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**Transnational Armed Groups
and International Humanitarian Law**

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**TRANSNATIONAL ARMED GROUPS
AND INTERNATIONAL HUMANITARIAN LAW**

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SUMMARY

The concept of 'transnational armed groups' has been used increasingly since September 11, 2001 by those who consider the 'war on terror' to be an armed conflict and who wish to apply the laws of armed conflict, called international humanitarian law (IHL), to that conflict (rather than human rights domestic legislation and international law on cooperation in criminal matters). In this debate, it is often claimed that IHL, as it stands, is inadequate to cover such a conflict and such 'transnational armed groups'.

This paper discusses, firstly, when IHL applies to transnational armed groups. Concretely, this involves the question of whether, and to what extent, the 'war' against Al Qaeda can be classified as an armed conflict. It is argued, that under international humanitarian law, the 'war on terror' must be split into different components. In some cases, the law of international armed conflicts applies. In others, the law of non-international armed conflicts applies. In most situations of the 'war on terror', IHL does not apply at all.

Secondly, this paper looks at the related issue of what determines the existence of an armed group as an addressee of IHL of non-international armed conflicts. According to what criteria can Al Qaeda be considered an armed group for the purpose of making IHL applicable? When are members of such a group covered by IHL, even though said group is not fulfilling those identified criteria?

Thirdly, the rules of IHL covering an armed conflict between a transnational armed group and a state are summarized, in particular the status and treatment of members of such groups.

Most importantly, this paper examines whether and how the existing rules of IHL should or could be adapted to (more) adequately cover transnational armed groups. In this context, few concrete proposals suggesting which rules should be adapted, and in what sense, were found.

Nevertheless, as a fourth issue, this paper tries to identify certain areas where the existing IHL of non-international armed conflicts is not entirely adequate because of the extraterritorial character of the fight against transnational armed groups.

Fifth, skepticism is expressed about the possibility of extending IHL and of applying it beyond armed conflicts as currently defined when transnational groups are involved. Sixth, as for the mechanisms of implementation, several proposals are brought forward regarding ways by which respect for existing (or any new rules of) IHL by transnational or any other armed groups can be improved. It is argued, centrally, that if armed groups are addressees of IHL, it is indispensable to involve them in the development and implementation of the rules.

Finally, the article explores ways, obstacles, and the risks of developing new rules and mechanisms of IHL specific to armed conflicts with transnational armed groups. The author remains skeptical about the realism and utility of any attempt to develop specific rules for such conflicts.

Transnational Armed Groups and International Humanitarian Law

By Marco Sassòli

The September 11, 2001 attacks and the 'war on terror' declared by the United States in response to those attacks have ignited interest in 'transnational armed groups'. One of these groups, Al Qaeda, was responsible for the attacks and is the main, declared enemy in the 'war on terror'. It is uncontroversial to state that international terrorism represents a considerable challenge to the international community and that international law must meet this challenge. What is controversial is whether this challenge must, or at least may, be met by classifying terrorism as 'war' — or, in the terminology of contemporary international law, as 'armed conflict'. Similarly, can the enemy engaged in such a war be duly regarded as an 'armed group'? The two questions are interrelated, as an armed conflict cannot exist without two or more parties which must be either states or armed groups. The result — or, for some, the aim — of such a classification as an armed conflict would be the application of the law of armed conflict, which, in conformity with contemporary practice, I prefer to call international humanitarian law (IHL).

Although I will attempt to address the issue announced in the title of this essay in a general manner, and not merely in the context of the 'war' the United States is fighting with Al Qaeda, such task is rendered difficult by the nominal absence, up until this point, of a transnational armed group other than Al Qaeda. One cannot therefore exclude the possibility that some of the thoughts and ideas articulated here may appear irrelevant, inappropriate, or even squarely erroneous in a future case involving a different type of transnational armed group.

This paper first discusses when IHL applies to transnational armed groups. This involves primarily the question of whether and to what extent the 'war' against Al Qaeda can be classified as an armed conflict, and the related identification of criteria to determine

whether Al Qaeda can be considered as an armed group for the purpose of making IHL applicable. To the extent that IHL does apply, this then necessitates a clarification of whether the rules of international or non-international armed conflict are relevant, and, subsequently, a summary of the rules of IHL that would cover such a conflict. Finally and most importantly, I will inquire whether and how the existing rules of IHL should or could be adapted to (more) adequately cover transnational armed groups.

As for substantive rules, the problem examined here raises, firstly, both the questions of whether the present rules are adequate for transnational armed groups involved in armed conflicts and whether IHL should be extended to apply beyond armed conflicts as defined currently when transnational groups are involved. Secondly, as to mechanisms of implementation, this raises the question of how respect for existing (or any new) rules of IHL by transnational and other armed groups can be improved. Thirdly, as to process, the exercise requires exploring ways, obstacles, and risks of developing new rules and mechanisms of IHL specific to armed conflicts with transnational armed groups.

Before addressing these issues, it is appropriate to nuance their humanitarian importance. The 'war' against the only readily identifiable transnational armed group — Al Qaeda — has met with considerable interest from public opinion, politicians, and scholars. Yet the fact remains that most armed conflicts are either clearly international or clearly internal. Such traditional conflicts continue to cause the overwhelming majority of war victims. International armed conflicts are fought between states (e.g., the United States and Iraq) or between a state and an armed group that can be associated with another state (e.g., the Taliban in 2001 to Afghanistan or, possibly, Hezbollah in 2006 to Lebanon). Internal armed conflicts are fought between a government and rebels, sometimes with the involvement of foreign governments and rebels (e.g., in the Congo), but essentially on the territory of one state (e.g., in the Sudan, Sri Lanka, and Colombia). While armed groups cause more than half of the suffering of war victims (the other half being the result of governmental action), most are not transnational, but traditional anti-governmental rebel groups.

Does armed conflict exist in the case of transnational armed groups?

For international humanitarian law to be applicable to a transnational armed group, the latter must be involved in an armed conflict, or, as a minimum, an armed conflict between other parties must exist on the territory of the state where the armed group acts.

IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions¹ (hereafter: the Conventions) and the two 1977 Additional Protocols (hereafter: the Protocols)². These instruments apply only to armed conflicts. The Conventions and Protocols establish a strict distinction between international and non-international armed conflicts, with the latter being governed by less detailed and less protective rules.

As for customary international law, a recent comprehensive study undertaken under the auspices of the International Committee of the Red Cross (ICRC) has uncovered a large body of customary rules, the majority of which are claimed to apply to both international and non-international armed conflicts.³ It is of note, however, that the study has neither clarified the distinction between international and non-international armed conflicts — in particular in cases where a conflict with a non-state actor extends beyond the borders of one state — nor has it defined the lower threshold at which violence amounts to an armed conflict (for non-international armed conflicts).

¹ *Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31-83; *Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85-133; *Convention [No. III] relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135-285; *Convention [No. IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287-417).

² *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 – 434; *Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 - 699.

³ Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005.

Can the conflict be classified as International Armed Conflict?

The Conventions and Protocol I apply to international armed conflicts. Common Article 2 to the Conventions states that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”⁴ Only states can be parties to the Conventions. Al Qaeda (or any transnational armed group) is not a state. Therefore, the Conventions do not apply to a conflict between the United States and this non-state actor. As for customary international law, there is no indication confirming what seems to be the view of the United States administration, namely that the concept of international armed conflict under customary international law is broader.⁵

State practice and *opinio juris* do not apply the law of international armed conflict to conflicts between states and certain non-state actors. In conformity with the tenets of the Westphalian system, states have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply those same rules, but only more limited humanitarian rules.

Some activities of (and against) transnational armed groups are nevertheless covered by the law of international armed conflicts, including all hostilities directed against the armed forces or the territory of one state by forces representing another state or acting *de facto* under the direction or control of that other state.⁶ A transnational armed group, such as Al Qaeda in 2001 in Afghanistan, may well be under the direction and control of a state. IHL of international armed conflict will then apply (in Afghanistan it applied regardless because of the conflict between the United States and the Taliban, the latter representing, at the time, the *de facto*

⁴ Article 2 common to the Conventions. Art. 1(3) of Protocol I refers to this provision, but Art. 1(4) expands the field of application to national liberation wars, a provision vehemently opposed by the United States.

⁵ See William K. Lietzau, “Combating Terrorism: Law Enforcement or War?”, in Michael N. Schmitt and Gian Luca Beruto, eds., *Terrorism and International Law, Challenges and Responses*, San Remo: International Institute of Humanitarian Law and George Marshall European Center for Security Studies, 2002, p. 80.

⁶ See International Criminal Tribunal for the Former Yugoslavia, Judgement, *Tadic*, Appeals Chamber, July 15, 1999, paras. 116-144.

government of the country). Similarly, but more controversially, the law of international armed conflicts applies when a state is directing hostilities against a transnational armed group on the territory of another state without the agreement of the latter state (e.g., Israel in Lebanon in 2006, if we consider the acts of Hezbollah to not be attributable to Lebanon).

If IHL of international armed conflicts applies somewhere to a transnational armed group because of the aforementioned reasons, it does not ensue that it applies to that group everywhere. Indeed, what makes that law apply is the attitude of the states involved, not the nature or geographical scope of activity of the group. Until now, it has been regretted by some analysts and practitioners that once there was an international element to a conflict in a given territory, the entire conflict could not be classified as wholly international. Under consistent state practice, a conflict had to be divided into components.⁷ Under the law as it stood before 2001, it was even less arguable that a worldwide conflict could be characterized as international simply because some of its components were international. Indeed, this never occurred during the Cold War. However, shortly after September 11, 2001, the United States administration classified the 'war on terrorism' as a single worldwide international armed conflict against a transnational non-state actor (Al Qaeda).⁸ Reactions by other states to that claim have been ambiguous.

