriment d'une autre (lien de belligérance).

L'auteur fait valoir qu'en principe les trois approches peuvent également être utilisées dans la deuxième situation. Cependant, une certaine prudence est recommandée. Après tout, les trois approches consistent à reprendre un concept ou un critère d'une autre partie du DIH et à l'adapter. Il est important d'être prudent avec de telles analogies, d'autant plus quand les concepts du régime du DIH des conflits armés internationaux sont appliqués au régime des conflits armés non-internationaux. De plus, les trois approches traitent de la situation dans laquelle il existe un GANE « principal » auquel se joindrait un GANE « subsidiaire ». Il est difficile de savoir comment les approches traiteraient les cas dans lesquels deux GANE auraient des capacités égales.

Il reste également important de distinguer les deux situations. En effet, dans la première situation (le GANE B n'est pas partie à un CANI préexistant contre l'État), il faut déterminer si le seuil minimum d'intensité des combats a été atteint.

On pourrait se demander si cette exigence s'applique à la violence armée entre l'État et le GANE A et à la violence armée entre l'État et le GANE B, ou s'il suffit que la violence armée atteigne cumulativement le seuil minimum. La littérature accepte ce dernier point de vue étant donné que le niveau global de violence a déjà dépassé le seuil requis. Par conséquent, l'exigence d'intensité d'un CANI s'applique au conflit armé dans son ensemble et non aux relations bilatérales entre deux (parmi plusieurs) parties à ce conflit.

Enfin, une approche cumulative ne peut être adoptée pour déterminer si le PA II s'applique entre un groupe armé et un État. Cela est dû au libellé de l'article 1 (1) PA II, qui fait référence à « des groupes organisés qui […] exercent un tel contrôle sur le territoire ». Le texte du traité subordonne l'application du PA II à un groupe armé organisé à la condition que ce groupe particulier exerce un contrôle sur le territoire.

Introduction

In many contemporary situations of non-international armed conflict (NIAC), there is more than one non-State armed group (NSAG) involved. Such groups may decide to form a coalition, like many States fighting armed groups do.

The cooperation between NSAGs raises questions of International Humanitarian Law (IHL). In this regard, it is necessary to distinguish between two situations.

The first situation is one where there is a pre-existing NIAC between a State and one NSAG ("A"), and another NSAG ("B") starts cooperating with NSAG A, without there being a separate pre-existing NIAC between the State and NSAG B. In this situation, the question is when exactly NSAG B becomes a party to the NIAC between the State and NSAG A.

The second situation is one in which there are originally distinct non-international armed conflicts between separate NSAGs and one single same State. In this situation, the question is whether, at some point, due to the cooperation between the different NSAGs, the distinct NIACs "merge" into one single NIAC between the State, on one side, and the NSAGs, on the other. The difference between this situation and the one described above is that not one but two armed groups are parties to pre-existing armed conflicts.

This contribution addresses the question of when, in the abovementioned situations, two armed groups become parties to one single same NIAC with a State. It does not deal with another question that may arise in both situations, namely when the relationship between different NSAGs leads them to become one single party to the same NIAC.[1]

This contribution is structured as follows. First, in section 2, three approaches, that are referred to in the literature for answering the question of when, in the first situation described above, two armed groups become parties to the same NIAC, will be discussed. Section 3 will deal with the same question in the framework of the second situation presented above. Section 4 will argue that the sound approach when treaty law does not provide an answer, as is the case here, is to inquire whether there is a rule of customary international law that regulates the issue. An attempt to identify such rule regulating instances when two armed groups become parties to the same armed conflict, however, requires an in-depth analysis of State practice. Such an analysis is beyond the scope of this contribution. Section 5 will discuss the application of the requirement of a minimum level of intensity of hostilities for determining whether there is an armed conflict in the context of the relationship between two NSAGs, as

1 This question is addressed in the contribution by Prof. Koutroulis in these proceedings.

discussed in this contribution. The following section discusses the applicability of Additional Protocol II (AP II) in that framework. The seventh and final section contains some concluding observations.

Cooperation between two groups, one of which is not a party to a pre-existing armed conflict

Three approaches

A variety of approaches have been proposed for addressing the issue of when NSAG B becomes a party to an armed conflict between NSAG A and a State, in a situation in which there is no pre-existing conflict between NSAG B and the State in question. There appear to be three main approaches, which have been listed by Deeks.[2] These three approaches will be analyzed in this section. Each of these approaches makes use of a criterion found elsewhere in IHL.

Support-based approach

One approach builds on the theory developed by the ICRC referred to as the 'support-based approach', which originally emerged out of the analysis of foreign interventions in a pre-existing non-international armed conflict (NIAC) in support of one of the parties to this conflict.[3] It was not developed with the relationship between two NSAGs in mind. It has been argued however that no logical reason prevents the ICRC's 'support-based approach' from being applied to other types of interventions in pre-existing NIACs, in particular to the support provided by armed groups to one party in a pre-existing NIAC, including when that party is another NSAG.[4]

The support-based approach as developed by the ICRC requires the fulfillment of four conditions. First, there needs to be a pre-existing NIAC taking place on the territory where the third power intervenes. Second, actions related to the conduct of hostilities need to be undertaken by the intervening power in the context of that pre-existing conflict. Third, the military operations of the intervening power should be carried out in support of one of the parties to the

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2 Deeks, Common Article 3 and Linkages between Non-State Armed Groups, Lawfare Blog, 4 October 2017, on internet: https://www.lawfareblog.com/common-article-3-and-linkages-between-non-state-armed-groups. Deeks describes four approaches. Two of the approaches she describes are in reality two variations of the "co-belligerency" approach described below in paragraph 2.2.3, but taking different positions on what is required for there to be "co-belligerency". These two variations will be treated as a single approach in this contribution.

3 See ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, report prepared for the 32nd International Conference of the Red Cross and Red Crescent (2015) 22.

4 R. van Steenberghe and R. Lesaffre, The ICRC's Support-based Approach: A Suitable but Incomplete Theory, Questions of International Law, 31 May 2019, on internet: http://www.qil-qdi.org/the-icrcs-support-based-approach-a-suitable-but-incomplete-theory/.

pre-existing NIAC. Last, the action in question should be undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.

An important element of the "support-based" approach is that NSAG B does not actually have to enter into hostilities together with NSAG A against the State, to become a party to the same conflict. It is sufficient that it undertakes actions related to the conduct of hostilities. The ICRC distinguishes between the provision of support that has a direct impact on the opposing party's ability to carry out military operations and more indirect forms of support, which would allow the beneficiary to build up its military capabilities. Only the former type of support would turn multinational forces into a party to a pre-existing NIAC.

Co-belligerency approach

Another approach would require NSAG B to indeed enter into hostilities with the State. This approach is reflected in (at least one reading of) the "co-belligerency" test used by US courts to determine whether persons can be detained by the United States under a domestic law (the AUMF) that authorizes the use of force by the United States against Al Qaeda and "associated forces". US courts have held that "associated forces" encompasses those forces that are "co-belligerents" as that term is understood under IHL. They have suggested that for a NSAG to become a co-belligerent with Al Qaeda, it must enter into hostilities with the US.

This "co-belligerency" test sets a higher threshold in the sense that it requires that both NSAGs actually fight, i.e. undertake hostilities against the State. This is not a requirement under the "support-based" approach.

This approach does require that one NSAG fights "in association with" another group. It has been argued in the literature that associated forces are forces that "act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States"[5]. This seems to set the bar for fighting "in association with" quite low.

Direct Participation in Hostilities approach

A third approach is to borrow the criteria used to determine whether a civilian is "directly participating in hostilities" (DPH). "Direct participation in hostilities" is the criterion for a

5 C. Bradley & J. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harvard Law Review 2047 (2005) 2113.

civilian to lose his or her protection from attack, as set out in Article 51 (3) AP I and Article 13 (3) AP II. Treaty IHL does not define the conduct covered by this term. The ICRC has developed interpretative guidance on DPH, clarifying what it considers falls under that term. For the ICRC, in order to qualify as direct participation in hostilities, a specific act must meet three cumulative criteria:[6]

First, the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm). Second, there must be a direct causal link between the act and the harm likely to result either from that act, or from a co-ordinated military operation of which that act constitutes an integral part (direct causation). Last, the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

It has been suggested that there may be some utility in considering the DPH factors in assessing links between groups in their adverse relationship to the State.[7] This is because the DPH factors are intended to assess the links between military-like acts by an actor who does not fall within the core of a NSAG, and an existing NIAC (or IAC) itself. The requirement that the act in question must be specifically designed to cause harm in support of a party to the armed conflict is probably the most difficult requirement to apply in practice. Although it must be distinguished from 'intent', it is still likely to be difficult to establish.

Second situation: merger of pre-existing distinct NIACs between two groups and a State

This situation concerns two NSAGs which are engaged in a separate pre-existing NIAC with the same State. What distinguishes this situation from the one described in the section above, is that not only NSAG A but also NSAG B are engaged in a pre-existing NIAC. In this situation also, the question is at what moment does the relationship between the two groups lead them to become parties to the same conflict. In that case, the two pre-existing NIACs 'merge' and become one single NIAC to which both A and B are parties.

There appears, in principle, to be no reason why the approach, that is taken to determine whether a group that is not a party to a pre-existing NIAC becomes a party to a pre-existing NIAC between another group and a State (in other words, the situation discussed in section 2 above), should not also be taken to determine when two NIACs merge. The nature of the

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6 ICRC, Interpretive Guidance of the Notion of Direct Participation in Hostilities (2009) 46.

7 Deeks, *supra* note 2.

inquiry is similar, so that it also seems logical to use a similar test. This may be one reason why in the literature the distinction between the two situations is not always made clear.[8]

In principle therefore, the three approaches discussed in section 2 above are also potential candidates for the test to determine whether two pre-existing NIACs have merged.

However, there is a strong argument for not accepting any of these approaches too quickly. Each of the three approaches consists of taking a concept or criterion from another part of IHL and adapting it to use it as a standard to determine when two NIACs merge. It is unclear what the legal basis is for the use of such analogies. Analogy is not in itself a source of international law.[9] It is therefore important to be careful when employing them. As a general matter, this is all the more true when the source of the analogy and its destination are far removed. In the context of IHL, the consequence of that particular reticence is in order when reasoning by analogy involves taking concepts from the IHL regime of international armed conflicts and applying them in the regime of non-international conflicts.

Moreover, a second argument applies when there are two groups that are parties to separate pre-existing armed conflicts. All three of the approaches discussed appear to deal with the situation in which there is a 'principal' NSAG which is joined by a 'subsidiary' one. This is most evident in the 'support-based approach' and the 'co-belligerency' approach, but it also permeates the 'DPH approach'. It is unclear how the approaches deal with cases in which two NSAGs are equal in capacities.

Although the difference between the situations described in section 2 and in this section may not justify applying different tests for NSAG B becoming party to the same NIAC as NSAG A, it is still important to distinguish the two situations. This is because in the case of an NSAG that is not party to a pre-existing NIAC with the State, it must also be determined whether the minimum threshold of intensity of the fighting has been met for that NSAG to be a party to a NIAC. If this requirement has not been met, there cannot be a NIAC to begin with. The application of the minimum intensity of hostilities criterion will be discussed below in section 5.

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8 An example is Deeks. She describes inter alia two variations of the "co-belligerency" approach, one requiring that the potential "co-belligerent" group actually fight the State, the other not. In the latter case, there is logically no pre-existing NIAC between group B and the State. The "co-belligerency" approach thus straddles the two situations. Deeks, supra note 2.

9 H. Thirlway, The Sources of International Law 24 (2014).

Is there a rule of customary international law?

When treaty law does not provide an answer, as is the case here, attempts can be made to "borrow" concepts from other parts of IHL. It is submitted however that a sounder approach is to inquire whether another source of IHL provides an answer. In particular, a logical question is whether customary IHL provides an answer. Many gaps in the IHL regime of non-international armed conflicts have been filled in this way, and it is quite possible that the same goes for the question addressed here.

When trying to discover a customary rule of IHL, one must first remember that the two requirements for the formation of a rule of customary international law are a) a general practice b) that is accepted as law. As the International Court of Justice stated in its judgment in the North Sea Continental Shelf Case, for the formation of a rule of customary international law two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[10]

An inquiry into whether State practice reflects one of the approaches discussed above, and *a fortiori* an inquiry into whether a rule of customary international law can be identified for determining when two armed groups become parties to the same armed conflict, requires an in-depth discussion of practice. The limited scope of this contribution however does not allow such a discussion.

Application of the minimum intensity of hostilities threshold

As mentioned above, there is an important difference between the situations discussed in sections 2 and 3 respectively. This is because in the case of NSAG B that is not party to a pre-existing NIAC with the State and which cooperates with another NSAG A that is such a party, it must be determined whether the minimum threshold of intensity of the fighting has been met for NSAG B to be a party to a NIAC.

For a NIAC to exist, there needs to be an armed violence that meets a minimum level of intensity. In the case at hand, the question is whether this requirement applies to the armed violence between the State and NSAG A and to the armed violence between the State and NSAG B, or whether it is enough that the armed violence cumulatively reaches the minimum threshold.

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10 ICJ, *North Sea Continental Shelf*, ICJ Rep. 1969, p 3, at p 44, para 77.

There is quite some support in the literature for the latter view.[11] It is argued that there are sound reasons for accepting that it may not be appropriate to use this same test for determining the entry of a new party into a pre-existing NIAC, since the overall level of prevailing violence has already surpassed the required threshold.

Another argument supporting such a cumulative approach is that the intensity requirement applies to the armed conflict as a whole, and not to the bilateral relationship between two (among more) parties to that conflict. Indeed, this is how the intensity criterion was framed by the ICTY Appeals Chamber when it was first introduced. The Appeals Chamber held that a NIAC exists whenever there is "protracted armed violence between governmental authorities and organized armed *groups* or between such groups within a State."[12] The "between" in reality concerns relations between more than two objects alone.

The Application of AP II

If two NSAGs are parties to the same NIAC with a State, at a minimum common Article 3 and customary IHL applicable to NIACs apply between all the parties to the conflict. It may be that one of the NSAGs (but not the other) also meets the criteria for the application of Additional Protocol II (AP II), in particular the requirement that the armed group "exercise such control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations and to implement [AP II]."

If there are two parallel NIACs, the fact that AP II applies to the NIAC between the State and NSAG A does not affect whether AP II also applies to the NIAC between the State and NSAG B. In case there is one NIAC to which several NSAGs are parties, it might, at first sight, seem logical to also apply a cumulative approach in this context, as was advanced in the context of the intensity criterion. This would entail that if only one NSAG party to the NIAC meets the criteria for the application of AP II, it nevertheless applies to all the NSAG parties to that NIAC. The better view however is that, in the context of the application of AP II, a cumulative approach is not appropriate. An argument to support this is that it is the logical consequence of the wording of Article 1 (1) AP II, which refers to "organized groups which […] exercise such control over territory". In other words, the treaty text makes the application of AP II to an organized armed group conditional on that particular group exercising control over territory.

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11 See e.g. Kleffner, The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict, 95 International Law Studies 161 (2019), at 175.

12 Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

Conclusion

This contribution has focused on the test to be applied for determining when the relationship between two non-State armed groups leads them to become parties to the same armed conflict.

Two situations were distinguished: the first situation is one where there is a pre-existing NIAC between a State and one NSAG ("A"), and another NSAG ("B") begins cooperating with NSAG A, without there being a separate pre-existing NIAC between the State and NSAG B. In this situation, the question is when exactly NSAG B becomes a party to the NIAC between the State and NSAG A.

The second situation is one in which there are originally distinct non-international armed conflicts between separate NSAGs (NSAG "C" and NSAG "D") and one single same State. In this situation, the question is whether, at some point, due to the cooperation between NSAGs C and D, the distinct NIACs "merge" into one single NIAC between the State, on one side, and NSAGs C and D, on the other.

Regarding the first situation, this contribution discussed three approaches that have been referred to for determining at what moment NSAG B becomes party to the pre-existing armed conflict between NSAG A and a State. These approaches are the "support-based approach", the "co-belligerency approach" and the "DPH approach". It was submitted that there appears to be no reason in principle why the approach taken in the first situation should not also be used in the second situation.

All three approaches consist in taking a concept or criterion from another part of IHL and adapting it for use in the present framework. It is submitted that it is important to be careful with such analogies. Analogy is not in itself a source of international law. As a general matter, this is all the more so when the source of the analogy and its destination are far removed. Applying this to the field of IHL this requires increased circumspection when reasoning by analogy involves taking concepts from the IHL regime of international armed conflicts and applying them in the regime of non-international conflicts, rather than an analogy involving one single regime only.

It was submitted that for this reason, a better approach than trying to use analogies may be to attempt to identify a rule of customary international law. However, the limited scope of this contribution does not allow for the in-depth inquiry into State practice which would be required to identify such a (possible) rule of customary international law.

Identifying the approach to be used is all the more important because once the threshold for considering NSAG B as a party to the pre-existing armed conflict between NSAG A and a State is crossed, it is not relevant anymore whether there is a minimum level of intensity of hostilities between NSAG B and that State. This is because it is enough that the armed violence cumulatively reaches the minimum threshold.

It is also submitted that such a cumulative approach may not be taken to determine whether AP II applies between an NSAG and a State. This is because of the wording of Article 1 (1) AP II, which refers to "organized groups which [...] exercise such control over territory". In other words, the treaty text makes the application of AP II to an organized armed group conditional on that particular group exercising control over territory.

ENGAGING NON-STATE ARMED GROUPS ON PROTECTION AND ASSISTANCE CONCERNS: AN ICRC PERSPECTIVE

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Résumé

Aujourd'hui, il y a environ 90 conflits armés dans le monde. Environ 70 de ces conflits sont des conflits armés non-internationaux (CANI). Il y a donc un rôle croissant tenu par les groupes armés non-étatiques (GANE). Selon le CICR, un GANE est un groupe non-reconnu en tant qu'État mais qui possède la capacité de provoquer des violences pouvant engendrer des préoccupations humanitaires. Quand un GANE se qualifie comme partie à un CANI, il est lié par le droit international humanitaire (DIH). En 2019, le CICR a identifié 561 GANE. Actuellement, le CICR entretient un dialogue avec 412 d'entre eux. Cet engagement reste possible car, dans ces circonstances-ci, toutes les parties au conflit ont accepté la présence d'une organisation humanitaire neutre et impartiale. Par conséquent, le CICR est libre de parler à toutes les parties pour garantir l'accès aux victimes ou pour encourager le respect du droit international humanitaire (DIH).

Selon la substance de l'échange, différents degrés d'interactions sont possibles. Premièrement, il y a le « contact sans dialogue ». Cela signifie que les interactions avec les dirigeants ou les membres des groupes armés n'atteignent pas un niveau de dialogue. Cela peut être dû à l'objection d'un État ou à un manque d'intérêt du groupe. À côté de cela, il y a le « dialogue non-opérationnel ». Cela implique un dialogue qui se concentre sur des discussions liées au DIH, en général, mais qui n'est pas lié au contexte. C'est, par exemple, le cas d'une séance de diffusion du DIH donnée à un GANE. La troisième interaction est appelée « accès et acceptation ». Il s'agit un dialogue opérationnel, limité à la négociation de l'accès et à la discussion sur la gestion des problèmes de sécurité. Un exemple comprend l'obtention de garanties de sécurité suffisantes pour être opérationnel. La quatrième interaction est appelée « protection basée sur le DIH ». Il s'agit d'un dialogue basé sur toutes les préoccupations relatives au DIH ou au droit international des droits de l'Homme (DIDH), qui peuvent être soulevées dans une situation ou un contexte donné. Un exemple est un échange sur des questions spécifiques liées à la détention. La dernière forme d'interaction est appelée « protection fondée sur les principes d'humanité ». Cette forme d'interaction est similaire à la catégorie précédente, sauf que le dialogue soulève des sujets humanitaires ou de protection en référence au principe d'humanité ou à des normes juridiques autres que le DIH ou le DIDH, comme le droit islamique ou le droit coutumier local.

Le CICR a été en mesure de soulever des préoccupations en matière de protection auprès de 203 groupes armés en 2019. Il reste bien entendu beaucoup de chemin à parcourir pour que davantage de victimes, blessés et malades soient aidés.

A humanitarian perspective on engaging with armed groups

Today, for a doctor in Idlib, the authorization to perform daily medical services will not come first from the Syrian government but from a bureaucratic authority militarily opposed to it. Likewise, in central Mali or in many other conflicted areas around the world where States' capacity to impose territorial authority is not a reality. The aim of this short paper is to contribute to the policy debate triggered by this state of affairs with hard figures coming out of the ICRC's operational network. I begin with a description of a shifting conflict environment, followed with factual observation of the growing place and role of non-State armed groups and finish with a zoom-in on the different modes of dialogue the ICRC engages in with these actors in order to perform our humanitarian mandate.

Conflicts today

In the observation of the ICRC, the number of armed conflicts has been on a constant rise at least since the late 1990s. Today, there are around 90 armed conflicts around the world. Since the early 2000s, the number of non-international armed conflicts has more than doubled from fewer than 30 to over 70[1].

We have observed a number of important features of contemporary armed conflicts, leading, in particular, to a multiplication of actors, both on the State and the non-State armed group (NSAG) side, hence this rises in the total number of armed conflicts over the last decades. Three aspects are particularly prominent:

First, the multiplication of NSAGs: while there has always been fragmentation dynamics within armed groups in the past, the proportion of non-international armed conflicts (NIACs) with a relatively low number of belligerent parties was higher in the past. Today, States experiencing NIACs are much more likely to have more than two parties to the conflict present on their territory. About a quarter of States in conflict have over ten parties fighting within their borders. Well-known examples would be Syria, Iraq or Yemen, but Mali, South Sudan, the DRC or Myanmar are equally among those. Second, the current conflict map is marked by a considerable number of States intervening in armed conflicts abroad, in particular in the Middle East and

1 https://www.icrc.org/en/document/icrc-more-conflicts-more-sides-conflict-equal-greater-danger-study.

Africa. This has led to a growingly dense and global web of interplay between allied State militaries but also between States and non-State militaries, a relatively new phenomenon in terms of scale where support can flow both ways. More on that can be found in the work currently undertaken by the ICRC under the title of "Support Relationship Initiative" (SRI)[2] that looks at what this dialectic means for humanitarian agencies and stakeholders in this new type of warfare. Third, a significant proportion of today's conflicts involve so-called jihadi armed groups: 50% of States experiencing NIACs on their territory are affected by conflicts involving jihadi groups. Also, the great majority of foreign interventions are directed against jihadi groups[3].

Importance of armed groups in the ICRC's environment

The term 'armed groups' is an operational definition used by the ICRC that includes a broad range of groups with varying goals, structures, doctrines, funding sources, military capacity and degree of territorial control. It denotes a group that is not recognized as a State but has the capacity to use violence that is of humanitarian concern. Included in this broad operational category are "non-State armed groups" (NSAGs) that qualify as a party to a non-international armed conflict and are therefore bound by international humanitarian law.

The ICRC identified 561 armed groups of relevance and humanitarian concern in all its operations worldwide. The typology goes from self-styled jihadi groups, gangs, cartels, pro-government paramilitaries, separatist movements, national challengers, local protection/auto-defense. The ICRC engages with 412 of those armed groups across 44 delegations (72% of the total number of delegations).

Concretely this means thousands of interactions with armed groups across hundreds of sites, at all levels of a group's command chain. A third of delegations operate in contexts with ten or more armed groups, three with more than 50 groups. This is an average of 13 armed groups per delegation.

Talking with armed groups (AG)

A cornerstone of our security doctrine relies on what we call "acceptance" by all parties to a conflict of the presence of a neutral and impartial humanitarian organization. This, of course, is an ideal objective, but it concretely means that the ICRC is attempting to talk to all sides in order to secure access to victims or to encourage weapon bearers to respect international humanitarian law.

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2 SRI panel event.

3 https://www.icrc.org/en/document/icrc-more-conflicts-more-sides-conflict-equal-greater-danger-study.

We have listed five types of interactions depending on the substance of the exchange. The first is called 'contact but no dialogue'. This means interactions with AG leaders or members does not reach a level that could be described as a dialogue in any practical sense. This can be as a result of State objection or a lack of interest from members of the AG. The second interaction is called 'non-operational dialogue'. This dialogue focuses on IHL-related discussions in general, not context-related issues or the past behavior of an armed group. Examples could include dissemination sessions where principles of IHL are explained to an armed group audience. The third interaction is called 'access and acceptance'. This category covers dialogue that is operational in focus, limited to negotiating access and discussing acceptance to manage security issues. Examples include obtaining sufficient security guarantees for field teams distributing assistance or holding discussions on the ICRC's mission and activities. The next interaction is called 'protection based on IHL'. This entails a dialogue on all subjects or concerns that can be raised with an AG that refer to IHL or IHRL compliance in a given situation or context. This includes examples where rules of IHL are used (e.g. access to medical services) even if references to specific articles, for instance, are not made explicit. Other examples include an exchange on specific cases or detention issues, discussions on the compliance of a group's codes of conduct with IHL. The last interaction is called 'protection based on principles of humanity'. This is similar to the previous category, except that the dialogue raises humanitarian or protection topics with reference to principles of humanity or legal norms other than IHL or IHRL, such as Islamic law or local customary law.

The distinction between the fourth and fifth approach reflects different approaches to AGs. The one explicitly referencing positive law, more classical, is based on integration model whereby weapon bearers are organized in a vertical hierarchic way and use explicit manuals to enforce discipline and ensure respect for IHL. The second, more realistic for armed groups, acknowledges their horizontal nature and reliance on informal norms (e.g. code of honor) or alternative legal framework (e.g. Islamic law) to influence behavior.

The ICRC is one of the leading protection actors in the world, particularly in terms of protection dialogue with armed groups – we raised concerns with 203 armed groups in 2019, which is 49% of the groups we are in contact with. Obviously progress needs to be made to help the victims, the wounded, and the sick, and there are still many obstacles in this very difficult line of work. In order to further contribute to the debate between policy, security, academia and humanitarian circles around the issue of armed groups we will try in future editions to complete this picture with figures of the population that is directly affected by this reality.

DISCUSSION WITH THE AUDIENCE

First, an audience member pointed out that it was very important to identify exactly what makes contemporary armed conflicts so complex. The person questioned whether this was due to the situations on the ground themselves or whether it was because of the attention paid to these situations on the ground. A speaker answered that the multiplication of actors is a factor that needs to be considered. However, as the ICRC has always been engaging with armed groups this is not necessarily a change compared to armed conflicts in the past.

Then, someone asked whether the 561-armed groups that were identified by the ICRC are all taking part in an armed conflict in which IHL is applicable from an ICRC's point of view. A speaker explained that the ICRC uses a broad definition for 'armed group'. This definition also examines the humanitarian impact on the region in which the group operates. The speaker added that, at the moment, the ICRC is having problems with this definition in Latin-America because several criminal groups operating in the region also have a large humanitarian impact. For this reason, the ICRC should refine its approach, as only armed groups operating in the context of an armed conflict are meant to be encompassed by the definition.

Another question touched upon the criteria of a NIAC. The person from the audience wondered whether the willingness to apply IHL is considered. It was added that the Commentary to the first Geneva Convention of the ICRC describes the capacity to apply IHL. This implies a minimum level of willingness of the armed group in question to apply IHL. The person from the audience found that this underlying aspect resulted in a certain reluctance of States to look into this element.

A speaker argued that the criteria of willingness and the capacity to apply IHL should be considered as two different criteria. After all, willingness to apply IHL excludes groups who are very well-organized but who have no willingness or intention to apply IHL while carrying out their actions. In relation to the capacity to apply IHL, the speaker would file this criterium under the larger one of 'organization of a NSAG'. The jurisprudence of the international criminal courts also follows this view.

The idea behind this is that a group which is sufficiently organized and, for example, has a hierarchy, will by definition have the capacity to respect IHL. However, looking at practice, this is not always the case. The speaker therefore pleaded to not just accept this as a consequence of organization, but to also check this criterion *as such*. Nevertheless, a total abstrac-

tion of the criterium of organization should not be made as the level of organization will have an impact on the capacity to apply IHL. In relation to the willingness to apply IHL, the speaker stated that it is indeed striking that it is left aside as a criterium.

Another speaker added that if willingness would be considered as a criterium, this could be counterproductive. After all, under the current IHL regime, armed groups still have little to gain by applying IHL as they still face the possibility of prosecution nor do they have prisoner of war (POW) status.

It was then asked whether evidence was found about the extent of Israel's responsibility based on the principle of attribution for the actions of Hamas in Gaza. Additionally, it was questioned how that relates to the theory whereby it suits a State to attribute the conduct of individuals who are present in a certain part of the territory to the authority that supposedly exercises control there.

The speaker answered that attribution normally involves the question of responsibility rather than the question of classification of a conflict. Nevertheless, if attribution were to be applied to the particular case of Hamas and other actors operating in Gaza, one problem is the fact that State attribution entails State responsibility and Hamas is not a State. Therefore, this would be breaking new ground.

However, it could be relevant if the intensity criterium and the cumulative approach are applied. The following example makes it clear. Currently, Hamas and the Palestinian jihad are both fighting Israel. However, if the Palestinian jihad would hypothetically be fighting another actor in Gaza (in a separate conflict from the conflict of Hamas and Israel), it would be difficult to consider the actions of the Palestinian jihad for the intensity requirement of the conflict between Hamas and Israel.

As a final point, the speaker contented that attribution becomes more relevant when talking about the situation where two NSAGs fighting in one conflict merge into one single NSAG. Here, one of the leading theories is the 'overall control theory' which has links with criteria used for attribution. So, in that sense it can also be relevant.

More information on mixed coalitions was requested. The speaker from the audience asked if NSAGs operating under the effective control of a State would internationalize the entire armed conflict.

A speaker gave the example of the IAC between Syria and Turkey and the NIAC between Turkey and the Kurds. If an alliance between Syria and the Kurds existed, this would lead to coordinated military operations between these two. Then, this would entail a separation of the conflict (when there is no control of the State over the armed group as defined in the Nicaragua Case of the International Court of Justice). However, in practice this makes things very difficult. For example, when a Turkish soldier is captured by adversaries, the status he gets would depend on who captures him (he would face the Syrian soldier next to the PKK soldier). This would result in an absurd situation. Therefore, the speaker suggests the complete internationalization of the armed conflict.

Another speaker gave the example of the intervention of the Soviet Union in Afghanistan to assist the government. Here, everybody agreed that it could not entirely qualify as an IAC. Of course, this led to operational issues. However, in relation to the question of detention, POW status was granted, even though the Soviets made sure that the persons responsible for detention were locals. Nevertheless, looking at the situation of Turkey, Turkey would not contemplate giving POW status to Syrian Kurds.

A comment from the audience touched on the answers provided by the speakers. It was argued that the fact that POW status was given in the situation of the Soviet Union should not be used to determine the classification of the conflict. The real question remains how protection on the ground can be improved. Much of the discussion is around how IHL is used as a basis for authorizing actions that are essentially violations of international law. For example, when the US attacked militants of I.S. with a drone in Libya (an accident happened on the 25th of September 2019), they argued that IHL authorized this action, although international human rights law was clearly violated.

In relation to the previous question, it was asked which specific support would meet the threshold of overall control. In addition, it was asked if the support of an actor (operating individually) to another actor (part of a coalition) may create a responsibility in terms of IHL for the other actors within the same coalition.

A speaker held that timing is an important element in this regard. For example, in the past, the Dutch government provided non-lethal assistance to certain Syrian opposition groups. Now, those opposition groups have become part of the Free Syrian Army, fighting in support of the Turkish intervention. It has been suggested that some of these groups are the same groups which received support from the Dutch government. Of course, if you support groups, you cannot predict how they will act in the future and how coalitions can be formed. This is a problem of foreseeability.

In terms of attribution, providing assistance to a group would not make you responsible *as such*. There remains of course the question of the application of common article 1 of the GC, as controversies exist in terms of what 'respect for the Convention' exactly entails in practice and which obligations lay upon States which are not party to the conflict.

Another speaker added that the problem of attribution ties in with the classification test and the attribution under State responsibility. The speaker suggested that the criteria used for establishing the test should be merged, as a single test would be much easier. However, there could also be a gap. The Case of Georgia v. Russia (II), currently pending before the Grand Chamber of the European Court of Human Rights, was shortly touched upon. It could be contented that there was Russian overall control over the South Ossetia militia, therefore the conflict qualifies as an IAC. However, the support given did not amount to effective control, and for this reason Russia cannot be held responsible for the acts of the South Ossetia militia. The speaker perceived the consequences of this reasoning as absurd.

Another speaker stated that, even when the purest definition of 'parties to an armed conflict' is used, there is a growing complexity. For example, Al-Qaida has evolved over the years from being an auxiliary to the Islamic Emirate of Afghanistan with its own capacity to project international operations, to a franchise/cluster of 30 to 40 groups that move within the territorial space defined by al Qaida. These groups will, depending on their needs and interests, merge further into the core of al Qaida or will work in a more opportunistic way. This added complexity was not necessarily present before. Furthermore, States also form coalitions with NSAGs, which equally blurs the lines. Therefore, new criteria are needed.

Someone asked whether one could elaborate more on the topic of 'association as a criterion of co-belligerence'. One of the speakers wondered whether 'association' could be filed under the concept of co-belligerency. The speaker referred to the associated forces within a US context. There, the threshold seems to be set very low as communications with NSAGs or provisions of safe houses is sufficient to be associated with them. Also, there is a gap between, on the one hand, States which do not always meet their obligations under the law of neutrality and, on the other hand, the situation whereby States systematically do not respect the law of neutrality. Only in the second situation, can one speak of co-belligerence. It could be submitted that, coordination, which demands more than just communication, would count as association. This question should be further developed.

A question was asked about the efforts of having a dialogue with NSAGs. More precisely, whether a 'most promising' way to conduct such a dialogue was identified and whether a published document existed on this matter.

It was answered that, in the past 10 years, the ICRC identified a need to engage with Islamic law. This engagement has ranged from participating in conferences where scholars and practitioners are gathered to more closed-door exercises. Such meetings are important for both sides. After all, NSAGs are also interested in how detainees need to be treated and what their status is.

Regarding this, the ICRC does have a well-developed code to start a discussion. For example, in case a NSAG is anti-State oriented, the ICRC will not start from a legal point of view. In such a scenario, it is better to start with the principle of humanity as it allows the ICRC to do a comparison exercise in relation to humanitarian action. As this principle does not provoke any controversy, it gives access to more focused discussions with the NSAGs. In this way, the ICRC does not come across as opportunistic, when it, for example, asks NSAGs to let ICRC trucks pass through check-points.

The ICRC seeks deeper understanding with other traditions than the Islamic one. For example, it also engages with the Buddhist tradition. Besides the legal discussion, there is the possibility or a need to engage on a moral ground. For example, responsibility is central in the Buddhist tradition (re-incarnation) and certainly contributes to these legal discussions.

Another question was related to the fact that coalitions may affect the character of an armed conflict. It was asked whether this theory will then also influence the applicability of International Human Rights Law (IHRL) in armed conflicts.

A speaker reacted by referring to the fact that the conventional perception remains that NSAGs have no human rights obligations on their own. So, in this regard, IHRL is not relevant. However, one could also look at the relation between a State and a non-State actor, for example, the Turkish and Syrian national armies. This goes back to the questions of overall control, as it should be verified whether the actions of the NSAG are attributable to the State.

In relation to this, there is of course the potential gap which we have discussed earlier. On one hand, overall control is used for the classification issue. On the other hand, effective control is used for the attribution of conduct. As a result, one could encounter a situation, whereby the armed conflict results in an IAC but the conduct is not attributable to the State, can be created. Then, a State will not be responsible for that conduct as long as it takes place outside its territory.

However, when it is inside its territory, one could argue that what happens in your territory or in territory controlled by a group that you, as a State, control (think about Northern Cyprus)

is your responsibility. In that case, IHRL may be relevant but only in terms of obligations of the State and not in terms of IHRL obligations of NSAGs.

Furthermore, there are theories that hold that, in case a NSAG exercises State-like control, it can have IHRL obligations. For example, the Dutch government has not recognized the State of Palestine. However, Palestine has stated that they do see themselves as a State and therefore expect to respect IHRL. In that sense, a dialogue with Palestine can be established as they believe they have obligations, even if, legally speaking, the application of IHRL remains debated.

Another speaker added that the structure of defining the parties to a coalition within an armed conflict cannot be transposed to IHRL. However, the speaker did believe that the existence of a coalition could have an influence on the IHRL obligations of States in terms of general due diligence and positive obligations.

A final remark held that the real reason everything has become more complex is not because facts have changed but rather because today national courts have an increased willingness to address these issues. This forces States to think about legal questions in an upstream manner.

On these words, Françoise Hampson closed the debate.

Session 2
Challenges to IHL arising from the use of new technologies of warfare
Deuxième Session
Les défis au DIH posés par l'utilisation de nouvelles technologies de combat

APPLYING IHL IN THE CYBER SPACE: WHAT ARE THE MAIN CONTEMPORARY CHALLENGES?

John Swords
UK Ministry of Defence

This contribution is not available for publication.

Cette contribution n'est pas disponible à la publication.

MILITARY APPLICATIONS OF ARTIFICIAL INTELLIGENCE: RISKS AND OPPORTUNITIES FOR INTERNATIONAL HUMANITARIAN LAW COMPLIANCE

Steven Hill
NATO[1]

Résumé

Comme le concept d'IA est large, un manque de clarté subsiste souvent autour de ce concept. Par exemple, à l'OTAN, le terme est régulièrement associé à des concepts connexes – mais distincts – tel que le « Big Data ». Steven Hill souligne que, plus récemment, à l'OTAN, le débat sur l'IA s'est concentré sur la question de savoir si les cadres juridiques existants étaient suffisants. En outre, des considérations éthiques sont également prises en compte.

Steven Hill considère qu'en raison du manque d'instruments juridiques internationaux adaptés pour traiter des technologies basées sur l'IA, il y a un manque de transparence et de confiance entre les États concernant l'utilisation autorisée de ces technologies. Cependant, avec l'évolution des technologies, une réticence persiste toujours à mettre en place des normes juridiques contraignantes. En effet, cela pourrait présenter un désavantage stratégique pour ceux qui respectent les règles.

En outre, cette contribution examine les risques et opportunités offerts par les outils et capacités technologiques émergents du point de vue de l'OTAN.

Quatre opportunités sont identifiées par l'orateur. Premièrement, la rapidité de la prise de décision. En effet, un humain ne sera jamais aussi rapide qu'une machine pour trier et extraire des informations utiles. Ensuite, l'IA peut soutenir les processus de prise de décision au sein de l'OTAN. En effet, ces systèmes peuvent augmenter considérablement le rythme et la qualité du traitement, de l'exploitation et de la diffusion des informations. Par ailleurs, un ciblage plus précis est un autre avantage. Enfin, l'IA peut réduire l'erreur humaine due à la surcharge cognitive et éloigner le personnel militaire des environnements dangereux ou hostiles.

1 Steven Hill served until February 2020 as Legal Adviser and Director, Office of Legal Affairs, North Atlantic Treaty Organization, NATO Headquarters, Brussels. The views expressed in this article are those of the author alone and do not necessarily represent the views of NATO or its Allies. The author gratefully acknowledges the support provided by Giulia Zilio of NATO's Office of Legal Affairs and by Eva Houtave of International Committee of the Red Cross (ICRC).

Cependant, l'IA présente également des risques. Steven Hill en identifie trois. Premièrement, l'IA peut être utilisée de manière malveillante. Par rapport à cela, il existe également un défi qui consiste à identifier et traiter les vulnérabilités (comme les biais). De plus, les données elles-mêmes peuvent présenter certaines difficultés. Par exemple, le partage des données peut affecter le droit à la vie privée. Finalement, il existe encore des lacunes en matière d'interopérabilité. Un manque d'échange d'informations pourrait contribuer à creuser le fossé en termes d'interopérabilité entre les Alliés de l'OTAN.

