Proceedings of the Bruges Colloquium

Who is Who on the Battlefield? The Actors Engaged in Contemporary Armed Conflicts

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Actes du Colloque de Bruges

Qui Est Qui Sur Le Champ De Bataille ? Les Acteurs Engagés Dans Les Conflits Armés Contemporains

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Brugge College of Europe Collège d'Europe Natolin

ICRC

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

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

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ACTES DU COLLOQUE DE BRUGES

OPENING REMARKS – DISCOURS D'OUVERTURE

Federica Mogherini
Rector of the College of Europe

Warm welcome to the College of Europe in Bruges for the 23rd edition of the Bruges Colloquium on International Humanitarian Law that the College of Europe is honoured to host.

This forum provides an excellent opportunity for the numerous participants both in-person and online to discuss extremely relevant topics, but also to network at least for those that are present in our beautiful city of Bruges.

The College of Europe is a postgraduate institute focused on European studies. Since more than 70 years now, we educate students from Europe and beyond. This year, we have 342 students in four different departments, among which international relations and diplomacy, but also law, political studies, and economics. The College of Europe also has a transatlantic program with the Fletcher School in Boston and provides one-year master's course. Over the decades, the College has trained and formed thousands of alumni, 17.000 of them are today mainly in the European institutions, but also international organizations, in the private sector, and in civil society. Additionally, the College has also contributed to forming a debate. We like to call ourselves a laboratory to shape the policies and the future of the European Union. The mission of the College, as stated in our statutes, is to contribute to the European integration and to good relations with our international partners. Therefore, I believe you are in a good place to discuss about what is today the relevance and the form of International Humanitarian Law.

The Bruges Colloquium on IHL also presents a great opportunity to connect the College community with the ICRC. My gratitude goes out to the excellent and long-standing cooperation with the ICRC which honours us enormously. In my previous capacity as High Representative for the European Union and Vice-President of the Commission, I have had the privilege of working closely with the International Committee of the Red Cross. Both the work on the ground done by the ICRC and the intellectual reflections, in particular on IHL, are of extreme importance. Especially as we are living today increasing conflictual times, and when conflicts look more and more diversified. I believe it is extremely important and is even more important today to discuss international humanitarian law as the forms of conflict and crisis vary.

Just a few years ago, we thought that we were totally in the field of hybrid threats and that armed conflicts were somehow changing of nature. This year, sadly, we saw a comeback to the traditional type of territorial war. Therefore, I believe that the discussions today and

tomorrow, and the elaborations you can have on the different forms and impacts of international humanitarian law to the reality of today and possibly of tomorrow is extremely relevant, not only for an academic purpose, but also for the policymaking and the connections between the civilian and the military work on the ground and international organisations. I would like to thank you very much for your participation.

The College of Europe will always be proud and happy to host this event. Celebrating this year, the 23rd anniversary of when we started for the very first time. Let me thank you again for being once more in Bruges, and I wish you all a very successful, interesting and probably also challenging one day and a half of meeting.

Thank you very much and looking forward to listening to this inaugural session today.

Gilles Carbonnier
Vice-President of the ICRC

Excellencies, ladies and gentlemen, dear colleagues,

It is my pleasure to join the Rector of the College of Europe, Mrs Federica Mogherini, and Stephanie Siklossy in welcoming you to this 23rd Bruges Colloquium on International Humanitarian Law (IHL). Let me thank the College of Europe for this enduring partnership which we greatly value. I hope to join you in person next year.

The theme chosen this year is very timely. Taking stock of *who's who on the battlefield* allows us to look at some of the fundamental legal and operational questions raised by modern warfare.

Armed conflicts continue to affect every region of the world. We are concerned about a resurgence of armed conflicts between States. International armed conflicts in Eastern Europe, such as the one opposing Russia and Ukraine, or the one pitting Armenia against Azerbaijan, are cases in point.

That said, non-international armed conflicts remain prevalent. They are increasingly characterized by the involvement of coalitions of States and non-State armed groups. We also see the participation of individuals and entities that are not formally considered as part of the armed forces. As the constellation of belligerents becomes increasingly complex, it makes it harder to know when, where, and to whom IHL applies. This also increases the risk of a dilution of the lines of responsibility among parties to armed conflicts and those supporting them. In the end, this may create a climate in which actors perceive themselves as free from the scrutiny of accountability processes, and in which they act beyond the parameters of applicable normative frameworks, notably IHL.

Looking at the rich program for this Colloquium, I wish to focus on three topics.

First, support relationships in conjunction with coalitions of States or non-State armed groups that are parties to the conflict. These relationships take various forms, such as the provision of training and equipment, arms transfers, financial assistance, cyber operations, intelligence sharing and, at times, the use of kinetic force.

Under IHL, those who support belligerents may themselves become party to the conflict when their support contributes to the collective conduct of hostilities; or when their support involves overall control over a non-State armed group. Let me be crystal clear: for the ICRC, a State does not become a party to an armed conflict on the sole ground that it supplies weapons or military equipment to a belligerent. Nevertheless, no matter the nature and degree of the support provided, that State can have an impact on the conduct of the party receiving the support.

Each time an alliance is formed in a conflict zone, a bond is created that can increase or alleviate human suffering. This gives States the power to exert a positive influence: to drive respect for the law and for humanitarian principles.

This is not only a humanitarian imperative. All States, including non-belligerent States, are obliged in our view to ensure respect for IHL by the parties to armed conflicts, by refraining from encouraging or assisting violations of IHL, and by proactively influencing the belligerents to respect IHL.

Recently, the ICRC has developed and refined its engagement with those who support parties to armed conflict. These efforts aim to help decision makers in bringing a humanitarian dimension to the design and implementation of any kind of support to warring parties, in any conflict.

Ladies and gentlemen, colleagues. My second point is that today's conflicts are characterized by the involvement of nationals from third States fighting alongside belligerents in the territory of another State. This so-called "foreign fighters" phenomenon is not new, as witnessed in non-international armed conflicts in Iraq and Syria for instance. Recently, foreign fighters have also been involved in international armed conflicts and have sometimes been labelled as "mercenaries". This is a concept that is in fact defined quite narrowly under international law in general, and IHL in particular.

The expression "foreign fighter" is not a term of art in IHL, and the phenomenon is characterized by a broad diversity of individual cases: generalizations omit facts that have important legal consequences.

In any case, IHL deals with them as it does with any other person involved in – or affected by – an armed conflict: it governs their actions, as well as any measures taken by States in relation to them.

When so-called foreign fighters are engaged in military operations, relevant IHL rules on the conduct of hostilities govern their conduct. They are thus subject to the same rules and principles that bind any other belligerent in the conduct of military operations.

Similarly, when foreign fighters are in the power of a belligerent, they must benefit from all applicable protection provided by IHL. Accordingly, in non-international armed conflicts, common Article 3 of the Geneva Conventions and customary IHL – as well as Additional Protocol II as applicable – will govern their treatment.

In situations of international armed conflict, the legal status of third State nationals who fall into enemy's hands turns entirely on the type and degree of affiliation with the State they have joined. On this basis, and according to the prevailing circumstances, they benefit from either

the protections afforded under the Third or the Fourth Geneva Convention. In this regard, the ICRC considers that there is no protection gap in the application of the Third and Fourth Geneva Conventions, as well as Additional Protocol I: foreign fighters therefore always fall within the reach of IHL.

Ladies and gentlemen,

I would like to turn to a third and very different aspect of today's warfare: There is no doubt that cyber operations are an established feature of modern military operations.

On several occasions, we have expressed concerns about the potential human cost of cyber operations in armed conflict. Considering the potential devastating effects of cyber operations, notably on critical infrastructure, the ICRC has urged States to work towards providing more clarity on the applicability and application of existing rules of IHL to cyber operations.

For us, there is no question that IHL applies to, and therefore limits, cyber operations during armed conflict – just as it regulates the use of any other weapon, means and method of warfare.

It is with concern that we observe the increasing involvement of civilians in cyber hostilities. While the IHL principle of distinction requires that parties to armed conflicts must at all times distinguish between civilians and combatants, the ongoing digitalization of warfare has brought that principle under strain.

It has never been easier to involve civilians in military-cyber and -digital activities. At times, States encourage civilians to engage in cyber operations, for example by using re-purposed smartphone applications to report the movements of enemy troops. In addition, digitalization has transformed the concept of remoteness: while individuals may be physically remote from the theatre of hostilities, they are only one click away from the digital battlefield.

These trends are worrying as they may bring the civilians involved closer to hostilities and thus expose them to real harm as they could be considered by the adversary as directly participating in the hostilities and thus subject to attacks. They are also in tension with existing obligations under IHL, such as the obligation of constant care which requires belligerents to protect civilians under their control against the dangers resulting from military operations – notably by not bringing them closer to hostilities.

Therefore, States should think twice before encouraging civilian involvement in cyber hostilities. At the very least, they should ensure that all individuals concerned are fully aware of the legal and practical consequences attached to their involvement.

Ladies and gentlemen,

As we embark on two days of debates which, I'm sure, will be very substantive and thought-provoking, I wish you all an enjoyable and productive Colloquium.

Ladies and gentlemen,

For you in the room and for those joining us online, please let me express again my pleasure to welcome you to the 2022 edition of the Bruges Colloquium on International Humanitarian Law which we have the pleasure to organize with our partner, the College of Europe, for the 23rd year in a row. I wish to thank them for their continued collaboration and incredible support.

Never, in the Colloquium history, has a topic triggered such interest from participants. We had more than 700 people wishing to register for this event on IHL. This is almost twice as many as last year. And with the best of intentions, we have only been able to accommodate half of the people who wanted to join in person in Bruges. We are very happy that the hybrid format allows us to reach a wider audience. We very much hope that *in situ* presence and online connection will allow for fruitful exchanges.

While such a large audience can be partially attributed to the important outreach effort in bringing the event to the attention of the public, the current state of the world with international armed conflicts happening presently on European soil, has certainly influenced and reinforced interest for IHL over the past months. The high number of participants indisputably shows how pressing some questions are, and how timely it is to address them.

That being said, the aim of the Bruges Colloquium is not to discuss specific contexts, rather to focus on contemporary challenges posed to IHL. It is an opportunity to take a step back and discuss key challenges through constructive debates and to share information in an educational spirit. I am confident that the Colloquium will help these interests to converge and provide a safe place to address the difficult issues relating to the application of IHL in today's armed conflicts. Furthermore, we want to hear from all of you and are pleased that we have been able to arrange for interpretation into English, French and Russian.

Ladies and gentlemen,

The idea underpinning the foundation of the Colloquium in the beautiful city of Bruges was indeed to build bridges, to foster understanding and to promote discussion. We will be led in our discussions by several panels composed of renowned academics, experienced practitioners, and knowledgeable experts. We hope that through their expertise we can have stimulating discussions with all of you present either in the room or connected from abroad.

The first panel will discuss when and how a State becomes a Party in an armed conflict. Many contemporary armed conflicts are characterized by additional actors providing support to parties involved directly in armed conflict. During the discussion, experts will provide their views on when forms of support provided by a third State to a warring party can be classified as co-

belligerency, when a State can trigger an international armed conflict through cyber means and the challenges related to occupation by proxy.