⁷ Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", 163/II *Collected Courses* (1979) 119; Hans-Peter Gasser, "Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon", 33:1 *American University Law Review* (1983), p. 145; Eric David, *Principes de Droit des Conflits Armés*, third ed., Brussels: Bruylant, 2002, pp. 153-160.

⁸ For a legal explanation of the US position, see White House, *Memorandum of February 7, 2002*, Appendix C to *Independent Panel to Review DoD Detention Operations*, Chairman the Honorable James R. Schlesinger to US Secretary of Defense Donald Rumsfeld, August 24, 2004, available online at www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf; Anthony Dworkin, Crimes of War Project, *Excerpts from an Interview with Charles Allen*, Deputy General Counsel for International Affairs, US Department of Defense, December 16, 2002, available online at www.crimesofwar.org/onnews/news-pentagon-trans.html. For a critical assessment of the US position, see Marco Sassòli, "Use and Abuse of the Laws of War in the 'War on Terrorism'", 22 *Law and Inequality: A Journal of Theory and Practice* (2004), pp. 198-203; Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", 14:2 *European Journal of International Law* (2003), p. 249; Jordan J. Paust, "War and Enemy Status after 9/11: Attacks on the Laws of War", 28 *Yale*

Can the conflict be classified as Non-international Armed Conflict?

Hostilities between one or several states, on the one side, and a transnational armed group, on the other (such as the 'war on terror' against Al Qaeda), that do not qualify under the above-mentioned criteria as international armed conflicts, may be non-international armed conflicts covered by Article 3 common to the four Conventions and by Protocol II. This presupposes, firstly, that the hostilities meet the minimum threshold for a non-international armed conflict, and, secondly, that every armed conflict not classified as international is perforce a non-international armed conflict, even if it is neither internal nor limited to the territory of one single state. Both conditions are subject to controversy.

As for the lower threshold of a non-international armed conflict, no clear-cut criteria exist. Protocol II simply excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts."⁹ Relevant factors that contribute to an armed conflict include: intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capacity to respect IHL; collective, open, and coordinated character of the hostilities; direct involvement of governmental armed forces (vs. law enforcement agencies); and *de facto* authority by the non-state actor over potential victims.¹⁰

The International Criminal Tribunal for the Former Yugoslavia (ICTY) puts particular emphasis on the protracted character of the conflict (or the violence) and the extent of organization of the parties.¹¹ Yet the protracted character cannot be the decisive

Journal of International Law (2003), p. 325; and Catherine Moore, "International Humanitarian Law and the Prisoners at Guantanamo Bay", 7:2 *International Journal of Human Rights* (2003), p. 1.

⁹ Protocol II, Art. 1(2).

¹⁰ See Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge: Cambridge University Press, 2002, pp. 30-52, and Jean-François Quéguiner, "Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire", 85 *International Review of the Red Cross*, June 2003, p. 278.

¹¹ ICTY, Decision on Jurisdiction, *Tadic*, Appeals Chamber, October 2, 1995, para. 70, and

criterion,¹² since it is not foreseeable at the outset of a given conflict. It is difficult to imagine that the obligation to respect IHL does not arise readily at the inception of a conflict but only from that time when hostilities become protracted. In that respect, the Inter-American Commission on Human Rights has applied IHL to a conflict which lasted a mere two days.¹³

Some authors also take the views of the parties into consideration, arguing that concerns about state sovereignty, which historically accounted for the high threshold of application of IHL in non-international armed conflicts, do not matter where the government accepts or invokes IHL.¹⁴ As far as the 'war on terror' is concerned, both the United States and Al Qaeda consider themselves involved in a war.¹⁵ In law, however, legal classifications depend upon the facts themselves and not upon the views on the facts of those subject to the law.

As for the law, the views of states about what the rules are matter evidently, and are even decisive. The United States administration adopts a very broad concept of 'armed conflict'. Its instructions to Military Commissions explain that armed conflict

does not require ... ongoing mutual hostilities A single hostile act or attempted act may provide sufficient basis ... so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or

Judgement, *Delalic, Mucic, Delic, and Landzo*, Trial Chamber, November 16, 1998, para. 184.

¹² See detailed criticism by Quéguiner, *supra* note 10, pp. 278-281.

¹³ Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.98, Doc. 38, December 6, 1997, www.cidh.org.

¹⁴ Derek Jinks, "September 11 and the Laws of War", 28 *Yale Journal of International Law* (2003), pp. 31-38.

¹⁵ *Id.*, at 35-38; Mohammad-Mahmoud Ould Mohamedou, "Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States", Program on Humanitarian Policy and Conflict Research at Harvard University, July 2005, available online at www.hpcr.org/projects/tags.php.

intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.¹⁶

Until now, terrorist acts by private groups have not been viewed customarily as creating armed conflicts.¹⁷ Upon ratifying Protocol I, the United Kingdom stated: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."¹⁸ The British and Spanish campaigns against the Irish Republican Army (IRA) and the Euskadi Ta Askatasuna (ETA) have not been treated as armed conflicts under IHL.¹⁹ Admittedly, those campaigns arose on the territory of only one state.

It is not clear to this author why a situation, which is not an armed conflict when it arises on the territory of only one state, should be an armed conflict when it spreads over the territory of several states.

On the second issue, whether a conflict between a transnational armed group and one or several states can be classified as non-international in spite of spreading over the territory of many states, the United States administration argued that the war against Al Qaeda was not covered by common Article 3.²⁰ This reasoning was not followed by the United States Supreme Court in *Hamdan v. Rumsfeld*, which held that every armed conflict that "does not involve a clash between nations" is not of an international character, and that the latter phrase "bears its literal meaning."²¹ In my view, the Supreme Court is correct, although the wording of the IHL treaties may be ambiguous. On the one hand, common Article 3 refers to

¹⁶ Section 5(C) of *Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission*, April 30, 2003, www.dtic.mil/whs/directives/corres/mco/mci2.pdf.

¹⁷ Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester: Manchester University Press, 2000, p. 56, "[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism [. . .] are outside the scope of 'IHL'". See also the ICTY in *Delalic et al.*, *supra* note 11, para 184.

¹⁸ Reservation by the United Kingdom to Art. 1(4) and Art. 96(3) of Protocol I, available at www.icrc.org/ihl.nsf.

¹⁹ Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Aldershot, Vermont: Dartmouth Publishing, 1992, p. 318.

²⁰ See *The White House*, *supra* note 8.

²¹ See *Hamdan v. Rumsfeld*, 548 U.S., 2006; See Jinks, *supra* note 14, pp. 38-41.

“armed conflicts not of an international character” and Article 1 of Protocol II refers to “armed conflicts which are not covered by Article 1 of ... Protocol I,” two indications that every armed conflict not qualifying as international is perforce non-international. On the other hand, common Article 3 refers to conflicts “occurring in the territory of one of the High Contracting Parties,” whereas Article 1 of Protocol II refers to those “which take place in the territory of a High Contracting Party.”

According to the aim and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not ‘non-international armed conflicts’, there would be a gap in protection, which could not be explained by states’ concerns about their sovereignty. Those concerns made the law of non-international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling over the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state. Additionally, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce, *inter alia*, the law of non-international armed conflicts, to the neighbouring countries. This confirms that even a conflict spreading across borders remains a non-international armed conflict. In conclusion, “internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.”²²

Applying the abovementioned definitions and minimum thresholds, existing IHL determines that a sustained ‘war’ between one or several states, on the one side, and a transnational terrorist group, on the other, may fall under the concept (and law) of a non-international armed conflict.²³ Some consider that the conflict between Al Qaeda

²² Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002, p. 136.

²³ See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser. L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, available online at www.cidh.oas.org/Terrorism/Eng/toc.htm, para 7; Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment”, 43 *Harvard International Law*

and the United States — and other conflicts against groups labelled by the state concerned as terrorist — are indeed armed conflicts of such nature.²⁴ Others hold that, beyond the case of the 2001-2002 conflict in Afghanistan, the contemporary ‘war on terror’ is no armed conflict at all.²⁵

In my view, who is correct depends exclusively upon the facts, namely the quantity and quality of violence, aspects that are both complex and controversial in the Al Qaeda conflict. After the Madrid and London attacks in 2004 and 2005, the British and Spanish governments did not consider themselves involved in an armed conflict (and, accordingly, did not target as military objectives the apartments where those responsible were hiding). What emerges from judicial inquiries following the two sets of attacks is that their authors were perhaps not linked to Al Qaeda by anything other than consulting the same websites and harboring the same hate against Western societies as Al Qaeda apparently does.²⁶

Subsequent intelligence assessments, representing a significant portion of the United States’ overall knowledge on terrorism networks, point to decentralized groups that spring up independently and operate with little, if any, connection to Al Qaeda. The burgeoning number of groups gather strategy, tactics, and inspiration from more than five thousand radical Islamic websites. The Central Intelligence Agency’s Director offered in April 2006 that “new jihadist networks and cells, *sometimes united by little more than their anti-Western agendas*, are increasingly likely to emerge”.²⁷

Journal (2002), p. 100.

²⁴ See, e.g., Jinks, *supra* note 14, pp 21-31. See for a detailed and nuanced analysis Noëlle Quenivet, “The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature”, in Roberta Arnold and Pierre-Antoine Hildbrand, eds., *International Humanitarian Law and the 21st Century’s Conflicts* (Lausanne: Edis, 2005), pp. 31-57.

²⁵ See Jelena Pejic, “Terrorist Acts and Groups: A Role for International Law?”, 75 *British Yearbook of International Law* (2004), pp. 85-88.

²⁶ See “Indictments are Near in ‘04 Attacks, Report says Madrid will charge 30-40”, *The International Herald Tribune*, April 10, 2006, p. 3; “Al-Qaida n’est pas lié aux Attentats de Londres”, *Le Monde*, April 11, 2006, p. 8.