Enfin, Steven Hill conclut que l'OTAN peut servir comme plate-forme aux Alliés et Partenaires pour examiner les questions pratiques, éthiques et juridiques qui découleront inévitablement de ces nouvelles technologies.

The increasing number of military applications based on artificial intelligence (AI) is attracting more and more attention in both technical and legal circles. The range of questions is broad. For the Bruges Colloquium, I would like to focus on how military applications of AI pose both risks and opportunities for States' ability to comply with their obligations under IHL. Not only is there relatively little State practice and jurisprudence on these questions, but the discourse on them tends to blur questions of technology, law, and ethics. Unpacking this debate requires a holistic approach[2] that can be challenging for IHL lawyers.

There is a general lack of realistic understanding about what current and even potential military applications of AI might look like. Nightmare scenarios like "killer robots" sometimes dominate the debate, which understandably leads to broad concerns regarding compliance with international law and respect of ethical principles. In reality, the development of such technologies is not meant to subvert the core principles of IHL, but rather to provide new tools that can help uphold our values and commitments in a changing security environment.

Often, there is a lack of clarity on what is meant when the concept of AI is addressed. There is no commonly agreed definition among experts of the subject matter, however AI is generally referred to as "the capability of a computer system to perform tasks that normally require human intelligence, such as visual perception, speech recognition and decision-making"[3].

For example, at NATO, the term is regularly blended with related – but distinct – concepts such as 'big data' or is included in the greater debate about the emergence of new technologies and

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2 Gilli A., *Preparing for "NATO-mation": the Atlantic Alliance toward the age of artificial intelligence, NDC Policy Brief*, No. 4, February 2019.

3 Cummings M. L., *Artificial Intelligence and the Future of Warfare*, Chatham House, 26 January 2017.

innovation.[4] At the same time, there is a certain appetite to concentrate the debate on lethal autonomous weapons systems (LAWS). In reality, fully autonomous LAWS are not on NATO's agenda. For example, the brand-new and highly advanced NATO Alliance Ground Surveillance Programme is not completely autonomous since the aircraft is remotely piloted and therefore a certain level of human control is retained.[5] Currently, there are no real LAWS operating in warfare. Rather, current military applications of AI cover a far different array of fields that, while important, may seem far more prosaic.

AI applications are inserted into intelligence, surveillance and reconnaissance tasks, but also in preventing and tracking cyber threats. Another field of widespread application of AI is social media, through strategic communication and analysis of people behaviors on the internet. Finally, there are emerging AI applications in the cyber defense area.

We need more informed debate on the legal issues raised by these current applications. The discussion is certainly characterized by great uncertainty due to the scarcity of precedents. Confronted with new technologies, legal advisers tend to say that existing legal frameworks already contain the tools needed to understand the relevant legal issues. Of course, explaining how these tools apply to particular applications may be easier said than done.[6]

We also need to think about ethical concerns related to the phases of development, programming, and control of such technologies. NATO and its Allies are in the forefront of promoting a thoughtful innovation process respectful of the Alliance's core values. The temptation of setting new legal norms and parameters needs to be balanced with the necessity of speeding up innovation and technological research in order to avoid possible strategic disadvantages. For example, in October 2019, NATO's ambassadors and military leaders had a dedicated "away day" to discuss the impact of disruptive technologies on the future of the Alliance's security. At this event, NATO Secretary General Jens Stoltenberg summed up NATO's ambition: "emerging and disruptive technologies are having a profound impact on how the Alliance carries out its

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4 See NATO Secretary General Jens Stoltenberg's speech at Columbia University, *NATO: Maintaining Security in a Changing World*, 26 September 2019, https://www.nato.int/cps/en/natohq/opinions_169183.htm?selectedLocale=en.
Read also *NATO focuses on future of advanced technologies*, 4 October 2019, available at: https://www.nato.int/cps/en/natohq/news_169419.htm?selectedLocale=en.

5 Read more about Alliance Ground Surveillance on the NATO factsheet available here: https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160627_1607-factsheet-ags-en.pdf.

6 See more on the importance of retaining human control over AI application in warfare in ICRC, *Artificial intelligence and machine learning in armed conflict: A human-centered approach*, Geneva, June 2019, available at: https://www.icrc.org/en/document/artificial-intelligence-and-machine-learning-armed-conflict-human-centred-approach.

core tasks. How we understand, adopt and implement those technologies will largely determine our future security, and NATO will play a key role in driving this change"[7].

Opportunities in relation to Compliance with International Humanitarian Law

I would like to highlight three ways in which AI can offer opportunities to enhance IHL compliance: (1) increased speed of information analysis for decision-making processes; (2) higher precision in targeting; (3) reducing human costs of conflict.

Living in a composite reality characterized by abundance of available data presents challenges related to the speed of decision-making. Relying on some form of machine-based AI would help in extracting relevant information to support decision-making process and situational awareness in a more timely manner. In this case, an information and elaboration support empowered by AI systems might be of interest to military and strategic decision makers.[8] Such systems would be able to substantially increase both the pace and quality of the processing, exploiting, and disseminating of information, ensuring broader situational awareness and more precision of data to decision makers. For instance, intelligence, surveillance, and reconnaissance systems' purpose is information gathering in support of operational decision-making and situational awareness. The autonomous nature of collection methods has increased the sheer amount of available data for analysis, becoming overwhelming for a traditional human analysis. AI-enabled systems can be leveraged to comb through these datasets. In this way, AI can enhance situational awareness capacities, improve decision-making, and promote greater freedom of action.

Regarding higher precision in the targeting process, it can be contended that autonomous vehicles and missiles might operate in a safer and more precise manner due to the use of AI. For example, situational analysis carried out by AI machines would be less susceptible to cognitive overload.[9]

Finally, in relation to the reduced human cost in the battlefield, introduction of robotic autonomous systems could fundamentally change operational concepts. The integration of such systems into combat formations could, for example, reduce a unit's personnel number sub-

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7 NATO ambassadors and military leaders meet to discuss disruptive technologies, 1 October 2019, read more at: https://www.nato.int/cps/en/natohq/news_169264.htm?selectedLocale=en.

8 Swedish Defence Research Agency, *Artificial Intelligence for Decision Support in Command and Control Systems*, 23rd International Command and Control Research & Technology Symposium, 2018.

9 *Supra*, Gilli.

stantially.[10] Indeed, robotic autonomous systems can carry out military tasks by augmenting or replacing human operators, and taking out some of the riskiest operations such as mine detecting.[11] In this scenario, there would be more availability of human resources for tasks demanding higher cognitive functions, removing military personnel from dangerous or hostile environments.

Challenges in relation to compliance with International Humanitarian Law

At the same time, the introduction of AI in the battlefield could result in difficulties for IHL compliance. As with other new technologies, AI bears the risk of being used for malicious purposes. Moreover, given that the main source of AI is data, proper management might constitute a risk. From an operational point of view, the development of new capabilities might widen current interoperability gaps existing among different nations.

In relation to the malicious use of AI, it needs to be emphasized that the main inherent risk of these technologies is their possible dual use.[12] Although these areas of development show tremendous potential for enabling collective security, they also present challenges in terms of how vulnerabilities can be recognized and addressed (such as bias). It remains to be seen how, in accordance, can be responded to such alleged nefarious uses of these technology, both of which have legal implications.

Another issue that presents itself lays in the core of data itself. There is the concern that the automated process of collection, storage, analysis and sharing of data for early warning purposes, and the identification of possible security threats may be very difficult to do. This process opens a wide array of legal implications starting with data ownership and intelligence sharing. Moreover, management of personal data might affect individual rights as well, such as the right to privacy, in a way that might be unsustainable to our societies.[13]

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10 Science and Technology Committee, Artificial Intelligence: Implications for NATO's Armed Forces, 149 STCTTS 19 E rev. 1 fin, 13 October 2019.

11 Read more on NATO's project on detection and clearance of improvised explosive devices here: https://www.nato.int/cps/en/natohq/news_160271.htm.

12 The so-called dual use dilemma is two folded in this filed. Firstly, these technological capabilities can be used both for commercial or civilian purposes and for military purposes. Secondly, their application might enhance collective security or serve malicious purposes. On this topic, the French Defence Ministry's AI Task Force has published an interesting report: *Artificial Intelligence in support of defence*, September 2019.

13 For instance, the Council of Europe has issued in January 2019 a series of guidelines on Artificial Intelligence and Data Protection emphasizing the importance of developing AI technologies in accordance with existing rights and obligations. Read the guidelines at: https://rm.coe.int/guidelines-on-artificial-intelligence-and-data-protection/168091f9d8.

Finally, AI will present numerous innovation challenges widening interoperability gaps.[14] Indeed, the quick technological development in this area of expertise constitutes a challenge for nations, especially for those who will not be able to maintain the same technological edge. As a result, the lack of exchange of information in this regard might widen the interoperability gap among NATO Allies.

For the above reasons, it can be concluded that NATO certainly can serve as a platform for Allies and Partners to consider the difficult practical, ethical and legal questions that will inevitably arise from these new technologies, preserving the Alliance's core values and full respect to international law. The recent development of collaborative research projects together with internal ongoing discussions suggest an awareness of opportunities and challenges emanating from the rapid development of AI.[15]

NATO could be a useful venue, among others, where Allies can express their views on emerging technologies from a military and security perspective in order to ensure interoperability, preparedness, and resilience towards collective defense.

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14 NATO Standardization Office, *NATO Glossary of Terms and Definitions*, AAP-06(2019), force interoperability is defined as: "The ability of the forces of two or more nations to train, exercise and operate effectively together in the execution of assigned missions and tasks". It is from this concept that the term "legal interoperability" is derived.

15 Kasapoğlu C, Kırdemir B., Artificial Intelligence and the Future of Conflict, Carnegie Europe, 28 November 2019, available at: https://carnegieeurope.eu/2019/11/28/artificial-intelligence-and-future-of-conflict-pub-80421.

CONDUCTING HOSTILITIES IN THE OUTER SPACE: WHICH LIMITS DO IHL AND SPACE LAW IMPOSE?

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Résumé

De nombreuses forces armées reconnaissent que les conflits armés modernes peuvent contenir une composante spatiale. À cet égard, on peut examiner les développements récents de super-puissances telles que la Chine, la Russie et les États-Unis.

D'abord, cette contribution examine la manière dont un conflit armé dans l'espace pourrait être mené. Dr Heather Harrison Dinniss soutient que des ressources spatiales pourraient être utilisées pour le soutien aux opérations militaires terrestres et empêcher l'utilisation de ces ressources pour la partie adverse.

Ces conflits armés engloberaient des opérations militaires de la Terre à l'espace, de l'espace à la Terre ou dans l'espace. Toutefois, on peut considérer que l'opinion dominante demeure que l'utilisation de missiles balistiques et d'autres armes, qui ne feraient que transiter simplement par l'espace plutôt que rester en orbite, ne devrait pas être assimilée au terme « conflit armé dans l'espace ». Des opérations spatiales seraient très probablement menées pour soutenir des conflits terrestres en cours mais pourraient également représenter le début d'un conflit armé. Par exemple, en détruisant les structures de reconnaissance ainsi que de commandement et de contrôle de l'ennemi, comme beaucoup de ces structures sont basées dans l'espace ou dépendent de moyens spatiaux pour leurs fonctionnalités.

En ce qui concerne les règles juridiques, le droit de l'espace mérite d'être examiné en premier. Ce domaine du droit contient le principe général selon lequel la lune et les autres corps célestes doivent être utilisés à des fins pacifiques. En outre, le droit de l'espace interdit expressément de mettre en orbite des armes nucléaires ou d'autres armes de destruction massive.

Aussi, il ne fait aucun doute que le DIH s'applique dans le domaine spatial. Toutefois, des règles adaptées de DIH sont nécessaires. En effet, l'espace soulève des questions complexes où les concepts de territorialité, propriété et responsabilité ne fonctionnent pas dans le sens habituel.

Un problème lié au principe de distinction repose sur le traitement des astronautes qui sont des membres des forces armées d'un État, qui peut être partie à un conflit armé, et, en même temps,

sont des « envoyés de l'Humanité ». Aussi, les objets à double usage dans l'espace (comme le GPS) posent également problème.

Le principe de précaution est également difficile à appréhender pour les opérations militaires dans l'espace. Par exemple, une partie à un conflit armé pourrait devoir être amenée à choisir une cyber-opération pour désactiver un satellite plutôt qu'une attaque cinétique qui risquerait de causer des dommages au trafic satellite civil. De même, la sélection des cibles pourrait devoir être limitée aux transpondeurs qui sont utilisés spécifiquement à des fins militaires, plutôt que cibler l'ensemble du satellite, pour autant que cela soit possible.

Au cours des quatre dernières années, un groupe de juristes, universitaires et praticiens du DIH, du droit international public général et du droit de l'espace, ont travaillé à la création d'un manuel pour examiner et clarifier de manière exhaustive la manière dont l'ensemble du droit existant s'applique dans le contexte de l'espace extra-atmosphérique. Cela a débouché sur un processus de consultation gouvernementale en vue de la rédaction du Manuel de Woomera sur le droit international des opérations spatiales militaires, qui débutera en novembre 2020, la publication finale du manuel étant prévue pour 2021.

Dr Heather Harrison Dinniss espère que le Manuel de Woomera sera aussi utile dans le contexte spatial que ses prédécesseurs dans d'autres domaines (comme par exemple, les manuels non-contraignants en matière de cyber-opérations).

Since the 1990s, and specifically since the 1990-91 Gulf War, there has been a common understanding amongst many militaries that modern armed conflicts will contain a space component. While the first Gulf War did not conduct hostilities in outer space, the United States used a variety of space-based assets and demonstrated the huge advantage to be gained in operating in – as some have called it – the ultimate high ground. Other States took notice; both those who are likely to form part of a coalition with the US (such as the United Kingdom) and those who may find themselves on the opposing side.

China, for example, has been developing its own space and anti-space programmes at an incredible speed. In 2007, China demonstrated a kinetic anti-satellite (ASAT) weapon against one of their own old weather satellites. The following year, the United States publicly demonstrated what appears to be similar capabilities on a malfunctioning satellite that was deorbiting. In 2014, the Russian Federation launched an unidentified space object (Object 2014-28E)

capable of making directed manoeuvres which, some have speculated, are some form of co-orbital ASAT.[1]

These developments, among others, have led the Commander of the US Air Force Space Command, General Jay Raymond, to talk about the normalization of space as a warfighting domain in a series of speeches,[2] and for the US to introduce a space warfighting construct including the development of a concept of operations (CONOP) for space warfighting. It should be noted that General Raymond has also explicitly stated that the United States is not *looking* to fight in space – but will be prepared for it.[3] Moreover, it is not just the US – the latest defense strategy report released in 2019 by the Chinese People's Liberation Army (PLA) emphasized the importance of space security, listing it as one of China's vital strategic interests. The report notes that outer space is a critical domain in international strategic competition, China is developing "relevant technologies and capabilities" for safeguarding satellites while maintaining the ability to safely enter, exit, and openly use space.[4] This transformation of perspective on the outer space environment from a benign space to be used for the peaceful exploration of all humankind to a contested domain of immense strategic importance has led to the realization that we do not have any specific legal guidance, or set rules of engagement, for how we might treat armed conflicts in space. Indeed, there are some that would argue that the peaceful purposes clause of the Outer Space Treaty should eliminate the need for any such considerations. However, history teaches us that such a view, while made with the best of intentions, does not mitigate the need to prepare for such an eventuality.

Armed conflict in space

Sadly, for fans of space-based science fiction, armed conflict in space will not take the form of their favorite shows and movies for the foreseeable future – there will be no pitched spaceship battles. It will be a far more prosaic use of space-based assets for the support of terrestrially based military operations during hostilities and the denial of use of such assets for the opposing side.

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1 'Op-Ed | Object 2014-28E: Benign or Malignant?' <https://spacenews.com/42895object-2014-28e-benign-or-malignant/> accessed 22 February 2020.

2 See for example, 'A Conversation with General Raymond' <https://www.csis.org/analysis/conversation-general-raymond> accessed 23 February 2020."

3 'Media Roundtable with U.S. Space Command Commander Gen. John Raymond' (U.S. DEPARTMENT OF DEFENSE) <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1949346/media-roundtable-with-us-space-command-commander-gen-john-raymond/> accessed 23 February 2020.

4 See for example, 'China Outlines Space War Plans' (*Washington Free Beacon*, 26 July 2019) <https://freebeacon.com/national-security/china-outlines-space-war-plans/> accessed 23 February 2020.

Armed conflict in space will encompass military operations either from Earth to space, from space to Earth, or within space. An additional question arises with respect to military operations which are conducted *through* space, although the prevailing view appears to be that the use of ballistic missiles and other weapons, which merely transit through space, rather than reaching orbit, should not be encompassed by the term 'armed conflict in space'. Thus, examples of the type of military operations that are discussed here include:

- Anti-satellite weaponry (ASATs), such as those tested by the US and China, launched from the Earth to space to destroy an enemy satellite.
- Cyber operations designed to destroy a satellite or other space object.
- Directed energy weapon released from space to Earth.
- The intentional collision of two satellites or other space objects – (this is the concern regarding the unidentified Russian object mentioned above).
- Laser dazzling against a space object that is specifically designed to damage its sensor array.

These types of operations would most likely occur in support of ongoing terrestrially based conflicts, but could also represent the start of an armed conflict. For example, writings on strategy by Chinese military authors have discussed that the first step in an armed conflict would be to destroy the reconnaissance as well as command and control structures of the enemy.[5] Many of these structures are space-based or rely on space assets for their functionality. Thus, there is an inherent tension between the peaceful uses of space and armed conflict taking place in, from, or through outer space.

Although space law undoubtedly contains the general principle that the moon and other celestial bodies are to be used for peaceful purposes (widely accepted as meaning non-aggressive),[6] beyond this general prohibition, there are very few rules which limit military uses of outer space. It is specifically prohibited to place nuclear weapons or other weapons of mass destruction in orbit, and military manoeuvres and installations are prohibited on the moon and other celestial bodies[7]. However, beyond that, any regulation of hostilities in outer space will come from IHL as the *lex specialis*, albeit adapted for the unique space environment.

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5 Qiao Liang and Wang Xiangsui *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House, February 1999).

6 Art IV, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967 27 January 1967, 610 UNTS 205 (in force 10 October 1967) (Outer Space Treaty or OST).

7 Ibid.

Application of international humanitarian law to conflict in space

The jurisprudence of the International Court of Justice clearly indicates that the relative newness of space as a domain of conflict would not, *per se*, prevent the law of armed conflict from applying. In the *Nuclear Weapons Advisory Opinion*, the Court held that the law of armed conflict "applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present, and those of the future".[8] While the treaty law based rules contained in the law of armed conflict may or may not be domain specific, there is no doubt that the customary IHL rules and principles will apply in the space domain. Article III of the Outer Space Treaty, itself reflective of customary international law, requires all States to 'carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law…'.[9] Further, the Martens clause**,** repeated in numerous IHL treaties in varying forms provides that "[i]n cases not covered by … international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[10]

In addition, there are explicit statements from major space-faring States, in particular the United States and China, NATO manuals, and more general statements from other States that international humanitarian law applies to *all* situations where there is armed conflict. The International Committee of the Red Cross (ICRC) has also stated explicitly that it considers that 'any use of outer space in armed conflict must comply with IHL in particular its rules on distinction, proportionality and precautions in attack'.[11]

With this in mind, the paper now turns to each of those principles and briefly sets out what they might mean in the space context.

Examples of legal issues in Space

The basic rule of distinction is stated in Article 48 of Additional Protocol I: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the

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8 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ GL No 95, [1996] ICJ Rep 226.

9 States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

10 Art 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Additional Protocol I).

11 ICRC challenges report; see 'Weapons: ICRC Statement to the United Nations, 2015' (*International Committee of the Red Cross*, 22 October 2015) <https://www.icrc.org/en/document/weapons-icrc-statement-united-nations-2015> accessed 23 February 2020.

conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'. In relation to people, perhaps the most challenging aspect will be the treatment of astronauts who are also members of the armed forces of a state that becomes a party to an armed conflict. This is not an unusual occurrence by any measure. Since the early days of space flight, crews of space vehicles from all major space-faring nations have largely been made up of members of the armed forces. Article V of the OST provides that astronauts are to be regarded as 'envoys of mankind', however under the law of armed conflict any member of the armed forces of a party to the conflict is *prima facie* targetable. One reading of the text would consider that the phrase 'envoy of mankind' does not connote a special legal protection, but is rather an indicator of moral status.[12] However, one might also reason that the special status granted to astronauts under space law can be preserved within IHL as long as they do not actively participate in hostilities, in much the same way as those who are *hors du combat* must refrain from acts of hostility. As far as objects are concerned, the principle of distinction is made more complex by the number of dual-use objects in space. Under IHL, the negative definition of civilian objects as 'all objects that are not military objectives',[13] leads to a binary distinction between those two categories. For example, the Global Positioning System (GPS) is a US military system and therefore a military objective and yet is relied on by millions of civilians around the globe for many aspects of their daily lives. Examples of such reliance include civilian navigation systems (for maritime, aviation and land transport), packet timing for internet communication, global financial systems, water supply infrastructure, health services, energy production etc. This remaining impact must be dealt with by the proportionality principle to the extent that the relevant deleterious effects on civilians are foreseeable.[14]

Other issues arise with respect to objects subject to special protection under IHL in the unique environment of space. For example, the protection of cultural property during armed conflict is made more complex by the lack of territorial claims in outer space, on the moon and other celestial bodies. While claims of protected status for the Eagle lunar landing module would still be feasible, the claims for protected status of the lunar landing site or of Neil Armstrong's footprints do not fit within the current legal constructs. Nor is it clear who would have a duty to protect such sites. Questions have also been raised as to the level of protection that would extend to space assets that are linked to terrestrially based specially protected objects. For

12 Stephan Hobe and others (eds), *Cologne Commentary on Space Law: In Three Volumes; [CoCoSL]* (Heymanns 2009) 98.

13 Art 52(1), Additional Protocol I.

14 An attack which is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is considered a prohibited indiscriminate attack Art 51(5)(b) Additional Protocol I.

example, satellite monitoring of dams or other installations containing dangerous forces, or other space-based disaster management applications, including the monitoring of drinking water installations that may be indispensable to the survival of the civilian population.[15]

The principle of precaution requires that 'in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects'.[16] Specific rules regarding the verification of targets, selection of means and methods, obligation to refrain, cancel or suspend attacks, warnings, and the selection of targets. In the space context, such precautions may require, for example, a party to the armed conflict to choose a cyber-operation to disable a satellite rather than a kinetic ASAT that would risk causing large amounts of harmful debris and potential damage to civilian satellite traffic. Likewise, target selection may be limited by choosing specific transponders that are used for military purposes, rather than targeting the whole satellite.

The examples given above serve to illustrate the need for a careful working through of the issues in order to apply IHL in the specific environment of outer space. This environment, unique both physically and legally, raises complex questions where concepts of territoriality, ownership, and responsibility do not operate in the conventional sense.

Woomera: a manual to provide some clarity

For the past four years a group of lawyers, both academics and practitioners, from IHL, specialising in general public, international and space law, have been working to create a manual to comprehensively examine and clarify how the body of existing law applies in the context of outer space. The governmental consultation process for the *Woomera Manual on the International Law of Military Space Operations* begins in November 2020, with final publication of the manual due in 2021.[17] With its strong pedigree of non-binding manuals in relation to sea, air and cyber warfare, international humanitarian law is clearly open to such non-governmental efforts to help clarify and articulate the application of the law governing resort to force and law of armed conflict to new domains and means and methods of armed conflict. It is to be hoped that the Woomera Manual will prove as useful in the space context as its predecessors have been in other environments.

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15 See, Dale Stephens and Cassandra Steer, 'Conflicts in Space: International Humanitarian Law and its Application to Space Warfare' Annals of Air and Space Law 32, 20.

16 Art 57(1), Additional Protocol I.

17 See generally 'The Woomera Manual | University of Adelaide', <https://law.adelaide.edu.au/woomera/>, accessed 24 February 2020.

DISCUSSION WITH THE AUDIENCE

First, a question was asked in relation to the malicious use and data related problems of AI. More precisely, it was asked whether this problem could be solved by retaining an element of human control. After all, human control is not only related to the question of accountability but also to the previously mentioned problems.

It was answered that, in the strategic context of a technological race, there is the dynamic related to how one's position in the race will define one's interest in regulation. The faster a State wants to work, the less it will be bothered by regulation in the beginning. These States hold that IHL is applicable as they just want to test cyber weapons and don't want a debate over IHL. The same applies to outer space.

The speaker also referred to the different technological capacities of States within the NATO Alliance. In addition, it was stressed that international law is applicable in the context of AI. Even more so, there is already a strong legal framework. For example, the issue of human control can be a way to mitigate the risks of AI. The speaker argued that NATO has a history of 70 years during which it was able to keep human control over very complicated IHL issues. The speaker admitted that sometimes it was indeed a chaotic process, but in the end, it always worked. The speaker was also convinced that in the future, NATO would manage to retain a human control. Consequently, a political control over the development of AI will be kept.

Another speaker added that although human control adds to accountability, it is doubtful that it would mitigate all risks. After all, human biases remain part of the problem. The strong statement that a machine will never become a human being was made. After all, humans remain involved in the malicious use of AI. To clarify this, the example of minority identification using AI was given. Some companies seem not to be aware of the legal and moral implications and are using this case in their campaigns. For example, there are campaigns that claim that the visual identification (from a certain company) has a 97% success rate in identifying individuals from a particular ethnicity or group. In addition, the analogy of command responsibility was shortly touched upon to look at the responsibility of humans over machines. In a sense, these two situations are comparable.

It was then added that the issue of the accountability of AI will not be solved via swift solutions. After all, the technology itself, the applications and the pride of developers and companies in what they create/accomplish, makes AI a product with room for fraud. This was proven in a recent test in the UK, where visual identification samples had 86 % false posi-

tives. Obviously, the issue of the development and reliability of these systems rests with the developers and the companies, as this is a matter of corporate social responsibility. One of the things that can be concluded, based on the previously mentioned UK test, is that relying on visual identification is simply not possible in the immediate future. Especially not in terms of IHL contexts.

The speaker stated that transferring responsibility to machines *as such* is problematic. After all, it would be twisted to lay all the responsibility on machines in armed conflicts, while decisions are made by governments and military commanders. The speaker continued by adding that developers are not responsible when machines are used in the context of an armed conflict. An additional issue is that it remains unclear to what exact proximity needs to exist between human control and the kinetic effect (in terms of time, effects of an attack).

Someone from the audience commented that the speakers were well chosen as each topic had its own specific problems. According to this person, looking at outer space, this entailed the Chinese-Russian proposal to make a treaty banning weapons in outer space as well as the threat or use of force against outer space objects. The person asked, based on the growing cyber capacities of the main players (US, China, Russia), whether it may be necessary to reconsider certain concepts of international humanitarian law. Also, the person identified that autonomous weapons systems have two distinct camps, one side argues for a ban whereas the other side does not want to do this. Lastly, the speaker held that there is such a plethora of fora that it remains difficult to keep an overview.

Another participant asked a question in relation to the existence of the principle of a peaceful use of outer space. They stated that articles on peaceful use are quite limited. The articles that do exist tackle the non-placement of nuclear weapons in the orbit. Furthermore, peaceful use of the moon and other celestial bodies are touched upon in these articles as no military installations can be placed there. However, the person said that the discussion now is more about whether we should talk about the militarization of space or the weaponization of space.

It was also requested to elaborate on the statement that robots can adapt to changing situations. Here, a speaker contended that a machine should be able to cancel an attack. At the very least, a machine should have the same capacities as a human to do this. After all, technology can and will produce human errors. This is a data issue as machines need to learn how to behave in such circumstances. However, there is enough evidence that has shown that machines are able to conduct invasive actions in situations where they shouldn't be able to act. For example, machines were able to improve and adapt in situations in which they shut

themselves down. After this negative experience, the machines learned to not shut down and move to a different kind of *modus operandi* in similar situations in the future.

Someone wondered how the actor responsible for a cyber-attack could be defined in the situation where a cyber-attack is undertaken by a non-state armed group.

Here, one of the speakers stated that this depends on the technical attribution. It was added that there are currently two groups consulted on cyber issues. The first group consists of governmental experts, who have been meeting for several years. This group has developed norms of responsible State behavior in cyber space (Global Cybersecurity Index, GCI). The other group is the open-ended working group of the UN (UN Group of Governmental Experts, GGE), open to all States and to experts of all States.

Another question was related to the problem that robots can modify their programming. It was asked whether this precise ability (adaption of own learning) can be constrained.

One of the speakers stated that the UN GGE had identified this as a potential problem. More precisely, there is a fear that there would be an inability to turn of the machine since a machine programmed itself. The speaker continued by stating that some States already have AI systems in place that can, within a limited timeframe and geographical area (mission area), automatically search for a target. The key question for such machines remains which objects can be targeted by the machine itself. For example, when something is a school bus, it should be recognized *as such*. However, a school bus can also be used for military transport in an area of conflict. This simple example shows that there are quite some parameters that can be described better. Therefore, such automatic systems are largely used as an anti-tank weapon because tanks are clear targets and are very easy to recognize. Also, one should not forget that IHL has a substantial number of possibilities to restrict certain uses. In other words, IHL does have the flexibility to manage such weapons and therefore can define when the possibility to abort a mission is required.

Furthermore, a person from the audience wondered whether the interpretation of hostile intent as an element of the threshold of harm complies with the principle of military necessity, especially in a cyber context.

Here, a speaker referred to the fact that the Tallinn Manuel approaches some concepts differently. More generally, direct participation in hostilities (DPH) in the area of cyber context can last for one or two seconds. In terms of DPH, you need to know whether the person is an active member of a military group. However, how this situation should be tackled in the cyber

context remains unclear. Another speaker added that different situations could be decisive. After all, you can look at the moment where the civilian pushes the button. Another possibility is that a person would be participating the entire time (from the pushing of the button to the attack itself). If you are hacking, you can still be shot. In terms of dissemination this should be very clear. Also, military personnel are conducting cyber operations. This, in terms of reciprocity, also needs to be considered.

In addition, someone remarked that one of the speakers presumed that there was a consensus on IHL about certain issues of data and AI. However, the person from the audience questioned whether such a consensus really exists.

One of the speakers stated that there was an attempt of certain States to roll IHL back. However, the overall applicability of IHL should be emphasized. Another speaker added that it should be kept in mind that there is an agreement that the general principles do apply. It was added that, for example, in relation to autonomous weapons, the Russian objection was not in relation to the guiding principles recognizing IHL's applicability on autonomous weapons *as such* but in relation to the numbers of days that the GGE will meet in 2020-2021.

One last question was related to data as an object. More precisely, the question was what might be considered as an object and what constitutes an attack in the cyber context. One of the speakers followed the idea that data can always be considered as an object, even if it can be considered as only code by nature. This understanding was adopted by France. After all, functional coding (software) is needed to allow the operating system of a machine to work and should therefore be considered as an object. In addition, the speaker held that there was also such a thing as 'content level data' (for example the content of a Power Point slide, letters within Word documents), as opposed to functional coding. For this second concept it is more debatable whether this constitutes an object. Certainly, protection seems to exist for some content at the level of data. For example, in the case of digital archives or medical files. However, it was added that the Tallinn Manual held the opposite view.

After defining whether something is an object, it should be defined whether a specific operation constitutes an attack. In relation to cyber-attacks, several questions remain unsolved. First, the question of whether an attack reaches the required level of consequences. Therefore, there is the question of the consequences of an attack. Is the attack just shutting its object down? Is it functionally destroying? The main attacks that we see consist of functional destruction and not of physical damage and harm.

On these words, Gert-Jan van Hegelsom closed the session.

Session 3
Climate change and the protection of the natural environment
Troisième Session
Changement climatique et protection de l'environnement naturel

ILC DRAFT PRINCIPLES ON THE PROTECTION OF THE ENVIRONMENTS IN RELATION TO ARMED CONFLICTS

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Résumé

Le projet de principes de la Commission du droit international (CDI), consacrés à la protection de l'environnement en rapport avec les conflits armés, est un instrument clé. Par ailleurs, les lignes directrices révisées du CICR de 1994 sur la protection de l'environnement dans les conflits armés sont très importantes. Ces deux documents n'abordent pas seulement la question des conflits armés et de l'environnement sous des angles différents mais sont véritablement complémentaires.

Premièrement, cette contribution examine l'objectif du projet. L'objectif est de clarifier le droit international applicable à la protection de l'environnement avant, pendant et après les conflits armés (aspect temporel). À cet égard, plusieurs principes expliquent quelles mesures (comme la diffusion et la diligence raisonnable par les entreprises, voir principes 4, 10 et 11) doivent être prises en compte à quel moment. Bien que ces projets de principes se réfèrent aux activités des entreprises dans les zones de conflit armé ou dans les situations de conflit post-armé, ils concernent essentiellement des mesures préventives, y compris des mesures législatives. De plus, ils examinent également la question de la responsabilité.

Ensuite, l'interaction entre plusieurs domaines du droit international est examinée (voir principes 24, 10 et 11). Il est établi que les droits de l'Homme, en complément au droit international de l'environnement, jouent un rôle particulièrement important dans les situations d'occupation (comme indiqué dans les règlements de la Haye, la quatrième Convention de Genève et dans l'arrêt de la CIJ sur les Activités militaires et paramilitaires). Sur cette base, la CDI a convenu qu'une puissance occupante possède certaines obligations en matière d'environnement, notam-

ment celle de prévenir tout dommage important à l'environnement du territoire occupé. Après tout, la protection de l'environnement est largement reconnue comme faisant partie des fonctions essentielles d'un État moderne.

Par ailleurs, les dommages environnementaux qui résultent des déplacements de population sont examinés (voir principe 8). Ici, le UNHCR a particulièrement exprimé ses préoccupations concernant l'accès à l'eau, l'emplacement des camps de réfugiés et des zones d'installation ainsi que l'assistance alimentaire des agences de secours et de développement.

Enfin, il est considéré que le projet dans son ensemble s'applique aux conflits armés internationaux et non-internationaux. Toutefois, la terminologie utilisée dans les différents principes indique leur champ d'application respectif. Il est également intéressant à cet égard de noter que la plupart des projets de principes se rapportent soit à des situations post-conflit, soit à la période précédant un conflit, soit sont de nature générale. Sur les 28 projets de principes, seuls cinq ou six portent spécifiquement sur la conduite des hostilités.

Marja Letho espère que les autres parties prenantes continueront à évaluer les résultats provisoires des travaux de la CDI. Les États, les organisations internationales et les organisations de la société civile, ayant une expertise pertinente, ont été invités à soumettre des commentaires écrits au cours de l'année 2020. La Commission finalisera le projet de principes à la lumière des commentaires reçus en 2021.

The UN Environment Programme and the International Committee of the Red Cross played an instrumental role in initially proposing the topic to the ILC, in a joint report with the Environmental Law Institute, back in 2009.[1] The Report also suggested that the ICRC should update its 1994 Guidelines on the protection of the environment in armed conflicts. Since both projects are relevant, it makes sense to present them together. The ILC draft principles and the ICRC revised Guidelines not only address the issue of armed conflicts and the environment from different angles, but are truly complementary documents.

It can also be stated that the work of the ILC has greatly benefited from the increased understanding of the environmental impacts of armed conflicts, based on the post-conflict environ-

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1 *Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law.* United Nations Environment Programme, 2009 (UNEP 2009), recommendations 4, 6, available at https://www.unenvironment.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international.

mental assessments conducted by the UN Environment Programme since the 1990s, as well as from other more direct support provided by the UN Environment.

The UN International Law Commission has been working on the topic 'Protection of the environment in relation to armed conflicts' since 2013 and has now adopted a complete set of draft principles in first reading. I will attempt to describe the general approach of the ILC topic, with examples of how this general approach is reflected in the draft principles. I will outline four general aspects that characterize the topic. These are, first, the temporal approach and, second, the interplay of several areas of international law. Third, I will give an example of how the work has profited from the enhanced understanding of the environmental effects of armed conflicts and I will finally speak of the general applicability of the draft principles to international and non-international armed conflicts.

As is clear from the words "in relation to", the topic is not limited to situations of armed conflicts. Its purpose is to clarify the international law applicable to the protection of the environment before, during, and after armed conflicts, in an attempt to cover the entire cycle of conflict. The chosen temporal approach means that the Commission has been looking at the measures that can be taken to prevent or minimize environmental harm in conflicts including those to be taken before a conflict breaks out. Likewise, special attention has been paid to the aftermath of armed conflict which is generally a critical period for building a sustainable peace and also for addressing the harm that may have been caused to the environment.

Examples of the measures to be taken before the outbreak of an armed conflict include dissemination of the relevant rules and training, weapons review, and designation of protected zones. Draft principle 4 provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.[2] Similarly, draft principles 10 and 11 on 'Corporate due diligence' and 'Corporate liability' belong to this category. The former draft principle asks home States of corporations and businesses which operate in areas of armed conflict or post-armed conflict situations to take measures aimed at ensuring that such corporations and enterprises exercise due diligence with regard to the protection of the environment and human health. The latter draft principle asks States to take similar measures aimed at ensuring that such corporations and businesses can be held liable for damage they have caused to the environment and human health. While these draft principles refer to corporate activities in areas of armed conflict or post-armed conflict situations, they address essentially preventive measures, including legislative measures. Post-armed conflict provisions deal, for instance, with sharing of and granting access to environmental information,[3] post-

2 Draft principle 3, examples given in the commentary, and draft principle 4.

3 Draft principle 24.

conflict environmental assessments and remedial measures,[4] as well as relief and assistance,[5] all issues that are relevant to addressing wartime environmental damage.

The chosen temporal approach has provided a general frame for the work on the topic. The broad focus has been beneficial to the ILC work in that it has allowed the Commission to take a fresh look at the different environmental concerns and challenges that arise in different phases of the conflict cycle.

Secondly, the topic draws on human rights law, which is applicable during all phases, and on international environmental law, in addition to the law of armed conflicts. It is evident that international human rights law and international environmental law play a role in pre- and post-armed conflict situations. For instance, draft principle 24 on 'Sharing and granting access to information' can be said to reflect modern international environmental law obligations and human rights instruments. Likewise, draft principles 10 and 11 on 'Corporate due diligence' and 'Corporate liability' draw on the existing frameworks of Corporate due diligence, the Business and Human Rights framework including the UN Guiding Principles, and the OECD Guidelines for Multinational Enterprises. Furthermore, the commentaries refer to the jurisprudence of UN Human Rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, as well as on national case law on corporate wrongdoing abroad.

As far as armed conflicts are concerned, the interplay of different areas of international law is most evident in situations of occupation. This is related to the fact that the main instruments codifying the law of occupation, the 1907 Hague Regulations[6] and the Fourth Geneva Convention[7] were created well before the protection of the environment emerged as a subject of international legal regulation in the 1970s. It is also well established that human rights law plays a particularly important role in situations of occupation, the more so, the longer the duration of the occupation. The International Court of Justice has notably stated in the *Armed Activities* case that respect for the applicable rules of international human rights law is part of the obligations of the occupying State under the Hague Regulations.[8] The Court has further confirmed that international human rights instruments are applicable to acts done by

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4 Draft principle 25

5 Draft principle 26.

6 Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, *Consolidated Treaty Series*, vol. 207, p. 277 (the Hague Regulations).

7 Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August, 1949), United Nations, *Treaty Series*, vol. 75, No. 973.

8 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, I.C.J. Reports, p. 116, para. 178.

a State in the exercise of its jurisdiction outside its own territory, "particularly in occupied territories".[9]

As a rule of thumb, it can be said that the longer an occupation lasts, the more onerous the obligations of the occupying power – as the ICRC says in its commentary of art. 2 of the First Geneva Convention, the obligations of the occupier are "commensurate to the length of the occupation".[10] In addition to the law of occupation, this applies to other areas of law such as human rights law and international environmental law.

