Proceedings of the Bruges Colloquium

Vulnerabilities in Armed Conflicts: Selected Issues

14th Bruges Colloquium
17-18 October 2013

Actes du Colloque de Bruges

Vulnérabilités en temps de conflits armés : Quelques enjeux

14ème Colloque de Bruges
17-18 octobre 2013

College of Europe
Collège d'Europe
Brugge
Natolin

CICR

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

Délégation du CICR auprès de l'EU, de l'OTAN et du Royaume de Belgique

Laura de Jong

Sous la direction de

Stéphane Kolanowski

Members of the Editorial Board, College of Europe/

Membres du Comité d'édition, Collège d'Europe

Luis Bouza García

Annelies Deckmyn

Emmanuelle Hébert

Marie-Salomé Rinuy

Collegium N° 44, Autumn/Automne 2014

PROCEEDINGS OF THE BRUGES COLLOQUIUM
ACTES DU COLLOQUE DE BRUGES

DISCOURS DE BIENVENUE

François Bellon
Chef de la délégation du CICR auprès de l'Union européenne, de l'OTAN
et du Royaume de Belgique

Monsieur le Directeur, Mesdames et Messieurs, j'ai l'honneur et le plaisir, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 14ème Colloque de Bruges, qui sera consacré cette année aux réponses que peut ou que devrait apporter le droit international humanitaire à certaines vulnérabilités spécifiques causées par des conflits armés.

Cette année 2013 est particulière pour le CICR. Nous célébrons en effet le 150ème anniversaire de notre Institution, et au-delà, celui de l'action humanitaire telle que nous la connaissons aujourd'hui. Le CICR est « né » le 17 février 1863 et, le 1er septembre de cette même année, notre Organisation envoya une convocation aux Etats ainsi qu'à des sociétés militaires, médicales et philanthropiques à participer à la « Conférence internationale de Genève » qui s'y est tenue du 26 au 29 octobre 1863.

Cette Conférence était très importante et les Résolutions qu'elle a adoptées, ainsi que les Vœux qu'elle a formulés ont posé les bases de l'action humanitaire moderne. Pour l'historien Pierre Boissier, ces documents – et je cite – « constituent la charte fondamentale de l'œuvre de secours aux blessés de guerre. Ils appartiennent à ce petit nombre de textes qui ont changé quelque chose dans le monde. Ils n'ont pas supprimé la guerre, mais ils ont réduit son empire sur les hommes, et lui ont arraché des victimes innombrables. Dans le grand livre de l'humanité, c'est une pièce à décharge ».

Ceci m'amène à revenir au thème de ce 14ème Colloque de Bruges et sur notre fructueuse collaboration avec le Collège d'Europe tant en ce qui concerne les Colloques annuels que les formations pour étudiants dont vous a parlé le Directeur du Département académique du Collège. Je ne vais pas vous faire l'historique des 13 Colloques précédents, vous en avez la liste dans votre dossier. Mais comme vous pouvez le voir, nous avons, en tout cas ces dix dernières années, toujours choisi des thèmes précis que nous avons explorés dans le détail. Ce rendez-vous nous a conduit à des discussions très spécialisées dont les résultats ont, par ailleurs, pu inspirer les travaux tant du CICR que d'autres organisations. Les actes de ces Colloques, par ailleurs, sont

disponibles aussi bien en ligne qu'en format papier.

Les commémorations, telles celles que nous avons cette année, sont toujours l'occasion non seulement de se souvenir, mais également de réfléchir. D'apprendre du passé et de chercher à s'améliorer ou à améliorer le contexte dans lequel on évolue pour préparer un futur meilleur. 150 ans d'action humanitaire, 150 ans à œuvrer à l'élaboration du droit humanitaire, à son développement, à sa mise en œuvre nous offrent effectivement une solide expérience sur la base de laquelle nous avons pu élaborer un beau programme.

Face aux nombreux défis qui se posent toujours dans les conflits armés d'aujourd'hui, il nous a fallu sélectionner quelques problématiques parmi les plus sensibles opérationnellement, les plus difficiles humainement, ou les plus éthiquement compliquées. Il est entendu que nous ne pourrons pas, dans le cadre de ce Colloque, répondre à toutes ces questions. Mais j'ambitionne tout de même que nous puissions offrir quelques pistes de réflexions utiles au travail du CICR mais également à d'autres acteurs désireux de contribuer à améliorer le sort des victimes des conflits armés.

Madame Beerli, Vice-Présidente du CICR, développera dans quelques instants dans son discours d'ouverture les différents thèmes pertinents cette année pour le Colloque. Permettez-moi simplement de revenir sur le choix des thèmes de nos cinq sessions qui sont au cœur même du mandat et de l'action du CICR et qui rendent les personnes affectées par un conflit armé particulièrement vulnérables. En effet, les thèmes choisis, s'ils présentent tous des défis au regard du droit international humanitaire, constituent tous également des priorités opérationnelles pour le CICR.

Les activités liées à la détention sont, vous le savez, très spécifiques au CICR. C'est à la fin 1914, il y a bientôt 100 ans, que le CICR créa « l'Agence internationale des prisonniers de guerre » et démarra sa première action d'envergure en faveur de ceux-ci. Depuis lors, chaque jour, de nombreux délégués du CICR négocient l'accès aux lieux de détention et visitent annuellement près d'un demi-million de personnes privées de liberté dans plus de 70 pays à travers le monde. Ces personnes sont bien entendu dans une situation de grande vulnérabilité. Si le CICR cherche, par son action dans les lieux de détention, à assurer aux personnes privées de liberté le respect de leur intégrité et de leur dignité, il cherche également, en consultation avec les Etats, à améliorer le cadre juridique sur lequel doit se baser toute détention. La question de la détention par les acteurs non-étatiques est également particulièrement problématique et nous tenterons, là aussi, d'identifier les contraintes juridiques et pratiques.

L'idée fondatrice du Mouvement international de la Croix-Rouge et du Croissant-Rouge, née sur le champ de bataille de Solférino le 24 juin 1859, et traduite dans les Résolutions du

29 octobre 1863 mentionnées précédemment, était d'apporter assistance aux blessés et aux malades en périodes de conflits armés. Le respect de la mission médicale, qui est pourtant absolument fondamentale, n'est pas toujours, loin s'en faut, observé. Il y a des formes très diverses d'entraves à la bonne conduite de la mission médicale qui affectent tant les patients que le personnel des soins de santé. Partant de ce constat, le CICR a mené une étude dans plus de 20 pays visant à identifier les problèmes les plus fréquents. Il s'est également lancé dans l'organisation de dix séminaires dont le but est d'améliorer l'accès à des soins de santé efficaces et dispensés en toute impartialité. Cela passe par une campagne ambitieuse qui implique l'ensemble du Mouvement international de la Croix-Rouge et du Croissant-Rouge. Il était donc tout naturel que les soins de santé fassent également l'objet d'une session du Colloque.

Le troisième sujet retenu, celui des violences sexuelles, est malheureusement une problématique que l'on rencontre dans de nombreux conflits. Ces violences faites, principalement, mais pas uniquement, aux femmes et aux filles peuvent revêtir plusieurs formes, mais ont pour constante de laisser à leurs victimes d'importants traumatismes physiques et psychologiques difficilement supportables. Le côté si personnel et intime de ces blessures et de leurs conséquences rend parfois l'assistance difficile à apporter, soit parce que la victime cache son traumatisme, soit parce que la société qui l'entoure, la pression sociale qu'elle subit, rendent toute initiative d'aide très compliquée. Dans toute action d'assistance ou de protection, le CICR garde au centre de ses préoccupations le sort des victimes. Mais cela doit être d'autant plus le cas pour les conséquences des violences sexuelles où, bien trop souvent, des considérations générales d'ordre moral ou éthique interviennent dans le débat et ne permettent pas toujours de prendre en compte les spécificités de chaque situation individuelle. Malgré nos convictions personnelles que nous avons tous, nous éviterons de nous y référer dans nos discussions pour nous concentrer sur les vulnérabilités spécifiques que révèlent ces formes particulièrement abjectes de violence.

Du « tambour » à Solférino à l'enfant recruté de force dans de trop nombreux conflits contemporains, on ne peut que constater le prix payé par ces enfants à qui la guerre a enlevé, si ce n'est la vie, en tout cas l'enfance. L'âge est en effet un facteur de vulnérabilité important. Cela est vrai pour les personnes âgées, mais cela est aussi vrai pour les enfants qui peuvent se trouver forcés de participer à ces conflits qui les dépassent. Dans ses opérations, le CICR tente, de diverses manières, de les protéger. Mais cette protection passe aussi par des initiatives diplomatiques et juridiques auxquelles nous nous associons. La quatrième session du Colloque nous permettra de faire le point sur ce sujet, lui aussi d'une très grande importance.

Je reviens à la Conférence internationale de Genève, qui s'est tenue en octobre 1863 et dont le secrétaire n'était autre qu'Henry Dunant. Parmi les trois Vœux émis par la Conférence se retrouve celui, et je cite, « que les gouvernements accordent leur haute protection aux Comi-

tés de secours qui se formeront, et facilitent autant que possible l'accomplissement de leur mandat ». Cela recouvre, entre autres, la question de l'accès humanitaire. Si l'on veut apporter assistance et protection aux victimes des conflits armés, si l'on veut pouvoir répondre à ces vulnérabilités spécifiques dont nous parlerons, il nous faut avoir accès aux victimes. C'était vrai il y a 150 ans, ce l'est toujours aujourd'hui. Et je dirais même que ce l'est d'autant plus aujourd'hui que dans de très nombreux cas, l'accès ne concerne pas que des autorités étatiques, mais également des groupes armés organisés les plus divers. Plusieurs conflits récents, et en cours, ont révélé combien les positions des diverses organisations humanitaires peuvent être divergentes sur ce point. Le panel que nous aurons demain matin sera, à n'en pas douter, d'un très grand intérêt.

Comme vous pouvez le constater, nous avons un programme intéressant qui nous permettra de traiter de diverses questions humanitaires parmi les plus importantes.

Pour aborder toutes ces questions délicates, nous avons avec nous des orateurs du monde académique, d'organisations humanitaires, des diplomates ou encore des militaires, ayant une très grande expérience et expertise dans les domaines que nous vous proposons d'aborder tout au long de cette journée et demie de discussions et de réflexion. Je suis très heureux de pouvoir accueillir nos orateurs, dont certains sont déjà des habitués de nos rendez-vous de Bruges, et d'autres, je l'espère, le deviendront également.

Le CICR a ses idées, ses opinions, ses convictions basées sur 150 ans de pratique et sur l'expertise qu'il a pu développer. Mais il nous importe de les confronter à d'autres afin de pouvoir préciser ou clarifier ce qui mérite de l'être et de faire avancer le droit et l'action humanitaires au bénéfice des victimes des conflits armés.

Je ne saurais terminer sans remercier les participants d'avoir été si nombreux à répondre favorablement à notre invitation à participer à ce 14ème Colloque de Bruges. Votre intérêt à prendre part à ces échanges, qui sont maintenant déjà devenus une tradition, nous conforte dans le choix des sujets de ce 14ème Colloque.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons avoir pendant ces deux jours qui s'annoncent très stimulants et je vous remercie de votre attention.

KEYNOTE ADDRESS

Ms. Christine Beerli
ICRC Vice-President

Ladies and Gentlemen,

It is a great pleasure to be here with you at this 14th session of the Bruges Colloquium and to have the privilege of making a few introductory remarks about the topic to be discussed over the next two days. Our theme this year – Vulnerabilities in Armed Conflict – is particularly far-reaching and touches on some issues which are at the core of the mandate of the International Committee of the Red Cross (ICRC), i.e. the protection and assistance of the most vulnerable in armed conflict situations.

The issue of vulnerabilities in armed conflict was seen as particularly appropriate to discuss this year, the 150th anniversary of the International Committee of the Red Cross. In 1863, the 'International Committee for Relief to the Wounded' – which later became known as the ICRC – was created in order to assist a particularly vulnerable group: wounded and sick combatants. The ICRC's mandate quickly expanded to carry out humanitarian action to assist all victims of armed conflicts, but the notion of vulnerability has definitely remained at the core of our action.

The selection of this theme has also been guided by the Four-Year Action Plan for the Implementation of International Humanitarian Law which was adopted in 2011 by the 31st International Conference of the Red Cross and Red Crescent, which brings together all the components of the Movement and the States parties to the Geneva Conventions. The objectives of this Action Plan included notably those of enhancing the specific protection afforded to certain categories of persons, in particular children, women and persons with disabilities and of enhancing access by civilian populations to humanitarian assistance in armed conflict. All members of the International Conference were also invited to submit pledges in relation to the recommendations contained in the Action Plan. We call on members of the International Conference to continue working tirelessly on the implementation of the Action Plan.

Given the richness and variety of the theme "Vulnerabilities in Armed Conflict", it would be illusionary to pretend that we will be able to discuss the issue comprehensively in two days. It is our hope, however, that the selected issues we propose to tackle will highlight some of the most topical and interesting problems the international community has to face as regards vulnerabilities in armed conflict. In order to do so, we have decided to adopt a transversal

approach and to address vulnerabilities in the context of some key International Humanitarian Law (IHL) themes – such as detention or the conduct of hostilities – rather than choose some vulnerable groups (such as women, children, persons with disabilities, etc). We have also selected some themes which are close to our hearts at the ICRC – including sexual violence and the unlawful recruitment and use of children in hostilities – which our organisation has particularly highlighted this year in its recent statements before the United Nations General Assembly in New York.

It also has to be noted that, in order to be comprehensive and meaningful, the topic of vulnerabilities in armed conflict situations has to be discussed not only from a purely IHL perspective, but also by taking into account International Human Rights Law, which complements IHL in armed conflict situations, as long recognised by the Red Cross and Red Crescent Movement. This is why, in most sessions, we have included presentations that address the issue of vulnerabilities from an International Human Rights Law perspective.

I will now say a few words about each of the different topics that we will be discussing in the next two days.

1. Vulnerabilities in Detention

During this colloquium, we will start by discussing the issue of vulnerabilities in detention. Women, children, the elderly and the disabled are among the most vulnerable in such situations, and mixing groups of detainees is frequently a source of problems. Holding women together with men poses obvious risks of abuse but may also indirectly affect their enjoyment of other protections. The fact that a courtyard is communal may compromise women's access to fresh air, as mixing with men could put them at risk and indeed may not be contemplated or permitted for cultural reasons. Likewise, when prison corridors are open to both sexes, women often do not leave their cells. Their access to basic facilities is limited or blocked and their specific health and hygiene needs may simply not be met. Pregnant women and nursing mothers have particular needs, requiring supplementary nutrition and appropriate pre- and post-natal care so that they and their infants remain in good health.

Similarly, holding children together with adults exposes them to a range of risks to their physical integrity, including sexual abuse, and can have harmful consequences for their psychological development. Children may be detained on their own account or because they accompany parents in detention. They require care and specific protection, including protection against abuse and inhuman or degrading disciplinary measures. Prison conditions and facilities are rarely appropriate to their needs and vulnerabilities. In numerous situations, these children are deprived of access to appropriate education or vocational training. They may also suffer

from a lack of sufficient access to recreational and physical activity. They rarely enjoy adequate communication with the outside world, including with their parents, which may seriously affect their emotional development. In situations of armed conflict, children who were associated with an armed force or armed groups should benefit from particular attention and care.

Most of these concerns, as well as the needs of other categories of persons, such as the elderly and persons with a disability, are not sufficiently addressed under current International Humanitarian Law governing non-international armed conflicts.

Human Rights Law and internationally recognised standards can usefully complement IHL when it comes to the protection of vulnerable groups in detention. However, some gaps remain. To the extent, for instance, that organised non-State armed groups are not directly bound by Human Rights Law, it is clear that this body of law does not suffice to ensure the protection of detainees – and the most vulnerable in particular – by all parties to a non-international armed conflict. In this regard, a key question is what protection standards should be reasonably expected of the range of non-State armed groups in contemporary conflicts. Given the variety of non-State armed groups, the answer to such a question is probably not clear-cut, but they merit more attention if the law is meant to be applied.

As many of you may know, the ICRC has been invited by Resolution 1 of the 31st International Conference to pursue further research, consultation and discussion in cooperation with States to identify and propose a range of options and recommendations to ensure that International Humanitarian Law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflicts. In this framework, the question of how to strengthen the protection of persons with particular needs and vulnerabilities detained in the context of non-international armed conflicts is part of the discussion.

2. Vulnerabilities in Hostilities

The second topic we will be addressing today is vulnerabilities in the context of hostilities. In order to exemplify this issue, we have chosen to discuss how the delivery of impartial health care in general – and to the wounded, sick, and shipwrecked in particular – can be endangered by hostilities. As highlighted by the ICRC-led project of the Red Cross and Red Crescent Movement *Health Care in Danger*, which is aimed at improving the efficiency and delivery of effective and impartial health care in armed conflict and other emergencies, it is not rare, unfortunately, that the wounded and sick as well as health-care personnel are targeted.

Such direct attacks are prohibited by the principle of distinction, in particular the prohibition of making health-care personnel or a person *hors de combat* by wound or sickness the object

of attack. Attacks that might accidently harm the wounded and sick or health-care personnel are also unlawful if they do not respect the principles of proportionality and precaution. In the ICRC's view, any assessment of the expected incidental harm under the rule of proportionality must take into account possible deaths or injuries among the medical personnel, including military medical personnel, as well as combatants who are *hors de combat*. This stems from the central obligation to respect and protect these persons.

"Follow up attacks" – i.e. attacks that occur after a first one and that may intentionally or incidentally kill wounded persons as well as rescuers – also raise difficult challenges in law and in practice. When do these types of attacks constitute an IHL violation and when are they lawful? In the same vein, military entries into medical facilities can endanger the patients, who might be accidentally killed, and constitute illegal interference with the medical mission. In some circumstances, however, the principle of military necessity requires such military entries and this is precisely the reason why they are not prohibited by IHL in all circumstances. How to make sure that medical facilities are not used to conceal weapons, for instance, and at the same time ensure that military entries do not endanger the medical mission? How can the obligation to respect the wounded and sick and medical personnel be appropriately implemented when performing military entries? In this case, the issue boils down to appropriate implementation of the law. In other cases, the law does not provide crystal clear answers. For instance, medical and religious personnel lose their special protection when they perform 'acts harmful to the enemy'. Are these terms synonymous to 'direct participation in hostilities' or do they have a different meaning and implication? These are some of the questions we will be addressing in this session.

3. Sexual Violence

The third session will be dedicated to sexual violence, which is unfortunately prevalent in armed conflicts and whose consequences are vastly underestimated. In its experience on the ground, the ICRC sees the grave and dehumanising effects of sexual violence on victims, their families and entire communities. Sexual violence can take many forms, including rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilisation. Sexual violence can be used as a form of reprisal, to create fear, or as a form of torture. It may also be used systematically, as an unlawful method of warfare, aimed at destroying the social fabric.

Sexual violence is perpetrated against men, women, boys and girls. Women and girls seem nevertheless to face a heightened risk of sexual violence. This is particularly so when they are internally displaced persons, migrants, widows, heads of households, detainees, persons associated with armed forces or armed groups, or from a specific ethnicity.

The notion that sexual violence is unacceptable and must be prohibited and sanctioned is not new. Already the *Lieber Code* provided in 1863 that 'all rape (…) of inhabitants [of the invaded country] are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence'. Nowadays, there is no doubt that rape and other forms of sexual violence are absolutely prohibited under Human Rights Law at all times and under International Humanitarian Law in both international and non-international armed conflicts. It is also clearly established that all rape as well as other forms of sexual violence that amount to serious violations of International Humanitarian Law entail individual criminal responsibility and must be prosecuted. All States are thus obliged to criminalise these violations under domestic law, and to effectively investigate and prosecute any instance of sexual violence. The continuing prevalence of sexual violence in armed conflicts indicates, however, that its prohibition and criminalisation are not sufficient to eradicate this awful crime. Further efforts must be made to prevent, halt and prosecute the perpetrators of rape and other forms of sexual violence. In this context, the ICRC follows with interest the UK initiative aiming at preventing sexual violence and facilitating the prosecution of perpetrators at the domestic and international level.

The consequences of sexual violence must also be addressed. Sexual violence can indeed result in severe physical and psychological trauma, HIV infection and, occasionally, death. Victims often face double victimisation: sustaining potentially dangerous and long-lasting injuries and trauma, and also facing stigmatisation and rejection by their families and communities. In addition to this, women and girls sometimes become pregnant as a result of rape. They may desperately seek out unsafe practices to terminate their pregnancy, which can put their lives or health at risk. This can be due to legal reasons: because abortion is prohibited in the country in which they live or at least not authorised in case of rape. This might also be the case for purely practical reasons: because access to health care is not available or disrupted due to the situation of violence. Children born of rape, and their mothers, often children themselves, are also highly vulnerable, facing an increased risk of exclusion from the community and from access to necessary services. Infants born of rape in armed conflict may be particularly vulnerable to infanticide, and other forms of violence inflicted upon them by their parents, families and communities.

The difficult humanitarian situation faced by women and girls made pregnant by rape has led some to try to find a solution in international law by establishing a "right to abortion" under either IHL or Human Rights Law. This alleged "right to abortion" has led to heated debates in the international community as it involves not only a dynamic interpretation of the law but also fundamental ethical, cultural and religious questions. When does life begin? Does the physical integrity and self-determination of the mother prevail over the life of the foetus? Is it not the prerogative of each State to define appropriate laws and policies in this domain? As a neutral, independent, impartial and purely humanitarian organisation – and without pretend-

ing to provide an answer to these difficult questions – the ICRC is committed to working in favour of victims of sexual violence and women and girls made pregnant by rape, to highlight their difficult humanitarian situation and the dilemmas they may face – despite the fact that as of today there is no such "right to abortion" in IHL – and to recall that all victims of sexual violence must have unimpeded access to timely and appropriate health care of a high quality, including comprehensive medical care within 72 hours, mental health services, and psychosocial support in both the acute phase and over the long term.

Over the next four years, the ICRC will endeavour to enhance its response to sexual violence in armed conflict and other situations of violence. We are also determined to expand our programmes to meet the needs of victims of sexual violence and to strengthen our action to prevent such violations.

4. Recruitment and Other Association of Children with Armed Forces or Armed Groups

The fourth session will address the issue of recruitment and other association of children with armed forces or armed groups. Boys and girls unlawfully recruited, used in hostilities or otherwise associated with armed forces or armed groups are especially vulnerable: they are often imprisoned, wounded or killed. Often they are also separated from their families and denied access to education and other essential services, including health care and psychosocial support. Unlawfully recruiting, using or otherwise associating children with armed forces or armed groups has a serious, long-lasting and complex impact on the children, their families and their communities; it *must* be prevented.

As for sexual violence, most suffering endured by children during armed conflict could be prevented or alleviated if there was greater respect for *existing* international law. In the event of armed conflict – whether international or non-international – children who are not members of States' armed forces or organised non-State armed groups are entitled to the general protections afforded to civilians against the effects of hostilities, unless and for such time as they directly participate in hostilities. Children affected by armed conflict are, moreover, entitled to special respect and protection. Some instruments of International Humanitarian Law and Human Rights Law address the question of the minimum age of involvement in hostilities. The International Red Cross and Red Crescent Movement promotes the principle that persons under 18 years of age should not participate in hostilities or be recruited into armed forces or armed groups.

The adoption in 2007 of the "Paris Commitments" and of the "Paris Principles" attests to the sustained commitment of the international community to preventing and responding to the

issue of children associated with armed forces or armed groups and to ensure the implementation of the prohibition of recruitment and use of children in hostilities. On the basis of its legal work and its activities in armed conflict situations, the ICRC has concluded that, indeed, in the absence of practical implementation measures at the domestic level, accepted rights and obligations often remain a dead letter. With this in mind, the ICRC has recently developed two very practical tools: (1) a series of Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups, and (2) a set of Model Legislative Provisions to be used by States as guidance in drafting legislation that prohibits the recruitment or use of children in armed conflict.

Unlawful recruitment or use of children in hostilities must be prosecuted. Perpetrators, regardless of their position in the chain of command, must be held accountable for acts committed by children during their association with armed forces or armed groups. The first-ever verdict of the International Criminal Court (ICC) on 14 March 2012 in the case of *Thomas Lubanga Dyilo*, leader of the rebel group Congolese Patriotic Union, who was found guilty of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, is a positive step in this direction. In this case, the ICC adopted a broad definition of what is active participation in hostilities for the purpose of Article 8 (paragraph 2, (e)(vii)) of the Rome Statute. The ICRC wishes to stress, however, that the significance of 'active participation in hostilities' under IHL shall not be diluted: 'active' and 'direct' participation in hostilities are synonymous under IHL. Their definition must not be construed too broadly because when civilians (including children) are directly participating in hostilities, they become legitimate targets under IHL and may lawfully be made the objects of attacks. This being said, the ICRC is convinced that the prosecution of perpetrators of these crimes committed against children is an integral part of efforts to prevent them from occurring.

5. Cross-Border Humanitarian Aid

The last session will be devoted to a panel discussion on the theme of humanitarian assistance, and more particularly the issue of "cross-border" humanitarian aid.

Humanitarian assistance is meant for the civilian population at large in armed conflict situations – and not only for the most vulnerable. However, the link between humanitarian assistance and vulnerabilities in armed conflicts remains: those who are the most in need of humanitarian assistance are precisely the most vulnerable. Under IHL, the parties to the conflict have an obligation to allow and facilitate a rapid and unimpeded passage of humanitarian relief for civilians in need that is impartial in character and conducted without any adverse distinction. This is subject to their right of control. In addition, parties to the conflict, be it an international armed conflict or a non-international armed conflict, must respect and pro-

tect humanitarian relief personnel and objects as well as ensure the freedom of movement of authorised humanitarian relief personnel. Their movements can be temporarily restricted only in a case of imperative military necessity.

The issue of cross-border humanitarian aid has also been selected because it has been the object of increased interest in the international community – and an object of concern for the ICRC – given notably the present situation in Syria as well as in Libya in 2011. These conflicts have brought to the forefront a particular aspect of the constraints on humanitarian assistance: the question of access to civilian populations in zones controlled by armed opposition groups. There have been difficulties for many organisations to obtain the necessary authorisations by the government to reach these areas. Humanitarian organisations have not all reacted in the same way to this challenge. Some have decided to carry out clandestine operations in opposition-held areas, by passing through neighbouring States, with or without the consent of the governments concerned. Others – like the ICRC – are of the view that consent from all sides must be sought, although this consent may not be refused arbitrarily.

States have been similarly divided on the question of whether cross-border humanitarian aid can be performed without the government's consent in zones that are under the control of organised non-State armed groups, despite the fact that IHL – at least in Additional Protocol II – explicitly requires such a consent to be able to provide humanitarian assistance to civilian populations in need.

This situation has thus triggered a debate on the policy and legal framework concerning so-called cross-border operations. It will be fascinating to hear the different views of the panellists and audience on this topical issue.

Conclusion

Ladies and Gentlemen,

In conclusion, one can say that IHL is definitely an important tool in protecting the most vulnerable in armed conflict situations. Sometimes, IHL would need to be further strengthened or clarified in order to ensure adequate protection to the most vulnerable in armed conflict situations. On most occasions, however, the problems do not lie in the law – which is already fairly comprehensive – but rather in a lack of respect for the law. I look forward to hearing your discussions on these different challenges, which constitute without a doubt the right ingredients for a lively and interesting debate.

Session 1
Vulnerabilities in detention – selected issues

Chairperson: **Elzbieta Mikos-Skuza**,
University of Warsaw

PROTECTION UNDER INTERNATIONAL HUMANITARIAN LAW: THE NEED TO STRENGHEN THE LAW APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICTS

Ramin Mahnad[1]
ICRC Legal Division

Résumé

Introduction

Contrairement aux règles s'appliquant aux conflits armés internationaux (CAI), très peu de dispositions régissent la protection des personnes privées de liberté lors d'un conflit armé non-international (CANI). Afin de combler cette lacune et conformément à la résolution 1 adoptée lors de la XXXIe Conférence internationale, le Comité international de la Croix-Rouge (CICR) a entrepris une série de consultations avec des Etats et autres acteurs pertinents afin de renforcer le droit international humanitaire (DIH) régissant la détention dans le cadre de CANI.
Le CICR a conclu à la nécessité de renforcer le DIH applicable aux CANI dans quatre domaines :

Les conditions de détention

En cas de détention dans le cadre d'un CAI, les troisième et quatrième Conventions de Genève contiennent plus de 100 dispositions concernant les conditions dans lesquelles des prisonniers de guerre et des civils peuvent être détenus. Elles couvrent une vaste gamme de garanties telles que la fourniture de nourriture et d'eau, l'accès aux soins médicaux, le contact avec l'extérieur, les besoins spécifiques de détenus vulnérables. En ce qui concerne les CANI, les traités contiennent très peu de garanties relatives aux conditions de détention. L'article 3 commun aux Conventions de Genève et le Protocole additionnel II stipulent que les personnes privées de liberté pour des raisons liées au conflit doivent être elles aussi traitées avec humanité, en toutes circonstances. Elles seront notamment protégées contre le meurtre, la torture et les traitements cruels, humiliants ou dégradants.

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

Protection des groupes de détenus particulièrement vulnérables

Outre les problèmes auxquels la population de détenus dans son ensemble doit faire face, certaines catégories de détenus souffrent de difficultés additionnelles lorsque les autorités ne prennent pas suffisamment en compte leurs besoins spécifiques. Les femmes, les enfants, les personnes âgées et handicapées sont parmi les plus vulnérables dans de tels cas. Les dispositions du DIH ne donnent cependant pas assez de précisions sur les conditions de détention et les catégories de détenus vulnérables dans le cadre des CANI.

Les motifs et procédures d'internement

Pour les CAI, les troisième et quatrième Conventions de Genève contiennent des règles spécifiques et détaillées régissant les motifs et procédures d'internement. La troisième Convention de Genève accorde une protection étendue aux prisonniers de guerre. Elle définit leurs droits et énonce des règles détaillées qui régissent la manière dont ils doivent être traités jusqu'au moment de leur libération. Par prisonniers de guerre on entend généralement les membres des forces armées d'une des parties à un conflit tombés aux mains de la partie adverse. La quatrième Convention de Genève prévoit également une protection étendue pour les internés civils lors d'un CAI. Si d'impérieuses raisons de sécurité le justifient, une partie à un conflit peut imposer une résidence forcée à des civils ou procéder à leur internement. Dans le cadre de CANI, les Conventions de Genève ne prévoient pas de motifs ni de procédures d'internement clairs, ouvrant ainsi la porte à des mesures arbitraires. La question qui se pose dès lors est celle de savoir si le critère d' « impérieuses raisons de sécurité », dont il est question dans la quatrième Convention de Genève, peut être transposé aux CANI en tant que motif d'internement justifié.

Transferts de détenus

Les troisième et quatrième Conventions de Genève interdisent expressément certains transferts dans le contexte des CAI. Les transferts vers des Etats non signataires de la Convention applicable sont formellement interdits, de même que les transferts de personnes protégées par la quatrième Convention de Genève vers un pays où elles peuvent craindre des persécutions en raison de leurs opinions politiques ou religieuses. Ces mêmes règles peuvent-elles s'appliquer aux transferts dans le cadre de CANI ? Quels sont les moyens d'appliquer le principe de non-refoulement aux transferts de personnes dans les CANI ?

Conclusion

A l'issue de toutes les consultations, le CICR élaborera un rapport exposant ses vues, assorti d'options et de recommandations, qui sera soumis à la XXXIIe Conférence internationale en 2015.

Introduction

In comparison to international armed conflicts (IAC), the treaty law regarding detention in relation to non-international armed conflicts (NIAC) is very limited. The four Geneva Conventions (GC), which are applicable to IAC, contain more than 175 provisions regulating detention. However, there is no comparable regime for NIACs. Militaries, armed groups and individuals involved in NIAC are therefore confronted with a lack of clear rules guiding their actions. Over the years, the International Committee of the Red Cross (ICRC) and other players have made various attempts at filling this gap in a number of ways. Pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), the ICRC is facilitating consultations with States and other relevant bodies on how to strengthen NIAC detention law. Four regional consultations are being organised by the ICRC with the aim of enabling experts to discuss humanitarian problems related to detention in NIACs in greater detail, providing a clearer picture of where the law may need substantive strengthening. In total, the consultations include 170 government experts from 93 States.

The ICRC has identified four key areas in which IHL governing detention in relation to NIACs falls short:

1. conditions of detention;
2. protection for especially vulnerable groups of detainees;
3. grounds and procedures for internment;
4. transfers of detainees from one authority to another.

Conditions of Detention

In case of detention in international armed conflict, the third and fourth Geneva Conventions require compliance with more than 100 provisions governing the conditions in which prisoners of war and civilians may be held. They address a vast range of potential concerns, including the provision of food and water, the adequacy of accommodation, access to medical care, contact with the outside world, the specific needs of vulnerable detainees, and much more.

Where NIAC is concerned, however, virtually all of the detail contained in the Geneva Conventions is missing, leaving only the very general protections of Common Article 3. Common Article 3 requires humane treatment without any adverse distinction and enumerates a number of acts which are specifically prohibited such as torture and other forms of ill treatment. The second Additional Protocol (AP II), which only applies to certain types of armed conflicts, provides some additional detail. AP II's provisions, however, are nowhere nearly as detailed as those found in internationally recognised human rights standards, which provide a broad range of more detailed specifications.

The ICRC has been looking at ways to fill these gaps in NIAC. One of the questions that has emerged in this process is whether the rules applying to IAC would make sense in NIAC. This is a tip of the iceberg question leading to other questions related to the type of detention and the circumstances of detention. When speaking about internment in an armed conflict situation one can easily imagine it taking place in a purpose-built detention facility away from the hostilities, but detention can also take place right on the battlefield in an operating base or at a checkpoint where the person is held for so long and the restriction on liberty is such that it amounts to a deprivation of liberty. What are the conditions that would apply to those circumstances? Detention might also take place near a village that is being searched and where the detainees are not placed in a detention facility but moved out of their homes and held in a particular area, often for a long period.

A second important question is: what effect would the geographic area in which detention is taking place have on the rules that should apply to the conditions provided? For a State, to detain people in a purpose-built facility in its own territory is one thing, but what if the State is assisting a third State in combating non-State armed groups in the latter's territory and detaining individuals? Should the rules reflect this difference and, if so, to what extent?

Protection for Especially Vulnerable Groups of Detainees

In addition to the challenges faced by detainee populations as a whole, certain categories of detainees suffer additional hardship when authorities fail to address their specific needs sufficiently. Women, children, the elderly and the disabled are among the most vulnerable in such cases. When looking at whether, and how, to strengthen the law protecting these categories in NIAC, further consideration could also be given to addressing the needs of other vulnerable groups, such as religious or ethnic minorities, foreign nationals and detainees with contagious diseases or terminal illnesses, including HIV-positive detainees. However, a balance must be struck to ensure that the protections afforded are broad enough to capture all appropriate categories. In addition, the potential for stigmatisation created by the segregation of certain groups has to be taken into consideration.

Grounds and Procedures for Internment

In situations of IAC, the third and fourth Geneva Conventions provide extensive regulation of the deprivation of liberty, including the grounds and procedures for internment. The third Geneva Convention expressly authorises internment where a particular individual meets the criteria for prisoner of war (POW) status. POWs are essentially combatants captured by the adverse party in an IAC. A combatant is a member of the armed forces of a party to an IAC who has 'the right to participate directly in hostilities'. The law provides members of State armed forces captured in IAC with immunity from criminal prosecution for their participation

in the conflict to the extent that they complied with the laws of war. In terms of procedural safeguards, the detaining State is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat. POW internment must end and POWs must be released at the cessation of active hostilities, unless they are subject to criminal proceedings or are serving a criminal sentence. For all other persons found in the hands of a party to an international armed conflict, the fourth Geneva Convention permits internment or assigned residence in a State's own territory only when 'the security of the Detaining Power makes it absolutely necessary' and in occupied territory 'for imperative reasons of security.' In both cases, the fourth Geneva Convention provides that a civilian interned in IAC has the right to submit a request for a review of the decision on internment, that the review must be expeditiously conducted either by a court or an administrative board, and that periodic review is thereafter to be automatic, on a six-monthly basis. Civilian internment must cease as soon as the reasons that necessitated it no longer exist. It must in any event end 'as soon as possible after the close of hostilities'.