²⁷ See Mark Mazzetti, “Spy Agencies Say Iraq War Worsens Terrorism Threat”, *The New York Times*, September 24, 2006, p. A1, citing the leaked National Intelligence Estimate of 2006, a thirty-page document synthesizing intelligence from sixteen different US intelligence agencies. See also Karen De Young, “Spy Agencies Say Iraq War Hurting

Arguably, this cannot be a sufficient basis for classifying all these acts as part of a single, non-international armed conflict under existing international humanitarian law. The question of whether IHL should be extended to cover such situations is discussed below.

When can terrorists be classified as an armed group to whom IHL applies?

As noted, the existence of parties is one of the most fundamental elements that allow a situation to be classified as an armed conflict. Put simply, IHL can only be implemented by and with *parties* to armed conflict. As Gabor Rona notes incisively, '[Parties] have rights and responsibilities. There can be no humanitarian law conflict without identifiable parties. ... Wars against proper nouns ... have anyway advantages over those against common nouns (e.g., crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again.'²⁸

For the purpose of this essay, it is therefore important to clarify what conditions a transnational armed group must fulfil in order to become party to an armed conflict. As mentioned above, only states (and under Protocol I national liberation movements) can be parties to an international armed conflict. Armed groups are the typical parties to non-international armed conflicts. Such a conflict presupposes in law the existence of at least one armed group and a government or of two armed groups fighting each other.

IHL may also apply to persons who do not belong to an armed group

Before discussing what requirements a transnational armed group must fulfil to be a party to a non-international armed conflict, it must be underlined that the members of such a group may be bound and protected by IHL even if their group does not fulfill the criteria of a party to a conflict, but an armed conflict nevertheless exists between other parties on the territory on which the members of the group are

U.S. Terror Fight", *The Washington Post*, September 24, 2006, p. A1, emphasis added.

²⁸ Gabor Rona, "International Law under Fire – Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'", 27 *The Fletcher Forum of World Affairs*, (2003), pp. 60-61.

found. One possibility is that such ‘other’ conflict may be an international armed conflict. As explained below, in my view (which is subject to considerable controversy), the members of the group are then civilians, protected by Convention IV if they fulfil the necessary nationality or allegiance criteria. Another possibility is that the members of the group not having the status of a party to the conflict are covered by the law of non-international armed conflicts if a non-international armed conflict between other parties exists on the territory where they find themselves. In this case, they are bound by IHL for any acts they commit with a nexus to the conflict,²⁹ and they are protected by IHL if they do not or no longer take an active part in the hostilities.³⁰

When is an armed group an addressee of IHL?

What changes if the group is a party to a non-international armed conflict is that it becomes *as a group* an addressee of IHL. Under its explicit wording, Article 3 common to the Conventions is binding upon “each party to the conflict”, i.e., the non-state armed group as much (and as equally) as the government side.³¹ Different legal constructions exist to explain why armed groups are bound by IHL. Either there is a rule of customary international law according to which they are bound by obligations accepted by the government of the state where they fight,³² or the principle of effectiveness implies that any effective power in the territory of a state is bound by the state’s obligations,³³ or they are bound via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules.³⁴

²⁹ *Tadic*, *supra* note 11, para. 70, and ICTR, Judgement, *Akayesu*, Appeals Chamber, June 1, 2001, paras. 425-446.

³⁰ Art. 3 common to the Conventions.

³¹ Zegveld, *supra* note 22, pp. 9-38, with further references.

³² Michael Bothe, “Conflits armés internes et droit international humanitaire”, 82 *Revue générale de droit international public*, 1978, pp. 91-93.

³³ Roger Pinto, “Les règles du droit international concernant la guerre civile” 114 *Collected Courses*, 1965, I, p. 528.

³⁴ Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht: ICRC, Martinus Nijhoff Publishers, 1987, para. 4444; and Georges Abi-Saab, “Non-international Armed Conflicts” in *International Dimensions of Humanitarian Law*, Geneva and Paris: Henry Dunant Institute and UNESCO, 1988, p. 230.

As for the criteria which a group must fulfil, Art. 1(1) of Protocol II sets a relatively high threshold for a group to be an addressee of it (and which at least one anti-governmental armed group must fulfill to make Protocol II applicable). The group must “under responsible command, exercise such control over [a High Contracting Party’s] territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol.” Transnational armed groups will only very exceptionally fulfil these criteria. In addition, the text of the provision requires that the conflict takes place in the territory of a High Contracting Party between *its* armed forces and an armed group, which would exclude fighting between a state and a transnational armed group on the territory of a third state. Despite its formulation as such, the sense of the provision may again simply be to avoid binding states not party to the Protocol. The above-mentioned provision of the ICTR Statute, which applies rules of Protocol II to fighting between Rwandan armed forces and armed groups on the territory of neighboring states, points in this direction.

The criteria that a group must fulfill to make common Article 3 (and presumably the corresponding customary law) applicable are lower, but controversial, as the text itself does not clarify anything. For humanitarian reasons, the ICRC pleads that “the scope of application of the article must be as wide as possible.”³⁵ The United Nations Security Council and the former United Nations Human Rights Commission have applied international humanitarian law to thirty very fragmented groups in a situation of chaos in Somalia.³⁶ On the other hand, the *ad hoc* international criminal tribunals and the Inter-American Commission on Human Rights are more restrictive and put emphasis on a minimum degree of organization of a group.³⁷

One can adopt a functional approach and consider any group to be subject to some rules formulated in terms of absolute prohibitions (such as the prohibition of torture), while not necessarily also to rules requiring a minimum degree of organization (such as the respect of judicial guarantees). This approach may be appropriate once an

³⁵ Jean S. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva: ICRC, 1958, p. 36.

³⁶ See Zegveld, *supra* note 22, pp. 138-141.

³⁷ *Ibid.*, pp. 134-138.

armed conflict already exists. However, it defies logic if it is used to determine whether at least two groups have the necessary degree of organization to make the situation an armed conflict, as IHL cannot only partly apply in a situation. For that purpose, I argue, it is preferable to require from an armed group the minimum degree of organization necessary to comply with all rules of IHL of non-international armed conflicts — which are, in any event, mostly formulated in prohibitory terms.

Regarding the application of these criteria to the ‘war on terror’, one author writes that Al Qaeda “unquestionably possessed the *de facto* capability to conduct sustained armed hostilities against the United States.”³⁸ Interestingly enough, this author does not affirm that Al Qaeda actually *conducted* such hostilities. On this issue, as noted, everything depends fundamentally on facts that are not fully known and which remain controversial. As mentioned above, the authors of the 2004 and 2005 attacks in London and Madrid were possibly linked to Al Qaeda only through reading websites and harboring the same hatred.³⁹ This cannot be a sufficient basis for considering them as ‘members’ of an armed group.

How does IHL, as it stands, deal with transnational armed groups?

As mentioned above, if a transnational armed group is a party to an armed conflict, it has to respect the whole of IHL of non-international armed conflicts, which has been drawing closer in recent years to the full IHL of international armed conflicts.⁴⁰ It has done so:

- through the jurisprudence of the two *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda based upon their very expansive assessment of customary international law;
- in the crimes defined in the Statute of the International Criminal Court;
- by states having accepted that both categories of conflicts

³⁸ Jinks, *supra* note 14, pp. 38.

³⁹ See *supra* notes 26 and 27.

⁴⁰ See, for references, Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* second edition, Geneva: ICRC, 2006, p. 250.

- are covered by the same rules in recent treaties on weapons and cultural objects;
- under the growing influence of international human rights law; and
- according to the very optimistic assessment of customary IHL by the ICRC.⁴¹

IHL prohibits, in both international and non-international armed conflicts, any act which could be classified as terrorist,⁴² in particular attacks against civilians, acts or threats of violence the primary purpose of which is to spread terror among the civilian population,⁴³ and indiscriminate attacks.⁴⁴ As always, however, IHL not only restrains members of such a group, but also their enemies and thus protects the members of the groups. The extent of such protection of members of transnational armed groups is subject to much more controversy than their obligations. On this issue too, the law of international and the law of non-international armed conflict must be distinguished.

IHL of international armed conflicts

It is only in rare cases of international armed conflicts that the controversial question arises whether members of transnational armed groups are civilians or combatants. As combatants, they would have a right to participate directly in hostilities and could not be punished for doing so, but they could be attacked until they surrender or become otherwise *hors de combat*. Should they fall into the power of the enemy, they would be prisoners of war protected by Convention III. Conversely, as civilians they would have no right to participate in hostilities, but they would be protected against attacks and benefit from the protection of Convention IV once fallen into the

⁴¹ See *supra* note 3.

⁴² See, generally, Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law", 847 *International Review of the Red Cross* (2002), p. 556; Pejic, *supra* note 25, pp. 73-76; Marco Sassòli, "International Humanitarian Law and Terrorism", in Wilkinson and Steward, eds., *Contemporary Research on Terrorism*, Aberdeen: Aberdeen University Press, 1987, pp. 470-472.

⁴³ See Art. 51(2) of Protocol I, Art. 13(2) of Protocol II, and a corresponding rule of customary IHL (see Rules 1 and 2 of the ICRC Study, *supra* note 3, Vol. I, pp. 3-11.).

⁴⁴ See Art. 51(4) and (5) of Protocol I, for international armed conflicts and Rules 11-14 of the ICRC Study, *supra* note 3, pp. 37-50, for all armed conflicts.

power of the enemy; if they directly participate in hostilities they too could be attacked, but only while they do so, and they may subsequently be punished for the mere fact of having participated.

In the current 'war on terror,' the United States claims that members of transnational armed groups are 'unlawful combatants' who have the disadvantages but not the benefits of the two statutes. As they (i) do not belong to a state, (ii) do not distinguish themselves from the civilian population, and (iii) do not comply with the laws of war, they are not combatants. At the same time, members of these groups may nevertheless be attacked as combatants and detained without any individual determination like prisoners of war (without having the privileges of that status). Such 'unlawful combatants' (from an IHL perspective, it is preferable to refer to them as 'unprivileged combatants') would fall in between Conventions III and IV and therefore be protected by neither of the two. Under the clear text of Article 4 of Convention IV, and according to the context and aim of both Conventions III and IV, they should, however, fall under Convention IV.⁴⁵ No one can fall between the two Conventions and therefore be protected by neither.⁴⁶ In my view, the correct analysis is therefore, first, to inquire whether these individuals are combatants. If they are not, and IHL of international armed conflicts applies, they must perforce be civilians.