On this basis, the Commission agreed that an occupying power has certain environmental obligations including the obligation to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.[11] It is to be recalled in this respect that the occupying power is expected to administer the occupied territory for the benefit of the occupied population. The occupying power's general obligation under the Hague Regulations to restore and maintain the civil life in the occupied territory[12] has in this sense been explained as "an obligation to ensure that the occupied population lives as normal a life as possible" under the circumstances.[13] Such an obligation has an obvious connection to the protection of the environment, given that environmental protection is widely recognized as belonging to the core functions of a modern State.

Similarly, the Commission agreed that the established right of usufruct as a general standard for the occupying power's administration and use of the natural resources of the occupied territory has to be interpreted as a sustainable use of natural resources.[14]

This broad frame – the temporal approach and the contribution of other areas of international law than the law of armed conflicts – also means that the Commission has been able to fully benefit from the enhanced understanding of the environmental impacts of armed conflicts. I will not go further into this subject which is addressed in David Jensen's presentation, but will just take a further example of the Commission's draft principles. This is draft principle 8 on the 'Environmental effects of human displacement'.

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9 *Ibid.*, para. 216.

10 ICRC, Commentary to the First Geneva Convention (2016), art. 2, para. 322.

11 Draft principle 20, para. 2.

12 The Hague Regulations, art. 43.

13 Tristan Ferraro, "The law of occupation and human rights law: some selected issues", in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar, 2013), 273–29, p. 279.

14 Draft principle 21.

Population displacement is a predictable consequence of the outbreak of an armed conflict, and one that may give rise to significant human suffering as well as environmental damage. A recent study on the protection of the environment during armed conflicts notes that massive conflict-induced displacement of civilian populations "may have even more destructive effects [on] the environment than actual combat operations".[15] The environmental impact of displacement is an issue to which the UNHCR, the UN Environment Programme, the International Organization for Migration, the World Bank and the UN Environmental Assembly have also drawn attention. As the UNHCR has pointed out, considerations relating to the access to water, the location of refugee camps and settlements as well as food assistance by relief and development agencies, "all have a direct bearing on the environment".[16] For instance, a decision to locate a refugee camp in, or near, a fragile or internationally protected area may result in irreversible impacts on the environment. "Areas of high environmental value suffer particularly serious impacts that may be related to the area's biological diversity, its function as a haven for endangered species or for the ecosystem services these provide".[17]

Draft principle 8 asks States, international organizations, and other relevant actors, while providing relief to persons displaced by a conflict, to take measures to prevent and mitigate environmental degradation in the areas where they are located. The principle includes a reference to local and host communities on the understanding that better environmental governance serves the interests of host communities, displaced persons, and the environment as such.

A fourth general aspect of the topic is that the draft principles have been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts.[18] As is well-known, humanitarian treaty law covers international and non-international armed conflicts very differently. At the same time, many rules of customary international humanitarian law apply in both types of conflicts. The International Criminal Tribunal for former Yugoslavia, in the *Tadić* Judgment, famously declared that "what is inhumane and consequently proscribed in international wars, cannot but be inhumane and inadmissible in civil strife".[19] Not distinguishing between international and non-international conflicts, or seeking, in one way or other, to harmonize the legal regimes, has been a general trend in the field of the law of armed conflicts.

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15 International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Report 12/2014 (*ILPI 2014*), p. 5.

16 2005 *UNHCR Environmental Guidelines*, p. 5.

17 *Ibid.*, p. 7.

18 See draft principle 1 (Scope), commentary, para. 3, *Report of the International Law Commission*, seventy-first session (2019), UN Doc. A/74/10, Chapter VI, p. 216.

19 ICTY, *Tadić*, Case No. IT-94-1-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 119.

It is also clear that not all the gaps in the legal regime of non-international armed conflicts have been filled by customary law, and even the ICRC Customary Humanitarian Law Study of 2005 put forward many rules as being only "arguably" applicable in NIACs. The ILC position, too, is somewhat nuanced. While the Commission has not distinguished between international and non-international armed conflict in the context of the entire set of principles, the terminology used in different draft principles indicates their intended scope of application. The Commission has thus referred to 'States', 'parties' 'international organizations' and 'relevant actors' depending on whether the relevant measures are intended to be taken by parties to an international armed conflict, parties to a non-international armed conflict including non-State armed groups, or by any States or actors in the position to do so. In some draft principles, the use of the passive tense indicates their general application. Furthermore, when a draft principle draws on existing rules of international law, the commentaries regularly remark on the applicability of such rules in IACs and NIACs.

Of interest in this regard is also that most of the draft principles either relate to post-conflict situations, or to time before conflict, or are of a general nature. Out of the 28 draft principles, only five or six specifically relate to the conduct of hostilities.

I hope these general characteristics have given an insight into the Commission's approach to the topic. As there is no opportunity to go into details here, let me add that the whole set of draft principles, together with commentaries, is available as part of the International Law Commission's 2019 Report, Chapter VII, at the ILC website.[20] I should add that this is a work in progress. It is now for other stakeholders to assess the provisional outcome of the ILC work. States, international organizations and civil society organizations, with relevant expertise, have been asked to submit written comments during 2020. In 2021, the Commission will finalize the draft principles in the light of the comments received.

20 https://legal.un.org>ilc.

ENVIRONMENTAL CHALLENGES RAISED BY MILITARY ACTIVITIES

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Résumé

Cette contribution sur les défis environnementaux posés par les activités militaires comprend deux messages clés.

Le premier message implique que les dommages environnementaux dans les situations de conflit ne sont pas dus aux seules opérations militaires. En fait, il existe trois sources principales de dommages. Ces trois facteurs doivent être évalués et pris en compte dans le cadre de la réponse humanitaire et du relèvement post-conflit.

Tout d'abord, il existe des impacts directs de la conduite des opérations militaires. Ces impacts sont visibles, aigus et spécifiques à chaque site. L'utilisation de tactiques de la terre brûlée, l'utilisation d'armes et les conséquences de la destruction des infrastructures y sont abordées. En outre, les dommages collatéraux, l'utilisation illégale des ressources naturelles et l'empreinte écologique globale de la guerre sont expliqués.

De plus, il y a les impacts secondaires résultant de la réponse sociale au conflit. Bien que ces impacts soient moins visibles, ils sont plus répandus, plus chroniques et possèdent des effets à plus long terme. Il s'agit ici d'examiner les stratégies de survie et les systèmes économiques parallèles. De plus, l'empreinte écologique des missions de paix et missions humanitaires elles-mêmes ne peut être sous-estimée.

Enfin, les impacts de l'effondrement des institutions responsables des infrastructures environnementales et de la gestion des ressources naturelles doivent également être pris en compte.

Le deuxième message clé est que l'environnement est toujours une victime silencieuse et ce dans chaque conflit. On ne peut l'oublier car les impacts sur l'environnement peuvent menacer la santé humaine, les moyens de subsistance et la sécurité des personnes longtemps après la cessation des hostilités. Il faut dès lors porter une attention particulière aux conséquences dans les pays touchés par les conflits et aux facteurs qui peuvent multiplier la menace du changement climatique. Finalement, David Jensen souligne la diversité des impacts causés par les opérations militaires sur l'environnement à l'aide d'exemples tirés de différents contextes.

When we think about warfare and environmental impact, some iconic examples often come to mind. Many colleagues think of the deforestation in the Vietnam war due to Agent Orange. The burning oil wells (scorched earth tactics) in Iraq is another common mental image that is often mentioned. Other examples relate to the visible destruction of industrial sites and public infrastructure during the Kosovo conflict, as well as the fuel oil tanks that were hit during the Lebanese war. However, when it comes to discussing the environmental impacts of conflicts, these examples are only the tip of the iceberg.

The takeaway of this contribution includes two key messages. The first one is that environmental damage in conflict situations is not solely due to military operations. In fact, there are three main sources of damage. First, there are indeed the direct impacts from the conduct of military operations. In addition, there are secondary impacts resulting from the social response to conflict. Lastly, governance impacts from the breakdown of institutions needs also to be considered. All three factors need to be assessed and addressed as part of a humanitarian response and post-conflict recovery.

The second key message is that the environment is always a silent casualty in every conflict. This must be considered as the impacts on the environment may threaten human health, livelihoods, and security long after the cessation of hostilities.

Let us now unpack these two key messages and explore in more depth the different ways in which the environment can be damaged together with the implications for health, livelihoods, and security.

When it comes to the direct impact of conflict on the environment, there are many cases that must be taken into consideration.

The first is the use of scorched earth tactics where the environment is directly targeted as a means to undermine local livelihoods, and make specific areas and infrastructure unusable for enemy forces. During the first Gulf war, when Iraqi forces withdrew from Kuwait, they set fire to over 650 oil wells and damaged almost 75 more, which then spewed crude oil across the desert and into the Persian Gulf. Fires burned for ten months. Another good example here is the destruction of the Mesopotamian marshlands. Eighty five percent of the marshlands was intentionally destructed to undermine the livelihoods of the Marsh Arabs in Iraq.

The second case stems from the use of weapons, including landmines and unexploded ordnance. Again, Iraq can be used as an example. 150 to 300 tons of depleted uranium were used

in the two different conflicts, leading to contamination risks as these munitions degrade over a long period of time in the environment.

The third source of direct impact is the toxic hazard and the chemical contamination that stems from damage to infrastructure and industry. As mentioned above, 50 industrial sites were bombed in Kosovo by NATO forces, resulting in four environmental hot spots from the release of chemicals and waste.

The fourth direct impact is collateral damage that happens to natural resources in protected areas, for example, parks that contain installations like communication towers. If these installations are bombed, damage to the actual protected area, namely the park, can ensue. This happened within the Fruska Gora National Park in Serbia during the Kosovo conflict.

The fifth source of direct impact on the environment consists of the use of natural resources to finance the conflict, for example, illegal gold mining by armed groups in Columbia. Not only does this lead to direct environmental damage, it also leads to chemical and toxic contamination from the use of mercury.

Finally, the overall environmental footprint of warfare, of direct military operations, should be considered (energy, water, materials, production of organic waste). At this point, UNEP has looked at the footprint of peacekeeping operations, but not yet at the overall footprint of warfare.

The direct impacts mentioned above are often visible, acute, and site-specific. However, there are also less visible and more widespread impacts. These are the so-called secondary impacts, resulting from social responses to conflict. For example, in Afghanistan, many natural pistachio woodlands were used for charcoal production as a survival strategy. Natural assets were dilapidated to create a livelihood. Such behavior often happens when the economy collapses.

Furthermore, there is often a proliferation of informal economies. For example, in the Eastern parts of the DRC, informal mining accounts for 90% of all mining activity. This resource extraction is detrimental to the environment. In addition, displacement and temporary settlements have a great impact on the environment. In many cases, the energy demand (fuel to cook for example) in camps is not met nor supplied by humanitarian organizations. This can be illustrated by an example from the DRC, where many people were displaced and relocated next to the Virunga National Park. Some of the camps were within the park boundary. Thousands of displaced people relied on charcoal from the park for cooking which led to deforestation.

Another secondary impact comes from peacekeeping and humanitarian operations themselves. Humanitarian and peacekeeping actors need to build infrastructure (shelters) and often use various natural resources such as water to carry out their operations. Often, the environmental impacts of these operations are not fully considered. For example, in Darfur, the demand for brick increased five-fold. This drove deforestation up significantly by about 50,000 trees per year.

These secondary impacts are, in contrast to the direct impacts, more widespread, more chronic, and have longer term effects.

Lastly, the third category is governance impacts. These are the implications of the breakdown of the institutions of the government and of the rule of law regarding natural resource management. For example, following the conflict in Liberia, there was a review of the timber concessions to see how many of them were legal and what percentage of the country was covered. It was determined that none of these concessions were actually legal. In addition, they covered about twice the total territory of the forestry area in Liberia.

In general, when a country is in conflict, very often, there is lack of investment in environmental infrastructure and natural resource governance. Another example, which illustrates this, is the case of Gaza where a waste water dam collapsed in 2007, leading to a so-called 'sewage tsunami', which led to the death of many people. This was primarily due to a lack of investment in infrastructure. Furthermore, there is a lack of engagement in transboundary environmental institutions and multilateral environmental agreements. For example, following the conflict between Iran and Iraq, water management authorities lost contact for over 20 years leading to a breakdown in transboundary water cooperation and management. In addition, there is often an expansion of illegal and criminal exploitation. For example, due to weak post-conflict governance in the DRC, an estimated USD 1.25 billion per year worth of natural resources are illegally exploited by a combination of armed groups and criminal networks working together. The final example of governmental impact touches on land tenure security. Due to conflict, illegal settlements appear, and the government is no longer able to protect land titles. This leads to uncertainty; therefore, people will not invest in sustainable practices and good land management. In Haiti, for example, lack of land tenure security was identified as a key driver of environmental deforestation and lack of investment. These governance impacts create systemic risks to the social contract and to political stability at large.

In addition to the above, one should keep in mind that climate change has three important consequences in conflict-affected countries that need to be considered: (i) Increasing scarcity of renewable natural resources, (ii) Increasing frequency and intensity of climate-related

hazards, (iii) Increasing food insecurity from shifts in growing seasons. In addition, there are several factors that will multiply the threat of climate change and will, therefore, have an effect on security. First of all, there are additional stressors such as (i) Increasing migration (ii) Increasing competition between groups (iii) Increasing poverty and inequality. There are also additional triggers such as (i) Price shocks (ii) Disasters (iii) Inadequate or poor policy responses. Lastly there will be more instability and unrest due to (i) Limited livelihood options and choices and (ii) Boosted grievances that motivate violence.

To recap, it can be interesting to look at the biggest differences between impacts in different countries. We have identified three factors that will cause the biggest variance.

One of the factors that will be decisive is the type of weapons and tactics used (Is it modern warfare with high-tech weapons? Is it ground warfare with guns?). Another factor is the location of the conflict (Urban environment? Highly industrialized country? Rural location?). Finally, the duration of a conflict and the impact on the economy (Maintained? Collapsing?) will be important. In general, we have seen that international armed conflicts tend to have more direct impacts and that non-international armed conflicts tend to have more secondary or governmental impacts.

Also, I would like to refer to three future applications of big data and frontier technology in the field of environmental security. First, it could be used to identify where different environment and climate stresses overlap in specific regions in order to identify potential hotspots. Second, it could automatically detect and monitor locations of environmental damage during a conflict. Finally, it could optimize land use planning and measure the impact of our field interactions on local peace and security dynamics.

It is important to note that the ILC is developing principles on protecting the environment during armed conflicts. The principles aim to improve measures that designate and protect areas of environmental and cultural importance. They will also improve cooperation and data sharing among international actors to rapidly assess and remediate damage, as well as improve public access to information on environmental damage.

CLIMATE CHANGE, THE PROTECTION OF THE NATURAL ENVIRONMENT: LEGAL AND POLICY PERSPECTIVES

Stéphane Kolanowski
ICRC

Résumé

Dans cette contribution, Stéphane Kolanowski présente les perspectives juridiques et de politiques humanitaires du CICR en matière de protection de l'environnement naturel en temps de conflit armé ainsi qu'en ce qui concerne l'impact du changement climatique sur le sort des victimes des conflits armés, voire sur l'action humanitaire elle-même.

Cela fait près de 30 ans que le CICR travaille sur la protection de l'environnement naturel en temps de conflit armé mais ce n'est que récemment que l'Institution s'est penchée sur le changement climatique. Dès 1994, le CICR a publié ses « Directives pour les manuels d'instruction militaire sur la protection de l'environnement en période de conflit armé ». L'évolution dans la manière de conduire les hostilités mais également l'évolution du droit et la prise de conscience grandissante à propos de l'importance de protéger notre environnement naturel ont conduit le CICR à réviser ses directives en la matière. Le CICR travaille donc actuellement à la publication de directives révisées qui seront publiées dans le courant de l'année 2020. Ce document ne se limitera pas au DIH et ne s'adressera pas qu'aux militaires. Il constituera un recueil de normes en vigueur et comprendra également un commentaire sur chacune des règles identifiées afin de faciliter l'adoption de mesures concrètes visant à la protection de l'environnement naturel en période de conflit armé. Le document sera divisé en 4 parties couvrant les protections spécifiques de l'environnement naturel, les normes générales qui peuvent également servir à protéger l'environnement naturel, même si ce n'est pas leur objet premier, les normes liées à certaines armes, et, enfin, quelques éléments liés au respect, à la mise en œuvre et à la diffusion des règles protégeant l'environnement naturel en période de conflit armé.

Ensuite, Stéphane Kolanowski se penche sur les interactions entre le changement climatique et les conflits armés. Certes, il existe des liens entre les deux mais ces liens ne sont pas évidents à définir car ils présentent des aspects très variés. Le changement climatique est perçu comme un multiplicateur de menaces et de vulnérabilités. Ensemble avec d'autres acteurs spécialisés en la matière, le CICR étudie la question afin de mieux adapter ses opérations aux besoins des victimes des conflits armés et du changement climatique. En parallèle, le CICR fait des efforts concrets en vue de diminuer l'empreinte écologique de ses activités humanitaires.

La thématique de la protection de l'environnement naturel et celle de l'impact du changement climatique resteront en haut de l'agenda international dans les années à venir. De son côté, le CICR utilisera la 33ème Conférence internationale de la Croix-Rouge et du Croissant-Rouge pour mettre l'accent sur ces sujets. Il continuera également à suivre les travaux en la matière du Conseil de sécurité des Nations unies, plusieurs États ayant déjà indiqué vouloir utiliser leur présidence pour mettre ces sujets à l'ordre du jour du Conseil.

The natural environment is frequently a silent casualty of armed conflicts. Although the impact of hostilities on the natural environment is often acknowledged, its scale is largely underestimated, and it is certainly not a priority for the warring parties. The International Committee of the Red Cross (ICRC) has been working on that issue for quite a long time already, but this topic has become a very important one in the past few years.

Climate change, or the climate risks it entails, is newer for the ICRC. Of course, we are not an organization working on climate or climate change, but it is obvious that climate change has an impact on the dynamic of armed conflicts and on the living conditions of the persons already affected by armed conflict.

I will come back to that a little bit later, but I would like first to focus on the legal protection of the natural environment in times of armed conflicts. You all know that IHL protects the natural environment during armed conflicts in two ways: through its general provisions, as a civilian object – unless proven otherwise – and through additional, specific provisions, that directly or indirectly protects the natural environment.

The ICRC started specific work on the protection of the natural environment in 1992. That was a time when the images of Kuwaiti oil wells burning were still very fresh in the minds, and some work also started at the UN, with the adoption of the Rio Declaration and of the UN General Assembly resolution 47/37[1] stressing that the destruction of the environment not justified by military necessity and carried out wantonly is clearly contrary to existing international law.

Then, in 1994, after consulting a group of international experts, the ICRC published its *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*[2]. The aim was to facilitate the incorporation of relevant IHL norms on the protection of the natural environment in military manuals and instructions.

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1 A/Res/47/37, 9 February 1993, accessed here: https://undocs.org/en/A/RES/47/37.

2 Last accessed on 19 February 2020 at: https://www.icrc.org/en/doc/resources/documents/article/other/57jn38.htm.

Since the release of these Guidelines, the law protecting the natural environment in situations of armed conflicts has continued to develop. And, numerous events affecting the natural environment in armed conflicts have occurred.

In 2009, a seminar organized by UNEP and the ICRC concluded that the Guidelines should be updated and efforts for their promotion should be increased[3].

This led to the decision of the ICRC to revise the 1994 Guidelines to reflect the developments in treaty law between 1994 and 2017, and the clarification of customary international humanitarian law provided in the 2005 ICRC study on the subject[4].

At the same time, when looking at which areas of IHL would need to be developed, the ICRC came to the conclusion in 2010-2011that the protection of the natural environment is one of the four areas needing some legal development (alongside implementation of IHL and reparation, protection of persons deprived of their liberty in non-international armed conflicts, and protection of the internally displaced). However, States, at the 31st Red Cross Red Crescent International Conference did not want to develop IHL further on the protection of the natural environment.

The revised ICRC Guidelines: an overview

Like the 1994 Guidelines, the focus remains on the protection of the natural environment by IHL rules, although the interaction between IHL and other bodies of international law is also briefly addressed. This is important as IHL might not be sufficient on its own. Clarification is needed on some elements, one of them being the definition of the natural environment which impacts on the civilian status of some elements depending on how broad the definition is. Furthermore, IHL can be usefully complemented by international environmental law which continues to be applicable during armed conflict. For the ICRC, the natural environment includes everything that is not man-made. Therefore, it does not only refer to objects indispensable to the survival of the civilian population (such as foodstuffs, agricultural areas, drinking water, and livestock), but also the general hydrosphere, biosphere, geosphere, and atmosphere (including fauna, flora, oceans and other bodies of water, soil, and rocks). Furthermore, it does not apply exclusively to organisms and inanimate objects in isolation, but

3 For more details, see https://postconflict.unep.ch/publications/int_law.pdf, last accessed on 19 February 2020.

4 https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law.

also refers more broadly to the system of inextricable interrelations between living organisms and their inanimate environment[5].

The 1994 Guidelines were intended primarily as a tool for the armed forces, but the purpose of the revised Guidelines is to act as a reference tool for *all* concerned actors, and in particular, but not only, for parties to armed conflicts, both State and non-State ones. The main aim of the revised Guidelines is thus to facilitate the adoption of concrete measures on the protection of the natural environment in armed conflict – through the incorporation of the Guidelines in military manuals and instructions, but also more comprehensively in national domestic frameworks and policies.

With this objective in mind, the revised Guidelines address how IHL rules apply to the protection of the natural environment. Like the previous version, they reflect the current state of IHL, and do not aim to create or develop obligations. As such, the Guidelines represent a comprehensive collection of existing rules. In contrast to the 1994 Guidelines, the revised version also contains a concise commentary accompanying each guideline in order to facilitate their promotion and implementation by providing additional information on their sources and interpretation.

The content of the revised ICRC Guidelines

The Guidelines are divided into four broad sections that center on the families of IHL rules that protect the natural environment in situations of armed conflict.
In Part I, the Guidelines focus on the first type of protection that IHL offers, which consists of the rules that provide specific protection to the natural environment as such.
Parts II and III then go on to look at the second type of protection, which consists of general IHL rules that protect, *inter alia*, the natural environment, without this being their primary purpose, part III focusing on weapons.
Finally, Part IV of the Guidelines addresses aspects related to the respect, implementation, and dissemination of IHL rules protecting the natural environment.

The draft Guidelines are currently submitted to an external process of peer review by practitioners and academics, with the aim of publishing them in the course of 2020.

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5 See Chapter 6 of the ICRC Report "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", Geneva, October 2019. Last accessed on 19 February at https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-3122.html.

We will now move on to climate change, and therefore leaving the field of IHL for policy as climate change is not addressed by IHL.

Even if ambitious mitigation measures are implemented, climate change will severely affect people's lives by multiplying the incidence of climate shocks and risks, and by aggravating their consequences, especially in fragile and conflict-affected places.

Up until now, climate policy around conflict has largely been framed as a security threat (e.g. the threat of large-scale migration). Security concerns – real or perceived – need to be acknowledged and leveraged in dialogue with States, but should not be pitted against international obligations, humanitarian, and human security considerations.

The interaction between climate change and armed conflict

The link between climate change and armed conflict is not always obvious. There is something there, that is clear. But it is not always easy to identify it as it has multiple aspects.

Climate change is understood as a threat multiplier (and not necessarily or exclusively as a cause or trigger) that worsens existing social, economic and environmental risks and degradation, and can ultimately lead to armed conflict, rather than being a direct cause of conflict.

Climate change is also described as a vector or multiplier of vulnerability. People, communities, and States affected by armed conflict are particularly vulnerable to climate change because the armed conflict they face limits their capacity to cope with changes. This is, in part, because armed conflicts – and especially protracted ones – harm the assets that are required to facilitate adaptation to climate change, such as infrastructure, markets, institutions, social capital, and livelihood. In certain cases, it also undermines the capacity for collective action, which can be critical to adaptation (e.g. to manage resources in agreed ways). The major humanitarian impacts of recent droughts in Somalia and South Sudan illustrate the particularly limited capacity of conflict affected community to cope with climate shocks.

As stated earlier, this domain is rather new for the ICRC, but it is now fully involved addressing the issue from the perspective of the affected population and from its capacity to operate, as climate change, implying climate risks, is making humanitarian work harder, less predictable and more complex.

As the ICRC needs to beef up its understanding and shape its policy towards climate change, or climate risk, the Institution is partnering with knowledgeable organizations such as the

Overseas Development Institute (ODI)[6] or the Red Cross Red Crescent Climate Center[7], based in The Hague. Together, they have organized 7 policy roundtables on "Conflict, Climate Risk and Resilience" in Nairobi, Abidjan, The Hague, Amman, Manila, Washington, and the last one in Geneva, just a week before the Bruges Colloquium.

On the operational side, the ICRC works at strengthening the resilience of affected communities. The aim, here, is to design programs that can help build people's resilience and notably help them adapt to the impact of climate change by reducing vulnerability to its harmful effects, for instance, through helping farmers switch to drought-tolerant crops or helping communities to find ways to better use water resources. Work is also being done to mitigate the impact that climate change can have on health structures, especially on those already weakened by an armed conflict. In addition, the ICRC's resource mobilisation division is working on forecast-based financing, with the aim of enabling access to humanitarian funding for early action.

Finally, the ICRC is also making efforts to reduce its own environmental footprintt. Carrying out humanitarian operations also bears environmental consequences. Indeed, it requires much flying, the use of cargo ships or big trucks, driving around the world in Landcruisers adapted to difficult terrain, relying on a lot of energy to power field hospitals, water sanitation and water transport systems, etc. All this leaves an environmental footprint.

The ICRC has adopted measures to mitigate its environmental footprint by working to limit its greenhouse gas emissions, by using renewable energies, making equipment more energy efficient, or changing management practices.

Looking ahead, there are a few landmarks to come. First, the 33rd International Red Cross and Red Crescent Conference[8], during which a special session will be devoted to climate change from a humanitarian perspective, and both the International Federation of the Red Cross and Red Crescent Societies, and the ICRC will present an Open Pledge for the Movement capturing their core commitments in relation to "greening" their operations and supporting climate action in close partnership with interested Red Cross and Red Crescent National Societies. After the adoption of that pledge, the focus will be on turning it into a proper Charter that could be adopted by other interested humanitarian organizations or integrated into existing humanitarian charters.

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6 https://www.odi.org.

7 https://www.climatecentre.org/.

8 For more details, see https://rcrcconference.org/about/33rd-international-conference/shifting-vulnerabilities/.

In parallel, the roundtables mentioned above will allow the ICRC to draft a policy report reflecting on the impact that conflict and climate risk bring together on people, and how to adapt responses accordingly. At the same time, as the ICRC is conducting case studies in affected countries (Mali, Iraq and an Asian context to be determined), it will, in the first part of 2020, issue another policy report, this time presenting the ICRC views and policy recommendations on climate risk and humanitarian action.

At the global level, the ICRC is also closely following the work being done at the UN, including at the UN Security Council, where "climate and security" will be very present on the 2020 agenda with some States, like Belgium, France, Germany, but also the Dominican Republic having already indicated that it will be a major focus of their UNSC Presidencies.

As one can notice, quite a lot is being done currently on both the protection of the natural environment and on climate risk at the ICRC. More is to come, and 2020 will definitely be a key year for concretization of the ICRC work on these two topics.

DISCUSSION WITH THE AUDIENCE

Someone remarked that IHL only offers weak protection to the environment as most of the protection is indirect. The person from the audience questioned why, instead of guidelines, there were no new rules adopted on this pressing topic.

A speaker answered that there was an initiative in August 2019, in which several scientists had drafted a document that asked that States undertake efforts to make the ILC draft principles a binding document. However, for the time being, the ILC draft principles remain a work in progress and there is no proposal that would convert them into a treaty. One the other hand, after finalizing them, the draft principles can serve as a benchmark for States. After all, it clarifies the existing law that applies in armed conflicts and some of the draft principles also contain recommendations which already reflect improvements implemented by States. So even if there is no treaty, it supports ongoing efforts.

Another speaker also reacted by saying that the Conflict and Environment Observatory benchmarked the UK on the new principles in a recent report. This was seen as a great example, in which a State was assessed on where it stands over time. The speaker also added that, in terms of legislative reform, one should look at what the UNSC is doing. Until now, only three or four debates on the topic have taken place and the only thing that the UNSC has agreed on was a presidential statement which requested peacekeeping missions to report to the UNSC if they are threatened or affected by climate change. However, not a single report has been written yet. On the other hand, specific peacekeeping missions do contain, in the mission mandate, more and more language on natural resources and climate change.

Another question focused on why the definition in the Guidelines of the ICRC on the environment does not include the concept of 'outer space'. After all, outer space is also subject to damage and is part of the environment. It was answered that the definition is very broad and although 'outer space' is not addressed in particular, it is not excluded either.

In addition, it was asked whether the Guidelines of the ICRC also looked at accountability, especially in relation to international armed conflicts. In other words, would States who are responsible for pollution (for example based on the use of depleted uranium) need to foresee a compensation? A speaker answered that this question was addressed in the ILC work. However, it was only addressed in the background work of the document. In addition, it was contended that environmental treaties should continue to apply in armed conflicts, provided that they are not in conflict with IHL. Another remark from one of the speakers was that there was a

nervousness about this topic as this could potentially lead to the payment of billions of dollars. Until now, the only compensation commission that was created was the one in Iraq for the damage caused by the oil fires. It was also added that the ILC draft principles do address State responsibility. After all, general State responsibility remains applicable in situations of environmental damage. This means that a responsible State has the obligation to pay for the full amount of damages, including purely environmental damage. The principles also address post-conflict environmental assessment.

Another question addressed whether the definition of 'environment' used by the ICRC should mean 'natural resources' or 'ecosystems' or 'everything not built by humans'. Here, it was contented that it is important to frame a definition broadly enough, in such a way that situations, which were maybe not thought off in the first place during drafting, are also covered. With a negative definition ("everything that is not man-made"), it is easier to keep it as open as possible.

Lastly, it was commented that the urgency of the problem seems to be absent from the climate change and climate discussion (as if it is an accepted fact). One of the speakers replied that the ICRC's task is not to solve conflict and prevent climate change, but to assist and protect those who are victims of an armed conflict and limit the effects of such a conflict. The big decisions need to be taken by the States.

On these final words, Elzbieta Mikos-Skuza closed the debate.

Panel discussion: Foreign fighters and their families: A discussion on legal challenges
Table ronde : Combattants étrangers et leur famille : discussion autour de certains défis juridiques

Résumé

La problématique des combattants étrangers a émergé ces dernières années en relation avec les camps de détention en Syrie et en Irak. Bien que la détention en tant que telle soit un phénomène plus large et plus répandu que la question qui nous préoccupe ici, des problèmes particuliers sont ressortis du contexte irako-syrien. Ces camps de détention étant remplis de combattants étrangers, de nationaux de pays tiers, et/ou de leur famille, un vif débat sur le degré d'obligation incombant à ces États de rapatrier leurs ressortissants est en cours. Cependant, plusieurs États essayent de déchoir ces individus de leur nationalité, afin d'éviter les obligations étatiques qui leur incomberaient. La problématique se complique encore plus avec les enfants de ces combattants étrangers, et la question de la séparation familiale est au centre de ces débats. En même temps, les États doivent réagir rapidement en raison de la volatilité du contexte, par exemple suite à la décision du Président Trump de retirer les troupes américaines de Syrie.

Il faut souligner la distinction importante à faire entre les combattants étrangers d'une part, et leur famille d'autre part. Il est essentiel de distinguer ceux qui auraient commis des infractions terroristes de ceux qui n'en auraient pas commis. Les femmes, dans beaucoup de cas, et les enfants, dans tous les cas, doivent être considérés comme des victimes. Des bases légales, telles que les Résolutions 2178 (2014) et 2396 (2017) du Conseil de Sécurité de l'ONU, permettent d'affirmer qu'il y a des obligations internationales pour les États concernés d'agir. Ces obligations restent nationales et il n'y a pas de politique en la matière au niveau de l'Union européenne. Cependant, l'UE prend des mesures liées au partage de l'information concernant les combattants étrangers. Ces informations sont cruciales si l'on veut poursuivre certains de ces combattants étrangers devant des cours et tribunaux d'États européens. Par ailleurs, plusieurs États ont adopté des politiques et des mesures pour activement empêcher les combattants étrangers de revenir dans leur pays d'origine. Une de ces mesures est la déchéance de nationalité, et ce, malgré l'obligation que ces États ont de poursuivre leurs nationaux suspectés de tels crimes. Se rajoute également les questions liées à la protection diplomatique, en particulier par rapport au respect des Droits de l'Homme, auquel tout citoyen d'un État peut prétendre lorsqu'il se trouve à l'étranger.

En ce qui concerne les enfants vivant dans ces camps, leur État d'origine a plusieurs obligations juridiques essentielles relatives au traitement de ces mineurs d'âge. Par exemple, il y a une obligation d'assurer une assistance appropriée pour veiller à leur récupération physique et mentale ainsi qu'à leur (ré)intégration sociale. Pour guider tout cela, l'intérêt supérieur de l'enfant doit être pris en compte. En conséquence, la séparation familiale doit être évitée lors des rapatriements. Par contre, cela ne veut pas forcément dire qu'une fois rapatrié, l'enfant doit absolument rester auprès de sa mère. Les procédures nationales doivent être respectées, et si la mère est condamnée à une peine de prison, l'enfant (à l'exception des bébés), pourra légalement être placé auprès de proches ou dans une famille d'accueil. Nous avons des exemples de bonnes pratiques allant en ce sens, même si la majorité des enfants rapatriés à ce jour étaient soit des orphelins, soit des mineurs non-accompagnés.

Ce panel a débattu de toutes ces questions – et bien d'autres – qui restent d'une brulante actualité.

Introduction to the panel on Foreign Fighters and their families by Prof. Françoise Hampson, Moderator

The problem of foreign fighters is an issue that has come to the forefront in recent years. This is due to the fact that many third country citizens travelled to the conflict zone in Syria and Iraq to fight on behalf of the Islamic State Group.

As these foreign fighters are now held in detention camps, the issue of return arises. A visible trend is that states withhold the citizenships of their nationals in order not to be responsible for their return. This raises of course many legal, as well as moral, issues.

In addition, the repatriation of the families of these foreign fighters is a particularly pressing problem as the living conditions in the camps are simply unbearable. After all, women and children have specific needs and their role in the armed conflict cannot be considered equal to that of the men. However, the role of women should also not be oversimplified. In light of the UN Convention on the Rights of the Child, states should act in accordance with the 'best interests' of a child. In relation to this specific issue, this would mean that no family separation can take place and that women and children are repatriated together. Here also, states remain reluctant to act and, in many cases, try to avoid the repatriation of children with their mothers. In this context, many states contend that a person can only be considered a child until the age of 12. Not only does this seems arbitrary, this is again an attempt by states to avoid their responsibility.

The above shows that states are doing everything possible to prevent these persons' return. This may seem to be a reasonable solution in the short term, compatible with public opinion. However, letting foreign fighters return to Europe seems to be the best long-term solution. After all, this is the best way to ensure they remain under control and can be prosecuted, interrogated, and helped with re-engagement in society as necessary.

To discuss this, we have 3 outstanding panelists respectively from the European Union, Geneva Call, and the ICRC. They will each introduce their views before we proceed with our discussion.

Dr Christiane Höhn[1], Office of the EU Counter-Terrorism Coordinator

Introduction

There is no EU policy on the repatriation of foreign terrorist fighters (FTF) and family members from Syria and Iraq.

Member States regard this as a national security issue which they want to decide on their own, on a case-by-case basis. This is a very sensitive issue for Member States.

Member States have repatriated children from camps in Syria and Iraq on a case-by-case basis, including this year, primarily orphans and unaccompanied children. Several women have also been repatriated.

Without the participation of the EU, a group of seven Member States is exploring the pursuit of justice in the region and discussing the possibility of a hybrid Iraq-based tribunal.

However, the EU has been active regarding several aspects of FTF and their family members in Syria and Iraq.

This contribution will first explain this EU activity, then touch on the consequences of President Trump's decision to withdraw troops from Syria and lastly cover the issue of children in camps more specifically.

1 Dr. Christiane Höhn is Principal Adviser to the EU Counter-Terrorism Coordinator and holds an LL.M. from Harvard Law School. The opinions expressed in this text are those of the author alone and do not necessarily reflect the positions of the Council of the European Union.

EU activity

The EU Radicalization Awareness Network of frontline officials has produced a handbook[2] to suggest good practices on how to deal with returning FTF and family members. It has a specialized section on children who need special care and support upon return. A number of children have already returned to Member States from the conflict zone. Member States such as France and Belgium have specialized services dealing with these children and supporting them to reintegrate.

The EU - Commission (DG ECHO – DG for European Civil Protection and Humanitarian Aid Operations) - is providing humanitarian assistance to the camps in Syria, including camps where family members of European FTF are located. Despite the Turkish offensive, the humanitarian assistance is continuing primarily with local staff.

The EU has worked to improve access to battlefield information for border security, investigations, and prosecutions. One of the challenges for repatriation is the difficulty to convict FTF and women for longer sentences, given the lack of evidence. Battlefield information could address this. The EU Counter-Terrorism Coordinator (EU CTC) and the Commission (DG HOME) organized a workshop in July with the US, which has collected a lot of battlefield information. Europol launched its first Terrorist Identification Task Force, which allowed to improve the information picture on a number of FTF.

The EU is also assisting countries in the Middle East and North Africa (MENA), in particular Tunisia, to face the challenges of returning FTF and family members. On the suggestion of the EU CTC, the EU organized a workshop in Tunisia to explore further stepping up EU support. Helping MENA countries strengthen the feeding and checking of Interpol databases is important. For example, with Project First the EU is helping Iraq collect information about prison inmates to feed Interpol databases. In Jordan, the EU supported connecting the border crossing points to Interpol databases. In the Western Balkans, with project Hotspot, Interpol will support the use of mobile devices to check Interpol databases. All this helps to identify FTF.

Leaving aside the ideological discussion related to the infiltration of irregular migrant flows and the undetected entry of FTF[3], a maritime border operation coordinated by INTERPOL has

2 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf (last visited on 19 March 2020)

3 Operation Neptune II of INTERPOL operated in six maritime ports in six participating countries (Algeria, Spain, France, Italy, Morocco and Tunisia), more than 1,2 million searches in Interpol databases were carried out. This allowed 31 new investigations to be open, including 12 for persons suspected of terrorism. https://www.interpol.int/News-and-Events/News/2019/Foreign-terrorist-fighters-detected-during-INTERPOL-maritime-border-operation (last visited 19 March 2020)

detected more than a dozen suspected FTFs travelling across the Mediterranean over the summer. Two Gambian migrants which had been recruited by Daesh were arrested in Naples in 2018.

Consequences of President Trump's decision to withdraw the troops from Syria

Turkey's military operation in Syria to create a buffer zone and the agreement between the Kurdish Syrian Democratic Forces (SDF) and Assad under the Russian umbrella have created new circumstances. This may lead to the need to redefine policy.

For now, many of the camps remain under SDF control. The humanitarian situation in these camps seems to have gotten even more difficult.

There are three possible scenarios:

(1) Prison breaks of FTF and women and children fleeing from the camps: US authorities have stated that around 100 FTF have already fled from prisons in Syria. It has also been reported that 800 women and children fled from the Ain Issa camp.

(2) FTF have already been arrested by Turkey (250). Turkey might send them back to their countries of origin.

(3) Assad might take control of the prisons and camps and use the FTF and family members as bargaining chips or kill FTF.

There is the risk of clandestine and undetected relocation and return of FTF and family members. Therefore, it is crucial that FTF and family members be detected at the EU's external borders. The EU CTC and the Commission sent a letter encouraging the Member States to add battlefield information received from the US into the Schengen Information System, including non-European FTF. The EU encourages the US to share contextual battlefield information as much as possible.