These aspects are directly related to the topics that will be debated during the second panel, covering the application of the law of neutrality in the XXIst century. Experts will discuss the evolution of the law of neutrality over the years and examine its relevance regarding the most recent practice. They will also examine if and how the concept of neutrality applies in the cyber and outer space domain.

During the third panel, the participation of non-State armed groups in armed conflicts will be examined. Panellists will discuss the application of IHL to instances where these groups have formed coalitions, if and how State support to such groups can change the nature of the conflict and share practical experience arising for States from fighting non-State armed groups abroad.

The second day of the Colloquium will then be devoted to individuals and entities participating in armed conflicts.

During the fourth panel, speakers will touch upon fundamental concepts of IHL: who is a combatant, the status of civilians under IHL, including concepts such as levée en masse and direct participation in hostilities, as well as the situation of third country nationals participating in international armed conflicts.

Finally, during the fifth and last panel, our experts will examine some special categories of persons and entities who are present on the contemporary battlefield and will discuss their status under IHL – this includes private and military security companies, the media and the private sector.

I wish us all stimulating and open, but not political, exchanges over the course of the one and a half day, as we look together at how to limit the cost of armed conflict. In this endeavour, let us never forget that IHL is the line between barbarity and our common humanity.

Thank you for your attention.

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Let’s move now to the substantive discussions. I’m delighted to present the chair and speakers who will set the scene of our event. You will find their biographies in your folders, or you can click on the “about the speakers” link in the programme menu of the Colloquium website. In view of their sound knowledge and extensive experience in interpreting and applying

International Humanitarian Law and in reading the world dynamics and event, I am certain that we will have insightful presentations to reflect upon, and that their words will accompany us during the entire Colloquium.

It is now my pleasure to welcome the speakers that will set the scene and share their vision on the global trends and contemporary landscapes of armed conflicts.

- **Ms Elizabeth Wilmshurst** is the renowned Director of the Royal Institute of International Affairs, Chatham House and University College of London. We are delighted that she accepted to be with us today to chair this panel.
- **Mr. Thomas de Saint Maurice** is the head of the Operational Law Unit of the ICRC Legal Division. As IHL only applies in armed conflicts, the first and crucial step is to determine whether the situation as such is or not an armed conflict and if so, the type of conflict, international or non-international. He will therefore share with us some reflections on the increasingly complex challenges but enduringly relevant necessity of classification.
- **Colonel Nathalie Durhin** is the Deputy Head of the Operational Law Branch of the NATO Supreme Headquarters Allied Powers Europe. Enjoying an extensive operational experience, she will share with us a military perspective of some of the main practical challenges of nowadays conflicts.
- **Dr. Julia Grignon** is a Professor at the Institut de Recherche Stratégique de l'Ecole Militaire in Paris. She will propose her legal reading of the relevance of identified criteria to classify contemporary armed conflicts under IHL.

I'm sure that you will join me in thanking them for their presence with us today. Now without further ado, I wish you a fruitful Colloquium and I'm delighted to give the floor to our first chair and panellists. Ms Wilmshurst, the floor is yours.

SESSION 1

SETTING THE SCENE: GLOBAL TRENDS AND CONTEMPORARY LANDSCAPES OF ARMED CONFLICTS

VUE D'ENSEMBLE: DYNAMIQUES MONDIALES ET PANORAMA DES CONFLITS ARMÉS CONTEMPORAINS

CHAIRED BY ELIZABETH WILMSHURST
ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, CHATHAM HOUSE AND UNIVERSITY COLLEGE OF LONDON

A legal perspective on the relevance of IHL criteria to classify contemporary conflicts

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Une perspective juridique sur la pertinence des critères du DIH pour qualifier les conflits contemporains

Julia Grignon
Université Laval (Canada) et l'Institut de Recherche Stratégique de l'Ecole Militaire, France

Summary

The emergence of numerous labels aiming at designating certain situations belonging to the sphere of conflict, has led to the question of whether the existing criteria for classifying situations of violence are still relevant. Some challenges have indeed arisen with regard to the classification of both international and non-international armed conflicts, it appears however that these criteria have lost none of their relevance. In fact, those challenges are more related to a real will to apply International Humanitarian Law (IHL). Thus, rather than working to thwart a supposed questioning of the criteria, it is advised to concentrate one's energy on a good faith application of IHL, which today requires a detour through interdisciplinarity.

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Thank you, Elizabeth and thank you to the organizers for inviting me. It's always a great honor and pleasure to come to Bruges. To address the legal perspective of the relevance of IHL-criteria to classify contemporary armed conflicts, I have been asked to answer two questions: first, what are the key IHL criteria and categories? And two, to what extent are these criteria and categories challenged or remain relevant in contemporary armed conflicts?

1. Existing criteria and categories

Regarding the existing criteria and categories, I think both are well-known. Bearing in mind the audience, and especially when the distinguished chair of this panel has edited a comprehensive book about *International Law and the Classification of Conflicts*[1] to which some of the contributors are sitting in the room, I will not dare to give an academic lecture about the relevant legal criteria used to classify situations of violence. However, because the classification exercise is to be done first and foremost before entering any discussion on IHL, and because the aim of this panel is to set the scene for the topic of this Colloquium, but also because the organizers asked me to do so, please allow me to take just a few seconds to summarize the matter.

[1] Elizabeth Wilmshurst (ed.), International law and the classification of conflicts, Oxford University Press, 2012, 531 p.

We have two kinds of armed conflicts in IHL: first, international armed conflicts ("IAC") that are covered by Common Article 2 of the Geneva Conventions of 1949 which includes situation of occupation as defined by Article 42 of the Hague Regulation of 1907, plus wars of national liberation of Article 1 (4) of Additional Protocol I to the Geneva Conventions (AP I).

Second, we have non-international armed conflicts to which Common Article 3 of the Geneva Conventions always applies when two doctrinal criteria, namely organization and intensity, are realized. Criteria that were conveniently complemented by indicators developed by the jurisprudence. We also have Additional Protocol II to the Geneva Conventions ("AP II") when its own requirements for its scope of application are met. With this, any situation of violence that falls under one of these scopes belongs to one of these two categories.

2. Challenges of classification

Before addressing the question of classification of contemporary conflicts, I think it is worth to have a quick look back at the challenges that always existed. It enlightens the way we should envision the challenges to contemporary conflict.

The question of challenges bound by the classification of armed conflicts has always existed. These challenges existed even before the adoption of the Geneva Conventions of 1949, and they are the reason why the term "armed conflict" was added to the notion of "declared war" at Common Article 2: so that we may address any attempts made by States to disqualify the application of IHL due to war not declared under these terms.

I do not have time to go into every detail, but it is possible to give a non-exhaustive list of situations of where challenges also appeared, right after the adoption of the Geneva Conventions to today. First, the wars of decolonization that have brought their own set of challenges. Then, I think it is useless to return to the subject of the global war against terrorism, which has occupied our thoughts for the last 20 years, notably because of the challenges related to classification. Similarly, I will not dwell on the developments of jurisprudence criteria for overall control which was followed by the development of the doctrine of "support-based approach", some terms that we will possibly hear again during the next panel in Jeroen Van Den Boogaard's presentation, or possibly this afternoon in the panel of Pauline Lesaffre. Neither will I dwell on questions related to the classification and the de-classification of situations of occupation which today may be exercised by proxies, as will be explained by Eugénie Duss.

Additionally, this list might have been extended with challenges that arise from violence tied to drug trafficking – where the fulfilment of the intensity criterion is often the source of IHL discussions. Another challenge relates to the use of cyber means, this will be addressed in the next panel by Mark Dakers.

Nevertheless, for every challenge there has always been a “solution”: no situation of violence has ever been without a legal response. Yet, while the most classic kind of armed conflicts is being waged on our continent, notably an international armed conflict, once again question of the adaptability of IHL arise.

3. What about contemporary armed conflicts?

Ultimately, the question is whether contemporary armed conflicts are truly different from past armed conflicts. Do they justify compromising existing legal criteria? This is what we mean when we talk about the relevancy of IHL criteria.

Failing to develop a nomenclature, I would like to use 3 examples to illustrate situations where current challenges may question the relevancy of existing criteria: one related to international armed conflicts and two others related to non-international armed conflicts.

A. <u>An extraterritorial applicability for Additional Protocol II?</u>

My first question relates to non-international armed conflicts. The criteria and their relevancy rests on the extraterritorial application of Additional Protocol II (AP II). Article 1 of Additional Protocol II reads as follows:

> *« Th[e] Protocol […] shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces […] which […] exercise such control over a part of its territory […]. »*

Certain States, bound by AP II, make a reference to it in circumstances when they are a party to an armed conflict outside of their territory. Yet, Article 1 AP II is explicit: it refers to a situation involving a High Contracting Party and dissident armed forces *on its own territory*. When a State decides to apply more instead of less IHL it is welcomed favourably. However, the question that rises is: what is the opposing law for armed groups when these States are fighting on foreign territory? Do we have to verify that AP II applies on the third-State’s territory? And if not, is the armed group still required to follow the terms of the Protocol, or must it only adhere to Common Article 3 of the Geneva Conventions? These are questions that might be answered throughout the Colloquium by Camille Faure. Here, the question of relevancy is not about the criteria for classification themselves – namely level of intensity and level of organization – but about the specific criteria for applying AP II.

B. <u>Armed groups that do not carry out any hostilities</u>

On the other hand, there is a scenario that puts the relevance of the intensity criterion in question. It concerns the situation that occurs when an armed group – which reaches the required level of organization – controls a part of a State’s territory but does not carry out any hostilities. This situation fails to satisfy both criteria – organization and intensity – and does not

at first instance classify as a non-international armed conflict. However, can we uphold this? Couldn't we transpose the possibility of an occupation without resistance within an international armed conflict to a control over a territory without resistance in a non-international armed conflict, as a catalyst for the application of IHL?

C. Les défis se posant dans le cadre des conflits armés internationaux

Venons-en maintenant à la question de la pertinence des critères qui permettent de déclencher l'applicabilité du DIH dans les conflits armés internationaux. En la matière, je crois que si défis il y a, ils se logent davantage dans le vocable employé dans certains milieux que dans la réelle pertinence des critères ; vocable qui sera d'ailleurs sans doute repris dans les présentations des deux jours à venir.

Sans parler de la pertinence de parler de « conflit de haute intensité » ou d' «engagement majeur » plutôt que simplement de « conflit armé international », prenons par exemple la « guerre informationnelle » qui sera sans doute évoquée dans le dernier panel demain, au travers la présentation de Christie Edwards. Cette « guerre » peut-elle constituer un conflit armé ou peut-elle être associée à un conflit armé préexistant ? Et si oui, quelles conséquences cela peut-il produire au niveau de la qualification de la situation ?

La même question peut se poser en lien avec les stratégies d'influence adoptées par certains Etats, stratégies qui mènent d'ailleurs à un autre vocable qui peut poser question, ces opérations donnant lieu à une « conflictualité sous le seuil ». Notion qui elle-même renvoie à un triptyque « compétition, contestation, affrontement » et qui amène même à vouloir « gagner la guerre avant la guerre ». Et là, il devient vraiment difficile de raccrocher le droit international humanitaire, parce que, précisément, ces éléments de langage cherchent à en éviter l'application.