⁴⁵ The first paragraph of Article 4 of Convention IV reads as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." According to paragraph 4 of that article, persons protected by Convention III "shall not be considered as protected persons within the meaning of the present Convention." This clearly indicates that anyone (fulfilling the requirement for protected person status) who is not protected by Convention III falls under Convention IV.

⁴⁶ Thus also Pictet, *supra* note 35, pp. 51; Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", 849 *International Review of the Red Cross* (2003), p. 45; Silvia Borelli, "Casting light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror'", 857 *International Review of the Red Cross* (2005), p. 50; Rona, *supra* note 27, p. 66; Marco Sassòli, "'Unlawful Combatants': The Law and Whether it Needs to be Revised", 97 *Proceedings of the 97th Annual Meeting of the ASIL* (2003), pp. 196-200. That 'unlawful combatants' are protected by Convention IV is also recognized by Richard B. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", 28 *British Yearbook of International Law* (1951), pp. 323, 328, and 344. When the concept of 'unlawful combatants' was used by the US Supreme Court in *Ex Parte Quirin et al.*, 317 U.S. 1 (1942), Convention IV did not yet exist.

Article 4 of Convention III defines who is a prisoner of war (and by implication a combatant). Members of a transnational group can by definition not be members of the regular forces of a state falling under Art. 4(A)(1) or (3) of Convention III. They could be members of “other militias ...[or] volunteer corps, ... including resistance movements belonging to a [State] Party to the conflict” falling under Art. 4(A)(2). This provision requires them, however, to fulfill collectively (i.e., as a group) several conditions, including distinguishing themselves sufficiently from the civilian population and respecting the laws of war. Even if Al Qaeda in Afghanistan could have been considered as a militia belonging to the state, its members nevertheless could have been denied prisoner of war status because Al Qaeda did not comply with the conditions such a militia must fulfil under Convention III, in particular the respect of the laws and customs of war.⁴⁷

In case of doubt whether persons having committed a belligerent act are combatants, Article 5(2) of Convention III prescribes that they must be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.” The United States established such tribunals in the Vietnam war and the 1991 Gulf War,⁴⁸ but it argued that, in the case of those detained in Guantánamo and arrested in Afghanistan, while IHL of international armed conflicts applied, there is no doubt as to the status of the individuals.⁴⁹

If the member of a transnational armed group is a civilian covered by IHL of international armed conflicts — or if the law of non-international armed conflicts applies — and if that member takes a direct part in hostilities, he loses protection against attacks, but only

⁴⁷ See Article 4(A)(2) of Convention III and, for a detailed discussion, Luisa Vierucci, “Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled”, 1 *Journal of International Criminal Justice* (2003), pp. 392-95.

⁴⁸ *United States Military Assistance Command, Vietnam. Directives No. 381-46, Military Intelligence: Combined Screening of Detainees, 27 December 1967*, reproduced in Sassòli/Bouvier, *supra* note 40, p. 1125, and *Department of Defense, Report to Congress on the Conduct of the Persian Gulf War*, 31 *ILM* (1992), p. 629.

⁴⁹ Donald Rumsfeld, *Fiscal Year 2003 Department of Defense Budget Testimony*, available online at www.defenselink.mil/speeches/2002/s20020205-secdef2.html.

for the time of such participation.⁵⁰ Commentators dispute both what ‘direct participation in the hostilities’ is, and for how long a civilian thus participating loses immunity from attack.⁵¹ The ICRC is presently holding expert consultations on both questions, possibly in view of drawing up lists of what clearly constitutes direct participation in hostilities, what clearly does not fall under that concept, and what remains in a grey zone.⁵²

In international armed conflicts, civilians are ‘protected civilians’ if they fall into the hands of a belligerent and fulfill certain nationality requirements.⁵³ Protected civilians may not be detained, except for two reasons. First, detention is permissible under domestic legislation (or security legislation introduced by an occupying power), for the prosecution and punishment of criminal offences (including for having directly participated in hostilities). Second, civilians may be interned for imperative security, upon individual decision made in a regular procedure to be prescribed by the belligerent concerned and which must include a right of appeal.⁵⁴ Such civilians are civil internees whose treatment is governed by extremely detailed provisions of Convention IV, and their case must be reviewed every six months.⁵⁵

As for the place of detention of such members of transnational armed groups captured in an international armed conflict, while combatants may be held as prisoners of war in virtually every corner of the earth,

⁵⁰ Protocol I, Art. 51 (3), and Protocol II, Art. 13 (3).

⁵¹ See for different approaches Frits Kalshoven, “Noncombatant Persons”, in Horace B. Robertson, ed., *The Law of Naval Operations*, 64 (1991), pp. 311-312; and A. R. Thomas and James C. Duncan, ed., *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, International Law Studies*, 73, Naval War College, Rhode Island, 1999, p. 484; Hans-Peter Gasser, “Protection of the Civilian Population” in Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict*, New York: Oxford University Press, 1995, pp. 232-233; Lisa Turner and Lynn G. Norton, “Civilians at the Tip of the Spear”, 51 *Air Force Law Review*, 2001, pp. 27 and 31; Michael E. Guillory, “Civilianizing the Force: Is the United States Crossing the Rubicon?”, 51 *Air Force Law Review*, 2001, pp. 117 and 120.

⁵² See the reports of the meetings held in 2003, 2004, and 2005, available online at www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument.

⁵³ Under the text of Convention IV, Art. 4, the term ‘protected persons’ covers enemy and certain neutral nationals. The ICTY replaces the nationality standard by an allegiance standard (see *Tadic, Judgment*, *supra* note 6, paras. 163-69).

⁵⁴ Convention IV, Arts. 41-43 and 78.

⁵⁵ *Id.*, Arts. 79-135.

protected civilians may never be deported out of an occupied territory.⁵⁶ Afghanistan was an occupied territory because it came under the control of the United States and its allies during an international armed conflict.

It may appear strange to classify as ‘civilians’ heavily armed members of a transnational armed group captured in an international armed conflict, but found not to benefit from combatant and prisoner of war status. In law, borderline cases seldom correspond to the ideal type of a category but fall nevertheless under its provisions. What matters is that such ‘civilian status’ does not lead to absurd results. As ‘civilians’, unprivileged combatants may be attacked while they unlawfully participate in hostilities. After arrest, Convention IV does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes. In addition, the Convention permits administrative detention for imperative security reasons and allows for derogations from protected substantive rights of civilians within the territory of a state and from communication rights within occupied territory.⁵⁷ Convention IV has not been drafted by professional do-gooders or professors, but by experienced diplomats and military leaders, fully taking into account the security needs of a state confronted with dangerous people.

Some may find it shocking that unprivileged combatants as civilians thus have an advantage over captured lawful combatants (i.e., prisoners of war) because the former may be interned only following a judicial or individual administrative decision.⁵⁸ However, lawful combatants can be easily identified, based on objective criteria, which they will normally not deny (i.e., being a member in the armed forces of a party to an international armed conflict), while the membership in a transnational armed group and past behavior of an unprivileged combatant and the future threat he or she represents can only be determined individually.

⁵⁶ Id., Arts. 49 and 76, and Convention III, Art. 12.

⁵⁷ Convention IV, Art. 5(1) and (2), respectively.

⁵⁸ Ruth Wedgwood, “The Supreme Court and the Guantánamo Controversy” in Berkowitz, ed., *Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases*, Stanford: Hoover, 2005, p. 179.

IHL of non-international armed conflicts

As explained above, in my view, ‘war on terror’-related ‘hostilities’ outside Afghanistan (and Iraq) are, mostly, not armed conflicts at all. If these engagements fulfill the threshold of armed conflicts, they could, as a maximum, be dealt with under the law of non-international armed conflicts. This law does not make a formal distinction between combatants and civilians, but rather protects all those who do not or no longer take an active part in hostilities.⁵⁹ Once in the hands of the enemy, members of a transnational or domestic armed group and peaceful civilians benefit from exactly the same protection under that law. In non-international armed conflicts, IHL cannot possibly be seen as a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in case of prosecution for criminal offences, for judicial guarantees.

The United States Supreme Court found in *Hamdan v. Rumsfeld* that the military commissions set up in Guantánamo violated precisely those judicial guarantees prescribed by common Article 3.⁶⁰ Yet the court left open the question whether Hamdan, arrested in Afghanistan when the country was still occupied by the United States and its allies, should rather be covered — as I would submit — by the law of international armed conflicts.

Should IHL be adapted to adequately cover transnational armed groups?

Substantive rules

Some scholars, politicians, and journalists claim that IHL as it stands was developed at another time and is not adequate for the new challenges raised by the contemporary kind of conflict with transnational armed groups. The law should therefore be adapted to ‘new realities’.⁶¹ Any discussion of this serious challenge is rendered difficult by two problems.

⁵⁹ For the concept of direct participation see *supra* notes 51 and 52 and accompanying text.

⁶⁰ See *supra* note 21.

⁶¹ See, for instance the (then) British Defense Secretary John Reid in a speech of April 3,

First, there are no concrete proposals by those labelling the Geneva Conventions 'outdated' as to which provisions of IHL treaties should be amended and with what new wording.⁶² For the author of this essay, who is harboring the preconceived idea that IHL understood correctly is adequate for any and all aspects of conflicts with transnational armed groups that are indeed armed conflicts, it is therefore difficult to respond or to get inspiration about what should be discussed practically.