IHL applicable in NIAC provides guidance neither on the basis for interning an individual, nor on the procedures for doing so. The option the ICRC has supported and recommended to States is to apply the fourth Geneva Convention by analogy, allowing States to detain those who constitute an imperative threat to their security. Several questions however emerge: what is an appropriate ground for detention in NIAC? What are the consequences in terms of procedural safeguards? How can the grounds and procedures of internment be combined in a way to ensure that those detained are not detained arbitrarily? Considering there might be different types of detention, at what point do these procedural safeguards, whatever they might be, kick in? Is it a matter of duration, of the place of detention, or of the degree of deprivation of liberty? Who should review the detention decisions? Should it be a court or an administrative body? Should it be inside or outside the military, within the same chain of command or outside that chain of command?

Transfers of Persons Deprived of their Liberty

A final area in which legal protection may be said to be inadequate relates to the transfer of detainees.

In IAC, the third and fourth Geneva Conventions place specific constraints on the transfer of individuals to other parties and impose obligations to ensure their appropriate treatment after transfer. The GCs foresee a categorical prohibition against transferring individuals to States that are not parties to the Geneva Conventions and to States in which the individual will face certain forms of prosecution. When transfers are permitted, a number of pre-transfer obliga-

tions apply which require the transferring authority to satisfy itself of the willingness and ability of the receiving authority to comply with the provisions of the Conventions. In addition, there are also post-transfer obligations which essentially imply that if it comes to light that a transferred detainee is being ill-treated, the transferring authority has to take appropriate measures to address the situation or ask for the return of the detainee. The receiving authority is under a corresponding obligation to return the detainee.

Can these same rules apply to transfers in NIAC, in case for instance of a transfer from a party to the conflict to the Government of the detainee in view of his prosecution? How do existing non-refoulement obligations inform any IHL standards? Depending on the treaties and regional human rights instruments the State is party to, its obligations, as far as transferring detainees is concerned, will vary and will continue to exist in situations of armed conflict.

Way Forward

The report of the four regional consultations held will be published. The ICRC will work towards making concrete and meaningful recommendations to the 2015 International Conference.

PROTECTION UNDER HUMAN RIGHTS LAW: A USEFUL COMPLEMENT? OPPORTUNITIES AND LIMITS

Françoise Hampson[1]
University of Essex

Résumé

Un certain nombre de questions juridiques se posent dès l'abord en ce qui concerne l'application des droits de l'homme dans les situations de conflits armés.

La première a trait à la relation entre les droits de l'homme et le droit international humanitaire (DIH). Bien que cette relation fasse encore l'objet de discussions, il est néanmoins clair que l'applicabilité du DIH, même en tant que lex specialis, ne privera pas les organes chargés des droits de l'homme de leur compétence. Deuxièmement, lorsque le DIH est applicable, l'organe considèrera soit qu'il y a une violation des droits de l'homme seulement s'il y a violation du DIH, ou alors elle appliquera un mélange des deux corpus juridiques.

La deuxième question concerne le champ d'application territorial des droits de l'homme. Bien que cette problématique soit également encore en chantier, en ce qui concerne la détention il est clair que la détention extraterritoriale place le détenu sous la juridiction de l'Etat qui procède à la détention.

La plupart des cas portés, par le biais de requêtes individuelles, devant des juridictions internationales des droits de l'homme concernent des situations où l'Etat niait l'existence d'un conflit armé et dès lors n'invoquait pas le DIH. Quant aux situations où le DIH est invoqué, il est prématuré d'affirmer quelles questions seront régies par le DIH et comment les juridictions des droits de l'homme vont combiner les deux corpus juridiques.

Quelle contribution les organes chargés des droits de l'homme seraient-ils dès lors susceptibles d'apporter ? Il serait contreproductif de n'appliquer que les droits de l'homme dans toutes les situations de conflits armés. Dans une telle hypothèse, les Etats ignoreraient les décisions de ces juridictions et se contenteraient d'appliquer le DIH. Une autre option, qui ne serait pas aussi contreproductive mais pas pour autant acceptable, serait d'appliquer uniquement le DIH lorsque celui-ci est applicable, en tant que lex specialis et non les droits de l'homme. Une telle approche ne serait cependant pas conforme à la jurisprudence de la Cour internationale de

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

justice selon laquelle le droit relatif aux droits de l'homme continue à s'appliquer en temps de guerre. Une contribution positive en revanche consisterait à identifier quelles dispositions relatives aux droits de l'homme doivent être interprétées à la lumière du DIH. Il n'y aurait alors de violation des droits de l'homme qu'en cas de violation du DIH. Un premier domaine dans lequel il ne devrait y avoir de violation des droits de l'homme qu'en cas de violation du DIH concerne les motifs de détention. Dans les conflits armés internationaux (CAI), les motifs de détention contenus dans la troisième Convention de Genève (CG) devraient s'appliquer, tandis que dans les conflits armés non-internationaux (CANI), ce seraient ceux contenus dans la quatrième CG. Le deuxième domaine dans lequel il ne devrait y avoir de violation des droits de l'homme en cas de violation du DIH a trait à l'existence de Procédures spéciales. Il semble difficile de suggérer que le droit d'habeas corpus doive s'appliquer à la détention de prisonniers de guerre. De même, l'on peut difficilement appliquer le droit d'habeas corpus traditionnel aux détentions sous la quatrième CG. La nature de la Procédure spéciale devrait dès lors relever de la lex specialis. Enfin, un troisième domaine concerne la libération des prisonniers. Les circonstances dans lesquelles une détention doit prendre fin devraient être exclusivement régies par le DIH. Au final, je crois que la résolution de ces questions doit passer par une combinaison des droits de l'homme et du DIH. Ce faisant, il est essentiel que les juridictions des droits de l'homme se basent sur ce qui est faisable dans la pratique et non sur ce qui est le plus commode pour les forces armées des Etats.

En conclusion, les droits de l'homme ne constituent pas une solution à tous les problèmes mais ne sont pas pour autant inutiles. Les droits de l'homme peuvent jouer un rôle important en renforçant le DIH existant et en clarifiant l'étendue de certaines de ses dispositions. Les droits de l'homme peuvent jouer ce rôle à condition que les organes chargés des droits de l'homme reconnaissent dans leurs jugements dans quels cas elles doivent appliquer le DIH.

The starting point when looking at opportunities and limits of protection under Human Rights Law is its important limitation, namely the fact it is *de jure* only binding for States. This affirmation however needs to be more qualified because non-State armed groups are in fact indirectly affected by States as the latter enforce their own human rights obligations to protect persons within their jurisdiction from the acts of third parties, including non-State forces. Furthermore, in some south eastern European countries (such as Transnistria, Southern Ossetia and Northern Cyprus) where non-State forces control, in a fairly stable way, chunks of territory and exercise government functions, some human rights bodies treat these non-State parties as responsible under Human Rights Law.

Turning to the important question of Human Rights Law and States, there are a couple of issues about the legal framework which need to be addressed regarding the application of Human Rights in situations of armed conflict.

The first framework legal issue is the relation between International Humanitarian Law (IHL) and Human Rights Law. While this relationship is a work in progress, it is however clear that the applicability of IHL, even as *lex specialis*, will not deprive a human rights body of jurisdiction. Secondly, it is also clear that when IHL is applicable, the human rights body will consider either that there is only a violation of Human Rights Law when there is a violation of IHL or it will apply a mixture of IHL and Human Rights Law. Whether the human rights body applies the one or the other solution depends on the particular issue at hand. There are instances where the human rights body can only find a violation of Human Rights Law if there is a violation of IHL and other instances where it needs to apply a mixture of both. Where exactly that boundary lies has not yet been settled.

The second framework issue concerns the scope of the territorial applicability of Human Rights Law. While this issue is also a work in progress, with regard to detention it is, however, clear that, according to every human rights body and the International Court of Justice (ICJ), extraterritorial detention brings the detainees within the jurisdiction of the detaining State. The scope of the territorial applicability of human rights is therefore not an issue with regard to detention. Regarding Human Rights Law and detention (both security detention or administrative detention and detention with a view to criminal proceedings), there are a range of both treaty-based and non-treaty-based human rights monitoring mechanisms. Among the non-treaty based human rights mechanisms are the United Nations (UN) Working Group on Arbitrary Detention, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, the Special Procedures of the Human Rights Council and the Commissions of Inquiry. Their mandates affect all members of the UN so they potentially have a universal reach. Commissions of Inquiry have a mandate limited to a particular situation and they tend not to be in a position to determine facts authoritatively. Moreover, the findings of the Special Procedures and Commissions of Inquiry tend to be fairly general and non-binding. Their reports are useful as they reinforce IHL but they do not go beyond it nor add anything to it. Treaty-based Human Rights mechanisms have as a primary function to monitor State compliance. Here also, the product of the monitoring is inevitably very general. The more human rights violations are occurring in a State, the more the result will be general and fail to go into detail. Furthermore, the concluding observations of treaty bodies only make recommendations to States and are not binding. Treaty bodies also produce general comments in which they explain their views on particular issues or articles but they are surprisingly short, very general and not binding. The work of treaty bodies therefore reinforces IHL but does not add much to it.

Through individual petitions under Human Rights treaties[2], be it under the European Convention on Human Rights, the American Convention on Human Rights or the International Covenant on Civil and Political Rights, one can obtain a detailed analysis on specific issues. Case law gives rise to very specific obligations based on the generality of a particular treaty. However, the more egregious the violation, the less likely the court will be to go into details and the more general the finding will be. In *Brannigan and McBride v. United Kingdom,* which involved an issue of detention in Northern Ireland, the question brought to the European Court of Human Rights (ECtHR) was: for how long can a person be detained before being brought before a judge? The Court did not argue in *days* but in *number of hours* and stressed very specific safeguards with regard to access to independent medical advice and to lawyers. In the case of *Aksoy v. Turkey*, on the other hand, the ECtHR did not address safeguards at all because the period of detention was considered too long. So the more serious the violation, the more general the finding. The above-mentioned cases involved situations where the States denied that there was an ongoing armed conflict and therefore did not invoke IHL. Therefore, these cases do not give insight into what a Human Rights Court would do in situations where a State invoked IHL. With regard to situations where IHL is invoked it is too soon to say which issues will be regulated by IHL, nor can we know how human rights bodies will mix both branches of law.

As one cannot yet speak of an actual contribution of human rights bodies, what is their potential contribution? A counterproductive contribution would be if human rights bodies acted as if IHL were not applicable and only applied Human Rights Law in all situations of armed conflict. In that case, States would disregard their findings and simply apply IHL. Another option that would not be as counterproductive but would not be acceptable is if human rights bodies simply said that whenever IHL is applicable, they will apply it and displace Human Rights Law. This, however, would not be consistent with the case law of the International Court of Justice because by doing so they would always make IHL the *lex specialis* and never apply a mixture of Human Rights Law and IHL as required. A positive contribution would be if all human rights bodies identified which human rights rules have to be interpreted in the light of the law of armed conflicts. As such, there would only be a violation of Human Rights Law if there were a violation of IHL. A first case where there should only be a violation of Human Rights Law where there is a violation of IHL concerns the grounds of detention. In international armed conflicts (IAC), grounds of detention contained in the third Geneva Convention should apply while in non-international armed conflicts (NIAC) the grounds of detention of the fourth Geneva Convention (GC IV) should apply. The second case where there should only be a violation of Human Rights Law if there is a violation of IHL relates to the existence of review mechanisms. In this regard, there is no way one could suggest that *habeas corpus* should apply to the detention of

2 This is only relevant where a State has both ratified the Human Rights treaty and accepted a right of individual petition.

prisoners of war. Similarly, I do not believe one can sensibly apply traditional *habeas corpus* to GC IV detentions. Therefore, the kind of mechanism should be a *lex specialis* issue. A third case concerns the release of prisoners. The circumstances in which detention must be brought to an end should also essentially be covered by IHL. Beyond that, I believe the issues need to be tackled by mixing IHL and Human Rights Law. In finding the way to achieve that mix it is vital that human rights bodies base themselves on what is practical and practically doable in the field and not on what is convenient to the armed forces of the States.

By way of conclusion, I do not believe that Human Rights Law is the solution to all problems, but nor is it useless. It could play a useful role first in enforcing the existing IHL and secondly, in clarifying the scope of some IHL provisions and possibly filling in some gaps. It could play that role on condition that judgements passed by human rights bodies do recognise when they need to apply IHL and deal with it in a practical way. The only case so far where there is the potential for a useful contribution of human rights bodies is through the right of individual petition. However, many States have not accepted such a right.

CAN NON-STATE ARMED FORCES ENSURE ADEQUATE PROTECTION TO VULNERABLE GROUPS IN DETENTION?

Ramin Mahnad and **Françoise Hampson**[1]

Résumé

Les caractéristiques propres aux groupes armés non-étatiques peuvent accroître la probabilité de certains problèmes d'ordre humanitaire dans le traitement des prisonniers et leurs conditions de détention. Le contrôle limité du territoire par ces groupes et leurs faibles ressources peuvent restreindre la disponibilité des biens et des services essentiels à la préservation de conditions humaines de détention. L'accès aux prisonniers de groupes armés peut en outre s'avérer problématique. Certains de ces groupes rejettent en effet tout contact avec des acteurs humanitaires, car ils y voient une menace pour leur sécurité.

Le fait que la détention par les groupes armés soit dépourvue de base légale constitue un autre problème. Outre les contraintes pratiques liées à la détention par des groupés armés, ceux-ci s'exposent à des poursuites pour kidnapping ou emprisonnement illégal. Ils pourraient dès lors être tentés de choisir une alternative moins risquée, à savoir tuer l'ennemi capturé. Il est donc nécessaire de trouver des moyens de les inciter à respecter le droit international humanitaire (DIH) et à détenir plutôt que tuer. Pour ce faire, les conséquences légales négatives associées à la détention doivent être éliminées. Le groupe armé doit être assuré que ses membres ne seront pas sujets – pendant ou après le conflit – à des poursuites civiles ou criminelles pour avoir détenu des prisonniers. Ceci implique la nécessité d'identifier qui les groupes armés ont le droit de détenir.

Il existe d'autres problèmes liés à la détention par des groupes armés non-étatiques.

Premièrement, dans certaines circonstances, des groupes armés peuvent ne pas avoir le contrôle du territoire ou posséder sur le territoire national les infrastructures nécessaires pour détenir des captifs. La question qui se pose dès lors est celle de savoir si ces groupes peuvent détenir leurs prisonniers en dehors du territoire national. A cet égard, deux questions doivent être considérées. Premièrement, la question de la relation entre l'Etat sur le territoire duquel a lieu le conflit armé (Etat A) et l'Etat sur le territoire duquel le groupé armé détient les ennemis capturés (Etat B). Deuxièmement, la question de la relation entre le groupé armé et l'Etat B. Concernant la relation interétatique entre l'Etat A et l'Etat B, il devrait y avoir un accord au niveau international selon

1 This contribution has been written on the basis of audio record and has not been reviewed by the speakers.

lequel l'autorisation donnée par un Etat pour que son territoire soit utilisé par un groupe armé non-étatique dans l'unique but d'y détenir ses prisonniers ne soit pas considérée comme encourageant une intervention hostile. Une alternative serait que l'Etat tiers détienne les personnes capturées dans ses propres centres d'internement au nom du groupe armé.

Deuxièmement, en cas de détention en vue de poursuites pénales, il serait irréaliste d'exiger de groupes armés non-étatiques qu'ils soient à même d'engager de telles poursuites. Il existe cependant une exception, à savoir lorsque l'acteur non-étatique a un contrôle tel du territoire qu'il exerce des fonctions gouvernementales. Dans un pareil cas, il devrait être autorisé à engager des poursuites pénales à la condition que ces poursuites soient conformes à l'article 6 du deuxième Protocole additionnel aux Conventions de Genève – que celui-ci soit de jure applicable ou non.
Une autre difficulté concerne l'obligation des Etats de protéger les personnes sous leur juridiction contre des violations des droits de l'homme. Si un acteur non-étatique peut détenir des personnes, l'on pourrait conclure que l'Etat a manqué à son devoir de protéger le détenu contre une violation des droits de l'homme. Les Etats sont-ils dès lors autorisés, dans la cadre des droits de l'homme, à déroger à l'obligation qui leur incombe de protéger les personnes contre une détention en autorisant des forces armées non-étatiques à détenir des prisonniers ?

Ramin Mahnad

International Humanitarian Law (IHL), given its essential importance, is necessary to regulate the behaviour of non-State armed forces in non-international armed conflicts (NIAC). As part of its overall project on 'Strengthening legal protection for victims of armed conflict' the International Committee of the Red Cross (ICRC) is attempting to address all the rules that should apply to non-State forces.

First of all, I would like to share a few issues we struggle with from a practical perspective in trying to articulate standards that somehow, in some degree or other, bind armed groups. Some of the challenges that we face, such as conditions of detention, occur in relation to both State and non-State forces. State forces that have captured an enemy on the battlefield are stuck in an operating base with an inability to move because they find themselves in a hostile environment. Therefore, what are the conditions of detention that one can demand of that State? That problem is multiplied when one takes into consideration the situation that non-State armed groups often find themselves in. Some armed groups can manage to build a proper detention facility or take one over, but most armed groups are constantly on the move and might not have other options than tying detainees to trees as they move around. Certainly, requirements regarding shelter cannot be the same for non-State armed groups in

those circumstances as they would be for a State. Furthermore, for armed groups, how does one articulate a standard for security of detention? The way in which the armed groups themselves live is often below what anyone would be willing to tolerate for prisoners, therefore for them to meet a standard of security remains unrealistic.

When it comes to arbitrary deprivation of liberty and the question of grounds and procedures for internment, one can easily imagine the vast differences one might have between a sophisticated armed group that controls territory and has its own quasi-government, and less organised, less sophisticated ones. Whilst with the sophisticated, organised armed groups one can probably have a dialogue on security detention and on whom they should release and whom they could detain under IHL, that dialogue is somewhat impossible with less organised armed groups.

Finally, another issue concerns visits by the ICRC and its monitoring of the conditions of detention and treatment of detainees by armed groups. Even if an armed group has the humanitarian or political intention to allow an ICRC visit, they simply cannot allow such a visit for their own overriding security interest as they would face the risk of being located by the enemy.

Françoise Hampson

In her introductory presentation, Ms. Christine Beerli underlined the need for IHL to be practical and relevant. In my experience, lawyers working with armed forces and governments tend to suggest that, unlike Human Rights Law, which they regard as aspirational, the key point with IHL is that it must be based on practical reality.

From here on, let me ask the following question: considering the fact that it is unlawful for non-State forces to detain persons, what are they to do with the enemy they have captured? They have basically two options: they can either detain the individual and be exposed to prosecution for kidnapping, unlawful imprisonment or ill-treatment, and in addition face the practical problems of finding a place to keep the detainee, looking after him, keeping him safe or moving him around; or there is a much easier solution not entailing the above-mentioned practical problems, namely killing the captured enemy. By doing so, the non-State combatants might be prosecuted for murder, but by detaining the individual they might be prosecuted for kidnapping anyway. Therefore, it looks as if killing is the least bad option. On the assumption that States might want to protect their armed forces from that least bad option, one needs to find a way to offer incentives to non-State forces by changing that balance so that it is no longer in their interest to kill rather than to detain. If non-State armed groups are to be

encouraged to respect IHL and to detain prisoners, then the negative legal consequences associated with detention must be removed. Those negative legal consequences are not a product of international law; international law does not make it an international crime or an international civil wrong-doing for non-State forces to intern people during an armed conflict. Domestic law is the cause of the problem. After 9/11 there have been regular attempts to criminalise any participation in non-international armed conflicts (NIAC). This has been highly counterproductive because by doing so an incentive for respect for IHL is destroyed. The same issue applies here. Leaving aside the question of a subsequent amnesty, the non-State armed group must be assured that its members will not be subject – during or after the armed conflict – to civil or criminal proceedings simply for detaining people. This means one will need to identify whom they are entitled to detain. In my opinion, this needs to be slightly broader than merely detaining members of the State's armed forces; one should consider giving them the right to detain informers or other people who constitute a real threat to their security. It will also be necessary to determine in what kinds of NIACs one will make this arrangement. Should it be in all NIACs, including Common Article 3 NIACs, or only the high intensity ones?

There are other related issues with regard to the detention of individuals by non-State armed groups in the national territory. First of all, there is a need to protect humanitarian supplies going to detention facilities from attack or interference. In addition, there is also the question of access. What if the State is denying access to detainees, whereas the non-State group is willing to grant access to humanitarian help? In some circumstances, it might not be practicable for non-State armed forces to run a detention facility in national territory. A non-State group can run a detention facility if it controls significant bits of territory but if it only has control at night or only in rural areas except when the military are passing through, it might be very difficult to run a detention facility safely in national territory. In which case, can non-State armed forces run detention facilities outside national territory? If one is willing to envisage this possibility, are they then allowed to run detention facilities outside national territory only where it is not possible to do so in national territory or do they have a choice? In this regard, there are two separate issues that need to be considered. Firstly, the issue of the relation between the State in whose territory the armed conflict is occurring (State A) and the State in whose territory non-State armed forces are running a detention facility (State B). Secondly, there is the issue of the relation between the non-State force and State B. Regarding the interstate relation between State A and State B, either there needs to be agreement at international level that a State allowing its territory to be used by a non-State armed group for the sole purpose of running a detention facility, will not be considered as encouraging terrorism, hostile or unfriendly interference. Or, another option would be for a third State to detain captives in their own detaining facilities on behalf of the non-State party. A number of consequences would flow from this scenario. For a start, the non-State party would require

the consent of the State in whose territory it wants to run a detention facility and the State would certainly require certain guarantees before giving that consent. Furthermore, the third State would have the same obligations as the non-State party. In both scenarios, would it be necessary to have a formal written agreement or memorandum of understanding between State A and State B and/or involving the non-State party? What rights or obligations, if any, would State B have to inspect the detention facility? What about the issue of access by the ICRC? Would that play out differently regarding access to detainees in the territory of a State that is not a party to an armed conflict?

With regard to detention by non-State armed groups, there are two areas of general difficulty that would need to be addressed. Firstly, in case of detention with a view to criminal proceedings, it would be unrealistic to expect non-State armed forces to be able to carry out such proceedings. There is however an exception, namely where the non-State force is well-established and in control of territory in such a way that it is exercising governmental functions. In such case, it ought to be allowed to conduct criminal proceedings on condition that those proceedings conform with Article 6 of the second Additional Protocol to the Geneva Conventions – whether or not it is *de jure* applicable. Secondly, there is the issue of the obligations of States A and B to protect those in their jurisdiction from human rights violations. If a non-State armed group can detain people, it might look as if the State had failed to protect the detainee from a human rights violation. Are States therefore allowed under Human Rights Law to derogate from their own obligation to protect people from detention by allowing non-State armed groups to detain?

By way of conclusion, the main big issue is recognising the right under domestic laws for non-State armed forces to intern individuals and for third States to either allow non-State forces to run detention facilities in their territories or to detain prisoners themselves on behalf of non-State forces. If this right is not recognised, non-State combatants will have no incentive to detain prisoners and will consider it much more practical to kill the captured enemy.

During the debate following the presentations, the audience raised two main issues.

1. Detention by Non-State Forces During Armed Conflicts

Regarding detention by non-State armed forces in the territory of third States, one of the speakers recalled that in 1982, the International Committee of the Red Cross (ICRC) reached an agreement with the Afghan fighters and the Soviet Union on interning Russian captives in Switzerland as keeping prisoners was not easy for the Afghan rebels. This was probably the first time that prisoners of war had been transferred with the agreement of the conflicting parties to an uninvolved third country. The speaker agreed on the need for a possibility for non-State armed groups to detain captives but argued that, unfortunately, States will probably never accept such a possibility. He suggested differentiating between low-level conflicts to which Common Article 3 applies, and high-level conflicts to which the second Additional Protocol (AP II) applies. While common Article 3 does not exclude the possibility for non-State belligerents to detain people,those non-State groups can simply not prosecute because they cannot comply with the guarantees found in common Article 3. In very low intensity conflicts, less organised armed groups will not be able to comply with many of the rules while the more organised ones will be better able to do so. The remaining problem is that if the principle of equality of belligerents is maintained, this means that when the group is less organised and thus less able to comply, the State will also have less obligations. In this regard, Human Rights Law can appear as a possible solution. Another possible solution the speaker suggested would be to abandon the principle of equality of belligerents in non-international armed conflicts (NIAC).

A panellist agreed with the idea of distinguishing between common Article 3 and AP II situations and suggested allowing the possibility for non-State armed groups to lawfully detain in AP II situations or situations in which they are controlling the territory.

One of the speakers posed a question regarding the issue of criminalisation versus the right of non-State armed groups to detain captives. She wondered if making the provisions of AP II regarding amnesty clearer rather than granting a right to detain captives could be a possible way forward. She noted that, from experience and practice, it is a known fact that non-State forces frequently keep prisoners. During the hostilities, their rationale for detaining captives is to be able to exchange them for their own captured members. According to the speaker therefore, it should be made clearer that, at the end of the hostilities, non-State belligerents will be granted amnesty for the enemy they have detained because the mere decriminalisation will not give them an incentive to keep prisoners.

A panellist replied that the problem with reliance on amnesty is that it will only be addressed at the end of the conflict. Amnesties are potentially useful but if States do not indicate during the course of a NIAC the terms of an amnesty, then it will remain a gamble for the non-State armed groups. Of course, they may detain members of the armed State security forces in view of their exchange value against their own imprisoned members but this can very easily be represented as hostage taking, which constitutes an international crime. In most circumstances, due to practical realities, it may be challenging for non-State forces to detain captives and they may therefore prefer to kill the captured enemy. In those situations, a way needs to be found to address the non-State belligerents during the conflict. If the State is not willing to discuss future amnesty during the conflict then another means will need to be found.

A participant wondered whether it is practical to offer incentives in favour of capture and detention in isolation and asked whether this could be done without also giving incentives to comply with the rules on conduct of hostilities. He further expressed worries about the discourse on how it is easier to kill captured government soldiers and noted that there are other options than to either kill or detain them. While not ideal from the perspective of an armed group, they could for instance disarm and release captured soldiers.

One of the panellists recognised that there is the possibility of release, but for non-State armed groups who do not have effective control of a territory, disarming and releasing soldiers is not an ideal solution. In such situations, unless there are specific reasons for the armed group to encumber itself with the captured soldier, the easiest option is to kill him. She further explained that there does not have to be but there can be a distinction between Geneva law and the Hague law. The Hague law, or Methods and Means of Warfare, implies the right to resort to armed force against a State and involve risks to the civilian population. Detention, for its part, implies dealing with the protection of victims. It is an area where no belligerent reprisals are allowed in international armed conflicts (IAC) because it is not seen ultimately as dependent on reciprocity whereas Methods and Means rules tend to be more dependent on reciprocity. It should therefore be possible to argue for non-prosecution of non-State armed groups for detaining enemy soldiers without needing to recognise a right to resort to armed force against a State.

A participant asked whether one could envisage a less far-reaching solution than granting non-State belligerents a right to detain prisoners. He referred to a situation where the non-State armed groups would release the person detained in exchange for a plea bargain immunity deal and that the released person would then either take residence in a third country for the duration of the conflict or go back but without taking up a new function in the armed forces for the duration of the conflict.

One of the panellists answered that there would need to be a clear agreement between the non-State forces and the State according to which the released enemy would not be allowed to carry on taking part in the armed conflict. The *quid pro quo* would be that the non-State belligerents would not be prosecuted for having detained the enemy in the first place.

A participant wondered whether the basic idea of Henry Dunant of reciprocity is still being respected. In practice looking after wounded soldiers creates many difficulties, namely the presumption that once wounded soldiers are taken care of and healed, they will take up their arms and go back to the battlefield.

A panellist replied by explaining that reciprocity plays out differently with regard to Methods and Means of Warfare than with regard to the protection of victims. The protection of victims is the reflection of accepted values, which is why to date no State has entered reservations with regard to the prohibition of reprisals contained in each of the four Geneva Conventions. Furthermore, there can be no military gain from killing detainees even if the other side is doing so. When dealing with Methods and Means of Warfare, if the one side is gaining a military benefit by ignoring the rules it will be extremely difficult to convince the other side to abide by the rules. On the contrary, this ought to be possible concerning the protection of victims by appealing to the values of the group or State in question.

2. Copenhagen Process on the Handling of Detainees in International Military Operations

A participant asked the panellists about the ICRC's view on the Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process). One of the panellists recalled that the ICRC was present during the Copenhagen Process as an observer and noted that the ICRC's implementation of Resolution 1 of the 31st International Conference, 'Strengthening legal protection for victims of armed conflicts' is moving forward in a spirit of complementarity. He explained that there are some substantive differences, primarily in terms of scope, between the Copenhagen Process and what the ICRC is attempting to address. Firstly, the Copenhagen Process does not apply to what the ICRC has come to call 'classical non-international armed conflicts', namely purely internal armed conflicts involving a government fighting against an armed group on its own territory or two armed groups fighting each other on the territory of a State, as it applies to international military operations in the context of a NIAC. Additionally, it also applies to peace operations which could be operations which do not actually amount to armed conflicts, whereas the ICRC initiative in Resolution 1 is only about NIACs – both NIACs which take place entirely in the territory of one State as well as those which might take place in the territory of multiple States.

Session 2
Vulnerabilities in hostilities – the example of health care

Chairperson: **Frederik Harhoff**, *Former Judge, ICTY*

LES ATTAQUES CONTRE LES BLESSÉS, LES MALADES, LES NAUFRAGÉS, LE PERSONNEL MÉDICAL ET LES DÉFIS POSÉS PAR LES ATTAQUES SUBSÉQUENTES

Julia Grignon et **Raymond Ouigou Savadogo**
Université Laval

Summary

The Prohibition of Attacks against the Wounded, Sick, and Shipwrecked, and Medical Personnel

Protecting the sick, wounded and shipwrecked in armed conflict is a founding principle of International Humanitarian Law (IHL). 'Wounded and sick' is defined in the first Additional Protocol to the Geneva Conventions as anyone in an armed conflict, whether military or civilian, who is in need of medical attention and is not taking part in hostilities. 'Shipwrecked' means military or civilian persons in a perilous situation at sea or on any other waters following a misfortune which has befallen them and who refrain from any act of hostility.

The treaties do not define the kind or degree of sickness or wounds entailing protection. In the absence of additional clarification, it could be argued that the reason why a person is wounded or sick is without relevance. In other words, it is not required that the sickness or wounds be the direct result of an armed conflict in order for the affected person to benefit from the protection.

Nowadays, the concepts of wounded, sick and shipwrecked are both wider and narrower than at the time they were conceived. They are wider as they also cover persons that are not wounded or sick in the common sense of the terms, namely women in childbirth, new-borns, the infirm and pregnant women. On the other hand, they are narrower as they protect these persons only on the condition that they refrain from any act of hostility. IHL however does not clarify the degree at which an act committed by a wounded, sick or shipwrecked person becomes hostile. In this regard one could reasonably refer to the usual definition according to which hostile acts should be understood to be 'acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces'.

The central principle is that all wounded, sick and shipwrecked persons, whichever party they belong to, must be respected and protected in all circumstances. The term 'protecting' implies a positive obligation meaning 'coming to their defence, lending help and support'. 'Respecting', on the other hand, implies a negative obligation, namely to spare and not to attack. Attacks against wounded, sick and shipwrecked persons are considered a war crime under international law. The protection afforded to the sick and wounded applies both in international armed conflicts (IAC) and in non-international armed conflicts (NIAC). The application of the protection during NIAC poses a particular challenge in terms of the ability of armed groups to have the appropriate means and medical units to be able to ensure and provide the necessary and effective relief to the wounded, sick and shipwrecked.

The rule that medical personnel must be respected and protected is explicitly stated in Additional Protocol II. In addition, under the Statute of the International Criminal Court, 'intentionally directing attacks against (…) personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' constitutes a war crime both in IAC and in NIAC. The consequences of attacks on medical personnel represent one of the main challenges of contemporary IHL.

Follow up Strikes

The expression 'follow up strikes' covers two different situations which give rise to two categories of legal problems. The first situation is the one in which two attacks are conducted consecutively in order to annihilate a target. In the second attack, the assessment of proportionality changes: often, persons will come running to provide assistance to the victims of the first attack, hence the exercise of evaluating the proportionality will have to be re-done and what was considered a lawful attack the first time can become unlawful the second time as a result of the presence of civilians who could suffer excessive damage. The second situation is one in which an accessory target is attacked in order to attract the main target to the site and then launch a second attack. By complying with its obligation under the Geneva Conventions to provide care to those in need and remove those persons from the immediate theatre of hostilities, the main target will become itself the victim of the hostilities. No specific provisions exist in relation to these kinds of attacks. They should therefore be analysed through the relevant rules applying to all types of attacks.

1. Introduction : les blessés au cœur du droit international humanitaire, bref historique et mise en contexte

Lorsque Henry Dunant a entrepris de venir en aide à ceux qui se trouvaient encore sur le champ de bataille le lendemain de la bataille de Solférino il y a maintenant 150 ans, il ne s'agissait pas de secourir des personnes civiles comme on le voit souvent aujourd'hui sur les images qui sont rapportées des zones de conflit ; il s'agissait de secourir des combattants. Du fait de la physionomie de la guerre à l'époque, dès lors que les civils n'étaient pas ceux qui étaient directement impliqués dans les conflits armés, les personnes affectées par ces situations étaient celles qui combattaient. Dans la conception de Dunant[1], reflétée ensuite dans la première Convention de Genève de 1864[2], les sociétés de secours qu'il était nécessaire de créer devaient avoir pour mission de secourir ces catégories de personnes. Du reste, c'est dans ce contexte que deux des principes de l'action humanitaire sont apparus concomitamment et sont devenus cardinaux depuis : la neutralité et l'impartialité.

Ainsi, protéger les combattants blessés, les malades et les naufragés, constitue l'essence même du droit international humanitaire. Et de cette dynamique découle de surcroît l'équilibre sur lequel ce *corpus* juridique repose tout entier, à savoir la balance entre les nécessités militaires d'une part et les considérations d'humanité d'autre part. Par conséquent, les enjeux liés aux attaques contre les blessés, les malades, les naufragés et le personnel médical sont d'autant plus importants qu'ils touchent aux fondements de ce droit. Il s'agit donc à la fois d'un enjeu contemporain avec la multiplication des attaques, en particulier, mais pas seulement, contre le personnel médical et les unités sanitaires, mais également un enjeu de principe puisqu'il est à la base du droit international humanitaire tel que nous le pratiquons aujourd'hui.

Par ailleurs, cette problématique s'inscrit dans celle plus large du non-respect du droit international humanitaire par les parties aux conflits. De façon assez évidente, les attaques contre les blessés, les malades, les naufragés et le personnel médical – qu'ils aient le statut de combattants ou de civils – sont interdites ; elles peuvent même constituer des infractions graves.[3]

---

1 Voir Henry Dunant, *Un souvenir de Solférino*, Genève, Comité international de la Croix-Rouge, 1990.

2 *Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne*, 22 août 1864, < http://www.icrc.org/dih.nsf/INTRO/120?OpenDocument> (Consulté le 7 janvier 2014).

3 Article 50 de la *Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne (Convention I)*, 12 août 1949, 75 RTNU 31; article 51 de la *Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer (Convention II)*, 12 août 1949, 75 RTNU 85; article 130 de la *Convention de Genève relative au traitement des prisonniers de guerre (Convention III)*, 12 août 1949, 75 RTNU 135 et article 140 de la *Convention de Genève relative à la protection des personnes civiles en temps de guerre (Convention IV)*, 12 août 1949, 75 RTNU 287.

En revanche, ce que l'évidence ne dit pas c'est : *qui sont les blessés, les malades, les naufragés et le personnel médical* ? Il sera nécessaire d'y revenir dans un premier temps avant d'examiner les défis que posent les attaques contre ces catégories de personnes pour enfin aborder un type d'attaques particulières, les attaques subséquentes.