Dans ces hypothèses, le vocable employé a davantage tendance à naviguer avec les limites du *ius ad bellum*, afin de ne pas être perçu comme un agresseur. De l'aveu même des spécialistes en recherche stratégique, il s'agit d'user de « mécanismes tendant à brouiller la lecture » ; de « créer une accoutumance à l'agression pour minimiser les réactions ». Au final, il s'agit de créer une « ambiguïté stratégique », c'est-à-dire un « dilemme pour le défenseur de l'ordre international, en le forçant à placer une ligne rouge et à assumer le choix de l'escalade ».

Mais, à force de faire la guerre sans la faire, on se retrouve dans une situation où la guerre est partout mais le DIH nulle part.

La notion chapeau qui retient particulièrement mon attention à cet égard, est la notion de « guerre hybride » que l'on retrouve dans les revues stratégiques d'un certain nombre d'Etats et qui semble donc être au cœur des préoccupations. Cette notion est « décriée dans le monde

universitaire parce qu'elle renvoie à un concept valise, à une sorte d'auberge espagnole, destinée à servir des agendas politiques », mais elle est tout de même utilisée dans les milieux stratégiques et elle recouvre une pluralité de situations. Autour des années 2005, elle servait à décrire un « conflit qui oppose un Etat avec des acteurs irréguliers mais qui ont des capacités Etatiques. » Depuis 2014, une date qui renvoie, et cela n'est pas un hasard, à un conflit des plus contemporains, elle cherche à décrire un « mélange entre cinétique et non cinétique afin de maintenir un flou, une ambiguïté » et de créer une situation qui se situe « sous le seuil » : sous le seuil politique, sous le seuil technologique, sous le seuil temporel et sous le seuil, donc, du *jus ad bellum.* Tout cela a pour but d'élargir le concept de guerre et de mettre au centre des stratégies indirectes et *in fine* de contourner la qualification de la lutte armée.

Qu'en est-il alors du seuil et des critères d'entrée dans le *jus in bello* ? Tout cela me ramène à ce qui m'a été demandé : offrir une perspective juridique, c'est-à-dire une perspective qui ne reprend pas le vocabulaire de la science politique, ni une perspective stratégique. D'un point de vue juridique, tout va bien. Exploré en vase clos, pour elle-même, cette perspective a démontré toute sa pertinence depuis 1949, sa malléabilité, sa souplesse, sa capacité d'adaptation. Le problème n'est donc pas tant la perspective juridique que les dérivatifs que les parties prenantes exploitent peut-être pour échapper aux catégories juridiques.

Or, c'est le rôle du droit que d'embrasser toute nouvelle situation et de lui offrir un cadre. Ce n'est pas parce que les vélos sont devenus électriques et que les trottinettes occupent aujourd'hui un espace qu'elles n'avaient jamais occupé auparavant qu'il faudrait refondre tout le code de la route. En revanche, élargir les voies de circulation dédiées à la mobilité douce va dans le sens de l'histoire, sans que cela n'enlève rien à la pertinence du code de la route.

4. Conclusions

Quelles conclusions on peut en tirer ? De tout cela je retiens deux séries de défis principales.

La première, bien connue, comprend les défis qui sont liés à la tentation, assumée ou non, de marginaliser ou de contourner l'application du DIH et donc corrélativement les solutions conventionnelles, doctrinales ou jurisprudentielles qui se sont efforcées de ramener le droit international humanitaire dans le spectre de la guerre - ce qui n'est pas le moindre des paradoxes.

La seconde embrasse les défis qui sont liés à l'émergence de tout un vocable dans d'autres sphères qui ne prennent pas du tout en considération les catégories existantes en droit international humanitaire et ignore tous des critères élaborés dans ce champ.

Dans les deux cas, il ne s'agit pas de la pertinence des critères juridiques vis-à-vis des situations de violence contemporaines, mais au milieu de leur ignorance, au pire de leur instrumentalisation. C'est donc dans ce contexte que s'inscrivent les réflexions qui seront les

nôtres dans le cadre de ce Colloque. Des défis liés à l'application et à la qualification des conflits armés et donc à l'applicabilité du DIH qui existent depuis que le droit international humanitaire existe et qui ne font que se renouveler à mesure que les conflits armés contemporains apportent des éléments tactiques, technologiques ou stratégiques qui n'avaient pas été anticipés. Or le DIH, jusqu'alors, a révélé toute sa plasticité et l'intelligence, à mon avis, qui fut celle de ses rédacteurs, de s'en remettre à des catégories juridiques souples plutôt qu'à des définitions rigides.

You once said Elizabeth, that “law cannot solve all problems and that sometimes what is needed is changes in the law”. You also emphasized “that energy should be focused on achieving compliance with international law”. I fully agree. I would even say that we need to bring interdisciplinarity into our thinking in order to achieve our goals. At least lawyers and non-lawyers need to work hand in hand. For me, the classification of armed conflicts on the basis of the existing criteria of IHL are fully relevant and we do not need to change them.

Il y a toutefois nécessité à garder le dialogue ouvert et je pense que ce Colloque en offre une parfaite occasion.

Merci.

Classifying conflicts in 2022 – reflections on a practical challenge
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Classification des conflits en 2022 - réflexion sur un défi pratique

Thomas de Saint Maurice
ICRC

Résumé

Lors de son intervention, Thomas de Saint Maurice a présenté les grandes tendances et a exposé les questions pratiques qui se posent en matière de qualification juridique des conflits contemporains.

L'intervenant a souligné que le nombre de conflits armés non internationaux (CANI) a triplé au cours de la dernière décennie et que le nombre de conflits armés internationaux (CAI) est également en augmentation. Le nombre de coalitions a également augmenté.

Il a ensuite pointé l'importance de l'exercice de qualification pour le CICR afin de déterminer si le DIH s'applique ou non et d'entrer en discussion avec les parties aux conflits. Il a tout d'abord abordé les différentes questions liées à l'identification des groupes armés et de leurs rôles dans un conflit armé préexistant, en mettant l'accent sur les CANI. Le nombre de groups différents impliqués dans une même situation rend difficile l'analyse visant à déterminer qui peut juridiquement être considéré comme une partie au conflit armé. La complexité est également liée à l'identification du niveau d'organisation et d'intensité pour atteindre le seuil requis. La situation varie également selon que le groupe armé est incorporé formellement ou de facto ou non dans les forces armées d'un Etat.

En deuxième lieu, l'orateur a abordé sous l'angle juridique les coalitions de groupes armés non Etatiques en l'absence de conflit armé préexistant. Le CICR propose de débuter l'examen par la détermination du niveau d'organisation des parties potentielles au conflit. Une fois celui-ci établi, les relations entre les différents groupes sont évaluées. Si, par la suite, un niveau suffisant de coordination existe entre les groupes, le CICR suggère d'examiner le critère d'intensité en agrégeant les confrontations armées survenant entre ces groupes et la partie adverse, ce qui permet de s'assurer que la réalité sur le terrain et l'analyse juridique ne sont pas contradictoires. Enfin, différents scénarios à considérer lors de la qualification juridique des conflits en relation avec les groupes dissidents sont proposés.

Toutes ces déterminations sont importantes pour savoir si le DIH est applicable ou non.

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To start setting the scene of this Colloquium entitled “who is who on the battlefield?”, I will share a few broad conflict trends, then address some of the specific challenges we face in terms of legal classification issues that we encounter in real conflict situations.

1. Broad conflict trends

Among the trends generating challenges in terms of classification is the constant increase in the number of armed conflicts over the years.

The vast majority of armed conflicts are non-international armed conflicts and, according to ICRC records on legal classifications, over the last couple of decades the number of non-international armed conflicts (NIAC) has tripled. The number of international armed conflicts (IAC) is also on the rise. Obviously, the IAC between Russia and Ukraine is the most dramatic illustration today, but there are others too.

More than 60 States are parties to armed conflict, which number is relatively stable. But non-State armed groups (NSAG) continue to multiply. New groups emerge, some split into factions, some form coalitions. Today, the ICRC counts around 600 armed groups of humanitarian significance in contexts in which we conduct activities. Among those, we legally classify more than 100 non-State armed groups as parties to armed conflicts.

Around a third of armed conflicts involve "coalitions" (more than one party fighting together at least on one side of the conflict). Of course, it concerns both States and non-State parties. For instance, many States intervene in conflicts abroad, often through partnerships and coalitions, as mentioned by ICRC Vice-President Gilles Carbonnier in his opening speech. This fact then mobilizes legal concepts such as the “support-based approach” in NIAC and “co-belligerency” in IAC – both will be addressed in the course of this Colloquium.

At the ICRC, we are not monitoring these trends or legally classifying armed conflicts for the sake of it or with the primary objective to feed academic debates.

Determining "who is who on the battlefield" allows us to adequately frame our dialogue with the actors of the violence, by knowing who is bound by IHL, who is not, who is protected by IHL or who has lost protection.

The IHL criteria to classify armed conflicts are known to all of you, and have been reminded by Julia Grignon, so they will not be detailed here: suffice to remind that a NIAC is as situation of armed violence of a sufficient threshold of intensity between governmental forces and organized armed groups or between such groups. As for IACs, they are triggered by any resort to armed force between States, irrespective of the intensity of the confrontation.

Let's dive directly into the description of some of the challenges we face frequently, and I will focus on NIACs since they constitute the vast majority of conflicts today and raise many complex issues.

2. Identifying the groups and their role in armed conflicts

One first challenge I wanted to share is related to the identification of the parties. There are a series of issues related to identification, in particular of non-State armed groups, and I will mention some of them.

First, there is an issue in some contexts with the sheer number of armed groups involved in the violence. This has an impact on the analysis we must conduct in order to determine who, among all these actors of violence, qualify legally speaking as parties to armed conflict. Indeed, in some contexts, you can have several, sometimes dozens, or even hundreds of different groups.

Often, information is scarce on the level of organization of this myriad of groups. And it is very difficult to know whether there are armed confrontations between two identified potential parties, which is the requirement of IHL. Indeed, you can have high levels of violence, but not in the form of direct confrontations between two identified parties, but by homicides, extorsions, kidnapping, burning of villages, pillages, etc. committed by a variety of actors against a variety of people. That does not mean these acts are constitutive of an armed conflict between identified party A against party B.

And it's very important to keep the integrity of IHL criteria for armed conflicts, otherwise we would expect from groups to respect and ensure respect for a set of law while they don't have the capacity to do so; and we would too easily give a license to kill to government forces in situations where human rights and law enforcement rules would be in fact the relevant legal framework. IHL must be kept for these exceptional situations which are armed conflicts.

Let me expand on a specific legal challenge linked to identification of parties: in this scenario, there is already a NIAC taking place, and the question is how to assess different types of groups that might take part in the conflict:

In many contexts we see the existence of local militia, self-defence groups, volunteers, etc. They can take different forms: you can have very basic volunteers group constituted to defend their village; or strong well-armed and organized militia. In this scenario, and it happens often, these groups are fighting alongside the State. How to analyse their involvement in an armed conflict, from a legal standpoint? There are a series of potential scenario in which we would have to check whether these self-defence groups or militia are formally incorporated into the armed forces of a State – or incorporated *de facto*. For that determination, the Articles on

Responsibility of States for Internationally Wrongful Acts may be of help, providing elements on who can be considered as organs of the State.