There is a short window now, perhaps several months, while the camps with family members of European FTF are still under the control of the SDF, which would be important to use. For example, DG ECHO could further step up humanitarian support to the camps. Perhaps it would also be possible to carry out risk assessments of the family members still in the camps and provide disengagement programmes there, perhaps segregating the women who want to rehabilitate from the most radicalized ones who pressure others to conform. Some of the women are very radicalized and enforce Daesh rules in the camps.

Children

Children in the camps in Syria are often very young. Many are under six years old. The children are first and foremost victims.

Some have already been heavily indoctrinated by their mothers. The so-called "cubs of the caliphate" play an important role for Daesh. It's the role of the women to raise the next generation of fighters. There have been Daesh propaganda videos using children in camps.

Psychologists and other specialists stress that the younger the children get repatriated, the better, the easier and more likely it is to rehabilitate these traumatized children. The older these children get, the greater the risk that they radicalize, the more difficult it will be to reintegrate them. Hence from a security point of view, returning the children as early as possible would be best.

In some Member States there have been court rulings obliging the governments to undertake their best efforts to repatriate children (and sometimes their mothers).

But the issue of the repatriation of children is complex. There are three challenges:

- Many say that children should not be separated from their mothers. However, the mothers are often very radicalized and also use Taqîya, which is concealment, so that their radicalization is difficult to detect. Therefore, Member States hesitate to repatriate children with their mothers. Hence, we need to reflect on the question: what is really the best interest of the child? To stay with the mother or to return home to Europe and potentially live with other family members?
- The SDF so far haven't allowed repatriation of children without their mothers. Therefore, Member States have primarily repatriated orphans and unaccompanied children.
- Without American troop presence on the ground: How would it be possible in practice to repatriate children while there is still a window of opportunity to do so before Assad takes control?

It has been reported in the media that an Irish woman with her two-year-old child fled from a formerly SDF controlled camp after the Turkish invasion, moved near the Turkish border where Irish authorities, including special forces, facilitated her return to Turkey, trying to achieve their return to Ireland. The objective here had been to evacuate the child.

Conclusions

The issues related to children of FTF in Syria and Iraq are complex. From a security and humanitarian perspective, it would be best to repatriate the children sooner rather than later, but that is not easy, given the often very radicalized mothers, the refusal of the SDF to allow the repatriation of the children only, and the practical and operational difficulties of a repatriation without US support. The EU CTC shares the concerns about the fate of the children.

Dr Sandra Krähenmann[4], Geneva Call

The focus of these brief remarks will be on the existing counter-terrorism framework that applies to foreign fighters and their families as well as the obligations of states towards their own nationals. As a preliminary consideration, I want to flag that the term 'foreign fighters and their families' conveys the idea that there are two separate groups of people, foreign fighters on the one hand, and their families on the other hand. These two groups rest on an implicit gendered construction where 'foreign fighters' are imagined as men while 'their families' are composed of women and children. While it is important to adopt a gendered approach, we also need to be wary of essentialist stereotyping that reduces women to passive victims while ignoring the broad range of functions that may be fulfilled by both men and women associated with armed groups, including groups that are also designated as terrorist groups. In addition, under the existing counter-terrorism framework set up to address the issue of foreign fighters, this distinction is less clear. Indeed, a detailed look at this framework reveals that the categories of 'foreign fighters' and 'their families' are both over- and under-aggregated.

This framework is comprised of two security council resolutions. First, in 2014, the Security Council adopted Resolution 2178 (2014) setting up a comprehensive structure to address so-called 'foreign terrorist fighters'.[5] For present purposes, three points deserve to be highlighted. First, the notion of 'fighter' is used to describe broader forms of association with armed groups that are also designated terrorist groups than under international humanitarian law and its concepts of direct participation in hostilities or continuous combat function. Second, amongst others, the resolution requires states to make sure that travelling abroad or attempted travel abroad, as well as financing or otherwise facilitating such travel is a prosecutable offence. In other words, criminal law is used to prevent the departure of foreign fighters. On a national level, this provision is implemented through various ways, not necessarily criminalizing travel

4 Dr Sandra Krähenmann works as a thematic legal adviser at Geneva Call. Her remarks were delivered in her personal capacity and do not necessarily reflect the views of her employer Geneva Call.

5 For a more detailed discussion of resolution 2178 (2014), including the term 'foreign terrorist fighter', see Sandra Krähenmann, 'Foreign Fighters under International Law', Geneva Academy Briefing, 2014, available at: https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf

per se, for example with material support provisions or designated area offences. Third, the resolution does not make any specific reference to the families of foreign fighters, women or children. Under this resolution, family members, including children, who travelled abroad voluntarily may well be caught up under foreign fighter related offences in national law.

The situation of family members was only addressed specifically in a later resolution, namely resolution 2396 (2017) which focused on the question of returnees. Resolution 2396 (2017) makes references to 'accompanying family members', 'spouses and children', or 'women and children associated with foreign terrorist fighters'. Rather positively, the resolution highlights the need to distinguish between those who were involved in terrorist offences and those who were not, including accompanying family members. Moreover, and importantly, the resolution recognizes that women and children may also be victims of acts of terrorism. Yet, one should not overestimate the relevance of these acknowledgments as foreign fighter and terrorist related offences are so broad that in many instances they cover accompanying family members. Indeed, the resolution highlights that states are to ensure that any person who participated in terrorist acts is brought to justice 'including with respect to foreign terrorist fighters and spouses and children accompanying returning and relocating foreign terrorist fighters'.[6]

My second point is that this framework focuses very much on the countries of origin of foreign fighters and their families and on how to prevent people from leaving as well as on how to deal with returnees. Yet, in respect with the foreign fighters and their families who are detained abroad, with a few exceptions, we have seen many countries adopting policies and measures geared towards refusal to assist or actively preventing them from returning.[7] In particular, many countries have broadened their powers to strip suspected foreign fighters of their citizenship. This not only raises questions about the lawfulness of such deprivations of citizenship but also about the opposability of such a decision to other states and the consequences for their obligation to prosecute those suspected of crimes. In addition, the issue of foreign nationals detained abroad, raises the question of obligations states have towards their own citizens abroad, including in terms of diplomatic protection but also from a human rights perspective.

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6 This part of the remarks were based on S. Krähenmann and P. Vandendriessche, 'From Child Soldiers to "Child Terrorist": safeguarding innocence from counter-terrorism', ICRC Blog, 20 November 2019, available at: https://blogs.icrc.org/law-and-policy/2019/11/20/child-soldier-counter-terrorism/

7 For a more detailed discussion of resolution 2396 (2017), see S. Krähenmann, 'Foreign Fighters' in B. Saul (ed) *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, forthcoming.

Dr Vanessa Murphy, ICRC

Thank you for inviting me to join this panel on 'foreign fighters' and their families.[8] The focus of my remarks today will be the legal issues arising particularly in the situation of women and children in the foreign fighter context. But as a preliminary point, while a great deal of recent media attention has been directed towards the activities and fate of third country nationals in Iraq and Syria, it is imperative to remember that the wider population – Iraqi and Syrians beyond the media's spotlight – also continues to face a deeply complex humanitarian situation. The scale of needs arising from these conflicts is enormous, and the ICRC is working to address this suffering in a number of ways.[9] During this work, and alongside the pressing needs of the local population, the ICRC has identified specific concerns with regard to the treatment of women and children in the foreign fighter context.

To begin, I would first like to place this discussion concretely in one of the specific contexts where it is most relevant. The situation of women and children in the foreign fighter context is exemplified by North East Syria, where the ICRC remains deeply concerned for the immediate needs and longer-term fate of those in Al Hol camp – the biggest, though not the only, camp in North East Syria. The situation in Al Hol is simply unsustainable. The camp now holds approximately 68,000 people, the vast majority of them women and children; indeed, about two-thirds are children, many under five years of age.

Looking at these numbers, one must emphasize that the discussion of the legal challenges regarding 'foreign fighters and their families' has, at times, dealt with the implicated 'women and children' as a secondary after-thought. Yet in reality, the majority of the population of 'foreign fighters and their families' consists of women and children whose circumstances are often overlooked, and whose affiliations with the group are at times over-simplified.

The situation of children

Turning first to children in this context – three key legal obligations are particularly relevant to their treatment.

First, the law and standards governing the treatment of children associated with armed groups (commonly referred to as "child soldiers") applies to children in the foreign-fighter context

8 The term "foreign fighter and their families" is used here for convenience, but the ICRC notes that the term may carry a risk of stigmatization. The ICRC observes that stigmatization affects persons associated with armed groups designated as "terrorist" – and indeed can affect a wide range of individuals who have had any contact with such groups – regardless of whether they are third-country nationals.

9 See the ICRC President's statement of 22 March 2019, available at www.icrc.org/en/document/statement-icrcpresident-upon-ending-5-day-visit-syria

who have been trained and/or used in hostilities. Notably, states party to the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict – this is most states, with 170 parties – are obliged, when necessary, to give unlawfully recruited children all appropriate assistance for their physical and psychological recovery and social reintegration; and to cooperate with each other for the rehabilitation and social reintegration of such children, including through technical and financial assistance.[10]

The second issue relates to the principle of the best interests of the child. It is a core obligation under Article 3 of the Convention on the Rights of the Child that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Decisions regarding, for example, how to repatriate and reintegrate children in the foreign-fighter context are actions to which this obligation applies, regardless of the age of the child and the nature of their involvement with a non-state armed group.

The third, related issue is the right of all children not to be separated from their parents against the parents' will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such a separation is necessary for the best interests of the child. This right is set out in Article 9(1) of the Convention on the Right of the Child and must be respected by states' Parties in the various situations of detention and repatriation that arise for foreign-fighter families. In the view of the ICRC, the legal requirement for a best interest determination subject to judicial review cannot currently be implemented in the camps in North East Syria, and consequently the process for lawful family separation would necessarily need to be conducted in a different jurisdiction.

The situation of women

The situation of women in this context is characterized by a marked diversity of individual cases; over-simplification must be avoided here. Women may have travelled voluntarily to areas where armed groups were active, or may be victims of trafficking; they may be both perpetrators and victims of war crimes (including, though not limited to, sexual violence); they may have fulfilled a wide variety of roles as members, civilian affiliates, or exclusively family members of the group; or they may have joined the group as a child. Each of these factors is important in determining the applicable legal framework.

It is for these reasons that the ICRC is encouraging, as a matter of priority, each case to be reviewed by competent authorities on an individual basis. In the view of the ICRC, the primary

10 Arts. 6(3) and 7 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).

challenges to gender-sensitive prosecution, rehabilitation and/or reintegration in this specific context is the absence of case-by-case individualized screening, the de-humanizing language used to describe this population, and low rates of repatriation for third-country nationals in Iraq and Syria.[11] The situation in the camps remains unsolved.

Conclusion

With regard specifically to third-country nationals, it is the ICRC's view that repatriation will afford the best chances for reintegration for most women and their children in this context, with due respect for the principle of non-refoulement. The ICRC therefore urges states to take all possible measures to repatriate their nationals from Syria and Iraq – whether they are former fighters or civilians. Repatriations would facilitate humane treatment, compliance with applicable standards and afford the best chances of reintegration, without jeopardizing security and justice objectives. The situation is particularly urgent for children and the sick and wounded who should be given priority in light of their specific needs. With these initial remarks, I look forward to our discussion.

Panelists' comments

First, Vanessa Murphy commented on Christiane Höhn's intervention. She reiterated the fact that Christiane rightfully flagged that there are 'best practices' available in relation to the return of foreign fighters and their families. She stressed that, in the two years that the issue has been on the table, repatriations have taken place. Especially, some central Asian states such as Kazakhstan have shown success and been vocal on this matter.

One of the areas where the ICRC tries to help and offer assistance is first of all by encouraging states to talk to each other and share these good practices. One good practice that should be highlighted is the fact that some states offer early active mental health support for children. This should be applauded and definitely be further encouraged.

On the issue of the repatriation of children with their mother, she stressed the fact that the profiles of these mothers vary widely. The ICRC's point of view is that the repatriation of adults should be followed by investigation and prosecution, when appropriate. However, as the tools for prosecution lay within domestic jurisdictions and, additionally, within European and other regional instruments, repatriation should therefore take place first. As a consequence, this means that family separation can only be lawful after the children have been repatriated with their mother. Regarding the issue of mothers who are sent to prison, it can be added that

11 For further discussion on gender-sensitive prosecution, rehabilitation and reintegration in context, see the ICRC's Chief Legal Officer's statement of 1 November 2019, available at www.icrc.org/en/document/integrating-gender-work-committee-and-cted

domestic jurisdiction makes it possible for very young children (babies) to stay with their mother in prison. For older children, they most often stay with their grandparents or other family members.

Sandra Krähenmann took the floor next. She stated that it was remarkable that all the panelists implicitly agreed on the fact that the panel was about the situation in Syria and Iraq although this was not stated in the program. She argued that this could be due, to some extent, to the fact that the issue has been highly mediatized. However, she declared that precautions should be taken. After all, precedents in relation to Syria and Iraq should not be used in totally different contexts. To sum up, the issue of foreign fighters is not exclusively linked to this specific context and exists elsewhere. In every situation of detention there are similar elements which are not exclusively linked to the issue of foreign fighters. One example is the issue of children living in those facilities.

Vanessa Murphy declared that doing nothing about the situation in the detention camps in Syria and Iraq also entails costs, in terms of potential longer-term security consequences. Here, she referred to the issue of foreign fighters in Afghanistan. Where the people who lived in the detention camps were unable to return to their home countries. Afterwards, these people started new terrorist cells.

Finally, Christiane Höhn took the floor. She added to the argument that it was important to not only address the humanitarian concerns but also to look at legal obligations. She continued by stating that some NGO's have done this in cases related to the return of children and women. However, in these cases, states argue that they do not control the situation in Syria, and therefore do not have extra-territorial jurisdiction. For this reason, states only have to undertake an attempt (everything that is reasonably possible) to give these people consular assistance. In other words, there is no legal obligation *as such* to let these people return. Lastly, foreign fighters are indeed a much wider problem than the detention camps in Syria and Iraq.

Françoise Hampson contributed to the discussion by stating that there are simply not enough trained people to treat the detainees in the camps. Therefore, she questioned whether it could be possible that other states plan psychological assistance for people leaving the camp. After all, the problem worsens over time. Immediate action is therefore required.

In relation to this remark, Vanessa Murphy added that several actors (DG ECHO, ICRC, MSF, Syrian Red Cross, UNICEF) do focus on the area of mental health. However, as the scale of the problem is so big, these measures are simply not enough. In addition, detention camps present the additional challenge of constantly changing situations. She continued by stating that

the needs of all the detainees should be met and that actions should be undertaken quickly. Indeed, the best chance for reintegration involves mental health support.

Vanessa Murphy also referred to the issue of separating a child from his/her mother. More specifically, she held that the legal requirement of 'best interest' (article 9 UN Convention on the Rights of the Child) is subject to judicial review. For this reason, NGOs and humanitarian organizations do not have the competence to act accordingly. It is thus up to the state to undertake action. Finally, she emphasized that family separations should not happen within the camps.

Françoise added that one must not forget that mental health issues are not limited to foreign fighters but that this remains a pressing issue in all sorts of conflicts. The conflict in Bosnia Herzegovina is an example of this. Due to the lack of staff, mental health needs could not be met in that situation.

Françoise continued by stating that in customary international law it is quite clear that, when an individual only has one nationality and no other state is willing to help that individual, the state of nationality has an obligation to act. However, she wondered whether there also exists a law on citizenship. As a consequence, would the state have an obligation to offer assistance to a foreign fighter? In addition, she wondered to what extent such help should be given. For example, should a state undertake efforts to go to the conflict area itself and extract those individuals? Or would it be considered enough to require that foreign fighters reach the border of the state of nationality first, at which point the state can let the foreign fighters in and prosecute them.

Sandra answered that the classic understanding of citizenship includes the discretionary right of the state to give diplomatic protection. The issue of assisting citizens abroad goes further than that of foreign fighters such as Guantanamo Bay for example. In existing cases it was concluded that persons can have a legitimate expectation that their case will be considered by their national government. However, from a human rights perspective, one could take it further. It could be argued that, the right to return to your country is not limited to the country of nationality but also includes the country of residence. This is where a person spends their entire – or the majority of – their life in a state other than the one of nationality.

Sandra continued by saying that these persons clearly fall within the sphere of influence of the states that don't let them return. Therefore, the argument can be made that a state has a positive obligation to fulfill this right. A possible solution could be to offer help through the organizations working within the camp.

Françoise questioned whether one could uphold that western states deliberately ensure they don't have a presence so that they cannot come under pressure to extract people. Here, Sandra answered by stating that she considered this to be true.

Françoise then commented that giving help abroad to your nationals is an ordinary part of diplomatic functions, specifically consular ones. States should ensure that these people get protection. In the case of (general) detention states should visit them. It is thus quite astonishing that 'security' is mentioned as the reason for not undertaking such visits. This is especially surprising in the light of international law that requires that individuals with only one nationality cannot be deprived of it. Therefore, she wondered what happens in the case in which a state would insist that a person has another nationality but no other state agrees.

On this question, Sandra mentioned that such a case occurred in the UK. Someone was fighting in Iraq and was deprived of his British citizenship. The UK was under the impression that this particular person held another nationality. However, this was not the case. This should of course be considered illegal. When the UK became aware of the situation, they changed the law to 'grounds to believe that the person does not have another nationality'. This change in law is quite exceptional, illustrating the point that states believe rather easily that someone holds another nationality. It should also be remarked that dual citizenship can become a race of who removes citizenship the quickest.

Vanessa Murphy added that she did not see the value of depriving people of their nationality in light of counter-terrorism measures. She questioned what the object and purpose could be. Concluding that it was a given fact that such actions add to a general feeling of marginalization and exclusion in the community in question. Therefore, she believes that this practice is not entirely coherent with a policy that tries to prevent radicalization.

Françoise reacted to this by stating that there are two objects and policies. First, if people are deprived of citizenship, a state no longer has to admit them to its territory. Second, deprivation of citizenship implies that these individuals cannot prosecute their state as there is no longer a bond of nationality. She continued by holding that this phenomenon is not only seen in contemporary armed conflicts. As a European, she has been struck by the specific practice of certain states, namely the USA and more recently also Canada. In these states, persons were stripped of their nationality whenever the authorities learned they committed war crimes during the second world war. It did not matter whether the states found this fact out right upon arrival or whether it emerged after they were naturalized. She considered this to be a clear example that there is a desire to avoid the prosecution of such persons. Notwithstanding that there are indeed challenges, as for example a UNSC resolution emphasizes the need for

Foreign Fighter's prosecution. However, as no fair trials have taken place, such an obligation to be prosecuted is repelling. After all, the UNSC and especially the P5, have the full knowledge that states will do everything that is humanely possible to strip people from their nationality so that states don't have to act.

Christiane added another dimension to the discussion and stated that the issue of evidence makes it very hard to prosecute those Foreign Fighters in the first place. At the moment, several actors such as the European Counter-Terrorism Coordinator, the anti IS-coalition, the Council of Europe, UNCTAD, America and European states are working to get procedures in place that make information access easier. This has also happened in the past, for example, in Afghanistan, military findings were shared with law enforcement agencies such as EUROPOL.

Françoise answered that it can indeed be hard to collect evidence. However, looking at the example of a video of detainees in Syria who were known as the Beatles (individuals with the British nationality), who proudly beheaded people, she wondered how this evidence could end up in the hands of the USA instead of the UK. She added that the general idea that it is 'difficult' to obtain evidence should not lead to a reluctance to try.

She considered it a sinister move by states who cannot find evidence against these individuals, to make it a crime to travel to conflict related areas in the world. At this time, the UK and Australia have such a legislation in place. Furthermore, the Netherlands is in the process of drafting one. She believed that, when it becomes a criminal offence to go to different parts of the world, exemptions should be carved out. In this regard, a humanitarian exemption was made. This way, persons working for the ICRC can still go to conflict zones in their humanitarian capacity. Furthermore, an exemption for journalists was also made. These exemptions should be applauded.

However, the problem with such carve outs is of course how the terminology is defined. In relation to a humanitarian worker, the following questions pop up: Are you only considered a humanitarian worker if you are working for the ICRC? Or are you only a humanitarian worker when your organization is funded by the state? What about a situation where you carry out a logistical function within a humanitarian organization such as driving a truck?

Regarding the definition of a journalist, one could question whether freelancers would fall under the scope.

She continued that she could see why displacement is framed as a crime by states. However, this does not mean that it is in line with human rights. Sandra added that training and dis-

semination activities may not fall under the humanitarian exemption, which is the case for Geneva Call. However, as these exemptions often require a citizenship link, this is only a problem for the citizens of Australia and the UK who travel to the area around Mosul. However, there is of course a risk that other states will copy this behavior.

Françoise also touched upon the tension between two fundamental principles. Namely, the principle of family reunification that can be found in International Humanitarian Law (IHL) and the principle of best interests under the UN Convention on the Rights of the Child. She expressed the idea that she could imagine that states are nervous to admit children back into their territory while their mothers are still living in camps.

Vanessa Murphy answered that there is not much tension. The IHL rules that regulate family reunification do not prevent states from prosecuting a mother who has committed a crime. However, the IHL rules on family reunification require family contact. In other words, they do not require that a mother and child be together by all means. More specifically, the detaining power has the right to check the relationship between the mother and the child. This means that the rules on family reunification are not so powerful. On the other hand, human rights law requires that parental consent be given for any sort of family separation. When a mother is prosecuted and jailed, both the rules on human rights and IHL require contact between her and her child(ren).

Debate with the audience

First, it was commented that decisions to bring people back and to prosecute them are not taken by the executive power of a state but by the legislative one. Therefore, ministers should not be blamed. After all, judicial powers are working independently. Here, a panelist answered that a state remains responsible for the conduct of their judicial authorities even if they act independently. Françoise believed that more attention should be given to the tension between the independence of the judicial power of a State and the fact that the state itself will be held accountable for the action of this power.

The next question was whether states have certain obligations to repatriate children following the 'best interest' article in the UN Convention on the Rights of the Child. There is a pending case before the Committee on the Convention on the Rights of the Child regarding this question. According to the speaker, this is a question of jurisdiction. Again, it was argued that the best interest obligation is not necessarily a requirement to repatriate. However, while taking the decision to repatriate, the best interest of the child should be considered. This means that family separation should be looked at, as this is something that is often forgotten.

A panelist added that Common Article 1 to the Geneva Conventions is sometimes presented more as a moral obligation than as a legal obligation. In addition, even if a state does not want to repatriate its citizens, the state should be considered to have moral obligations to assist with capacity building. For example, in the places where those people are detained.

The next question was whether IHL is relevant in relation to foreign fighters who have been detained by other actors abroad. Would Common Article 1 of the Geneva Conventions, especially the sentence 'respect and ensure respect', be applicable? It was said that states should influence other actors to the largest extent possible. However, one of the biggest problems here is the limitation of capacity building of local administrations.

Next, a comment was made on prosecution, stating that costs can play an important role. Indeed, it costs about 150 euros a day to detain a regular detainee and 550 euros for a terrorist. Thus, costs go up exponentially and can be a decisive factor for the state. For example, in Finland a genocide case was brought before the court. However, the trial was stopped after this one case was more costly than all the cases before the criminal court of Helsinki that year. A speaker answered that states have a legal obligation to bring proceedings against a person who has committed a grave breach of IHL. Arguing that it would be too expensive to prosecute would thus destroy the grave breach regime presented in the Geneva Conventions. Another speaker added that, if the state itself did not do this, these costs would be externalized to other actors.

The next question was whether women and children, for example those living in the Al-Hol camp, should be considered as detainees. What is the legal basis of their detention? A panelist stated that this situation should be considered as *de facto* deprivation of liberty. She added that there is an inherent power to detain in IHL. However, the procedures in place are indeed unclear. Another panelist agreed with the qualification as a *de facto* detention. However, she also considered that it could amount to detention, due to the limited possibilities of movement these people have. She also reiterated the point that local laws are often very unclear, which is reflected in the lack of judicial guarantees.

A speaker said that there should be a distinction between detained fighters held in some form of detention facility and the fighters held in detention camps. She highlighted the fact that many refugees, outside the context of armed conflicts, are also not free to leave the camp in which they are detained. For example, Burundian refugees in Tanzania cannot leave the camps. This is in contrast with camps in Uganda where detainees can wander around freely. Focus should thus lay on detention facilities.

In a next round of questions, someone remarked that the French approach was systematic and required that each person above the age of 13 that returned to France had to appear in court. However, it was also said that it was very difficult to repatriate these persons. Indeed, the only way to bring a terrorist before a criminal court was in cases where a person was extradited or expelled. Reference was also made to public opinion wanting these persons to be put in prison. However, France has almost 600 foreign fighters and it seems simply impossible to put all of these persons in French prisons.

A speaker found it striking that, in the French domestic context, criminal proceedings can only be brought when someone is extradited or expelled. She suggested that this rule should be re-evaluated. For example, if a French detainee asked for repatriation even if this would mean prosecution, why would you as a state disregard this? It is strange that the courts then do not recognize the fact that this national tried to benefit from its citizenship and use this a basis to prosecute.

A panelist commented that there is indeed a struggle over how to conduct repatriations. However, it is possible as there is practice available from around ten states. One of the ways to conduct repatriations could be to better coordinate with other states. She added that battlefield evidence is indeed difficult to obtain. However, as two thirds of the population in the Al-Hol camp are children, this question is simply irrelevant. After all, prosecutions are not conducted in these cases.

Another panelist added that states just have not done enough. She stated that, in her opinion, it is particularly strange that there is an age-limit for children. For example, in some states everyone below the age of 13 is considered to be a child, in other states the limit is the age of 12. There is a lot of divergence between states and it is simply not something that is communicated about. People have the right to know where these limitations come from.

Françoise Hampson closed this very lively panel.

Session Four: Urbanisation of warfare
Quatrième session : L'urbanisation de la guerre

FIGHTING IN URBAN AREAS: LEGAL AND OPERATIONAL CHALLENGES

Andrés Munoz
SHAPE

Résumé

La contribution décrit les cadres juridiques et non-juridiques de la guerre urbaine. La question de savoir comment l'OTAN envisage cette question est également abordée.

En ce qui concerne les aspects non-juridiques, il est important de reconnaître que la guerre urbaine est toujours menée dans un contexte spécifique où plusieurs éléments doivent être pris en compte (tels que l'existence de forces irrégulières ou le soutien populaire local). De plus, comme la guerre urbaine est par définition menée dans une zone dense, une intelligence humaine plus sophistiquée est nécessaire pour minimiser les pertes.

En ce qui concerne les aspects juridiques, Il est essentiel de comprendre que la guerre urbaine n'est pas tenue dans un vide juridique. Plusieurs instruments (article 25 du Règlement de La Haye, articles 51, §5 a), 58 PA I de 1987 et le Commentaire du CICR sur le PA I) montrent que le DIH considère que la guerre dans les villes non-défendues est interdite. Cependant, cela signifie, a contrario, que dans le cas où une ville est défendue ou que des objectifs militaires sont situés dans une ville, la guerre n'y est pas interdite.

Andrés Munoz se tourne ensuite vers plusieurs concepts de base pour montrer que le DIH est applicable à la guerre urbaine. La contribution nous rappelle qu'un objet civil peut devenir un objectif militaire en fonction de son utilisation (article 52, paragraphe 2, AP I). De plus, la participation directe aux hostilités (PDH, article 51 AP I) est examinée. Enfin, les concepts de population civile et de boucliers humains sont discutés. En effet, ces concepts sont importants dans l'application du principe de proportionnalité (article 51 §5(b), article 57 §2(b) AP I) et dans l'examen des dommages collatéraux.

Ensuite, Andrés Munoz se penche sur l'OTAN et soutient qu'elle considère la guerre urbaine comme un environnement multidimensionnel plein de complexités. En raison de cela, l'OTAN a élaboré un étude conceptuelle urbaine (2014). L'étude se penche sur la dynamique spécifique

de la ville (le sous-système) qui influence toute opération militaire. Ce sous-système comprend les non-combattants qui exercent un contrôle et utilisent la force, comme les bandes de jeunes, les groupes criminels, les réfugiés/personnes déplacées, les trafiquants de drogue, les mafias de contrebande, etc. En outre, l'étude a identifié que la prise en compte des infrastructures urbaines multidimensionnelles sont essentielles lors de la conduite d'opérations militaires.

Par ailleurs, des recherches supplémentaires sur cette question sont nécessaires d'autant plus que les opérations conjointes de l'OTAN doivent également prendre en compte l'environnement urbain, comme l'a envisagé le Conseil de l'Atlantique Nord (CAN) en 2019. Le processus de planification de défense de l'OTAN doit donc refléter la réalité d'un environnement urbain, qui devrait également être intégré dans les programmes de formation actuels. En outre, Andrés Munoz estime que l'OTAN doit améliorer son interopérabilité dans cet environnement et intégrer les systèmes physiques et humains, les adversaires à multiples facettes, les cyber-opérations, les opérations d'information, l'opinion publique et le droit.

L'OTAN veut continuer à être une plate-forme où les alliés et les partenaires de l'OTAN peuvent discuter des problèmes qui se posent dans ce domaine.

Andrés Munoz tient à préciser que la présentation et les opinions qui y sont exprimées sont ses opinions personnelles. Ils ne représentent pas nécessairement les opinions du Commandement allié Opérations de l'OTAN ou du SHAPE. Il tient également à remercier son collègue pour la corédaction.

Andrés Munoz would like to state that the presentation and the opinions expressed therein are his personal opinions. They do not necessarily represent the opinions of NATO Allied Command Operations or SHAPE. He also wants to thank his colleague for co-authoring.

Introduction

Yoram Dinstein characterises urban warfare as "intense and sustained grand fighting for effective control of defended localities within the contact zone".[1] Thus, the topic at hand addresses the legal aspects of activities that extend into populated areas, what some call urban warfare, which is a combination of close-quarter-battle (micro urban warfare) and urban operations (macro urban warfare).

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1 Y. Dinstein, The conduct of hostilities under the law of international armed conflict, 2nd ed. (CUP, Cambridge, 2010).

Already in Joshua 8-10 urban warfare was a reality in Makkedah or Jericho. These cities are most likely the first record of such warfare, which has continued over human history until most recently, Stalingrad, Sarajevo, and Aleppo. Today more that 55% of the world population lives in urban areas and the trend indicates that in year 2050 this figure will be 66%. Even more significantly, 80% of the global population lives today within 100 kilometres of the coast, in urban littoral area.

The next paragraphs will briefly describe the non-legal basis of urban warfare, the legal basis and finally what NATO does on this matter.

Non-legal basis

In urban warfare small combined arms units instead of large-scale forces are used. In addition, war is fought in ringed areas instead of in open fields. This, in turn, requires more sophisticated intelligence in all three categories of human intelligence (HUMINT), signal intelligence (SIGINT) and imagery intelligence (IMINT). Therefore, the planners and executors of operational plans are required to develop a set of options where kinetic and non-kinetic tool are immediately available. The imperative need to minimize casualties demands state-of-art technology. This technology must live up to international humanitarian law standards which in turn requires intensive training.

Interestingly, there are other more 'human' elements such as combatants and non-combatants; the governance of the cities (gangs, mafias, specific areas, etc.); the rhythm of the city; irregular forces; local popular support; use of human shields... Mapping all the elements is a mammoth task and needs to be looked at on a case-by-case basis for every urban area potentially subject to warfare.

Some legal basis

No legal vacuum

In urban warfare there is not such a thing as a legal vacuum. After all, article 25 of The Hague Regulations discusses undefended towns, villages or buildings, stating that their attack or bombardment is prohibited.

Furthermore, article 58 of Additional Protocol I to the Geneva Conventions (AP I) addresses the need for warnings and precautions against the effects of armed attack. In addition, article 59 of AP I sets the conditions which should be fulfilled, in order for a locality to be considered as non-defended. This article re-affirms the prohibition of attacks on such localities.

It is also interesting to look at the 1987 ICRC commentary on AP I, this states that "if a locality contains military objectives and hostile acts are perpetrated from such objectives, that does not in any way justify the total destruction of the buildings in that locality". In fact, it may be recalled that Article 51, paragraph 5(a), on protection of the civilian population prohibits treating several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, as a single military objective.

However, this would also mean that within an undefended locality, military objectives could exist if there are combatants, as well as mobile weapons and mobile military equipment, the hostile use of fixed military installations, acts of hostility committed by the authorities or activities conducted by the population, in support of military operations. The 1987 ICRC commentary appears to second that, limiting bombardment to military objectives. It would appear that the distinction between defended and undefended sites is the fact that, in the first case, the site is actually defended by the enemy, while the latter is specifically declared as a non-defended site, open to occupation. However, when there is military activity that creates a legitimate military objective, that specific objective is targetable while taking the principle of proportionality into account.

Some Basic Concepts

Article 52(2) AP I defines a military objective as: "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

The article also touches upon civilian buildings/civilian installations. More precisely, one easily identifiable requirement is the term 'definite', with regards to providing a military advantage. With other words, an estimation is not enough. Therefore, a concrete and directly linked military advantage is needed. What is most interesting to investigate within the context of this presentation is the extent to which property that would otherwise be characterised as civilian property can become a military objective. There is a general consensus that the change of use of such property would indeed turn it into a military objective. However, it could also be argued that in case the military use is only of a short-term duration, when that use ceases, the property should no longer be considered to be a military objective. This limitation is made clear by the terms, 'in the circumstances ruling at the time', as well as by the fact that the term 'use' itself is used to describe the current function (as stated in the ICRC commentary). Within the category of civilian buildings, hospitals and religious buildings receive special

protection. This is also re-iterated in the Rome Statute of the ICC in Article 8, paragraph 2bis. The article concludes, with the phrase 'provided they are not military objectives'. Hence, interpreted *a contrario*, they can be military objectives when their use has been changed and they are being used as a military fixed installation for example.

One can consider that a purely civilian object is one that contains neither military personnel nor items of military significance. However, a civilian object which does contain these is considered to be a military objective.

As stated before, a civilian object can become a military objective based on its use or purpose. In the following paragraphs I will focus on this use. After all, 'purpose' presents a difficulty as it is linked to the intended future use of an object. To define this would require credible intelligence that the object (for example the building) is intended to be used for military purposes. Some authors have indicated that, if linked to the phrase 'in the circumstances ruling at the time', defining a military objective based on its purpose creates further difficulties, meaning, that in the circumstances ruling at the time, the object is not yet used in its intended future use, as it is not fulfilling its purpose.

Nevertheless, it is highly unlikely that a military commander would base a decision on a military objective, on purpose, when the object has been a civilian object up to then, even if there is reliable information that the purpose of the object will change. The reasons for that are twofold. First, if we take the principle of proportionality, we need an anticipated concrete and direct military advantage. Second, as a matter of policy, the lower the civilian casualties, the better. This is especially important in light of lawfare and the 'court' of the public opinion, which are particularly powerful tools used for non-abiding actors.

Another important definition that should be looked at, is the one of civilians, especially in the case of Direct Participation to Hostilities (DPH). According to the Commentaries on the Additional Protocols of the Geneva Conventions, the immunity afforded to individual civilians is subject to an overriding condition, namely, that they abstain from all hostile acts. These should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm). DPH implies a direct causal relationship (direct causation), between the activity engaged in and the harm done to the enemy at the time and place where the activity happened. In addition, the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another

(belligerent *nexus*). Furthermore, it is interesting to note that during the course of the discussions on article 51 AP I, several delegations indicated that the expression 'hostilities' used in this article included preparations for combat and the return from combat.

Lastly, the concepts of civilian population, and human shields should be addressed. They must be factored into collateral damage. Here, the proportionality principle applies, measured against the military advantage. The rule of proportionality is set out in Article 51 para 5(b) and Article 57 para 2 (b) of AP I, although the word proportionality itself though does not appear in the articles. It is to be construed from the overall text. During the negotiations for API, certain delegations participating in the conferences objected to the use of the word, or even to a reference to the rule. The reason for that was that a proportionality principle would entail comparing things that are not comparable, i.e. military advantage and civilian casualties. Secondly, it was held that it created a level of subjectivity. Indeed, while the principle of distinction contains objective criteria assessed by examining facts, the principle of proportionality contains a qualification that is left up to what is reasonably expected.

These concepts illustrate that there is not such a thing as a lawless situation, there may be cases that are under-regulated simply because they have been caught up by modern methods or means of waging war, but not one can claim that an action falls in the realm of 'non-applicable law'.

NATO activities in urban warfare

Since 2001 NATO has shown an interest in urban warfare in order to provide a platform for discussions among NATO members and partners. More precisely, land Group 8 of the NATO Army Armaments Group was in charge of covering a capability gap with respect to the difficulties and limitations associated with urban warfare.

Technology took the lead at the time, although organizational aspects were also carefully considered as the imperative requirement to build training information architecture and future-proofing. The Group also considered the variety of urban terrain types, arms that could be used, and the need to have allied forces involved in a multidimensional environment, i.e., a multilayer of military operations taking place simultaneously vertically and horizontally, internally and externally, subterranean and roof-top, as well as low-fly devices.

The conclusion of the Group's works was to focus on operational concepts, battlefield effects, vulnerabilities, essential infrastructures, exercise control and system architecture. The final goal was to promote standards and contribute to interoperability. This background has made NATO capable of developing the study below, which is explained very briefly below.

NATO urban conceptual study

The conceptual study dates back to 2014 and was part of the framework that the Alliance develops for future operations (until 2035), whose results were presented to the NATO nations in 2017. The study took place in the multidimensional environment that characterize urban combat together with the 'demographics' and 'city rhythms', which includes non-combatants who exercise control and use force, like juvenile gangs, criminal groups, ethnic and economic groups, refugees/displaced people, neighborhood lords, drug-dealers, smuggling mafias, etc. Altogether these elements form a subsystem that significantly influences any military operation in the urban *milieu*.

This anthropological subsystem is a source of risk as much as an opportunity, which requires major planning as well as to take the multidimensional urban infrastructure into account. This characterization raises the issue of the hybrid environment in urban areas and the complexity of addressing it for regular military forces, who confront ambiguous situations, low-tech forces, strong air-defense weapon systems, state-of-art telecommunications, Improvised Explosive Devices (IEDs), etc.

The conclusion of the study was that thorough research was required in order to develop credible scenarios of future cities and threats, which include anti-IED methodologies and technology, command and control mechanisms, special logistics, commensurate targeting, communications, and intelligence.

NATO joint operations in an urban environment

In 2019, based on the same requirements as the study, the North Atlantic Council (NAC) considered that urban environments will be a constant factor in any NATO operation the allies may be involved in, which requires the adaptation of doctrine, the introduction of urban scenarios, and the development of specific capabilities.

The Council considers that the NATO Defense Planning Process must reflect the reality of an urban environment and must be incorporated in current training programs as a requirement enhanced with urban combat advanced training technology.

Also, I personally consider that the Alliance needs to improve its interoperability in this environment and integrate the urban settlement, the physical and human systems, the multifaceted adversaries, cyber, information operations, public opinion and lawfare in its planning.

The military implications of joint operations in an urban environment will present challenges in command and control, as well as in battlefield management, which has a major repercussion

on the decision authority at all levels of command. Intensive and reliable intelligence should help in the accuracy of targeting since maneuvers will take place in high-density populated areas with complex infrastructures and physical obstacles.

Non-kinetic means such as information operations must be used as a multiplier of kinetic postures or actions, as well as civil-military cooperation. Finally, force protection, logistics, and medical support are key for sustaining activities in the urban environment.

Conclusion

NATO sees urban warfare as a multidimensional environment full of complexities and as a constant battlefield in future Allied operations. While there is no legal vacuum in urban warfare, there are many legal elements to be developed due to said complexities and the imperative need for NATO to abide to the Rule-Based International Order (RBIO).