2. Définition des blessés, malades, naufragés et du personnel médical

Les Conventions de Genève (CG) n'ont « jamais tenté (…) de définir ce qu'il faut entendre par 'blessé ou malade' »[4], c'est donc grâce au premier Protocole additionnel, que l'on est aujourd'hui capable de dire que ces notions englobent toute personne qui en raison d'un traumatisme, d'une maladie, d'une incapacité ou d'un trouble physique ou mental se trouve dans une situation telle qu'elle ait besoin de soins médicaux[5]. Quant aux naufragés, il s'agit des personnes qui se trouvent dans une situation périlleuse en mer ou dans d'autres eaux par suite de l'infortune qui directement ou indirectement les frappe[6]. Quelques éléments permettent de préciser ce que le droit international humanitaire entend par « blessés, malades ou naufragés » : ces personnes peuvent être des combattants ou des civils (a), les raisons de leur affection sont inopérantes à la qualification (b), pour se voir reconnaitre ce statut, les personnes concernées doivent s'abstenir de tout acte d'hostilité (c), et subsidiairement les protections offertes à ces catégories de personnes sont également applicables dans les conflits armés non internationaux (d).

a. Combattants et civils

Tout d'abord, les deux premières Conventions de Genève – respectivement les articles 14 et 16[7] – doivent se lire conjointement avec la troisième qui prévoit que lorsque les blessés ou malades tombent au pouvoir de l'ennemi, ils deviennent prisonnier de guerre[8] et il ne fait alors aucun doute que ces catégories de personnes appartiennent à la catégorie des combat-

---

4 Jean Pictet (dir.), *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, Commentaire (CG I)*, Comité international de la Croix-Rouge, Genève, pp. 149-150. De même lors de l'adoption des Conventions de Genève, on ne s'était jamais préoccupé de déterminer le degré de gravité qu'une blessure ou une maladie devrait présenter pour entrainer le droit au respect. En l'espèce, il s'est agi de prendre des mesures de précaution en ce sens que « une définition, en raison de son caractère forcement limitatif, aurait ouvert la porte à toutes les interprétations et à tous les abus ».

5 Voir article 8 (a) du *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I)*, 8 Juin 1977, 1125 RTNU 3 [ci-après: Protocole additionnel I].

6 Voir article 8 (a) du *Protocole additionnel I*.

7 Les articles 14 CG-I et 16 CG-II disposent que « les blessés et les malades d'un belligérant, tombés au pouvoir de l'adversaire, seront prisonniers de guerre et les règles du droit des gens concernant les prisonniers de guerre leur seront applicables ».

8 Article 4 CG-III.

tants. Les personnes civiles font toutefois elles aussi explicitement l'objet d'une protection lorsqu'elles sont blessées ou malades au terme de l'article 16 de la quatrième Convention de Genève. Cette protection n'est d'ailleurs pas limitée aux blessés et malades, mais est étendue aux infirmes et aux femmes enceintes. Le Protocole additionnel I prévoit quant à lui de manière tout aussi explicite que « les termes blessés et malades s›entendent des personnes, *militaires ou civiles*, qui, en raison d'un traumatisme (…) ont besoin de soins médicaux » (nos italiques)[9]. Il en est de même pour les naufragés[10], et cette protection qui couvre aussi les civils a maintenant acquis une valeur coutumière[11].

b. Les raisons et la gravité de l'affection sont inopérantes

Ensuite, si toutes les catégories de personnes, combattants ou civils, font l'objet d'une protection du fait de leur situation de vulnérabilité, l'absence de définition laisse une grande marge d'appréciation quant à savoir quels types de maladies ou de blessures sont visés. Lors de l'adoption des Conventions de Genève, on ne s'est jamais préoccupé de « déterminer le degré de la gravité qu'une blessure ou une maladie devait présenter pour entraîner le droit au respect »[12]. En effet, sans précision additionnelle dans les textes, il peut être avancé que la ou les raison(s) pour lesquelles une personne se trouve blessée ou malade, au sens usuel des termes, est sans importance. Autrement dit il n'y a rien qui exige que ces blessures ou maladies soient le résultat direct du conflit armé pour que les personnes qui en sont atteintes bénéficient de la protection. Ainsi, les civils malades chroniques, par exemple les diabétiques ou ceux qui ont besoin de dialyse, bénéficient également de cette protection, et pas simplement ceux qui ont été victimes des hostilités. C'est un élément capital au regard des conséquences des attaques contre le personnel médical : ce ne sont pas seulement les personnes blessées au cours du conflit armé qui perdent le bénéfice de leurs soins lorsque le personnel médical est empêché de mener sa mission, mais toute personne qui nécessite d'être prise en charge, pour autant qu'elle s'abstienne de participer aux hostilités.

c. S'abstenir de tout acte d'hostilité

Enfin, de nos jours, les notions de blessés, malades et naufragés sont à la fois plus larges et plus étroites que lorsqu'elles ont été conçues. Elles sont plus larges « en ce qu'elle[s] englobe[nt]

---

9 Voir article 8 (a) du *Protocole additionnel I*.

10 Ibid.

11 Il a été souligné que « [l]e nombre considérable de manuels militaires qui contiennent cette règle sont rédigés en termes généraux couvrant l'ensemble des blessés, des malades et des naufragés, qu'ils soient militaires ou civils » : voir Règle 109 dans Jean-Marie Henckaerts & Louise Doswald-Beck, *Droit international humanitaire coutumier*, vol. 1 : Les Règles, Bruxelles, Bruylant, 2006, p. 525.

12 *Commentaire des Conventions de Genève (CG I)*, p. 149. Cette omission était voulue afin de ne pas ouvrir « la porte à toutes les interprétations et à tous les abus » : voir *Commentaire CG I*, p. 150.

des personnes qui ne sont pas blessées ou malades au sens courant de ces termes »[13]. Font partie de cette catégorie les femmes en couche, les nouveau-nés, les infirmes et les femmes enceintes[14]. En revanche, elles sont plus étroites « en ce qu'elle[s] ne protège[nt] l'ensemble de ces personnes (donc aussi les blessés et malades selon le sens courant) qu'à la condition qu'elles s'abstiennent de tout acte d'hostilité »[15]. Toutefois, le droit international humanitaire ne précise pas le moment ou plutôt le degré à partir duquel un acte posé par un blessé, un malade ou un naufragé devient hostile[16]. Pour ce faire, on pourrait raisonnablement se référer à la définition habituelle selon laquelle on doit entendre par actes d'hostilité « les actes qui par leur nature ou leur but, sont destinés à frapper concrètement le personnel et le matériel des forces armées »[17]. Cela implique donc que la protection n'est pas automatique mais, plutôt, conditionnée. Pour reprendre les termes des commentaires des Conventions de Genève, c'est cette chute à terre, cet abandon des armes, qui donnent naissance à la protection ; autrement dit, « seul peut être tué le soldat qui lui-même cherche à tuer »[18]. Puis, a contrario, « une personne ayant une jambe cassée n'est pas un blessé au sens du Protocole si elle continue de tirer »[19], et il en va de même pour un naufragé qui « combat[trait] en nageant »[20].

d. Protections étendues aux conflits armés non internationaux

Subsidiairement, les protections offertes aux blessés et malades s'appliquent également dans les conflits armés non internationaux puisque l'article 3 commun le prévoit à son deuxième paragraphe, tout comme l'article 7 du deuxième Protocole additionnel. Et, selon la règle 111 de l'étude du Comité international de la Croix-Rouge (CICR) sur le droit international humanitaire coutumier, ces dispositions ont aujourd'hui acquis une valeur coutumière[21]. Un défi particulier résulte de cette extension et pourrait se poser dans le cadre des conflits armés non internationaux : celui de la capacité des groupes armés à respecter les obligations attachées à ces catégories de personnes. Si pour ce qui concerne les attaques, qui sont l'objet de notre propos ici, il s'agit d'une abstention plutôt facile à réaliser, il en va différemment pour ce qui concerne le traitement des personnes.

---

13 *Commentaire du Protocole additionnel I*, p. 119.

14 Ibid.,p. 120.

15 Ibid. p. 119.

16 Voir par exemple Jann K. Kleffner, « Protection of the Wounded, Sick and Shipwrecked », in: Dieter Fleck (eds.), *The Handbook of International Humanitarian Law*, Oxford, Oxford University Press, 2008, 325, p. 329.

17 *Commentaire du Protocole additionnel I*, p. 633.

18 *Commentaire des Convention de Genève* de 1949 (CGI), p. 150.

19 *Commentaire du Protocole additionnel I*, p. 120.

20 Marco Sassoli, Antoine Bouvier et Anne Quintin, *Un droit dans la guerre*, Genève, Comité international de la Croix-Rouge, 2012, Cas n°156.

21 Jean-Marie Henckaerts & Louise Doswald-Beck, op. cit., note 11.

La protection accordée aux blessés, malades et naufragés serait insuffisante et incomplète si elle ne s'étendait pas aux personnels et unités sanitaires. Pour ce qui concerne les conflits armés internationaux, par « personnel sanitaire », on entend couramment toutes les personnes qui sont exclusivement affectées par une partie au conflit soit aux fins sanitaires, soit au fonctionnement ou à l'administration de moyens de transport sanitaire[22]. L'ensemble du personnel sanitaire civil jouit aujourd'hui de l'immunité créée dès 1864 pour le personnel sanitaire de l'armée,[23] et ce, dans le but de mieux assurer la protection de l'ensemble des blessés et malades, civils ou militaires[24]. Dès lors, l'expression couvre, entre autres, le personnel sanitaire militaire ou civil d'une partie au conflit, qu'il soit affecté de manière temporaire ou permanente à des fonctions sanitaires, et le personnel sanitaire des sociétés nationales de la Croix-Rouge et du Croissant-Rouge.

Dans le régime juridique de la protection offerte au personnel sanitaire, le principal défi réside dans l'affectation *exclusive* de ces personnes à leurs fonctions. D'une part, cette affectation exclusive implique que le personnel sanitaire protégé ne peut pas se consacrer à d'autres activités[25]. D'autre part, l'affectation exclusive implique aussi que pour les personnes temporairement affectées à l'exercice des fonctions sanitaires, la protection ne vaut que pour le temps d'exercice desdites fonctions ou dans l'hypothèse où ce personnel en question est tombé au pouvoir de l'ennemi. Quant aux unités sanitaires, elles englobent les établissements et autres formations mobiles ou fixes qui ont été mises sur place pour assurer les fonctions de secours aux blessés et malades. Il s'agit des hôpitaux, des dépôts de matériels sanitaires et produits pharmaceutiques, les centres d'approvisionnement, etc. Pour leur part, les moyens de transport sanitaire incluent tout moyen de déplacement terrestre (ambulances), naval (navires-hôpitaux) ou aérien (aéronefs sanitaires) du personnel ou matériel sanitaire[26].

Tout comme les blessés et malades, ces personnels, ces unités et ces moyens de transport sanitaires doivent être respectés et protégés par les parties au conflit, et ce en toutes cir-

---

22 *Protocole additionnel I*, article 8 (c).

23 Jean Pictet, « La profession médicale et le droit international humanitaire » (1985), in : 754 *Revue internationale de la Croix-Rouge (RICR)*, 195, p. 211.

24 *Commentaire du Protocole additionnel 1*, p. 127, paragraphe 349.

25 Ibid.,p. 128, paragraphe 353.

26 Pour le cas spécifique des aéronefs sanitaires, Waldemar A. Solf estime que l'une des déficiences des Conventions de Genève résident dans le fait que ces types d'avions n'étaient pas protégés même dans l'hypothèse où ils avaient reçu l'accord des parties au conflits : Waldemar A. Solf, « Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions » in : *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, The Hague, ICRC, M. Nijhoff, 1984, 237-248, p. 238.

constances[27]. Au regard des commentaires de l'article 24 de la première Convention de Genève (CG-I), les mots « en toutes circonstances » montrent bien que les personnels et les unités sanitaires jouiront du respect et de la protection en tous temps et en tous lieux : qu'ils soient sur le champ de bataille ou à l'arrière, qu'ils soient retenus temporairement ou durablement par l'adversaire[28].

Enfin, pour ce qui concerne la protection du personnel médical en temps de conflits armés non internationaux, elle découle de la protection offerte aux blessés et malades. Il s'agit d'une forme de protection subsidiaire pour permettre d'assurer les soins à cette catégorie de personnes[29].

3. L'interdiction d'attaquer les blessés, les malades, les naufragés et le personnel médical

L'interdiction d'attaquer les blessés, malades, naufragés et personnel médical trouve son fondement dans le fait que toutes ces personnes doivent être respectées et protégées[30].

Du terme « protéger », il résulte une obligation active en ce qu'il signifie « prendre la défense de quelqu'un, prêter secours et appui »[31]. Tout comme il est aussi exigé de leur venir en aide puis de les « traite[r] avec humanité »[32] et ce, en toutes circonstances, c'est-à-dire dès qu'on est en contact avec un blessé, un malade ou un naufragé. Quant au terme « respecter », il induit une obligation passive, précisément : « épargner, ne point attaquer »[33].

Appartenant tous à la catégorie des personnes hors de combat ou ne participant pas aux hostilités, les blessés, les malades et les naufragés ne peuvent jamais être la cible d'attaque. Du reste, au terme des articles 50 et 51 des deux premières Conventions de Genève et 147 de la quatrième, une telle attaque constituerait une infraction grave. Ces attaques constituent également

---

27 Voir les articles 24 et 25 du CG I ; articles 36 et 37 du CG II ; article 15 du Protocole additionnel I et article 9 *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II)*, 8 Juin 1977, 1125 RTNU 609 [ci-après: Protocole additionnel II] ; Jean-Marie Henckaerts & Louise Doswald-Beck, op.cit.,Règles 29 et 30.

28 *Commentaire de la CG-I*, p. 243.

29 Jean-Marie Henckaerts & Louise Doswald-Beck, op.cit. Règle 25.

30 Article 12 CG I et CG II

31 *Commentaire du Protocole additionnel I*, p. 148.

32 Article 10 (2) du Protocole additionnel I. Voir aussi les *Commentaires du Protocole I*, p. 149. Jean Pictet concède qu'« [i]l serait dangereux de définir en détail ce qu'est le traitement humain, car on serait toujours en retard sur l'imagination des scélérats. Le déterminer est une question de bon sens et de bonne foi. Contentons-nous de dire que c'est le minimum qui doit être réserve à l'individu pour qu'il puisse mener une existence acceptable.» Voir Jean Pictet, op. cit p. 198.

33 *Commentaire du Protocole additionnel I*, p. 148, paragraphe 446.

un crime de guerre au terme du *Statut de Rome*, tant dans les conflits armés internationaux que non internationaux[34]. De plus, par l'expression « à quelque Partie qu'ils appartiennent » il faut comprendre que chaque partie au conflit doit respecter et protéger ses propres blessés, malades et naufragés – ce qui peut paraître évident, mais qu'il n'est peut-être pas inutile de rappeler – et, surtout, que les blessés et malades de l'autre partie bénéficient du même droit[35].

Pour ce qui concerne le personnel médical, « respect » et « protection » impliquent non seulement une interdiction d'attaquer, mais aussi une obligation, incombant aux autorités compétentes, de veiller à ce que ces établissements et formations sanitaires soient situés de telle façon que les attaques éventuelles contre des objectifs militaires ne puissent mettre ces établissements et formations en danger[36]. D'ailleurs au regard du *Statut de Rome*, le fait de lancer des attaques délibérées contre « les unités et les moyens de transport sanitaires (…) utilisant, conformément au droit international, les signes distinctifs prévus par les Conventions de Genève » constitue un crime de guerre tant dans les conflits armés internationaux[37] que non internationaux[38]. À cet égard, la Chambre d'instance du Tribunal spécial pour la Sierra Leone a eu l'occasion de statuer qu'« [i]l n'existe aucune exigence que le personnel ou les objets aient subi des dommages réels à la suite de l'attaque (…) la simple attaque constitue l'élément matériel de l'infraction » [39]. Il suffit que « l'objet principal de l'attaque [soit] le personnel, les installations, le matériel, les unités ou les véhicules employés dans le cadre d'une mission d'aide humanitaire »[40]. Cette double obligation de respecter et de protéger constitue donc la véritable « clé de voute »[41] de l'interdiction des attaques contre les blessés, les malades, les naufragés, le personnel et unités sanitaires.

---

34 *Statut de Rome*, art. 8 (2) e iv) CANI et 8 (2) b ix) CAI.

35 *Commentaire du Protocole additionnel I*, p. 148. Dans l'affaire *In re Pilz* par exemple, un médecin allemand a été poursuivi après la guerre pour avoir refusé de laisser le personnel allemand soigner le blessé qui était un jeune néerlandais. Voir : Marco Sassoli et A. Bouvier, op.cit. (Cas n°109, Pays-Bas, *In re* Pilz).

36 Jean-Marie Henckaerts & Louise Doswald-Beck, op. cit. Règle 24 ; voir aussi Michael Bothe and Karin Janssen, « Issues in the protection of the wounded and sick », 26, in: *International Review of the Red Cross*, 1986, 189-199, pp. 190-194.

37 *Statut de la Cour Pénale Internationale*, 2187 RTNU 90 [entrée en vigueur : 1er juillet 2002], article 8, paragraphe 2, alinéa b) xxiv) [*Statut de Rome*].

38 *Statut de Rome*, article 8, paragraphe 2, alinéa e) ii).

39 Tribunal Spécial pour la Sierra Leone, *Jugement de la Chambre de première instance* dans l'affaire *Sesay et al.* 2 mars 2009, paragraphe 220. [Traduction non officielle].

40 *Ibid*. Quant à la *mens rea* de l'infraction, la Chambre précise que l'accusé doit être dans un état tel qu'il « aurait dû savoir ou avait des raisons de savoir que le personnel, les installations, le matériel, les unités ou les véhicules étaient protégés. Il n'est pas nécessaire d'établir que l'accusé avait effectivement la connaissance légale de la protection à laquelle les personnes et les objets avaient droit en vertu du droit international humanitaire », voir paragraphe 235 [Traduction non-officielle].

41 Jean Pictet, op. cit. note 23, p. 200.

Il convient enfin de noter que les conséquences des attaques sur ces catégories de personnes représentent l'un des défis majeurs du droit international humanitaire contemporain. En effet, d'abord, attaquer un hôpital, c'est non seulement mettre en danger les combattants blessés qui s'y trouvent et le personnel médical déployé pour les soigner, mais c'est également premièrement mettre en danger des personnes civiles qui s'y trouveraient et deuxièmement mettre en danger la population civile dans son ensemble en l'empêchant pour l'avenir d'avoir accès à des soins de santé, comme c'est le cas pour les personnes atteintes de diabète ou d'autres maladies chroniques par exemple, tel que les contextes syrien ou de Gaza l'ont notamment illustré[42]. Ensuite, la multiplication des attaques à l'encontre du personnel médical signifie qu'un signe distinctif ne suffit plus à le protéger et qu'il doit envisager d'autres solutions pour ce faire. Parmi celles-ci, le personnel médical peut par exemple choisir de se faire accompagner d'une protection armée, ce qui induit deux défis subsidiaires : s'il fait partie d'un convoi armé, le personnel médical devient alors lui-même une cible légitime d'attaque ou dommage collatéral qui pourrait être justifié au moment de l'examen de la proportionnalité de l'attaque; s'il est accompagné par une compagnie militaire ou de sécurité privée, les membres de cette dernière ne pourront pas être considérés comme participant directement aux hostilités puisqu'ils protègent autre chose qu'un objectif militaire. Le personnel médical peut également prendre une mesure extrême, plus opérationnelle que juridique, mais dévastatrice pour les personnes affectées par les conflits armés, c'est-à-dire se retirer du pays concerné avec toutes les conséquences qui y sont attachées tant pour les blessés, malades et naufragés qui bénéficient de leurs soins que pour la population civile qui peut également être amenée à les consulter.

4. Les attaques subséquentes

L'expression « attaques subséquentes » couvre en fait deux réalités. Premièrement la situation dans laquelle deux attaques sont menées consécutivement afin d'annihiler une cible, et deuxièmement la pratique qui consiste en ce qu'une partie au conflit cible un objectif, non pas dans l'idée de neutraliser cet objectif lui-même, mais aux fins que cette attaque contre cet objectif provoque comme réaction chez la partie adverse de se mettre à découvert, ce qui permettra à l'auteur de la première attaque d'en conduire une deuxième contre ce qui était son « objectif initial déguisé », c'est-à-dire ceux qui se sont mis à découvert. En somme, on vise une cible accessoire afin d'attirer la cible principale sur les lieux pour ainsi lancer une seconde attaque. Quelques exemples permettent d'illustrer ces hypothèses. Le premier exemple avait connu un certain retentissement lorsque Wikileaks l'avait révélé. Il s'agissait des images de soldats américains tirant sur des irakiens venus secourir un blessé d'une attaque préliminaire. Les images montrent assez clairement qu'un véhicule s'arrête près du blessé, que des irakiens non armés

42 CICR, « Gaza : répondre aux besoins médicaux urgents dans une bande de Gaza à l'agonie », 19 novembre 2008, <http://www.icrc.org/fre/resources/documents/interview/palestine-interview-181108.htm> (Consulté le 14 janvier 2014).

en sortent pour vraisemblablement le secourir et que depuis un hélicoptère américain est lancée une attaque. On entend également distinctement une personne dire : « Regarde ça ! En plein dans le pare-brise ! » et une autre rire[43]. En guise de deuxième exemple, on peut rappeler qu'au Pakistan, une enquête menée par des journalistes avait permis de démontrer – après trois mois d'enquêtes et de témoignages recueillis[44] – qu'au moins 50 civils avaient été tués dans des attaques subséquentes alors que ces personnes s'employaient à secourir des victimes d'une attaque précédente.[45] La question des attaques subséquentes tient également une place importante dans le débat relatif aux attaques par drones. En effet, ceux-ci sont également l'un des moyens avec lesquels sont menées les attaques subséquentes, comme l'illustre le témoin d'une attaque subséquente par drone qui rapporte que les victimes de l'attaque s'employaient à sortir les corps, en aidant à dégager les décombres de l'hôpital, et qui conclut qu'aujourd'hui plus personne ne veut se rendre à proximité d'un bâtiment endommagé par une attaque de peur d'être victime d'une attaque subséquente[46].

De ces deux types d'attaques subséquentes résultent deux catégories de problèmes juridiques. Dans le premier exemple, l'auteur d'une première attaque en mène une seconde afin de s'assurer d'avoir atteint son objectif, c'est-à-dire neutraliser sa cible, mais lors de la seconde attaque l'examen relatif à la proportionnalité change : bien souvent, des personnes auront accouru pour porter secours aux personnes victimes de la première attaque, et de ce fait il faut refaire l'exercice du calcul de la proportionnalité et ce qui était une attaque licite la première fois peut devenir une attaque illicite la deuxième fois, même si la cible reste inchangée, du fait de la présence de civils qui pourraient faire l'objet de dommages excessifs. Dans cette hypothèse, c'est donc la réévaluation de la licéité de l'attaque qui pose problème. Dans le deuxième exemple, le lien avec les attaques contre les blessés, malades, naufragés et personnel médical est encore plus évident parce que si les personnes qui sont la véritable cible de l'attaque se mettent à découvert, c'est précisément, la plupart du temps, parce qu'elles veulent porter secours aux victimes de la première attaque. Respecter et protéger les malades et les blessés suppose des actions positives : prodiguer des soins à ceux qui en ont besoin, éloigner ces personnes du théâtre immédiat des hostilités ou encore collecter les morts. C'est donc à l'occasion de la mise en œuvre de l'une de leurs obligations au terme des Conventions de Genève[47] que ces personnes se trouvent elles-mêmes victimes des hostilités et ce qui rend ces attaques sub-

43 Chris McGreal, «Wikileaks reveals video showing US air crew shooting down Iraqi civilians», in: The Guardian (5 avril 2010), <http://www.theguardian.com>.

44 Chris Woods and Christina Lamb « CIA tactis in Pakistan include targeting rescuers and funerals», Thebureauinvestigates (4 février 2012), <http://www.thebureauinvestigates.com/>.

45 Ibid.

46 Ibid.

47 Voir entre autres les articles 24 et 25 CGI et article 8 (c) du *Protocole additionnel 1*.

séquentes particulièrement odieuses et qui justifie que l'on se pose la question de ces attaques en soi, c'est-à-dire en tant que méthode de guerre, et non pas comme une attaque comme une autre contre des personnes civiles par exemple.

Aussi, le véritable défi que posent ces nouvelles tactiques de guerre résulte du fait que le droit international humanitaire ne les catégorise pas comme une méthode de guerre en tant que telle. Il n'existe donc pas de dispositions spécifiques relatives à ce type d'attaques. Par conséquent, il convient de les analyser grâce aux règles pertinentes s'appliquant indistinctement à tout type d'attaque. En l'occurrence, il faut se placer du point de vue du statut juridique de la personne qui apporte le secours. S'il s'agit d'une personne civile ou d'un membre du personnel médical, l'interdiction d'attaquer est double. D'une part parce que celui qui apporte la protection – à savoir ce personnel médical ou cette personne civile – est lui-même protégé et d'autre part, celui à qui le secours est destiné (le blessé, malade ou naufragé) jouit, lui aussi, d'une protection. Ce faisant, une attaque directe contre la personne qui apporte le secours devient également une attaque directe contre les blessés, malades et naufragés à qui le secours est destiné, et ce, par le simple fait qu'elle se trouve dans une situation telle que l'une et l'autre sont indissociables. Ici l'analyse est donc assez aisée. Il peut en aller différemment lorsque celui ou celle qui apporte le secours en question est un combattant ou une personne participant ouvertement aux hostilités. Il s'agirait par exemple d'un soldat qui s'emploierait à secourir ses compagnons d'armes tombés pour blessure ou maladie. Une attaque subséquente qui vise ce soldat est-elle licite? Il faut ici distinguer deux choses : premièrement l'attaque contre ce combattant; on appliquera alors les règles classiques relatives à la conduite des hostilités; et deuxièmement l'attaque par ricochet contre les blessés ou malades; ici ils n'entrent pas seulement dans la balance de la proportionnalité, mais on peut considérer qu'en visant le combattant c'est en fait ces blessés que l'on vise puisqu'on leur ôte la possibilité de se faire secourir.

De même, tout comme la présence d'un combattant au sein de la population civile ne fait pas de cette population civile une cible légitime d'attaque, la présence d'un combattant parmi les blessés, malades ou naufragés ne doit pas faire de ces blessés une cible légitime d'attaque. En tout état de cause, il convient de garder à l'esprit que l'avantage militaire direct et concret attendu doit toujours rester proportionnel aux dommages causés et ces attaques subséquentes ne doivent point faire exception à la traditionnelle loupe d'équilibre entre humanité et nécessité militaire.

Les règles relatives à la conduite des hostilités sont donc aptes à prendre en compte ce phénomène, il faut dès lors constamment le réaffirmer, même s'il ne faut pas occulter le fait que l'utilisation de la perfidie par certains groupes armés met en danger le respect de ces règles par les armées régulières qui y sont confrontées.

5. Conclusion

Il ressort de l'examen du cadre juridique des attaques contre les blessés, les malades, les naufragés et le personnel sanitaire que ces personnes – civiles ou combattants – sont protégées aussi longtemps qu'elles s'abstiennent de tout acte d'hostilité sans égard aux raisons de leur affection, et ce, aussi bien dans le contexte d'un conflit armé international que non international. Toutefois, bien que la protection reconnue à ces catégories de personnes ait été la raison d'être du droit international humanitaire, celle-ci rencontre aujourd'hui plusieurs défis à la fois normatifs, conjoncturels et opérationnels dans les conflits armés contemporains.

Normatifs d'une part parce que le cadre juridique ne précise pas le degré à partir duquel, une blessure, une maladie ou un naufrage devient grave pour bénéficier de la protection. Normatifs aussi parce que ce même cadre ne définit pas un régime juridique qui serait spécifique aux blessés, malades et naufragés en matière d'abstention de tout acte d'hostilité à tel point qu'en pratique, il est arrivé que le simple fait pour un naufragé de « nager » pour se sauver sa vie ait été considéré comme étant un acte nuisible à la puissance ennemie[48].

Ensuite vient le double défi conjoncturel auquel la protection reconnue aux blessés, malades et naufragés est confrontée. Premièrement, avec la multiplication des conflits armés internes, on fait désormais face à un nombre croissant de groupes armés qui bien que capables de contrôler une portion de territoire ne sont pas pour autant en mesure de disposer de moyens et d'unités sanitaires qui seraient aptes à assurer et apporter les secours nécessaires et efficaces aux blessés, malades et naufragés qui en ont besoin. Deuxièmement, il ressort de l'analyse des attaques subséquentes que si les règles traditionnelles de la conduite des hostilités peuvent trouver application, force est de reconnaitre qu'il demeure toutefois nécessaire de penser lesdites règles, les débattre à la lumière de cette méthode de guerre pour faire en sorte que les blessés, malades, naufragés et le personnel sanitaire puissent être effectivement respectés, protégés et soignés.

En dernier lieu, les défis contemporains relatifs aux attaques contre les blessés, malades, naufragés et personnel médical sont d'ordre opérationnel puisque malgré le cadre juridique relativement solide dont ils font l'objet, la question de l'accès aux blessés, malades et naufragés ou celle de l'inviolabilité du personnel sanitaire reste le talon d'Achille dans cette épreuve.

---

48 Marco Sassoli, Antoine Bouvier et Anne Quintin, op.cit.

WHEN DO MEDICAL AND RELIGIOUS PERSONNEL LOSE WHAT PROTECTION?

Marco Sassòli
University of Geneva

Résumé

Les membres du personnel religieux et sanitaire appartiennent à la catégorie de personnes bénéficiant d'une protection spéciale en droit international humanitaire (DIH) en raison de leur fonction. Cette protection n'est cependant pas absolue.

Les circonstances dans lesquelles les membres du personnel religieux et sanitaire peuvent perdre leur protection contre des attaques ne sont pas explicitement définies dans les Conventions de Genève (CG) et leurs Protocoles Additionnels (PA). Ces instruments fournissent cependant certaines indications : la première CG et le premier PA, qui s'appliquent tous deux en cas de conflit armé international, disposent que la protection due aux établissements et aux *unités sanitaires mobiles ne pourra cesser que « s'il en est fait usage pour commettre, en dehors de leur destination humanitaire, des actes nuisibles à l'ennemi ». Dans des situations de conflits armés non-internationaux, le deuxième PA prévoit, de façon similaire, que la protection due aux unités et moyens de transport sanitaires ne pourra cesser que s'ils sont utilisés pour commettre, « en dehors de leur fonction humanitaire, des actes hostiles ». Il est généralement admis que ces dispositions, bien que conçues par les traités afin de s'appliquer aux unités et moyens de transport, peuvent également être appliquées, mutatis mutandis, au personnel religieux et sanitaire.*

Si l'expression « en dehors de leur fonction humanitaire » ne pose pas de problèmes particuliers (*les devoirs du personnel sanitaire étant clairement défini dans les CG), la définition d'* « actes nuisibles à l'ennemi » *est loin d'être évidente. Selon le Comité international de la Croix-Rouge, les actes nuisibles à l'ennemi sont ceux « ayant pour but ou pour effet, en favorisant ou en entravant des opérations militaires, de nuire à la Partie adverse ». Plus concrètement, il peut s'agir d'abriter dans un hôpital des combattants valides ou d'utiliser du personnel médical pour entraver une attaque de l'ennemi. Bien que la plupart des auteurs considèrent que la notion d' « actes nuisibles à l'ennemi » est plus large que celle de « participation directe aux hostilités », les deux expressions ont pour moi la même signification. La différence de terminologie résulte uniquement du fait que l'expression « actes nuisibles à l'ennemi » a été élaborée afin de s'appliquer aux unités et moyens de transport tandis que celle de « participation directe aux hostilités » se réfère aux personnes.*

Il est important de souligner que seuls les actes nuisibles à l'ennemi commis par des membres du personnel sanitaire en dehors de leur mission humanitaire peuvent entraîner une perte de protection. Les soins aux blessés et malades, la prévention de maladies ou le présence sur le champ de bataille afin de recueillir les blessés et malades n'entraîneront jamais une perte de protection, même si les bénéficiaires sont des soldats et si ces actes renforcent la capacité militaire d'une des parties au conflit. En outre, les membres du personnel sanitaire peuvent réaliser un grand nombre d'actes en dehors de leur mission humanitaire, tels que la distribution de nourriture ou le construction d'un pont pour la population civile, sans pour autant que cela entraîne une perte de protection contre des attaques en droit international humanitaire.

Pendant combien de temps les membres du personnel religieux et médical perdent-ils leur protection lorsqu'ils commettent des actes nuisibles à l'ennemi en dehors de leur mission humanitaire ? Cette question est particulièrement complexe en ce qui concerne le personnel médical militaire. Dans l'affaire Galic, le Tribunal pénal international pour l'ex-Yougoslavie a souligné qu'un hôpital cesse d'être protégé pendant le temps où il est utilisé pour commettre des actes nuisibles à l'ennemi. La protection est rétablie dès que l'hôpital n'est plus utilisé à cette fin. Au contraire, les membres du personnel sanitaire militaire qui participent directement aux hostilités ne regagnent pas la protection qui leur est conférée une fois leur participation aux hostilités terminée. La question qui se pose dès lors est celle de leur statut et de leur traitement lorsqu'ils tombent entre les mains de l'ennemi.
La position logique serait de considérer qu'ils demeurent membres du personnel médical. Cependant, dès lors que les membres du personnel sanitaire doivent être immédiatement rendus à la partie au conflit dont ils relèvent, à moins que leur rétention soit nécessaire *afin de soigner les blessés et malades, cette option n'est pas réaliste. En tout état de cause, ils pourront être punis pour leur participation dès lors qu'ils ne sont pas des combattants. Une alternative serait de considérer qu'en participant directement aux hostilités, les membres du personnel sanitaire militaire – en tant que membres des forces armées – perdent de manière permanente leur statut de personnel sanitaire et deviennent ainsi des combattants. Ils pourraient dès lors être détenus en tant que prisonniers de guerre jusqu'à la fin des hostilités, mais ne pourraient pas être punis pour avoir commis des actes nuisibles à l'ennemi. Une troisième et dernière possibilité serait de considérer comme des civils les membres du personnel sanitaire militaire ayant perdu leur protection en tant que personnel sanitaire. Cette interprétation présente l'avantage d'exiger une évaluation au cas par cas de la possibilité de détention pour raisons impératives de sécurité.*

The International Committee of the Red Cross (ICRC) considers that violence against health-care workers is 'one of the most crucial yet overlooked humanitarian issues today'.[1] Since 2009, it has run a global campaign aiming, *inter alia*, at improving the protection of and respect for medical personnel in situations of armed conflict and other situations of violence.[2] However, although the ICRC Campaign did indeed further highlight the lack of respect for such personnel, one should refrain from concluding that the relevant protective rules are systematically violated: in reality, the law is complied with most of the time but understandably such respect does not make it into the headlines.

International Humanitarian Law (IHL) provides a solid legal framework protecting medical and religious personnel in all circumstances.[3] Thanks to Additional Protocol I, the protection regime is now the same for military and civilian medical personnel.[4] Contrary to what was upheld in a recent US court decision,[5] such protection does not depend on the personnel carrying a card and other identification, but only on their temporary or permanent assignment, by a party to the conflict, to medical tasks. Such protection is however not unlimited, and may cease if personnel commit, 'outside their humanitarian duties, acts harmful to the enemy'.[6] While the expression 'outside their humanitarian duties' does not give rise to particular problems (as the functions of medical personnel are clearly defined in the Geneva Conventions), the definition of 'acts harmful to the enemy' remains a critical issue. Does the phrase bear the same meaning as 'any act of hostility'? As 'direct participation in hostilities'? Or does it describe a third category of acts? Furthermore, what does 'loss of protection' mean? Does it imply that such medical personnel become lawful targets of attack? For how long? If such personnel fall into the hands of the enemy, what is their status, and how should they be treated? This presentation aims at providing some elements of answer to these controversial questions.

---

1 Health Care in Danger Campaign, ICRC website:< http://www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp?cpn=hcid>

2 Ibid.

3 See Article 24, Geneva Convention I.

4 Articles 8 (c) and 15, Additional Protocol I.

5 *Al Warafi v. Obama*, US Court of Appeals, No. 11-5276, 24 May 2013: The Court held: 'In the end, the question of whether Al Warafi has met his burden of establishing his status as permanent medical personnel entitled to protection under the First Geneva Convention is one of fact, or at least a mixed question of fact and law. Although the district court believed – and we agree – that military personnel without appropriate display of emblems can never so establish, it also found facts – *e.g.*, the prior combat deployment – inconsistent with that role.' (pp. 7-8).

6 Article 21, Geneva Convention I. See also Article 13, Additional Protocol I.

1. Loss of Protection of Medical and Religious Personnel

The circumstances under which medical and religious personnel may lose their protection against attack are not explicitly defined in the Geneva Conventions of 1949 and their Additional Protocols of 1977. However, these instruments provide some guidance: the First Geneva Convention, and Additional Protocol I, which both apply to international armed conflicts, indicate that the protection of medical *units* and *establishments* may cease if 'they are used to commit, outside their humanitarian duties, acts harmful to the enemy'.[7] They also mention several types of acts which cannot be considered as depriving such units of their protected status.[8] With regard to non-international armed conflict (NIAC), Additional Protocol II similarly envisages that medical units and transports will lose their protection against attacks if they commit 'hostile acts, outside their humanitarian function'.[9] The variation in the terminology used in Protocols I and II denotes reluctance by States to refer to an 'enemy' in NIACs, but the meaning is in my view the same.