When there is a law incorporating volunteers' groups or militia into the armed forces, then it's straightforward: these groups are organs of the State and not separate independent armed groups. If there is no law, *de facto* incorporation is often more difficult to assess.

But then what if there is no incorporation at all? How to assess the role of such groups in an armed conflict?

There, the first pre-requisite would be to assess the organization of such groups, and as such it is a challenge when they are numerous. Then for organized armed groups we have to assess whether the level of the armed confrontation against another party is reaching the necessary threshold of intensity to constitute a NIAC. Alternatively, I submit here that if we can demonstrate that their actions contribute to the collective conduct of hostilities in support of the State in a pre-existing NIAC, the so-called "support-based approach" developed by the ICRC might as well be very relevant. The support-based approach, and more generally the issue of the identification of who is a combatant in contemporary conflicts and on how to assess the participation of civilians in conflicts is also a topic that will be discussed by eminent speakers during this Colloquium.

These scenarios are not moot. We have been facing these challenges, which by the way are not always new phenomena, in concrete situations around the world.

3. Coalition of armed groups: can we aggregate intensity?

The first category of challenges was related to the identification of non-State parties to armed conflicts, including the relationship they might have with pre-existing parties.

The second challenge I wanted to say a word about is when there is no pre-existing conflict, and a new situation of violence emerge, emanating at least on one side from not one group, but a variety of groups who seem to fight together.

What the ICRC stated in its 2019 Challenges Report is that '[w]hen several organized armed groups display a form of coordination and cooperation, it might be more realistic to examine the intensity criterion collectively by considering the sum of the military actions carried out by all of them fighting together.'

In a nutshell we propose to aggregate the intensity of the armed confrontations in one relationship of belligerence between one side against another side, but where one side at least is composed of several parties having effectively adopted a collective approach to the fighting against their common enemy.

What are the conditions under which we suggest adopting this approach.

First, we need to assess the organization of the potential parties to this conflict. In our view we cannot get rid of a thorough analysis of the criteria of organization for each armed group involved in a coalition.

Then we would look at the relationship between them: how they work together, how they coordinate their actions, support each other, etc. When we consider we have sufficient factual elements demonstrating that several organized armed groups have put in place a sufficient level of coordination, then we suggest we could look at the criteria of intensity by aggregating the armed confrontations occurring between these groups and their enemy.

These armed confrontations involve several organized armed groups, but they all take place in the framework of the same conflict against a common enemy.

For their enemy, in fact, for operational purposes, it makes no difference what the affiliation is of the fighters attacking them, as long as they carry out military operations in a coordinated way and as long as they are members of an organized armed group.

To apply a strict approach requiring assessing separately the relations of belligerence between each and every party, would mean taking the risk of putting the reality on the ground and the legal analysis at odds.

Other IHL experts have suggested different approaches: some suggest approaches that go further away from the classic criteria of NIAC and from a fragmented approach; at the other end of the spectrum, some have warned against the risk of “over-classification”. Finally, some experts seem to broadly agree with our suggested approach, often proposing useful adjustments.

It is true we must remind that we need to reserve the application of IHL to extreme situations which constitute armed conflicts. I would say that the approach we propose is quite strict and quite demanding. At the same time, it also provides a solution which is sound in fact and in law and addressing concrete situations we are dealing with in contemporary conflicts.

4. Splinter groups: old parties, new conflict?

Here is another classification challenge that we have been facing.

There is a NIAC, involving an organized armed group. At a certain point in time, it splinters, leading to the emergence of new groups. Once a faction that has split off no longer falls under the hierarchical structure and chain of command of the original non-State party to the conflict, the question arises whether the newly formed group qualifies as a new party to a conflict. Because indeed, this faction may continue to fight against the same enemy, or on the contrary stop the fight.

Obviously, the first criteria to check is whether the new splinter group meets the required level of organization to qualify as party to an armed conflict. If it's not, it cannot be a party to any conflict.

For organized splinter groups, then all depends on facts on the ground. In some cases, a group will disengage from hostilities. In other cases, the splinter group, while being now independent from it, will continue to fight alongside its parent group, in support of it. In this case, the fact that there was this splintering makes little to no difference for the enemy. But legally, how to address this new situation?

Even more complex, but I would say more frequent, what happens if the splinter group is really opposed to its parent group? Still this group can continue to engage separately and on its own in hostilities against its former, and ongoing, enemy, for instance the State armed forces.

Should we then consider it's a potential brand new NIAC? It means that we need to ensure the criteria of intensity is met, it can happen very fast if the hostilities are going on; but it can be that the hostilities involving the splinter group are taking place but not at very high pace.

In that case how to determine whether IHL is applicable? It's particularly important because a State, opposing this splinter group who used to take part to the armed conflict before, needs to know whether it can continue to fight this group under a "conduct of hostilities" paradigm, or if on the contrary it must legally revert to law enforcement measures when using force against it. Alternatively, an approach could be to assess intensity of the bilateral belligerent relationship between this splinter group and its enemy, by considering the intensity that existed before the group split off.

There is no straightforward answer to this issue. Still, this is the reality of some of today's armed conflicts and, as a humanitarian organization trying to have a dialogue with all States and non-State parties to armed conflicts, we need to find solutions that are both legally sound and operationally practicable.

This year's Colloquium allows for this type of discussions and debates to take place.

Global trends in armed conflicts: the perspective of a military institution

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Les tendances mondiales en matière de conflits armés: le point de vue d'une institution militaire

Colonel Nathalie Durhin
Grand Quartier Général des Puissances Alliées de l'OTAN en Europe (NATO SHAPE)

Résumé

Au cours de sa présentation, le Colonel Nathalie Durhin a abordé la position de l'OTAN sur les tendances mondiales des conflits armés, en mettant l'accent sur les dimensions et les défis juridiques.

Elle rappelle que l'OTAN est une Alliance militaire et politique composée de 30 (maintenant 31) Etats membres ayant chacun leurs propres objectifs et intérêts, ce qui rend difficile la prise de décision par consensus. En 2022, l'OTAN a toutefois réussi à adopter un nouveau concept stratégique, qui accorde une place centrale à la dissuasion et à la défense et souligne le lien entre les valeurs de l'OTAN et l'ordre international fondé sur les règles de droit, ainsi que les défis transversaux. L'OTAN identifie clairement deux adversaires principaux, que sont la Russie et le terrorisme, tout en évoquant les menaces posées par la Chine. La panoplie d'outils de réaction de l'Alliance comprend non seulement des capacités militaires, mais aussi des instruments diplomatiques, économiques, financiers et juridiques. Alors que l'OTAN doit préserver sa posture défensive à tout moment, elle est confrontée au défi délicat de la préparation politique, militaire et juridique contre ses adversaires tout en évitant l'escalade.

La deuxième partie de la présentation a porté sur les défis auxquels l'OTAN, en tant qu'Alliance défensive, est confrontée face à la crise ukrainienne. Bien que l'OTAN ne soit pas directement engagée militairement en Ukraine, elle surveille la situation de près et a déployé des troupes sur son flanc Est. Elle est attentive aux nombreuses questions juridiques découlant de violations de l'espace aérien, de possibles incidents ou erreurs d'appréciation, ainsi qu'aux défis maritimes, par exemple en mer Noire. Les « opérations juridiques » (LEGOPS) de la Russie comme nouveaux moyens de guerre caractérisés par l'utilisation du droit comme instrument de pouvoir sont exposées par l'oratrice. Plusieurs exemples à cet égard sont présentés, y compris ceux utilisés dans l'annexion de la Crimée et à la question du détroit de Kertch. Enfin, la reconnaissance de nouveaux domaines opérationnels par l'OTAN, à savoir le cyberespace et l'espace extra-atmosphérique, ainsi que les technologies émergentes et disruptives telles que l'intelligence artificielle sont abordées.

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Thank you to the organizers for inviting me, it is always an honour and a pleasure to participate in the Bruges Colloquium on IHL. I will share with you the perspective of the military institution North Atlantic Treaty Organization (NATO) on the global trends in armed conflict. My tenure within NATO spans over three years now during which I have witnessed the organization confronting unprecedented threats and challenges, many of which have legal aspects to it.

NATO, the Alliance, has been founded more than 70 years ago but is still very alive and continues to evolve and enlarge, most recently with the (at the time of this Colloquium) potential accession of Finland and Sweden. However, it is also facing unprecedented threats and challenges with multiple legal dimensions.

Today I will address two questions from a NATO perspective, notably, "who is who on the battlefield" and "what does the battlefield look like"?

1. Who are the adversaries for NATO?

A. NATO is a military and political Alliance

First, it is important to remember that NATO is not only a military but also a political Alliance composed of 30 independent Member States[2] each with different objectives and agendas. Notably, countries on the Eastern flank look mainly towards the East, while countries on the Mediterranean flank mainly look to the South. Therefore, it is difficult to have a common view on the strategic environment.

To ensure the survival of the organization, it is essential to share the same assessment of the political-military environment and to define who is the adversary. In this respect, we must bear in mind that the whole NATO decision-making process is based on consensus, which means that the 30 Member States must agree on all the policies, doctrines, and strategies. This results into powerful decisions, however, it is highly complicated since the Members of the Alliance do not always share the same interpretation of international law and international humanitarian law (IHL). For example, the definition of organized armed groups as a non-State party to a non-international armed conflict (NIAC) can have some important strategic consequences.

B. What has changed in the NATO Strategic Concept endorsed in June 2022?

Despite these obstacles, different interests and interpretations, NATO has to clearly and commonly describe the current security environment, and the strategy which flows from this assessment is defined in what is called the "Strategic Concept". It took several years for NATO to revise the previous Concept dating back to 2010, due to Member States' fear that they might not agree on who were the adversaries. However, the Ukraine conflict – while not the sole

[2] At the time of the Bruges Colloquium in October 2022. Since then, Finland has joined NATO as its 31st Ally on April 4, 2023.

trigger – pushed Member States to make unambiguous choices to ensure the Alliance's credibility and survival.

The 2022 NATO Strategic Concept retains three tasks – similarly as in 2010 – namely, (1) deterrence and defence, (2) crisis prevention, and (3) management and cooperative security. Especially striking throughout the Strategic Concept are the many references to international law. For instance, the multiple reminders on the intrinsic and inalienable linkage between NATO values and the rule-based international order (RBIO), as well as the principles to be applied in the new operational domains, *i.e.,* Space and Cyber. In addition, NATO Members considered it necessary to refer to the law when addressing what is called "cross-cutting challenges". For instance, the Strategic Concept refers to climate change and the protection of the environment; human security with a strong focus on the protection of civilians; and the Women, Peace, and Security (WPS) Agenda with many references to the protection from sexual violence.

C. New adversaries on the battlefield?

In the Strategic Concept, NATO decided to focus on "deterrence and defence" and to refer to international law to build credibility and legitimacy. As such, the Alliance agreed to clearly name threats and potential adversaries challenging the RBIO, which is a major change in comparison with the previous Strategic Concept.