USE OF HEAVY EXPLOSIVE WEAPONS IN POPULATED AREAS AND WHY IT SHOULD BE AVOIDED: HUMANITARIAN, LEGAL AND POLICY CONSIDERATIONS

Eirini Giorgou
ICRC

Résumé

Dans les guerres urbaines contemporaines, un des grands problèmes est que toutes les parties (les États et les groupes armés non étatiques) utilisent des armes explosives lourdes. Ces armes se caractérisent par une charge explosive importante, un manque de précision du système de lancement et la possibilité de tirer simultanément plusieurs munitions en une seule fois sur une vaste zone. Il n'est donc pas discutable que dans un environnement où les objectifs militaires se trouvent à proximité de civils et/ou de biens civils, l'utilisation de telles armes comporte un risque élevé d'effets indiscriminés.

Non seulement les civils peuvent être tués ou blessés à la suite d'une attaque, mais les infrastructures civiles (logements, hôpitaux, écoles, lieux de travail) sont souvent endommagées ou détruites. En plus de ces effets directs, il existe aussi des effets indirects ou «réverbérants».

Cela signifie que les infrastructures civiles au fonctionnement des services essentiels – tels que l'eau et l'assainissement, l'électricité et les soins de santé – sont endommagées ou détruites. Comme ces services sont souvent interconnectés et interdépendants, une interruption d'un service aura souvent un effet domino sur les autres services. Lorsque le conflit se prolonge, les systèmes de fourniture de services peuvent même s'effondrer. Il en résulte des effets dévastateurs tels que des décès et des épidémies. En outre, de larges populations seront forcées de fuir les centres urbains à la recherche de sécurité. De plus, une fois le conflit terminé, le retour à leur ancien lieu de résidence n'est souvent pas possible.

Pour les raisons susmentionnées, le CICR appelle depuis 2011 les États et toutes les parties à un conflit armé à éviter l'utilisation d'armes explosives en zones peuplées.

Cet appel est principalement basé sur les réflexions humanitaires telles que décrites et peut donc être vu comme une considération politique. Toutefois, malgré l'absence d'une interdiction légale expresse pour des types d'armes spécifiques, l'appel trouve également des motifs dans le DIH. Après tout, le DIH interdit les attaques indiscriminées et disproportionnées. Le DIH exige égale-

ment des belligérants qu'ils prennent toutes les précautions possibles dans leurs attaques pour éviter et, en tout état de cause, réduire au minimum les dommages indirects causés aux civils.

Par exemple, dans le cadre du DIH, l'interdiction des attaques disproportionnées exige qu'une force mette en balance les dommages indirects attendus causés aux civils avec l'avantage militaire concret et direct attendu de l'attaque. Selon le CICR, les effets directs et indirects ou réverbérants d'une attaque doivent être pris en compte dans la mesure où ils sont «raisonnablement prévisibles». Ce qui est «raisonnablement prévisible» est ce qui est prévisible pour un commandant raisonnable qui utilise, de bonne foi, les informations auxquelles il/elle a raisonnablement accès.

Lorsque ces armes explosives sont utilisées pour couvrir les forces propres ou amies attaquées, certains États invoquent la notion de «légitime défense». Cependant, même dans ce cas, l'interdiction absolue des attaques indiscriminées et disproportionnées s'applique.

Le CICR plaide donc pour une «politique d'évitement», à moins que des mesures de mitigation suffisantes puissent être prises pour limiter les effets sur une large zone et le risque de dommages aux civils. Dans les cas où les mesures de mitigation ne sont pas réalisables, des armes et des tactiques militaires alternatives devraient être envisagées. Une politique d'évitement devrait être soutenue par des mesures et des orientations concrètes (politiques et pratiques) préparées avant les conflits armés et les opérations militaires et fidèlement mises en œuvre lors de la conduite des hostilités.

Enfin, au niveau multilatéral, une déclaration politique visant à remédier aux dommages causés aux civils par l'utilisation d'armes explosives dans les zones peuplées est en cours d'élaboration. À ce jour, plus de 80 États ont exprimé leur soutien à une telle déclaration. L'adoption d'une déclaration est attendue avant la fin de l'année 2020.

As the world urbanizes, so does armed conflict. Wars are increasingly being fought in urban and other population centers, with devastating consequences for civilians. Mosul, Aleppo, Sana'a, and Tripoli are only a few examples of the heavy toll that urban warfare takes on the lives, health, and wellbeing of civilians. They join a long list of cities and towns in Afghanistan, Iraq, Syria, Libya, Yemen, Ukraine, and elsewhere, whose inhabitants continue to suffer, in many cases long after active hostilities have ended.

A defining feature of contemporary urban warfare is the use by all parties –state or non-state – of heavy explosive weapons that are often neither designed nor adapted for use in populated areas. Weapons such as large bombs and missiles, unguided indirect fire systems like most artillery and mortars, and multi-barrel rocket launchers (MBRL) deliver effects over a broad area. They do so because of their large explosive payload, the lack of accuracy of the delivery system, or the fact that they fire multiple munitions simultaneously over a large area. In an environment where military objectives are near civilians and/or civilian objects, using such weapons with a large 'footprint' entails a high risk of indiscriminate effects.

The use in populated areas of explosive weapons with wide area effects is one of the main causes of civilian harm. Recent data indicates that when cities are bombed and shelled 90% of the victims are civilian.[1] Such harm is not limited to the civilians – men, women and children – directly killed or injured as a result of an attack, many of them left with permanent disabilities or long-lasting mental trauma. It includes the damage and destruction of civilian objects such as housing, hospitals, schools, cultural monuments and places of worship – often the destruction of entire population centers, when hostilities are protracted.

Next to the direct effects of the use of heavy explosive weapons, there are often indirect or 'reverberating' effects which occur when critical civilian infrastructure indispensable for the functioning of essential services – such as water and sanitation, electricity and health care – is damaged or destroyed. In urban centers, these basic services on which civilians depend for their survival are interconnected and interdependent; disruption in one service (e.g. electricity) will often have a domino effect on other services (e.g. water distribution or functioning of hospitals). When conflict is protracted, service provision systems may even collapse, meaning that they may be damaged to a point where repair is no longer possible. Lack of essential services can lead to death and disease outbreaks; ultimately, the use of heavy explosive weapons typically affects a much larger part of the civilian population than those in the immediate vicinity of the attack.[2]

The direct threat of explosions and lack of access to essential services force large populations to flee urban centers in search for safety. Displaced persons are vulnerable to serious risks to their life and health, including sexual violence. Many are unable to return to their former places of residence years after the conflict has ended, with basic service provision often non-existent, and the constant threat of unexploded munitions.

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1 According to Action on Armed Violence (AOAV) data, available at https://aoav.org.uk/2019/get-aoavs-explosive-violence-data/.

2 ICRC, Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People, ICRC, Geneva, 2015 (hereinafter "ICRC Urban Services Report"), pp. 21-31.

Since 2011, the International Committee of the Red Cross (ICRC) has been calling on States and all parties to armed conflict to avoid the use of explosive weapons with a wide impact area in populated areas due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons.[3] This call for avoidance is primarily grounded in humanitarian concerns, namely the pattern of grave civilian harm – both direct and indirect – caused by the use of these weapons, as described above. It is also based on the law, and in particular on the rules of International Humanitarian Law (IHL) prohibiting indiscriminate and disproportionate attacks and requiring belligerents to take all feasible precautions in attack to avoid and in any event minimize incidental civilian harm.

IHL does not prohibit the use of heavy explosive weapons in populated areas *per se*. However, the wide area effects of these weapons and the concentration of civilians and civilian objects which is characteristic of populated areas make it very challenging to use them in conformity with key IHL rules regulating the conduct of hostilities. The extensive civilian harm, both direct and indirect, witnessed when explosive weapons with a wide impact area are used in populated areas gives rise to serious questions with regard to the prohibitions of indiscriminate and disproportionate attacks. In the ICRC's view, there is a high risk that such use will fall foul of said rules – hence the need to avoid it altogether.

IHL prohibits indiscriminate attacks, i.e. attacks that are of a nature to strike military objectives and civilians and civilian objects without distinction, including by employing a means or method of combat which cannot be directed at a specific military objective.[4] A key question in this respect is whether, and to what extent, the use in populated areas of inaccurate weapons, such as artillery, mortars and MBRL using unguided munitions and projectiles, can be considered as complying with this prohibition, insofar as the weapons' typical margin of error and dispersion pattern mean that the large majority of the munitions can be expected to land off target. The wide area effects of many of the weapons commonly used in populated areas in relation to the size of the military objectives targeted raise serious questions with regard to how the prohibition of indiscriminate attacks is interpreted and applied by armed forces.

At times, explosive weapons with a wide impact area (most commonly artillery or other indirect-fire weapon systems) are used to harass the enemy, to deny them freedom of movement, or to obstruct their activities ("harassing", "interdiction" or "suppressive" fire). This takes the form of a continuous flow of fire – often of low or moderate intensity – intended to deliver ef-

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3 This position has been published inter alia in IHL and the Challenges of Contemporary Armed Conflict: Report, ICRC, Geneva, 2011, 2015 and 2019 (hereinafter "ICRC Challenges Report").

4 Article 51(4) of Additional Protocol I (hereinafter "AP I") and customary IHL (see ICRC, Customary International Humanitarian Law, Vol. 1, Rule 12 (hereinafter "ICRC Customary IHL Study")).

fects over an area or on specific objects or persons, depending on the circumstances. However, to be lawful, harassing, interdiction or suppressive fire must be directed at a specific military objective, and must use means capable of being so directed. Yet in practice it is not always clear that this is the case.[5]

The prohibition of disproportionate attacks requires an attacking force to weigh the expected incidental civilian harm against the concrete and direct military advantage anticipated from the attack.[6] In the ICRC's view, both the direct and the indirect or reverberating effects of an attack should be considered, insofar as they amount to death or injury of civilians, damage to civilian objects, or any combination thereof, and insofar as they are 'reasonably foreseeable'. What is 'reasonably foreseeable' is what is foreseeable to a reasonable commander making use, in good faith, of the information reasonably available to them. Thus, an effect can be reasonably foreseeable even if geographically and/or temporally remote from the point of attack, as long as it could have been foreseen in advance. The standard of reasonable foreseeability implies that the commander has an active duty to search for information that will allow them to anticipate, to the maximum extent possible, the effects of their attack. What is reasonably foreseeable of course depends on the circumstances prevailing at the time of assessment, but it will also be informed by the experience and lessons learned of the armed forces; for example, what may not have been foreseeable before the first attack in an area may very well be foreseeable before future similar attacks.

It should be underlined that knowledge about the interconnectivity of critical infrastructure and essential services in urban environments increases, the reverberating effects of the use of heavy explosive weapons become increasingly foreseeable. However, it is far from clear whether, and to what extent, militaries consider these effects when planning and assessing the proportionality of their attacks. In light of the significant short- and long-term reverberating effects the use of heavy explosive weapons in populated areas foreseeably have, there is a high risk that such use would be at odds with the prohibition of disproportionate attacks.

Where explosive weapons with a wide impact area are used to provide covering fire for own or friendly forces under attack, some States invoke the notion of 'self-defense' to suggest that IHL restrictions on the use of force, including on the choice of weapons, could be less stringent compared to such restrictions in pre-planned attacks, and to justify the use of weapons that carry a high risk of indiscriminate effects in the circumstances. However, even the use of force in 'self-defense' is circumscribed by the absolute prohibitions against indiscriminate and disproportionate attacks, and by all other IHL rules governing the conduct of hostilities, which

5 ICRC Challenges Report 2019, p. 13.

6 Article 51(5)(a) of AP I and customary IHL (ICRC Customary IHL Study, Rule 14.

apply in defensive as well as offensive situations. In the ICRC's view, the protection of own or friendly forces is a relevant military consideration impacting on the feasibility of precautions. It is also a relevant military advantage when assessing the proportionality of an attack, but only insofar as it is 'concrete and direct', which is primarily the case when troops are under attack (i.e. in 'self-defense' scenarios). In all such circumstances, force protection must be balanced against humanitarian considerations, such as the extent of incidental civilian harm expected to result from the use of heavy explosive weapons. In this respect, the greater the risk of incidental civilian harm anticipated from the attack, the greater the risk to its own forces the attacking party may have to be prepared to accept. At any rate, force protection can never justify the use of indiscriminate fire as a measure to avoid the exposure of own or friendly forces.[7]

Lastly, IHL obliges parties to a conflict to take all feasible precautions in attack in order to ensure that the attack is not indiscriminate or disproportionate and to avoid, and in any event minimize, incidental civilian harm.[8] To comply with this obligation parties may be required to use the most accurate weapon or munition available, or to refrain from launching altogether, suspend or cancel the attack, if the only weapons or munitions available would, if used, lead to an indiscriminate or disproportionate attack. However, it is important to acknowledge that precision-guidance is not always the solution; precision-guided munitions may also have wide area effects due to their large explosive payload, and can thus give rise to a high risk of indiscriminate effects and civilian harm.

From the above it becomes clear that, while the key rules of IHL regulating the conduct of hostilities apply to the use of heavy explosive weapons in populated areas, complying with these rules becomes particularly difficult due to the wide area effects of the weapons (which are likely to go beyond the target), the proximity of military objectives to civilians and civilian objects and the vulnerability of civilians, who in urban areas are largely dependent on a complex web of interconnected essential services. In addition, even in cases where parties claim to have fully complied with the law, we observe levels of civilian harm that are unacceptable from a humanitarian, moral and often also legal point of view.

The ICRC's call on States and parties to armed conflicts to avoid the use of heavy explosive weapons in populated areas is based on the high risk of civilian harm and of IHL violations when such weapons are used. More recently, this call was reiterated in a Joint Appeal launched

7 ICRC Challenges Report 2019, p. 12-13.

8 Article 57 of AP I and customary IHL (ICRC Customary IHL Study, Rules 15-21).

by ICRC President, Peter Maurer and United Nations Secretary-General, António Guterres.[9] They appealed to States to take urgent action to curb the unacceptable tide of civilian death and suffering that is characteristic of urban warfare today, including by reviewing their military policies and practices to ensure that the use of heavy explosive weapons is avoided in urban and other populated areas.

An 'avoidance policy' means that explosive weapons with a wide impact area should not be used in populated areas, unless sufficient mitigation measures can be taken to limit their wide area effects and the consequent risk of civilian harm. This would be first and foremost measures related to targeting and to the choice of weapons, complemented by further measures to reduce the likelihood and/or extent of civilian harm.

In some cases, mitigation measures may not be feasible, sufficient and/or effective for reducing the weapon's area of impact and the consequent risk of civilian harm to an acceptable level, in which case heavy explosive weapons should then not be used and alternative weapons and tactics should be considered. In other cases, certain mitigation measures could bring the attacker from a situation where they should not use explosive weapons with a wide impact area in populated areas, to a situation where civilian harm will be sufficiently mitigated, either because the area would not be populated anymore or because targeting and weaponeering measures would reduce significantly the size of the explosive weapons' area of impact. Such concrete mitigation measures could also facilitate respect for the IHL prohibitions of indiscriminate and disproportionate attacks, as well as for the general obligation to take constant care to spare the civilian population, civilians and civilian objects, notably by taking all feasible precautions in attacks, including in the choice of means and methods of warfare.

An avoidance policy should be supported by concrete measures and guidance (policies and practices) to be prepared in advance of armed conflicts and military operations and faithfully implemented when conducting hostilities. Such good practices should also be considered when transferring heavy explosive weapons to any recipient, when conducting partnered operations, as well as when providing support to a party to armed conflict.

In light of the unacceptable levels of civilian harm we witness in contemporary urban warfare, largely due to the use of explosive weapons with a wide impact area, urgent action is needed by States to review and adapt their doctrine and practice to effectively address the challenges of operating in urban environments; to ensure their armed forces are trained and equipped

9 "Explosive weapons in cities: civilian devastation and suffering must stop", Joint Appeal by the Secretary-General of the United Nations, António Guterres, and the President of the ICRC, Peter Maurer, 17 September 2019.

specifically for urban warfare; and to avoid the use in urban and other populated areas of heavy explosive weapons.

At the multilateral level, efforts are currently underway to elaborate a political declaration to address the civilian harm caused using explosive weapons in populated areas. To-date, over 80 States have expressed support for such a declaration, although several States remain skeptical as to the utility of such an instrument. The diplomatic process is expected to conclude with the adoption of the declaration before the end of 2020.

In the ICRC's view, a political declaration can be a powerful tool to bring about tangible progress, provided it contains strong and unequivocal commitments to change the unacceptable *status quo*, including a commitment to avoid the use of explosive weapons with a wide impact area in populated areas. Such a commitment should be operationalized through concrete practical measures ('good practice') to be adopted and implemented as a matter of policy. A policy of avoidance will strengthen the protection of civilians from the use of heavy explosive weapons in populated areas and will facilitate respect for IHL. Ultimately, reducing the unacceptable levels of civilian death and suffering in urban warfare is more than a political goal or legal obligation: it is a humanitarian imperative.

BESIEGING CITIES AND HUMANITARIAN ACCESS: HOW TO ACCOMMODATE HUMANITARIAN NEEDS, LEGAL OBLIGATIONS AND OPERATIONAL CONSTRAINTS?

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Résumé

La guerre de siège est une ancienne méthode de guerre qui est réapparue dans les conflits armés contemporains comme en Syrie, au Yémen ou en Irak. Dans la pratique, les sièges sont principalement menés en combinant deux méthodes spécifiques : la famine et les bombardements.

Le DIH ne définit pas les sièges et ne prévoit aucune règle explicite interdisant la guerre de siège. Cependant, Gloria Gaggioli démontre que de nombreuses dispositions du DIH rendent la guerre de siège illégale lorsqu'aucune mesure concrète visant à protéger efficacement la population civile contre ses effets n'est en place.

Aujourd'hui, le CICR et un Groupe d'éminents experts internationaux et régionaux sur le Yémen considèrent l'interdiction de la famine (article 54 (1) PA I) comme un droit coutumier dans les conflits internationaux et non-internationaux. Ce point de vue est également fondé sur le fait que le droit pénal international considère la famine comme un crime de guerre dans le cas d'un conflit international (article 8 (b) XXV du Statut de Rome) et qu'un amendement pour l'application de cette règle dans les conflits non-internationaux est actuellement en cours d'examen.

On peut se demander si la guerre de siège est indirectement interdite par l'interdiction de la famine des civils. En effet, les civils sont les premiers à souffrir de l'isolement induit par le siège. Cependant, l'opinion majoritaire est que les sièges ne sont pas interdits même s'ils provoquent la famine, tant que leur but est d'atteindre un objectif militaire et non d'affamer la population civile.

Cependant, la famine accidentelle de civils résultant de l'attaque, de la destruction, du déplacement de civils ou du fait de rendre inutilisables des objets indispensables à la survie de la population civile est interdite par les Protocoles additionnels (article 54 (2) - (3) PA I et 13 PA II), et probablement par le droit coutumier. Cela signifie que la famine accidentelle est interdite lorsqu'une partie belligérante prend des mesures pro-actives pour priver l'ennemi des ressources existantes.

De plus, le principe de proportionnalité (article 51(5)(b) du PA I) limite la guerre de siège. En effet, lorsqu'une partie isole une ville, la situation humanitaire devient insupportable après quelques mois. En conséquence, les coûts humains parmi les civils sont beaucoup plus élevés que l'avantage militaire attendu. Cependant, comme l'article interdit strictement les attaques, la question est de savoir si un siège peut être considéré comme une « attaque ». Gloria Gaggioli présente quatre arguments à l'appui de cette thèse. Premièrement, la notion d'attaque (article 49 PA I) est suffisamment large et flexible pour inclure les sièges. Deuxièmement, des analogies peuvent être établies avec les blocus dans les conflits armés internationaux, avec lesquels les sièges présentent un certain nombre de similitudes (Manuel de San Remo (paragraphe 102b) et le Manuel de droit international relatif à la guerre aérienne et aux missiles (paragraphe 157b)). Troisièmement, il existe un argument pratique. La guerre de siège combine souvent la force cinétique (par exemple, les bombardements) et l'isolement ou l'encerclement. Considérer que la proportionnalité ne s'appliquerait qu'à certaines des méthodes utilisées dans le cadre du siège est artificiel et difficile à mettre en œuvre. Enfin, la pratique des États (voir par exemple le Manuel du Ministère américain de la Défense) et certains experts du droit international humanitaire soutiennent l'argument selon lequel la proportionnalité et d'ailleurs le principe de précaution s'appliquent dans le contexte d'une guerre de siège. En conclusion, cela signifie que la partie assiégeante doit constamment surveiller et évaluer la légalité du siège à la lumière de l'avantage militaire concret et direct attendu et des dommages collatéraux attendus.

En outre, la guerre de siège peut également être interdite sur la base de méthodes de guerre aveugles. En effet, l'avis consultatif de la CIJ sur les armes nucléaires a déclaré que « les méthodes et moyens de guerre qui excluraient toute distinction entre les cibles civiles et militaires, ou qui entraîneraient des souffrances inutiles pour les combattants, sont interdits ».

Cette interprétation est plus stricte que celle basée sur la proportionnalité car ici la guerre de siège est toujours considérée comme illégale lorsqu'elle touche des civils. Cependant, l'interprétation basée sur la proportionnalité tient mieux compte de la réalité des conflits armés.

En effet, dans certains cas, un siège peut être préférable à un combat pour obtenir le même avantage militaire, tant qu'il n'est pas attendu qu'il cause des dommages excessifs aux civils.

Quelle que soit l'interprétation choisie, pour que la guerre de siège soit légale, il faut trouver des moyens de protéger la population civile de ses effets secondaires. Dans le cas contraire, cela ne sera pas conforme au DIH et violera le principe de précaution.

Deux solutions potentielles sont envisagées par le DIH : les évacuations et l'aide humanitaire.

En ce qui concerne les évacuations, les Conventions de Genève recommandent l'évacuation des plus vulnérables des zones assiégées. À tout le moins, les forces assiégeantes et assiégées doivent autoriser les civils à quitter l'endroit assiégé.

Gloria Gaggioli donne quelques indications sur la manière dont l'évacuation peut être assurée. Premièrement, les évacuations ne peuvent être réalisées lorsque la sécurité de la population ou des raisons militaires impératives l'exigent. Deuxièmement, toutes les mesures possibles doivent être prises afin que les civils concernés soient accueillis dans des conditions satisfaisantes d'abri, d'hygiène, de santé, de sécurité et de nutrition. En outre, les membres d'une même famille ne peuvent pas être séparés. Par ailleurs, les évacuations ne doivent pas entraîner le déplacement de civils vers des régions éloignées. Enfin, les évacuations doivent être menées sous la supervision d'une tierce partie neutre (État ou organisation humanitaire telle que le CICR ou le HCR).

L'aide humanitaire dans la zone assiégée peut également être une solution. Bien que plusieurs dispositions du DIH exigent une telle assistance humanitaire lorsque la population civile ne dispose pas des moyens essentiels à sa survie, elle est généralement toujours soumise au consentement ad hoc des parties. Toutefois, Gloria Gaggioli estime que, dans le contexte d'un siège, le refus d'opérations de secours lorsque la population civile est insuffisamment approvisionnée ne peut être concilié avec le DIH.

Introduction

Siege warfare is an ancient – some would say archaic or medieval – method of warfare that has made its comeback in contemporary armed conflicts such as in Syria, Yemen or Iraq. The urbanization of warfare may further incentivize the use of this method in the future. The catastrophic humanitarian consequences of recent prolonged sieges – such as in Ghouta (Syria) or Ta'izz (Yemen), where civilians starved because of the lack of access to the objects indispensable to their survival – have led to widespread condemnations by the international community.[1] However, sieges have been used throughout history, and military doctrine usually regards them as essential to the effective conduct of hostilities in order to control a defended locality and obtain surrender of or otherwise defeat the enemy by isolating it from relief in the form of supplies or additional defensive forces. In practice, sieges are mainly conducted through the combination of two specific methods: starvation and bombardments.[2]

1 See e.g. UN Security Council Resolution 2139 (2014), preamble §4 and operative §5 on sieges in Syria. See also UN Security Council Resolution 2417 (2018), operative §§ 1, 5 and 6 on the link between armed conflicts and starvation of civilians and food insecurity.

2 James Kraska, "Siege", Max Planck Encyclopedia of Public International Law, 2009, §1.

Given the often-disproportionate effects of sieges on the civilian population, a burning question is whether this method of warfare can still be considered lawful under contemporary international law. While admitting that IHL neither defines sieges[3] nor provides any express rule prohibiting siege warfare *per se*,[4] I will demonstrate that numerous IHL provisions substantially constrain siege warfare to the point that besieging cities is now unlawful without concrete measures aiming at effectively protecting the civilian population from its effects. I will focus on the prohibition of starvation and demonstrate the relevance of the conduct of hostilities rules, such as the principle of proportionality and the prohibition of indiscriminate methods of warfare.

Other IHL prohibitions may also constrain siege warfare. These include the prohibition of terrorizing the civilian population[5], the prohibition of collective punishment[6], or the prohibition of human shields.[7] Lastly, international human rights law may complement IHL in this domain. If jurisdiction is established,[8] rights such as the right to life come into play. Economic, social, and cultural rights such as the right to food, water, shelter, and to an adequate standard of living are also particularly relevant. These elements will however not be further developed here.

Sieges and the prohibition of purposeful and incidental starvation

Modern IHL prohibits the starvation[9] of civilians as a method of warfare, i.e. deliberately depriving them of food. Derived from the IHL principle of distinction, this rule appears for the first time in both Additional Protocols of 1977[10] and, today, is considered customary law in both international and non-international armed conflicts.[11]

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3 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions – Report, Geneva, ICRC, 2019, p. 23. [Hereafter: ICRC Challenges Report 2019].

4 IHL merely mentions steps to be taken to mitigate their negative effects on civilians and civilian objects. See: Art 27 of the Hague Regulations (1907); Art 15 of the First Geneva Convention (1949); Art 18 of the Second Geneva Convention (1949); Art 17 of the Fourth Geneva Convention (1949). [Hereafter: GCI; GCII and GCIV respectively].

5 Art 51(2) Additional Protocol I [Hereafter: API]; Art 13(2) Additional Protocol II [Hereafter: APII]; ICRC, Customary IHL Database, Rule 2.

6 Art 75 API; Art 4 APII; ICRC, Customary IHL Database, Rule 103.

7 Art. 51(5) API; ICRC, Customary IHL Database, Rule 97.

8 A hurdle in this context – at least in extraterritorial sieges – is to determine whether jurisdiction is established. Such a limitation seems less relevant in internal armed conflicts though.

9 Oxford English Dictionary: Starvation is defined as "[t]he condition of being starved of food; suffering and gradual decline caused by lack of adequate nutrition, leading eventually (if unchecked) to death." Available at: https://www.oed.com/.
As implied by this definition, the term starvation does not necessarily imply death.

10 Art 54(1) API; Art 14 APII.

11 ICRC, Customary IHL Database, Rule 53.

The Rome Statute provides that 'intentionally using starvation of civilians as a method of warfare' is a war crime in international armed conflicts.[12] There is no equivalent provision for non-international armed conflicts in the Statute, but after a careful analysis of the drafting history, Rodger Bartels concludes that this omission was the result of an unfortunate oversight.[13] In August 2019, Switzerland made an official proposal to amend the ICC Statute in order to include starvation for non-international armed conflicts.[14] Under domestic criminal law, however, individuals have been convicted for the crime of starvation in the context of non-international armed conflicts.[15] On that basis, as well as considering the absurdity of criminalizing such a conduct in international but not in non-international armed conflicts, there are good arguments to consider that the intentional starvation of civilians also amounts to a war crime in non-international armed conflicts under customary law. The ICRC and the Group of Eminent International and Regional Experts on Yemen hold this position.[16]

A key issue here is whether siege warfare when civilians are present is indirectly banned by the prohibition of the starvation[17] of civilians since, in practice, they will be the first to suffer from deprivations arising from the siege-induced isolation. What matters here is how the prohibition against starvation is interpreted. In this respect, views vary. The majority view seems to be that sieges are not prohibited even if they cause starvation, as long as their *purpose* is

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12 Statute of the International Criminal Court, Rome, 1998, Art 8(2)(b)(xxv). [Hereafter: ICC Statute].

13 Roger Bartels, "Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and some Proposals for the Future", Israel Law Review, vol. 48: 3, 2015, p. 298.

14 Switzerland: Proposal for Amendment of the Rome Statute of the International Criminal Court, 30 August 2019, ref. C.N.399.2019.TREATIES-XVIII.10. Available at: https://treaties.un.org/doc/Publication/CN/2019/CN.399.2019-Eng.pdf. See also Kevin Jon Heller, "Switzerland Proposes the War Crime of Starvation in NIACS", Opinio Juris, 9 September 2019. Available at: http://opiniojuris.org/2019/09/09/switzerland-proposes-the-war-crime-of-starvation-in-niac/.
The proposal is to add to article 8, paragraph 2 (e), the following:"(xix) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies."

15 See, e.g., Croatia, District Court of Zadar, P*erišić and Others* case, Judgment, 24 April 1997.

16 ICRC, Customary IHL Database, Rule 156; Situation of Human Rights in Yemen including violations and abuses since September 2014, Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, 2019, UN Doc. A/HRC/42/CR P.1, §358. [Hereafter: Report of the Group of Eminent Experts on Yemen 2019].

17 Yves Sandoz et al. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, Commentary to Art. 14 of APII, § 4791: "The term 'starvation' means the action of subjecting people to famine, i.e., extreme and general scarcity of food." [Hereafter: ICRC Commentaries 1987].

to achieve a military objective and not to starve the civilian population.[18] Some go as far as to require that starvation of civilians is the *'sole' or 'primary' purpose* of a siege to consider it unlawful, which would reduce considerably the value of the provisions on the prohibition of starvation.[19] In practice, it is very difficult, if not impossible, to prove that the 'purpose' – and particularly the 'sole or primary purpose' – of a siege is the starvation of civilians.[20]

In any case, this should not be the end of the analysis. It is often forgotten that, even if a restrictive interpretation is given to the starvation of civilians as a 'method of warfare' based on the notion of purpose (art 54(1) API), the prohibition of acts that have the effect of starving the civilian population, which is to be found in the Additional Protocols, is wider. As a corollary to the prohibition of the starvation of civilians, IHL also prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, agricultural areas, crops, livestock, drinking water and irrigation systems) for the specific purpose of denying these items for their sustenance value to the civilian population *or to the adverse party*, whether in order to starve out civilians, to cause them to move away, *or for any other motive*.[21]

A combined reading of articles 54(2) and (3) API shows that more than the mere purposeful starvation of civilians is prohibited.[22] Take, for instance, the destruction of a drinking water installation in the context of a siege that has the specific purpose of denying water to the adverse party. This will be considered unlawful if such destruction 'may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement' (art 54(3)(b) API). Although article 14 APII is drafted differently, it was meant to be a "simplified version of article 54 API" and not supposed to provide less protection.[23]

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18 See e.g., ICRC, Customary IHL Database, Rule 53, commentary: "The prohibition of starvation as a method of warfare does not prohibit siege warfare as long as the purpose is to achieve a military objective and not to starve a civilian population." See also ICRC Commentary 1987 to Article 14 of APII, § 4796: "Consequently the use of blockade and siege as methods of warfare remain legitimate, provided they are directed exclusively against combatants."

19 See San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Art. 102a) ('sole purpose' in relation to sea blockades); Manual on International Law Relating to Air and Missile Warfare, 15 May 2009, Art 157a) ('sole or primary purpose' in relation to an aerial blockade').

20 Laurie Blank, Sieges, "Evacuations and Urban Warfare: Thoughts from the Transatlantic Workshop", EJIL: Talk!, 17 January 2019: "(…) differentiating between sieges undertaken for lawful military purposes and those imposed with the intent to starve the civilian population can be extraordinarily difficult."

21 Art 54(2) of API; ICRC, Customary IHL Database, Rule 54.

22 Upon ratification of API, France and the United Kingdom made a reservation to the effect that this provision had no application to attacks that were carried out for a specific purpose other than denying sustenance to the civilian population. Ibid, Commentary to Rule 54.

23 ICRC Commentaries 1987 to Article 14 of APII, §4792.

The ICRC Commentaries provide an interpretation that is similar to the combined reading of articles 54(2) and (3) of API.[24]

Incidental starvation is therefore prohibited when a belligerent party takes *proactive measures to deprive the enemy from existing resources* (see 'attack, destroy, remove or render useless objects indispensable to the survival of the civilian population').[25]

The fact that incidental starvation – at least under certain circumstances – is prohibited under articles 54 API and 14 APII has led eminent scholars to consider that the Additional Protocols considerably restrict the possibility to resort to sieges. In practice, indeed, sieges will almost inevitably have the side effect of starving the civilian population or forcing its movement. Sean Watts is of the view that, under API, a siege is 'almost entirely prohibited with respect to life-sustaining objects for civilians'.[26] Beth Van Schaack highlights that, in current armed conflicts "it [is] very difficult for a commander to conduct a siege that is both successful and lawful".[27] Already in 1991, Yoram Dinstein wrote that, with the 1977 prohibition of starvation, 'a true siege would no longer be feasible'.[28] This conclusion leads Dinstein to consider that the Additional Protocols are unrealistic because a siege is such a valuable method of warfare from a military perspective.

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24 ICRC Commentary 1987 to Art. 14 of APII, paras 4806-4807: "if the objects are used for military purposes by the adversary, they may become a military objective and it cannot be ruled out that they may have to be destroyed in exceptional cases, though always provided that such action does not risk reducing the civilian population to a state of starvation."

25 The ICRC Commentaries point to a broader interpretation of incidental starvation by considering that incidental starvation may also result from an omission. Thus, preventing the civilian population from being resupplied (e.g. through the effective blocking of the entry to the city) or to deliberately decide not to resupply the civilian population would be prohibited. See: ICRC Commentaries 1987 to Article 14 of APII, §4800: "[t]o deliberately decide not to take measures to supply the population with objects indispensable for its survival in a way would become a method of combat by default, and would be prohibited under this article". The difficulty with such an interpretation is that nothing in the wording of Article 54 API or 14 APII seems to indicate that omissions are covered.

26 Sean Watts, "Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations", Research and Policy Paper, Counterterrorism and Humanitarian Engagement Project, May 2014, at 2. Available at: http://blogs.harvard.edu/cheproject/files/2013/10/CHE-Project-IHL-and-SC-Practice-concerning-Urban-Siege-Operations.pdf (Last accessed: 3 Feb 2020).

27 Beth Van Schaack, "Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime", Just Security, 4 February 2016 (on the difficulties to prosecute starvation as a crime). Available at: https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/ (Last accessed: 3 Feb 2020)

28 Yoram Dinstein, "Siege Warfare and the Starvation of Civilians", in Astrid J.M. Delissen and Gerard J. Tanja, Humanitarian Law of Armed Conflict: Challenges Ahead, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991, pp. 150-151.

Whether this prohibition of sieges causing incidental starvation is considered to be realistic or not, this is now the current state of the law for States that are parties to the Additional Protocols. What remains unclear is whether customary law goes this far as well.[29]

Proportionality as a key constraint in siege warfare

Another question is whether the IHL principle of proportionality restricts siege warfare.[30] Of course, when sieges are conducted through bombardments, the principle of proportionality applies, but one may consider the following, more complex, situation. A belligerent party is besieging a small defended town by merely preventing weapons, as well as food and other livelihood assets into the area. This party does comply with article 54 API or 14 APII. Its purpose is to weaken the enemy and obtain its surrender, not to starve the civilian population. And, the party does not attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. The belligerent party merely isolates the town and prevents it from receiving supplies. After a few weeks, the civilian population starts to exhaust its food reserves and the most vulnerable start to suffer from malnutrition and contract illnesses. After some months, the humanitarian situation becomes unbearable, the human toll among civilians is high while the expected military advantage is much lower than what the besieging party hoped for because the armed enemy controls and continues to use the means of survival that remain available.

Should we not consider that continuing the siege is disproportionate from a humanitarian law perspective? Instinctively, the answer is yes. Technically speaking, the answer is less straightforward under the law. Article 51(5)(b) of API – which encompasses the IHL principle

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29 In the ICRC Customary IHL Database (Rule 54) the ICRC considers that the prohibition of "attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population" is customary for both international and non-international armed conflicts. However, it considers that the exception to be found under Article 54(3) of API – and from which the interpretation that incidental starvation is prohibited – belongs to customary law only for international armed conflicts. The Commentary to the rule holds that "This practice recognizes, however, that when such objects are not used as sustenance solely for combatants but nevertheless in direct support of military action, the prohibition of starvation prohibits the attack of such objects if the attack may be expected to cause starvation among the civilian population. This practice includes that of States not party to API. It is doubtful, however, whether this exception also applies to non-international armed conflicts, because Article 14 of APII does not provide for it and there is no practice supporting it. (Emphasis added)" Note that this seems to contradict the earlier ICRC Commentary 1987 to APII. See above note 25. See also US Department of Defense, Law of War Manual, 2015, §5.20.4, p. 317 stating that "[g]iven the intricacy of this provision of API, it would be difficult to conclude that all of its particulars reflect customary international law".

30 Gloria Gaggioli, "Are Sieges Prohibited Under Contemporary IHL?", EJIL: Talk!, 30 January 2019. Available at: https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/#more-16877 (Last accessed: 3 Fb 2020).

of proportionality and which reflects to a large extent customary law[31] – prohibits *attacks* which may be expected to cause 'collateral damage' which would be excessive in relation to the concrete and direct military advantage anticipated. The question here is whether a siege can be considered to be an 'attack'. In my view, the answer is yes. I submit four arguments in support of this proposition.

First, the notion of attack under IHL is sufficiently broad and flexible to include sieges. Article 49 of API defines 'attacks' as '*acts of violence* against the adversary, whether in offence or in defense'. As has been notably clarified in the context of cyber warfare[32], "acts of violence should not be understood as limited to activities that release kinetic force, a point that is well settled in the law of armed conflict. (…) The crux of the notion lies in the effects that are caused. (…) Restated, the consequences of an operation, not its nature, are what generally determine the scope of the term attack."[33] As a result, the notion of "acts of violence" refers to acts that have violent consequences or that cause consequential harm. In this sense, how could sieges causing the starvation of civilians (purposefully or incidentally) not be considered as an act of violence?

Second, analogies can be drawn with blockades in international armed conflicts, with which sieges entertain a number of similarities.[34] In relation to blockades, the principle of proportionality has been included in important soft law documents, such as the *San Remo Manual* (para 102b) and the *Manual on International Law Relating to Air and Missile Warfare* (para 157b).[35] It has been argued that the San Remo Manual included proportionality because the drafters had in mind blockades enforced through the laying of mines.[36] Proportionality would thus apply in this specific instance and not to the mere fact of preventing the entry of means of survival. Without questioning this historical argument, it is a matter of fact that the actual

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31 ICRC, Customary IHL Database, Rule 14.

32 Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, Rule 92: Definition of cyber attack: "A cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects. (…) Although cyber attacks seldom involve the release of direct physical force against the targeted cyber system, they can result in great harm to individuals or objects."

33 Ibid.

34 For a definition of blockades in international humanitarian law, see How Does Law Protect in War Database. Available at: https://casebook.icrc.org/glossary/blockade (Last accessed: 3 Feb 2020).

35 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, §102b); Manual on International Law Relating to Air and Missile Warfare, 15 May 2009, §157b).

36 Discussions in the framework of the 6th Transatlantic Workshop on International Law and Armed Conflict held at the European University Institute in Florence in July 2018.

text of the San Remo Manual is not so limited and that it has already influenced State practice in its present shape.[37]

Third, there is a practical argument. Siege warfare is often a combination of kinetic force (e.g. bombings) and isolation/encirclement. Considering that proportionality would apply to only some of the methods used in the context of the siege is artificial and impractical.