It has generally been accepted that such provisions, used by the treaties for *units* and *establishments*, may also be applied, *mutatis mutandis*, to medical and religious *personnel*. Indeed, personnel are an essential part of units. Nevertheless, this does not entirely solve the problem: a difficult – and recurring – question is whether the expression 'acts harmful to the enemy', when applied to personnel, should be understood as bearing the same meaning as 'direct participation in hostilities'. The ICRC explains that the terms 'acts harmful to the enemy' refer to 'acts the purpose or effect of which is to harm the adverse party by facilitating or impeding military operations.'[10] Most authors consider that the concept of 'acts harmful to the enemy' is larger than 'direct participation in hostilities':[11] for instance, they may include sheltering able-bodied combatants or situating medical personnel as an obstacle to an attack.

---

7 Ibid.

8 Article. 22, Geneva Convention I; Article 13, Additional Protocol I; Article 11, Additional Protocol II. See also ICRC, CIHL 25

9 Article 11, Additional Protocol II

10 See Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* (Geneva and The Hague: ICRC, 1987), at paragraph 550.

11 See for instance Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949,* The Hague, Martinus Nijhoff, 1982, p. 411; Robert W. Gehring, "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I", 90 in: *Military Law Review* 49 (1980); Nils Melzer, *Targeted Killings in International Law,* Oxford: Oxford University Press, 2008, p. 329 (the first two references however technically deal with the interpretation of the same terms concerning civil defence (see Article 65 (1) Additional Protocol I)

In my opinion however, the two expressions should be equated; it is true that the above-mentioned examples of acts harmful to the enemy do not constitute direct participation in hostilities, but this simply stems from the fact that the expression 'acts harmful to the enemy' was elaborated for medical units and establishments, while 'direct participation in hostilities' refers to persons. A hospital can obviously not directly participate in hostilities, but it can be used to commit acts harmful to the enemy if it shelters able-bodied combatants. Although I must admit that this remains subject to controversy, my opinion is that this does not apply to medical personnel: if the latter shelter an able-bodied combatant, this cannot be considered as an act harmful to the enemy entailing a loss of protection. Admittedly, my interpretation will raise controversy. For instance, driving an ammunition truck from a port to a place where the ammunition will be stocked does not constitute direct participation in hostilities,[12] while most would argue that, if committed by medical personnel, this is an act harmful to the enemy.

Here it is important to clarify that a wide range of acts may be carried out by medical personnel outside their humanitarian function, such as the distribution of food or the construction of a bridge for the civilian population, without entailing a loss of protection against *attacks* under International Humanitarian Law. Geneva Convention I and Additional Protocol I cite only some examples of acts which do not entail a loss of protection, because they would otherwise be controversial.[13] Both provide in particular that medical units do not lose their protected status by virtue of their personnel being armed for the purpose of their own defence or the defence of the wounded and sick. In this context, it is important to interpret, in a very restrictive way, the concept of self-defence of non-combatants (and here, it should be reminded that even military medical personnel are not combatants), in an armed conflict. First, medical personnel may only act in self-defence against attacks, i.e. acts of violence, not against attempts by the enemy to gain control over them, their units or the wounded and sick, which are not prohibited by International Humanitarian Law. Second, they must take into account the risk of generating a distorted perception when they start to use force against enemy armed forces, even if it is in self-defence. In addition, not all attacks may give rise to self-defence: in my view an unlawful attack triggering the right to self-defence is only one which has an unlawful target. On the contrary, medical personnel may not react to attacks which are unlawful because they violate the principle of proportionality, the obligation to take all feasible precautionary measures, or because they use – against combatants – unlawful weapons. Medical personnel would not be able to evaluate the legality of such an attack. This being said, one could wonder whether medical personnel may defend other people as well as themselves, their

12 See ICRC, *Interpretive Guidance to the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, ICRC, 2009, p. 56

13 Article 22, Geneva Convention I; Article 13, Additional Protocol I.

fellow personnel and the wounded and sick against an unlawful attack. Under the wording of the provisions, it is clear that they may defend other medical personnel and the wounded and sick under their care; in my opinion, this should be extended to defending a civilian targeted by an unlawful attack, even though this is not provided for in the Conventions. One should also add that the question of self-defence is one of the differences between medical and religious personnel: military religious personnel may not defend those in their spiritual charge, as it is not unlawful to attack them.

Finally, it should be stressed that IHL explicitly clarifies that only acts harmful to the enemy committed by medical personnel 'outside their humanitarian duties' can lead to loss of protection. Care for the wounded, sick, prevention of diseases, or presence on a battlefield to collect the wounded and sick never leads to loss of protection, even if the beneficiaries are soldiers and the medical acts therefore enhance the military capacity of those who fight for one party to the conflict.

As a preliminary conclusion, I would say that medical personnel lose their protection only when they directly participate in hostilities, in a manner which is outside their humanitarian function.

2. Consequences of a Loss of Protection

The consequences of the loss of protection constitute another controversial question. First, for how long do medical and religious personnel lose their protection if they commit acts harmful to the enemy? This is a tricky question especially for military medical personnel. In its *Galic* Judgment of 30 November 2006, the International Criminal Tribunal for the former Yugoslavia (ICTY) underlined that a hospital lost protection only while it was used for acts harmful to the enemy.[14] Protection is therefore regained as soon as the hospital is no longer so used, which is logical considering the definition of a military objective found in Article 52(2) of Additional Protocol I. Only a military advantage for the attacker 'in the circumstances ruling at the time' turns an object into a military objective. But this is applicable to hospitals, and not necessarily to persons: while the concept of military objectives is situation-dependent, the targetability of combatants depends on their status. The question is therefore whether military medical personnel, who are members of the armed forces, losing their specific protection: (1) automatically turn into combatants; (2) remain medical personnel regaining protection once they are no longer committing acts harmful to the enemy; or (3) turn into civilians as everyone who is neither a combatant nor medical personnel is a civilian.[15]

---

14 ICTY, *The Prosecutor v. Stanilav Galic* (Appeal Judgement), IT-98-29-A, 30 November 2006, p. 346

15 Arts 50 (1) and 43 (2), Additional Protocol I.

A second question concerns the meaning of the loss of protection. Should one distinguish between the notions of 'respect' and 'protection'? Article 21 of the First Geneva Convention only mentions that '*protection* (…) shall not cease', which might be considered to imply that *respect* for medical personnel continues until they directly participate in the hostilities. If they commit acts harmful to the enemy that do not amount to direct participation in hostilities, they only lose the protection but not the respect. In my opinion however, 'protection' and 'respect' are the same concepts and, as mentioned above, military medical personnel may only be attacked if they directly participate in hostilities.

Here it should be noted that the question of the consequence of loss of protection is only relevant for military medical personnel. For civilian medical personnel, no legal problem arises: they may lose their protection as medical personnel, but they still remain civilians. Therefore, they may not be attacked except if and for such time as they directly participate in hostilities.

Another, but closely related question is to determine the status and treatment of military medical personnel who have committed acts harmful to the enemy once they fall into the power of the enemy.

From a logical point of view, one may argue that they remain medical personnel and hence still benefit from the retention regime. However, because medical personnel have to be sent back home immediately except if they are needed to treat the wounded and sick,[16] this option is not very realistic. In any case, as they are not combatants, they may be punished for their participation: either under the domestic law of the country for having committed acts harmful to the enemy,[17] or if their direct participation in hostilities as medical personnel constituted an act of perfidy, or, finally, if their participation may be regarded as a violation of Article 8(2)(b) (xxiii) of the Statute of the International Court of Justice, which prohibits '[u]tilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations'.

An alternative would be to consider that military medical personnel, being members of the armed forces, permanently lose their status as medical personnel by directly participating in hostilities and therefore become combatants.[18] This would be in line with Article 43 of Additional Protocol I, which states that all members of the armed forces except medical personnel are combatants: if they are no longer medical personnel, they have to be combatants. They

16 Arts 28 and 30, Geneva Convention I.

17 However, under Art. 16, Additional Protocol I, medical personnel may not be punished for medical acts, nor for refusing to provide information (except as required by the law of their own party).

18 See Melzer, op.cit. , p. 330

could therefore be detained as prisoners of war until the end of active hostilities, but could not be punished for having committed acts harmful to the enemy. However, an act harmful to the enemy committed by medical personnel will frequently be an act of perfidy and will thus be punishable as such (even combatants may be punished for perfidious acts). In addition, one could also argue that combatant immunity only applies for the time that a person is a combatant. In that sense, medical personnel who commit acts harmful to the enemy may still be punished for such acts because they were not yet combatants at the time the act was committed. This follows the same logic as that for civilians killing enemy soldiers before entering the army: they may be punished for acts committed before becoming combatants.

A third and final possibility would be to consider military medical personnel as civilians once they lost their specific protection as medical personnel. Article 4 of the fourth Geneva Convention states that persons not protected by the other Geneva Conventions (granted that they are in the power of a party to the conflict of which they are not nationals) are persons protected by the fourth Convention. This may be interpreted as meaning that military medical personnel indeed become protected persons: they are no longer protected by the first Geneva Convention (because they lost the protection of medical personnel), nor by the third Convention (because they are not combatants). This interpretation would have the advantage of requiring a case-by-case decision on whether the person may be detained – and therefore retained – for imperative security reasons.[19]

In conclusion, unresolved controversies continue to exist on when military medical personnel lose what kind of protection for what duration in international armed conflicts and what subsidiary protection they benefit from in such case. In practice, however, most medical personnel are civilians and/or affected by non-international armed conflicts. They are therefore not concerned by these controversies. In addition, most medical personnel are attacked under circumstances which cannot possibly be considered as evidencing the controversies mentioned in this contribution.

19 Articles 42 and 78, fourth Geneva Convention.

SESSION 2 – VULNERABILITIES IN HOSTILITIES – THE EXAMPLE OF HEALTH CARE

During the debate following the presentations of the second session, the audience raised three main issues.

1. The Notion of Acts Harmful to the Enemy

A participant noted that International Humanitarian Law (IHL) rules have their own logic. When trying to apply concepts such as 'direct participation in hostilities' to acts carried out by medical personnel one should be very careful because this concept was created and developed for the participation of civilians in hostilities. When medical personnel commit acts harmful to the enemy, she argued that it should be qualified as an act of perfidy. There are clear consequences for acting in perfidy as it is a grave breach of the Geneva Conventions.

The Chair agreed that it is important to keep the loss of protection by military personnel and religious personnel separated from the concept of 'direct participation in hostilities'. These are two completely separate regimes and one should not try to mix them.

A panellist noted that this is, indeed, the majority opinion but highlighted the difficulty and confusion for soldiers in having too many different standards applying to different categories of persons. He argued that the concept of 'acts harmful to the enemy' should then be clearly defined and that committing acts 'outside their humanitarian function' should not be the only criterion entailing a loss of protection for medical personnel. Search and rescue operations, for instance, fall outside the humanitarian function of medical personnel but do not turn them into lawful targets of attack. The panellist agreed that qualifying acts harmful to the enemy as acts of perfidy could perhaps be a solution. However, it would not be compatible with the concept of perfidy as defined in Article 37 of the second Additional Protocol to the Geneva Conventions which does not prohibit perfidy as such but rather to 'kill, injure or capture an adversary by resort to perfidy'. Acts harmful for the enemy can entail other acts than killing, injuring and capturing, therefore it should be broader than perfidy. He argued that while the concept of 'direct participation in hostilities' was initially developed for civilians and not for medical personnel, there is nonetheless a parallelism behind the idea that these persons should be protected unless they act in a certain way. He added that this debate is only relevant for military medical personnel in international armed conflicts (IAC) because civilian medical personnel who for one reason or the other lose their protection, remain civilians and therefore may only be attacked if, and for such time, as they directly participate in hostilities.

A participant asked whether medical units or medical transports and hospitals which are used to commit acts harmful to the enemy – and therefore lose their protection – become military objectives.

One of the panellists replied that this in part depends on the debate as to whether respect and protection are two different things. The relevant articles say that only objects lose protection. Some people argue that they lose respect only if they become a military objective. The panellist argued that the concept of military objective does not take into account the specificities of a hospital or medical unit. He added that, with regard to objects, there are quite a lot of examples in scholarly writing on what constitutes an act harmful to the enemy.

2. Follow up Attacks

The Chair wondered whether a first mortar attack following which an observer analyses where the mortar landed and gives direction to adjust the course of the trajectory of the second attack would be an example of a follow up attack.

A panellist replied that the follow up attack, in this hypothesis, would be the attack whose primary aim is to attract people in order to attack them. Whatever the means used, it is the purpose of the attack that qualifies an attack as 'follow up'.

One of the speakers asked whether follow up attacks are always illegal. Combatants who comply with their obligation under IHL by taking care of the wounded, remain legitimate targets and can therefore be attacked. Would a follow up attack against these combatants therefore be legal?

A panellist replied that there are no specific provisions with regard to follow up attacks. Therefore, they need to be analysed through the rules applying indiscriminately to all kinds of attacks by taking into account the legal status of the person providing relief. When the person attacked is a combatant, one will need to distinguish two things: firstly, the attack against the combatant himself, which will be analysed by applying the rules on the conduct of hostilities: secondly, the indirect attack against the wounded, which will be analysed by applying the rule of proportionality. In addition, one could consider that by attacking the combatant it is in reality the wounded who are being attacked since they lose the possibility of being rescued.

Another panellist noted that this debate only concerns the rare cases in which firstly, the initial target is lawful and secondly, the persons providing relief are combatants.

3. Attacks against Medical Personnel

A panellist recalled that the solution found by Henry Dunant to the problem encountered during the battle of Solferino when combatants would not care for the wounded for fear of being attacked, was to have medical personnel instead of the soldiers taking care of the wounded. This system however no longer works because there are, unfortunately, conflicts where medical personnel are deliberately attacked.

One participant noted that in Afghanistan, attempts to increase the security of the military medical personnel by means of the Red Cross emblem had to be abandoned when the vehicles carrying the emblem were increasingly targeted. The Red Cross emblem turned out to have the effect of a "bullet magnet". Therefore, medical personnel deliberately did not have a protective emblem placed on their vehicles in the International Security Assistance Force (ISAF) operations.

The Chair wondered why medical personnel and facilities have increasingly become the object of attacks.

A participant replied by saying that the reason for targeting medical personnel and facilities is that it works and is very efficient in certain types of conflicts. He explained that there is a gap regarding the status of the medical mission in non-international armed conflicts (NIAC). In Syria, for instance, there is a legal asymmetry in the national law defining who is allowed to treat patients as it provides that wounded must be treated in military hospitals, making civilian medical personnel punishable. The second Additional Protocol to the Geneva Conventions contains a number of provisions defining the status of medical personnel in NIAC but there are a number of vague provisions that need clarification. He underlined the need to define the privilege for medical care, which is very difficult to recognise in NIAC.

One of the panellists added that somehow respect for civilians is a more obvious idea than respect for medical personnel who treat wounded and sick military because by doing so, they contribute to the military effort of a party to the conflict. Respect for medical personnel is something which is, fortunately, in the Geneva conventions, but is not obvious.

A participant gave the example of Syria where war surgeons are no longer able to provide medical care because of a deliberate government and opposition policy to withhold medical aid. In addition, both parties to the conflict deliberately target hospitals and medical personnel. The whole health system in Syria is crumbling as the chronically sick are also affected when there is no safe and regular access to treatment.

A participant noted that in NIAC, arresting and then removing injured people from hospital, against medical advice, frequently happens. The State has the responsibility to maintain security and the right to arrest people, but under IHL if a patient in need of ongoing care is arrested, they should remain in hospital or be transferred to a facility where similar treatment can be provided.

Session 3 – Sexual violence

Chairperson: **Mykola Gnatovsky**, *University of Kiev*

L'INTERDICTION ABSOLUE DES VIOLENCES SEXUELLES EN DROIT INTERNATIONAL HUMANITAIRE ET EN DROIT INTERNATIONAL DES DROITS DE L'HOMME

Hélène Tigroudja
Université d'Aix-Marseille

Summary

The Absolute Prohibition of Sexual Violence in International Humanitarian Law and in International Human Rights Law

The notion of "sexual violence" is not clearly defined in international public law, but based on the Status of the International Criminal Court, one can consider that it comprises several actions perpetrated against women/girls and men/boys, both in time of peace and in time of armed conflicts and which have the effect of violating an individual's physical and/or psychological integrity and in particular his or her sexual intimacy.

Sexual violence has progressively been taken into account by international law, yet very slowly. For a long time – and perhaps even still today – these abuses were considered as an 'unfortunate but inevitable side effect of conflicts'.

For a long time International Human Rights Law, International Humanitarian Law (IHL) and International Criminal Law did not condemn nor prohibit sexual violence as such. Undeniable progress has been achieved in this regard in at least three directions: in International Human Rights Law, not only has the notion of ill- treatment progressively incorporated sexual violence such as rape, forced sterilisation or the trafficking in human beings, but the prohibition of slavery and forced labour has started to be applied by international judges to contemporary forms of slavery such as sexual slavery. Furthermore, International Human Rights Law has progressively adopted specific instruments that prohibit all forms of sexual violence and demand that States fight it. In IHL and International Criminal Law, significant progress has also been made. First of all, there has been an international acceptance that sexual violence is massive, sometimes collective and that it can no longer be considered as regrettable but necessary collateral damage in armed conflicts. This raising awareness has been translated into the progressive incrimination of 'rape' and other types of sexual infringements such as 'enforced pregnancy' and 'sexual labour' in

the status of the Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court.

While undeniable progress has been achieved both from a point of view of the texts and from their implementation, we are only at the beginning of a long process before reaching a complete prohibition, with a preventive effect, of sexual violence. Some challenges remain today. Firstly, prevention: the establishment of an effective fight against sexual violence requires first and foremost sensitisation and education. Moreover, the prevention of sexual violence in times of armed conflicts is inextricably linked to the prevention of sexual violence in peacetime; here, the work of the United Nations Committee on the Elimination of Discrimination against Women with regard to the obligation of diligence on this matter is particularly relevant. Secondly, the question of reparation for victims of sexual violence should be addressed both by the human rights protection bodies and by the international criminal jurisdictions. In its current state, the international law of compensation is not adequate as it contains very few developments on the notion of 'sexual harm' for instance. Thirdly, progress should be made both in international Human Rights Law and in International Criminal Law with regard to implementation. For the time being, sexual violence committed by international forces remains widely unpunished due to the incomplete character of the system of international responsibility of international organisations. This gives rise to a real problem of implementation mechanisms. As the international criminal justice has its political and legal limits, it is important that the national legal systems be capable of prosecuting perpetrators of sexual violence.

La notion de « violences sexuelles » n'est pas clairement définie en droit international public mais si l'on s'appuie par exemple sur le Statut de la Cour pénale internationale[1], on peut considérer qu'elle regroupe divers comportements perpétrés tant contre les femmes et/ou les fillettes que contre les hommes et/ou les garçons – nous y reviendrons plus loin –, en temps de paix comme en temps de conflits armés, et ayant pour effet de porter atteinte à l'*intégrité physique et/ou mentale de la personne* et plus encore, son *intimité sexuelle*. Ces comportements sont divers et peuvent viser tant le viol que d'autres formes d'agression sexuelle, telles que les mutilations sexuelles, les grossesses forcées, les stérilisations forcées, la prostitution forcée, la réduction en esclavage sexuel, etc. Les définitions mêmes de ces différents éléments des « violences sexuelles » ne sont pas toujours universelles ni même fixées avec certitude par le droit international – la jurisprudence jouera ici un rôle central – et à ce stade, il faut déjà

1 Voir en particulier les articles 7 (crimes contre l'humanité) et 8 (crimes de guerre) du Statut de la Cour pénale internationale (CPI) : il y est fait mention du viol, de l'esclavage sexuel, de la prostitution forcée, de la grossesse forcée, de la stérilisation forcée « ou toute autre forme de violence sexuelle de gravité comparable » (article 7 paragraphe 1(g)).

souligner que tous ces éléments ne bénéficient pas du même statut au plan international ni donc de la même *règle prohibitive*.

Un constat factuel doit être fait : dans certains conflits armés internationaux ou non-internationaux, tout comme dans certains Etats, les violences sexuelles dénombrées – celles qui ne sont pas officiellement constatées peuvent encore être plus nombreuses – peuvent être *massives* : sans remonter jusqu'à l'Antiquité, les conflits du 20e et de ce début du 21e siècles en ont été souvent l'atroce théâtre, que ce soit au cours de la Seconde Guerre mondiale ou au moment de la « Libération »[2], lors des conflits des années 1990 dont les plus médiatisés ont été ceux en ex-Yougoslavie et au Rwanda, lors des conflits en République démocratique du Congo, en Ouganda, en Sierra Leone, ou encore en Amérique latine. Plus proches de nous, lors des manifestations publiques du « Printemps arabe », des agressions sexuelles contre les femmes qui y prenaient part ont également été dénoncées par les victimes elles-mêmes ou par des Organisations non gouvernementales (ONG). Comme le résume pour le déplorer Christine Chinkin, malheureusement, ces violences sexuelles n'ont ni frontières de temps ou de lieux, ni religion, ni culture, elles sont universelles, perpétrées lors de toutes formes de conflits, quelle qu'en soit la qualification juridique, et peuvent être le fait tant des ennemis que des compatriotes…[3] Certains travaux des Commissions « Vérité et réconciliation » témoignent du lien entre le statut juridique, politique et social inférieur des femmes avant un conflit dans un Etat donné et les violences perpétrées lors des conflits que connaîtrait cet Etat[4]. Des études plus récentes commencent d'ailleurs à montrer – à contre-courant sans doute de la mode actuelle en faveur des approches *féministes* du droit international – que les hommes et jeunes garçons aussi sont des victimes cachées et honteuses de ces violences sexuelles[5] et la présente contribution n'entend pas établir de *hiérarchie entre les victimes*. Les femmes et fillettes sont certes, numériquement, les premières victimes de ces violences sexuelles[6] mais l'interdiction

---

2 Une historienne américaine, Mary Louise Roberts, a montré que dans l'Histoire, contrairement à ce que les Etats occidentaux ont écrit, les viols collectifs et la prostitution n'étaient pas l'apanage des Japonais avec leurs « femmes de réconfort », des soldats de l'URSS ou encore des contingents marocains ; l'Armée américaine a aussi à son actif un nombre importants de viols de « femmes libérées » (*Le Monde*, 18 juillet 2013, « Le sexe a été une manière d'assurer la domination américaine »).

3 C. Chinkin, « Rape and Sexual Abuse of Women in International Law », in : *Journal of International Law*, 1994, pp. 326-327.

4 Voir de ce point de vue les conclusions des Commissions du Guatemala, de la Sierra Leone et du Libéria, relatées in : E. Guematcha, *Les Commissions vérité et les violations des droits de l'homme et du droit international humanitaire*, Thèse Paris-Ouest Nanterre, 2012, p. 189.

5 D. Lewis, « Unrecognized Victims : Sexual Violence against Men in conflicts settings under International Law », in : *Wisconsin International Law Journal,* 2009.

6 Pour des données chiffrées reprenant une partie des principaux théâtres de conflits des années 1990, voir en particulier le Rapport de la Rapporteuse spéciale sur la violence contre les femmes, ses causes et ses conséquences, du 23 janvier 2001, E/CN.4/2001/73.

de ces dernières devant être *absolue*, il n'y a pas lieu de considérer comme moins grave ou moins digne d'intérêt la *violence faite aux hommes*.

Or, si ces violences sexuelles sont universelles tant dans le temps que dans l'espace, le paradoxe offert par l'ordre juridique international est qu'elles ne sont un objet d'attention et de préoccupation que depuis fort peu de temps. La « *long history of violence* » dont parle C. Chinkin dans l'article précité n'a pas pour contrepartie une longue histoire du point de vue des réactions des Etats et des organisations internationales. Ces réactions en faveur de la prohibition absolue des violences sexuelles existent pourtant et elles sont d'abord étroitement liées à l'affirmation au plan international, à partir de la Déclaration universelle des droits de l'homme (DUDH) de 1948, du *droit individuel à la dignité*. Elles se sont depuis lors déclinées tant en droit international des droits de l'homme, avec des dispositions de plus en plus spécifiques interdisant cette forme de violences, qu'en droit international humanitaire, qui se précise davantage. Néanmoins, les avancées les plus importantes – surtout comparées au « silence » de Nuremberg – concernent le droit international pénal qui, grâce à certains jugements et arrêts sur lesquels nous reviendrons, ont fait entrer le viol et l'esclavage sexuel comme éléments constitutifs du crime contre l'humanité et du génocide. Plus récemment encore, le Conseil de sécurité des Nations unies adoptait deux résolutions dans lesquelles il manifestait sa « préoccupation » face à ces violences dont les femmes et les fillettes étaient victimes lors des conflits[7].

L'objet de cette contribution consiste donc dans un premier temps à montrer comment le cadre légal international tend, *progressivement, lentement*, mais de manière indéniable, à interdire ces violences qui sont à la fois physiques et psychiques et qui laissent des traces sur leurs victimes, bien après la fin des conflits (**1**), tout en soulignant dans un second temps que nous ne sommes qu'au début d'un long processus pour que la prohibition de ces formes de violences soit *substantiellement* universelle et efficace à prévenir leur perpétration (**2**).

1. L'affirmation progressive de l'interdiction absolue des violences sexuelles en droit international

Comme nous l'avons déjà suggéré en introduction, cette prise en compte par le droit international des violences sexuelles n'est que lente et progressives, ces formes d'exactions ayant été pendant longtemps – et peut-être encore aujourd'hui – considérées comme un « *unfortunate but inevitable side effect of conflicts* »[8].

---

7 Résolution 1888(2009) du 30 septembre 2009 et Résolution 1889(2009) du 5 octobre 2009.

8 C. Chinkin, op. cit., p. 334.

L'état du droit antérieur a longtemps été le suivant :

- en *droit international des droits de l'homme*, les Conventions *générales* de protection des droits de l'homme – Convention européenne des droits de l'homme (CEDH), Convention américaine des droits de l'homme (CADH), Pacte international relatif aux droits civils et politiques (PIDCP), Charte africaine des droits de l'homme et des peuples – interdisent certes les mauvais traitements mais ne contiennent pas de clause prohibant spécifiquement cette forme particulière de violences[9] ;
- en *droit international humanitaire*, certaines dispositions générales des quatre Conventions de Genève de 1949 s'adressent *a priori* aux victimes de violences sexuelles (article 3 commun aux Conventions, par exemple) tandis que des articles plus spécifiques vont viser expressément les femmes[10] mais sans pour autant condamner en tant que telles les violences sexuelles ;
- en droit international pénal, qui naît officiellement avec les deux Tribunaux militaires internationaux (TMI) de Nuremberg, l'on se souvient que la responsabilité pénale des dirigeants japonais pour les « femmes de réconfort » n'a jamais été engagée, tandis que dans le Statut du TMI de Nuremberg, l'article 6 définissant le crime contre l'humanité ne vise pas les violences sexuelles.[11]

De ce point de vue, des progrès indéniables[12] ont été opérés dans au moins trois directions.

En droit international des droits de l'homme, non seulement la notion de mauvais traitement a progressivement intégré les violences sexuelles telles que le viol – y compris le viol entre époux –, les stérilisations forcées ou la traite des êtres humains, tandis que l'interdiction de l'esclavage et du travail forcé a commencé à être appliquée par les juges internationaux à des situations contemporaines de formes d'esclavage, dont l'esclavage sexuel. De même, lors de certaines situations de violations graves des droits de l'homme, certains organes des droits de l'homme, tels que, par exemple, la Cour interaméricaine pour la situation au Pérou ou la

---

9 L'élément « sexuel » apparaît cependant déjà dans ces Conventions dans les clauses qui interdisent la discrimination.

10 Voir par exemple l'article 27 de la Convention de Genève sur la protection de la population civile (IV) ainsi que l'article 76 du Protocole additionnel I de 1977.

11 Pour une critique du droit humanitaire sur ce point, antérieure aux évolutions les plus récentes provenant de la pratique des tribunaux pénaux internationaux (TPI) et du droit de la CPI, voir H. Charlesworth, « Worlds Apart : Public/private Distinctions in International Law », in : M. Thornton (eds.), *Public and Private* : *Feminist Legal Debates*, Melbourne, OUP, 1995, pp. 243-260.

12 Sans nul doute influencés par les critiques parfois très dures adressées par certaines écoles de pensée féministe du droit international à l'égard du caractère « androcentrique » de ce dernier. Voir par ex. H. Charlesworth, « What are Women's Human Rights ? », in : R. Cook (eds.), *Women's Rights in International Law*, University of Pennsylvania Press, 1994, pp. 58-84

Commission africaine des droits de l'homme, ont commencé à distinguer, parmi les victimes, celles – surtout des femmes – qui faisaient l'objet d'une violence spécifique caractérisée par leur dimension *sexuelle*[13]. De plus, le droit international des droits de l'homme, soucieux de devenir un véritable *droit international des droits des femmes*, s'est progressivement doté d'instruments spécifiques qui interdisent et demandent aux Etats de lutter contre les violences sexuelles en tout genre[14].

En droit humanitaire et en droit international pénal, les progrès ont également été sensibles. En premier lieu, il y a eu, dans les faits et pendant ou après certains conflits, une réelle prise de conscience internationale – grâce aux travaux de certains Secrétaires généraux des Nations unies et aux Rapporteurs spéciaux par exemple – de ce que les violences sexuelles sont *massives, voire collectives* et ne peuvent plus être considérées comme des dommages collatéraux regrettables mais nécessaires dans le cadre d'un conflit.[15] Cette prise de conscience s'est traduite par l'inclusion progressive du « viol » et d'autres types d'infractions sexuelles telles que la « grossesse forcée » et « l'esclavage sexuel » dans les Statuts des Tribunaux pénaux pour l'ex-Yougoslavie (TPIY) et pour le Rwanda, et de la Cour pénale internationale[16] (la pratique du TPIY a d'ailleurs été prise en compte par la Cour européenne dans sa propre approche des

---

13 Voir sur ce point le très intéressant arrêt de la Cour interaméricaine des droits de l'homme du 25 novembre 2006, *Prison Miguel Castro Castro c. Pérou*, série C n°160. Pour un commentaire de cet arrêt, voir L. Hennebel et H. Tigroudja, « Chronique des décisions rendues par la Cour interaméricaine des droits de l'homme (2006-2007)», in : *RTDH* n°76/2008, pp. 1029-1031. Voir également la décision rendue par la Commission africaine sur la base de la pétition interétatique *République démocratique du Congo c. Burundi, Ouganda et Rwanda*, dans laquelle l'Etat demandeur alléguait que l'Ouganda avait envoyé une horde de soldats atteints du VIH violer massivement des femmes en RDC (décision de mai 2003, *République démocratique du Congo c. Burundi, Ouganda et Rwanda*, pétition n°227/99).

14 Outre la Convention des Nations unies pour l'élimination de la discrimination à l'égard des femmes (1979), mentionnons également la Convention interaméricaine pour l'élimination de la discrimination à l'égard des femmes (1994) ainsi que le Protocole à la charte africaine sur les droits des femmes en Afrique (2003). En Europe a été récemment (2011) adoptée la Convention du Conseil de l'Europe sur la violence domestique.

15 Sur les femmes et les fillettes comme « armes de guerre », voir le Rapport annuel du 23 mai 2012 de la Rapporteuse spéciale des Nations unies sur la violence à l'égard des femmes, A/HRC/20/16, paragraphes 51 sqq.

16 Pour les dispositions pertinentes, voir O. de Frouville et A.-L. Chaumette, *Droit international pénal*, Paris, Pédone, 2012, pp. 158 sqq. Certains arrêts du TPIY, dont l'affaire *Kunarac*, ont montré avec quelle cruauté des femmes de tous âges étaient privées de liberté, parquées dans des gymnases ou appartements et étaient régulièrement violées – parfois devant leurs enfants – par les soldats serbes. Comme le précisent les auteurs, les TPI ont progressivement assoupli l'exigence de la « contrainte » comme élément constitutif du viol pour en retenir aujourd'hui, dans les *Eléments des crimes* qui servent à la Cour pénale internationale, une approche suffisamment souple pour ne pas tomber dans les stéréotypes de la victime de viol qui doit s'être dûment débattue pour être crédible, stéréotypes dénoncés par le Committee on the Elimination if Discrimination Against Women (CEDAW) dans l'affaire *Vertido*.

obligations positives des Etats en matière de pénalisation du viol[17]), Cette prise de conscience s'est également concrétisée par l'attention croissante des Secrétaires généraux successifs des Nations unies, du Conseil de Sécurité[18] et même les Etats du G8 dont les Ministres des affaires étrangères ont adopté en 2013 une *Declaration on Preventing Sexual Violence in Conflict*.

2. Les obstacles à l'éradication *universelle et préventive* des violences sexuelles

Des progrès indéniables ont été opérés tant du point de vue des textes que de leur mise en œuvre : désormais, même lorsqu'elles interviennent en temps de conflits, les violences sexuelles pourront être qualifiées au regard du droit international des droits de l'homme tel qu'interprété par les organes de protection, qui n'hésitent plus à utiliser le droit humanitaire ou le droit international pénal comme normes de référence, ou être incriminées dans les cas les plus extrêmes en droit interne et/ou international.

Néanmoins, nous ne sommes qu'au début d'un long processus avant de parvenir à une interdiction complète et avec un effet préventif des violences sexuelles. Quelques-uns des défis posés au droit international vont être ici mis en avant.

Tout d'abord le défi de la *prévention* : de ce point de vue, la thématique liée à la violence *sexuelle* n'est pas éloignée de la thématique plus générale de la violence faite aux femmes et de la discrimination fondée sur le genre : pour qu'une lutte efficace soit mise en place, cela passe d'abord et avant tout par la *sensibilisation et l'éducation*. La lutte contre les stéréotypes tels que « le repos du guerrier » doit être clairement mise en place par les Etats. De même, la prévention des violences sexuelles en temps de conflits est inextricablement liée à la prévention des violences sexuelles en temps de paix et de ce point de vue, les travaux du Comité des Nations unies pour l'élimination de la discrimination à l'égard des femmes relatifs à l'obligation de diligence en la matière sont pertinents.

Dans le même ordre d'idée, les questions de *réparation* des violences sexuelles doivent être abordées tant par les organes de protection des droits de l'homme que par les juridictions pénales internationales. Pour l'heure, le droit international de la réparation appliqué par les Cours régionales n'est pas adéquat car elles restent prisonnières des schémas issus du droit

---

17 Dans l'arrêt de la Cour européenne des droits de l'homme *M.C. c. Bulgarie* (arrêt du 4 décembre 2003), la Cour européenne cite en effet dans le « droit international pertinent » la jurisprudence *Furundzija* et *Kunarac* du TPIY (paragraphes 102-107).

18 Voir en particulier l'importante Résolution 2106(2013) adoptée par le Conseil le 21 juin 2013, qui affirme en particulier que la violence sexuelle utilisée comme arme de guerre peut entraver la restauration de la paix et de la sécurité internationales (point 1 de la Résolution).

de la responsabilité internationale, et l'on y trouve peu de développements sur la notion de « préjudice sexuel », par exemple. Même les *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*, adoptés par l'Assemblée générale des Nations unies en décembre 2005 et qui serviront notamment à la Cour pénale internationale, restent très neutres et ne prescrivent pas une forme particulière de réparation pour *violences sexuelles*[19].

---

19 Voir par exemple le Principe IX qui porte sur la réparation du préjudice subi. Le but d'une réparation adéquate, effective et rapide est de promouvoir la justice en remédiant aux violations flagrantes du droit international des droits de l'homme ou aux violations graves du droit international humanitaire. La réparation devrait être à la mesure de la gravité de la violation et du préjudice subi. Conformément à sa législation interne et à ses obligations juridiques internationales, l'Etat assure aux victimes la réparation des actes ou omissions qui peuvent lui être imputés et qui constituent des violations flagrantes du droit international des droits de l'homme ou des violations graves du droit international humanitaire. Dans les cas où la responsabilité de la réparation incombe à une personne physique, à une personne morale ou à une autre entité, la personne ou l'entité devrait assurer réparation à la victime ou indemniser l'Etat lorsque celui-ci a déjà assuré réparation à la victime.