In 2022, it comes as no surprise that Russia is identified as the main threat to the Alliance with explicit references to the Russian war of aggression and multiple violations of international law. To be noted that back in 2010, the cooperation with Russia was still envisaged through the lens of strategic partnership… Terrorism in all its forms and manifestations remains the second threat, although the Strategic Concept provides less clarity on how to tackle it. It is significant to note that for the first time, China is mentioned as a threat and potential adversary of NATO. The Strategic Concept highlights how China poses a challenge to NATO's interests, security, and values, and how it strives to undermine the RBIO. NATO's response to these threats includes not only military capabilities but also diplomatic, economic, financial, and legal instruments.

However, as NATO reaffirmed its defensive character, it faces challenges in preparing to defend itself politically, militarily, and legally against the adversaries while avoiding any escalation. This posture is complex and sometimes poorly understood; yet it is necessary to present a united front without risking global conflict, as Allies perceive, describe, and evaluate outcomes differently.

2. A defensive Alliance facing new legal challenges

A. The Ukraine crisis and associated risks

The defensive Alliance is facing many challenges, especially in relation to the ongoing Ukraine crisis which raises pertinent questions regarding NATO's role and engagement, particularly "how is NATO coping with the Ukraine crisis" and since Russia is identified as the Alliance's main threat, does that mean that Ukraine is a battlefield for NATO?

First, let me remind you that Ukraine has been a NATO partner since the 1990s, a status reinforced following Russia's annexation of Crimea. In 2016, NATO built a comprehensive assistance package aimed at bolstering Ukraine's capacity development and capacity building. As the crisis evolved, the support has been reinforced by NATO and the NATO Member States.

Although Russia poses a significant threat to NATO, the collective defence mechanism enshrined in Article 5 of the Washington Treaty is only triggered in the event of an armed attack against a NATO Nation, not against a third party like Ukraine. Hence the dual approach with on the one hand NATO Member States providing direct military support to Ukraine while on the other hand NATO, the Alliance itself, is deploying troops to the Eastern flank for deterrence and defence purposes only.

Amid these deployments and engagements in relation with the Ukraine crisis, a variety of legal questions rise, demanding careful consideration.

a) Risk of miscalculations

First, there is the major risk of miscalculation, notably the question how NATO responds to incidents or provocations, such for example as violations of NATO Nations' airspace. The seriousness of this situation is higher than usual as there have been a lot of encounters over the past years. For instance, there are incursions of drones within NATO's territory and questions that rise on whether such acts would amount to an armed attack against a NATO Nation that would further request the invocation of the collective defence mechanism. Drafting the rules of engagements (ROE) that authorize the use of force in response to these threats, miscalculations, or incidents is important and then the question is – again – "how"? Additionally, issues related to coordination remain. There is, for example, the incident of March 2022 when one armed drone apparently drifted uncontrolled from Ukraine crossing into Romania and Hungary before entering Croatia where it crashed without it being declared hostile or factored into NATO's considerations.

These are the kind of issues NATO is currently dealing with, *i.e.,* we are at the margins of a conflict where NATO is supporting a partner while trying to avoid any miscalculation and incidents that could force NATO to engage militarily.

b) Maritime issues

Other types of legal issues that NATO faces lay in the maritime domain. A contemporary question relates to the possible role of NATO's maritime forces in upholding agreements, such as the Grain Export Agreements. It is important to note that while NATO has no mandate to enforce such agreements yet NATO risks being blamed in case of the occurrence of security incidents within areas patrolled by NATO forces.

When it comes to minefields in the Black Sea, there are numerous challenges. Evidently, NATO strives to ensure the freedom of navigation. Therefore, NATO wants to keep on patrolling these areas, however, this is not without danger. Force protection issues and some security requirements under the law of the sea further complicate the situation. Regulations related to rescue at sea must be enforced, even when NATO is not a party to the conflict.

c) Critical infrastructure

The protection of critical infrastructure is also one of the legal challenges NATO is faced with. A well-known example relates to the damages caused to the Nord Stream pipelines, passing through the Exclusive Economic Zone (EEZ) of Sweden, Denmark, and Germany, three NATO Member States. This case raises questions related to the respective roles of Member States and NATO in the event of sabotage or of an attack. Determining who (landing or coastal State) bears the legal responsibility to repair, to investigate and to prosecute remains unsettled.

More generally, how can NATO forces protect the submarine cables which are of utmost importance for cyber and for communication, as 97% of communication cables are submerged beneath the sea and the only remaining 3% of communications go through satellites? Hence, the protection of these critical infrastructure is very important to NATO, with some "grey areas" to be addressed when it comes to the legal framework in international waters.

B. The "Legal operations" (LEGOPS): a renewed means of warfare

While Ukraine in itself is not *per se* a battlefield for NATO, the Alliance closely monitors how Russia is using the law as an instrument of power in this conflict. The question that raises is: why is NATO doing this? The answer lies in the necessity to better understand and anticipate our future battlefields in order to be prepared to react to new means of warfare.

The term 'lawfare' is no longer used; instead, NATO uses the term 'legal operations' or 'LEGOPS' to refer to the use of law as an instrument of power. LEGOPS encompass actions in the legal environment aiming at gaining or undermining legitimacy, advancing, or undermining interests or enhancing or denying capabilities. These actions can take different forms, from questionable interpretations of international law to the exploitation of alleged IHL violations, which can go up to court proceedings, and false flag events.

NATO has been experiencing a lot of Russian LEGOPS, even before the start of the current conflict. For example, during the annexation of Crimea, Russia conducted a lot of legal

operations. In 2018, the Kerch Strait incidents brought to light the Russian biased interpretation of the law of the sea to restrict the freedom of navigation in the Sea of Azov.

More recently, before the invasion of Ukraine, Russia prepared its legal narrative by handing out passports giving citizenship to many inhabitants of Ukraine ("passportization strategy"), to subsequently enable itself to take recourse to the concept of "responsibility to protect" (R2P) and justify the Russian intervention. Afterwards, Russia shifted its strategy by holding a referendum, for example, in the regions they consider to be part of Russia. As a result, Russia can now legitimately recourse to self-defence and justify the possible use of nuclear weapons to defend its own territory.

NATO recognizes the importance of LEGOPS in modern warfare and is concerned about it. First, there is a need to better understand these operations to enable commanders to assess the security risks, the reality of the threat and to anticipate the manoeuvres, the physical ones being often prepared by legal ones. Second, it is necessary to think about possible responses to these legal operations. These responses go beyond the military scope and could include political, diplomatic, financial, and judicial elements. But even from a purely military perspective, for example, NATO can conduct military action to reaffirm the primacy of the law and of the RBIO when patrolling in contested maritime areas to make sure that the freedom of navigation is ensured. Moreover, it is paramount to build a real military strategic communication (STRATCOM), to allow NATO to formulate legal counterarguments against malign LEGOPs.

In sum, LEGOPS are a new mode of warfare for NATO used by traditional actors. Legal Advisers within NATO must be aware of it and must remain legally vigilant. It is a new state of mind that we must focus on.

C. Legal challenges in the new domains

NATO has recognized new "operational domains", i.e., cyber and outer space, which leads to new military and legal challenges, as well as the Emerging and Disruptive Technologies (EDTs) with a focus on Artificial Intelligence principles of responsible use (PRU). These domains are new battlefields in which the grey legal areas have to be cleared and which can be exploited by NATO's adversaries.

We know the global statements on space and cyber, but we now must think about the practical implementation measures and how we will deal with it.

Regarding outer space there are the challenges related to, on the one hand, trying to prevent the militarization of space and, more specifically, the possible damage caused by debris when satellites are destroyed (see the November 2021 Russian anti-satellite test – "ASAT"). On the other hand, the challenge relates to the confrontation with the reality which is a use of space to support the military operations and the need to protect our assets in space, perhaps resulting

in the need to get the assets armed. There is this dichotomy between the responsible behavior in space and the daily concrete and practical use of space as a support for military operations.

In the fields of cyber and space, NATO's adversaries are trying to shape the environment and the international law because there are so many grey areas. They are trying to do this by their discourses, by their actions, by their tests, which could be interpreted, in the absence of new treaties, as State practice and ultimately as customary law. This is something NATO must closely monitor.

3. Conclusion

To conclude, NATO's role is complex. While NATO is not directly militarily engaged in the main current battlefields, it has clearly identified the main threats and its possible future adversaries. NATO is confronted with a multitude of new methods of warfare, including non-military ones like legal operations. In fact, NATO finds itself woven into the dynamics of an international armed conflict which is something that should be taken into consideration.

Ukraine has been a real "eye-opener" from a strategic perspective, and the Alliance must get prepared for direct attacks and new means and methods of warfare to avoid a weakening of NATO's capacities, a discreditation of NATO's values and jeopardizing the weakening of the RBIO. NATO must prevent a global conflict, while remaining vigilant in complying with international law as it is constantly being tested.

SESSION 2

PANEL 1: INTERNATIONAL ARMED CONFLICT: WHEN DOES A STATE BECOME A PARTY TO THE CONFLICT?

PANEL 1: CONFLIT ARMÉ INTERNATIONAL: QUAND UN ETAT DEVIENT-IL UNE PARTIE AU CONFLIT?

CHAIRED BY FRANK HOFFMEISTER
EUROPEAN EXTERNAL ACTION SERVICE (EEAS)

From supporter to party in the conflict: when does support amount to co-belligerency?

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Du supporter à la partie au conflit: quand le soutien équivaut-il à une co-belligérance ?

Jeroen Van Den Boogaard

Ministry of Foreign Affairs, The Netherlands

Résumé

Cette intervention a examiné les critères permettant de déterminer quand le soutien d'un Etat tiers équivaut à de la cobelligérance. L'analyse repose sur les prémisses selon lesquelles le jus ad bellum n'est pertinent que pour déterminer si l'usage de la force par un Etat est légitime au regard de la Charte des Nations Unies et qu'il est possible de n'être ni un Etat neutre, ni une partie à un conflit armé.

En abordant la première question visant à déterminer l'applicabilité du droit international humanitaire (DIH), le Dr. Jeroen Van Den Boogaard a affirmé que cette détermination est basée sur des critères factuels et objectifs : la présence d'hostilités entre Etats, d'une occupation qui ne rencontre pas de résistance armée ou d'une déclaration de guerre déterminent l'existence d'un conflit armé international (CAI). À cet égard, il a souligné que, globalement, aucune institution n'avait autorité pour déterminer l'existence d'un conflit armé entre deux Etats.

Lors de l'évaluation du niveau d'intensité requis pour qualifier une situation d'« hostilités entre Etats », une distinction a été faite entre deux situations. Pour déterminer l'existence d'un CAI, l'orateur a exprimé son soutien à la théorie du premier coup de feu (« first shot theory ») selon laquelle aucun critère d'intensité ne doit être rempli. Toutefois, pour déterminer si un Etat tiers devient partie à un CAI préexistant en soutenant l'une des parties au conflit, il a affirmé qu'un niveau d'intensité minimal devait être respecté. Il estime en effet que la différenciation est justifiée car, dans cette dernière situation, l'applicabilité du DIH est déjà établie et le risque que le DIH ne soit pas applicable aux actes d'un Etat tiers qui apporte son soutien est donc plus faible. Selon lui, la proximité géographique des hostilités est pertinente mais n'est pas concluante en soi. Les activités réelles menées par l'Etat qui apporte son soutien sont importantes, le lien direct entre ce soutien et les hostilités en cours étant déterminant pour déclencher l'application du droit international humanitaire. L'orateur considère qu'un test fonctionnel du caractère direct et de son impact reflète les critères de participation directe aux hostilités (DPH) tels qu'ils sont définis dans le guide interprEtatif de 2009 du CICR, à savoir le seuil de nuisance, la causation directe et le lien de belligérance.