If scholars and politicians argue that IHL is not adequate without immediately adding which rules *are* adequate and in what situation, this has catastrophic results in the field. Every soldier, policeman, or interrogator, pressed hard by the enemy or the need to avoid terrorist attacks, may consider inadequate in the case at hand those very rules of IHL he was trained to comply with (e.g., not to torture or to take feasible precautions in attack), but which hinder him in taking short-cuts or oblige him to engage in additional work, be more patient, or take additional risks. As the defense attorney of a United States private accused of having tortured someone to death in Afghanistan remarked: "The President of the United States does not know what the rules are!.. The Secretary of Defense doesn't know what the rules are. But the government expects this Pfc. to know what the rules are?"⁶³

2006, at Banqueting House, Royal Palace of Whitehall, available online at www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/SofS/20thcenturyRules21stcenturyConflict.htm; certain remarks of US Defense Secretary Donald Rumsfeld at a press conference of February 8, 2002, available online at www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html and White House, 'Press Briefing by Ari Fleischer' of January 28, 2002 available online at www.whitehouse.gov/news/releases/2002/01/20020128-11.html; D. Montgomery, "Geneva Convention's Gentility; Treaty Stresses Civil Treatment of Prisoners", *Washington Post*, February 17, 2002, F01. For scholarly views see *infra*, notes 62, 64, 68, and 69.

⁶² Eric A. Posner, "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Terrorism and the Laws of War", 5 *Chicago Journal of International Law*, (2005), p. 423, e.g. simply writes that the laws of war "might sensibly be applied... though most likely in a highly modified form". In my view the most interesting and precise, although still very tentative, proposals are made by Roy S. Schondorf, "Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?" 37 *New York University Journal of International Law and Policy*, pp. 61-75. See also *infra* notes 64, 68 and 69, and accompanying text.

⁶³ See Tim Golden, "Abuse Inquiry Yields Little Justice", *International Herald Tribune*, February 13, 2006, pp. 1-2.

Second, the claim that the rules are inadequate may either mean (i) that they apply but that the answers they provide are not adequate, or (ii) that they do not apply but that they (or rather new, adapted rules) should apply. I will examine hereafter both aspects. While both possible arguments are interlinked, it is important to distinguish them.

If someone criticizes Swiss family law because it does not adequately cover my cat (indeed it does not contain any provision about domestic animals), the *de lege lata* answer is easy: in law, my cat is not part of the family, but simple moveable property belonging to one family member, governed by property laws. Similarly, as explained above, if most aspects of the 'war on terror' are not adequately covered by IHL, this is so simply because legally they are not armed conflicts and they are therefore not governed by IHL but rather by human rights law, international and domestic criminal law, domestic rules on law enforcement and international rules on judicial cooperation in criminal matters. This is however not the end of the matter. The criticism directed against Swiss family law may also mean that the relation between me and my cat should, *de lege ferenda*, be governed by family law, because in the social reality of contemporary families, cats may have as important a role as humans. For IHL, this would mean that it should cover all aspects of the struggle between transnational armed groups and states, instead of splitting the struggle into several legal sub-categories to which different rules apply.

■ **Are the rules of IHL of non-international armed conflicts adequate for armed conflicts between states and transnational armed groups?**

The law of non-international armed conflicts may appear in certain respects inappropriate for a transnational conflict between a state and a global non-state actor, since such law was designed for conflicts occurring within a country, mainly between the government and rebels, and its rules accord much consideration for the sovereignty of the state concerned.

Conceptually, one might consider that in transnational conflicts, a higher level of protection should be possible as opposed to a conflict

occurring in the territory of only one state and fought between government and rebel forces, where the sovereignty of that state is an obstacle to greater protection. One of the more reasonable suggestions is that the standards of IHL of international armed conflicts should govern the protection of 'civilians' while those governing non-international armed conflicts should apply to the treatment of 'combatants'.⁶⁴ This is not so revolutionary when one remembers that the ICRC has recently found that most rules on the conduct of hostilities and the treatment of civilians are the same for both categories of conflicts in customary IHL. In any case, such (or any other) increase in protection — which, in IHL, should necessarily also cover the enemy, including arrested enemy fighters — is not at all what the politicians and journalists calling existing IHL inadequate, are demanding.

Searching for inadequacies of the IHL of non-international armed conflicts in respect of transnational armed groups, one may point out that on some issues it refers explicitly — and on many more points implicitly — to the law of the land, which was seen by the drafters as the state disrupted by the internal conflict.⁶⁵ When fighting transnational armed groups, a state is often acting on a territory other than its own. Theoretically, under the territoriality principle, one would expect it to apply the laws of the territorial state. In addition, the intervening state may normally not adjudicate or enforce those laws without the agreement of the territorial state. All this, however, is not realistic, in particular if the territorial state is a failed state precisely because of the presence of the transnational armed group.

On the other hand, it would be unfair to allow a state to apply fully and enforce — often retroactively — its own legislation abroad when fighting a transnational armed group. IHL of international armed conflicts contains a compromise for this dilemma in the law of military occupation, which could inspire future specific rules for this problem particular to transnational armed conflicts (against a transnational armed group or when a government is fighting its domestic rebels abroad). Beyond the question of the applicable law,

⁶⁴ Schondorf, *supra* note 62, pp. 46-48.

⁶⁵ See, e.g., Protocol II, Arts. 4(3)(e), 68(2)(c) and (d), 10(3); Rules 100 and 101 of the *ICRC Study*, *supra* note 3, Vol. I, pp. 352-372.

many other problems arise when a state is fighting a transnational armed group abroad. These problems are similar to those which arise when a state is fighting another state on the latter's territory. What measures can or must a state fighting a transnational armed group abroad take to maintain or restore security, public safety, health, and the welfare of the local population affected by the fighting? Can a captured member of the transnational armed group, a civilian follower of such a group, or a local sympathizer of such group be transferred out of the territory of the state where the fighting is happening? IHL of military occupation contains answers to those questions.⁶⁶

Any analogy with the law of military occupation, however, must take relevant differences into account: the territory and its population are not 'enemy', local armed and security forces may not be considered as directly participating in hostilities, and any definition of 'protected person status' according to nationality is impossible, while any definition according to allegiance is very difficult to establish in the field.⁶⁷ Some may in addition object that those issues are governed by other branches of international law, such as *ius ad bellum*, international criminal law, and the rules on conflicts of laws, jurisdiction and extraterritorial enforcement. However, it is not certain whether such application of the law of peace is realistic. Under the law of peace, the consent, attitude, and procedures of the territorial state play a decisive role, but in our situation, such factors may be difficult to establish, may be entirely irrelevant in reality, and the territorial state may often not foresee any effective procedures for prosecuting some people and for protecting their and other people's rights.

⁶⁶ See Art. 43 of the *Regulations concerning the Laws and Customs of War on Land*, annex to *Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907, in James Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York: Oxford University Press, 1918, pp. 100-132; *Convention IV*, Arts. 55-61 and 49 (1) respectively.

⁶⁷ See *supra* note 53.

- **Should IHL cover all aspects of the struggle between states and transnational terrorist groups?**

According to what was explained above, different legal regimes apply to Al Qaeda members captured in Afghanistan in 2001, the Philippines, or Boston. In the first case, IHL of international armed conflicts applies, in the second IHL of non-international armed conflicts, and in the third case IHL does not apply at all. Such a splitting up of reality may not be entirely satisfactory. In addition, where IHL of international armed conflicts applies, it is not because of the group, but because of an otherwise existing armed conflict and the group as such is not the addressee of the rules.

A unique law covering all aspects of the struggle between states and transnational terrorist groups would presumably involve creating a new category of conflicts for which new rules should be devised. Unless one is prepared to lose the advances made by IHL of international armed conflicts in the last one hundred and forty years, the new law should not replace the old law altogether but simply apply to a new category of transnational armed conflicts. One author suggests calling them 'extra-state hostilities' and describes a sophisticated mix of rules of IHL of international and of non-international armed conflicts, of human rights law, and of the principles applicable to the exercise of self-defense to govern such hostilities.⁶⁸ The result, however, is not so different from the law of non-international armed conflicts including the customary rules recently found by the ICRC. Another author considers the policy of the United States administration towards detainees held at Guantánamo to be new law adapted to the new reality and considers this new law, in an astonishingly voluntarist approach, to be already in force, blurring the distinction between *lex lata* and *lex ferenda*.⁶⁹

Such a third category of armed conflicts would add to the existing objective difficulties in classifying situations under IHL and involve the risk that states confronted with the other two categories invoke the existence of the new third category, especially if, as one may fear, the latter provides limited protection to the enemy.

⁶⁸ Schondorf, *supra* note 62, pp. 61-75.

⁶⁹ Wedgwood, *supra* note 58, pp. 173-177.

As for the substance of the new rules, several questions arise. First, it is not clear why and how such diverse situations as open hostilities with a transnational armed group controlled by (or controlling) a foreign state (like Afghanistan in 2001); sporadic hit-and-run (or rather hit and die) attacks against embassies, tourism resorts, airplanes, or trains in countries like Spain, Indonesia, and Kenya; and the arrest of an United States citizen, José Padilla, at a Chicago airport⁷⁰ should be governed by the same rules.

Second, it is not easy to design rules appropriate to conflicts like the one existing between the United States and Al Qaeda that would allow the protagonists to pursue their aims, as the laws of war must do (that is, for Al Qaeda to attack America), and yet bring a degree of humanity to such attacks. Indeed, it is the very axiom of IHL that, unlike criminal law, it must permit both sides to hope for victory while respecting its rules; otherwise the rules will not be respected.

Further questions arise regarding the development of a new law. Should it permit torture in order to dismantle terrorist networks? Prohibit all correspondence between ‘terrorists’ and their families? Must members of a transnational armed group, fighting on the territory of a state that agrees with their presence (such as Afghanistan in 2001) and openly carrying arms, be punishable if they attack a US tank? Is it indispensable in the ‘war on terror’ that civilians accused of terrorism may be detained and judged on a Caribbean island and not in the place where they were arrested during the war?