- Les Etats devraient s'efforcer de créer des programmes nationaux pour fournir réparation et toute autre assistance aux victimes, lorsque la partie responsable du préjudice subi n'est pas en mesure ou n'accepte pas de s'acquitter de ses obligations.
- S'agissant des plaintes des victimes, l'Etat assure l'exécution des décisions de réparation prononcées par ses juridictions internes à l'égard des particuliers ou des entités responsables du préjudice subi et s'applique à assurer l'exécution des décisions de réparation ayant force de chose jugée prononcées par des juridictions étrangères, conformément à son droit interne et à ses obligations juridiques internationales. À cette fin, les Etats devraient prévoir, dans leur législation interne, des mécanismes efficaces pour assurer l'exécution des décisions de réparation.
- Conformément à la législation interne et au droit international, et compte tenu des circonstances de chaque cas, il devrait être assuré aux victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire, selon qu'il convient et de manière proportionnée à la gravité de la violation et aux circonstances de chaque cas, une réparation pleine et effective, comme l'énoncent les principes 19 à 23, notamment sous les formes suivantes : restitution, indemnisation, réadaptation, satisfaction et garanties de non-répétition.
- *La restitution* devrait, dans la mesure du possible, rétablir la victime dans la situation originale qui existait avant que les violations flagrantes du droit international des droits de l'homme ou les violations graves du droit international humanitaire ne se soient produites. La restitution comprend, selon qu'il convient, la restauration de la liberté, la jouissance des droits de l'homme, de l'identité, de la vie de famille et de la citoyenneté, le retour sur le lieu de résidence et la restitution de l'emploi et des biens.
- *Une indemnisation* devrait être accordée pour tout dommage résultant de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire, qui se prête à une évaluation économique, selon qu'il convient et de manière proportionnée à la gravité de la violation et aux circonstances de chaque cas, tel que :
  a) Le préjudice physique ou psychologique ;
  b) Les occasions perdues, y compris en ce qui concerne l'emploi, l'éducation et les prestations sociales ;
  c) Les dommages matériels et la perte de revenus, y compris la perte du potentiel de gains ;
  d) Le dommage moral ;

Au plan du droit, là encore, des progrès doivent être réalisés tant en droit international des droits de l'homme qu'en droit humanitaire et droit international pénal, du point de vue de la mise en œuvre.

En laissant de côté certains arrêts assez critiquables de la Cour européenne, notamment en matière de stérilisations forcées[20] ou de violences domestiques[21], force est de reconnaître que pour l'heure, un grand nombre de violences sexuelles perpétrées *par les forces internationales* restent impunies, du fait du caractère incomplet du système de responsabilité internationale des organisations internationales[22]. Se pose donc ici un vrai problème de *mécanisme de mise en œuvre*. De ce même point de vue, la justice pénale internationale ayant ses limites tant juridiques que politiques, il faut que les systèmes juridiques nationaux soient aptes, tant

---

e) Les frais encourus pour l'assistance en justice ou les expertises, pour les médicaments et les services médicaux et pour les services psychologiques et sociaux.

- *La réadaptation* devrait comporter une prise en charge médicale et psychologique ainsi que l'accès à des services juridiques et sociaux.
- *La satisfaction* devrait comporter, le cas échéant, tout ou partie des mesures suivantes :
  a) Mesures efficaces visant à faire cesser des violations persistantes ;
  b) Vérification des faits et divulgation complète et publique de la vérité, dans la mesure où cette divulgation n'a pas pour conséquence un nouveau préjudice ou ne menace pas la sécurité et les intérêts de la victime, des proches de la victime, des témoins ou de personnes qui sont intervenues pour aider la victime ou empêcher que d'autres violations ne se produisent ;
  c) Recherche des personnes disparues, de l'identité des enfants qui ont été enlevés et des corps des personnes tuées, et assistance pour la récupération, l'identification et la réinhumation des corps conformément aux vœux exprimés ou présumés de la victime ou aux pratiques culturelles des familles et des communautés ;
  d) Déclaration officielle ou décision de justice rétablissant la victime et les personnes qui ont un lien étroit avec elle dans leur dignité, leur réputation et leurs droits ;
  e) Excuses publiques, notamment reconnaissance des faits et acceptation de responsabilité ;
  f) Sanctions judiciaires et administratives à l'encontre des personnes responsables des violations ;
  g) Commémorations et hommages aux victimes ;
  h) Inclusion, dans la formation au droit international des droits de l'homme et au droit international humanitaire et dans le matériel d'enseignement à tous les niveaux, d'informations précises sur les violations qui se sont produites.

20 Cour européenne des droits de l'homme (CrEDH), arrêt du 8 novembre 2011, *V.C. c. Slovaquie*

21 La Cour européenne refusant dans la grande majorité des affaires de violences domestiques de l'examiner sous l'angle du droit à la non-discrimination. Même si la majorité des juges de la Cour européenne restent encore largement hermétiques aux travaux du Comité de la CEDAW et des Rapporteurs spéciaux des Nations unies, l'un des juges actuels les plus libéraux, le Juge Pinto de Albuquerque, exprime avec beaucoup de lucidité et de clairvoyance les défis qui attendent la Cour européenne dans l'appréhension des violences domestiques comme atteintes « autonomes » aux droits de l'homme : voir en particulier son opinion séparée dans laquelle il reprend une partie des critiques féministes adressées à la CrEDH, jointe à l'arrêt du 26 mars 2013, *Valiulienė c. Lituanie*.

22 Sur les allégations de violences sexuelles portées dès les années 1990 à l'encontre des forces internationales, voir en particulier le Rapport de la Rapporteuse spéciale sur la violence contre les femmes, ses causes et ses conséquences, du 23 janvier 2001, E/CN.4/2001/73.

juridiquement que politiquement, à prendre le relais et poursuivre les auteurs des violences sexuelles, ce qui pose la question tant de l'adoption d'une législation d'incrimination que de la mise en œuvre *effective* de la répression pénale interne.

CRIMINALISATION AND PROSECUTION OF SEXUAL VIOLENCE IN ARMED CONFLICT AT THE DOMESTIC LEVEL: GRAVE BREACHES AND UNIVERSAL JURISDICTION

Theo Rycroft
UK Mission to the United Nations

Resumé

Dans des situations de conflits armés, les violences sexuelles sont largement répandues. Elles affectent non seulement un grand nombre de femmes, mais aussi d'hommes et d'enfants.

Le 29 mai 2012, le Ministre des Affaires Etrangère britannique a lancé la « Preventing Sexual Violence Initiative » (PSVI). L'objectif de cette initiative est de remettre en question la culture d'impunité qui existe pour les violences sexuelles dans les situations de conflits armés et d'accroître le nombre de coupables amenés à rendre des comptes en promouvant une plus grande cohérence internationale et en renforçant les capacités nationales. Le principe au cœur de cette initiative est que les violences sexuelles ne constituent pas une conséquence inévitable de la guerre.

Le viol, dans le cadre des conflits armés tant internationaux que non internationaux, est spécifiquement interdit par les Conventions de Genève (CG) et leurs Protocoles additionnels (PA). Le viol et les violences sexuelles graves figurent parmi les crimes contre l'humanité et crimes de guerre inventoriés dans le Statut de Rome de la Cour pénale internationale (CPI). En outre, l'interdiction du viol et des autres formes de violence sexuelle est devenue une norme de droit international coutumier, applicable dans les conflits armés tant internationaux que non internationaux.

Les CG et le premier PA énumèrent un certain nombre d' « infractions graves » qui représentent certaines des violations les plus flagrantes du droit international humanitaire (DIH). Le DIH exige des Etats qu'ils recherchent et poursuivent toutes les personnes ayant commis des infractions graves, indépendamment de la nationalité du coupable ou du lieu de l'infraction. Ce principe, dit de la juridiction universelle, est essentiel pour garantir la répression efficace des infractions graves. Les violences sexuelles ou le viol ne sont pas spécifiquement cités comme des infractions graves des CG ou du premier PA. Cependant, plusieurs arguments plaident en faveur d'une reconnaissance de ces actes comme infractions graves dès lors qu'ils équivalent à de la torture ou du traitement inhumain ou causent délibérément de grandes souffrances (tous ces actes étant qualifiés d'infractions graves). En 2005, le CICR a pris la position formelle qu'en tant que principe de droit coutumier international, le viol devrait être considéré comme une infraction

grave dès lors qu'il équivaut à un traitement inhumain ou à causer délibérément de grandes souffrances ou de graves blessures au corps ou à la santé.

Le régime des infractions graves des CG et PA s'applique uniquement aux conflits armés internationaux (CAI). En 1995, les Etats-Unis ont considéré que le régime des infractions graves s'appliquait également aux conflits armés non internationaux (CANI), mais cette vision est loin d'être partagée. Cette lacune dans la portée du régime des infractions graves est cependant comblée par le fait que de nombreux Etats ont des législations nationales établissant une juridiction universelle pour tous les crimes de guerre, en se référant par exemple à la liste du Statut de Rome, y compris les violences sexuelles graves commises dans le cadre de CANI.

Le régime des infractions graves s'applique aux victimes définies comme « personnes protégées » sous les CG. La question s'est posée devant le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) de savoir si des victimes de la même nationalité que la partie ayant commis une violation du DIH sont des « personnes protégées » sous la quatrième CG (qui traite des civils). La quatrième CG dispose en effet que seules les personnes n'étant pas de même nationalité que la partie au pouvoir de laquelle elles sont tombées, sont des « personnes protégées ». Ceci exclurait donc de nombreuses personnes en besoin de protection dans des conflits modernes. Le TPIY et la CPI ont remédié à cette carence en se fondant sur le concept d'« allégeance » : lorsque des personnes ne sont plus protégées par leur Etat, elles tombent dans la catégorie de « personnes protégées » sous la quatrième CG.

I am very grateful to the International Committee of the Red Cross (ICRC) and the College of Europe for inviting me to speak on this panel today. As we witness ongoing conflicts in many different regions across the world, the vulnerabilities of those caught up in those conflicts, whether combatants or civilians, are all too obvious, and as such it is right for us to be focussing on these issues here at the 14th Bruges Colloquium. Whilst many of those vulnerabilities have been evils of war which International Humanitarian Law (IHL) has always sought to prevent, others have been given a still more pressing character by the nature of modern conflict.

What is the Preventing Sexual Violence Initiative (PSVI)?

Sexual violence in conflict is widespread. It affects not only large numbers of women, but also men and children. In addition to the physical and psychological trauma suffered by survivors, sexual violence adds to ethnic, sectarian and other divisions, further entrenching conflict and instability. Prevention of sexual violence forms part of the Four-Year Action Plan agreed to at the last Red Cross and Red Crescent International Conference. I am very grateful to Helene for

setting out so expertly the prohibition of sexual violence in armed conflict: that is the perfect point from which to continue. First, I would like to describe to you the recent efforts made by my government to prevent sexual violence in conflict. I will then focus on one important aspect of those efforts: prosecutions for sexual violence crimes in domestic courts based on the grave breaches provisions of the Geneva Conventions.

The United Kingdom (UK) Government is resolved that more can and must be done to combat the use of sexual violence in conflict. On 29 May 2012, the Foreign Secretary launched the Preventing Sexual Violence Initiative. The objective of the Initiative is to challenge the culture of impunity that exists for sexual violence in conflict and to increase the number of perpetrators held to account through promoting more international coherence and strengthening national capacity. It is not an inevitable consequence of war. It is a central principle of our efforts that there should be no safe haven for perpetrators of sexual violence in armed conflict.

The UK has been addressing this issue through a high-level political campaign, including the UK Presidency of the G8 in 2013. In addition, we have been working on a range of practical measures, such as: the development of an International Protocol on the Documentation and Investigation of Sexual Violence in Conflict; sustained country engagement, including targeted deployments of the UK Team of Experts to help conflict-affected countries address the issue; and commitments for financial support to the United Nations (UN) and other organisations.

On 11 April 2013, G8 Foreign Ministers adopted a historic Declaration on Preventing Sexual Violence in Conflict. The Declaration contained a number of key political, practical and legal commitments, which were also reflected in the 18 June 2013 G8 Leaders' Communiqué from Lough Erne.

On 24 June 2013, during the UK Presidency of the UN Security Council, the UK Foreign Secretary hosted a debate on tackling sexual violence in conflict, which focussed on the need to challenge the culture of impunity that exists and to hold perpetrators to account. A new UN Security Council Resolution (2106) was adopted during the debate. This was the first resolution on the issue of sexual violence in conflict in more than three years.

On 24 September 2013, the UK chaired a high-level event at the UN General Assembly (UNGA) on Ending Sexual Violence in Conflict, which was co-hosted with the Secretary-General of the United Nations (UNSG) Special Representative on Sexual Violence in Conflict, Ms Zainab Bangura, and which urged all States to act now to end sexual violence in conflict, tackle impunity and hold perpetrators to account. At the event, Member States, UN agencies, non-governmental organisations (NGO) representatives and journalists came together to witness the launch of

a Declaration of Commitment that States had endorsed. The Declaration was developed with a number of State level "champions" from countries all over the world. The Declaration has now been endorsed by 132 States. It includes a set of ambitious, action-oriented commitments and pledges to end sexual violence in conflict. It sends a message to the victims of these crimes that the international community has not forgotten them and to perpetrators that they will be held to account.

In both G8 and UNGA Declarations there was a statement that rape and serious sexual violence in conflict constitute grave breaches of the Geneva Conventions. Moreover, of course, States parties to the Conventions have an obligation to search for and prosecute (or hand over for trial) any individual alleged to have committed or ordered a grave breach, regardless of nationality. It is on this aspect that I intend to focus today.

The Prohibition of Sexual Violence in Armed Conflict in International Law

Rape in the context of both international armed conflicts (IAC) and non-international armed conflicts (NIAC) is specifically prohibited under the Geneva Conventions (GC) and their Additional Protocols (AP). Other serious sexual assaults such as sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation are expressly or implicitly prohibited in various provisions of the same treaties. [1] Rape and serious sexual violence are listed as crimes against humanity and war crimes under the Rome Statute of the International Criminal Court (ICC).[2] Outside treaty law, the prohibition of rape and other serious forms of sexual violence committed in both IACs and NIACs has been established as a matter of customary international law.[3]

Why Grave Breaches?

The GCs and the first Additional Protocol (AP I) list certain serious violations of their provisions as 'grave breaches'. The relevance of the grave breaches regime is that any contracting party has an obligation to search for and prosecute (or extradite) someone accused of committing or ordering a grave breach, irrespective of where the crime was committed and irrespective of that person's nationality. In other words, States have an obligation under the

---

1 E.g. in IACs: Article 27 of GC4 and Article 76(1) of AP I; and in NIACs: Common Article 3 of the GCs and Article 4(2)(e) of AP II.

2 ICC Statute Articles 7 (crimes against humanity) and 8 (war crimes in IACs and NIACs).

3 See e.g. Rules 93, 151 and 156 of the ICRC Customary IHL Study, and the trial judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Furundzija*, paragraph 168, referring to *inter alia* the convictions in the Tokyo International Military Tribunal for command responsibility for violations of the laws or customs of war by soldiers in Nanking, which included widespread rapes and sexual assaults.

GCs to establish *universal jurisdiction* over grave breaches, a very powerful tool.[4] All States have ratified the GCs.

Conversely, there is no right or duty under the ICC Statute for States to establish universal jurisdiction domestically in respect of its wider list of crimes. Although a wide range of countries have established universal jurisdiction in relation to all ICC crimes,[5] the UK for one has no universal jurisdiction in relation to all ICC crimes. We take that position on the basis that there is no clear authorisation in the ICC Statute to do so.[6]

Is Sexual Violence and / or Rape a 'Grave Breach' of the GCs?

Sexual violence or rape is not *specifically* listed as a grave breach of the GCs or of AP I. However, there are good arguments that, as a matter of treaty interpretation, serious sexual violence and rape should be counted as grave breaches on the basis that they amount to torture or inhuman treatment or wilfully causing great suffering, which are listed as grave breaches. The UK supports this view. It is the basis of the statements on grave breaches in the Declarations.

There is good support for this view. Since 1992, the ICRC has taken the position that the grave breach of 'wilfully causing great suffering or serious injury to body or health' includes rape. In 2005 the ICRC took the formal position that, as a matter of customary international law, rape 'would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health'.[7]

There is of course a substantial body of jurisprudence on sexual violence in the international criminal tribunals. In particular, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has considered the status and elements of sexual violence as a war crime extensively.

---

4 In the UK, the Geneva Conventions Act 1957 grants the courts universal jurisdiction in respect of grave breaches of the GCs and AP I. In most States, universal jurisdiction still requires the accused to be present in the prosecuting jurisdiction.

5 It appears that a wide range of States have universal jurisdiction in respect of all war crimes, not just grave breaches. E.g.: South Africa, Germany, Australia, Cameroon, Canada, Cyprus, Colombia, Croatia, Denmark, Finland, France, Hungary, Ireland, Iraq, Kenya, Norway, New Zealand, the Netherlands, Peru, Poland, the Czech Republic, Rwanda, Sweden, Switzerland, Uruguay.

6 The UK's International Criminal Court Act 2001 provides for jurisdiction over genocide, war crimes and crimes against humanity committed overseas only by persons who are nationals of or resident in the UK, or by UK service personnel.

7 'Wilfully causing great suffering': *Aide-Memoire* of 3 December 1992; and again in its recommendations to the Conference on the Establishment of an International Criminal Court in Rome, July 1998. Widened to include inhuman treatment in ICRC *Customary International Humanitarian Law* (2005) Volume 1, p.585.

It has specifically found that rape has amounted to torture.[8] It has noted the ICRC's position as to grave breaches.[9]

But what is the interpretation argument? It would plainly always have to be based on the facts of an individual case. However, by way of example, in the ICC elements of crimes, the war crime of inhuman treatment requires the following to be proved:

1. The perpetrator inflicted *severe physical or mental pain or suffering upon one or more persons*.
2. Such person or persons *were protected* under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

In what situation would a court find that a rape or indeed serious sexual violence committed in the context of an armed conflict did not amount to the infliction of 'severe physical or mental pain or suffering'? To state it in those terms is to make the clearest case that rape, and in our view, sexual violence of a sufficiently serious nature, could always be argued as a grave breach.

On the question of interpretation, it is interesting to note that the ICC's Pre-Trial Chamber II in *Bemba* declined to confirm a charge of outrages upon personal dignity, in particular humiliating or degrading treatment under Article 8(2)(c)(ii) of the Statute, on the basis that the facts presented by the Prosecution reflected the constitutive elements of force or coercion in the crime of rape, and that the count of outrages upon personal dignity was fully subsumed by the count of rape.[10] Whilst the crime of outrages upon dignity, derived as it is from Common Article 3, is not itself a grave breach of the Conventions, this is an interesting parallel to the claim that the constitutive elements in the crime of rape or serious sexual violence would satisfy the elements of the grave breach of inhuman treatment.

---

8 *Delalic* trial judgment, 16 November 1998, paragraphs 478-497.

9 *Furundzija* trial judgment, 10 December 1998, paragraph 165, footnote 192.

10 *Bemba* Decision on the Charges of the Prosecutor, 5 June 2009, paragraph 310.

However, if the interpretation argument is right, then the universal jurisdiction provision in the GCs applies to such crimes.

I have said that rape and serious sexual violence constitute grave breaches as a matter of interpretation. Conversely, we do not yet consider that sexual violence is a new category of grave breach as a matter of customary international law. The ICTY case law does not say directly that rape is always a grave breach. [11] Notwithstanding that, the position can still be taken that as a matter of interpretation of the existing grave breaches, rape and serious sexual violence would amount to a grave breach.

The above analysis is relatively straightforward. However, I want to highlight three issues which underlie the analysis, and which may be raised as problematic when it comes to the scope of the position.

a) Sexual violence as well as rape?

The argument has been made that only rape is *always* a grave breach and that sexual violence *may* be a grave breach, if it amounts to inhuman treatment or one of the other grave breaches. But Article 8(2)(b)(xxii) of the ICC Statute – the "catch all" sexual violence provision – describes as a war crime all sexual violence other than those specific types listed in the prior provisions, where it is of a comparable gravity to a grave breach. So it would be consistent to say that 'serious' sexual violence is a grave breach in the same way as rape. There is a threshold of conduct, but it is the same threshold that applies to sexual violence as a war crime. All sexual violence war crimes are grave breaches, in other words.

b) Non-international armed conflicts

The grave breaches regime in the GCs and APs only applies to IACs.[12] Of course, many modern conflicts are NIACs.

There is some support for the alternative view that the grave breaches regime applies to NIACs. For example, in 1995 the United States (US) took the view that the grave breaches regime

---

11 The ICTY case law says merely that rape 'may' amount to a grave breach: ibid., paragraph 172.

12 'The [IAC] requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. States parties to the [GCs] did not want to give other States jurisdiction over serious violations of International Humanitarian Law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system.' (ICTY *Tadic* interlocutory appeal 2 October 1995, paragraph 80)

does apply to NIACs.[13] In the German Military Manual, grave breaches include some violations of Common Article 3 of the GCs (which applies to NIACs). At least one judge in the ICTY has supported this view.[14] However, it is fair to say that this view is far from accepted by all, and the UK takes the position that the grave breach regime only applies in IACs.

This would therefore be a gap in the reach of the grave breaches regime for sexual violence, as for other grave breaches. However, of course, the distinction between IACs and NIACs is not always clear-cut. Moreover, as referred to above, many States do have domestic legislation establishing universal jurisdiction in respect of all war crimes, for example by referring to the list in the ICC Statute, including serious sexual violence in NIACs.

c) Are all relevant victims 'protected persons'?

The grave breaches regime applies to victims who are defined as 'protected persons' under the GCs. One issue which arose in the context of the ICTY was whether victims of the same nationality as the party committing violations of IHL were 'protected persons' under the fourth GC (which deals with civilians). The wording of GC IV says that only those who are not of the nationality of the party into whose power they have fallen, are 'protected persons'. But this would then exclude many of those in need of protection in modern conflicts. The ICTY and ICC have solved this by relying on the concept of 'allegiance': if persons are no longer protected by their State, they then fall into the category of 'protected persons' under GC IV.[15]

Prosecutions?

The UK Government has taken this view publicly, and now we have the support of 132 States for it. However, of course, this is just a position taken by the executives of those States. A decision to prosecute would have to be taken by the prosecuting authorities and a court would always have to decide whether the elements of a grave breach had been proved to the required standard.

We must also acknowledge that universal jurisdiction prosecutions have their own specific practical and political challenges. Complex cross-border investigations are expensive. Collecting reliable witness, documentary and forensic evidence is very difficult in those circumstances, as is producing witnesses in court. It is still more difficult when the context of the alleged

---

13 US *Amicus Curiae* brief, ibid., paragraph 83. Further, the US War Crimes Act 1996 describes sexual violence and rape as a grave breach of Common Article 3 of the GCs (which applies to NIACs).

14 Separate Opinion of Judge Abi-Saab (ICTY *Tadic* interlocutory appeal 2 October 1995). Affirmed in ICTY *Celebici* trial judgment, paragraph 202.

15 ICTY *Tadic* appeals judgment, 15 July 1999, paragraphs 164-166.

crime is an armed conflict. Add to that the sensitivities of investigating and documenting sexual violence crimes which apply whenever these crimes are prosecuted. Universal jurisdiction itself can be the most politically sensitive manifestation of cross-border criminal justice, touching as it does on issues of State sovereignty, as we have seen in recent examples in my jurisdiction. As a result of these challenges, very few such prosecutions are ever brought. Nevertheless, universal jurisdiction prosecutions are brought despite this. In addition we should never forget the central reason for universal jurisdiction: the creation of a jurisdictional web of non-impunity. It is designed to make potential perpetrators stop and think twice.

PSVI: Next Steps

So much for the grave breaches argument. But what is next on PSVI? Following the UNGA, we want to use the Declaration as a platform for future practical activity, particularly at the regional level, as well as in conflict and post-conflict affected countries.

A key element of this practical activity is the development of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. The Protocol aims to set out the ideal standards for the documentation and investigation of rape and sexual violence in conflict to ensure that information collected in the field can support future investigations and prosecutions of sexual violence at the national and international levels. These standards will ensure that information is collected in such a way as to increase and preserve its value as evidence, that survivors receive sensitive and sustained support and – critically – that the people involved in collecting information and working with survivors are doing so in a coordinated and mutually supportive way. It will build on existing local, regional and international guidance and be open to States, the UN system, regional bodies and NGOs for use in training and capacity building programmes.

The Protocol intends to represent a multi-disciplinary approach to investigating and documenting sexual violence in conflict. Its standards will address the long-standing practice silos in the field, and outline how documentation processes by practitioners other than criminal investigators can best support the criminal law process. It will also be particularly focused on embedding protection strategies throughout the entire investigative process, to ensure survivors receive sustained support should they choose to come forward.

We have established a number of Expert Working Groups according to thematic areas of expertise, who have begun to work together to draft the Protocol. Grassroots field testing of the Protocol, as well as regional Consultation Workshops will feed into the drafting process. Throughout the process the UK will act as a convenor of expertise. Our role is to enable, fund and encourage the development of the Protocol, ensuring the best expertise is involved and

that other States are galvanised to support its process and objectives. We wish to build on existing work but provide the opportunity to explore and globally disseminate original and effective approaches of proven success at the grassroots level. We will also lead on an implementation plan for the Protocol and develop the right partnerships to ensure that it is of practical use for practitioners.

Finally, the Foreign Secretary has also recently announced that the UK will host a major conference in London around June next year on addressing sexual violence in conflict. The objective will be to turn political commitment into practical action. The United Kingdom will invite all the governments that have endorsed the Declaration as well as others, who we hope will join our efforts, along with representatives from civil society, judiciaries and militaries around the world. We will be consulting with States, civil society and grassroots organisations in advance of the conference for views on where we should focus our efforts.

So once again thanks are due to the ICRC and the College of Europe for including this topic at this year's Colloquium. We hope that the discussion will contribute to the renewed momentum which has developed.

IS THERE A "RIGHT TO ABORTION" FOR WOMEN AND GIRLS WHO BECOME PREGNANT AS A RESULT OF RAPE? A HUMANITARIAN AND LEGAL ISSUE

Gloria Gaggioli
ICRC Legal Division

Résumé

Les femmes et filles qui sont enceintes suite à un viol dans un conflit armé doivent faire face à une situation extrêmement difficile et douloureuse. Lorsqu'un viol entraîne une grossesse non désirée, les victimes peuvent être tentées de recourir à des moyens dangereux pour y mettre un terme, au péril de leur santé, voire de leur vie. L'accès à un avortement sûr dans le cadre de conflits armés n'est pourtant pas toujours possible, et ce en raison de nombreux obstacles. Outre le statut légal de l'avortement dans un pays déterminé, les violences, le manque de sécurité, la destruction de routes et le manque de personnel médical peuvent constituent des barrières additionnelles.

Quelles sont les réponses fournies par le droit international en ce qui concerne l'avortement de femmes et filles enceintes suite à un viol ?

Les traités du droit international humanitaire (DIH) ne contiennent aucune référence à la question de l'avortement et ne consacrent pas de « droit à l'avortement ». Un certain nombre de dispositions sont cependant utiles et pertinentes. Le DIH stipule ainsi que les belligérants doivent fournir des soins médicaux aux blessés et malades sans discrimination. Des femmes et filles ayant été violées sont couvertes par les dispositions du DIH protégeant les blessés et malades et doivent donc recevoir les soins médicaux requis par leur condition. Ceci est confirmé, par exemple, par l'article 8, paragraphe a, du premier Protocole additionnel aux Conventions de Genève qui définit les « blessés et malades » comme des personnes, militaires ou civiles qui, s'abstenant de tout acte d'hostilité, ont besoin de soins médicaux en raison d'un traumatisme, d'une maladie ou d'autres incapacités ou troubles physiques ou mentaux. Le DIH ne précise pas quels types de soins médicaux sont requis dans chaque cas particulier, mais il n'y a aucune raison pour que l'avortement ne soit pas inclus dans les soins médicaux énumérés dans le DIH.

Tout comme les traités du DIH, ceux relatifs aux droits de l'homme ne prévoient pas de « droit à l'avortement » et ne font d'ailleurs pas référence à la question de l'avortement, la seule exception étant le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique. L'article 14, paragraphe 2 c) de ce dernier dispose que « Les États prennent toutes les mesures appropriées pour protéger les droits reproductifs des femmes, parti-

culièrement en autorisant l'avortement médicalisé, en cas d'agression sexuelle, de viol, d'inceste et lorsque la grossesse met en danger la santé mentale et physique de la mère ou la vie de la mère ou du fœtus ». Bien que les traités relatifs aux droits de l'homme ne consacrent pas de « droit à l'avortement » proprement dit, la question clé est de savoir si le fait de refuser l'accès à l'avortement à des femmes ou filles enceintes à la suite d'un viol équivaut à un traitement cruel, inhumain ou dégradant. A ce jour, il n'existe pas de consensus entre les Etats sur cette question. Certains Etats considèrent que le refus d'avortement dans certains cas – en particulier lorsque la grossesse est la conséquence d'un viol – peut être considéré comme un traitement cruel, inhumain ou dégradant en raison de la souffrance psychologique et/ou physique endurée par la femme enceinte. D'autres estiment qu'il appartient à chaque Etat de décider de la manière de réglementer l'avortement conformément à la culture, à la *religion et aux croyances de sa population, et que le droit international ne les empêche pas de proscrire ou de réglementer l'avortement aussi bien en temps de paix qu'en temps de conflit armé.*

En droit pénal international, une grossesse forcée peut constituer un crime de guerre ou un crime contre l'humanité. La grossesse forcée est cependant strictement définie par le Statut de la Cour pénale internationale comme « la détention illégale d'une femme mise enceinte de force, dans l'intention de modifier la composition ethnique d'une population ou de commettre d'autres violations graves du droit international ».
En raison des souffrances auxquelles les femmes et filles enceintes suites à un viol dans un conflit armé doivent faire face et en raison des risques pour leur vie et leur santé en cas d'avortement non médicalisé, le Comité international de la Croix-rouge (CICR) est fermement engagé à s'assurer que ces victimes aient accès à des soins de santé complets, y compris à un avortement médicalisé. Ceci étant dit, le CICR est tenu de respecter les lois nationales des pays dans lesquels il opère. Dans les pays où l'accès à l'avortement est restreint et où il n'y a pas de disposition spéciale autorisant l'avortement pour les victimes de viol, les femmes ou filles violées cherchant à avorter pourraient faire l'objet de poursuites et sanctions. Toute violation du droit national pourrait également entraîner des poursuites judiciaires à l'encontre du personnel du CICR, ce qui pourrait compromettre son travail humanitaire. Dans chaque contexte, le CICR doit donc évaluer la loi nationale et les obstacles pratiques à l'accès aux soins de santé pour les victimes de viol.

The presentations by Professor Tigroudja and Mr Rycroft that we have just had the privilege of listening to made clear that rape and other forms of sexual violence are completely prohibited both under International Humanitarian Law (IHL) and Human Rights Law. Moreover, all rape, as well as other forms of sexual violence that amount to serious violations of IHL, entail individual criminal responsibility and must be prosecuted. In addition to being awful crimes,

they give rise to a number of consequences that constitute major humanitarian issues, as highlighted in the keynote speech of our Vice-President, Ms Beerli.

One of them is that women and girls who are raped may become pregnant as a result. These women and girls may face tremendously difficult choices and may seek unsafe practices to terminate their pregnancy, which in turn may endanger their lives and health. My presentation will focus on this particular consequence of rape in armed conflicts and the related legal issue that has been raised by some human rights non-governmental organisations as well as States' representatives alleging the existence of a "right to abortion" under existing international law and advocating this right.[1]

Before developing the legal analysis, I would like to start briefly by highlighting the humanitarian issue.

1. The Humanitarian Issue

Women and girls who become pregnant following rape in a situation of armed conflict face an extremely difficult and painful situation. Pregnancy often adds more difficulties to the suffering that they have already experienced. They need to make excruciating choices, and may face major challenges and risks to their health and survival.

In situations in which women and girls have continued with these pregnancies, some have abandoned their babies; some who kept them have faced ostracism and exclusion, have had

---

1 A non-governmental organisation based in the United States of America (USA) and called the Global Justice Center (GJC) has recently launched a campaign advocating to fight against denial of abortion for women made pregnant by rape. The GJC interprets International Humanitarian Law (IHL) as providing a "right to abortion" to women impregnated by rape and a corresponding obligation to provide abortions to rape victims; failure to do so would notably constitute a discriminatory treatment and an inhuman and degrading treatment and would violate common Article 3 to the 1949 Geneva Conventions, their Additional Protocols as well as customary IHL. See, for instance: <http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34>
Discussions revolving around the issue of sexual violence, abortion and IHL also made their way into the debates of the United Kingdom's House of Lords and House of Commons. In this context, the following positions have been recently held at the House of Lords. Baroness Kinnock of Holyhead: 'I firmly reject the notion that dealing with rape is down to culture, custom and religion and that that somehow excuses the denial of the right to safe abortion for women who have often endured mass rape which has scarred them both physically and psychologically'. Baroness Northover: 'The denial of abortion in a situation that is life-threatening or causing unbearable suffering to a victim of armed conflict may (…) contravene Common Article 3 [to the Geneva Conventions]. Therefore an abortion may be offered despite being in breach of national law by parties to the conflict or humanitarian organisations providing medical care and assistance'. Available on: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130109-0002.htm>

to leave their family and community, and relocate in order for them and their child to survive. In other cases the woman and/or the child have been killed by their families. Rape-conceived children may also suffer health and developmental problems, related to the circumstances of the pregnancy, the birth and the psychosocial trauma of their mothers.

For many victims of sexual violence facing such prospects, continuing with their pregnancy is seen as emotionally, rationally and practically impossible to cope with, and they therefore choose to interrupt the pregnancy.

However, access to safe abortion in situations of armed conflicts is not always available. Lack of, or limited, access to safe abortion, including legal restrictions, leads many women and girls to induce an abortion themselves or seek an abortion from unskilled persons. Unsafe abortion[2] is a significant public health concern.[3] There are many reasons for this lack of access to safe abortion in armed conflicts.

First, access to safe abortion is dependent on the legal status of abortion. This status varies between different countries and derives from various cultural, ethical and religious conceptions and convictions. In almost all countries, however, the law permits abortion when a woman's life is at stake. and in the majority of countries abortion is allowed to preserve the woman's physical and/or mental health.[4] How these exceptions are interpreted, and the evidence and process required for permission being granted, varies from country to country and can create a barrier to access to safe abortion for many victims. According to data on national

---

2 'Unsafe abortion' is defined by the World Health Organization (WHO) as 'a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both'. See: "Safe abortion care: the public health and human rights rationale", in*: Safe abortion: technical and policy guidance for health systems*, 2nd ed., WHO, Geneva, 2012, p. 18 (hereafter: WHO, *Safe Abortion care*). Available on: <http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf>

3 WHO estimates that 22 million unsafe abortions take place around the world each year. Close to 50,000 pregnancy-related deaths are due to complications linked to unsafe abortion. One in four women and girls who undergo unsafe abortion are likely to develop temporary or lifelong disabilities requiring medical care. WHO, *Safe Abortion care*, pp. 17-21. See also, *Beijing Declaration and Platform for Action*, 15 September 1995, paragraph 97: 'Unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk'.

4 UN Department of Social and Economic Affairs, "World Abortion Policies 2013", available at: <http://www.un.org/en/development/desa/population/publications/policy/world-abortion-policies-2013.shtml>.
According to the UN Department of Social and Economic Affairs, only six countries (Chile, Dominican Republic, El Salvador, Holy See, Malta and Nicaragua) completely prohibit abortion. In practice, however, a number of other countries tend to adopt a very restrictive interpretation of their laws even where it could allow abortion in some cases.

laws collected in 2011 by the United Nations (UN) Department of Social and Economic Affairs, Population Division, abortion is specifically allowed in the case of pregnancy following rape in 51 percent of countries.[5] This indicates that countries remain very much divided as to the necessity to allow abortion for women or girls who become pregnant as a result of rape.

Beside legal restrictions, there are a number of other barriers to safe abortion in situations of armed conflict. These can include:

- Lack of available health services and medical supplies – either as an endemic issue or as a consequence of the armed conflict;
- Distance from such services or impracticability of roads to reach such services – sometimes due to the situation of armed conflict;
- Lack of competence or training of health professionals;
- Negative attitudes by professionals in regard to sexual violence and pregnancy interruption;[6]
- Security and safety concerns;
- Forensic procedures required in order to prove a rape, combined with sometimes excessively restrictive definitions of rape;[7]
- Financial barriers. Sometimes due to the high price of abortion or of the medical certificate, rape victims cannot afford them.
- Fear of exclusion or stigmatisation for having terminated a pregnancy. Sometimes, even fear of violence or even death if the family or community finds out about the termination of a pregnancy;
- Fear of reprisals, which prevent rape victims from reporting the rape to the police and which in turn, prevents them from getting access to abortion.