En conclusion, l'orateur a suggéré d'aborder spécifiquement la question de savoir comment des Etats tiers deviennent partie à un conflit armé préexistant dans la prochaine mise à jour des commentaires de la quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre.

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Thank you, Chair, and good morning, everybody. It is a great pleasure for me to speak on this panel at the Bruges Colloquium and I would like to start by sharing that speaking here has been on my bucket list for a long time and therefore I would like to thank the organizers very much for inviting me to speak here today.

I should start with the **disclaimer** that I speak in a private capacity today, and what I say should not be attributed to any of my employers.

The **subject of my intervention is how, or when, or under what circumstances, a State that is providing support to another State, becomes a party to an already existing armed conflict between the assisted State and another State.**

1. Preliminary issues

A. Ius ad bellum

Before I go to today's order of business, it would make sense to make some remarks about the relevance of *ius ad bellum* in this context. I will focus on IHL in my presentation, and I have no intention to speak to you about the relation between *ius ad bellum* and IHL, other than that I am a firm supporter of the foundational notion that IHL and the *ius ad bellum* must be kept clearly separate. One could argue that the question under which circumstances a State becomes a party to an existing international armed conflict is clearly solved when an armed attack has occurred that triggers the right of self-defence for States as reflected in Article 51 of the UN Charter. However, assuming that *ius ad bellum* is only relevant to determine whether the use of force by a State is legitimate under *ius ad bellum* and the UN Charter, I will now turn to International Humanitarian Law (IHL).

B. Law of neutrality

The next issue that merits some discussion is neutrality. However, I noted that there is an entire session dedicated to neutrality, so let me just say that I think the current state of the law of neutrality is ambiguous. It has been argued by some[3] that States violate the law of neutrality as soon as they provide military support to State X that is engaged in an international armed conflict with State Y. It is argued that this violation of neutrality

[3] KONCHAK, P., "U.S. and Allied Involvement in the Russo-Ukrainian War: The Belligerent Status of NATO States and Its Implications", 20 July 2022, *Opinio iuris,* available at: https://opiniojuris.org/2022/07/20/u-s-and-allied-involvement-in-the-russo-ukrainian-war-the-belligerent-status-of-nato-States-and-its-implications/.

automatically means that the supporting States become parties to the existing armed conflict and as such a co-belligerent of the supported State X. I note however that this is not what Western States have said in the context of their military support to Ukraine since February 2022.[4]

To put it in the simple terms of a football game: the supporting States are certainly rooting for one party to the conflict, cheering them on and providing more than only moral support, but they are not present as players on the pitch, and as such, they are not participating in the "game".

I will proceed this presentation based on the assumption that it is possible to be neither a neutral State nor a party to the armed conflict.

2. Questions that arise

A. <u>What is the test for a supporting State to become a Party to an IAC?</u>

What is the test that must be satisfied to determine whether a supporting State is becoming a party to a pre-existing armed conflict?

Is it: "what does it mean to become a 'party to the conflict' in the context of IHL?" Thus, would we look for a definition of the term "party to the conflict"? Or is the question: "Is the application of IHL triggered?". In that case, the question could simply be whether IHL is applicable to the supporting State, to be determined by Common Article 2 to the Geneva Conventions, id est the first shot theory? Or are these the same questions?

The next question that arises is whether the test for a pre-existing IAC is the same as the one to start an IAC between two States? Or is there a certain threshold that needs to be passed first, because the armed conflict is already ongoing?

B. <u>Threshold requirement?</u>

Another important question that arises is the one of the required material threshold. Should we focus on the type of support or rather the function of military support? For instance, does it matter whether a supporting State is merely providing flack-jackets and medical supplies, as compared to States providing heavy weapons such as mobile long-range artillery systems or fighter-jets? Are there certain weapons that, when provided, would make another State a party to the conflict regardless of other factors? For example, at the outset of the conflict, I think a representative of the Italian Government noted that providing fighter-jets to Ukraine would be the red line in this regard. I am not sure if that is true, but this would illustrate that the conclusion may be different depending on the type of weapon. Or perhaps, is it not a quantitative test, but

[4] HATHAWAY, O. and SHAPIRO, S., "Supplying Arms to Ukraine is Not an Act of War", 12 March 2022, *Just Security,* available at: https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/.

rather a qualitative test, meaning that the directness of the military support to the actual hostilities determines whether a third State becomes a party to the conflict?

C. Geographical requirement?

What about the territorial dimensions? IHL applies within the territories of the States that are engaged in an international armed conflict (IAC). Does that mean that a supporting State becomes a party to that armed conflict if its forces provide assistance on the territory of the supported State? Conversely, can a supporting State become a party to an existing IAC without setting foot on the territory of the assisted State? A third scenario to question is what happens if a State consents to one of the States that is a party to the armed conflict to use its territory, for example to launch attacks? Does the State that allows its territory to be used automatically become a party to the conflict?

D. Temporal requirement?

Another aspect to consider is the temporal element: suppose we determine that a supported State has become a party to a pre-existing IAC, is that participation then permanent until the end of the armed conflict or is it also possible to stop being a party to the conflict before the conclusion of the armed conflict? And if so, how would that happen?

E. Other requirement?

Or is there perhaps another existing implicit standard in IHL that may be used to determine under which circumstances a supporting State becomes a party to a pre-existing armed conflict between two other States?

In conclusion, it seems there are many questions. But it is important to start with the basics and the law.

3. Analysis

According to a 2010 Report of the International Law Association (ILA) on the meaning of armed conflict in international law,[5] there is "no widely accepted definition of armed conflict in any treaty…" but there is "significant evidence in the sources of international law that the international community embraces a common understanding of armed conflict."

In general, it is widely recognized that determining whether any State is a party to any armed conflict is a factual exercise. When the facts indicate that there are hostilities between two States, Common Article 2 to the Geneva Conventions provides that this triggers the applicability of IHL. Common Article 2 states:

[5] International Law Association (ILA), "The Hague Conference (2010) – Use of Force ", available at: http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf.

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognized by one of them."

One could wonder whether, in this context, a continued relevance of declarations of war exists. The updated ICRC Commentary to the Geneva Conventions notes that this is indeed the case, even when there are no hostilities between the States of which one has declared war on the other.[6] In particular, States would have to treat civilians who are nationals of the opposing State in accordance with Geneva Convention IV, even if there are no ongoing hostilities.

The ICRC Commentary underscores that the Geneva Conventions and IHL more generally apply based on objective and factual criteria. Thus, it seems we need to look at the facts to determine whether there are 'hostilities between States', although also an occupation that meets no armed resistance triggers the applicability of the Geneva Conventions.

A. What action is considered "hostile recourse to armed force"?

The question at hand is to determine whether States are engaging in 'hostile recourse to armed force'. Are bullets being fired towards the enemy? Are the military forces of States blowing stuff up? Put in simple words, is the percentage of lead in the atmosphere elevated? When these facts occur, it is reasonable to presume the existence of an armed conflict. Additionally, have military forces of one State entered the territory of another State? There is a lot more to be said regarding the cyber context, which Colonel Dakers will cover in another session.

B. Who decides?

Moving on to the next point: who determines whether an armed conflict is ongoing and whether a State is in fact a party to such armed conflict?

There is no institution in the world that has the authority to determine whether there is an armed conflict between two States, although there have been instances where the United Nations Security Council (UNSC) has taken on this role. It is surely indicative what the States themselves say, and this ties into what I just mentioned about the continued relevance of declarations of war. Additionally, it may be relevant – although not conclusive – what the ICRC says about a certain situation.

[6] IHL Treaties - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field,1949 - Commentary of 2016 Article | Article 2 - Application of the Convention | Article 2 (icrc.org)

C. Required level of intensity?

When we examine the objective criteria outlined in Common Article 2 to the Geneva Conventions, it is important to stress that for an IAC – contrary to in case of a NIAC – the level of intensity of the armed confrontation is irrelevant, as put forth by the ICRC Commentary.

This approach is at odds with the 2010 ILA report that I mentioned before, because that report insists that for all types of armed conflicts, two conditions must be met: (1) the existence of organized armed groups (which is not really an issue in an IAC between two States) and (2) the requirement that these groups are engaged in fighting that reaches a certain degree of intensity. According to the ILA report, the high threshold is necessary to justify the transition from peacetime law to the laws of war, in other words, IHL.

A description of the term 'hostilities' is provided in the ICRC Interpretative Guidance on the Direct Participation of Hostilities (DPH): *"the (collective) resort by the parties to the conflict to means and methods of injuring the enemy..."*[7]

One could argue that the ICRC has an interest to advocate for a low threshold to conclude to co-belligerency, as the ICRC mandate is triggered by the application of IHL, and, as a result, supporting States become bound by the protective obligations of IHL. Conversely, one could also argue that there is merit to refrain from assuming too easily that a State is a party to an IAC, because it also means that the authority of that State to use armed force shifts from the restrictive peacetime rules of law enforcement under International Human Rights Law (IHRL) to the much more permissive targeting rules of IHL.

In my view, this approach is not persuasive, because it would exclude the application of IHL to the first shots fired at the outset of the armed conflict, leaving such situation without the guidance provided by the IHL rules governing the conduct of hostilities. Therefore, I believe that for the start of armed conflict, we should definitely go with the first-shot theory.

D. Requirement to become a party to a pre-existing armed conflict?

Turning back to the situation at hand, in which supporting States may, or may not become parties to a pre-existing armed conflict between two other States. The question arises: is there a threshold requirement for supporting States in becoming a party to a pre-existent IAC?

I think it is arguable to say that there is a certain *de minimis* threshold for becoming a party to an already existing armed conflict as a result of providing assistance to one of the parties of that conflict. I realize that this seems at odds with my earlier remark about the first-shot theory, but we must not forget that IHL is already applicable to the States that are already engaged in

[7] ICRC, Interpretive Guidance on Direct Participation in Hostilities, 2009, p. 43.

the existing IAC. Therefore, the risk that IHL is not applicable to acts by an assisting third State is smaller, because IHL already applies on the territory of those States.

E. Geographical requirement?

This brings me to a possible geographical requirement. In my view, the territorial dimension of the military support is relevant in determining whether the supporting State becomes a party to the conflict. If, for example, the military of the supporting State is present on the territory of one of the States that is a party to the pre-existing armed conflict, and if those soldiers are supporting the armed forces of the supported State directly in the conduct of the hostilities, that may be sufficient to establish that the supporting State has become a party to the conflict. If, however, the members are there, but they only engage in medical assistance or in the clearance of unexploded ordinance, then the conclusion would be different. Therefore, the geographical dimension is certainly relevant in terms of the proximity with the hostilities, but I do not think it is conclusive in itself. It does also depend on the specific activities the military personnel of the supporting State are engaged in.