Last but not least, State practice and a number of IHL experts support the argument that proportionality, and for that matter the principle of precaution, apply in the context of siege warfare. In terms of State practice, the US Department of Defense Manual states that "starvation is a legitimate method of warfare, but it must be conducted in accordance with the principles of distinction and proportionality. (…) Military action intended to starve enemy forces, (…), must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained".[38] In a similar vein, the UK Manual of the Law of Armed Conflict highlights that "[t]he principles of the law of armed conflict, particularly the rules relating to attacks, apply equally to situations of siege or encirclement."[39] The 2019 Report of the *Group of Eminent International and Regional Experts on Yemen* to the Human Rights Council held a similar position.[40] Numerous top-notch scholars have referred to the principle of proportionality in relation to sieges. For instance, Michael Schmitt, Kieran Tinkler, and Durward Johnson consider that "[s]ieges are lawful so long as directed at enemy forces (and not intended to starve the civilian population), compliant with the rule of proportionality, and consistent with the requirement to take precautions in attack."[41]

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37 The San Remo Manual specifies that "a blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document" (emphasis added). (Rule 97) Again here, it is not so much the methods/means of warfare used to enforce the blockade which matter, but rather the effect, which must be consistent with the rules set out in the document, including the principle of proportionality.

38 US Department of Defense, Law of War Manual, 2015, 5.20, p. 315.

39 UK Ministry of Defence, The Manual of the Law of Armed Conflict, Oxford University Press, 2004, §5.34.

40 Report of the Group of Eminent Experts on Yemen 2019, above n. 16, §746. See also: OHCHR Report on Yemen, 2018, §58: "Given the severe humanitarian impact that the de facto blockades have had on the civilian population and in the absence of any verifiable military impact, they constitute a violation of the proportionality rule of international humanitarian law."

41 Michael Schmitt, Kieran Tinkler and Durward Johnson, "The UN Yemen Report and Siege Warfare", Just Security, 2 September 2019. Available at: https://www.justsecurity.org/66137/the-un-yemen-report-and-siege-warfare/ (Last accessed: 3 Feb 2020) See also: Kraska, above n. 2, §9; Watts, above n. 27, p. 12.

Assuming the relevance of the principle of proportionality, the lawfulness of sieges needs to be continually monitored and assessed in light of the concrete and direct military advantage anticipated and expected incidental civilian damage (including number of civilians expected to starve, suffer from malnutrition and other nutritional deficiencies, forced to move, etc.) The duration of the siege (a few weeks or months) is thus an important consideration as well as the size of the besieged city area and the degree of presence of enemy fighters. Perhaps one way to render sieges more humane would be to further investigate how the principle of proportionality operates in the context of siege warfare.

Towards considering siege warfare as an indiscriminate method of warfare

Another way to look at the relevance of conduct of hostilities rules for siege warfare is simply to consider it (or starvation) as a method of warfare. As highlighted by the ICJ in the *Nuclear Weapons Advisory Opinion*, "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited."[42] To the extent that siege warfare cannot be directed at a specific military objective – or may not be limited in its effects – and inevitably affects civilians, it can be held that siege warfare is an indiscriminate method of warfare.

The only circumstances where sieges could then still be considered as a lawful method of warfare would be[43]: 1) if a siege is applied in areas where civilians are not present or otherwise only affects enemy armed forces/fighters; or 2) if precautionary measures such as evacuations and relief operations are accepted/undertaken in order to effectively eliminate the effects on the civilian population.

This interpretation is more protective than the one based on proportionality (developed in section 3 above) because siege warfare would then be considered illegal when it affects civilians. From a humanitarian perspective, it may thus be preferred although it does not seem to match State practice, which tends to accept the legality of siege warfare despite knowing that it will affect civilians. The previous interpretation based on proportionality better accounts for the realities of armed conflicts and the fact that, in some cases, a siege may be preferable to

42 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, §95.

43 See ICRC Commentary 1987 to Article 51§4 of API: "Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack."

alternative methods of warfare (e.g. urban fighting) to obtain the same military advantage,[44] so long as it is not expected to cause excessive damage to civilians.

Evacuations or humanitarian relief operations as precautionary measures

Sieges whose purpose is to starve the civilian population are always prohibited. Sieges that cause incidental starvation of civilians (or harm to civilians more broadly) are either prohibited under art. 54(2) and (3) API when these rules apply, or constrained by the conduct of hostilities principles, with two possible interpretations developed under sections 3 and 4. Irrespective of the interpretation chosen for siege warfare to be lawful, there is a need to find ways to protect the civilian population from its incidental effects. Two potential solutions are envisaged by IHL: evacuations and humanitarian relief. These can also be seen as part of the precautionary measures to spare the civilian population from the effects of siege warfare.[45]

a) Evacuations

The 1949 Geneva Conventions *recommend* evacuations of the most vulnerable from besieged or encircled areas.[46] The ICRC considers that the prohibition of starvation and the protection of objects indispensable to the survival of the civilian population encompassed in the Additional Protocols *requires* the evacuation of starving civilians, or – at the very least – requires both the besieging and besieged forces to authorize civilians to leave the location under siege.[47] The practice that consisted in driving back/attacking civilians who tried to escape from the besieged area, which was accepted in the past,[48] is now clearly outlawed.[49]

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44 ICRC Challenges Report 2019, p. 23: A siege "avoids the hazards of urban fighting for the besieging party and may also be a means to limit the heavy civilian casualties often associated with urban fighting". See also: Blank, above n. 20.

45 See in this sense US Department of Defense, Law of War Manual, 2015, §5.20.2, §316: "Feasible precautions to reduce the risk of harm to the civilian population or other reasonable measures to mitigate the burden to the civilian population may also be warranted when seeking to starve enemy forces."; UK Ministry of Defence, The Manual of the Law of Armed Conflict, Oxford University Press, 2004, 5.34.2 (located within a section dedicated to precautions in attacks). See also: Schmitt et al, above n. 43.

46 See Art. 17 GCIV for civilians who are "wounded, sick infirm, aged persons, children and maternity cases" and Art. 15 GCI and 18 GCII for wounded and sick combatants.

47 See e.g. ICRC Commentary 1987 on Article 54 API, §2096; Commentary on Rule 53 of the ICRC Customary IHL Database. See also: ICRC Challenges Report 2019, p. 24.

48 US Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al, High Command Case, 1948.

49 See Dinstein, above n. 29, p. 151; Beth Van Schaack, above n. 28. See also in this sense ICRC Challenges Report 2019, pp. 23-24.

International Humanitarian Law provisions do not provide much information as to how evacuations should be performed.[50] There are however a few IHL rules that are relevant either directly or by analogy. These are in particular article 49 of the Fourth Geneva Convention, which deals with deportations, transfers, and evacuations by an occupying power[51] and article 17 of Additional Protocol II on the prohibition of forced movement of civilians in non-international armed conflicts. The ICRC has also identified a number of customary rules related to displacement.[52] The ICC Statute provides that forced displacement may amount to a war crime in international and non-international armed conflicts.[53] On that basis, the following guidance may be provided.

Evacuations may be undertaken only "if the security of the population or imperative military reasons so demand".[54] Although voluntary evacuations are preferable, civilians may be evacuated against their will by a party to the conflict, but only to ensure the security of the civilian population or for imperative military reasons.[55] Attacking civilians to coerce them to leave is prohibited and amounts to a war crime.[56] Evacuations shall never be used as a form of collective punishment.[57] Humanitarian organizations have criticized evacuation of besieged areas by the Syrian government because civilians were allegedly forced to evacuate as a "punishment" for their support of the opposition.[58]

In case of an evacuation, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.[59] Similar obligations apply when civilians *flee* a besieged area (i.e. are not being evacuated by the besieging party). Recent experience from Syria has shown that evacuation from a besieged area to completely inadequate locations is an issue.[60] The besieging and besieged parties should agree on the modalities of

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50 Blank, above n. 20.

51 In general, the besieging party is not an Occupying Power as the siege aims at precisely capturing a certain city or area that is not yet under the control of the besieging party. See Kraska, supra note 2, §1.

52 ICRC Customary IHL Database, Rules 129-133.

53 ICC Statute, Art. 8§2b)viii) and Art. 8§2e)viii).

54 Art. 49§2 GCIV; 17§1 APII.

55 See ICRC Challenges Report 2019, p. 24.

56 Art. 85§3a) API; ICC Statute, art. 8§2b)i) and art. 8§2e)i).

57 Art. 33§1 GCIV; Art. 75§2d) API; Art. 4§2)b) APII; ICRC Customary IHL Database, Rule 103.

58 See e.g. Independent International Commission of Inquiry on the Syrian Arab Republic, Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate, 29 May 2018, §3.

59 Art. 49 GCIV; 17§1 APII; ICRC Customary IHL Database, Rule 131. See also Art. 4§3b) APII.

60 Above n. 60.

civilian evacuation.[61] In a context of hostilities, both parties must take all feasible precautions to avoid incidental harm to civilians and civilian objects.[62] Displaced civilians benefit from all the protections of international humanitarian law that apply to other civilians, including special protections for persons in need such as women, children, the disabled and elderly.[63] The besieging party may conduct a "screening" of persons evacuating the area (to avoid the enemy slipping out), but always in a humane manner that is consonant with international law rules and principles.

Evacuations should as far as possible not lead to the displacement of civilians to remote areas. Proximity with their place of residence should be attempted. In international armed conflicts, evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when materially impossible to do otherwise. [64] In non-international armed conflicts, evacuation may never involve displacement outside the national territory.[65]

Evacuated civilians have a right to voluntary return and should be transferred back to their homes or places of habitual residence as soon as the circumstances having prompted the evacuation have ceased.[66] This means that the displacement is temporary and "must last no longer than required by the circumstances".[67] In occupied territories, the occupying power has the *obligation* to transfer evacuated civilians back to their homes as soon as hostilities in the area have ceased.[68] In all cases, measures to facilitate return and integration must be taken.[69]

Evacuations should be conducted under the supervision of a neutral third party (State or humanitarian organization such as the ICRC or the UNHCR).[70] The primary responsibility for caring for evacuated/displaced persons rests with the governments concerned.[71] Such a responsibility includes an obligation to allow for humanitarian relief operations when needed.[72] The mere

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61 ICRC Challenges Report 2019, p. 24.

62 Arts 57 and 58 API. ICRC Customary IHL Database, Rules 15 and 22 in particular.

63 ICRC Customary IHL Database, Rule 131, commentary.

64 Article 49§2 GCIV.

65 Art. 17§2 APII.

66 ICRC Customary IHL Database, Rule 132.

67 ICRC Challenges Report 2019, p. 24.

68 Art. 49§2 GCIV.

69 ICRC Customary IHL Database, Rule 133, commentary.

70 See mutatis mutandis Art. 49§4 GCIV: "The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place."

71 See ICRC Customary IHL Database, Commentary on Rule 131. See also Blank, above n. 20 who insists on the responsibilities of both the besieging and besieged parties.

72 ICRC Customary IHL Database, Commentary on Rule 131.

fact that a displacement is illegal does not render humanitarian assistance to displaced persons unlawful.[73]

To the extent that evacuations may be seen as a solution to protect civilians from the consequences of a siege, and that relevant IHL rules are not numerous and scattered, a collection of good practices or guidance deserve to be developed. Human rights law (right to property[74], privacy, life and security, water, food, shelter, etc.) as well as principles on internally displaced persons[75] could provide further guidance.

b) Humanitarian Relief Operations

An alternative to evacuation to protect the civilian population from the effects of a siege is to allow humanitarian assistance into the besieged area. Several IHL provisions related to relief operations are pertinent in this respect.[76] These provisions show that while humanitarian assistance is required when the civilian population lacks supplies essential to its survival, it is generally still subject to the *ad hoc* consent of the parties. These apparently contradicting requirements are generally reconciled through the understanding that consent must not be withheld arbitrarily.[77] The question then is whether the besieging and the besieged parties may deny access to humanitarian relief operations when the civilian population is starving.

Some highlight that there may be very cogent reasons why the besieging party would not want to allow humanitarian assistance into the besieged area, given the high risk that such aid may be diverted in favor of enemy combatants/fighters and would not (or not solely) reach the civilian population.[78] Some States, such as the United Kingdom, even suggest that "so long as the besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area".[79]

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73 Ibid.

74 See in this sense, ICRC Customary IHL Database, Rule 133.

75 OCHA, Guiding Principles on Internal Displacement, United Nations, 2004.

76 See Art. 17 and 23 GCIV; Common Article 3 to the Four Geneva Conventions; Art. 70 API and 18 APII.

77 See e.g. ICRC Customary IHL Database, Rule 55.

78 Watts, above n. 27, p. 18.

79 UK Ministry of Defence, The Manual of the Law of Armed Conflict, Oxford University Press, 2004, §5.34.3. See also Danish Ministry of Defense, Military Manual on international law relevant to Danish armed forces in international operations, 2016, p. 419: "Only if the civilian population has received an offer to leave the town but nevertheless chooses to stay may the supply of vital necessities be cut off temporarily."

Others consider, on the contrary, that "the withholding of consent to humanitarian access that leads to starvation is considered arbitrary, hence unlawful"[80]. In the same vein, the ICRC, which provides an interpretation that combines IHL rules on starvation with those on relief operations, concludes that: "[t]he commander of a besieged force who is not in a position to provide the supplies essential to the survival of the civilian population under its control *must consent* to humanitarian relief operations for civilians. Similarly, the commander of a besieged force *must allow* humanitarian access to and relief operations for civilians remaining in the besieged area. (emphasis added)"[81] Lastly, the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflicts* states that "withholding consent to humanitarian relief operations in situations where the civilian population is inadequately supplied and the State intends to cause, contribute to, or perpetuate starvation" is arbitrary.[82] This last opinion is more restrictive than the preceding ones, as it adds the notion of intent.

In my view, in the context of a siege, the denial of relief operations while the civilian population has inadequate supplies cannot be reconciled with IHL provisions pertaining to starvation, humanitarian assistance, as well as the prohibition of indiscriminate methods of warfare and the principle of precaution. It is the duty of both the besieging and besieged parties to protect civilians from the effects of a siege. Civilians cannot be deprived from humanitarian assistance as a "punishment" for not having left the area. If civilians do not leave the area, and the siege is causing excessive damage to the civilians who remain, humanitarian assistance *must be* provided or else the siege would be rendered unlawful (disproportionate and indiscriminate).

In the most extreme cases, the absence of any attempt to spare the civilian population from the effects of a siege (through evacuations and/or humanitarian assistance) may be used as evidence that the actual purpose of the siege is (or is also) to starve the civilian population.[83]

In brief, while contemporary IHL does not completely outlaw siege warfare, we must be aware of the numerous restrictions it imposes. Considering the immense hurdles associated with sieges, it is doubtful that this method of warfare is still a valuable one. The question we may thus ask ourselves is: do we really need it?

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80 See Report of the Group of Eminent Experts on Yemen 2019, above n. 16, §745.

81 ICRC Challenges Report 2019, p. 25.

82 Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, Commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, Oxford Institute, OCHA, University of Oxford, October 2016, §51 and §96.

83 See in this sense, ICRC Challenges Report 2019, p. 24.

Conclusion

While siege warfare is not directly prohibited by international humanitarian law, it is severely constrained by it. Based on the legal arguments presented above, I submit that:

Purposeful starvation of civilians is prohibited and amounts to a war crime in international armed conflicts and arguably in non-international armed conflicts as well.

Incidental starvation of civilians resulting from the attack, destruction, removal, or the fact of rendering useless objects indispensable to the survival of the civilian population is prohibited by the Additional Protocols, and arguably under customary law.

The *principle of proportionality* constrains siege warfare. This means that the besieging party must continuously monitor and assess the lawfulness of the siege in light of the concrete and direct military advantage anticipated and expected collateral damages.

Siege warfare that is conducted without any attempt to mitigate its effects on the civilian population – i.e. *evacuations and/or humanitarian relief operations* – is contrary to IHL and violates notably the *principle of precautions*.

DEBATE WITH THE AUDIENCE

Someone in the audience asked on which basis the ICRC holds that certain types of weapons are appropriate or not from an operational perspective. In addition, the person drew from personal experience and stated one can always provide legal advice based on IHL even in urban situations. Therefore, the person questioned whether this was not just too abundant a discussion. After all, the basic principles of IHL always remain applicable.

A speaker held that first of all, weapons which are by design characterized to produce wide area effects fall under the scope of IHL. This is indeed a broad category which can make it difficult for States to implement this in their operations. Also, the notion of wide area effects is both simultaneously objective and subjective. So, it is absolute and relative. It is absolute in the sense that light weapons (for example rocket propelled grenades, RPG) fall outside the scope of this objective threshold, even when an RPG may be used in a very densely populated area and could therefore cause damages beyond its target alone.

At the same time, the question of wide area effects also depends on the size of the target. Therefore, when non-guided artillery is used in a dense populated area, compliance with indiscriminate attack, as stated in article 51 API, is highly doubtful. In addition, weapons that are specifically regulated, such as cluster munition and anti-personnel mines also do not fall under the scope of IHL.

Furthermore, it was stressed that the ICRC does not state that existing IHL is insufficient. The IHL principles of distinction, proportionality, and precaution remain fully applicable in urban warfare. However, the ICRC wants to avoid the use of EWIPA as a matter of policy and good practices irrespective of legal rules. A first observation here is that there is a pattern of great civilian harm, even if States say that they fully comply with not using EWIPA. Here, one can think of the examples of Mosul and Raqqa. The speaker was also convinced that, in many cases, the use of EWIPA would also not be acceptable from a legal point of view.

Second, there seems to be an objective difficulty of using these weapons in compliance with the provision on indiscriminate and disproportionate attacks. This is especially the case in relation to accuracy and with regard to reverberating effects.

The third observation is that it is not clear how IHL principles are interpreted with regard to EWIPA. For example, everyone agrees that indirect effects should be considered. However, guidance on what exactly is seen as a reasonably foreseeable reverberating effect remains

absent. This has led the ICRC to move the discussion beyond the legal framework. IHL remains relevant, but the risk for civilians is such that it justifies adopting a policy approach in relation to urban areas.

The person who asked the question in the first place added that he did not see a conflict between law and policy. He re-iterated that there can indeed be issues with targeting and reverberating effects (such as for example when an energy plant is targeted).

Another question from the audience wondered if, as societies rapidly change due to technology, there is also a changing conception of assets and goods. For example, operations can run through the internet. The answer stated that, in military operations, one looks at legal effects but also at cyber effects. How this will evolve in the future remains to be seen. The speaker also noted that, in addition to proportionality, distinction was another aspect which remained key. After all, in many recent conflicts, there has been an issue of 'dual use'.

An audience member also asked how the proportionality principle can be interpreted in relation to the specific military objective in siege warfare.

One of the speakers answered that, as stated in article 54 AP I on attacks against objects indispensable to the survival of the civilian population, attacking things that are essential and needed to survival is banned.

Therefore, in case of a siege, the same rules remain applicable and should thus also be considered in qualifying a military objective. However, the means to reach this objective differ. It is very interesting to read the commentary of the ICRC on article 14, AP II. In this document the ICRC states that the list of goods seen as essential to survive is not exhaustive.

Furthermore, another speaker held that article 54 AP I prohibit attack if it may be expected that civilians would be left with scarcity that would result in starvation. This means that article 54 AP I is an application of the proportionality rule. However, both the UK and France expressed a reservation on this provision and thus removed the added value of paragraphs two and three.

In addition, another comment was made on this topic which held that the Tallinn Manual had caused a bit of controversy. For example, the definition of a cyber-attack, it focuses on the effects rather than on the act itself. This especially caused damage in the *ad bellum* area and the interpretation of article 51 of the UN Charter. In addition, there is also controversy on the issue of sieges. Here, one the speakers stated that the interpretation comes from a *jus ad bel-*

lum perspective and should not be considered in an IHL discussion. During the Tallinn process, the experts did not come up with an entirely new definition of attack. Also, discussions on certain topics have always existed. However, the Tallinn Manual makes this clearer.

A second round of comments touched upon the issue of reverberating effects. Someone remarked that the way the ICRC articulates the campaign risks undermining the underlying IHL principle of proportionality in relation to reverberating effects. First, there is the question of causation, as one needs to show that an attack has a particular effect. This is very difficult in the case of psychological harm. There is also a risk of confusion because one of the speakers referred some of the times to 'reasonably foreseeable' and at other times to 'risk'. It was said that these are two different criteria within the same area. To trigger something that might be relevant legally, you must trigger something that might be 'reasonably foreseeable', however that in itself is not enough. Therefore, the risk of foreseeable harm materializing also needs to be considered.

Furthermore, the audience member believed that not clarifying these elements along the way is dangerous.

A speaker explained that the ICRC sees foreseeability and risks as two different elements, relevant to different things. Foreseeability is talked about in the context of expected incidental harm within the legal assessment of the proportionality principle. On the other hand, the risk of violation of key rules of IHL and the risk of causing indiscriminate effects is linked to the call to avoid the use of these weapons. The ICRC does not see the likelihood or the degree of likelihood of an effect materializing as an element of reasonable foreseeability. Same as the ICRC does not see a geographical or temporal proximity as an element defining foreseeability.

The recent report by Chatman House on the principle of proportionality was mentioned. According to the commentator, it is the principle as such (article 49 AP I) that limits siege warfare. Therefore, reference to article 51 AP I is unnecessary. In addition, the person asserted that siege warfare is not indiscriminate *per se*. For example, in a situation where only 20% of a city population are civilians, urban warfare would not be indiscriminate. A speaker reacted by saying that the presentation did not refer to the underlying principle of proportionality, but to the rule of proportionality. After all, an argument based on only a principle is weaker, especially as there is an existing rule.

It was also asked if some comments could be shared on how different NATO States perceive siege warfare. The answer was that it depends on the doctrine, capability, and training. NATO does try to have all members of the Alliance on the same page. In terms of doctrine and policy

on urban warfare this is certainly the case. Indeed, the most important part of a NATO operation is the operation plan which is always conducted by the common organs, which means that, at the end of the day, States need to abide.

Lastly, someone asked whether the ICRC was active in the planning of urban warfare. This was answered by stating that passive precautions are an aspect that receives less focus from the ICRC. However, it has undertaken efforts and is holding consultations with States and military experts, including expert meetings on the matter.

Panel discussion on support relationship in armed conflict: Discussing operational challenges
Table ronde sur les défis opérationnels dans le cadre de relations de soutien en temps de conflit armé

Résumé

Les Etats apportent de plus en plus fréquemment leur soutien à certains belligérants prenant part à un conflit armé, que ce soit à travers un soutien logistique, en transmettant des renseignements ou en dispensant des formations. Le soutien de la part d'un Etat n'implique pas nécessairement que cet Etat devienne partie au conflit armé. Cependant, les relations de soutien peuvent entrainer de nombreux risques juridiques, opérationnels et humanitaires.

Au cours de ce panel, les intervenants ont abordé les différents défis juridiques liés à l'article 1 des Conventions de Genève et engendrés par les relations de soutien. Les intervenants ont évoqué les risques de dilution de la responsabilité relative au respect du DIH et à la protection des civils. Cette dilution peut être le résultat de la multiplication des acteurs et des relations de soutien durant les hostilités. Les défis opérationnels soulevés par ces nouvelles dynamiques ont également été abordés, en particulier les risques d'escalade et de prolongation des hostilités et du contexte d'insécurité. Ces risques peuvent être exacerbés par de nombreux facteurs spécifiques tels que la nature des acteurs impliqués ou celle du soutien apporté.

Pour minimiser ces risques, le CICR a appelé à une plus grande responsabilisation individuelle et collective afin de réduire les risques et les conséquences négatives pour les personnes civiles. Les parties apportant leur soutien devraient également saisir l'opportunité que représente cette relation pour renforcer le respect du DIH et la protection des personnes hors de combat. Afin de limiter les effets négatifs entrainés par les dynamiques de soutien dans les conflits, des mesures devraient être envisagées lors de la préparation d'une mission de soutien, lors de son exécution et une fois la mission finie. Avant qu'une mission n'ait lieu, l'évaluation des acteurs avec lesquels elle sera engagée est essentielle pour éviter de détériorer davantage la situation sur le terrain. Finalement, une stratégie de sortie adaptée à la situation doit être soigneusement élaborée.

L'efficacité des missions de support a également été mise en doute par une intervenante. Contrairement à un mythe bien établi, les missions de soutien peuvent causer plus de tort que de bien. L'absence de troupes au sol ne signifie pas qu'une opération militaire ne présente aucun risque. En réalité les risques sont supportés de manière disproportionnée par la population civile et les

forces locales. De plus, les missions d'entrainement et de soutien telles que celles misent en place par l'Union européenne ne peuvent remplacer les solutions politiques indispensables pour remédier aux causes profondes des conflits. Finalement, certains Etats utilisent les missions de soutien afin de poursuivre leur propre agenda politique, au détriment de la stabilité de la région dans laquelle le conflit prend place.

Finalement, de nombreuses questions ont été posées concernant les missions d'entrainement militaire, sur leur utilité et leur intérêt. Le CICR a insisté sur l'importance des normes culturelles et religieuses dans la diffusion du DIH pour que les formations soient efficaces. Les intervenants ont également souligné l'importance d'engager un dialogue à tous les niveaux et avec tous les acteurs impliqués, tous les Ministères et entre les différents acteurs internationaux. Il est également nécessaire que les Etats ne se limitent pas aux missions d'entrainement militaire mais adoptent une approche globale en matière de gestion des conflits.

Introduction to the panel on support relationship in armed conflict by Elizabeth Wilmshurst, Chatman House, Moderator

It is increasingly common for states to provide various kinds of support to other states participating in an armed conflict. This can be via the provision of logistical support, intelligence, training or assistance by other means. In addition, arms sales can be regarded as another form of support. By providing such assistance the supporting state itself may be aiming to carry out its own national and military objectives, which can include security and counter-terrorism policies in particular regions on the territory of the states who are party to the armed conflict. However, one must keep in mind that giving assistance will not always mean that the supporting state itself becomes a party to the existing armed conflict.

Attention should be drawn to the fact that giving support to other states in armed conflict entails legal and humanitarian risks. Not only can there be less acceptance of responsibility for the humanitarian consequences since the lives of the supporting state's own troops are not in danger, there may also be less political dissent within the supporting state which can mean that the full consequences of giving support are not broadly explored domestically. The assisting states must be aware of these risks and must do all in their power to mitigate or avoid them.

Furthermore, there are several legal and operational issues which arise in connection with possible humanitarian risks. The legal issues include the obligation under common Article 1 of the Geneva Conventions to 'ensure respect' for international humanitarian law, and the obligation under general international law not to aid or assist another state in the commission of an internationally wrongful act (as set out in Article 16 of the International Law Commission's

Articles on the Responsibility of States for internationally wrongful acts). Leaving aside arguments about legal obligations, it should be considered whether there are *best practices* which can be adopted by the supporting state in these support relationships. For example, could the supporting state avoid or mitigate harmful consequences by influencing the partner? Furthermore, one can wonder whether training the troops of the supported country can avoid harmful humanitarian consequences – or whether the supporting state suffers from false expectations about the benefits of attending training courses.

Next to this, the aim of support relationships should be to encourage and facilitate the supported state's compliance with international humanitarian law, on the one hand, as well to avoid complicity by the supporting state in breaches of international humanitarian law.

To discuss this topic, 3 outstanding panelists respectively from the Ministry of Defence of France, the ICRC and from the Oxford Research Group will elaborate on this topic. First, they will each introduce their views. Next, they will confront their ideas. Finally, the floor will be opened for questions from the audience.

Camille Faure, Ministry of Defence, France

En vertu de l'article 1er commun aux quatre Conventions de Genève et de l'article 1er (1) du Protocole additionnel I (PA I), « *[l]es Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances* ». Cette obligation de moyens d'ordre interne et externe, qui fait, selon la Cour internationale de justice, partie des principes généraux du droit international humanitaire (DIH), s'applique à la fois aux conflits armés internationaux et non-internationaux.

La mise en œuvre de l'article 1er commun a vocation à constituer l'un des fils directeurs de la diplomatie d'un Etat et trouve concrètement à s'appliquer dans le cadre des opérations qu'il conduit.

En premier lieu, s'agissant de la mise en œuvre générale de l'article 1er commun, qui peut poser également des défis, les États sont tenus de promouvoir le respect du DIH dans leurs relations internationales. Dans cette perspective, la France s'attache à promouvoir le renforcement du respect du DIH dans les enceintes internationales, dans ses relations bilatérales comme sur le terrain. Cela constitue ainsi l'un des trois axes de sa *Stratégie humanitaire* pour les années 2018-2022.

L'*Appel à l'action humanitaire*, annoncé par la France et l'Allemagne le 1er avril 2019 à New York à l'occasion de leurs présidences jumelées du Conseil de sécurité, a visé à mobiliser les États

membres des Nations unies en vue d'une mise en œuvre effective et renforcée du DIH, s'agissant notamment de la protection des personnels humanitaires et des personnels de santé.

La France s'est également engagée aux côtés des Nations unies et d'acteurs reconnus dans la promotion du DIH et des droits de l'homme pour former des ressortissants d'autres Etats. Depuis 2016, elle forme chaque année, en lien avec l'Organisation internationale de la Francophonie, des officiers d'Etats contributeurs de troupes et d'unités de police aux opérations de maintien de la paix de l'ONU. Ces formations labellisées par les Nations unies visent à garantir une unicité de formation aux contingents d'origines diverses et à faciliter l'engagement de ces Etats dans les missions de maintien de la paix. Elles permettent de s'assurer que les programmes nationaux de formation préalables aux déploiements sont conformes aux exigences onusiennes aussi bien opérationnelles qu'éthiques et déontologiques (DIH, règles de comportement en opération, *etc*.). Depuis son lancement, cette initiative a permis de former plus d'une centaine de militaires et policiers, originaires d'Etats africains et asiatiques, et ainsi de contribuer à une meilleure protection des personnes affectées par les conflits armés.

En second lieu, comment ces stipulations peuvent-elles être mises en œuvre sur un théâtre d'opération, dans des relations avec des acteurs étatiques ou non étatiques ?

Il n'existe pas de réponse unique à une telle interrogation, qui porte sur des problématiques très sensibles, complexes et évolutives. Tout l'enjeu réside dans la mise en œuvre de mesures ou dispositions pragmatiques, adaptées aux acteurs et au contexte d'un conflit. Le champ et l'efficacité de ces mesures est toutefois limité et porte principalement sur la formation au DIH.

S'agissant des acteurs, le dialogue concernant le respect du DIH avec un Etat organisé, n'est pas du même ordre que des relations ou interactions avec des groupes armés non étatiques, dont le degré d'organisation peut varier.

A l'égard d'acteurs étatiques, la mise en œuvre de l'article 1er commun pourra notamment se manifester de plusieurs manières. Premièrement, la conclusion d'accords intergouvernementaux, contraignants en droit international et en droit interne, conduisant l'Etat soutenu à respecter le droit international humanitaire et le droit international des droits de l'homme. Ainsi, les mécanismes de renforcement du respect du DIH sont insérés dans les instruments de coopération contraignants négociés avec un partenaire. Au Mali, par exemple, les instruments bilatéraux de coopération en vigueur subordonnent la remise des personnes capturées par les forces armées françaises aux autorités territoriales compétentes à l'absence d'application de la peine de mort, de traitements inhumains et dégradants, à l'absence d'extradition sans accord

préalable des autorités françaises et à un droit d'accès permanent des forces françaises et du CICR aux personnes transférées.

Ensuite, la diffusion, la formation au droit international humanitaire et la présence de conseillers juridiques opérationnels sont importants. Pour être respecté, le DIH doit être connu, maîtrisé. En devenant parties aux quatre Conventions de Genève de 1949 et à leurs Protocoles additionnels de 1977 relatifs à la protection des victimes des conflits armés, les États se sont engagés à diffuser le plus largement possible les dispositions de ces instruments, en temps de paix comme en période de conflit armé, de telle manière qu'elles soient connues des forces armées et de l'ensemble de la population. Cette obligation de faire connaître le DIH constitue un facteur essentiel de son application effective et, par conséquent, de la protection des victimes des conflits armés.

Sur le terrain, les conseillers juridiques opérationnels du ministère des armées jouent rôle cardinal. Ils assurent la diffusion du DIH après des forces armées, françaises et étrangères. Là où les forces françaises sont stationnées conjointement avec des troupes étatiques, des actions de formation au DIH sont réalisées selon les besoins. Au Mali, les troupes maliennes sont ainsi formées au DIH par les conseillers juridiques opérationnels de l'opération Barkhane et sensibilisées aux règles de comportement à respecter avant chaque opération conjointe.

La constitution de la Force conjointe du G5 Sahel, soutenue par la France, s'est accompagnée de mesures concrètes pour participer à la formation au DIH[1].

Ainsi, le ministère des armées a répondu favorablement à la demande de la Force conjointe du G5 Sahel de disposer, à titre de renfort, d'un conseiller juridique opérationnel expérimenté pour bénéficier de son expérience et de sa compétence dans le suivi des personnes privées de liberté en situation de conflit armé. Ce conseiller juridique français, déployé auprès du poste de commandement de la Force conjointe du G5 Sahel, aide à la rédaction de règles d'engagement et de procédures opérationnelles conformes au DIH et facilite les contacts avec le CICR. Le ministère des armées a également soutenu la demande adressée par Force conjointe du G5 Sahel à l'Institut international de droit humanitaire de San Remo d'assurer, en langue

1 A cet égard, la résolution 2391 (2017) adoptée par le Conseil de sécurité des Nations unies demandait aux Etats « *d'aider les États du G5 Sahel, au moyen de contributions volontaires et par l'offre d'une assistance technique et de conseils, dans leurs efforts pour établir et appliquer [un] cadre réglementaire* » de nature à « *prévenir toute violation du DIH et du droit des droits de l'homme » et à « réduire au minimum les risques pour les civils dans toutes les zones d'opérations* ». De même, la résolution 2480 (2019) « *[r]appelle que pour obtenir la confiance de la population et, partant, assurer l'efficacité et la légitimité de la Force conjointe, il est indispensable [pour celle-ci] de respecter le cadre réglementaire visé dans la résolution 2391 (2017)* ».

française, la formation au DIH du personnel servant ou appelé à servir dans son état-major. Plusieurs représentants du ministère ont ainsi contribué à la formation au DIH et au DIDH de l'état-major de la Force conjointe à San Remo en mai et en décembre 2018.

D'autres officiers français, déployés dans le cadre de la mission de formation de l'Union européenne au Mali (EUTM Mali), assument par ailleurs des missions de formation au profit des forces armées maliennes.

Au Levant, depuis 2015, des militaires français sont déployés à Bagdad au sein des *Task Force Narvik et Monsabert* afin d'améliorer les capacités de commandement et les savoir-faire tactiques des troupes irakiennes, dans le respect du DIH. Depuis 2018, un conseiller juridique opérationnel est déployé au sein de la mission de formation de l'OTAN présente en Irak depuis 2018, laquelle vise à développer la capacité des forces de sécurité de ce pays, ses institutions de défense et de sécurité, ainsi que ses académies nationales de défense.

Enfin, des réponses aux violations du DIH, par des protestations ciblées, militaires, diplomatiques ou au plus haut niveau de l'Etat, plus ou moins médiatisées en cas de violation alléguée du DIH ou de pratiques répréhensibles. Pour être entendu, tout l'enjeu est de choisir le niveau idoine de l'autorité qui rappellera au partenaire ses obligations.

A l'égard des acteurs non étatiques, les relations éventuelles de soutien doivent nécessairement être accompagnées de préalables, d'une formation robuste au DIH et faire l'objet, autant que possible, d'un suivi rigoureux.

Ainsi, au Mali, certains acteurs signataire des accords de paix d'Alger ont pu bénéficier d'un soutien, sous réserve de répondre à trois conditions : avoir été reconnus par l'Etat malien, s'engager à respecter le DIH, collaborer avec les forces armées maliennes.

Dans le cadre de ses fonctions, le conseiller juridique opérationnel de l'officier général commandant la force Barkhane forme au DIH des membres de groupes reconnus par l'Etat malien, qui peuvent collaborer avec celui-ci et se sont engagés à respecter le DIH, tels que le *Mouvement pour le salut de l'Azawad* et le *Groupe autodéfense touareg Imghad*.

Au titre de la formation des groupes armés au DIH, dans le cadre de l'opération Barkhane, le ministère des armées a contribué à l'élaboration d'un carnet du combattant. Traduit en huit langues, ce carnet est distribué aux groupes armés organisés que les forces armées françaises rencontreraient à l'occasion de leurs opérations. Il comprend des développements et illustrations sur les principes du DIH à respecter et sur les conséquences de leur violation.

En conclusion, en dépit de leur effet généralement vertueux sur le respect du DIH, ces différentes mesures ou leviers d'influence comportent des limites évidentes, qui conduisent à envisager avec prudence et réserve une forme de soutien à des partenaires.

Tout d'abord, il n'est pas toujours possible de subordonner un soutien au respect futur de certaines obligations par des partenaires étatiques ou non étatiques, compte tenu notamment du principe de l'égalité souveraine des Etats et des rapports de force. Ensuite, les informations disponibles portant sur les opérations réalisées par un partenaire demeurent le plus souvent lacunaires et tardives. Enfin, il entre difficilement dans les missions d'une force armée, dont l'empreinte au sol est limitée et les missions opérationnelles complexes, de surveiller constamment le comportement de partenaires.

Patrick Hamilton, ICRC

Over the last 15-20 years the ICRC has seen armed conflict becoming more complex in character. This has been impelled by 3 main dynamics. Firstly, there has been a significant escalation in armed conflict driven by more than twofold increase in non-international armed conflicts. More precisely, these conflicts are asymmetric and pitch a nation-state against one or more non-state armed groups. Secondly, the actors and types of actors engaging in these conflicts have multiplied. Thirdly, there is an emerging trend of actors no longer fighting in isolation; instead they engage in support relationships to multiply effects as well as reduce their own risk, exposure and liability.

The ICRC believes that these dynamics, and in particular the relationships of support and partnering, may heighten the risks and negative consequences for the populations who exposed to them. However, they may also bring opportunities that can positively improve the protection of people on battlefields.

Risks

The ICRC currently sees 2 overarching risks to the populations exposed to these dynamics. The first one is the danger of escalation and prolongation of conflict and the insecurity that these dynamics entail. The multiplication of actors and of support and partner relationships makes an escalation of arms carriers and weapons in these conflicts inevitable. Increasing support by external actors may lead to increasing counter-support by others. These dynamics may increase the number of actors, further fragment the battlefield, significantly reinforce or establish conflict economies and vested interests, and make achieving lasting peace and stability substantially more difficult.

The second threat stems from a diffusion of responsibilities between the actors involved in support relationships for ensuring that people are protected and IHL is complied with. This

may occur even between well-intended actors due to the complication of achieving alignment towards upholding responsibilities. However, the risk of diffused responsibilities is higher when ill-intended actors are provided with additional cover to behave malignly by the complexity of the relationship and the battlefield.

There are also a series of specific risks associated with support relationships in armed conflict. First of all, the question of who, and who else, is involved will determine the risks. The types of actors may include, in addition to the states, multinational coalitions, multilateral organizations and peacekeeping forces, private military security companies (PMSCs), and non-state armed groups (NSAGs). A simple relationship may be bilateral, i.e. a third state to a host nation-state; a state to a non-state armed group; or a non-state armed group to a state. However, constellations of actors and relationships are often significantly more complicated and involve multinational or multilateral coalitions or alliances, host nation-states, PMSCs and non-state armed groups; or multiple third states supporting multiple NSAGs.

Additionally, the type of warfare will also influence the risks related to the support relationship. For example, warfare may be conducted via major combat operations or via counter-insurgency or counter-terrorism operations. Other examples include the use of foreign internal defense and irregular or special warfare (in support of opposition non-state armed groups). The risks associated with these different types of warfare vary and clearly need specific consideration.