Moreover, would any diminished protection apply across the board, such that it would be legal for Al Qaeda to treat similarly a captured United States serviceman? Or would the new law do away with the principle of equality of belligerents? If such were the purpose of the new law, who believes that those qualified as terrorists will respect that new law?

⁷⁰ See for the wish of the U.S. administration to invoke the laws of war concerning Padilla, *Respondents’ Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus*, 7, *Padilla v. Rumsfeld*, 02 Civ. 4445 (MBM), 2002 U.S. Dist., S.D.N.Y., August 27, 2002, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf>.

One can object that the aforementioned questions are biased because their starting point is existing IHL: its principles, axioms, and approach. Why, some may object, could the new IHL for transnational armed conflicts not abandon equality of the belligerents, prohibit transnational armed groups from achieving their aims, and foresee sets of flexible principles that may be adapted better to the nature of the threat? The issue may then indeed, to a certain extent, become a terminological one.

All agree that more specific rules are needed to combat international terrorism in relation to law enforcement, international criminal law, jurisdiction, and cooperation in criminal matters. Some have been adopted during the last four years. Others are still needed. If the objective is merely to draft sets of rules for humanitarian reasons, which aim at restraining those who fight international terrorism without making their fight impossible, there ought not be disagreement. But why call those rules IHL? Are they not rather part of international human rights law? It may well be that human rights law must adapt to the new challenges. One of the reasons why the United States administration so obstinately wants to apply the laws of war to its struggle against international terrorism is, arguably, that it considers it necessary in that struggle to have recourse to war-like internment which goes beyond what the human rights supervisory bodies admit outside declared situations of emergency.

Beyond the terminological problem, there remains a substantive risk in making the 'new law' part of IHL. Criminal law, law enforcement, and — to a certain extent — international human rights law, are subject to judicial or quasi-judicial implementation, which allows for more flexible and vague principles. IHL, conversely, is still largely self-implemented law, the respect of which depends upon the good will and good faith of the parties and upon clear, detailed rules without too many escape clauses. International criminal tribunals will check such interpretation, at best, years after the end of a given conflict. This may be a reason for not calling the new law applicable to the fight against international terrorism IHL.

Mechanisms to improve compliance by transnational armed groups

By definition, at least half the belligerents in the most widespread and the most victimizing of armed conflicts around the world, i.e., non-international armed conflicts, are armed groups. In addition, according to the United States government, transnational armed groups may also be parties to international armed conflicts, and it is unnecessary to recall that they respect IHL even less than groups fighting within a country. In both cases, it is urgent to improve IHL compliance by such armed groups. Here as elsewhere (e.g., transnational corporations, international NGOs), the difficulty is that the practice of international affairs is increasingly less state-centered, while international law remains very much so. Most international law dispositions remain almost exclusively addressed to states and the law's implementation mechanisms are characteristically state-centered.

■ **Allow and encourage armed groups to commit themselves to IHL**

We have seen that transnational and other armed groups involved in armed conflicts are bound by IHL.⁷¹ The problem with the legal explanations for this rule is that they make the obligation of the group dependent on the state(s) against which they are often fighting. It may be psychologically and diplomatically preferable to have a commitment by the group itself, or to otherwise increase its sense of ownership.

The first way of permitting armed groups to commit themselves is mentioned explicitly in Article 3 common to the Conventions, which encourages the parties "to bring into force, by means of special agreements, all or part of the other provisions" of the Conventions. Such agreements were concluded in the different conflicts of the Former Yugoslavia under the auspices of the ICRC.⁷² Similarly, less formal agreements have been concluded under the auspices of the UN in the Sudan, Congo, and Sierra Leone. These agreements have

⁷¹ See above discussion on the application of IHL to persons that do not belong to armed groups.

⁷² See, for their text, Sassòli and Bouvier, *supra* note 40, pp. 1761-1769.

the advantage of clarifying the law for all parties to the conflict and, possibly, increasing obligations compared to those that would apply under the law of non-international armed conflicts. It is, however, not easy to imagine such an agreement between the United States and Al Qaeda.

A second way to entice the armed groups is through declarations of intent to respect either the laws of non-international armed conflict (which the actors have to respect in any case) or, in addition, some rules of the law of international armed conflict that the groups are not normally bound to respect.⁷³ Whether the armed groups make such declarations for propaganda or other motives is in effect immaterial as long as they can be brought to implement them.

Thirdly, a non-governmental organization, Geneva Call, has successfully obtained adherence by a number of active armed groups to a Deed of Commitment for a ban on anti-personnel mines.⁷⁴ This process draws such groups into the political arena for dialogue and intends to encourage them to adhere to a wider humanitarian code of conduct through the landmine issue. There is no reason why such a process could not engage transnational armed groups. For the benefit of the victims of such groups, it should at least be tried.

One method of creating a sense of ownership and developing rules adapted to the concrete situation in which the armed group is acting may be to negotiate specific codes of conduct with individual armed groups. These codes could interpret and adapt IHL to their particular situation, and should contain provisions on their dissemination and enforcement within the armed group. Ideally, they should also designate an external monitoring mechanism. Merely discussing and drafting such codes within an armed group would have a considerable impact on sensitizing and hopefully influencing the behavior of that group. Such an approach may also provide an

⁷³ Denise Plattner, "La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé", 18 (1) *Revue belge de droit international*, (1984-1985), pp. 298-230; Michel Veuthey, *Guérilla et droit humanitaire*, second edition, Geneva: ICRC, 1983, p. 50.

⁷⁴ See www.genevacall.org/home.htm. See also *Resolution on Measures to Promote Commitments by Non-State Actors to a Total Ban on Anti-Personnel Landmines*, OSCE P.A., thirteenth annual session, Edinburgh Declaration (2004).

opportunity for an armed group to manifest its acceptance of IHL in order to sway local and/or international public opinion.

■ Dissemination

If those who fight are not properly instructed, the rules of IHL will never be respected. Protocol II, which applies to non-international armed conflicts, therefore prescribes that it must be “disseminated as widely as possible,”⁷⁵ that is, *including* to armed groups. Admittedly, certain typical characteristics of armed groups and their relationship to the state render dissemination difficult, even more so if the group is transnational. Compared with regular armed forces, transnational armed groups have less bureaucratic and/or training structure to facilitate dissemination. They function in secret, and the state on whose territory they operate usually does not wish to engage them, least of all to inform them of their rights and obligations in case of open conflict.

The groups’ loose hierarchy and secrecy also mean that many operational decisions (e.g., means and methods to achieve a goal) may be left to those fighting in the field rather than to ‘commanders’. Consequently, ensuring that the whole population has a basic understanding of IHL is the most promising preventive action. Political or social activists, religious leaders, journalists, students, schoolchildren, all of whom may one day become members or supporters of an armed group, must know the obligations to which every person’s actions are subject, and the rights each may claim, in armed conflicts.⁷⁶

■ Reporting

Periodic reporting to an international monitoring body on respect and implementation of certain obligations is a traditional, non-intrusive method of monitoring states party to an international treaty, although IHL obligations are generally not subject to such reporting. Transnational armed groups could be encouraged to

⁷⁵ Art. 19 of Protocol II.

⁷⁶ This obligation to disseminate IHL in peacetime is prescribed in Arts. 47, 48, 127, 144, respectively, of the Conventions, and Art. 83 of Protocol I.

report — in some cases, this is already happening with other armed groups.⁷⁷ The content and trigger of reports (e.g., incident-triggered or periodic) may vary. What is important is that the mere responsibility of writing reports and the process of collecting data will increase awareness of and sensitivity to IHL on the part of armed groups, and may increase their sense of ownership of it.

■ Rewards

Rewarding respect for the law is an important method of encouraging compliance with international humanitarian law. In international armed conflicts, combatants who fall into the power of the enemy cannot be punished for the simple fact of having participated in hostilities, including for having killed enemy combatants. They must, however, be punished for violations of IHL. Thus, they have a direct incentive to comply with IHL. Conversely, in non-international armed conflicts (or, under the United States' approach, in international armed conflicts in which the member of the transnational armed group is denied combatant status), a member of a transnational armed group who falls into the power of the enemy may be punished simply for having fought, regardless of his or her compliance with IHL. Moreover, most national criminal laws will qualify the killing of a government soldier and the killing of a peaceful civilian in the same way: as murder. Since this crime already entails harsh punishment, there is little left to discourage members of armed groups from violating IHL. How, then, can members of armed groups be motivated to respect IHL?

First, Protocol II appeals to the authorities to extend, at the end of hostilities, the broadest possible amnesty to persons having participated in the conflict (but not for war crimes).⁷⁸ Second, the ICRC suggested to the Diplomatic Conference which adopted Protocol II a provision which would have required a tribunal sentencing someone for having participated in a non-international armed conflict to take into account, to the largest extent possible, whether the accused complied with Protocol II.⁷⁹ The ICRC also

⁷⁷ For example, the organization Geneva Call (see *supra* note 74) requires periodic reports to be submitted.

⁷⁸ Art. 6(5) of Protocol II.

⁷⁹ Art. 10(5) of Draft Protocol II, *Draft Additional Protocols to the Geneva Conventions of*

suggested a prohibition on carrying out of death sentences during the conflict.⁸⁰ Both ICRC proposals were unfortunately rejected, but they could be revived. Another idea might be to delay any criminal prosecution for acts of hostility other than violations of IHL and human rights until the end of hostilities, when the atmosphere is less passionate and reconciliation can be achieved. Third, in state practice, as soon as a non-international armed conflict intensifies to a certain level, governments often do not punish every individual 'rebel' captured while carrying his weapon openly, except for acts of terrorism, but rather simply intern him or her.⁸¹ However, states have refused to translate this practice into an obligation under IHL.

Third states could reward members of transnational armed groups fighting abroad while respecting IHL in two ways. They could, for instance, consider prosecution for the mere fact of having participated in hostilities as a persecution leading to eligibility as a refugee, while denying refugee status to members of armed groups who violated IHL.⁸² Similarly, third states could apply the exemption from extradition for political offenders in extradition treaties to members of armed groups involved in an armed conflict, except for acts contrary to IHL.