F. What is the directness to the already ongoing hostilities?

This brings me to my final point. I think the IHL criteria of when a supporting State becomes a party to the existing IAC has not yet completely crystallized. As has also been mentioned by others: it seems relevant to assess the link of the support to the actual ongoing hostilities when determining whether a supporting State becomes a party to an ongoing IAC. The threshold may be crossed if the support consists of significant operational, logistical, or intelligence support to an existing belligerent, provided there is a direct link between that support and the hostilities. Indications of this link may include the presence of members of the military of the supporting State on the territory of the supported State in close proximity of the frontlines where they provide direct support to the tactical and operational efforts of the military of the assisted State. In other words, the directness of the assistance to the actual exchange of hostilities between the belligerents may be a relevant factor that could trigger the applicability of IHL to the supporting State, rendering it a party to the armed conflict.

It may prove challenging to determine whether providing actionable intelligence to the assisted State – which may be used directly in the conduct of hostilities in the existing IAC – is sufficient to be regarded as being a party to the armed conflict.

A colleague of mine as well as others in the blogosphere,[8] suggested that in essence, the functional test of directness of the support and its impact or proximity to the actual hostilities

[8] WENTKER, A., "At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean?", 14 March 2022, available at: At War: When Do States Supporting Ukraine or Russia become Parties to the Conflict and What Would that Mean? – EJIL: Talk! (ejiltalk.org).

reminds us a lot of the ICRC DPH criteria (threshold of harm, causal link and belligerent nexus)[9]. Could these criteria be useful or adequate to assess whether a supporting State becomes a party to an existing IAC? It must be stressed that these criteria were drafted by Nils Melzer of the ICRC with a focus on the temporary loss of protection against direct attack for civilians during armed conflict. Reading these in relation to Common Article 2 may therefore seem strange because they deal with a completely different situation. Nevertheless, it may be argued that the test for a supporting States to become a party to a pre-existing IAC may in practice not be so different.

4. Conclusion

In conclusion, the new ICRC Commentary on Common Article 2 of the Geneva Conventions I, II and III does not specifically address the issue of how third States become a party to a pre-existing armed conflict. Therefore, I propose that the team under the guidance of Jean-Marie Henckaerts addresses this issue in the forthcoming update of the Commentaries for the Fourth Geneva Convention concerning the protection of the civilian population.

Thank you very much for your attention and I look forward to your questions and comments.

[9] ICRC, Interpretive Guidance on Direct Participation in Hostilities, 2009.

Entering an international armed conflict through cyber means: virtual or real/ possibility?

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Entrer dans un conflit armé international par des moyens cybernétiques : possibilité virtuelle ou réelle ?

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Résumé

Au cours de sa présentation, le colonel Mark Dakers a abordé la question de savoir si un conflit armé international (CAI) peut être déclenché par l'utilisation de moyens cybernétiques. Il a ouvert la session en clarifiant l'importance d'utiliser une terminologie précise, il a exprimé sa préférence pour l'emploi de termes tels que « cyber moyens », « cyber événements » et « cyber opérations » au lieu de « cyber attaque ».

Après avoir affirmé qu'un événement cybernétique pouvait effectivement être le déclencheur d'un CAI, le colonel Dakers a examiné les conditions permettant de déterminer quand un événement cybernétique pouvait être qualifié d'attaque armée. Il a évoqué le test de « l'échelle et des effets requis ». Il a rappelé qu'il n'existe pas de consensus entre les Etats sur un ensemble concret de critères permettant d'effectuer ce test. En outre, le colonel Dakers a souligné la difficulté d'attribuer la responsabilité des opérations cybernétiques.

L'intervenant a ensuite examiné si un Etat pouvait devenir partie à un CAI préexistant en utilisant des moyens cybernétiques. Bien que les cyber opérations ciblent souvent des objectifs stratégiques ou opérationnels, il n'y a pas de consensus sur les effets requis pour permettre de qualifier un Etat utilisant de tels moyens de partie à un conflit. Le point de vue de Markus Krajewski, qui soutient qu'« un Etat ne devient partie que lorsqu'il exerce une force militaire attribuable » est ici remis en question. L'orateur suggère que les effets obtenus devraient être au centre de l'attention, quelle que soit la façon dont ces effets se produisent. S'inspirant de la théorie militaire, il soumet l'idée que si un Etat tiers mène des actions cybernétiques qui contribuent de manière significative à des objectifs opérationnels ou stratégiques, il peut être considéré comme une partie au conflit armé, quand bien même la force militaire « traditionnelle » ne serait pas utilisée par cet Etat. Il se réfère au concept de « centre de gravité », qui représente la source de puissance d'une partie au conflit, pour soutenir que si une cyber opération perturbe cette source, elle peut faire de l'Etat qui conduit cette opération une partie au CAI.

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Before starting, I would like to thank the organizers for inviting me and for giving me the possibility to address the question whether an international armed conflict (IAC) can commence through cyber means. I am speaking in a personal capacity and hence the normal caveat applies that these views are very much my own and represent neither the position of the UK, UK Ministry of Defence nor the International Institute of Humanitarian Law.

Turning to the question at hand, in my view the answer is. "Yes, it is a real possibility to commence an IAC through cyber means". However, I think the organizers may wish to hear a little bit more detail on the topic and I would be short-changing them, and you, if I did not provide it. So, from the initial answer that it is a real possibility in law, I will go on to discuss if it is a realistic possibility in a broader sense.

1. Terminology

First, allow me to share my thoughts on terminology. I am glad to see that the title of this session refers to "cyber means". Too often "cyber events" or "cyber operations" are referred to as "cyber-attacks" especially in the mainstream media. This, I think, is unhelpful terminology when considering conflict in either the *ad bellum* or *in bello* contexts. There is a certain degree of misunderstanding and hyperbole when it comes to cyber operations. To mention some of the examples used in the media are the following "virtual invasion", "dropping cyber bombs", "cybergeddon", "cyber-Pearl Harbour", "cyber 9/11", "declaration of war".[10] I would argue that this is an overaction because in fact, most of the cyber operations are well-below this cataclysmic level. The major cyber events that have been observed were criminal and political in nature, but they haven't been "cyber–Pearl Harbour's". Consequently, I think one must be careful not to get lost in or distracted by such hyperboles.

Better terms would be "cyber means", "cyber events", "cyber actions", or "cyber operations" as they do not have the implications which the word attack does for those in the International Humanitarian Law (IHL) and broader international law fields.

Moving forward from my simple answer "yes", the next question that rises is: "what lies behind it?" I think here it is necessary to look at two different situations:

- the commencement of an International Armed Conflict (IAC) through a cyber event and possible response to it;
- an ongoing IAC and the circumstances in which a non-party State could become a party to that IAC through certain types of cyber activity.

[10] With thanks to Maj Juliet Skingsley AGC (ALS) UK Army.

2. Issue of attribution and patriotic hackers

Before turning to the two different situations, it is worth considering attribution. Attribution is a central issue in cyber operations, especially if the activity could potentially make a State a party to an IAC. One of the perceived advantages for a State to use cyber means as a use of force or armed attack is that it is extremely difficult to attribute the acts in comparison with kinetic uses of force. Therefore, in both scenarios there must be clear attribution and it must be for a political purpose and thus analogous to a use of force. The notorious cyber events of recent years have been criminal rather than political in nature and therefore would not be of the sort which could make as State a party to an IAC.

Attribution is further complicated by the rise of the so called "patriotic hacker". Those of a certain vintage may recall the 1983 film "War Games" where a young hacker unwittingly gains access to the US's nuclear launch systems. In recent times there have been instances of hackers acting in support of their State's aims but not with the instruction or agreement of the State. If such a hacker were to conduct an operation could that make a State a party?

To consider this we need to look at the International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts. Whether the entry into the armed conflict would be a wrongful act or not would be a matter of fact and circumstances but logically the Articles' analysis of State Responsibility holds true for all acts not just wrongful ones.

Article 8 deals with "Conduct directed or controlled by a State" and the commentary examines the circumstances in which the patriotic hacker's activity could be the responsibility of the State even though "as a general principle, the conduct of private persons or entities is not attributable to the State under international law."[11] Two circumstances are outlined where this general principle would not operate. The first situation is the one in which the individual or group is operating on the instructions of the State. This is relatively straightforward and would make the State responsible. The second situation is where the individual or group acts "under the direction or control" of the State. The International Court of Justice (ICJ) addressed this issue in the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)[12]. The ICJ held that the test for State responsibility was whether the State had effective control of the individual or group. The court set out a high criterion for fulfilling this test. Effectively the State would have to specifically direct the individual or group to act in a

[11] International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 47.

[12] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

particular way which was unlawful. This judgement was endorsed by the ICJ in the 2007 judgement in the Bosnia Genocide Case.[13]

So, what can we deduce from this in terms of patriotic hacker activity? It seems clear from the case law that in order for a State to be held responsible for a patriotic hacker's cyber operation the State would have had to specifically direct the hacker to conduct that particular operation. It would therefore seem very unlikely that the test could be met given the obfuscation around attribution.

3. Commencement of an IAC through a cyber event

It is broadly accepted that the UN Charter applies to cyberspace and that a cyber event can constitute a use of force as set out by the 2021 report of the Group of Government Experts (GGE)[14]. The NATO Alliance has stated repeatedly that a cyber event could constitute an "armed attack" for the purposes of triggering Article 5 of the Washington Treaty. I would submit that if it is considered that it can be an armed attack for Article 5 purposes legal logic suggests a cyber event can be an armed attack full stop. Other non-NATO States have adopted a similar position. Hence both the GGE and the expressed opinion of States lead us to the conclusion that cyber activity can be both a use of force and an armed attack that would trigger the right of self-defence under the UN Charter. Thus, it is clear that such an event could be the trigger for an IAC. However, the next question that rises is: "what sort of cyber event would it have to be to trigger an IAC"?

For starters, when would a cyber event reach the threshold of an armed attack? Herein lies the problem that greater minds than mine have been struggling with since the advent of the idea of the "cyber-attack". This is one of those situations where everyone agrees that it can indeed be an armed attack, however, critically there is no clarity on the set of criteria that need to be fulfilled in order to qualify as such.

Professor Mike Schmitt[15] first proposed some factors to be considered in relation to this in 1999. This was developed by the International Group of Experts working on the Tallinn Manual[16] into the "scale and effect" test. This test examines the consequences of a cyber event to assess whether it reaches the threshold of harm or damage that could be considered an armed attack. This is a very practical approach which I will adopt here, although it should be noted that while some States have endorsed this approach the great majority have not

[13] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement, ICJ Reports 2007, p. 43.
[14] Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security, 14 July 2021.
[15] Schmitt, Michael N., Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework (1999). Columbia Journal of Transnational Law, Vol. 37, 1998-99.
[16] Tallinn Manual on the International Law Applicable to Cyber Warfare, Schmitt, Michael N. (ed) Cambridge University Press, Cambridge 2013.

expressed a public view. The test raises the twin questions: (a) what is the level of the scale and (b) what are the necessary effects?

It must be recognized that the test is necessarily circumstances dependant. The scale would have to be substantial but most cyber operations are not of the "headline variety" I mentioned earlier. These lower-level cyber events are not going to reach the threshold of scale let alone effect. The "scale and effect-test" is of a qualitative nature of fact and circumstance depending on numerous factors which will not always be the same, rather than a legal test in the strictest sense. There is no agreement on this. Some countries argue that it must be military in nature, others would argue that it has to impact the financial well-being of the State. Michaela Pruckova[17] referred in an article this year to "NATO's blurry but consistent line" on this issue and this is reflected among others as well. It could very well be that States do simply not wish to set out criteria and wish to remain able to adapt and react to certain situations[18].