In brief, the humanitarian issue that we are discussing is much broader than the legal issue of the extent to which abortion is allowed in different countries for women and girls who have been raped. Practical, sociological and administrative barriers are as important as – or sometimes even more important than – legal barriers to the issue of safe access to abortion.

---

5 Ibid.,The Centre for Reproductive Rights provides a map showing the status of the world's abortion laws, see: <http://worldabortionlaws.com/map/>

6 See, for instance, Inter-American Commission on Human Rights, *Paulina del Carmen Ramírez Jacinto v. Mexico*, 9 March 2007 (settlement): case of a girl who became pregnant following rape and who could not have access to abortion because the public health institution denied her medical care, despite the fact that she had authorisation from the Public Prosecutor to terminate the pregnancy.

7 K. Teklehaimanot and C. Hord Smith, "Rape as a Legal Indication for Abortion: Implications and Consequences of the Medical Examination Requirement" in: *Medicine and Law,* 2004, p. 91.

In armed conflict situations in particular, ongoing violence, lack of security, destruction of roads, and lack of medical personnel constitute additional barriers.

With this overview in mind, let us see which response international law provides when it comes to abortion in cases of rape-related pregnancies, I will start by analysing IHL, which provides the specific legal framework applicable in armed conflicts and then turn to Human Rights Law and – very briefly – International Criminal Law.

2. The Legal Analysis

a) What does IHL say regarding abortion for victims of rape in armed conflicts?

A first observation that has to be made when looking at IHL treaties is that there is no reference to the issue of abortion at all. IHL treaties cannot be said, therefore, to provide a "right to abortion" or a universal obligation to provide abortions to rape victims.

There are, however, a number of IHL provisions that are relevant and useful when it comes to the humanitarian issue faced by victims of rape. As highlighted earlier, rape is prohibited and constitutes an international crime that must be prosecuted. If IHL were fully respected, the humanitarian issue of women and girls pregnant as a result of rape committed in connection with the armed conflict would not exist. This is an important but not the only contribution of IHL to the issue.

In addition to this, IHL stipulates that belligerents must provide medical care to the wounded and sick without discrimination.[8] Women and girls who have been raped – as well as all other pregnant women and girls – are covered by IHL provisions protecting wounded and sick persons and must receive the medical care and attention required by their condition. This is evidenced, for instance, by Article 8, paragraph a, of Additional Protocol I to the Geneva Conventions which defines 'wounded and sick' as 'persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, (…) persons who may be in need of immediate medical assistance or care, such as (…) expectant mothers (…)'[9]

---

8 Common Article 3 to the Geneva Conventions; Article 12, paragraph 2, and 15, paragraph 1, of the First Geneva Convention; Article 12, paragraph 2, and 18, paragraph 1, of the second Geneva Convention; Article 16, paragraph. 1, of the fourth Geneva Convention; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitariam Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, Rule 110. On non-discrimination, see: Common Article 3; Article 14 of the third Geneva Convention; Article 10 of Additional Protocol I; Article 7 of Additional Protocol II; J.-M. Henckaerts and L. Doswald-Beck, ibid, rules 88 and 110.

9 See also: Article 16 of the fourth Geneva Convention which specifies that 'the wounded and sick (…) and expectant mothers, shall be the object of particular protection and respect'.

IHL treaties do not specify what kind of medical care and attention is required in each specific case, but there is no reason why abortion could not be included within the meaning of medical care under IHL. This means that, in countries where abortion is permitted in such situations, women and girls must have access to it if they so wish. It does not mean, however, that IHL imposes abortion in such situations independently of the choice of women and girls or independently of what domestic law prescribes. There are no international provisions making abortion a required or adequate medical treatment. The World Health Organisation (WHO) can provide, however, useful guidance for States when adopting and revising domestic laws and policies in the field of health. In this domain, the WHO is of the view that the provision of abortion in cases of rape should be an option,[10] but as mentioned earlier, States' laws are not uniform, with only a little bit more than half of them envisaging abortion in cases of rape when there are no additional risks for the life or health of the mother or foetus.

The prohibition of discriminatory treatment in the provision of comprehensive medical care under IHL also means that denying abortions to certain raped women or girls (e.g. women or girls considered as belonging to the opponent in an armed conflict) while allowing it for other raped women or girls constitutes discriminatory treatment, which is clearly prohibited under IHL. If abortion is legally available in case of rape, the State must ensure that all women and girls in this situation have access to it, and that, for instance, health service providers who refuse to perform such services based on conscientious objection, nevertheless refer these women and girls to alternative health providers.[11]

Let us see now whether Human Rights Law – which can usefully complement IHL – provides a "right to abortion" for women and girls pregnant as a result of rape.

b) What does Human Rights Law say regarding abortion for victims of rape in armed conflicts?

Similarly to IHL treaties, human rights treaties do not generally provide for an explicit "right to abortion" and do not refer to the issue of abortion either.

One exception in this respect is to be found in the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2003), called the Maputo Protocol, which provides in Article 14, paragraph 2 c), that 'States Parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, *rape*, incest, *and where the continued pregnancy endangers the mental and*

---

10 WHO, 'Safe Abortion care', op cit, p. 69.

11 Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 24, Women and health*, 5 February 1999, paragraph 11.

physical health of the mother or the life of the mother or the foetus' (emphasis added). This Protocol has been ratified by 28 States to date and is – to the best of our knowledge – the only human rights treaty which explicitly provides for a duty for States to take all appropriate measures to authorise medical abortions in some specific cases.

Although there is no "right to abortion" in human rights treaties, the key question – and in our view the more interesting question – is: could denial of abortion lead to other human rights violations?

Could, for instance, refusing abortion to women or girls who are pregnant as a result of rape amount to cruel, inhuman or degrading treatment? To date, there is no consensus among States as regards the answer to this question and abortion issues in general, even for rape-related pregnancies. Some States consider that denial of abortion in some cases – in particular when it is life-threatening or when the pregnancy is the result of rape – can be considered as a cruel, inhuman or degrading treatment because of the psychological and/or physical pain suffered by the pregnant woman.[12] Other States are of the view that it is up to each State to decide how to regulate abortion in accordance with their populations' culture, religion or beliefs and that international law does not prevent States from outlawing or regulating abortions both in peacetime and in armed conflict situations.[13]

According to the WHO, however, 'the protection of women from cruel, inhuman and degrading treatment requires that those who have become pregnant as the result of coerced or forced sexual acts can lawfully access safe abortion services.'[14]

Human rights practice in this respect is not completely straightforward, although there is a tendency to consider denial of abortion in some cases as a cruel, inhuman or degrading treatment.

---

12 The Norwegian Agency for Development Cooperation (NORAD) Scoping Paper*: Sexual Violence in Conflict and the Role of the Health Sector*, n°21, 2011, p. 12: 'The denial of abortion to women who become pregnant as a result of being raped has been considered to constitute torture or cruel, inhuman or degrading treatment. Consequently, the denial of the full range of medically appropriate care to victims of rape in situations of armed conflict constitutes a violation of their rights under applicable international law.' See also positions expressed in the United Kingdom's House of Lord. Lord Lester of Herne Hill: 'Denying a rape victim an abortion when there is medical need is also capable of amounting to a form of torture'. Available on: < http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130109-0002.htm>

13 For instance, the Holy See and several Catholic and Arab countries advocated against the inclusion of forced pregnancy into the Rome Statute of the International Criminal Court, fearing that the inclusion of this crime might be interpreted as imposing an obligation on national systems to provide forcibly impregnated women access to abortion. See C. Steains, "Gender Issues", in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues – Negotiations – Results*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 366-367.

14 WHO, 'Safe Abortion care', op.cit., p. 92.

Regarding denial of access to abortion for women raped in countries where it is legal in such circumstances, there is binding case law and non-binding human rights practice indicating that this may amount to inhuman or degrading treatment.[15] For instance, in the case *P. and S. v. Poland*, the European Court of Human Rights found a violation of Article 3 of the European Convention on Human Rights (inhuman or degrading treatment) because a 14-year-old girl who had been raped, and became pregnant as a result, did not have access to safe abortion and had been harassed by State authorities and anti-abortion activists despite the fact that Polish law allowed for abortion in case of rape.[16]

Regarding countries where abortion is completely outlawed or severely restricted, some human rights bodies have expressed concern in non-binding concluding observations or reports to the extent that it might lead to cruel, inhuman or degrading treatment in some circumstances.[17]

---

15 See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, J. E. Méndez, 1 February 2013, UN Doc. A/HRC/22/53, paragraph 46: 'International and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include (…) denial of *legally available health services such as abortion and post-abortion care'* (emphasis added). See also: Human Rights Committee (HRC), *Concluding Observations: Argentina*, 3 November 2000, UN Doc. CCPR/CO/70/ARG, paragraph 14: 'On the issue of reproductive health rights, the Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, *inter alia* when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women.'

16 See European Court of Human Rights (ECtHR), *P. and S. v. Poland,* 30 October 2012, paragraphs 157-169. See also HRC, *Concluding Observation: Poland*, UN Doc. CCPR/CO/82/POL/Rev.1 (2004), paragraph 8.

17 See Human Rights Committee, *General Comment n° 28: Equality of Rights between Men and Women*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, which states that to assess compliance with Article 7 of the Covenant (prohibiting torture and cruel, inhuman or degrading treatment or punishment), the Committee 'needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape' and that it also 'needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape' (paragraph 11). It should be noted, however, that the Committee does not clearly contend that refusing abortion in cases of rape amounts to inhuman and degrading treatment. See also: Committee against Torture (CAT), *Concluding Observations: Peru*, 25 July 1996, UN Doc. CAT/C/PER/CO/4, paragraph 23: 'Current legislation severely restricts access to voluntary abortion, even in cases of rape, leading to grave consequences, including the unnecessary deaths of women. According to reports received, the State party has failed to take steps to prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment.' See also: CAT, *Concluding Observations: Nicaragua*, 10 June 2009, UN Doc. CAT/C/NIC/CO/1, paragraph 16: 'The Committee is deeply concerned by the general prohibition of abortion set forth in Articles 143-145 of the Criminal Code, even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence (…) The Committee urges the State party to review its legislation on abortion (…) and to consider the possibility of providing for exceptions to the general prohibition of abortion for cases of therapeutic abortion and pregnancy resulting from rape or incest'.

A good example of this trend is the 2013 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* of Juan E. Méndez, which interprets the practice of the Human Rights Committee as being that denial of access to safe abortions to women who have become pregnant as a result of rape is a breach of Article 7 of the International Covenant on Civil and Political Rights (on cruel, inhuman or degrading treatment).[18]

It remains to be seen whether these evolutions in the human rights sphere will crystallise into an accepted interpretation of the prohibition of cruel, inhuman or degrading treatment, which could in turn have an influence on corresponding IHL provisions. Indeed, IHL also prohibits cruel, inhuman or degrading treatments and these concepts should be defined in the light of the evolutions taking place both in IHL and in the human rights spheres. In brief, what is cruel, inhuman or degrading treatment should be the same under both Human Rights Law and IHL. In that respect, these two bodies of law definitely converge.

Some human rights bodies, especially the Committee on the Elimination of Discrimination against Women (CEDAW) and the Human Rights Committee (HRC),[19] have also indicated in non-binding concluding observations that the complete prohibition and criminalisation of abortion without exception, including where the mother's life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped, constitute a violation of (or at least constitutes a potential risk to) the rights of women to health and life.[20] Regarding the right to life, it has been invoked in different ways, notably by pro-abortion activists (who focus on the right to life of the mother) and anti-abortion activists (who focus on the right to life of the foetus); and there is no internationally agreed definition as to when life begins.[21] In any case, in the context of pregnancy following rape, the right to life of the

---

18 See also: *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, op. cit., paragraph 50.

19 See Center for Reproductive Rights, *Briefing Paper: Bringing Rights to Bear,* p. 16. Available on: <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF>

20 See, for instance : CEDAW, *Concluding Observation : Colombia*, 20 August 1999, UN Doc. A/54/38/Rev. 1, paragraph 393. It is to be noted that Colombia has modified its domestic laws related to abortion since then. Today, abortion is notably allowed if pregnancy is the result of rape. See also: HRC, *Concluding Observation : Chile,* 30 March 1999, UN Doc. CCPR/C/79/Add.104, paragraph 15; HRC, *Concluding Observation : Paraguay,* 24 April 2006, UN Doc. CCPR/C/PRY/CO/2, paragraph 10. See also, but in a more generic way: HRC, *General Comment n° 28: Equality of Rights between Men and Women*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, paragraph 10.

21 For instance, the European Commission and the European Court of Human Rights (ECtHR) have interpreted Article 2 of the European Convention on Human Rights (right to life) as not including the unborn child. See: European Commission of Human Rights, *Paton v. United Kingdom*, 13 May 1980, paragraph 9; ECtHR, *Vo. v. France*, 8 July 2004, pargraph 84. By contrast, the American Convention on Human Rights considers life as having begun from the moment of 'conception' (Article 4, paragraph 1).

mother is not necessarily pertinent, unless the pregnant woman or girl faces health complications which would threaten her life. The right to health appears to be more relevant in case of pregnancy following rape, especially when not only physical, but also mental and social well-being is introduced into the analysis.[22]

More broadly, a number of human rights bodies have expressed concern over extremely restrictive and punitive abortion laws and have called upon States to consider reviewing restrictive legislation to permit abortion in cases where the life of the pregnant woman is at risk and in cases of rape or incest.[23]

In brief, one can say that the practice of human rights bodies shows that, despite the fact that no "right to abortion" has been recognised so far, a failure to ensure access to abortion when it is legal, as well as highly restrictive abortion laws – even when the life or health of the women or girls are at risk – have been considered, at least, an issue of concern.

c) What does international criminal law say?

To conclude this legal analysis, let me briefly highlight that under International Criminal Law, forced pregnancy can amount to a war crime or a crime against humanity. However, forced pregnancy is strictly defined by the Statute of the International Criminal Court as 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.' The

---

In a recent case, the Inter-American Court of Human Rights has specified that, nowadays, 'conception' must be understood as occuring at the moment when the embryo becomes implanted in the uterus (rather than at the moment of mere fertilisation) and that the protection of the right to life of the implanted embryo and then foetus is not absolute, but rather 'gradual and incremental according to its development'. See Inter-American Court of Human Rights, *Artavia Mutillo et al. v. Costa Rica*, 28 November 2012, paragraph 264.

22 See the definition of health by the WHO: 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' Preamble to the Constitution of the WHO as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the WHO, n°2, p. 100) and entered into force on 7 April 1948.

23 See, for instance : Committee on the Rights of the Child (CRC), *Concluding Observation : Chile*, 23 April 2007, UN Doc. CRC/C/CHL/CO/3, paragraph 56; CEDAW, *Concluding Observation: Peru*, 2 February 2007, UN Doc. CEDAW/C/PER/CO/6, pararaph 25; HRC, *Concluding Observation : Chile,* 30 March 1999, UN Doc. CCPR/C/79/Add.104, paragraph 15; HRC, *Concluding Observation: Kenya,* 29 April 2005, UN Doc. CCPR/CO/83/KEN, paragraph 14; HRC, *Concluding Observation: Panama,* 17 April 2008, UN Doc. CCPR/C/PAN/CO/3, paragraph 9; Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observation: Chile,* 26 November 2004, UN Doc. E/C.12/1/Add.105, paragraph 53; CESCR, *Concluding Observation: Nepal,* 24 September 2001, UN Doc. E/C.12/1/Add.66, paragraph 55; CESCR, *Concluding Observation: Costa Rica,* 4 January 2008, UN Doc. E/C/12/CRI/CO/4, paragraphs 25 and 46.

Statute of the International Criminal Court further stresses that: 'this definition shall not in any way be interpreted as affecting national laws relating to pregnancy'.[24]

To the extent that denial of abortion could amount to cruel, inhuman or degrading treatment in some specific circumstances, it would constitute a serious violation of IHL in armed conflict situations and would also entail individual criminal responsibility. So far, however – and to the best of our knowledge – there has been no international prosecution on this basis at the international level.

Finally, as mentioned earlier, International Criminal Law already criminalises rape and other forms of sexual violence. Together with the prohibition of these crimes under IHL and Human Rights Law, sanction has a preventive effect.

3. The Approach of the International Committee of the Red Cross (ICRC) to the Humanitarian Issue

Due to the considerable suffering faced by women and girls who become pregnant as a result of rape in armed conflict, and because of the risks to their life and health as a result of unsafe abortion, the ICRC is firm in its commitment to ensure that these victims have access to comprehensive health care, including access to safe abortion care in compliance with the applicable law.

The ICRC recognises the urgent need to ensure that rape victims receive quality medical care and that in many countries this is lacking because access to functioning health facilities with trained staff and appropriate and reliable medical supplies is a major problem. The ICRC endeavours to support national medical services and medical personnel throughout the world in their efforts to provide appropriate care for victims of armed conflict.

Access to safe abortion, with caring support, including sympathy and professional counselling, allows the pregnant victim of rape to make an enlightened and informed choice regarding termination of pregnancy according to national laws. The ICRC will endeavour to support all victims of rape throughout the process of seeking appropriate medical care and other needs which are a consequence of sexual violence in armed conflict and other situations of violence.

This being said, the ICRC has to abide by the national laws of the country in which it operates wherever it carries out its activities. In countries where access to abortion is restricted and there is no special provision allowing abortion for rape victims, raped women and girls

24 See Article 7, paragraph. 2 f), of the Statute of the International Criminal Court (ICC). See also Article 8, paragraph. 2 b) xxii and Article 8, paragraph 2 e) vi) of the Statute of the ICC.

seeking abortion care could be subject to prosecution and sanction. Any violation of domestic law could also lead to judicial proceedings against ICRC staff (whether expatriate or resident). Any such incident would jeopardise the ICRC's humanitarian work, in particular its ability to access, assist and protect victims of armed conflict and other situations of violence, including victims of sexual violence.

In each context the ICRC needs to assess the national law and the practical impediments to the ability of rape victims to access medical care. Where appropriate, the ICRC can intervene on a case by case basis and, with the express consent of the victim of rape, on a confidential basis to raise the issue of rape and ensure better access to medical care, including abortion. When States are committed to improving access to comprehensive medical services but have either not adapted their legislative provisions or failed to set in place supportive systems for victims, the ICRC can also support authorities in improving their legal frameworks, health practices and procedures.

During the debate following the presentations of the third session, the audience raised three main issues.

1. Rape and Other Forms of Ill-Treatment

One of the speakers expressed concern about the suggestion to disaggregate different forms of ill-treatment and underlined the importance of treating rape as part of torture or cruel, inhuman and degrading treatment rather than as a crime on its own. She recalled that in *Aydin v. Turkey*, a 17-year-old girl subjected to ill-treatment while in detention was held by the European Court of Human Rights to have been tortured. The girl in this case was also raped, however the Court held that both the rape and the other treatment that she was subjected to would have independently been classified as torture.

A panellist recalled the *Bemba* case brought before the International Criminal Court (ICC) in which the Prosecution laid multiple, different, charges for what were in most instances, the same underlying acts. Thus, certain acts of rape were defined as rape, torture and outrages on personal dignity. The ICC however considered that the Prosecution's approach constituted impermissible cumulative charging. As a result, the Court confirmed the rape charges, but refused to confirm either of the torture charges or the charge of outrages upon personal dignity. The panellist agreed with the importance not to disaggregate sexual violence with regard to criminal charges. However, he argued that in view of the wider aim of prevention, it can be important to isolate rape from other forms of ill-treatment because there are specific consequences flowing from sexual violence that need to be addressed separately.

One of the chairpersons partially agreed with the proposal that rape should not be isolated, or then only to the extent that it can be subsumed under torture or degrading treatment. In those cases, rape can even appear as an aggravating factor. He did however call for the possibility of moving towards an independent and permanent recognition of rape as a separate crime in armed conflicts.

2. Non-Medical Support for Victims of Sexual Violence

One of the speakers noted that in situations of armed conflict, obtaining access to medical care is often a significant challenge. Therefore, it is extremely important to rely not only on medical treatment but also on non-medical assistance and other forms of counselling for victims of sexual violence. She underlined the important role of the members of national Red Cross and Red Crescent societies in this regard and suggested training some of them as counsellors.

Another speaker spoke of the importance of the availability of emergency contraception. Emergency contraceptives can be provided by relief workers and are extremely important in order to maintain a link between the essential judicial debates and the extreme distress victims of rape suffer from. She explained that the experience of *Médecins sans frontières* (MSF – Doctors without Borders) in the Congo, where legislation regarding abortion is rather restrictive, shows that with sufficient information and availability of medical services, 80 percent of the women who have been raped get medical care within 72 hours of the rape.

A panellist explained that the International Committee of the Red Cross (ICRC) has constantly tried to underline the importance of a multidisciplinary approach in relation to sexual violence. In this regard, the psychological care provided to women can play an important role. She explained that in the Democratic Republic of the Congo, sexual violence counselling centres (*maisons d'écoute*) have been set up in the two Kivus in order to provide support for victims of sexual violence. Through exercises such as theatrical productions, the centres try to raise awareness in the community, to change how victims of sexual violence are perceived, and to fight against exclusion. These exercises have had positive effects on women who realise they can have a role in the community and no longer feel rejected.

3. Barriers Faced by Victims in Obtaining Access to Health Care

One of the speakers explained that often a medical certificate will be required in order to prove the rape and to obtain an abortion or to lead to judicial procedures. The requirement of a medical certificate puts great pressure on the victims and caregivers, who are often put at risk. Doctors are often threatened and prevented from providing the necessary care. Furthermore, in some countries such as Sudan, treatment cannot be provided as long as there has not been a denunciation. Victims are therefore put at risk by pursuing legal processes. She underlined the importance that a link be made between the criminal procedures, respect for the victims and respect for medical secrecy in such a way that treatment can always be accessible. Finally, she noted that in the case of the Congo, 90 percent of the victims helped by MSF do not know their aggressor. The prosecution of non-identified aggressors remains a huge challenge in terms of the fight against impunity.

A panellist underlined the need for a victim-centred approach within the investigative process. He explained that the aim of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, which seeks to raise the standards for the investigation of rape and sexual violence, is not only to enhance the collection of evidence but also to embed the sense of support for victims within the process of investigation.

Session 4 – Recruitment and other association of children with armed forces or armed groups

Chairperson: **Paul Berman**, *Director, Council of the EU Legal Service*

THE PROTECTION OF CHILDREN AGAINST RECRUITMENT AND PARTICIPATION IN HOSTILITIES: INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW AS COMPLEMENTARY LEGAL FRAMEWORKS

Matthew Happold
University of Luxembourg

Résumé

Les Conventions de Genève de 1949 contiennent très peu de dispositions relatives au recrutement et à l'utilisation d'enfants soldats. La seule disposition traitant spécifiquement du recrutement d'enfants est l'article 50 qui, en cas d'occupation, interdit à la puissance occupante d'enrôler des enfants dans des formations ou organisations dépendant d'elle. A cet article s'ajoute l'article 51 qui interdit d'astreindre des personnes protégées à servir dans les forces armées d'une puissance occupante, ainsi que toute pression ou propagande tendant à des engagements volontaires de ces personnes. L'article 77 (2) du premier Protocole additionnel (PA) aux Conventions de Genève dispose que « Les Parties au conflit prendront toutes les mesures possibles dans la pratique pour que les enfants de moins de quinze ans ne participent pas directement aux hostilités, notamment en s'abstenant de les recruter dans leurs forces armées (…) ». Le deuxième Protocole additionnel dispose quant à lui que « les enfants de moins de quinze ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à prendre part aux hostilités ». Enfin, le Statut de Rome de la Cour pénale internationale pose parmi les crimes de guerre engageant la responsabilité pénale individuelle « le fait de procéder à la conscription ou à l'enrôlement d'enfants de moins de 15 ans » ainsi que le fait de « les faire participer activement à des hostilités ». Cette interdiction fait désormais partie du droit international coutumier.

Les enfants sont également protégés par les instruments généraux des droits de l'homme. En insérant une disposition relative au recrutement et à l'utilisation d'enfants soldats, la Convention relative aux droits de l'enfant (CDE) de 1989 a largement suivi le libellé du premier PA. La Convention prévoit, entre autres, que les Etats parties « prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes n'ayant pas atteint l'âge de quinze ans ne participent pas directement aux hostilités » et « s'abstiennent d'enrôler dans leurs forces armées toute personne n'ayant pas atteint l'âge de quinze ans ». En 2000, l'Assemblée générale des

Nations unies adopta un Protocole facultatif se rapportant à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés. Ce protocole interdit aux Etats parties d'accepter l'enrôlement volontaire d'enfants n'ayant pas atteint l'âge de 16 ans et interdit le recrutement obligatoire de tout enfant.

La nature hybride des nombreuses dispositions relatives au recrutement et à *l'utilisation d'enfants soldats garantit leur applicabilité dans toute situation (en temps de conflit armé comme en temps de paix) et à toute personne (indépendamment de sa nationalité). Cependant, un certain nombre de difficultés juridiques demeurent. La première a trait à la nature fragmentée du droit relatif au recrutement et à la participation d'enfants aux hostilités. Il existe une norme minimale d'application générale qui est communément considérée comme étant celle contenue dans le premier PA et la CDE, mais au-delà de cette norme, les choses sont bien plus fragmentées. La deuxième difficulté concerne l'applicabilité des dispositions et plus particulièrement la question de savoir à qui elles s'adressent. Selon la conception généralement admise, le droit international humanitaire lie toutes les parties à un conflit tandis que les traités relatifs aux droits de l'homme ne lient que les Etats parties. Ceci est reflété dans l'article 4(1) du Protocole facultatif qui dispose que « Les groupes armés qui sont distincts des forces armées d'un Etat ne devraient en aucune circonstance enrôler ni utiliser dans les hostilités des personnes âgées de moins de 18 ans ». L'utilisation du mot « devraient » plutôt que « doivent » suggère que cette disposition est indicative plutôt qu'obligatoire. Cette conclusion est renforcée par l'article 4 (2) qui donne aux Etats la responsabilité de prendre* « *toutes les mesures possibles pour empêcher l'enrôlement et l'utilisation de ces personnes* ». *Enfin, la troisième difficulté a trait* à la signification exacte de la notion de participation aux hostilités. *L'interdiction sous le Statut de Rome d'utiliser des enfants afin de les faire* « *participer activement* » *à des hostilités est considérée comme allant au-delà de l'interdiction de les faire participer directement* » *aux hostilités.*

I have been asked to speak about the protection of children against recruitment and participation in hostilities: International Humanitarian Law and Human Rights Law as complementary legal frameworks. To begin with, however, I have to say that it is not how I would frame the issue myself because in the particular instance of the law regulating the recruitment and use of child soldiers, I do not think it helps to contrast two bodies of law. Rather, what has developed is a hybrid, taking characteristics from both International Humanitarian and Human Rights Law, both to its benefit and to its detriment. Let me explain.

If we go back to 1949, there is very little in the Geneva Conventions (GC) concerning the recruitment and use of child soldiers. The fourth Geneva Convention has a number of provisions relating to children and, although there is no express definition, age 15 does appear to be set

as the end of childhood.[1] However, the only provision dealing specifically with child recruitment is in Article 50, which, in cases of belligerent occupation, prohibits the occupying power from enlisting children 'in formations or organisations subordinate to it'. To Article 50 we can add Article 51, which prohibits the conscription of protected persons into an occupying power's armed forces and any pressure or propaganda aimed at securing the voluntary enlistment of such persons. Moreover, we get an idea of the purpose behind the two provisions when we look at Pictet's commentary, which states: 'The prohibition in paragraph 1 [of Article 51] is not new, since a basic principle, universally recognised in the law of war, strictly prohibits belligerents from forcing enemy subjects to take up arms against their own country'.[2]

Article 51's prohibition of the recruitment of children into formations and organisations subordinate to an occupying power (which, given the historical context, would appear to refer, in particular, to youth movements of an ideological character, such as those established in a number of countries under German occupation in World War II, the Luxemburger Volksjugend being one example) should thus be read not so much as a provision protecting children *qua* children but as protected persons, and, indeed, as protecting contracting parties' sovereign rights to their nationals' allegiance. Pictet's Commentary also states that GC IV 'remains faithful to a recognised principle of international law: it does not interfere in a State's relations with its own nationals.'[3]

Therefore, when the recruitment and use of child soldiers was regulated in the two Additional Protocols (AP) of 1977 something new was happening. AP I provides that: 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces (...)[4]'

AP II states that 'children who have not attained the age of fifteen years shall neither be recruited into the armed forces or groups nor allowed to take part in hostilities',[5] AP I is clearer ('Parties to the conflict shall (...) refrain from recruiting them into their armed forces (...)') but both provisions are directed principally at the regulation of the recruitment by parties to conflicts into their own forces, with no restriction of nationality or allegiance. From the

---

1 When an age limit is given in GC IV, it is set at 15: see Articles 14, 23, 24, 28 and 50, Geneva Convention (IV) relative to the Protection of Civilians in Times of War of August 12, 1949, 75 UNTS 973 (1950).

2 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, vol. IV (1958), p. 292.

3 Ibid, p. 46.

4 Article 77(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (1977).

5 Article 4(2)(c), ibid.

beginning, then, I would argue that provisions in International Humanitarian Law concerning the recruitment and use of child soldiers have been more akin to Human Rights Law than to the law of armed conflict as traditionally conceived.

Indeed, this affinity has been reflected in the way in which the law has developed since, which has been largely within the corpus of human rights treaties. The 1989 Convention on the Rights of the Child (CRC), in including a provision on the recruitment and use of child soldiers, largely followed the wording in AP I. The CRC provides, *inter alia*, that States parties 'shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities' and 'shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.'[6] In 1999, the International Labour Conference of the International Labour Organisation (ILO) adopted ILO Convention 182 on the Worst Forms of Child Labour, which prohibits the forced or compulsory recruitment of children (that is, all persons under 18) for use in armed conflict.[7] One year later, in 2000, the United Nations (UN) General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The Protocol prohibits States parties from accepting the voluntary enlistment of children under the age of 16 and prohibits the compulsory recruitment of all children.[8] States parties to the Optional Protocol are also required to take all feasible measures to keep all children from directly participating in hostilities.[9] Action has also been taken at the regional level. The African Charter on the Rights and Welfare of the Child, adopted in 1990, requires States parties to take all necessary measures to ensure that no child takes a direct part in hostilities and refrain from recruiting any children into their armed forces.[10] So international law has moved towards a "straight-18" position, if only at treaty level.

Looking at the matter from another perspective, the origins of the regulation of children's participation in armed conflict in International Humanitarian Law have been recognised, albeit not without some reticence. This is the recognition of the recruitment of children under 15 and their use to participate actively in hostilities as a war crime; a war crime, of course, being a serious violation of the laws and customs of war (that is, a breach of International Humanitarian Law) incurring individual criminal responsibility. During the negotiations of

---

6 Article 38, Convention on the Rights of the Child, 1577 UNTS 3 (1989).

7 Articles 1, 2 and 3(a), ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, (1999) 38 ILM 1207.

8 Articles 2 and 3, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (2000) 39 ILM 1285.

9 Article 1, ibid.

10 Article 22, African Charter on the Rights of Welfare of the Child, OAU Doc. CAB/LRG/24.9/49 (1990).

the Rome Statute of the International Criminal Court, at least one State, the United States of America (USA) stated that it saw the prohibition of child recruitment as belonging to the corpus of human rights rather than humanitarian law.[11] When drafting the Statute of the Special Court for Sierra Leone, the UN Secretary-General stated that 'While the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused'.[12]

The Secretary-General also referred to the 'the doubtful customary nature of the International Criminal Court (ICC) Statutory crime'.[13] However, the Security Council took another view[14] and the Appeals Chamber of the Special Court, in *Prosecutor v. Norman* held (albeit, I would say, on dubious premises) that the crime had enjoyed customary status at least from the beginning of the Court's temporal jurisdiction in November 1996.[15] Regardless of the accuracy of the Appeals Chamber's conclusions, the opinion of the Security Council (a number of whose members were and are still not parties to the Rome Statute), coupled with the widespread ratification of the Rome Statute (which describes the war crimes within its jurisdiction as crimes 'within the established framework of international law'[16]) and, indeed, the USA's criminalisation of the recruitment and use of child soldiers in the same terms under its domestic law,[17] lead to the conclusion that the Rome Statute's provisions reflect contemporary customary law.

Therefore, it might be said that we have the best of both worlds. The various provisions' hybrid nature guarantees their applicability in all situations (both during armed conflict and

---

11 See Herman von Hebel and Daryl Robinson, "Crimes within the Jurisdiction of the Court", in: Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 117.

12 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000), paragraph 17.

13 Ibid, paragraph 18.

14 See Letter 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, p. 2, where the Council requested that the relevant provision of the draft Statute be amended to mirror that in the Rome Statute 'so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community'.

15 *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR729E, Appeals Chamber, Special Court for Sierra Leone, decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004. For commentary, contrast Alison Smith, 'Child Recruitment and the Special Court for Sierra Leone" (2004) 2 in: *JICJ 114* with Matthew Happold, "International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision" in: *Prosecutor v. Samuel Hinga Norman* (2005) 18 Leiden JIL 283.

16 Articles 8(2)(b) and 8(2)(e), Rome Statue of the International Criminal Court, 2187 UNTS 90 (1998).

17 The Child Soldiers Accountability Act 2008, Public Law No. 110-340.

during peacetime) and to all persons (regardless of nationality or allegiance). Moreover, their enforceability is ensured by the criminalisation of their breach. However, a number of legal difficulties do remain.

The first concerns the fragmented nature of the law on children's recruitment and participation in hostilities. There is a generally applicable minimum standard, which is usually said to be that set out in AP I and the CRC (to whom all States in the world except Somalia, South Sudan and the USA are parties) but beyond that matters are much patchier. AP II has 167 parties, the ILO Convention 182 has 177, the Optional Protocol to the CRC 152, and the African Charter 45.

The second difficulty concerns the applicability of the provisions; that is, to whom they are directed. The general view is that whereas International Humanitarian Law binds all parties to conflicts, human rights treaties only address themselves to their State parties.[18] This is reflected in Article 4(1) of the Optional Protocol, which states that 'Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'.

The use of the word 'should' rather than 'shall' suggests that the provision is hortatory rather than obligatory, a conclusion reinforced by Article 4(2), which puts the onus on States by requiring parties to the Protocol to 'take all feasible measures to prevent such recruitment and use', including by criminalising such conduct under domestic law.

Both these problems have, however, been ameliorated by the Security Council's activities on the theme of children and armed conflict. In assembling his first list of parties to conflicts recruiting or using children in violation of the international obligations applicable to them, the Secretary-General stated that

> 'The conduct of non-State armed groups was assessed in accordance with the widely accepted minimum international standard that children under age 15 shall not be conscripted or enlisted into armed forces or groups or used by them to participate actively in hostilities in either international or internal armed conflicts. This standard echoes the Convention on the Rights of the Child, Additional Protocol II to the Geneva Conventions, the Rome Statute of the International Criminal Court, and the Statute of the Special Court of Sierra Leone. In States that have ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, non-State armed

18 See Liesbeth Zevgeld, *The Accountability of Armed Opposition Groups in International Law* (2002) but contrast Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006).

groups are held to that higher standard, prohibiting all recruitment and use of children under 18'.[19]

The Council and its Working Group on Children and Armed Conflict have followed this view, and no State has dissented from it. One might say that there has been subsequent agreement that Article 4 of the Optional Protocol does bind non-State belligerents. Again, however, we see evidence that the regime governing children's participation in armed conflict is of a hybrid nature.