■ Monitoring

In addition to reporting by armed groups themselves, there are a number of options for monitoring by external, international bodies. It should be noted that UN Charter-based mechanisms such as the Security Council and the late UN Human Rights Commission have condemned violations of IHL by armed groups, demonstrating that

August 12, 1949, ICRC, June 1973.

⁸⁰ See *ibid.*, Art. 10(3).

⁸¹ See for state practice, Veuthey, *supra* note 73, pp. 216-240; and François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, second edition, Genève: CICR, 2000, p. 739.

⁸² An example of this is the case of *Sivakumar v. Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 433 (C.A.), in which an LTTE member was denied refugee status despite the threat of persecution in Sri Lanka, because he had violated IHL. Of course, if such practice were to be implemented, it would have to occur according to the well-developed principles of refugee law. See, for example, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1988, paras. 175-180.

they consider themselves competent to monitor the respect of that law by such groups.⁸³

The ICRC, of course, may offer its services of scrutiny, protection, and assistance, to armed groups as well.⁸⁴ The Committee may only render these services if the offer is accepted by the armed group in question, but if this is the case, the ICRC deploys the same monitoring activities and makes the same kind of interventions with an armed group as it does under the Geneva Conventions with a state involved in an international armed conflict.

The possibility of armed groups reporting on their compliance with IHL was discussed above. Who might such reports be sent to, and what might receiving bodies do with them? NGOs already send reports to human rights treaty bodies, where they are received informally. Armed groups could do the same. However, it may be difficult for a treaty body to make recommendations to an armed group without gravely upsetting states. Rather, the establishment of a distinct, independent, expert body may be envisaged. The ability of such a body to verify and support an armed group's allegations and claims of compliance, and to provide assistance with compliance, may in itself serve as a strong incentive for armed groups to report. This body could be an excellent mechanism for monitoring armed groups. Based on information received from all sources, including armed groups, it could submit its own report to a periodic meeting of the High Contracting Parties of the Geneva Conventions.

The advantages of this approach are that it would leave decisions about measures to be taken to increase the respect of IHL to states, but would ensure that those deliberations are based upon a sound, impartial, and non-selective factual basis. In addition, the simple

⁸³ See, e.g., Security Council Resolutions 1193 (1998) (concerning Afghanistan), 764 (1992), 771 (1992), 780 (1992), 787 (1992), 827 (1993), 913 (1994), 941 (1994) and 1010 (1995) (concerning the Former Yugoslavia), 814 (1993) (concerning Somalia), available at www.un.org; and Pieter H. Kooijmans, "The Security Council and Non-state Entities as Parties to Conflicts" in Karel Wellens, ed., *International Law: Theory and Practice: Essays in Honour of Eric Suy*, The Hague, Boston, and Cambridge, MA: M. Nijhoff, 1998, p. 339. For the United Nations Human Rights Commission, see references in Zegveld, *supra* note 22, pp. 32, 33, 46, 65-67, and 145.

⁸⁴ See Art. 3 common to the Conventions.

existence of an official report on violations may provide some relief for victims, as well as a basis for future reconciliation.

■ Responsibility for violations

Criminal responsibility of armed groups, at least theoretically, can be individual or collective.⁸⁵ Extending criminal responsibility for serious violations of IHL beyond the individual members to armed groups as such poses no conceptual challenge. Such a proposal, however, was rejected in the International Criminal Court (ICC) Statute.⁸⁶ Arguably, the most effective way of repressing crime would be to hold all members of a group criminally responsible once the group itself is held responsible.⁸⁷ While international criminal law has not yet adopted such a concept, the common purpose theory of the ICTY,⁸⁸ and to a lesser extent, provisions of the ICC Statute on individual criminal responsibility for crimes committed within a group context,⁸⁹ can lead to similar results. However, I have discussed elsewhere the inherent risks in thus extending individual criminal responsibility.⁹⁰ A recollectivisation of responsibility should be avoided. It remains of utmost importance to be able to reward the armed group member who respects IHL in order to increase our ability to encourage compliance with IHL and, thus, protect victims.

Over the past decade, there has been considerably more attention paid to establishing and implementing criminal responsibility for serious violations of IHL. However, the virtues and efficacy of

⁸⁵ The former principle of *societas delinquere non potest* (companies cannot commit an offense) is being eroded through the development of corporate criminal responsibility. See, e.g., Brent Fisse and John Braithwaite, *Corporations, Crime, and Accountability*, Cambridge: Cambridge University Press, 1993.

⁸⁶ Article 25(1) of the *Rome Statute* grants the court jurisdiction over natural persons. See Kai Ambos, "Article 25" in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden: Nomos, 1999, p. 477.

⁸⁷ This is possible in both the Anglo-Saxon legal systems through the concept of conspiracy, and in Roman-German legal systems in crimes of membership in criminal organizations.

⁸⁸ *Tadic*, Judgement, *supra* note 6, paras. 185-233.

⁸⁹ Art. 25 (3)(d) of the *Rome Statute of the International Criminal Court*, July 17, 1998, U.N. Doc. A/CONF.183/9.

⁹⁰ Marco Sassòli and Laura Olson, "The decision of the ICTY Appeals Chamber in the *Tadic* Case: New Horizons for International Humanitarian and Criminal Law?" 82 *International Review of the Red Cross*, (2000), pp. 747-756.

responsibility under private law for such acts should not be underestimated. Indeed, the burden of proof is lower than for criminal conviction, victims themselves can set the process in motion, and they may receive tangible benefits if successful. The United States Alien Tort Statute⁹¹ is an interesting example, which permits filing a tort claim for war crimes and crimes against humanity even if they were committed abroad by foreigners against foreigners.

On the international level, promoters of IHL and human rights suggest the adoption of international rules requiring states to offer a forum to victims of IHL and human rights violations for tort claims⁹² and to establish universal jurisdiction over such claims. Such forum and jurisdiction would be particularly useful against armed groups, since as opposed to states, they do not benefit from immunity against civil claims before foreign courts.

As for the international responsibility of an armed group itself, the International Law Commission (ILC) states in its Commentary to the *Draft Articles on State Responsibility* that an “insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of [IHL] committed by its forces”.⁹³ Indeed, IHL implicitly confers upon parties to non-international armed conflicts, no matter their success, the functional international legal personality necessary to have the rights and obligations foreseen by it. It is useful to recall that violations of IHL by such parties entail their international legal responsibility, which is of particular importance concerning the corresponding rights and

⁹¹ 28 U.S.C. § 1350.

⁹² Article 19 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by UN GA Res. A/RES/40/34, fortieth session, December 11, 1985, already notes that states should provide remedies to victims of substantial human rights violations, including reparation and/or restitution, and Article 20 encourages the conclusion of international treaties on that matter. See also Principle 17 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* as suggested by Cherif Bassiouni in his final report as a special rapporteur on the matter, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN ESCOR, fifty-sixth session, UN Doc. E/CN.4/2000/62, January 18, 2000.

⁹³ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in United Nations, International Law Commission, *Report on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001)*, UN doc. A/56/10 (SUPP), October 1, 2001, p. 118 (paragraph 16 to Article 10).

duties of third states in the face of such violations. Most often, measures to enforce IHL and human rights are taken as institutional reactions in the framework of international organizations, in the form of sanctions. In practice, the United Nations Security Council has decided repeatedly in favor of sanctions against armed groups.⁹⁴

■ Risks of abuse

Any suggestion of addressing mechanisms of implementation towards armed groups has to overcome the objection that such mechanisms and processes heighten the legitimacy of such groups and increase their willingness to pursue their struggle, which in turn results in more victims. Even those sympathetic to an inclusive approach towards armed groups suggest that at least some groups should be excluded, among them transnational armed groups, as they in any event do not aim to become the government of a given state.

As for the objection in principle, IHL of non-international armed conflicts answers formally that its application and the functioning of implementation mechanisms (such as an offer of services by the ICRC, or an agreement between a government and an armed group on humanitarian matters), “shall not affect the legal status of the Parties to the conflict”⁹⁵ and may not be invoked for an outside intervention into the conflict, nor affect the responsibility of the government to maintain or re-establish law and order.⁹⁶ Governments, however, are skeptical and armed groups indeed often abuse humanitarian tenets in the hope of gaining legitimacy — although this may be less the case for transnational armed groups, as they do not appear to want any recognition by the inter-state system, but rather want to undermine it.

The objection therefore deserves a more substantive answer. States do not like armed groups. A world without transnational and

⁹⁴ See Security Council Resolutions 1127 (1997), 1173 (1998), and 1221 (1999) (concerning UNITA), 942 (1994) (concerning the Republika Srpska), 1171 (1998) (concerning rebels in Sierra Leone), and to a certain extent, Resolution 792 (1992) (concerning the Khmer Rouge), available online at www.un.org.

⁹⁵ Article 3(4) common to the Conventions.

⁹⁶ See Article 3 of Protocol II.

domestic rebel armed groups would indeed be a better world, with less armed conflict and less suffering. A world without any armed conflict would be even better. Just like armed conflicts, transnational and other armed groups do, however, exist and they will not disappear because international law and its implementation mechanisms ignore them.

Ostrich-like attitudes will merely eliminate hopes of bringing some humanity to the conflicts fought by those groups. The international community has rejected rightly the suggestion not to regulate behavior in armed conflict because such regulation could legitimize armed conflicts prohibited by international law.⁹⁷ It should similarly resist the temptation to ignore armed groups. Everyone who has tried to obtain respect for IHL in armed conflicts comes to the realization that the first step is dialogue and engagement with those who are supposed to respect the law.