Thirdly, the type of support given can also change. The support itself might include weapon transfers or partnered military operations (both overt and covert). Force Creation can be conducted through training, advising, accompanying and embedding, kinetic, info sharing, detention operations, and logistical support. Financial aid can also be given. Other examples of support include hosting military forces, infrastructure, surrogate private military security companies, and support to institutions – military, judiciary, rule of law, forensics, etc. While these different types of support are often talked about or seen as being separate and distinct from one another, actors frequently engage in multi-faceted relationships of support combining two, or more, of these types of help, whose associated individual and combined risks clearly vary. It is important to note the trend of increasingly blurred lines between the engagement of states in long-term security assistance/security cooperation and partnered military operations and other types of conflict-related support.

Lastly, the type of conflict-related activities will also influence the specific risks of a particular operation. These activities can include weapons management, providing training and capacity building, conducting hostilities, managing displacements and returns, ensuring delivery of,

and civilian access to, essential public services (i.e. health, water, food supplies, education). Further support activities also involve management of rehabilitation, reconstruction and recovery; disposal of mortal remains and dealing with the dead and the missing can fall under these activities. The risks from these activities for the people at the receiving end differ of course, just as the decision-making stakeholders involved in their delivery – on both sides of the support relationship.

Humanitarian Consequences

The ICRC is concerned that the risks outlined above frequently contribute to the significant escalations of harmful consequences for populations exposed to them on the battlefield.

The overall consequence the ICRC sees across many contexts is an increased exposure of populations to harm as a result of the general militarization of society whenever support is provided to existing armed actors or when creating new forces. Whilst many foreign states see themselves as playing a relatively minor individual role in creating, training, and assisting individual forces, the collective effect is often a major escalation of the personnel and means by which violations of IHL can take place.

This escalation applies to the full spectrum of negative humanitarian consequences, and can include higher numbers of those killed, wounded, and disabled; malnutrition, epidemics, higher morbidity and mortality rates and mental health deterioration; a reduced resilience and economic capacity; the destruction of civilian property and essential infrastructure, forced/obstructed displacement and returns; demographic re-engineering; separation from family members; stigmatization, protracted societal grievances, instability and conflict; emergency health, food, water, shelter, education and other needs; reconstruction and development needs; missing family and community members.

Ultimately, the consequence for populations is also a question of who they should turn to for protection, security, and justice on these battlefields. Do they have to rely on the array of local actors? On the governmental forces that are behind or against them? Or on the multiple international actors with competing agendas that are active on and/or just off the battlefield?

What can a government that is preparing to support a party to an armed conflict do to manage the risks associated with that support?

In the first place the ICRC is calling for greater individual and collective responsibility-taking to reduce the risks and negative consequences for people in conflict globally.

The ICRC believes that governments (and indeed any actor) preparing to provide or receive support should be doing more to factor into their decision-making not only the risks and opportunities for the state (i.e. themselves), but also the risks to the populations exposed to their support relationships. In doing so, they should think first and foremost about the 2 main risks of escalation and the diffusion of responsibilities previously discussed; as well as integrating the more specific risks listed above.

However, the ICRC would also encourage thinking about the opportunities that engaging in relationships of support and partnering may bring to ensure that civilians and those hors de combat are better protected. Investing in the relationship with a partner to prevent IHL violations, operationalizing the law in operations and taking appropriate steps when there are behavioural concerns may contribute not only to mitigating some of the risks, but to greater levels of protection for people exposed than would be the case if there were no relationship of support.

To mitigate the risk of a diffusion of responsibility and optimize the opportunity of enhancing respect for IHL through support relationships, it seems helpful to frame the thinking notionally in terms of 3 main areas of engagement, namely the readiness to engage in a support relationship its implementation, and the drawdown.

Within that notional "Pre-During-After" construct, there are practical measures in which governments can invest to manage the risks identified above, but that are highly dependent on applying a contextualized approach.

Regarding the readiness to engage, the following measures can be implemented. First of all, normative engagement can be conducted. More precisely, this means engaging on the issues of legal obligations and other normative frameworks of behaviour between partners. Furthermore, internal readiness to engage can be established. Here, the question is whether you as a state, your personnel, and your systems are ready to engage in a support relationship across the spectrum of actors, types of warfare, types of activities, and types of support. Finally, roles and responsibilities should be assessed, framed and clarified. Both internally and with the partner.

Regarding the implementation phase, focus should be on the following actions. First, institutional capacity to protect people during armed conflict and in its aftermath should be supported. It is important to not only focus on military support, but also assistance regarding the rule of law, judicial capacity, detention infrastructure and forensic capacity should be considered. Additionally, partner forces can be trained and advised on IHL and its contextualized operationalization. Also, supporting states can assist by engaging in operational oversight,

joint operations and substitution for certain functions. Furthermore, transparency, oversight, and accountability need to be well established and functioning within supporting actor systems. Finally, the monitoring, evaluation, and accountability capacity of the supported partner should also be established.

Some points also need to be considered concerning the last phase, drawdown. It is important to have an exit strategy through a structured disengagement that mitigates the humanitarian consequences of doing so – that considers doing so across at least the 3 scenarios of "victory", "protracted engagement but diverging agendas" and "defeat". Moreover, it seems critical that lessons learned are regularly fed into adjusting the engagement throughout; and into the adaptation of longer-term strategic and tactical approaches to partnering in conflict.

Abigail Watson, Oxford Research Group

The failure of two costly military interventions in Iraq and Afghanistan to establish the expected levels of stability has led some commentators to announce the "death of the nation-building project."[2] Placing comparable numbers of Western boots on the ground, except in the case of a direct threat to state survival, does not seem likely – at least for another generation, when national budgets may have recovered and the memory of those campaigns is more distant.[3] Despite these restrictions, governments remain concerned about potential terrorist threats emanating from places like Iraq, Syria, Libya, Somalia and the Sahel. In this strategic environment, states like the UK work with local and regional partners who do the bulk of frontline fighting against shared threats. Instead of deploying large numbers of their own troops, these same states play a largely supporting role, providing services such as training, arms, intelligence and air-support to regional, national and local actors engaged on the frontline.

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2 Doug Bandow, "The Nation-Building Experiment That Failed: Time For U.S. To Leave Afghanistan," *Forbes*, March 1, 2017, https://www.forbes.com/sites/dougbandow/2017/03/01/the-nation-building-experiment-that-failed-time-for-u-s-to-leave-afghanistan/#35f9a24c65b2.

3 Rachel Gribble, Simon Wessley, Susan Klein, David Alexander, Christopher Dandeker, Nicola T. Fear, "British Public Opinion after a Decade of War: Attitudes to Iraq and Afghanistan," *Political Studies Association*, 2014, https://www.kcl.ac.uk/kcmhr/publications/assetfiles/2014/Gribble2014b.pdf; BBC, "David Cameron: 'Syria Is Not like Iraq,'" *BBC News*, August 29, 2013, http://www.bbc.co.uk/news/uk-politics-23883970; Economist, "Missing in Action," *The Economist*, March 8, 2014, http://www.economist.com/news/britain/21598654-britain-needs-strategy-make-best-use-its-shrinking-military-capabilities-it-isnt; Richard Norton-Taylor, "UK Military Operations since Cold War Have Cost £34bn, Says Study," *The Guardian*, April 23, 2014, sec. Politics, https://www.theguardian.com/world/2014/apr/23/uk-military-operations-costs; Shashank Joshi, "Future Wars Will Need a More Versatile Response," *The Telegraph* July 13, 2015, sec. News, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11735180/Future-wars-will-need-a-more-versatile-response.html.

Rather than acknowledging the risks and dilemmas associated with these types of support relationships, many states now portray them as a way to both avoid costly interventions like those in Iraq and Afghanistan and enable local and regional forces to provide their own security more autonomously in the future. For instance, the U.S.'s 2018 *National Defense Strategy*, said: "We will broaden our range of partners to combat radical Islamist terrorism, Iran-sponsored terrorism, and other forms of violent extremism; encourage capable partners to play a larger role in counterterrorism efforts; and assist other partners so that they can eventually address terrorist threats independently."[4] Similarly, the UK's 2018 *Government's Approach to Stabilisation*, Stated that: "Stabilisation seeks to support local and regional partners in conflict affected countries to reduce violence, ensure basic security and facilitate peaceful political deal-making, all of which should aim to provide a foundation for building long term stability."[5]

For some, the international coalition against the so-called Islamic State (IS), has shown this approach can deliver these objectives. In these campaigns international actors partnered with local partners – such as the Peshmerga in Iraq, the Syrian Democratic Forces (SDF) in Syria and Misratan militias and General Haftar's forces in Libya – to push IS back. In doing so, Western forces lost few of their own forces, while the anti-IS coalition "achieved a singular success" in ousting IS from an area the size of Great Britain.[6] This has led many to conclude "it was a 'by, with and through' that actually worked."[7]

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4 Jim Mattis, "Summary of the 2018 National Defense Strategy," 2018, https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf

5 Stabilisation Unit, "The UK Government's Approach to Stabilisation: A Guide for Policy Makers and Practitioners," *HM Government*, December 19, 2018, https://www.gov.uk/government/publications/the-uk-governments-approach-to-stabilisation-a-guide-for-policy-makers-and-practitioners.

6 Deborah Haynes, "British Soldier Captain Dean Sprouting Dies on Iraqi Base," *The Times*, February 3, 2018, sec. News, https://www.thetimes.co.uk/article/british-soldier-captain-dean-sprouting-dies-on-iraqi-base-c06mvwzzp; "UK Armed Forces Death: Operational Deaths Post World War II", Ministry of Defence, March 28, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789825/20190328_UK_Armed_Forces_Operational_deaths_post_World_War_II-0.pdf; Chris Stephen, "Three French Special Forces Soldiers Die in Libya," *The Guardian*, July 20, 2016, (Accessed November 6, 2019): https://www.theguardian.com/world/2016/jul/20/three-french-special-forces-soldiers-die-in-libya-helicopter-crash; Mona Yacoubian, "'By, With, Through' Was the Best Hope for Syria — And Ending 'Endless Wars'" Defense One, October 10, 2019, https://www.defenseone.com/ideas/2019/10/through-was-best-hope-syria-and-ending-endless-wars/160540/; Josie Ensor, "British Soldier Killed by IED in Syria in First UK Troop Death in Fight against Isil," *The Telegraph*, March 30, 2018, https://www.telegraph.co.uk/news/2018/03/30/british-soldier-killed-ied-syria/.

7 Gayle Tzemach Lemmon, "The Sense in Syria's Senselessness," War on the Rocks, October 28, 2019, https://warontherocks.com/2019/10/the-sense-in-syrias-senselessness/; "Analysis: Trump's 'success' in Syria Cedes Region to Russia," Al Jazeera, October 24, 2019 (Accessed October 30, 2019): https://www.aljazeera.com/news/2019/10/analysis-trump-success-syria-cedes-region-russia-191024092549326.html.

However, despite the promises of these operations, the long-term prospects for peace and stability in Syria, Iraq and Libya as well as many other places around the world show this approach has risks. To understand these risks the Oxford Research Group undertook field research in Iraq, Afghanistan, Kenya and Mali and spoke to British and international soldiers rotating out of Nigeria and Somalia. It also ran almost twenty closed-door roundtables in London with over 100 experts from the military, government, academia and civil society (both in Europe and the U.S. and from countries impacted by support relationships, such as Yemen, Syria, Chad and Somalia).

This research has revealed several distinct challenges to support relationships, especially those based on militarily-focused, tactical training to address shared threats and instability abroad. Unless understood, this could lead to states doing more harm than good in the places where they intervene and perpetuating conflict rather than addressing its root causes. To illustrate, the rest of this contribution unpicks three common myths about support relationships: 1) that a light footprint means the risks are minimized, 2) that tactical training can provide a "quick fix" to a partner's problems and 3) that such engagement can be used to build political access and influence.

Light footprint doesn't mean risk free

In support relationships the fact that states intervene with a light footprint does not mean that the risks associated with military intervention are removed, or even mitigated. In fact, in many cases, while Western forces may be removed from the frontline, civilians and partner forces often bear a disproportionate amount of risk. Similarly, military intervention – even on a small footprint – can still have long-term, detrimental implications for peace and stability. For instance, while providing training, equipment and air support to local forces in the fight against IS, Western forces lost very few soldiers while pushing back the group but civilians and local partners on the ground suffered significantly.

Iraqi forces had been deeply traumatised by the experiences of 2014, and in many cases were reluctant to advance without heavier levels of international air support than might otherwise have been considered ideal in densely populated urban terrain. The consequences of this can be seen clearly in western Mosul, the final stronghold of IS in the city, where around 15 neighbourhoods have been completely destroyed. These districts previously housed around 230,000 residents, leaving large numbers of internally displaced people who will not be able to return in the short to mid-term.[8] Three-quarters of Mosul's roads, all of its bridges, and most

8 "Recovery in Iraq's War-Battered Mosul Is a 'tale of Two Cities,' UN Country Coordinator Says," UN News, August 8, 2017, https://news.un.org/en/story/2017/08/563022-recovery-iraqs-war-battered-mosul-tale-two-cities-un-country-coordinator-says.

of the electrical network have also been destroyed, and many buildings have been rigged with explosives and booby-traps by retreating IS fighters.[9] UN estimates suggest that 8 out of 10 buildings damaged in Mosul were residential buildings, with 8,475 houses destroyed – more than 5,500 of which in west Mosul's Old City.[10] According to an investigation by *The New York Times* (from April 2016 and June 2017 of the sites of nearly 150 airstrikes) one in five of the coalition strikes we identified resulted in civilian death.[11]

Similarly, while the Western footprint was relatively small in these campaigns, the long-term consequences of working with certain groups in the fight against IS are likely to loom large in the Middle East for years to come. In Iraq, empowering the Peshmerga and the Popular Mobilization Forces (PMF, largely Shia paramilitaries) throughout the course of the campaign now threatens to weaken the unity of an already fragmented Iraqi security sector. Many Iraqis have recently begun claiming that the Iraqi Army "is lucky if it can be considered the fourth-strongest army in Iraq—behind, Kurdistan's Peshmerga forces, the [PMF] and Iraqi tribal fighters."[12]

In Syria, working with the SDF pushed back IS and established enduring governance structures in Kurdish majority areas, but the group was not seen as legitimate by Arab communities. Moreover, the perceived links between the SDF and the Kurdish Workers Party (Partiya Karkerên Kurdistanê [PKK]) – a group leading an armed insurgency against the Turkish State – has meant that support to the group remains unacceptable to the Turkish government. This has led to worsening relations between the West and NATO-ally Turkey. It also led to flare ups in violence; for instance, in January 2018, Turkey launched an air-ground operation against Kurdish forces in the Afrin district of Syria, in response to U.S. efforts to build a Kurdish led border security force – which would have positioned "potentially… thousands of Kurdish militia fighters along Turkey's southern border."[13] A two-month military campaign saw Turkish-backed

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9 Igor Kossov, "'Mosul Is Completely Destroyed,'" *The Atlantic*, July 10, 2017, https://www.theatlantic.com/international/archive/2017/07/mosul-iraq-abadi-isis-corruption/533067/.

10 Lucy Rodgers, Nassos Stylianou, and Daniel Dunford, "What's Left of Mosul?," BBC News, accessed February 27, 2018, http://www.bbc.co.uk/news/resources/idt-9d41ef6c-97c9-4953-ba43-284cc62ffdd0.

11 Azmat Khan and Anand Gopal, "The Uncounted," *The New York Times*, November 16, 2017, https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html.

12 Renad Mansour and Faleh Jabar, "The Popular Mobilization Forces and Iraq's Future," Carnegie Middle East Center, April 28, 2017, https://carnegie-mec.org/2017/04/28/popular-mobilization-forces-and-iraq-s-future-pub-68810.

13 Eric Schmitt, "Turkey's President Assails U.S.-Trained Kurdish Border Force," *The New York Times*, January 15, 2018, https://www.nytimes.com/2018/01/15/us/politics/syria-turkey-kurds-border.html.

militias take over Afrin. Before this offensive, Afrin had remained relatively untouched by the war – however, afterwards, the situation deteriorated significantly.[14]

In Libya, by supporting Misratan forces, international actors arguably undermined efforts to bring aligned militias under the meaningful control of the UN-backed Government of National Accord (GNA). Their backing of General Haftar empowered an individual who has repeatedly sought to politically and militarily challenge the GNA – most recently through the military offensive he launched on Tripoli in April 2019 which has killed around 2200 people and displaced 146 000.[15] In doing so, they have undermined any hope the GNA had of uniting non-state groups within a common state security sector. Now, the GNA lacks any "real coalition of political and armed groups backing it besides the moderate elements in Misrata, which have increasing reservations about the government" and, despite the fact that IS was pushed back, "Libya is more polarised and fragmented than ever."[16]

The only way to address some of these failures is to recognise the problems of the current approach and that, relatively small or not, poorly planned or poorly coordinated activities can still have a lasting and detrimental impact on peace and stability.

Tactical training does not fix political problems

One reason for these failures is that militarily-focused, tactical efforts with partner forces cannot address instability when most of the problems facing the places where the UK is engaged are deeply political and, as such, require political solutions. For instance, since 2007, a depressing 23% of the violent incidents against civilians recorded worldwide were perpetrated by state forces rather than by anti-regime groups.[17] In such contexts, the appropriate response will not be tactical or militarily-focused solutions. Instead, building the capacity of predatory

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14 "Turkish-Backed Rebels Looting in Afrin," BBC News, March 19, 2018, http://www.bbc.co.uk/news/world-middle-east-43457214; Carlotta Gall and Anne Barnard, "Syrian Rebels, Backed by Turkey, Seize Control of Afrin," *The New York Times*, March 19, 2018, https://www.nytimes.com/2018/03/18/world/middleeast/afrin-turkey-syria.html; Alex Rossi, "Kurds Say Syrian City of Afrin Is Being 'ethnically Cleansed' by Turkish Military," *Sky News*, March 10, 2018, https://news.sky.com/story/kurds-say-syrian-city-of-afrin-is-being-ethnically-cleansed-by-turkish-military-11283062.

15 "Air Raids in Libyan Capital Kill Five: Ministry," December 2, 2019, https://news.yahoo.com/air-raids-libyan-capital-kill-five-ministry-094249591.html.

16 Frederic Wehrey and Wolfram Lacher, "Libya After ISIS," Carnegie Endowment for International Peace, February 22, 2017, https://carnegieendowment.org/2017/02/22/libya-after-isis-pub-68096; Hayder al-Khoei and Mattia Toaldo, "After ISIS: How to Win the Peace in Iraq and Libya" (ECFR, January 4, 2017), http://www.ecfr.eu/publications/summary/after_isis_how_to_win_the_peace_in_iraq_and_libya_7212.

17 Armed Conflict Location & Event Data Project (ACLED), "ACLED Data Export," ACLED Data, 13 April 2019, <https://www.acleddata.com/data/>, accessed 22 April 2019.

armed forces will feed a self-perpetuating cycle of violence and conflict that currently sees almost half of all post-civil war countries relapse within five years.[18] However, as the U.S. Stabilization Assistance Review noted "the international community is providing high volumes of security sector training and assistance to many conflict-affected countries, but our programs are largely disconnected from a political strategy writ large, and do not address the civilian-military aspects required for transitional public and citizen security."[19]

This is evident in many countries in the Sahel and Horn of Africa, where governments have used international support to increase the capacity of their security sectors but have failed to address the root causes of instability – such as abuses by predatory state forces, "disunity along ethnic lines, economic discontentment, limited territorial control, and corruption and weak institutions."[20] In this sense, short-term activities, which focus on "defence and security institutions" but allow oversight to remain "weak and ineffective … can lead to a situation where rights-violating security forces become better equipped to do what they have always done."[21] In turn, this "risk[s] further undermining human security" when populations are trapped "between increased violence of abusive security forces and the terror of non-state armed groups."[22]

In Nigeria, one British soldier interviewed by the Oxford Research Group said that the international effort was "treating the symptoms not the causes of the problem [when] the whole defence structure here needs institutional reform."[23] In Mali, the EU is currently training large numbers of local troops in basic soldiering without putting much pressure on the government in Bamako to introduce structural reforms. This is despite the fact the Malian Armed Forces (and government) have been accused of ethnic bias. Accelerating the growth of an unrepresentative force in the context of ongoing conflicts between different ethnicities in Mali could be extremely detrimental to long-term security.[24] In Somalia, internationally delivered

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18 Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It (New York: Oxford University Press, 2007), pp. 27, 34, and 177.

19 "A Framework For Maximizing The Effectiveness Of U.S. Government Efforts To Stabilize Conflicted Affected Areas."

20 Zoe Gorman, "Pursuing Elusive Stability in the Sahel | SIPRI," SIPRI, March 26, 2019, https://www.sipri.org/commentary/topical-backgrounder/2019/pursuing-elusive-stability-sahel.

21 Katrin Kinzelbach and Yasmine Sherif, "Public Oversight of the Security Sector: A Handbook for Civil Society Organizations" (United Nations Development Programme, 2008), https://www.dcaf.ch/sites/default/files/publications/documents/CSO_Handbook.pdf.

22 Emily Knowles and Jahara Matisek, "Western Security Force Assistance in Weak States," *The RUSI Journal* 164, no. 3 (April 16, 2019): 10–21, https://doi.org/10.1080/03071847.2019.1643258.

23 Telephone Interview (05/10/2018)

24 Annelies Hickendorff, "Civil Society White Book on Peace and Security in Mali" SIPRI, July 2019, https://www.sipri.org/publications/2019/other-publications/civil-society-white-book-peace-and-security-mali-2019-english-summary.

short-term training courses are unlikely to "lead to locally credible and legitimate governance and security institutions."[25] In fact, as one soldier told the Oxford Research Group, the Somali National Army (SNA) are currently "just another militia, albeit an apparently legitimate militia."[26] These problems are unlikely to be addressed by more training and may even make matters worse by providing the means for the SNA to more ably exploit the local population.

This could exacerbate instability and violence in these regions. In some areas, predatory states have further alienated the civilian population and pushed them more towards extremist groups.[27] In Somalia, the Oxford Research Group were told that the abuses of the SNA are "a big recruitment tool for Al Shabab because… they steal, rape, etc. Same as others, but this time in uniform, with Somali flags on it."[28] This reflected the findings of Anne Speckhard and Ardian Shajkovci, who said of Al Shabab: "Adept at blaming the government as the perpetrator of injustices and discrimination, the group is able to generate resonance in those who do not know how, or do not wish to, achieve justice and address their particular circumstances in a nonviolent manner."[29] Again, during interviews in Mali, it was said that "[i]njustice is actually a huge motivator among the people I've spoken to who end up joining [extremist] groups." Similarly, an International Alert study on young Fulani people in the regions of Mopti (Mali), Sahel (Burkina Faso) and Tillabéri (Niger) found "real or perceived state abuse is the number one factor behind young people's decision to join violent extremist groups."[30]

Partnered operations cannot focus on access and influence

Another reason for the failings of these support relationships is that states often use them to gain political access and influence rather than to build long term peace and stability in the places where they get involved. For instance, one British soldier said of his training activities

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25 Louise Wiuff Moe, "Between War and Peace: Capacity Building and Inclusive Security in the Grey Zone," Peace Lab, May 30, 2018, https://peacelab.blog/2018/05/between-war-and-peace-capacity-building-and-inclusive-security-in-the-grey-zone.

26 Telephone Interview (20/10/2016)

27 See for example; Meg Aubrey et al., "Why Young Syrians Choose to Fight: Vulnerability and Resilience to Recruitment by Violent Extremist Groups in Syria" (London: International Alert, 2016), https://www.international-alert.org/sites/default/files/Syria_YouthRecruitmentExtremistGroups_EN_2016.pdf; Vera Mironova, Loubna Mrie, and Sam Whitt, "The Motivations of Syrian Islamist Fighters" (West Point: Combating Terrorism Center at West Point, October 31, 2014), https://ctc.usma.edu/the-motivations-of-syrian-islamist-fighters/.

28 Telephone Interview (20/10/2016).

29 Anne Speckhard and Ardian Shajkovci, "The Jihad in Kenya: Understanding Al-Shabaab Recruitment and Terrorist Activity inside Kenya—in Their Own Words," *African Security* 12, no. 1 (January 2, 2019): 3–61, https://doi.org/10.1080/19392206.2019.1587142.

30 Luca Raineri, "If Victims Become Perpetrators" (International Alert, June 2018), https://www.international-alert.org/publications/if-victims-become-perpetrators-violent-extremism-sahel.

in Kenya: "As an embedded security adviser, am I making these people any better? Probably not. However, I am sending a political message." Nor is this unique to the UK. For instance, a number of experts have highlighted that smaller states may undertake Security Force Assistance operations to "be considered a reliable and capable member of an organisation such as the EU, and to improve relations with larger States, foremost the US."[31] Similarly, the increased engagement of a number of Gulf States in the Horn of Africa has led some commentators to fear that the region may become another area in which Iran and Saudi Arabia compete for access and influence.[32]

Attempts at balancing national and international objectives are understandable, and even unavoidable, when working with international coalitions. However, it can become deeply problematic when nations pursue their own agendas at the expense of regional stability. A Chadian expert interviewed by the Oxford Research Group noted that different nations seeking political access and influence with the host nation can lead to a less effective international effort.[33] Certainly, international efforts in the Sahel and the Horn of Africa are defined by many actors engaged in parallel, and often disjointed, activities, which end up duplicating – and even contradicting – the efforts of allies. The African Union Mission in Somalia (commonly known as AMISOM) relies on a network of external partners for "logistical, financial and security force assistance", with the UN, EU, and bilateral partners such as the UK and the U.S. all offering support. However, while the volume and variety of these activities requires careful coordination, they "have been characterised by fragmentation rather than unity of effort."[34] Beyond poor coordination, some countries have actively side-lined international organisations and other countries operating in the same region. For instance, International Crisis Group said of Saudi Arabia: "The Kingdom prefers to work bilaterally in most cases and has ignored – if not intentionally side lined – multilateral organisations such as the African Union and the Intergovernmental Authority on Development."[35]

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31 Øystein Rolandsen, Ilaria Carrozza, and Nicholas Marsh, "Small States' Security Force Assistance in the Sahel: Lessons Learned and Future Challenges," Policy Brief (PRIO, 2019), https://www.prio.org/Publications/Publication/?x=12135.

32 "Intra-Gulf Competition in Africa's Horn: Lessening the Impact," Crisis Group, September 19, 2019, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/206-intra-gulf-competition-africas-horn-lessening-impact.

33 Telephone Interview (05/07/2019)

34 Paul D. Williams, "Assessing the Effectiveness of the African Union Mission in Somalia (AMISOM)," (EPON, 2019) https://effectivepeaceops.net/wp-content/uploads/2019/04/EPON-AMISOM-Report-LOWRES.pdf.

35 "Intra-Gulf Competition in Africa's Horn."

Prioritizing political access and influence above long-term peace and stability can also create a situation where countries provide a host nation with military support – because it will provide political access and influence – even though regional stability would be better served by a greater focus on, say, poverty reduction, corruption or security sector reform.[36] For instance, one roundtable participant said of the international effort in Niger, "it is one of the poorest countries in the world, but the focus on food security has fallen on deaf ears, while at the same time there is a whole list of countries queueing up to provide more military support."[37]

Conclusion

For some, support relationships hold the promise of avoiding costly military interventions, while still engaging abroad against perceived threats and, potentially, building local and regional capacity to address these threats more autonomously in the future. However, contemporary campaigns show that the way in which support relationships have been conducted – through militarily-focused, tactical support – have not delivered on this promise. Moreover, in some cases, these relationships have exacerbated instability and violence. To address this, it is essential that states understand the inherent dangers of such engagements and realise that a light footprint does not mean risk free. Additionally, focusing on tactical training is unlikely to address the drivers of instability when the problems are deeply political – and attempting to do so may even make matters worse when it empowers rights violating states to do what they have always done. Relatedly, these activities should not focus solely on building an intervening state's own political access and influence, as doing so is likely to incentive states to prioritise their own national objectives above regional peace and stability.

Panelists' comments

First Abigail Watson commented on the two other speakers' presentations. She seconded the fact that often the level of help issued by the supporting state is quite tactical and can thus only offer an advantage on that level. It cannot, by its nature, lead to political change. However, on the tactical level itself the effects remain quite small in terms of soldiers trained and the number of personnel deployed to do this. As only a few of the soldiers will know how to tackle certain issues and be operationally capable of facing certain situations, it will not change the nature of the course. There is no focus on greater institutional change, although this should indeed be the focus.

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36 Rita Abrahamsen, "Return of the Generals? Global Militarism in Africa from the Cold War to the Present," Security Dialogue 49, no. 1–2 (February 1, 2018): 19–31, https://doi.org/10.1177/0967010617742243.; Roundtable participant, 17/09/2019

37 Roundtable participant (17/09/2019).

Moreover, Patrick Hamilton also commented on the issue of training. He said that the devil is always in the details. Therefore, supporting states should conduct a thorough assessment of the capacity of the actor they will train and the context the actor operates in. To do this, the following questions should be asked: what is the actor able to do? Who are you going to train within the structure of the actor? What is the command structure? What are the cultural norms of this actor? What will be the end state if you leave this actor? Will the actor behave over the longer term, including once you have left? Other questions that present themselves are: can the training be given in a classroom? Or would it be better to have an operational training? How long should the training be? It should be emphasized that a two-week course on IHL might not be sufficient to qualify as a responsibility carried out by the supporting state.

Someone from the audience added that the EU currently has three training missions in Africa (Mali, Central African Republic, and Somalia) where it helps the state rebuild its armed forces in the framework of a democratic society. The speaker stated that addressing the tactical level *as such* is simply not enough. Work should be conducted at all levels. This includes the sub tactical level but also the strategic (military and political) and operational levels. Training is thus only one component of a spectrum. Only when the different aspects are tackled, can a difference be made.

Furthermore, the EU provides advice in its training missions at the highest levels, including advising the office of the president, the minister of defence, the foreign minister and the office of military strategy. The EU thus tries to ensure a holistic approach and an interoperability between the different forces of a state. After all, whatever a soldier decides on the field is based on doctrine and doctrine is based on strategy. So, although the tactical level is the end of the chain, training (strategy and doctrine) should focus on the 'head of the snake'. Ultimately, the higher level decides what soldiers will do in the field. Finally, it was also added that the EU only trains the armed groups of states and thus does not conduct business with non-state armed groups.

Another remark from the audience related to the time factor. Reference was made to a capacity building project (a joint British-Dutch project) in Uganda, focusing on military legal advice to the higher levels of the government. The aim of the project is that higher ranked officials will become trainers themselves over the long-term. The speaker from the audience believed that this example was not the way forward. After all, it is not just a matter of training; (national) practices on which training can build on are also needed. Solely training people will not make a difference as the system in place is simply inadequate and will not allow a change in behavior. The speaker mentioned a training on IHL of Saudi-Arabian soldiers which was considered as a complete waste of time since the Saudi-Arabian system does not have a rule of law and

all powers lay with the Royal family of Saudi-Arabia who can thus trump everything. Training should thus not be considered as a short-term fix unless other problems are also addressed over the long term.

Camille Faure added that regarding the issue of time it is important to make a distinction between EU missions and missions of states. After all, the goal of EU missions is to rebuild a state. Even if the objective of both missions can be to enable local armies to deal with a threat, for example ensure the security of their territory, the missions are in essence not the same. When looking at the evaluation and appropriateness of a certain mission (including the short- and long-term goals) this should be kept in mind.

Abigail added that focusing on different levels is indeed important. However, connecting on those level is as important as having the dialogue on each level. She relied on her research to assert that soldiers in EU missions are sometimes not well briefed on the end point they are expected to achieve via these missions. This can of course have a detrimental impact on the tactical level of the mission. She added that tactical trainings are often seen as a measure that states can take. They are not seen as an essential aspect for the contributing countries. This has consequences on how much a state wants to invest politically, economically, and military. She stressed that if such trainings are conducted, cultural awareness of the situations you are training in should be included. For example, she referred to her research in which she had concluded that training would never work in some states, regardless of how much training would be given. According to her, this was due to the fact that becoming a trainer was not seen as good vocation in these countries. Therefore, the best soldiers would never want to be trainers in the first place. She referred to the work of Larry Lewis who had also researched the case of Saudi-Arabia. In his work, he reported that as long as he talked to individual soldiers everything went well. However, everything fell apart at the structural level and it would never go anywhere. Abigail added that trainings could, in some cases, foster instability. Here, she referred to her co-researcher Emily Knowles (also from the Oxford Research Group), who argues that in situations where non-state armed groups are provided with training, these groups can become very powerful. This can of course change the regional situation, such as with the IS-coalition. In terms of trainings for a state, this boils down to the question of whether the biggest drivers of instability are corruption and predatory state forces. What is the impact then of training these forces to do what they already did, but better?

Debate with the audience

The question of how the message of IHL is communicated to non-state armed groups was posed. It was questioned whether Red Cross societies and the ICRC give trainings from the cultural viewpoint of these groups or whether a more western point of view was adopted.

A panelist took the floor and answered that culture was indeed a factor that was looked at. For example, the ICRC engages with jihadi armed groups in a protection dialogue. In such situations it makes more sense to look at IHL from an Islamic perspective to see where the compatibilities are rather than have a strict IHL dialogue. A few years ago, the ICRC also published a long-term study on the roots of restraint. This study looked precisely at the issue of how actors are structured (heavily centralized as state armed forces tend to be or decentralized as network actors) poses significant problems on how command and control is implemented and how you engage with this from an IHL perspective. When groups are more decentralized, more emphasis will probably be given to ethos and culture. It is increasingly visible that understanding and assessing the ethos and culture of actor results in better long-term engagement and impact.

It was asked whether, apart from training, the ICRC gives recommendations to governments. A speaker stated that rather than recommendations, it was more about asking questions that can be relevant while engaging with actors. In relation to recommendations, it was recognized that the ICRC was still in the learning process. However, the ICRC fully agrees that it is not only about military training but also about a much broader engagement across government from footmen operators to those who are involved in weapons transfer (in the case of providing training to a state). In addition, there is a whole area of normative engagement whereby, while engaging with the partner on legal obligations, general rules of behavior but also cultural and religious norms should be adopted. The ICRC tries to remain active on this as it is essential.

Furthermore, the assessment aspect is critical. It is important that assisting state actors carry out a thorough assessment of what they are about to get themselves involved in as far as possible. This allows them to make a well-informed decision on tailoring the way the support can be given. Afterwards, roles, expectations, and responsibilities should be clarified both internally (within the systems of the states), as externally (within the relationship with the partner).

Looking at broader institutional support, such as capacity building in relation to the rule of law, judicial capacity, detention infrastructure, forensic capacity, it is important to carry out monitoring and evaluation. In addition, focus should be on accountability so that adjust-

ments came be made as the relationship goes forward in order to have a positive impact on behaviour.

When states consider the possibility of going beyond training the following alternatives can be considered. For example, advising and assisting in military operations or operational oversight can be options. Also, joint operations should be encouraged as they can substitute certain functions, which may bring a positive influence in terms of behaviour. Looking at your own internal transparency, oversight and accountability mechanisms should be optimized.

The exit strategy is another important aspect. Here questions such as the duration of the support and the end point that will allow you as a state to disengage needs to be considered. There are different possible scenarios, such as operational success and a victory or a protracted engagement whereby you and your partner have divergent agendas that result in the supporting state taking a step back. Alternatively, operational loss can also be the outcome. In that scenario, departure should be achieved in a way that mitigates the impact on civilians, but also on detainees and other vulnerable groups.

Also, it should be ensured that lessons learned are regularly fed into adjusting the engagements as you go along, both on the tactical level but also on the longer strategic level.

A speaker added that it is important to be aware of the fact that engagements are not risk-free. She referred to the UK after the Iraq war, to the Chilcot inquiry more precisely. The UK realized that having a better debate about strategy and the risks that occur in case the UK engages in a war is essential to avoid catastrophic mistakes. It was considered that such awareness should also be in place in case of support engagements. The speaker continued that it is often argued that the UK does not have the same level of scrutiny around these types of operations although they can have a huge impact on long-term peace and stability. Also, the panellist considered the 'lessons learned' aspect as part of the strategy process. After all, a lot of the soldiers that she and other researchers from her group interviewed in Kenya and Mali, felt that they were deployed only to send a political signal. These soldiers were not sure why they were there, except to carry out training so that the UK could say that they were training local forces. The panellist condemned this behaviour and stressed the fact that the government of the UK should have first checked the strategy before actions were undertaken. More precisely, monitoring and evaluation should have been better considered as part of the complex security and stability of the partner state.

Another panelist added that in contemporary armed conflicts, there is no such thing as victory. After all, these conflicts are wars against networks which will almost certainly return later.

This differs widely from the model that existed until the second world war. There, the pattern of a war was to besiege a city, and at some point, surrender would follow. Afterwards, peace would be established. That doesn't exist anymore. This makes it even more difficult to choose partners, as there are periods of conflicts. In addition, these conflicts are highly mobile since these networks move over very vast territories. Therefore, the question we should ask is how we can formulate support in a way that enables states (not armed groups) to resist this type of threat. For example, in Africa, armies are quite weak, this is due to the fact that many African states have lived through continuous coups d'état. Therefore, the policy of several states is to weaken their armies to the point that they cannot rebel anymore and thus cannot take power. However, those armies must now be able to resist armed groups affiliated with terrorist organizations.

Someone from the audience remarked that as the military part should be considered as an element of long-term nation building, this presumably entails cross ministry activities (so not only actions related to the Ministry of Defence). Therefore, it was questioned whether part of the problem was that, at the moment, there was too much focus on the Ministry of Defence. In connection to this, it was asked whether there was a role for legislative scrutiny before these activities are engaged in.

A person from the audience answered that within the government of his country they try to have an impact on a larger scale than solely to focus on the Ministry of Defence in training, advise, and education. After all, the aim is to have a holistic approach, which means undertaking not only a vertical approach but also a horizontal one. For example, emphasis lies on interoperability, which involves both the Ministry of Defence and the Ministry of Interior. This is about connecting all the actors that you can influence. By focusing on the high-level actors, one hopes that it boils down to the tactical level as this is of course the main goal.

It was added that the EU has the advantage of having diplomatic representation in most of the states where its operations are conducted. This is done via delegations. These delegations are responsible for implementing development and humanitarian programs. They need to ensure that this is done comprehensively. In addition to the military missions, we also have civilian missions. The EU also tries to ensure that there is complementarity between these different programs so that the EU activity is not counterproductive. In addition, the EU talks about a comprehensive approach towards crises which underlines planning for all types of missions (both military and civilian), and also includes other actors. Increasingly, what the EU tries to do is seek regional and sub-regional cooperation such as assisting the G5 Sahel, one of the major new actors, to make sure that they can ensure their own security. In addition, the EU also operates a bilateral or trilateral cooperation with the African union. On a trilateral level

the EU works with the African union and the UN regarding Libya. This is in order to have a common response to these crises. It was also stated that, in Africa, societal problems such as urbanization, lack of work, exponential population growths are worsening over time. Therefore, the roots of these problems should be addressed so as not to be too late.

Furthermore, one of the speakers referred to article 35 of the French Constitution. This article focuses on military interventions abroad, which is a case attributed to the Directorate of Legal Affairs of the Ministry of the Armed Forces. It is interpreted very vigilantly, since the application of this article sets out the conditions under which France can react. The power of the French Parliament only relates to the principle of armed intervention. It connects to the overall approach we have in terms of support, whereby we adopt a humanitarian strategy in which several ministries are involved, mainly the ministries of sovereign power, i.e. Interior, Foreign Affairs, who adopt a strategy for structural cooperation. It remains up to the Ministry of Defence to implement a strategy for operational cooperation. It was added that the Parliament can also discuss these subjects when in regard to the budget, and when performance reports are issued. These missions are reviewed every four years.

Another panellist took the floor and stressed the need for coordination. The speaker believed that, next to focusing on national strategies where we are indeed getting better at bridging the gap between defence and development, attention should also be given to coordination between international actors in the same country. At this time, there is a lot of duplication and contradictory operations, not only by Western States, but also by non-Western States. This can often be a great driver of instability.