The third difficulty, however, is displayed in the Secretary-General's statement and is an issue already addressed in Madame Beerli's keynote address yesterday. Reference is made to children's 'active participation' in hostilities which, it is said, echoes the standard in the Rome Statute[20] and that of the Special Court for Sierra Leone[21] but also that in the Convention on the Rights of the Child and Additional Protocol II. However, the Convention requires only that all feasible measures be taken to ensure that under-15-year-olds do not take a direct part in hostilities, whilst AP II prohibits under-15s taking part in hostilities at all. Further, the criminalisation of the use of children to participate actively in hostilities in the Rome Statute (and the Statute of the Special Court for Sierra Leone) is said to go beyond prohibiting their use directly to participate in hostilities.[22] Indeed, it was even argued by Judge Odio Benito in her separate and dissenting opinion in *Prosecutor v. Lubanga* that the majority of the trial chamber erred by not I do not want to go here into an exegesis of the various treaty provisions and their inter-relationship (although I would say that Judge Odio Benito was plainly wrong). Nevertheless, I do want to make a few comments. First, I am not sure that the conflict is not largely a false one. Looking at the definition of direct participation in hostilities given in the ICRC's Interpretative Guidance, it would seem to cover most of the specific instances of active participation found by the Court in the *Lubanga* judgment.[23] In addition, even if an under-15-year old is not used actively to participate in hostilities, this does not mean that his or her recruiter's conduct is lawful. Recruitment alone is criminal; so there exists no legal *la-*

---

19 Report of the Secretary-General on Children and Armed Conflict, UN Doc. S/2002/1299 (26 November 2002), paragraph 31.

20 Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) Rome Statute, op. cit.

21 Article 4.c, Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138.

22 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paragraph 627.

23 See the *Lubanga* judgment, op. cit., paragraphs 821- 77, and 915, and Recommendation V, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

cuna. Second, however, the real reason why the distinction has been drawn is that, on the one hand, in order for such conduct to be criminal it has been necessary to categorise it as a war crime but, on the other, it has increasingly been considered that the categories derived from International Humanitarian Law do not cover all harmful instances of children's associations with armed forces and groups. To put it simply: it is not just as potential objects of enemy attack that child soldiers are threatened; they also suffer at the hands of their comrades and commanders. Hence the attempts, from a children's rights (or at least a children's welfare) perspective, to expand the scope of the crime, through a wider notion of what active participation in hostilities might mean, to cover as many such situations as possible.

In this instance, I think we do see a tension between the perspective of International Humanitarian Law and human rights thinking. In general, however, a coherent body of law has emerged to regulate children's recruitment and participation in hostilities. The fragmentation arising out of a plethora of treaties has been ameliorated by nearly all States' adhesion to the Convention on the Rights of the Child and by the promulgation of general (one might say customary) standards by the Security Council and its Working Group, which have also made clear that the relevant rules apply to all parties to conflict. One might consider that those rules set too low an age or are too narrow in their scope. The first criticism is about a lack of political will, not a legal failure. We have not yet attained a "straight-18" consensus. The second has seen a widening of the prohibition of under-15s use to participate in hostilities, albeit in a manner about which legal purists (such as myself) might complain. Moreover, increasingly we see international action to enforce the rules, most publically through the work of the International Criminal Court, more consistently and (I would argue) effectively through that of the Security Council's Working Group on Children and Armed Conflict.[24]

24 On which see Matthew Happold, "Protecting Children in Armed Conflict: Harnessing the Security Council's 'Soft Power'" (2010) 43 in: *Israel Law Review* 360", and Bo Viktor Nylund, "From Standard-Setting to Implementation: The Security Council's Thematic Focus on Children and Armed Conflict" (2011) 5 in: *HR & ILD 110*.

THE LUBANGA CASE – A CRITICAL ANALYSIS

Tomaso Falchetta
Child Soldiers International

Résumé

Le 14 mars 2012, la Cour pénale internationale (CPI) a déclaré Thomas Lubanga Dyilo coupable d'avoir procédé à l'enrôlement et la conscription d'enfants de moins de 15 ans et de les avoir fait participer activement à des hostilités dans le contexte des faits survenus en Iturie, en République démocratique du Congo, en 2002-2003.

L'interdiction de recruter des enfants de moins de 15 ans et de les faire participer directement aux hostilités est bien établie en droit international conventionnel et fait désormais partie du droit international coutumier. Cette interdiction vise à protéger les enfants non seulement de violences et blessures pendant les hostilités, mais également du traumatisme potentiel pouvant accompagner le recrutement.

Qu'est-ce qui constitue un recrutement dans des groupes armés ?
Le Statut de Rome pose parmi les crimes de guerre engageant la responsabilité pénale individuelle « le fait de procéder à la conscription ou à l'enrôlement d'enfants de moins de 15 ans » dans des forces armées ou dans des groupes armés ainsi que le fait de « les faire participer activement à des hostilités ». Un seul de ces trois faits suffit à constituer une infraction. Il n'est pas requis que le recrutement d'enfants ait pour but de les utiliser afin de participer aux hostilités, et inversement l'utilisation d'enfants afin de les faire participer aux hostilités ne requiert pas qu'ils aient été préalablement recrutés.

Selon la CPI, la différence entre l'« enrôlement » et la « conscription » réside dans le fait que la conscription contient un élément de contrainte qui n'est pas présent en cas d'enrôlement. Selon la jurisprudence du Tribunal spécial pour la Sierra Leone (TSSL), le consentement de l'enfant ne constitue pas un moyen de défense légal valable contre l'enrôlement. La CPI semble quant à elle suggérer que le consentement de l'enfant ne peut jamais être valable en raison de l'immaturité de l'enfant et du contexte dans lequel le recrutement a lieu.

Les termes « conscription » et « enrôlement » sont aisés à comprendre lorsqu'ils s'appliquent au recrutement dans les forces armées d'un Etat. L'adhésion aux forces armées d'un Etat est généralement définie dans le droit national et s'exprime par une intégration formalisée dans des unités formellement reconnaissables. En ce qui concerne les groupes armés, la situation peut

être très différente dès lors que ces derniers n'ont souvent pas de structure d'adhésion formalisée équivalente à celle des forces armées de l'Etat. Dans l'affaire des Forces de défense civile (Civil Defence Forces – CDF), le TSSL a souligné que le recrutement doit être compris au sens large comme incluant toute conduite acceptant l'enfant comme membre des milices. En effet, le recrutement d'enfants dans un groupe armé peut ne pas être constitué par un seul acte, mais par un processus impliquant plusieurs actes, y compris par exemple par des formes d'initiation ou d'entraînement militaire.

La nature continue du crime de recrutement d'enfants

La CPI a conclu que les crimes de conscription et d'enrôlement sont commis dès lors qu'un enfant de moins de 15 ans est incorporé dans une force ou un groupe armé ou qu'il en rejoint les rangs, avec ou sans contrainte. De nature continue, ces infractions ne cessent de l'être que lorsque l'enfant atteint 15 ans ou quitte l'armée ou le groupe concernés. Ceci soulève la question de savoir si la responsabilité pénale peut être attribuée non seulement à l'individu ayant recruté l'enfant mais également à tout commandant subséquent responsable d'un groupe armé comptant des enfants dans ses rangs. La CPI semble suggérer que lorsqu'un nouveau commandant prend le contrôle d'un groupe armé, il peut être pénalement responsable s'il savait ou aurait dû savoir que des enfants de moins de 15 ans faisaient partie de ce groupe et n'a pas agi immédiatement afin de les en écarter.

Que faut-il entendre par participation active aux hostilités ?

Selon la CPI, une « participation active » n'est pas synonyme de « participation directe » aux hostilités mais concerne une grande variété d'activités liées aux hostilités. Le TSSL considère quant à lui que tout travail ou support qui permet ou aide les opérations militaires dans un conflit constitue une participation active. Ainsi, selon le TSSL, la collecte de renseignements, la transmission de messages, l'acquisition et/ou le transport d'armes, de munitions ou de nourriture, ou encore servir de leurre ou de bouclier humain constituent des exemples de participation active.

Conclusion

Les juridictions pénales internationales ont pris d'importantes mesures afin de traduire en justice les personnes responsables de recrutement d'enfants, envoyant ainsi le signal important de l'absence d'impunité pour ces crimes. Malheureusement, la réalité au niveau national ne suit pas les progrès des tribunaux internationaux dans la lutte contre l'impunité. En effet, de nombreux Etats dans lesquels des rapports crédibles font état de l'utilisation d'enfants soldats, n'érigent pas le recrutement ou la participation d'enfants aux hostilités en crime dans leurs législation pénale nationale. En outre, même dans les Etats ayant mis en place une législation adéquate, l'investigation et les poursuites judiciaires sont presque inexistantes.

1. Introduction

Child Soldiers International (formerly known as the Coalition to Stop the Use of Child Soldiers) is an international human rights research and advocacy organisation. We seek to end the military recruitment and the use in hostilities, in any capacity, of any person under the age of 18 by State armed forces or non-State armed groups. We advocate for the release of unlawfully recruited children, and promote their successful reintegration into civilian life.

A key component of our work is to advocate for the accountability of those who recruit children or use them in hostilities in violation of international law.

This presentation gives a brief overview of the development of international jurisprudence concerning the war crime of conscripting, enlisting or using children under the age of 15 to participate actively in hostilities. The focus will be on the March 2012 *Lubanga* judgment by Trial Chamber I of the International Criminal Court (ICC), but reference will also be made to the jurisprudence of the Special Court for Sierra Leone, and to International Humanitarian Law (IHL) and human rights standards related to child soldiers. The presentation ends with some brief observations about criminal accountability at national level.

2. The Lubanga Case

On 14 March 2012 Trial Chamber I of the ICC found Thomas Lubanga Dyilo guilty of conscripting and enlisting children into the Force Patriotique pour la Libération du Congo (FPLC) and using them to participate actively in hostilities during the conflict in Ituri, in the north east of the Democratic Republic of the Congo (DRC), in 2002-2003.

The case is a first in many ways: Mr Lubanga was the first person arrested and transferred to the ICC and the first convicted. The defence appealed against the conviction. Other appeals are also pending on the decisions on reparation and sentence.

There are many aspects of the Lubanga case that could be discussed: from the prosecution decision to limit the charges to child recruitment and use in hostilities to the treatment of child witnesses during the trial; from the prosecutor's reliance on intermediaries to the issue of disclosure. Some of these procedural issues raised serious concerns about the trial and almost led to its collapse.

However, this presentation will focus on the conviction judgment itself, and in particular on some of the elements of *the war crime of conscripting or enlisting children under the age of 15 into armed groups, or using them to participate actively in hostilities.*

3. The War Crime of Conscripting or Enlisting Children under the Age of 15 into Armed Groups, or Using them to Participate Actively in Hostilities

The Appeals Chamber of the Special Court for Sierra Leone held that recruitment of children under 15 years and their use in hostilities has been a crime under customary international law since at least November 1996. Justice Robertson dissented with regards to the non-forcible enlistment of children.[1] But in any case, since the adoption of the Rome Statute in July 1998, there is no longer any doubt that recruiting children under 15 years, either forcibly or voluntarily, or using them to participate in hostilities is a crime under customary international law, a point confirmed in the Study on Customary International Humanitarian Law by the International Committee of the Red Cross (ICRC).[2]

The war crime should not be read in isolation. One needs to look at the range of provisions of IHL and Human Rights Law that relate to the protection of children from the risks of involvement in armed conflict. Prohibition of child recruitment or involvement in hostilities can be found in treaty and customary IHL, and in Human Rights Law, notably the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC).

It is beyond the scope of this presentation to illustrate all such norms. Suffice to say that these provisions (IHL and human rights standards related to child soldiers) recognise the fact that children are particularly vulnerable and require privileged treatment in comparison with the rest of the civilian population.

These provisions have a common rationale: protecting children not only from violence and injuries during fighting, but also from the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).

It is with this rationale in mind that the following observations are made on the *Lubanga* judgment.

---

1 Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman, Dissenting Opinion of Justice Robertson*, Case No. SCSL-04-14-AR72(E), 31 May 2004.

2 Rule 156, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, 2006.

4. What Constitutes Recruitment into Armed Groups?

Article 8(2)(e)(vii) of the Rome Statute reads: 'Conscripting *or* enlisting children under the age of fifteen years into armed forces or groups *or* using them to participate actively in hostilities'.

The emphasis on the word *'or'* is because the Trial Chamber interpreted it to mean that the three conducts – i.e. conscripting, enlisting or using children in hostilities – are separate offences, or, as some commentators have suggested, the realisation of one of these conducts suffices for the realisation of the offence.[3]

It follows that it is *not required* that the child recruitment was done for the *purpose of using them to participate in hostilities* and, conversely that the use of the child to participate in hostilities does not require that they had been previously recruited.

Bearing in mind the above, the Trial Chamber goes on to explain *the difference between conscription and enlistment*. In doing so, it notes that conscription contains an element of compulsion which is not required in enlistment.

In addition, following the Special Court's jurisprudence,[4] it notes that a *child's consent* does not provide a valid defence to enlistment, although the manner of recruitment may be considered for sentencing and reparation purposes.

This raises an interesting question: is consent of the child irrelevant because a child under 15 years of age cannot give valid, informed consent to joining an armed group in the context of armed conflict? Or is it that the *actus reus* of 'enlistment' already implies consent?

The Trial Chamber following the opinion of experts, including the Special Representative of the Secretary-General on children and armed conflict,[5] and the jurisprudence of the Special Court for Sierra Leone seem to suggest that such consent can never be valid, because of the immaturity of the child and the context where such recruitment occurs. Some commentators

---

3 Kai Ambos, "The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues", in: *International Criminal Law Review*, 12 (2012) 115-153, and Roman Graf, "The International Criminal Court and Child Soldiers, an Appraisal of the Lubanga Judgment", in: *Journal of International Criminal Justice*, 2012.

4 Special Court for Sierra Leone, Civil Defence Forces (CDF) Appeal Judgment, paragraph 139.

5 Written submission of the United Nations (UN) Special Representative of the Secretary-General on Children and Armed Conflict, submitted in application of Rule 103 of the Rules of Procedure and Evidence,T-223-ENG.

noted instead how enlistment already in its definition presupposes consent and as such it is a crime to enlist a child even with their valid consent.[6]

On a separate, related issue, the Trial Chamber is silent: *what constitutes recruitment into armed groups?*

The Trial Chamber refers to the ordinary meaning of the terms 'enlistment' and 'conscription'. These are easily understood when applied to recruitment into State armed forces. Membership of State armed forces is generally defined in domestic law and expressed through formal integration into recognisable units. Once someone is recruited into a State armed force, they are members of such a force, irrespective of the function that they perform.

With armed groups, the situation can be quite different. Armed groups often do not have a formalised membership structure equivalent to that of State armed forces. The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities notes, for example, how membership of armed groups 'is rarely formalised through an act of integration other than taking up a certain function for the group.'[7]

The Special Court for Sierra Leone has reflected on this issue. In the Civil Defence Forces (CDF) Appeal Judgment it noted that recruitment 'cannot narrowly be defined as a formal process' and should be considered 'in the broad sense as including any conduct accepting the child as part of the militia.'[8] Indeed, recruitment of children into an armed group may not be a single act, it may be a process involving several acts, including for example forms of initiation or military training.[9]

This understanding of recruitment reflects the practices of many armed groups and offers broader protection to children from the risks of association with armed groups.

5. The Continuous Nature of The Crime of Recruitment of Children

The Trial Chamber found that the offences of conscripting and enlisting 'are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group' and that

---

6 Kai Ambos, op.cit.

7 Melzer, N (2009), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, International Committee of the Red Cross.

8 Special Court for Sierra Leone, *Prosecutor v. Fofana and Kondewa (CDF Case)*, Appeal Judgment, 28 May 2008, paragraph 144.

9 See Judgment, *Fofana and Kondewa ('CDF')* (SCSL-04-14-A), Appeals Chamber, 28 May 2008, Partially Dissenting Opinion of Honourable Justice Renate Winter.

they 'are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.'

This raises the question of whether criminal responsibility can be ascribed not only to the individual who recruits the children but also to any subsequent commander responsible for armed groups with children in their ranks.

This question relates directly to the complex nature of contemporary armed conflict. Such conflicts are often characterised by the proliferation of armed groups, quick and frequent changes of armed groups' commanders as well as merging and splitting of factions.

It is in this context that the continuous nature of the offences of conscripting or enlisting children needs to be framed. Were criminal liability for the offence to attach only to the moment when recruitment took place it would not apply to commanders who took control of forces with children in their ranks.

The Trial Chamber does not explicitly address this issue when considering the elements of the war crime. Nevertheless, it gives some indication on it, in a finding of fact, where it notes that for events that took place prior to the period of the charges, the central issue is whether the perpetrator knew that children below the age of 15 who had been previously recruited would remain within the armed group.

The above suggests that when a new commander takes control of an armed group they could be held criminally responsible if they knew, or should have known, that children under the age of 15 were within the ranks of such forces, and did not act immediately to remove them. Moreover, that would hold true regardless of the commander's role in the initial recruitment. Therefore, as one commentator noted, retention of children in the armed group must be considered equivalent to recruitment.[10]

6. What Amounts to Active Participation in Hostilities?

The Lubanga judgment finds that 'participate actively in hostilities' is *not synonymous* with 'taking direct part in hostilities', but covers a *broader range of activities related to hostilities*.

The Trial Chamber bases its interpretation on the supporting rationale for the war crime, namely 'to protect children from the risks that are associated with armed conflict', and on the *travaux préparatoires* of the Rome Statute.

---

10 Roman Graf, op. cit.

It is also worth noting that the Special Court for Sierra Leone also adopted a broad interpretation of active participation when considering the war crime of using children under 15 years to participate actively in hostilities under Article 4(c) of its Statute. The Special Court Trial Chamber, in the Armed Forces Revolutionary Council (AFRC) case, stated that 'any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.'[11]

The Special Court also found that 'carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat'.

Some commentators have expressed concerns that this broad interpretation may have unintended, negative consequences. It may potentially lead to the loss of protection of civilian children from military attack.[12]

These commentators noted that for the purpose of the principle of distinction under International Humanitarian Law the terms 'active participation' and 'direct participation' in hostilities are considered synonymous. Hence, broadening the definition of what constitutes active participation might have the unintended consequence that civilians (including children) would lose their status of protected persons under International Humanitarian Law.

These concerns arise particularly from the fact that the Trial Chamber introduces *the test of 'potential target'* to define the scope of active participation in hostilities. While 'potential' target is not to be constructed as 'legitimate' or 'lawful' target, the reference to 'target' risks framing active participation within the International Humanitarian Law principle of distinction.[13]

To allay these concerns, one needs to look at the *rationale and the standards underpinning the war crime* of using children to participate actively in hostilities.

---

11 *The Prosecutor* vs. *Brima, Kamara and Kanu* (AFRC Case), 20 June 2007, paragraph 737.

12 Aptel, C. (2012), *Lubanga Decision Roundtable: the Participation of Children in Hostilities* (published on 18 March at <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities/>); and Urban, N. (2012), *Direct and Active Participation in Hostilities: the Unintended Consequences of the ICC's Decision in Lubanga* (published on 11 April at <http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/>)

13 See Roman Graf, op.cit.

The underpinning rationale is 'to protect children from the risks that are associated with armed conflict'. This is consonant to the rationale of the relevant norms of human rights and International Humanitarian Law noted earlier (Article 4 OPAC, customary IHL.)

This rationale supports an interpretation of 'active participation in hostilities' that covers the risks facing children in armed conflict, including those originating from being associated with their own armed groups.

Child soldiers are often required to perform a range of roles, switching from combat-related activities to support activities: they may be used in fighting but also as porters or to gather intelligence or as couriers. The broad range of functions performed by child soldiers is reflected in the *Paris Principles'* definition of a child associated with armed forces or armed groups:

> 'A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes. It does not only refer to a child who is taking, or has taken, a direct part in hostilities.'

By accepting that the rationale of protecting children from the risks of armed conflict is different from the rationale underpinning the principles of distinctions between combatants and civilians, it is possible to maintain a distinction between 'direct participation' (classically used to determine combatant status under International Humanitarian Law) and 'active participation' (the criterion for the use of children in hostilities.)

It follows that active participation of children in hostilities should be interpreted broadly, without conferring combatant status on those children.[14]

7. Conclusions

The concluding remarks are not strictly related to the *Lubanga* judgment, but more broadly on accountability for child recruitment or use in hostilities.

International criminal tribunals have taken very significant steps to bring to justice some of those responsible for child recruitment and use. The conviction of Lubanga was preceded by the conviction of other defendants by the Special Court for Sierra Leone for the crime of child recruitment and use. Then last month there was the confirmation of the conviction of Charles

14 Report of the UN Special Representative of the Secretary-General for children and armed conflict, UN Doc. A/67/256, 6 August 2012.

Taylor, including for his role in aiding and abetting the Revolutionary United Front (RUF) to recruit and use children. Other defendants have been charged for conscripting, enlisting or using children in hostilities by the ICC and their trials are pending.

These judgments have all contributed to an understanding of the war crime. They have also exposed the violence and trauma that child soldiers suffer, and they have – as is often repeated – sent a strong signal that perpetrators will be brought to justice and impunity for child recruiters will not prevail.

Regrettably, the reality at national level does not match the successes of the international tribunals to address such impunity.

As it is a crime under international customary law, States must enact *legislation to explicitly criminalise recruitment and use of children*.

A number of States have indeed done so and some (including Argentina, Burkina Faso, Chile, Colombia, DRC, Finland, Liberia, Lithuania, Norway, Panama, Portugal, Sri Lanka and Uruguay) have gone beyond the language in the Rome Statute by criminalising recruitment or use in hostilities of under-18s.

Others have incorporated the wording of the Rome Statute in their national criminal laws. But many – including States where there are credible reports of child soldiers such as the Central African Republic, Chad, Côte d'Ivoire, India, Libya, Somalia, Thailand, and Yemen – do not make child recruitment or use in hostilities a crime.

These shortcomings remain despite the consistent recommendations by the *Committee on the Rights of the Child* to explicitly criminalise recruitment and use of children in violations of the provision of OPAC. The ICRC has recently published a *Model Legislation* to criminalise child recruitment and use, and it is hoped that States that have not yet done so will use it to enact the necessary criminal legislation.

Lastly, even in those countries that have the necessary legislation, *investigation and prosecution have been almost totally absent*. In DRC, for example, despite some efforts to cease underage recruitment in State armed forces, there is still almost complete lack of accountability for suspected perpetrators of child recruitment and use.

So the "Lubanga effect" in national contexts remains largely absent. At Child Soldiers International we continue to advocate for effective investigation and prosecution at national level of those suspected of child recruitment and use in hostilities.

SESSION FOUR – RECRUITMENT AND OTHER ASSOCIATION OF CHILDREN WITH ARMED FORCES OR ARMED GROUPS

During the debate following the presentations of the fourth session, the audience raised five main issues.

1. Responsibility of Children Associated with Armed Forces

One of the speakers wondered about the responsibility of children who commit violations of IHL while associated with the armed forces of a party to the conflict.

A panellist replied that the extent to which child soldiers are responsible for their acts is an issue on which the law is not clear because the Convention on the Rights of the Child does not set a minimum age for criminal responsibility. It leaves it up to the States to establish a minimum age below which children will be presumed not to have the capacity to infringe the penal law. This has been elaborated upon by the Committee on the Rights of the Child but is still not clear. The Rome Statute for its part prevents the International Criminal Court (ICC) from prosecuting anyone under the age of 18. The panellist explained that there have been instances in which States have prosecuted children for their conduct during an armed conflict and gave the example of the trial of Omar Khadr, a former child soldier detained in Guantanamo.

2. Children Directly Participating in Hostilities

One of the speakers wondered whether children can be lawfully targeted by virtue of their direct participation in hostilities. Does the law, as it currently stands, adequately address that dimension? She recalled this was an issue in 2003 when the United States (U.S) forces were preparing to go to Iraq and issued guidance on how to deal with the possibility of being confronted with child soldiers.

A panellist replied that if children are members of the armed forces, they are lawful targets. He claimed that affirming that child soldiers cannot be targeted might encourage warlords to recruit children.

Another panellist underlined that when considering children engaged in fighting, the main question is how to deal with their detention rather than the issue of whether or not they constitute legitimate targets. Determining whether or not they are legitimate targets goes back to the question of whether or not they are taking a direct part in hostilities, which needs to be determined on a case by case basis. To address the issue of children detained, he argued that

one could look at the Convention on the Rights of the Child and the standards there in terms of detention as a measure of last resort and for the minimum possible time.

A panellist underlined the need to keep the rationale of the principle of distinction, when having to decide who is a lawful target, separate from the rationale of protecting children from participating in hostilities. Such an approach would provide further protection to children, he argued. While direct participation in hostilities for the principle of distinction refers to what the International Committee of the Red Cross (ICRC) has said in its Interpretative Guidance on the notion of direct participation in hostilities, when it comes to the issue of active participation in hostilities, it should be possible to consider a different range of activities.

3. Notion of Association with Armed Forces

One of the panellists explained that the term 'child soldiers' referred to in the Cape Town Principles was thought to be too narrow and was progressively replaced by 'children associated with armed forces and groups'. He explained that the Optional Protocol to the Convention on the Rights of the Child imposes a double standard by allowing voluntary recruitment of persons aged 16 and upwards into a State's national armed forces while at the same time prohibiting the recruitment, under any circumstances, of persons under the age of 18 years by armed groups. This double standard undermines the legitimacy of those standards, he argued.

A speaker underlined the problem posed by the broad definition of 'association with armed groups' in the Paris Principles which prohibits the mere presence of children within an armed group. This is problematic for many armed groups because it means that parents who want to fight have to abandon their children in an orphanage or with a relative. The speaker noted that while in the Cape Town Principles there was an exception for children accompanying armed groups as family members, there is no such exception in the Paris Principles.

Another panellist noted that in many conflicts involving State armed forces and armed groups, States have committed themselves, through a legally binding Declaration, to recruit only above the age of 18.

4. Comprehensive Approach to Dealing with the Issue of Child Soldiers

One of the speakers underlined the need to adopt a comprehensive approach when dealing with the issue of child soldiers. She stressed the need to ensure that during an armed conflict there is some form of education available for children (even if it is only on a part time basis) in order to avoid creating an entire generation that is illiterate and unschooled and therefore unemployable. The United Nations High Commission for Refugees (UNHCR) and other organisations delivering assistance to displaced populations must ensure that

something is done to occupy those above the age of seven in order to avoid their recruitment, she underlined.

A participant explained that with regard to the conflict in Syria, the European Union's (EU) humanitarian aid and civil protection directorate (Directorate-General for Humanitarian Aid – DG ECHO) has been providing assistance to children in refugee camps in Jordan and Turkey. However, the problem DG ECHO faces as a humanitarian donor is it has to focus on life saving needs. It therefore strives to have a complementary approach with the European Commission's Development and Cooperation Directorate-General so the latter would focus on education.

A panellist agreed that the issue of prevention of recruitment remains a very important one to be addressed. He explained that in 2012, Child Soldiers International produced a report to assist States, the United Nations and other bodies in assessing where and why children are at risk of being used in hostilities in armed forces for which States are responsible and to identify what measures can be taken to reduce these risks. Among those measures, he mentioned the extent to which States providing security sector assistance can encourage other States to implement measures to prevent recruitment into their own armed forces.

5. National Prosecution

One of the participants raised the issue of national prosecution of child recruitment and use. He noted that there are still many governments that have yet to pass legislation to explicitly criminalise child recruitment and use.

A panellist replied that, being an international crime, the recruitment of child soldiers can be prosecuted at national level even without relevant national legislation. He explained that some States have gone beyond the wording of the Rome Statute and have criminalised the recruitment of children under the age of 18. However, even where such legislation has been adopted, weak criminal justice systems and lack of political will mean that criminal investigations and prosecutions generally do not take place. Conversely, he cited Myanmar as an example of criminal accountability at national level where, despite the fact that the court system is lacking independence, there have been cases of disciplinary procedures against low ranking officials who were found responsible for recruiting and using children into the Myanmar State army.

Panel Discussion: Cross-border humanitarian aid

A wide range of questions and remarks followed this last session.

Political and Practical Rationality of Cross-Border Operations

A panellist explained that cross-border relief operations are a very ancient phenomenon. Almost all conflicts imply, in one way or another, cross-border activities. Cross-border operations have a practical rationality. The practical rationality is based on the right to assistance, which has to be as effective as possible. Cross-border operations also have a political rationality. From a concrete point of view, the place from which the assistance is provided inevitably has a political connotation. Assistance which has transited through a State capital, in the case of a NIAC, would appear as more suspicious in the eyes of the opposition than assistance arriving from a more neutral territory. Armed groups often refuse assistance provided from the territory controlled by the government out of fear that it would bring about a weakening of the front lines. While playing an important role, State sovereignty goes against the logic of the law of armed conflicts, which considers States not only as sovereign States but also potentially as a party to a conflict. The panellist underlined the need to establish a hierarchy between both rationalities.

Law Applicable to Cross-Border Operations

A panellist noted that there are different types of cross-border operations and that it is not the cross-border dimension *per se* that is problematic. What becomes problematic from a legal and operational point of view is cross-border operations carried out without the consent of all the requisite parties. First, she noted that legal arguments are not used for litigation in this particular context but rather serve as a background to negotiations which are likely to have an important number of political dimensions. Secondly, the law is not the only element to consider in these discussions: policy and operational considerations are equally, if not more, important. The lawfulness of a particular course of conduct in no way ensures the safety of relief operations or of the people seeking assistance. Thirdly, operationally, the repercussions of unauthorised relief operations on activities in the rest of the affected State have to be considered. Fourthly, more generally, consent to relief operations is one of the most politically sensitive issues in humanitarian action. The positions adopted in one context are likely to have repercussions in other contexts elsewhere, not only operationally but also at a policy level in discussions within the United Nations (UN) and beyond. For these reasons, the decision made by most humanitarian organisations on whether or not to carry out unauthorised cross-border operations tend to be a policy decision informed by the law.

Against this background, the panellist explained that the basic legal framework for the provision of legal assistance is essentially the same in international armed conflicts (IAC) and non-international armed conflicts. The primary responsibility for meeting the needs of civilians lies with the party that has control over them. If that party is unable or unwilling to meet those needs, States and humanitarian organisations can offer to carry out relief operations that are humanitarian and impartial in character and conducted without adverse distinction. The primary element of complexity in these otherwise simple rules is the requirement of consent. While States and organisations may offer their services, consent of the affected State is required before relief operations may be implemented. This is stated clearly and expressly in both Article 70 of the first Additional Protocol to the Geneva Conventions (AP I) for IAC and Article 18.2 of the second Additional Protocol to the Geneva Conventions (AP II) for NIAC. Despite this clear requirement of consent, it is generally accepted that parties do not have an absolute and unfettered freedom to refuse consent to relief actions. They can only do so for valid reasons and consent may not be arbitrarily denied or withheld.

Arbitrary Withholding of Consent

A panellist explained that two conditions must be fulfilled before the issue of consent even arises. First, relief must be necessary. Civilians must be inadequately provided with essential supplies and the party in whose control they are unable or unwilling to provide this necessary assistance. Second, the organisation offering its services must provide the assistance in a principled manner. If these two conditions are fulfilled, consent may not be arbitrarily withheld.

The panellist noted that, despite it being at the heart of the rules regulating humanitarian assistance, there is little clarity as to what amounts to arbitrary withholding of consent. There is no definition or guidance in any treaty and, to date, the issue has not been addressed by any national or international tribunal or human rights mechanism. It is extremely difficult to determine in a particular situation, both legally and factually, whether consent is being withheld for valid or for arbitrary reasons. Commentators have put forward a number of valid and arbitrary reasons. Suggested valid reasons include imperative considerations of military necessity, for instance if the humanitarian personnel could hamper military operations or are suspected of unneutral behaviour. Possible arbitrary reasons include a desire to weaken the resistance of the adversary by depriving the civilian population of means of subsistence. The most accepted example is the withholding of consent that violates the State's other international obligations, for instance in situations where the civilian population is facing starvation. Another example of an arbitrary reason is the withholding of consent to medical relief operations on the ground that the medical supplies or equipment could be used to treat wounded enemy combatants. Withholding consent for such a reason would be a violation of

the fundamental rule of IHL according to which the wounded and sick, including the enemy, must receive to the fullest extent possible the medical care they need. No distinction may be made on any grounds other than medical ones. Finally, another possible example is the withholding of consent that is likely to endanger the fundamental rights of the affected civilians. The most relevant rights in this regard are the right to life, the realisation of economic and social rights such as the right to an adequate standard of living, and the right to be free from hunger. Limited guidance however exists as to the precise circumstances of when withholding consent to relief operations would violate these human rights.

Whose Consent is Required for the Relief Operations?

A panellist explained that in IAC, the position is relatively uncontroversial. Article 70 of AP I requires the consent of parties concerned in the relief action. Most important is the consent of the State party to the conflict in whose territory operations have to be carried out. The consent of the States from whose territory a relief action is being undertaken – the third, neighbouring States – is also needed. As regards NIAC, the position is far more complex. Common Article 3 provides that an impartial humanitarian body may offer its services to the parties to the conflict, suggesting the possibility of either party providing consent. Article 18 of AP II, on the other hand, requires the consent of the High Contracting Party concerned. The question here is: who is the High Contracting Party concerned? The panellist argued that Article 18 refers to the State in whose territory the operations are taking place. However, others have suggested that this State is only concerned, and therefore its consent is only necessary, if the operations have to transit through territory within its control. If, somehow, the operations can reach the opposition-held territory without crossing the territory of the affected State, its consent is not required and only the consent of the opposition would be required. The panellist argued that this interpretation is very difficult to reconcile with the reality that affected States consider themselves extremely affected by any proposed operation within their territory and it would also mean that, in such circumstances, there would be no High Contracting Party concerned. The panellist wondered about the interplay between common Article 3 and Article 18 of AP II.

Another panellist explained that cross-border aid is in fact always negotiated with the authorities controlling the territory where the action is taking place for reasons of both security and operationality, and because one can never act against the will of those in place.

Consequences of a Denial of Consent

Are unauthorised operations lawful? A panellist replied that this question is quite confusing because the answer depends on who provides the assistance. States have to comply with the rules of international law, including the prohibition of interference and the rules protecting

State sovereignty and territorial integrity. Therefore, if the provider of the assistance without consent is a State, the assistance could be qualified as an interference or intervention in the internal affairs of a State. Non-State organisations providing assistance without consent, on the contrary, could not be accused of interference as the prohibition of interference does not apply to them. Non-governmental organisations however have to comply with national law. By entering a State's territory without the formal consent of the government, non-governmental organisations could be accused of illegal entry into the territory.

Another panellist noted that if consent is withheld, it is only in extremely rare circumstances that the law foresees lawful unauthorised operations. The violation of territorial integrity that unauthorised operations entail would have to be justified either as a counter-measure or as a case of necessity, which might only be possible in extreme circumstances. In addition, the absence of consent could be circumvented if the UN Security Council, acting under Chapter VII of the UN Charter, imposed a relief operation. The panellist explained that there have been instances in which the Security Council has taken measures under Chapter VII in relation to relief operations, namely in Bosnia, Somalia and northern Iraq but it never imposed such operations. Rather, it authorised taking measures that enables the carrying out of relief operations by others. In other words, it authorised the use of force to facilitate and enable relief operations. This has not happened in relation to Syria, she noted.

On the specific issue of how to provide assistance in opposition-held areas if the affected State is refusing to give its consent, a panellist explained that, UN humanitarians have been trying to find alternatives by exploring the possibility of providing indirect assistance to organisations operating in a country. From a legal point of view, this raises few concerns in terms of violation of territorial integrity. In terms of sovereignty interference, the International Court of Justice declared that the provision of humanitarian assistance to those operating inside does not constitute an unlawful interference.

Operational Limits of Cross-Border Humanitarian Aid

Giving the example of Syria, one of the panellists dwelled on the operational limits of cross-border humanitarian aid. He noted that the International Committee of the Red Cross (ICRC) always seeks the consent of all belligerents in full transparency because by doing so it can have a better impact than if it were to carry out cross-border operations without consent. He explained the difficulties faced by the ICRC in Syria: difficulties due to the Government which imposes administrative barriers and difficulties, even once the consent has been obtained, in reaching the people who often find themselves in besieged areas. Even though the ICRC has been able to increase its operations in different regions of the country, huge difficulties remain and the lack of access to detainees is perhaps the most pressing issue. The panellist

further explained that in Syria, the population is concentrated in cities which are highly volatile: in some cities a street will not be controlled by the same group during the morning as during the evening, which gives rise to an increased instability. In addition to the difficulties in obtaining the consent of the Syrian government, it is also extremely difficult to obtain the consent of the neighbouring country in order to deploy massive operations from their territory. In the absence of a Security Council resolution, neighbouring countries are reluctant to facilitate openly and actively major relief operations.

The panellist underlined the importance to strive for cross-border operations with the consent of all parties concerned. It is extremely important that effective political pressure be exercised in order for the belligerents to allow access to humanitarian aid, whether it is across the front lines or international borders.