As for the suggestion to exclude some armed groups from efforts to increase respect for IHL, armed groups are very diverse in their degree of organization and control over their members, territory or people, their aims, and in particular in their inclination to respect humanitarian rules. Very often it is argued that some groups, in particular transnational armed groups like Al Qaeda, cannot possibly be brought to respect IHL. I dare to suggest that the international community should try to obtain respect of international humanitarian law by any and all armed groups. I would then leave the decision to exclude a given group — and consequently the renunciation of any hope to obtain some restraint — to that group itself, if it rejects the mechanisms discussed above, does not take them seriously, or only abuses them for propaganda purposes.

There are several reasons for this inclusive approach. First, it is very difficult to define objective criteria to characterize those groups that are ‘hopeless.’ For example, even the Algerian war — an example of state-building triggered by armed groups — started with sixty

⁹⁷ In 1949 the International Law Commission refused to engage in codification of the laws of war because “public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.” See *Yearbook of the International Law Commission*, (1949), p. 281 (A/CN.4/SER.A/1949).

indiscriminate terrorist attacks perpetrated during one night.⁹⁸ Second, even if such criteria exist, it will be very difficult to convince the state(s) or other armed groups fighting against a given group that the group warrants inclusion and that its opponents should therefore tolerate the functioning of international mechanisms in respect of that group. To offer some practical examples: Were/are the Afghan Mujaheddins fighting against the Soviet Union, the Farabundo Marti National Liberation Front (FLMN) in El Salvador, the *Contras* in Nicaragua, the Revolutionary Armed Forces of Colombia (FARC), the Chechen fighters in Russia and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka sufficiently 'civilized' that they deserve efforts to improve their compliance with international standards? If the answer is (partly) affirmative, would the governments of the Soviet Union, Russia, El Salvador, Nicaragua, Colombia or Sri Lanka necessarily agree with the qualification? It is unlikely.

Those who understandably remain skeptical about a dialogue with transnational groups like Al Qaeda should ask themselves whether the real problem is that these are not armed groups in the sense of IHL and that they are not engaged in an armed conflict to which IHL applies or should apply.

For here indeed lies a central difference between IHL applicable to armed conflicts, law-enforcement, and criminal law directed towards combating crime. The former has to apply to both sides equally and it has to be implemented with and by the parties, while criminal law has to be enforced against the criminals. IHL has to take the problems, aims and aspirations of armed groups seriously, while criminal law does not need to do so about criminals. This may be precisely an important reason for not legally classifying the 'war on terror' as an armed conflict and transnational terrorist networks as 'armed groups'.

Process

If based on careful consideration of the aforementioned questions and despite all reasons for scepticism, the international community comes to the conclusion that IHL should be revised to cover

⁹⁸ Bugnion, *supra* note 81, p. 739.

transnational armed groups at all, or more adequately, the process by which such a revision should be envisaged remains to be determined.

It is true that after every major war, IHL has been revised to adapt it to changing military and technological realities and to cover new humanitarian problems and additional categories of victims.⁹⁹ However, what is suggested currently, for the first time, is, implicitly, to diminish protection. In addition, every/any process of revision also implies the risk that states will take advantage of the opportunity to broaden their freedom of action instead of reinforcing the protection of victims.

■ Treaty law

The result of any revision has until now been a treaty, which binds only those states formally accepting it. The United States has still not ratified the 1977 Protocols. It rejects the prohibition on anti-personnel mines, and is opposed to the International Criminal Court. It is doubtful whether a new law for transnational conflicts, as it should necessarily also give some rights to the non-state actor involved, would be acceptable to states involved in such conflicts. It is even more doubtful as to how such a new law could be binding upon — and whether it would be respected by — groups such as Al Qaeda.

When it comes to making treaties and developing soft law standards, involving armed groups becomes complicated. Which groups should be invited to conferences convened with the aim of developing treaties or soft law? How long should they be in existence before being recognized as worthy participants? How should or might they contribute? States that are in the process of negotiating with or even fighting armed groups would not welcome their recognition as potentially legitimate participants in the development of international law. The presence of such groups would inevitably render the process even more cumbersome and political than it already is. Including armed groups formerly involved in conflict would not necessarily solve the problem, since those who remain accessible often are the groups that were successful, which therefore

⁹⁹ Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law*, (2000), p. 239.

represent governments and no longer retain their erstwhile 'armed group' perspective.

To bring transnational and other armed groups into treaty-making processes thus appears rather difficult. How could said groups be expected to abide by a special set of laws designed to govern conflicts if they are not, however, involved in the law-making process?

■ Soft law

In addition to the practical problems, the development of soft law standards with the participation, and for the consumption, of armed groups raises further issues. First, the relationship between any new soft law and the hard law obligations of armed groups under the law of non-international armed conflicts would have to be clarified. Second, the additional soft law rules will not be the same as the hard law rules for states. This will lead to a situation in which both sides will not be bound by the same rules, which would be contrary to the principle of equality of the belligerents before IHL. These concerns, however, should not discourage us from looking for new ways to include belligerents in the development of soft law standards.

■ Customary law

Many consider that customary law is the solution to the normative needs of the contemporary world. Customary law indeed plays a significant role in the evolution of humanitarian law. Most of the Geneva Conventions and Protocol I are already customary law.¹⁰⁰ Treaty rules governing non-international armed conflict, such as common Article 3 and Protocol II, are transformed easily into customary law. After nearly a decade of research, the ICRC claimed in a recent study that most of the rules of customary law of international armed conflict are also customary for non-international

¹⁰⁰ Theodor Meron, "The Geneva Conventions as Customary Law", 81 *American Journal of International Law* (1987), p. 348; Christopher Greenwood, "Customary Law Status of the 1977 Geneva Protocols", in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honor of Frits Kalshoven*, Dordrecht: Martinus Nijhoff, 1991, p. 93; Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Basel/Frankfurt am Main, Helbing and Lichtenhahn, 1990.

armed conflicts.¹⁰¹ This conclusion may come as a surprise to those who remember that, during the 1974-77 Diplomatic Conference, states rejected an ICRC draft Protocol II, which was quite similar to Protocol I. Yet the pronouncement does conform with recent ICTY judicial practice.¹⁰²

In this author's view, armed groups already contribute to customary IHL of non-international armed conflicts. Customary law is based on the behavior of the subjects of a rule, in the form of acts and omissions while fighting or (whether qualified as practice *lato sensu* or evidence of *opinio juris*) in the form of statements, mutual accusations, and justifications for these actors' own behavior. Clearly, non-state actors are the subjects of the rules governing their behavior.

I harbor, nevertheless, doubts whether customary law is the solution. On the one hand, I fear that the most powerful declare their practice which is incompatible with existing IHL regimes as new customary law, thus taking advantage of the vagueness and controversies of the theory of sources in international law. On the other hand, as for the noble idea of increasing protection of war victims through customary law, custom must have something to do with practice. And practice consists not only of more or less humanitarian statements of belligerents and of third states, but also of what belligerents actually do in armed conflicts. This actual practice is all too often inhumane and falls well below existing treaty obligations. Who wants such actual practice to 'develop' IHL?

Furthermore, I have some doubts whether states can be duped by experts, NGOs, and international criminal tribunals claiming that obligations which those states rejected as treaty obligations are in any event part of customary international law. Even less will transnational armed groups — entities that oppose the whole of the interstate system and the values proclaimed (but only selectively enforced) by the international community — be impressed by alleged

¹⁰¹ See *supra* note 3.

¹⁰² For example, the *Tadic* Appeals Decision on Jurisdiction, *supra* note 11, is the first judicial affirmation that violation of common Article 3 entails individual criminal responsibility in customary law. Pointed out by Theodor Meron in "The Continuing Role of Custom in the Formation International Humanitarian Law", 90 *American Journal of International Law* (1996), p. 244.

customary rules, which are based more upon aspirations of do-gooders and a new wind of natural law than upon what those who fight all over the world actually do.

Conclusions

If international humanitarian law is to be revised to cover transnational armed groups — at all, or more adequately — the purpose of such an exercise ought to be neither rhetorical nor meant to deprive those suspected of membership in (or aiding) such groups of the guarantees provided for by human rights law and domestic law. As in the case of any development of IHL, the aim, rather, should be to improve the protection of the actual and potential victims of the situations.

This paper raised several doubts that IHL, in view of its structure of implementation and philosophy, is an overall answer to the challenges raised by transnational terrorism. Would the August 16, 2006 alleged plot against transatlantic airliners have been prevented better through missile attacks, targeted killings of enemy ‘combatants’, and indefinite internment until the defeat of terrorism, than through intelligence, inter-state cooperation, criminal inquiries, law-enforcement and police arrests?

Some aspects of the fight against Al Qaeda, however, are genuine non-international armed conflicts, and one could well imagine in the future a full-fledged transnational armed group engaged in a worldwide armed conflict against the forces of one or several governments. In this essay, I have argued that such a conflict would be covered by existing IHL of non-international armed conflicts, but I have also identified some issues on which that law, as it stands, is not adequate.

Despite all risks connected to creating and defining a new category of armed conflict, the international community may wish to legislate a new category of transnational armed conflicts. A less delicate approach would be to strengthen the mechanisms of implementation geared towards armed groups, because this could be done without distinction between national and transnational groups. In all cases,

however, it is extremely difficult to imagine a process for this revision that could lead to practical rules improving the fate of the victims and acceptable for both states and transnational armed groups.

To conceive of such a successful revision process is difficult in the present international atmosphere and, more fundamentally, as long as states remain the main legislators in international law. In this context, it may be noted that even the 'post-modern' process of reaffirmation and development of IHL started by Switzerland and the Program on Humanitarian Policy and Conflict Research at Harvard University, which does not aim at new treaty rules but at action-oriented research, informal discussions with governments, and possibly 'new interpretations' of IHL, remains very much state-oriented, and includes neither representatives of armed groups nor even of non-governmental organizations.¹⁰³

¹⁰³ See Program on Humanitarian Policy and Conflict Research, *Informal High-Level Expert Meetings on Current Challenges to International Humanitarian Law*, <http://www.ihlresearch.org/ihl/feature.php>.

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