The next question addressed whether it would be possible to formally integrate trainings into the chain of command of NSAG groups. One of the panellists stated that, in principle, this is not possible. After all, it would create a contradiction in command responsibility (as defined under International Criminal Law). More precisely, national law states that NSAG cannot take up the arms whereas IHL states the contrary. In addition, the application of the rules of engagement, military equipment, etc., would make it hard to train NSAG.

Finally, it was announced that the ICRC will issue a handbook of practical questions for decision makers in the second half of 2020. In the longer term (2023-2024) the ICRC aims to publish a compilation of practices and lessons learned which would include some recommendations at that point.

On this, Elisabeth Wilmshurst closed a very lively panel.

REMARQUES FINALES

Yves Sandoz

On ne saurait parler de ce Colloque sans souligner, en premier lieu, la qualité de son organisation, la maîtrise des présidents de séance, la pertinence ainsi que la discipline des orateurs et la qualité des débats, auxquels une bonne place a été laissée. Si tout s'est parfaitement déroulé, ce sont l'actualité et la diversité des thèmes choisis qui ont ouvert de nouveaux horizons aux participants et les inciteront à approfondir les nombreuses questions qui ont été abordées. Parmi celles-ci, on relèvera, en premier lieu, l'extrême complexité des situations de conflit, examinée par le groupe présidé par François Hampson, dans lequel Vaios Koutroulis et Marten Zwanenburg ont évoqué la difficulté de définir les conflits armés – et donc d'appliquer le droit international humanitaire – face à la multiplication des groupes armés. Il est notamment ardu de définir les critères qui doivent être remplis en ce qui concerne la communauté d'objectifs et en matière de coopération pour que soit atteint le niveau d'intensité et d'organisation, justifiant la qualification de conflit armé. Pour illustrer le problème, Irénée Herbet nous a révélé le nombre incroyable de plus de 500 groupes armés identifiés aujourd'hui, le CICR entretenant un dialogue avec plus de 400 d'entre eux. Ce dialogue se déroule toutefois à des niveaux très variables, allant d'un dialogue précis sur l'application du droit international humanitaire à des rencontres lors desquelles même les principes de ce droit ne peuvent être évoqués.

Sous la présidence de Gert-Jan van Hegelsom, nous sommes entrés dans le vaste sujet des nouvelles technologies de combat. John Swords nous a démontré toute la complexité de l'utilisation hostile du *cyberespace*. Les problèmes sont d'abord liés au « *jus ad bellum* » : l'ampleur des dommages causés mais aussi l'identification de leur(s) auteur(s) permet de qualifier ou non une situation de conflit armé. Cependant, on entre bien sûr également dans le « *jus in bello* » quand le *cyberespace* est utilisé à des fins hostiles dans une situation reconnue de conflit armé, les critères habituels du droit international humanitaire, en particulier les principes de précaution et de proportionnalité, s'appliquant aux attaques cybernétiques dans ces situations. Heather A. Harrison Dinniss nous a rappelé la complexité de la guerre dans l'espace extra-atmosphérique, les interactions entre satellites, de la Terre aux satellites et, surtout, des satellites à la Terre, avec tous les problèmes des dommages civils collatéraux et du respect, ici aussi, des principes de précaution et de proportionnalité. Tout cela nous rappelle que nous sommes hélas bien éloignés de l'idéal, qui avait pourtant été proclamé, d'une utilisation pacifique de l'espace extra-atmosphérique. Enfin, Steven Hill nous a démontré les effets de la révolution numérique sur les méthodes de guerre. Il nous a rappelé la compétition qui existe dans le domaine de la recherche sur l'intelligence artificielle et l'effet pervers de celle-ci, que ce soit la tentation de se servir plus facilement de la force quand une partie dispose de

moyens qui mettent leur utilisateur à l'abri de tout dommage. Il a également évoqué la crainte d'un robot échappant totalement au contrôle de son créateur, à l'image de celui du Docteur Frankenstein dans une fameuse fiction, mais il a insisté sur le fait que la question du contrôle mérite un débat plus subtil et nuancé.

Sous la présidence d'Elzbieta Mikos-Skuza, nous nous sommes penchés sur un problème qui est aujourd'hui sur le devant de la scène, la protection de l'environnement. Qu'en est-il de la protection de l'environnement pendant les conflits armés ? Quel est l'effet du réchauffement climatique sur les conflits armés ? Maya Lehto et Stéphane Kolanowski nous ont expliqué les travaux entrepris respectivement par la Commission du droit international et par le Comité international de la Croix-Rouge pour établir des principes et des lignes directrices sur la protection de l'environnement en relation avec les conflits armés, David Jensen illustrant de manière spectaculaire l'impact immédiat, mais aussi à long terme, des conflits armés sur l'environnement.

Sous la présidence à nouveau de Françoise Hampson, Vanessa Murphy, Sandra Krähenmann et Christiane Höhn se sont penchées sur les défis juridiques et humanitaires posés par ceux qui ont rejoint des groupes armés, notamment pour leur famille, avec le problème particulièrement aigu de tous ceux, femmes et enfants surtout, qui se trouvent dans des camps. Elles ont insisté sur la très grande diversité des situations personnelles et sur la nécessité d'un « assessment » individuel, cela malgré la tendance des États à externaliser le problème et à s'en débarrasser autant que faire se peut.

Ce matin, nous avons abordé, sous la présidence de Paul Bermann, la question particulièrement complexe de la guerre urbaine. Andreas Muñoz Mosquera est remonté jusqu'à l'attaque de Jéricho relatée dans la bible pour nous rappeler que le problème n'est pas nouveau. On ne peut néanmoins ignorer le fait qu'il est aujourd'hui plus important – 60% de la population mondiale vit dans les villes – et plus complexe au vu des moyens techniques dont on dispose. Il a souligné l'importance de comprendre en profondeur le fonctionnement d'une ville que l'on veut assiéger, sa gouvernance, l'existence éventuelle de groupes d'influence, telles des maffias. Il a aussi insisté sur les problèmes particulièrement délicats du choix des objectifs ainsi que la manière de les cibler (« targeting ») et de la communication pour minimiser les pertes civiles. Eirini Giorgiou a insisté sur l'importance des effets collatéraux de l'usage d'explosifs dans les villes et sur l'inadéquation d'un tel usage dans des lieux où il existe une concentration de civils. Il a également relevé l'effet « domino » des atteintes aux infrastructures. Comment restreindre, de manière réaliste, l'usage d'explosifs dans la guerre urbaine ? La question n'est pas tranchée. Gloria Gaggioli a elle aussi rappelé que le problème des cités assiégées n'est pas nouveau. Le droit international humanitaire l'admet d'ailleurs implicitement puisqu'il fixe des

limites juridiques qui s'imposent lors d'un siège, notamment l'interdiction d'utiliser la famine comme méthode de guerre. Cependant, il reste important de clarifier toutes les règles qui s'imposent lors d'un siège.

Elizabeth Wilmshurst a enfin présidé une table ronde sur les défis opérationnels dans le cadre des relations de soutien en temps de conflit armé. Elle a notamment mis le doigt sur les obligations spécifiques qui existent dans les traités sur le commerce des armes. Patrick Hamilton a relevé la grande diversité des formes de soutien (financier, logistique, militaire, humanitaire…) et l'importance de clarifier les responsabilités. Les civils doivent savoir vers qui se tourner pour rechercher une protection : le risque étant grand, quand les civils sont dénués de protection, qu'ils cherchent à s'armer eux-mêmes et que l'on assiste à une prolifération des armes. Camille Faure a rappelé que l'on ne choisit pas toujours ses partenaires. L'influence que l'on peut avoir dépend par ailleurs aussi des moyens que l'on mobilise. Elle donne comme exemple l'accord de la France avec le Mali qui contenait des exigences en ce qui concerne la protection des personnes détenues par les Maliens. La formation des porteurs d'armes est, à cet égard, évidemment un élément crucial. En ce qui concerne les groupes armés auxquels il a parfois été recouru, la capacité et la volonté de ces groupes d'appliquer le droit international humanitaire et leur volonté de coopérer avec les forces armées régulières du Mali étaient des critères essentiels. Elle a relevé enfin que tout accord de soutien devait faire l'objet d'une évaluation continue.

Vous me pardonnerez de me contenter de ce que je qualifierais de survol plutôt que de résumé de nos riches débats pour consacrer les quelques minutes qui me restent à une réflexion un peu plus large à l'occasion de ce 20ème anniversaire du Colloque de Bruges, qui coïncide par ailleurs avec le 70ème anniversaire des Conventions de Genève.

Nous sommes presque tous ici, d'une manière ou d'une autre, engagés dans une lutte pour un meilleur respect et pour le développement du droit international humanitaire ainsi que des droits de l'Homme. Cette lutte a-t-elle encore un sens face aux problèmes que l'Humanité affronte aujourd'hui et va affronter toujours davantage dans les années qui viennent ? Friedrich Dürrenmatt avait dit, il y a plus de 50 ans déjà, que les Humains avaient commis trop d'erreurs et que la fin de l'Humanité était inéluctable… et, avait-il ajouté, que c'était probablement la meilleure chose qui pouvait arriver à notre planète ! Ce qui s'est passé depuis, avec notamment le réchauffement climatique et l'explosion démographique – Konrad Lorenz parlait déjà il y a plus de 60 ans de la « bombe démographique » – nous inciterait à partager ce pessimisme. Alors que tous les habitants de cette Terre devraient s'unir pour affronter les problèmes majeurs auxquels on doit faire face – pollution des sols, de l'air et de l'eau, épuisement des ressources naturelles, perte de la biodiversité, pauvreté, sous-développement et,

lié à celui-ci, croissance démographique non-maîtrisée… – on constate au contraire un repli sur soi et la résurgence d'un nationalisme étroit, comme si, sur un navire en péril, on pensait éviter le naufrage en s'enfermant dans sa cabine. Cela se traduit également par un déclin des valeurs, par l'indifférence aux souffrances des autres. On ne veut pas entendre parler des enfants qui se noient en méditerranée et l'on en arrive même à condamner ceux qui essaient de leur venir en aide.

Le Collège d'Europe célèbre cette année Hannah Arendt, qui a notamment réfléchi et écrit sur le totalitarisme. Si je mentionne ici cette femme remarquable, c'est aussi pour rappeler qu'elle a été au centre d'une polémique quand elle a suivi le procès d'Eichmann, le gestionnaire principal de la pire exaction commise dans l'histoire de l'Humanité, la politique nazie d'extermination des Juifs, des Tziganes et d'autres minorités. Cette polémique s'est développée quand Hannah Arendt a décrit Eichmann non pas comme un monstre, mais comme un « homme ordinaire », un fonctionnaire qui faisait l'abominable travail qu'on lui avait confié comme il aurait accompli une banale tâche administrative. Je me permets de le rappeler parce que l'évolution actuelle du Monde, qui doit faire face à des problèmes toujours plus complexes, conduit à la renaissance de mouvements extrémistes et racistes, dont on ne peut exclure qu'ils se développeront encore, avec à nouveau des « hommes ordinaires » prêts à accepter et cautionner les pires horreurs.

Je ne saurais toutefois terminer sur une note aussi pessimiste. Je dirais même qu'il est trop facile d'être pessimiste et que la petite Greta Thunberg, qui nous a secoués, est un rayon de soleil, comme toute la jeunesse qui l'a suivie, et nous impose d'agir et de rester optimistes.

Peut-on pour autant situer ce colloque comme une contribution à ce courant ? Je crois pouvoir le dire. Tous les efforts qui ont été évoqués pour préparer des principes ou lignes directrices dans les différentes situations et face à une grande diversité de problèmes, dans l'espace extra-atmosphérique, le cyberespace, les guerres urbaines, ou pour mieux protéger l'environnement, tous ces efforts sont entrepris de manière sérieuse et intelligente, avec des experts reconnus et suffisamment représentatifs de toutes les régions du Monde. Ils donnent aux documents produits une grande crédibilité qui leur permet de devenir une référence reconnue. De plus, je dirais en passant qu'à mon avis il est préférable qu'ils restent en l'état, même s'ils n'ont pas le caractère obligatoire d'un traité car le risque est grand qu'une véritable négociation diplomatique conduise à des compromis qui les videraient de leur substance.

On ne saurait certes se contenter de ces efforts mais il est important de souligner que, comme d'ailleurs pour l'ensemble du droit international humanitaire, ils ne doivent pas être considérés comme des substituts à des efforts visant à la paix mais comme une contribution à ceux-ci. Le

respect du droit international humanitaire pendant un conflit armé peut apaiser les tensions, alors que les violations exacerbent celles-ci et deviennent parfois une raison supplémentaire de prolonger les hostilités. Comme nous l'avons d'ailleurs souligné lors de notre colloque à propos de l'espace extra-atmosphérique, la préparation d'un Manuel sur le droit international applicable à l'usage militaire de cet espace ne s'oppose en rien aux efforts nécessaires en faveur de l'usage pacifique de celui-ci ; ni à ce que l'on considère un astronaute, comme il l'a été dit, comme un « envoyé de l'Humanité » plutôt que comme le soldat d'un pays. N'oublions pas que Neil Armstrong, en posant le pied sur la Lune, a dit que c'était un grand pas pour l'Humanité (et pas pour la seule Amérique).

Bref, tout le monde ne peut pas tout faire. Je dirais sans hésiter que les efforts déployés pour développer et clarifier le droit international humanitaire ainsi que les droits de l'Homme gardent toute leur pertinence, méritent d'être encouragés et s'inscrivent dans le cadre général des actions visant à la paix et à la préservation de notre planète.

Reste néanmoins une question : le colloque lui-même est-il utile ? Peter Singer, que la plupart d'entre nous connaissent bien pour ses réflexions remarquables sur différents sujets liés aux conflits armés et au droit international humanitaire, s'interrogeait sur l'utilité de réunions pendant lesquelles les gens ayant le même niveau d'expertise et le même langage discutent entre eux, en cercle fermé. Mais précisément, comme Gilles Carbonnier l'a dit, le but et la réalité du Colloque de Bruges est d'ouvrir le dialogue entre les juristes, les politiciens, les militaires, les diplomates et j'ajouterai aujourd'hui surtout entre les étudiants, la génération qui devra affronter et résoudre les problèmes que j'ai évoqués. Or, l'on ne pouvait trouver meilleur cadre pour ce dialogue que celui du Collège d'Europe, dont l'objectif est précisément, comme l'a rappelé le Recteur Jörg Monar, de préparer les futurs cadres européens à assumer leurs responsabilités.

Donc oui, le Colloque de Bruges est utile ; oui, il faut maintenir ce que Walter Füllemann a appelé « l'esprit de Bruges » ; oui, nous pouvons sans hésiter remercier Stéphane Kolanowski et tous ceux, au CICR tout comme au Collège d'Europe, qui l'ont aidé à préparer et à gérer ce 20ème colloque.

Longue vie au colloque de Bruges, merci de votre attention et bon retour dans vos foyers.

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Legal Challenges for Protecting and Assisting in Current Armed Conflicts

20th Bruges Colloquium, 17-18 October 2019

Simultaneous translation into French / English
Traduction simultanée en anglais/français

DAY 1: Thursday, 17th October

9:00 – 9:30 **Registration**

9:30 – 9:40 **Welcome address by Mr Jörg Monar**,
Rector of the College of Europe

9:40 – 9:55 **Opening address by Mr Walter Füllemann**,
Head of Delegation, ICRC Brussels

9:55 – 10:15 **Keynote by Mr Gilles Carbonnier**, Vice-President, ICRC

10.05 – 10:20 Coffee break

Session One: THE INCREASING COMPLEXITY OF ARMED CONFLICTS
Première Session : Complexification des conflits armés
Chairperson: **Françoise Hampson**, University of Essex

10:30 – 10:45 **Classifying contemporary armed conflicts: The challenge of coalitions of non-State armed groups and/or of States.**
Speaker: **Vaios Koutroulis**, ULB

10:45 – 11:00 **Addressing the threat posed by coalitions of non-State armed groups: a State perspective**
Speaker: **Marten Zwanenburg**, Ministry of Foreign Affairs, The Netherlands

11:00 – 11:15 **Engaging non-State armed groups on protection and assistance concerns: an ICRC perspective**
Speaker: **Irénée Herbet**, ICRC

11:15 – 12:00 **Discussion**

12:00 – 13:15 **Sandwich lunch**

Session Two: TWO: CHALLENGES TO IHL ARISING FROM THE USE OF NEW TECHNOLOGIES OF WARFARE

Deuxième Session : Les défis au DIH posés par l'utilisation de nouvelles technologies de combat

Chairperson: **Gert-Jan van Hegelsom**, EEAS

13:30 – 13:45 **Applying IHL in the cyber space: what are the main contemporary challenges?**
Speaker: **John Swords**, UK Ministry of Defence

13:45 – 14:00 **Artificial intelligence in warfare: risks and opportunities for IHL compliance?**
Speaker: **Steven Hill**, NATO

14:00 – 14:15 **Conducting hostilities in the outer space: which limits do IHL and space law impose?**
Speaker: **Heather Harrison Dinniss**, Swedish Defence University

14:15 – 15:00 **Discussion**

15:00 – 15:20 **Coffee break**

Session Three: CLIMATE CHANGE AND THE PROTECTION OF THE NATURAL ENVIRONMENT
Troisième Session : Changement climatique et protection de l'environnement naturel
Chairperson: **Elzbieta Mikos-Skuza**, University of Warsaw and College of Europe

15:25 – 15:40 **ILC Draft principles on the protection of the environments in relation to armed conflicts**
Speaker: **Marja Lehto**, Ministry of Foreign Affairs, Finland and International Law Commission

15:40 – 15:55 **Environmental challenges raised by military activities**
Speaker: **David Jensen**, UNEP

15:55 – 16:10 **Climate changes, the protection of the natural environment: the legal and policy perspectives**
Speaker: **Stéphane Kolanowski**, ICRC

16:10 – 16:40 **Discussion**

16:45 – 18:00 **PANEL DISCUSSION: FOREIGN FIGHTERS AND THEIR FAMILIES: A DISCUSSION ON LEGAL CHALLENGES**
Table ronde : Combattants étrangers et leur famille: discussion sur certains défis juridiques
Moderator: **Françoise Hampson**, University of Essex

Panellists:
Christiane Höhn, Office of the EU Counter-Terrorism Coordinator
Sandra Krähenmann, Geneva Call
Vanessa Murphy, ICRC

19:30 – 22:30 **Dinner (*registration required*)**

DAY 2: Friday, 18th October

Session Four: URBANISATION OF WARFARE
Quatrième session : L'urbanisation de la guerre
Chair person: **Paul Berman**, Council of the EU Legal Service

9:05 – 9:20 **Fighting in urban areas: Legal and operational challenges**
Speaker: **Andres Munoz**, SHAPE

9:20 – 9:35 **Use of heavy explosive weapons in populated areas and why it should be avoided: humanitarian, legal and policy considerations**
Speaker: **Eirini Giorgou**, ICRC

9:35 – 9:50 **Besieging cities and humanitarian access: how to accommodate humanitarian needs, legal obligations and operational constraints?**
Speaker: **Gloria Gaggioli**, University of Geneva

9:50 – 10:35 **Discussion**

10:35 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: SUPPORT RELATIONSHIP IN ARMED CONFLICT: DISCUSSING OPERATIONAL CHALLENGES**
Table ronde : Les défis opérationnels dans le cadre de relations de soutien en temps de conflit armé
Moderator: **Elizabeth Wilmshurst**, Chatham House

Panellists:
Camille Faure, Ministry of Defence, France
Patrick Hamilton, ICRC
Abigail Watson, Oxford Research Group

12:30 – 12:45 **CLOSING REMARKS**
Yves Sandoz, Honorary Member of the ICRC

SPEAKERS' BIOGRAPHIES
CURRICULUM VITAE DES ORATEURS

Welcome Addresses and Keynote Speech
Allocutions de bienvenue et discours introductif

Professor Jörg Monar is Rector of the College of Europe (Bruges/Natolin, Warsaw) since 1 September 2013. His previous positions include Director of the Department of Political and Administrative Studies of the College of Europe (2008-2013), Professor of Contemporary European Studies and Co- Director of the Sussex European Institute, University of Sussex (Brighton, UK), Director of the SECURINT Research project on EU internal security governance and Professor at the Robert- Schuman-University (Strasbourg, France) and Professor of Politics and Director of the Centre for European Politics and Institutions Professor of Politics (Leicester, UK).

In addition to his research and teaching functions Professor Monar has done advisory/consultancy work for the European Parliament, the European Commission, the Planning Staff of the German Ministry of Foreign Affairs, the Dutch Scientific Council for Government Policy (WRR, The Hague), the German Bundestag, the French Commissariat Général au Plan (Paris) and the British House of Lords and House of Commons (London). He is also a member of several academic advisory boards such as that of Access Europe of the University of Amsterdam and the Research Council of the European University Institute in Florence.

Professor Monar holds a Doctorate in Modern History from the University of Munich and a Doctorate in Political and Social Sciences from the European University Institute, Florence. His over 200 publications relate mainly to European Union justice and home affairs and external relations as well as the institutional development of the Union. He is also a founding editor of the European Foreign Affairs Review.

Mr Walter A. Füllemann has been with the International Committee of the Red Cross (ICRC) 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's 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.

Dr 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 Secretariat for Economic Affairs.

Session One: The increasing complexity of armed conflicts
Première Session : Complexification des conflits armés

Professor Françoise Hampson taught at the University of Dundee from 1975 to 1983 and has been at the University of Essex since then. She was an independent expert member of the UN Sub- Commission on the Promotion and Protection of Human Rights from 1998-2007. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the UK, USA, Canada & Ghana. She represented Oxfam and SCF (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded Human Rights Lawyer of the Year jointly with her colleague from the Centre, Professor Kevin Boyle. She has taught, researched and published widely in the fields of armed conflict, international humanitarian law and on the European Convention on Human Rights. She is currently working on autonomous weapons, investigations into alleged violations in situations of armed conflict and on the use of an individual petition system to address what are widespread or systematic human rights violations.

Professor Vaios Koutroulis is a Senior Lecturer at the International Law Centre of the *Université Libre de Bruxelles* since 2013, teaching, among others, 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 (ULB). 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).

Dr 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 Defense. 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.

Mr Irénée Herbet is currently Head of the Global Affairs Unit at the ICRC in Geneva. It manages the integration of cross-cutting issues related to asymmetric conflicts in the ICRC's operational strategies. Previously, he worked in the same unit, where he has been present since 2014, as a consultant. Irénée started at the ICRC as a field delegate in 2002 and did several assignments in different countries, the Middle East and Asia, before working at the headquarter. He holds two Bachelors: one in Modern History and one in Classical Arabic. He is fluent in French, English and Arabic.

Session Two: Challenges to IHL arising from the use of new technologies of warfare
Deuxième Session : Les défis au DIH posés par l'utilisation de nouvelles technologies de combat

Mr Gert-Jan van Hegelsom is the head of the legal affairs division of the European External Action Service. From March 2001 till January 2011, he was the representative of the Council Legal Service (External Relations Team) to the European Union Military Committee and dedicated Legal Adviser to the Director-General of the European Union Military Staff. He was transferred to the European External Action Service upon its establishment on 1 January 2011.

Gert-Jan followed primary and secondary schooling education in Belgium and Luxembourg. He read law at Leyden University (specialised in Public International Law) and graduated in 1980

(LLM equivalent). He performed his military service as a reserve officer in the Royal Netherlands Navy, lecturing on public international law issues at the Naval War College in Den Helder and developing operational training modules. He joined the Directorate of Legal Affairs of the Ministry of Defence of the Kingdom of the Netherlands as a junior legal adviser in 1981. His latest assignment was Head of the Department of International and Legal Policy Affairs of that Directorate, a position that he held from 1994 till February 2001.

Mr van Hegelsom is a graduate of the NATO Defence College (Course 68) and holds the Diploma (Public International Law) of The Hague Academy of International Law. He lectured at the University of Nice-Sophia Antipolis as a visiting Professor in 1995-1996. He has published on legal aspects of military operations.

Mr John Swords has been Head of the Operational and International Humanitarian Law division of the UK Ministry of Defence since 2014. His team there advises ministers and civil servants in departmental headquarters in Westminster on the more strategic, high profile or sensitive legal issues connected to military operations. John also oversees the legal team in the UK's operational headquarters in Northwood which comprises of civil servant and armed service lawyers who operationalise the strategic departmental direction for the purposes of service personnel and lawyers confronting tactical issues in theatre.

Mr Steven Hill is the Legal Adviser and Director of the Office of Legal Affairs at NATO Headquarters in Brussels. In this role, Steve is Secretary General Jens Stoltenberg's chief legal adviser and a member of his senior management team. He leads the multinational legal team in the Office of Legal Affairs, which provides legal counsel on issues on a wide range of issues, including the law of armed conflict, privileges and immunities, status of forces, investigations, and the law of the international civil service. He also oversees litigation on behalf of NATO before the NATO Administrative Tribunal and in national courts.

Prior to joining NATO in February 2014, Steve worked in New York as Counselor for Legal Affairs at the United States Mission to the United Nations in New York. He represented the U.S. in Security Council and General Assembly 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.

Steve spent the 2010-2011 academic year in China as a Visiting Professor at the Hopkins-Nanjing Center for Chinese and American Studies. From 2008 to 2010, he led the legal unit at

the International Civilian Office / European Union Special Representative in Kosovo. Before that, he worked in the Office of the Legal Adviser at the U.S. Department of State and at the American Embassy in Baghdad. He has appeared as counsel before the International Court of Justice and the Inter-American Court of Human Rights. Steve graduated from Yale Law School and Harvard College and is a member of the New York bar. In 2018, he was elected to the Executive Council of the American Society of International Law.

Dr Heather A. Harrison Dinniss is a Senior Lecturer at the Centre for International and Operational Law at the Swedish Defence University. Heather's research focuses on the impact of modern warfare on international humanitarian law; on emerging military technologies such as cyber warfare, advanced and autonomous weapons systems and the legal aspects of human enhancement techniques on members of the armed forces. She is the author of *Cyber War and Laws of War* (Cambridge University Press, 2012) which analyses the status and use of cyber operations in international law and the law of armed conflict. Heather has served as a member of advisory groups to the Swedish Government on autonomous weapons systems and cyber operations, a member of the International Law Association's Study Group on Cyber Terrorism and International Law (2014-2016) and as a core expert for two projects to establish Manuals on International Law Applicable to Military Uses of Outer Space (MILAMOS (2016-18) & Woomera (2018-)).

Session Three: Climate change and the protection of the natural environment
Troisième Session : Changement climatique et protection de l'environnement naturel

Dr Elzbieta Mikos-Skuza is a senior lecturer at the Faculty of Law and Administration, University of Warsaw, Poland and a Visiting Professor at the College of Europe in Natolin. She is the Director of NOHA (consortium of European universities conducting programmes in humanitarian action) at the University of Warsaw. For 30 years she has been volunteering with the Polish Red Cross, including the function of a vice-president of the Polish Red Cross in 2004 – 2012. She's a vice-president of the International Humanitarian Fact Finding Commission established under Protocol Additional I of 1977 to the Geneva Conventions of 1949. She is also a full member of the San Remo International Institute of Humanitarian Law. Dr. E. Mikos-Skuza is the author of publications in English and in Polish on public international law and international humanitarian law of armed conflicts.

Ambassador Marja Lehto is Senior Expert in public international law at the Legal Service of the Ministry for Foreign Affairs of Finland. Dr Lehto is a current member of the UN International Law Commission (2017- 2021) and Special Rapporteur for the topic "Protection of the Environment in Relation to Armed Conflicts". Dr Lehto has served formerly, inter alia, as Fin-

land's Ambassador to Luxembourg (2009–2014), Director of the Unit for Public International Law of the MFA (2000–2009) and as Legal Adviser of the Finnish UN Mission in New York (1995–2000). Dr Lehto is Adjunct Professor of international law at the University of Helsinki and has published on a broad range of international legal questions.

Mr David Jensen is the Head of the Environmental Peacebuilding Programme at UN Environment. Since 2009, David has been a leader in a global effort to establish a new multidisciplinary field of environmental peacebuilding. David is one of the core faculty members of the Massive Open Online Course on Environmental Security and Sustaining Peace.

He is the coordinator or co-author of six flagship policy reports on risks and opportunities from natural resources across the conflict lifecycle. He is also a series co-editor of a six-volume set of books on post- conflict peacebuilding and natural resource. David has worked with and advised all the key peace and security institutions of the UN, including the peacebuilding, peacekeeping, and mediation communities, as well as UN country teams, Resident Coordinators and Special Representatives of the Secretary General.

Since 2016, David has been pioneering efforts to identify environmental applications of frontier technologies in conflict-affected countries and fragile states, including big data, cloud computing, artificial intelligence, the internet of things, block chain, virtual reality, and citizen science. He has been advising the UN Science Policy Business Forum on these topics since 2018 and was the co-author of a flagship discussion paper entitled The Case for a Digital Ecosystem for the Environment as well as a Medium article: Promise and Peril of a Digital Ecosystem for the Planet.

David is graduated from Oxford University (UK), from the University of Victoria (Canada). He is an Alumnus of the Peace Mediation Platform (Swiss Federal Department of Foreign Affairs) and a Beahrs' Environmental Leadership Fellow at the University of California, Berkeley.

Mr Stéphane Kolanowski holds a Law Degree and a Master in Laws (LL.M.) in Public International Law. He joined the ICRC Legal Division (Geneva) in 1997, where he worked on different issues, such as Human Rights, impunity, as well as on some arms related issues. In 1999, he participated in the build-up of the ICRC Delegation to the EU, NATO and the Kingdom of Belgium, a Delegation in which he is still working today as the Senior Legal Adviser. He is responsible for following relevant legal developments in EU and NATO policies and operations and for promoting and disseminating International Humanitarian Law for several audiences. Since 2013, Stéphane is Visiting Professor at the College of Europe. He is also a member of the Steering Committee of the *Chaire Jean Monnet* on "the EU and crisis management (Université

Côte d'Azur, 2019-2023). Stéphane has published articles on International Humanitarian Law and participated in several conferences and seminars. He is also the founder of the "Bruges Colloquium" in International Humanitarian Law.

Panel discussion: Foreign fighters and their families: A discussion on legal challenges
Table ronde : Combattants étrangers et leur famille : discussion sur certains défis juridiques

Dr Christiane Höhn is the principal adviser to the EU Counter-Terrorism Coordinator, for whom she has worked since 2010. Her previous assignments at the EU were transatlantic relations and non- proliferation and disarmament. Prior to joining the Council of the EU in 2004, she was a researcher at the Max Planck Institute for International Law in Heidelberg and an affiliate at the Center for Public Leadership, Harvard Kennedy School of Government. Christiane holds a PhD in international law from Heidelberg University, an LLM from Harvard Law School and the two German State examinations in law. She has published a book and several articles in international law and international affairs.

Dr Sandra Krähenmann is Thematic Legal Adviser at Geneva Call. Amongst others, she works on forced displacement, sexual violence and gender discrimination, the protection of cultural property and counter-terrorism laws and policy. She also teaches at the Geneva Academy of International Humanitarian Law and Human Rights. Her research focuses on the impact of counter-terrorism on human rights law and international humanitarian law, during the last two years with a focus on measures to stem the so-called foreign fighter phenomenon. She has written a series of articles on these topics and is currently co-authoring a book on the protection of human rights in times of terror and conflicts.

Mrs Vanessa Murphy is a Thematic Legal Adviser at the International Committee of the Red Cross in Geneva, where she is responsible for legal issues related to the protection of children in armed conflict. Between 2017-2019, she has worked on issues related to children associated with groups designated as 'terrorist.' Vanessa's professional experience prior to the ICRC includes her work at AO Advocates, a UK-based law firm specializing in litigation for survivors of childhood sexual abuse, and as Head of Development at Hestia, a UK NGO delivering support services for victims of sexual violence and human-trafficking. Her professional experience also includes work for the Geneva Centre for the Democratic Control of the Armed Forces, Human Rights Now, and the International Criminal Law Media Review. Vanessa holds an LLM in international humanitarian law from the Geneva Academy, a Graduate Diploma in Law in the UK, and a BA in Political Science from Yale University.

Mr 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.

Mr Andres B. Munoz Mosquera is one of the three NATO senior legal advisors. Mr Munoz Mosquera joined NATO in year 2000 as a civilian and he is the NATO Commander's Legal Advisor (Director of the ACO/SHAPE Office of Legal Affairs) since 2014. He served in the Spanish Armed Forces in two cavalry regiments as secretario de causas (case officer/paralegal) and tank commander until 1991. From 1991 to 1999 he worked at the Spanish CHOD as a permanent member of the Spanish inter-ministerial delegation before the International Telecommunications Union (ITU).

In 1994 he deployed in Bosnia i Herzegovina and performed press information duties for General Rose. He was involved in the negotiation of anti-sniping agreements and exchange of prisoners and corpses in the area of Sarajevo. In years 1997 and 1998 he was assigned for the identification and collection of evidence of war crimes committed between 1991-1995. Mr Munoz Mosquera is author of several publications relating to international law and international relations. He was visiting professor of the UNICIT in Nicaragua. He lectures in high education centres. He is a member of the Society of the Military Law and Law of War, the Madrid Bar Association. He is also a CCB European Lawyer.

He holds a honoris causa Master in International Relations from UNICIT and is an Honor Graduate for his academic achievement at the Keesler Technical Centre, USA. Mr Munoz Mosquera has been awarded several decorations, among them: the NATO meritorious medal, and the French Republic medal of the Ex-Yusgolavie. He is Caballero de la Orden de San Hermenegildo. Mr Munoz Mosquera is a Fletcher School of Law and Diplomacy (Tufts) graduate and also from the NATO Defense College (GFOAC).

Dr Eirini Giorgou is a legal adviser in the Arms Unit of the ICRC, based in Geneva. Prior to joining the Legal Division, Eirini worked in the ICRC's unit for relations with armed and security forces. Outside of the ICRC, she has several years' experience in multilateral disarmament and arms control diplomacy and negotiations on both conventional and nuclear weapons. Eirini is a licensed lawyer and holds a PhD in international law from the University of Geneva, Switzerland.

Professor Gloria Gaggioli is a Swiss National Science Foundation (SNSF) Professor at the Law Faculty of the University of Geneva as well as Lecturer at the Geneva Academy of International Humanitarian Law and Human Rights and at the University of Neuchâtel (Switzerland). She has researched and/or taught in several Universities in Denmark, Sweden, France and the United States of America and published extensively in various fields of public international law.

Her work focuses on issues related to the interplay between international humanitarian law and international human rights law, the right to life and the use of force, including the conduct of hostilities, law enforcement and self-defense. She is currently leading a four-year research project funded by the SNSF on 'Preventing and Combating Terrorism and Violent Extremism: Towards a Legal-Empirical Approach'. Prior to joining the University of Geneva, she served as Legal Adviser in the legal division of the International Committee of the Red Cross (ICRC) and is the author of the ICRC report 'The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms'.

Panel discussion on support relationship in armed conflict: Discussing operational challenges

Table ronde sur les défis opérationnels dans le cadre de relations de soutien en temps de conflit armé

Dr Elizabeth Wilmshurst CMG is Distinguished Fellow, International Law, at Chatham House (the Royal Institute of International Affairs) in London. She was a legal adviser in the United Kingdom diplomatic service until 2003. When she left government service, she was a Visiting Professor at University College, London University in international criminal law for a few years. Among other publications, she is editor of *International Law and the Classification of Conflicts* (Oxford, 2012)); co-editor of *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, 2007) and a contributor to D. Murray: *Practitioners' Guide to Human Rights Law in Armed Conflict*, OUP 2016.

Mrs Camille Faure is, since 2017, the deputy head of the Department of legal affairs, Ministry for the armed forces. Before this, she was the Head of the International and European Law Di-

vision, Department of Legal affairs, Ministry of Defense (between 2015-2017). Previously, she was *Chargée de mission* for the Legal adviser of the Department of legal affairs of the Ministry of Foreign Affairs (2011- 2015), the Head of the International Law Office, Department of legal affairs, Ministry of Defense, (2008- 2011), the Deputy Head of the planning of investment expenditures Office, Department of finance, Ministry of Defense (2007-2008), the *Chargée de mission* for the Hospitalization and Care Organization Division (DHOS), Health Ministry (2002-2004), and the Deputy director of the Regional University Hospital Center of Nancy (1998-2002). She graduated from the Ecole nationale d'administration (ENA; 2005-2007), the Ecole nationale de la Santé publique (ENSP; 1996-1998), and from the Institut d'Etudes Politiques de Strasbourg (1989-1992). She also holds a Master's Degree in health law and bioethics, Faculty of law and political sciences, Rennes, (1997).

Mr Patrick Hamilton is the Head of a new global project at the ICRC Head Quarters looking at practical steps that can be taken by state, non-state and other actors to better leverage relationships of support in armed conflicts to improve the protection of civilians and those hors de combat on modern complex battlefields. Until March 2019 Patrick was the Deputy Regional Director for the Near and Middle East Region, and the main focal point at the Geneva Head Quarters for the Iran and Iraq Delegations, a post he assumed in March 2016.

Previously, Mr Hamilton was the Operations Coordinator for the Syria Delegation at the ICRC Head Quarters (2014-2016), Deputy Head of Delegation for Somalia (2012-2014), Regional Global Affairs Advisor East and Horn of Africa (2011-2012), Deputy and Interim Head of Delegation in Chad (2010), Deputy Head of Delegation in Afghanistan (2008 – 2009), Head of Sub-Delegation in Kandahar, Afghanistan (2006-7), and Head of Office in Ampara, Sri Lanka (2005-6).

Mr Hamilton joined the ICRC in late 2001, serving until the end of 2003 as a Pushtu Interpreter, involved in carrying out visits to those being detained by Afghan and US Forces in Afghanistan and Guantanamo Bay.
Mr Hamilton is a graduate of the Universities of London (BA English Literature) and Glasgow (MPhil Development Studies).

Mrs. Abigail Watson is a Research Manager at the Oxford Research Group. She researches and presents on the military, legal, and political implications of "remote warfare": the shift towards light footprint intervention. Instead of deploying their own forces states like the UK tend to work "by, with and through" regional and local groups, who are expected to the bulk of frontline fighting – with the UK providing, for instance, training, air support, equipment or intelligence. She leads on the team's research into this shift, including conducting extensive

field research with UK personnel undertaking these activities. This work has resulted in four reports: *Lawful But Awful? Legal and political challenges of remote warfare and working with partners; Remote Warfare: Lessons Learned from Contemporary Theatres; No Such Thing as a Quick Fix: The Aspiration-Capabilities Gap in British Remote Warfare; and All Quiet on the ISIS Front? British secret warfare in an information age.* Abigail's work has also been published in outlets such as Just Security, Strategy Bridge, E-IR and OpenDemocracy and can be found on the Oxford Research Group's WarPod podcast.

Concluding remarks
Discours de clôture

Professor Yves Sandoz is Doctor in Laws of the University of Neuchâtel. As a delegate of the International Committee of the Red Cross (ICRC) between 1968 and 1973, he carried out several missions on the field, notably in Nigeria, in Israel and the Occupied Territories, in Bangladesh and in Yemen. Between 1975 and 2000 he worked at the ICRC Headquarters, where he held the office of Director for International Law and Doctrine for 18 years. He was also a member of the Standing Committee of the Red Cross and the Red Crescent and President of the Academic Committee of the International Institute of International Humanitarian Law at San Remo for 12 years. After his professional career at the ICRC, Yves Sandoz was Member of the Institution from 2002 to 2014. He is also the initiator of the Geneva Academy of international humanitarian law and human rights and was professor of IHL in this Academy and in many other Academic Institutions, including the College of Europe, from 2002 to 2014. Yves Sandoz is the author of numerous publications, mainly in International Humanitarian Law.