Concluding Remarks and Closure

CONCLUSIONS DU COLLOQUE DE BRUGES 2013

Christine Beerli
Vice-Présidente du CICR

Nous voici arrivés à la fin de ce 14ème Colloque de Bruges qui fut très riche en idées et en débats. Il me revient maintenant de conclure et d'essayer d'en résumer l'essentiel, ce qui n'est pas chose aisée au vu de la densité et la qualité des échanges ainsi que la diversité des sujets.

The first session was dedicated to vulnerabilities in detention. The first speaker recalled that the International Committee of the Red Cross (ICRC) had received, by virtue of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), an invitation to pursue further research, consultation and discussion in cooperation with States to strengthen the protection of persons deprived of their liberty in non-international armed conflicts. He highlighted the four areas that are currently the object of discussions, which are: 1) the material conditions of detention; 2) the needs of particularly vulnerable groups in detention; 3) arbitrary deprivation of liberty and, 4) questions related to transfer of detainees. For each of these areas, gaps in International Humanitarian Law (IHL) have been identified and difficult questions have arisen, such as whether the same standards should apply in all types of detention, or how one articulates comprehensive standards including new categories of vulnerable persons. The ICRC is looking for answers to these various difficult questions in further consultations with States, with the objective of proposing meaningful recommendations at the next International Conference.

The second speaker focused on the question as to whether International Human Rights Law could serve to fill the gaps in IHL concerning detention in non-international armed conflicts. In that respect, it was recalled that Human Rights Law does not generally bind non-State players; with the exception, however, that where non-State armed groups exercise control over a territory and have governmental functions, they can be said to have human rights responsibilities. Human Rights Law remains however important when it comes to detention by States. It was argued that human rights mechanisms, such as treaty and non-treaty mechanisms, could primarily serve to reinforce but not to add to IHL rules. In addition, when the right to individual petition is used, human rights bodies could clarify and possibly fill the gaps in IHL. In brief, Human Rights Law was pictured as not being the solution to everything but, at the same time, as not being useless. Human rights bodies

can enforce IHL. They can also clarify IHL, but if – and only if – they take into account the applicability of IHL.

During the third and last part of the first session, the capacity of non-State belligerents to apply IHL in practice was looked at. In this respect, the challenges faced by non-State armed groups were seen as important as regards not only the actual detention facilities, but also possible ICRC visits or standards for the provision of food, water and shelter. It was then highlighted that domestic law might pose obstacles to the detention by organised non-State armed groups, leaving such group with the "easier" alternative of killing the enemies. It was argued that in order to provide incentives to non-State belligerents to choose detention rather than killing, the possible negative legal consequences should be removed. In conclusion, it was agreed that in whatever way the gaps in IHL are clarified or filled, IHL should remain practically applicable.

The second panel raised a number of fundamental issues around sexual violence in armed conflicts. Discussions showed that sexual violence is a universal problem as it has been persistent over time, is widespread in non-international armed conflicts, and while its primary victims are women and girls, it also affects men and boys. While progress has been achieved in the elaboration of norms prohibiting sexual violence, and awareness has been raised about the importance of an unconditional prohibition, the universal eradication of sexual violence still faces numerous challenges in terms of prevention, redress for the damage suffered and prosecution.

The second speaker dwelled on the criminalisation and prosecution of sexual violence at the domestic level and presented the UK Preventing Sexual Violence Initiative. In this context, it was argued that rape and serious sexual violence are grave breaches and therefore can be prosecuted on the basis of universal jurisdiction.

Finally, the controversial issue of the right to abortion for victims of rape was raised. Discussions pointed to a lack of access to safe abortion due not only to the legal status of abortion but also and mainly to practical, sociological and administrative barriers. It was noted that so far neither IHL treaties nor Human Rights Law provide for a "right to abortion" for victims of rape. However, a number of IHL and Human Rights Law provisions are relevant. In particular, it appeared that in countries where abortion is allowed for women who become pregnant as a result of rape, victims must have access to it. Human rights practice tends to consider moreover that States should allow abortion in case of rape, although States' laws are very diverse in this respect. Finally, it was highlighted that the ICRC is committed to ensuring that victims of sexual violence have access to comprehensive health care, including access to safe abortion in compliance with applicable law.

The third session focussed on vulnerabilities in hostilities, looking specifically at the issue of how the delivery of health care in general – and the assistance to the wounded, sick and shipwrecked in particular – can be endangered by hostilities. Starting with the simple question of why it is that the wounded and sick, as well as medical personnel are being attacked so often, the session explored a number of difficult questions. The basic idea of Henry Dunant which is to provide assistance to wounded and sick military personnel, including enemy personnel, was pictured as ambitious, as treating a wounded or sick enemy combatant can be considered as making him or her fit for combat again. The panel and the audience agreed on the importance of holding to this basic idea which allows IHL to serve its purpose to preserve a minimum of humanity in armed conflict situations. Although some lessons learned from conflicts in Iraq and Afghanistan were, in a way, reassuring as they showed how military commanders can ensure protection beyond the minimum rules they have to respect, experiences in other contexts, i.e. Syria, show the whole extent of the problem. Issues such as follow up strikes, the notion of acts harmful to the enemy *versus* direct participation in hostilities or the lack of respect for the protected objects displaying the emblems of the Red Cross or the Red Crescent during hostilities in some situations have triggered lively debates. There is no doubt that the ICRC project 'Health Care in Danger' and in particular the two remaining workshops on military practice and on the normative framework will benefit from yesterday's discussion.

I will not recall the discussions of the last panel as the debates are still fresh in your mind. However, I will briefly come back to the session devoted to the recruitment and other association of children with armed forces or armed groups. The first speaker highlighted that IHL clearly prohibits the recruitment of children and their participation in hostilities. Human rights treaties, notably the United Nations (UN) Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflicts, have complemented these IHL provisions. The enforceability of these prohibitions has then been ensured by the criminalisation of their breach, under both treaty and customary law. Despite the differences between the standards under IHL, Human Rights Law and International Criminal Law, the fragmentation between these different bodies of law tends to decrease.

The second speaker presented a critical analysis of the *Lubanga* case before the International Criminal Court (ICC), which is now under appeal. Particular issues that emerged in this case were discussed. For instance, the issue of the continuous nature of the crime of recruitment of children was raised and it was alleged that the retention of children in armed forces or armed groups also constitutes recruitment. What amounts to active participation in hostilities for the purpose of Article 8 of the ICC Statute was also discussed. In this respect, it was suggested that the broad definition of active participation in hostilities adopted by the International Criminal Court should be understood in light of the rationale underlying the crime and the

fact that Additional Protocol II, for instance, prohibits both direct and indirect participation of children in hostilities. An appeal was made to put further efforts to ensure that States introduce effective legislation, criminalise and prosecute recruitment and the use of children in hostilities *at the national level*. Last but not least, the importance of the prevention of recruitment and use was raised in discussions because the best way to avoid children joining armed forces or armed groups is to provide them with alternatives.

Je suis très heureuse de la qualité des débats que nous avons eus, qui démontre l'importance du sujet traité. Le CICR va très certainement, en consultations avec les experts dans ce domaine, poursuivre ses recherches et ses réflexions au bénéfice du droit international humanitaire, et donc des victimes des conflits armés.

Je vous remercie de votre attention et vous invite d'ores et déjà au 15ème Colloque de Bruges qui aura lieu la troisième semaine d'octobre 2014 dans la foulée de la Conférence annuelle de la Société internationale de droit militaire et du droit de la guerre qui se tiendra à Ypres, à quelques kilomètres d'ici.

PARTICIPANTS LIST
LISTE DES PARTICIPANTS

- **ADAMS Michael**
  Office of the Chairman of the Joint Chiefs of Staff
- **ANTTILA Jane**
  European External Action Service / Crisis Management and Planning Directorate
- **ARLOVIC Branka**
  Croatian Red Cross
- **BAQUERIZO LOZANO Victoria**
  SHAPE
- **BASS Léa**
  French Ministry of Defence
- **BEERLI Christine**
  ICRC
- **BELLON François**
  ICRC Brussels
- **BERMAN Paul**
  Council of the EU Legal Service
- **BESSLER Manuel**
  Swiss Humanitarian Aid Unit
- **BIRMANN Cindy**
  Ecole Royale Militaire
- **BOST Cécile**
  Ministère des affaires étrangères français
- **BOUCHET SAULNIER Françoise**
  Médecins sans Frontières
- **BRAIBANT Thomas**
  Croix-Rouge de Belgique
- **BUTTICKER François**
  Comité international de la Croix-Rouge
- **CASIER Frédéric**
  Croix-Rouge de Belgique - Communauté francophone
- **CATARRASI Maria Beatrice**
  NATO
- **CHARITY Njuguna**
  International Society for Military Law and the Law of War

- **CLERCQ-ROQUES Romain**
  ICRC Paris
- **CUYCKENS Hanne**
  Institute for international law, University of Leuven
- **DE GRÈVE Laura**
  Belgian Red Cross-Flanders
- **DE GRUBEN Dimitri**
  EUMM Georgia
- **DE JONG Laura**
  ICRC
- **DE SOYSA Shehara**
  British Institute of International and Comparative Law
- **DE VIDTS Baldwin**
  International Institute of Humanitarian Law, San Remo
- **DECKMYN Annelies**
  College of Europe
- **DECOCK Christian**
  MOD-DG Legal Support & Mediation
- **DELGADO Juliana**
  Colombian Embassy
- **DEPREZ Christophe**
  Université de Liège
- **DERDERIAN Katharine**
  Amnesty International European Institutions Office
- **DOUCET Ghislaine**
  CICR Paris
- **FALCHETTA Tomaso**
  Child Soldiers International
- **GAGGIOLI Gloria**
  ICRC Legal Division
- **GERMOND Thierry**
  ICRC
- **GHELARDUCCI Martina**
  Medecins sans frontieres Belgique
- **GIDRON Avner**
  Amnesty International
- **GILLARD Emanuela**
  Oxford University

- **GNATOVSKY Mykola**
  University of Kiev
- **GRADITZKY Thomas**
  Université libre de Bruxelles, Centre de droit international
- **GRIGNON Julia**
  Université Laval
- **GSTÖHL Sieglinde**
  College of Europe
- **HAMPSON Françoise**
  University of Essex
- **HANSOUL Gilles**
  ICRC Brussels
- **HAPPOLD Matthew**
  Université du Luxembourg
- **HARHOFF Frederik**
  ICTY
- **HAUGEN Ida Gjerdrum**
  Norwegian Red Cross
- **HÉBERT Emmanuelle**
  College of Europe
- **HECTOR Mireille**
  Ministry of Foreign Affairs, The Netherlands
- **HELINCK Pauline**
  Croix-Rouge de Belgique
- **HUSZTI ORBÁN Krisztina**
  Graduate Institute of International and Development Studies
- **JOSHI Manoj**
  Observer Research Foundation
- **JUAREZ Margerita**
  SHAPE
- **KOLANOWSKI Stéphane**
  ICRC Brussels
- **KRAUZE Maris**
  Ministry of Foreign Affairs, Latvia
- **KUDELOVA Martina**
  Ministry of Defence of the Czech Republic
- **LAMESCH Max**
  Ministry of Foreign Affairs, Luxembourg

- **LEINDERS Saskia**
  Ministry of Foreign Affairs, The Netherlands
- **LENDENMANN WINTERBERG Sandra**
  Mission of Switzerland to the European Union
- **LENSU Maria**
  DG ECHO, European Commission
- **LINGAAS Carola**
  University of Oslo
- **LONGUET Samuel**
  SPF Justice - Service de droit international humanitaire
- **MAHNAD Ramin**
  ICRC
- **MASSCHELEIN Liesbet**
  FOD Kanselarij Dienst Geschillen
- **MATUSIKOVA Beata**
  EEAS - CPCC
- **MIKOS-SKUZA Elzbieta**
  University of Warsaw
- **MOSKALENKO Denis**
  Permanent Mission of Russia to NATO
- **MUMBALA ABELUNGU Junior**
  Université de Gand
- **NAERT Frederik**
  Council of the European Union
- **NICHOLSON Joanna**
  Norwegian Centre for Human Rights
- **NIZET Guerline**
  Médecins Sans Frontières
- **NOOIJEN Mario**
  NATO HQ JFCBS
- **OCHMANNOVA Petra**
  Allied Command Transformation Staff Element Europe
- **PAGE Delphine**
  Médecins sans frontières Belgique
- **PAUWELS Victoria**
  Embassy of Colombia
- **PFEIFFER Sonja**
  UNU-CRIS

- **PLUMED PRADO Allende**
  NATO
- **RINUY Marie-Salomé**
  College of Europe
- **ROJAS Angela**
  Colombian Embassy
- **RYCROFT Theo**
  United Kingdom Mission, Geneva
- **SASSÒLI Marco**
  University of Geneva
- **SEBOK Endre**
  NATO
- **SEROIN Isabelle**
  Commission européenne
- **SHAHIDI CHUBIN Nanaz**
  Comité international de la Croix-Rouge
- **SOLANO Pablo**
  Allied Command Transformation
- **STAEHELIN Balthasar**
  ICRC
- **SWINKELS Nicoline**
  SHAPE
- **SZAFARYN Lidia**
  Geneva Academy of International Humanitarian Law and Human Rights
- **THIBAULT Annabelle**
  NATO - ACT/SEE
- **TIGROUDJA Hélène**
  Université d'Aix-Marseilles
- **TRIVOLI Francesca**
  SHAPE
- **VANDECASTEELE Jean-Pierre h.a.**
  Belgian Defence
- **VANSINTJAN Hildegarde**
  Handicap International
- **VERLINDEN Nele**
  ICRC
- **VERNIERS Alexandra**
  RCN Justice et Démocratie

- **VRYDAG-JOHNSON Michele**
  SHAPE
- **WALLEYN Luc**
  Cour Pénale Internationale
- **WARNOTTE Pauline**
  Federal Public Service Justice (Belgium) - IHL Unit
- **WÉRY Marine**
  Université de Liège
- **WESTGAARD Audun**
  Joint Warfare Centre
- **SANDERS Luk**
  Koninklijk Hoger Instsituut voor Defensie
- **WRIGHT Jessica**
  NATO ACT SEE Legal Office
- **WITTORSKI Isaline**
  Université de Liège

Vulnerabilities in Armed Conflicts: Selected Issues

14th Bruges Colloquium – October 17 and 18, 2013

Simultaneous translation into French and English will be provided
Traduction simultanée anglais/français

DAY 1: Thursday, 17 October

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Thierry Monforti**, Director of the Academic Service, College of Europe

9:40 – 9:50 **Welcome address by Mr. François Bellon**, Head of Delegation, ICRC Brussels

9:50 – 10:10 **Keynote address by Ms. Christine Beerli**, Vice-President of the ICRC

10:10 – 10:30 Coffee break

Session One: VULNERABILITIES IN DETENTION – SELECTED ISSUES
Chairperson: **Elzbieta Mikos-Skuza**, University of Warsaw

10:30 – 10:50 **Protection under International Humanitarian Law: the need to strengthen the law applicable in non-international armed conflicts.**
Speaker: **Ramin Mahnad**, ICRC Legal Division

10:50 – 11:10 **Protection under Human Rights Law: a useful complement? Opportunities and limits**
Speaker: **Françoise Hampson**, University of Essex

11:10 – 11:30 **Can non-state actors ensure adequate protection to vulnerable groups in detention?**
Contributions from **Ramin Mahnad** and **Françoise Hampson**

11:30 – 12:30 **Discussion**

12:30 – 14:00 **Sandwich lunch**

Session Two: VULNERABILITIES IN HOSTILITIES – THE EXAMPLE OF HEALTH CARE
Chairperson: **Frederik Harhoff**, Former Judge, ICTY

14:00 – 14:20 **Attacks against wounded, sick, shipwrecked and medical personnel; as well as the challenges posed by "follow up strikes"**
Speaker: **Julia Grignon**, Laval University

14:40 – 15:00 **"Acts harmful to the enemy" *versus* "direct participation in hostilities" or when does medical and religious personnel lose protection against attacks?**
Speaker: **Marco Sassòli**, University of Geneva

15:00 – 15:45 **Discussion**

15:45 – 16:00 **Coffee break**

Session Three: SEXUAL VIOLENCE
Chairperson: **Mykola Gnatovsky**, University of Kiev

16:00 – 16:20 **Sexual violence as an absolute prohibition under IHL and HRL**
Speaker: **Hélène Tigroudja**, Université d'Aix-Marseille

16:20 – 16:40 **Criminalization and prosecution of sexual violence in armed conflict at the domestic level: grave breaches and universal jurisdiction**
Speaker: **Marko Milanovic**, United Kingdom (Mission in Geneva)

16:40 – 17:00 **Is there a "right to abortion" for women and girls who become pregnant as a result of rape? A humanitarian and legal issue**
Speaker: **Gloria Gaggioli**, ICRC Legal Division

17:00 – 18:00 **Discussion**

19:30 – 22:30 **Dinner**

DAY 2: Friday, 18 October

Session Four: RECRUITMENT AND OTHER ASSOCIATION OF CHILDREN WITH ARMED FORCES OR ARMED GROUPS

Chair person: **Paul Berman**, Director, Council of the EU Legal Service

9:00 – 9:20 **Protection of children against recruitment and participation in hostilities – IHL and HRL as complementary legal frameworks**

Speaker: **Matthew Happold**, University of Luxembourg

9:40 – 10:00 **The Lubanga case – A Critical Analysis**

Speaker: **Tomaso Falchetta**, Child Soldiers International

10:00 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: CROSS-BORDER HUMANITARIAN AID**

Moderator: **Manuel Bessler**, Delegate for humanitarian aid and head of the Swiss Humanitarian Aid Unit (SHA)

Panellists:

Françoise Bouchet Saulnier	Médecins sans Frontières
Manoj Joshi	Observer Research Foundation
Balthasar Staehelin	ICRC
Emanuela Gillard	OCHA/Oxford University

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**

Ms. Christine Beerli, Vice-President of the ICRC

SPEAKERS' BIOS
CURRICULUM VITAE DES ORATEURS

François Bellon is the Head of the ICRC Delegation to the European Union, NATO and the Kingdom of Belgium, in Brussels since August 2010. Mr Bellon joined the ICRC in 1984, and has occupied numerous positions within the ICRC. Prior to Brussels, he has been the Head of ICRC Regional Delegation for the Russian Federation (2006-2010), the Head of Delegation in Israël (2002-2005), in Georgia (1999-2002), in Budapest (1997-99), and in the Federal Republic of Yougoslavia (1994-97). Before that, Mr Bellon did several ICRC field missions in Azerbaijan (Nagorni Karabakh), Moldova, Bosnia-Herzegovina, Sri Lanka, Pakistan, Iraq and Lebanon. He also served at the ICRC Headquarters at the Middle East and North Africa Desk as well as in the Legal Division. He holds a Master in Law from the Lausanne University in Switzerland and completed a Postgraduate course in conflict management and emergency response at the Complutense University in Madrid.

Christine Beerli is the Vice-President of the International Committee of the Red Cross. As member of a law firm in Biel, Ms Beerli began her political career on that city's municipal council, where she served from 1980 to 1983. From 1986 to 1991 she was a member of the legislative assembly of the Canton of Bern. In 1991 she was elected to the upper house of the Swiss parliament, where she remained until 2003, chairing the foreign affairs committee (1998-99) and the committee for social security and health (2000-01). Ms Beerli chaired the caucus of the Free Democratic Party in Switzerland's Federal Assembly from 1996 to 2003. She also served on committees dealing with security policy and economic and legal affairs. She retired from politics in 2003. Since 1 January 2006, she has headed Swissmedic, the Swiss supervisory authority for therapeutic products. She is former director of the School of Engineering and Information Technology at Bern University of Applied Sciences.

Elzbieta Mikos-Skuza is an associate professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw where she established, among others, the course on International Humanitarian Law. She served as Faculty's Vice-Dean in 2008 – 2012 and since 2008 has been a NOHA (Network on Humanitarian Action) Director at the University of Warsaw. For thirty years, she has been volunteering with the Polish Red Cross. In 2004 – 2012 she was Vice-President of the Polish Red Cross and in 1999 – 2012, President of the Polish Red Cross Commission for Dissemination of International Humanitarian Law. Dr Mikos-Skuza is also a member of the International Humanitarian Fact Finding Commission established under Article 90 of the first Additional Protocol to the Geneva Conventions. She is the author and co-author of numerous publications on Public International Law and

International Humanitarian Law, including the collection of IHL documents published in Polish language.

Ramin Mahnad has been with the ICRC since 2006 and currently serves as Legal Adviser within the Legal Division in Geneva. In this capacity, he heads the ICRC's project on strengthening international humanitarian law protecting persons deprived of their liberty in armed conflict. Prior to his posting in Geneva, Ramin served as Deputy Legal Adviser to the ICRC regional delegation in Washington, D.C., as well as Legal Adviser to the delegations in Afghanistan and Sri Lanka. Before joining the ICRC, Ramin spent two years in private practice in New York where he worked on litigation matters before U.S. federal courts. Ramin earned his J.D. at the George Washington University Law School in Washington, D.C. He also holds a Diplome d'Etudes Approfondies (D.E.A.) in International Law from the Graduate Institute of International Studies, Geneva, and a B.A. in Political Science from the University of California, Berkeley.

Françoise Hampson is a Professor of Law at the Human Rights Centre of the University of Essex. She was a member of the steering group and the group of experts for the ICRC study on customary international humanitarian law. She has taught on courses and participated in conferences for members of the armed forces in Australia, Canada, Ghana, the UK and the USA, as well as at the International Institute of Humanitarian Law in San Remo, Italy. She is a member of the IHL Military Department Training Advisory Committee. She was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998-2007. She is an expert on the European Convention on Human Rights and has been the legal representative of applicants before the European Court of Human Rights in many cases arising out of military operations. In recognition of their litigation on behalf of Turks of Kurdish origin, she and her colleague Professor Kevin Boyle were given the award Human Rights Lawyer of the Year in 1998. She produced an expert report for the Steering Committee on Human Rights of the Council of Europe on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions. Her publications are in the fields of the law of armed conflicts and human rights law. In 2005, she was awarded an OBE for services to international law and human rights.

Frederik Harhoff, LL.M. from the Law Faculty of Copenhagen University (Cand. Jur.) and LL.D. from the University of Copenhagen (Dr. Juris.), has been a Judge ad litem at the International Criminal TribunaI for the Former Yugoslavia (ICTY) from 2007 until recently. He taught International Law and International Human Rights at the University of Southern Denmark. He was a Judge in the Danish Eastern High Court in 2001. Between 1996 and 1998 he was a senior Legal Officer and Head of the Legal Section with the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. Between 1998 and 2002, he was a member of the Danish Delegation at the Rome Conference for Establishment of the International Criminal Court (ICC),

and of the Danish Delegation at the ICC Preparatory Committee in New York for the drafting of the ICC Rules of Procedure and Evidence and the Elements of Crimes under the Court's Jurisdiction. In 1999, he was a member of the International Law Committee of the Danish Red Cross Society. He has published and taught in Danish constitutional law, public international law, international human rights, international humanitarian law and international law of armed conflicts at the Law Faculty of Copenhagen University, Denmark, at the Raoul Wallenberg Institute in Lund, Sweden, and at the University of Southern Denmark.

Julia Grignon est professeure adjointe à la Faculté de droit de l'Université Laval depuis janvier 2013. Avant cela elle était assistante d'enseignement et de recherche à la Faculté de droit de l'Université de Genève (Suisse) où elle a également soutenu sa thèse de doctorat, portant sur l'applicabilité temporelle du droit international humanitaire, à l'automne dernier. Elle est spécialisée en droit international humanitaire. Ses champs d'intérêt portent plus généralement sur toutes les branches du droit international relatif à la protection des personnes: droit international des droits de la personne, droit international humanitaire, droit international pénal, droit international des réfugiés, domaines qu'elle aimerait contribuer à développer à la Faculté de droit de l'Université Laval. Julia Grignon est membre du Comité pour le Concours Jean-Pictet depuis 2008 (elle a participé au Concours en 2002), après en avoir été l'administratrice pendant 4 ans.

Marco Sassòli, a citizen of Switzerland and Italy, is professor of international law and Director of the Department of international law and international organization at the University of Geneva. From 2001-2003, Marco Sassòli has been professor of international law at the Université du Québec à Montreal, Canada, where he remains associate professor. He is commissioner of the International Commission of Jurists' (ICJ). Marco Sassòli has worked from 1985-1997 for the International Committee of the Red Cross at the headquarters, inter alia as deputy head of its legal division, and in the field, inter alia as head of the ICRC delegations in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC, as legal adviser to its delegation in Islamabad. He has also served as executive secretary of the ICJ, as registrar at the Swiss Supreme Court, and from 2004-2013 as chair of the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules. Marco Sassòli has published on international humanitarian law (inter alia How Does Law Protect in War? 3rd ed., Geneva, ICRC, 2011, 2580 pp. (with A. Bouvier and A. Quintin), human rights law, international criminal law, the sources of international law, the responsibility of states and non-state actors, and Swiss constitutional law. »

Mykola Gnatovsky was born on 1 July 1977 in Kyiv, Ukraine. He holds a B.A. in International Relations (1998); an LLM in International Law (1999) and a PhD in International Law (2002).

He is the Deputy Head and associate professor of the International Law Department at the Institute of International Relations and of the National Taras Shevchenko University of Kyiv where he teaches IHL, international criminal law and general international law. Mykola Gnatovsky is Second Vice-President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. He is the academic Secretary of the Ukrainian Association of International Law and Executive Editor of the Ukrainian Yearbook of International Law. He is also a member of the editorial boards of the International Review of the Red Cross and the Ukrainian Journal of International Law.

Hélène Tigroudja est Docteur en droit et Professeur de droit international public à l'Université d'Aix-Marseille (France). Elle est experte indépendante auprès du Conseil de l'Europe et de l'Union européenne pour des thématiques telles que la protection des droits fondamentaux et la lutte internationale contre le terrorisme, la protection des libertés telles que la liberté d'expression ou encore les droits des femmes. Elle a effectué plusieurs missions en Europe centrale et orientale et en Asie centrale (Moldova, Ukraine, Azerbaïjan, Ouzbekistan) ainsi qu'en Amérique latine (Argentine, Pérou, Chili). Spécialiste de la protection des droits de l'homme, ses recherches académiques portent à la fois sur les systèmes européen et interaméricain de protection des droits de l'homme et sur les rapports entre le droit international des droits de l'homme, le droit international humanitaire et le droit international pénal. Madame Tigroudja rédige actuellement un Traité de droit international des droits de l'homme qui sera publié aux éditions Pédone (France) en 2014; elle dirige la rédaction d'un ouvrage collectif Femmes, féminisme et droit international qui sera publié aux éditions Bruylant (collection *Jus gentium*) et en 2014, elle dirigera le Centre d'études et de recherches de l'Académie de droit international de La Haye (Pays-Bas) sur le thème Droits des femmes - Elimination de la discrimination.

Theo Rycroft is a member of the UK Diplomatic Service. He has been Legal Counsellor at the United Kingdom Mission to the United Nations and other organisations in Geneva since April 2011, where he focuses on a range of international human rights law and international humanitarian law issues. Before that, from 2009 to 2011, he was an Assistant Legal Adviser at the Foreign & Commonwealth Office, London. From 2005 to 2009 he was a lawyer at the UK Government's Treasury Solicitor's Department. He was in private practice at Herbert Smith LLP in London and Paris from 2001 to 2005. He has an LLM in international law from University College London, and a BA (Hons) from Oriel College, University of Oxford. He has taught LLM students at the Universities of Reading and Melbourne courses on "Law and Diplomacy".

Gloria Gaggioli serves as Legal Adviser within the ICRC's Legal Division in Geneva since 2011. She works on various IHL themes and notably on the protection of women and children and other vulnerable groups in armed conflicts. Before joining the ICRC, she was a researcher

at the Law Faculty of the University of Geneva and a Visiting Professor at the "Université catholique de Lille" (France) where she taught international humanitarian law. Previously, Gloria Gaggioli worked during five years as a teaching and research assistant at the Geneva Academy of International Humanitarian Law and Human Rights. She has also been working as an external lecturer during two years at the Law Faculty of Copenhagen's University, Denmark, where she taught international humanitarian law. She was in parallel a PhD visiting researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund (Sweden). She wrote her PhD thesis at the Law Faculty of the University of Geneva on the "Mutual Influence between Human Rights and Humanitarian Law through the Example of the Right to Life" (summa cum laude, published by Pedone in 2013). She holds a postgraduate diploma in International Humanitarian Law from the Geneva Academy and a Master in International Relations from the Graduate Institute of International Studies, Geneva. She has written several articles in the field of international humanitarian law, human rights law and international criminal law.

Paul Berman joined the Legal Service of the Council of the European Union in February 2012 where he is the Director responsible for Institutional issues. After his studies at Oxford and Geneva, Mr Berman qualified as a Barrister (advocate) and joined the legal cadre of the UK Diplomatic Service in 1991. As well as working as a legal adviser at the Foreign and Commonwealth Office in London, he has served as Legal Adviser to the Advisory Service on International Humanitarian Law at the International Committee of the Red Cross in Geneva (1996 to 1998), senior adviser to the UK Attorney General on international, ECHR and EU law (2000 to 2002), Legal Counsellor and Head of the Legal Section at the United Kingdom Permanent Representation to the European Union in Brussels (2002 to 2007) and as Director of the UK Cabinet Office European Law Division (2008 to 2012). His work has covered legal advice on a wide range of international, EU and public law issues including multilateral and bilateral negotiations and litigation before international, European and domestic courts. He was closely involved in promoting the adoption of the EU Guidelines on International Humanitarian Law. He represented the United Kingdom in the Intergovernmental Conference Legal Experts Groups for the Constitutional Treaty and the Treaty of Lisbon.

Matthew Happold is Professor of Public International Law at the University of Luxembourg, where he teaches public international law and international human rights law. He previously taught at universities in the United Kingdom, and has been a Visiting Fellow at the Human Rights Program, Harvard Law School and a Visiting Professional in the Office of the Prosecutor of the International Criminal Court. Matthew's publications include International Law in a Multipolar World (editor, 2012), Child Soldiers in International Law (2005) and Constitutional Human Rights in the Commonwealth (co-editor with Michael Anderson, 2003), as well as articles in the Human Rights Law Review, the International and Comparative Law Quarterly , the

Leiden Journal of International Law, and the Yearbook of International Humanitarian Law. He is a member of the editorial boards of the Human Rights Law Review and the Revue Trimestrielle des Droits de l'Homme. Matthew also practices as a barrister from 3 Hare Court, London.

Tomaso Falchetta joined Child Soldiers International as legal and policy advisor in July 2010. Previously he worked for Amnesty International's (AI) International Secretariat, in the International Law and Policy Program where he was legal and policy advisor. His main responsibilities included providing advice on international human rights and humanitarian law, drafting interventions before human rights courts and bodies and representing the organization in meetings of UN human rights law experts. In his capacity as legal advisor on Africa, Mr. Falchetta carried out regular advocacy missions for AI before the African Union in Ethiopia and the Gambia from 2006 to 2009. From 2004 to 2006, he represented AI at the Parliamentary Assembly of the Council of Europe and he was responsible for AI's campaign around the reform of the European Court on Human Rights. Tomaso Falchetta is an Italian lawyer and has a Law Degree from the Law College in Ferrara (Italy.) He lives in the UK.

Manuel Bessler is Ambassador and Delegate for Humanitarian Aid and Head of the Swiss Humanitarian Aid Unit (SHA). Before that, from 1999-2011, he occupied numerous positions within the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). He has been Head of Office in Pakistan, Deputy Chief of the Policy Development and Studies Branch in New York, Head of Office in the occupied Palestinian territory, Chief of the Promotion of the Humanitarian Agenda Unit in New York and Senior Advisor to the Policy Development Unit in New York. Mr Bessler has also occupied numerous positions within the ICRC from 1991-1998. He has been the Head of ICRC Delegation in Iraq, Head of Mission in Chechnya, Liaison and Information Delegate to the Armed Forces of the International Haiti Intervention Force, Head of the Sub-Delegation in Jerusalem and Legal Advisor of the ICRC Delegation in Israel. In 1994 Mr. Bessler worked as a Military Desk Officer at the UN Protection Force in former Yugoslavia. From 1988-1991 he worked as a Lawyer at the Henrici, Wicki und Guggisberg Law Firm in Zürich. He holds an LL.M from Harvard Law School.

Françoise Bouchet Saulnier a Doctor of Law and magistrate, is the Legal Director of Médecins sans Frontières and former Research Director at the Foundation Médecins sans Frontières since 1991. She is the author of several books and articles on humanitarian work, humanitarian law and international justice, in particular the Practical Guide to Humanitarian law/Dictionnaire pratique du droit humanitaire, and a book on Rwanda, "Maudits soient les yeux fermés". She is involved in framing the rights and responsibilities of MSF humanitarian and medical activities in situation of armed conflict or internal tension, as well as medical rights and duties when treating sick, wounded and victims of sexual violence and interacting with judicial systems.

In the past 20 years she has been involved in developing key MSF policy and public positioning on humanitarian action and mass crimes, military intervention and international criminal justice. She currently teaches in masters at the Paris Institute of Political Studies and at the Paris Catholic Institute. She is also a member of the Editorial Committee of the International Review of the Red Cross and of the Editorial Committee of the historical publication of MSF speaking out case studies.

Emanuela-Chiara Gillard is a Senior Research Fellow at the Oxford Institute for Ethics, Law and Armed Conflict. From 2007 to 2012 she was Chief of the Protection of Civilians Section in the Policy Development and Studies Branch of the United Nations Office for Coordination of Humanitarian Affairs (OCHA). The Section works with the United Nations and other key partners to promote and enhance the protection of civilians in armed conflicts. For eight years prior to joining OCHA, Emanuela was a legal adviser at the International Committee of the Red Cross. There she was responsible for providing advice to headquarters and field on the legal issues relating to the protection of civilians in armed conflict, children, assistance, multinational forces, civil/military relations, occupation and private military/security companies. Before joining the ICRC in 2000, Emanuela was a legal adviser at the United Nations Compensation Commission, in charge of government claims for losses arising from Iraq's invasion and occupation of Kuwait. From 1995 to 1997 she was a research fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge. Emanuela holds a B.A. in law and an LL.M from the University of Cambridge. She is a Solicitor of the Supreme Court of England and Wales.

Manoj Joshi is a senior fellow at the Observer research Foundation, a leading Indian Think Tank. Joshi has written in several academic publications around the world on security, foreign policy and media related issues. He is a well-known security analyst and political commentator who is often cited in international publications. He was earlier Comment Editor with the Mail Today newspaper in India and prior to that he has worked as the political editor of The Times of India. He has worked with India Today, The Hindu and was the Washington Correspondent of Financial Express. He finished his schooling from the prestigious St. Joseph's College in Nainital. After an undergraduate degree at St. Stephen's College, Delhi, Joshi studied history at Lucknow University and earned his MPhil and PhD from the School of Law and International Studies, Jawaharlal Nehru University. He has reported on the rise and fall of the militancy in Punjab, India's Sri Lanka venture in 1987, the conflict in the Siachen Glacier, India–Pakistan crises of 1987, 1990, 1999, 2002 and 2008–2009, on Sino-Indian relations and the growing ties between India and the United States. He remained a member of India's National Security Council's Advisory Board, 2004–2006. In July 2011 he was appointed by the Government of India's Cabinet Committee on Security to be a member of a high level National Task Force

chaired by former Cabinet Secretary Naresh Chandra. The 14-member task force was asked to examine India's security system and suggest ways of plugging the gaps, if any, and recommend reforms to make the system more efficient

Balthasar Staehelin est Directeur général adjoint au Comité international de la Croix-Rouge. Il a rejoint le CICR en 1993 et y a occupé différents postes sur le terrain (Moyen-Orient, Afrique, Balkans) comme au siège. De 2002 à 2006, il a été le Délégué Général pour le Moyen-Orient et l'Afrique du Nord et a supervisé toutes les opérations du CICR dans ces régions, Iraq inclus. Il a ensuite occupé le poste de Directeur adjoint des Opérations en charge des «policy and global affairs» entre 2006 et 2008. Il a quitté le CICR en 2008 pour rejoindre les autorités locales à Genève, où il a dirigé durant quatre ans le département en charge de la sécurité sociale, de l'hébergement, de la santé et de l'intégration des requérants d'asile et des réfugiés. Il est revenu au CICR en août 2012 pour occuper son poste actuel. Balthasar est un citoyen suisse. Il détient un master en histoire, en littérature anglaise et en droit constitutionnel délivré par l'Université de Bâle.