To return to a refined analysis of the original question, I asserted earlier that indeed there is a real possibility to start an IAC through cyber means. Now we are looking into whether it is realistic. It depends on the circumstances, but please don't ask me what those circumstances are. In this case, there are more questions than answers. The issue lies with the fact that there is no agreement between States on the thresholds for the required "scale" and "effect".

In conclusion, in terms of initiating an IAC yes, it is possible, but the requirements are strenuous. In addition, whether it is realistic also depends on whether the act can be attributed to another State.

4. Becoming a party to a pre-existing IAC

Turning to an activity which would make a State a party to a pre-existing armed conflict does the "scale and effect" test hold true. I tend to the view that it does but that it may have to be considered in a slightly different way. Typically, cyber operations are used for strategic or at least operational advantage rather than at the tactical level and so it is on these levels I will focus. There is no clear consensus on what the effect must be to involve a State in a conflict. Markus Krajewski suggested, writing in the Völkerrechtsblog in March 2022, that a State "does not become a party to the conflict in IHL as long as no attributable military force is exercised"[19]. While I understand the thinking behind that position, I think it is too narrow a view. There has of course been much discussion about intelligence sharing and whether that might be sufficient

[17] Pruchkova, M., "Cyber attacks and Article 5 – a note on a blurry but consistent position of NATO", 10 May 2022, available at: CCDCOE (gwu.edu).

[18] For a review of the current approaches see Professor Schmitt's contribution to the symposium, "The Evolving Face of Cyber Conflict and International Law: A Futurespective" presented by the Lieber Institute for Law and Warfare at the American University, Washington College of Law in June 2022, available at: https://lieber.westpoint.edu/evolution-cyber-jus-ad-bellum-thresholds/.

[19] Krajewski, M., "Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine", 09 March 2022, *Völkerrechtsblog,* available at: Neither Neutral nor Party to the Conflict? - Völkerrechtsblog (voelkerrechtsblog.org).

to make a State a party to an armed conflict as well as the provision of arms and training. A cyber operation in support of a party to an IAC could in some circumstances be considered analogous to intelligence sharing but again I think this is too narrow a view. Cyber operations could also be much more than that and enable decisive offensive operations through their effects. Therefore, I think there are circumstances where it could make a State party to the existing IAC.

5. Conclusion

To come to my conclusions, in this regard, I applied a bit of military theory to the possible situations. As I have already said, the use of cyber tends to be for strategic and operational goals rather than tactical ones because of the nature of the weapon. Armed forces should not take actions without those actions being designed to assist in the attainment of a military objective. All military planning does, or at least should, start with a desired end State otherwise it is pointless activity. From the end state one can deduce objectives, the conditions to achieve those objectives and the desired effects to reach those conditions. From the desired effects at the operational or strategic level will be deduced the operational activity which will achieve them. This operational activity can be kinetic or non-kinetic or a combination of the two. This is the military theory but the lawyers in the audience may well think it sounds remarkably similar to the IHL principle of military necessity.

It is my view that if a third State conducts cyber activity of a sufficient scale that significantly assists to reach operational or strategic objectives then this could be considered, in certain circumstances, sufficient to make them a party to the armed conflict. This is not “military force” in the traditional sense which I think Markus Krajewski means but nonetheless can degrade the military capability and effectiveness of a party to the conflict.

Taking the logic of the scale and effect test outlined above, I think that it is necessary to reverse the considerations and consider first the effect. The critical factor I suggest is the effect the cyber operation has on the IAC when those effects are felt. This is because there may be a considerable delay from the launch of the cyber operation until the effect is felt by the targeted party. If it leads to no effect or at least only minor tactical effect, then it is not at a significant scale. If, however it leads to or significantly contributes to the attainment of an operational or strategic objective, I think it can be the equivalent of attributable military force. The key is the effect and not the way in which it is achieved. As Sun Tzu put it in the 5th century BC “the supreme general is the one who wins without fighting”. As such a cyber operation by a third party having a significant effect could make that State a party to the IAC.

The key question then becomes how significant does the effect have to be? Clearly there are shades here and as with the “scale and effect” test for commencing an IAC there is in no set-in-stone scale. I would posit one circumstance where I think it can be argued that the operation

could make the third State party to the IAC. For this I return to military theory and the concept of the "Centre of Gravity" first outlined by von Clausewitz in "On War" in the 19th century. Without providing a long dissertation on von Clausewitz, in essence the Centre of Gravity (CoG) is the source of strength for a party to the conflict which if destroyed or made ineffective means that the party will be defeated. This strength exists at the operational and strategic levels of war and if sufficiently degraded, destroyed, or made ineffective (in the military vernacular "unhinged") the party's war effort will collapse, and it will inevitably be defeated. At the operational level the CoG should be a physical thing but at the strategic level it may be more metaphysical.

To clarify at the operational level, it could be a military formation such as an army corps or a naval carrier group while at the strategic level it could be the will of the people or the cohesion of an alliance. All these examples could be adversely impacted by a cyber operation.

If it is a large-scale army formation, this can be made ineffective by destroying or degrading its command-and-control systems. Command and control systems are always one of the critical military vulnerabilities as formations cannot fight coherently without them. The reliance of modern militaries on Information and Communications Technology (ICT) has made command and control systems arguably more vulnerable today than in the past.

At the strategic level the nature of the CoG may lend itself to being targeted by both information and cyber operations. Again, I think cyber operations which have a devastating effect on the CoG at this level could make the State conducting it a party to the IAC.

A cyber operation that targets and "unhinges" the centre of gravity would, in my opinion be of such a scale and effect that it could make the State conducting it a party to the IAC.

While the problems related to attribution remain as outlined above, there is a particularly significant issue with becoming a party to the ongoing conflict related to attribution. In theory if the CoG is destroyed or unhinged the party's war effort should collapse leading to relatively swift defeat. By the time the attribution to the non-party has been done the IAC may be finished.

In conclusion in both triggering an IAC and making a State a party to an ongoing IAC, it is more than a virtual possibility that this can occur through cyber means. However, whether it is a realistic possibility as opposed to a real one comes with some serious caveats and needs much more consideration and analysis.

Le renouveau de l'occupation : le défi de l'occupation par procuration

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The revival of occcupation tactics: the challenge of occupation by proxy

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Summary

Eugénie Duss is completing a doctoral thesis on the IHL applicable to IACs by proxy (University of Geneva) and currently working with the NGO TRIAL, engaged in combating impunity. In her presentation, she discusses how occupation by proxy generally and specifically challenges IHL of IACs. Beyond the ways in which different proxy IACs may defy IHL, she observes that proxy occupation specifically defies IHL in several ways. First, while proxy occupation is now widely recognized, we need to identify who, among the third State and the armed group, is the occupying power. Second, the exact level of control that the third State should exercise over the armed group that actually controls a territory remains controversial. Third, it is questionable whether members of the armed group who are also inhabitants of the occupied territory can be considered protected civilians. Fourth, if taken literally, the rights and duties of the occupying power could not be exercised as such by the armed group alone. Fifth, occupation by proxy might end in certain specific circumstances, but the other circumstances provided for by IHL will not always be operative. In presenting these different challenges posed by proxy occupation, Eugénie Duss will observe that while there are legal solutions to those challenges, some political obstacles to the application of IHL of IACs will persist and prevent compliance by all belligerents.

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1. Introduction

L'occupation militaire, qui constitue l'une des trois principales formes de conflits armés internationaux (ci-après CAI)[20], ne saurait avoir lieu dans le cadre d'un conflit armé non international (ci-après CANI).

Les CAI voient généralement s'affronter deux ou plusieurs Etats[21]. Cela étant, il existe des CAI qui ne mettent pas en proie exclusivement des Etats. C'est notamment le cas lorsqu'un Etat

[20] Conventions de Genève de 12 août 1949 (ci-après CG I-IV), art. 2 ; Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) (ci-après PA I), art. 1 (3).
[21] CG I-IV, art. 2 ; Comité international de la Croix-Rouge (ci-après CICR), Commentaire de la Première Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en champagne, 2e édition, 2018, par. 221 [cité : « Commentaire de 2016 »].

(généralement l'Etat territorial) (*cible*) affronte un groupe armé organisé (*proxy*) qui est contrôlé par un autre Etat (*sponsor*). Le conflit, que l'on peut qualifier de CAI par *proxy* ou de « CANI internationalisé », devient alors international dans son ensemble. Des controverses subsistent néanmoins, en particulier relativement au degré de contrôle que doit exercer le *sponsor* sur le *proxy*.

L'occupation par *proxy* décrit, quant à elle, une situation où le groupe *proxy* contrôle effectivement une portion de territoire au détriment de l'Etat territorial. Or, si l'occupation par *proxy* fait aujourd'hui l'objet d'une large reconnaissance, il reste que le degré de contrôle requis de la part du *sponsor* pour donner naissance à l'Etat d'occupation n'est non plus pas toujours identique. Plus généralement, l'occupation par *proxy* pose des défis majeurs au droit international humanitaire (ci-après DIH) qui sont tant d'ordre général – communs à l'ensemble des CAI par *proxy*, ils relèvent de considérations politiques, matérielles ou conceptuelles – que d'ordre spécifique – propres à l'occupation par *proxy*. Cette dernière catégorie s'articule autour de cinq axes : l'identité de la puissance occupante, le degré de contrôle que doit exercer le *sponsor* sur le *proxy*, le statut de civil protégé et les habitants du territoire occupé (TO), la mise en œuvre des droits et devoirs de l'occupant et la fin de l'occupation.

Notre analyse porte sur comment l'occupation par *proxy* éprouve spécifiquement le DIH. Toutefois, nous ne saurions totalement négliger les défis communs à l'ensemble des CAI par *proxy*, en particulier parce que les défis propres à l'occupation par *proxy* consistent souvent en la manifestation des défis communs aux CAI par *proxy*. De façon à conserver une vue d'ensemble, nous commencerons par rappeler les controverses entourant le degré de contrôle que doit généralement et spécifiquement exercer le *sponsor* sur le *proxy* ainsi que la reconnaissance grandissante dont jouit l'occupation par *proxy*. Dans un second temps, nous survolerons les principaux enjeux que soulèvent les CAI par *proxy* pour finalement nous pencher sur les interrogations spécifiques que suscite l'occupation par *proxy*.

2. L'avènement du contrôle global et de l'occupation par *proxy*

Avec pour point de départ le célèbre arrêt *Tadic*[22], le contrôle global fait aujourd'hui l'objet d'un large consensus relativement à la qualification du conflit[23]. En revanche, l'on tend à exiger un

[22] TPIY, *Le Procureur c. Dusko Tadic*, « Arrêt », Chambre d'appel, 15 juillet 1999, Affaire nº IT-94-1-A, pars. 137, 141 et 145 [cité : TPIY, *Tadic,* arrêt (15 juillet 1999), IT-94-1-A]

[23] Voir par exemple : TPIY, *Le Procureur c. Tihomir Blaskic*, « Jugement », Chambre de première instance I, 3 mars 2000, Affaire nº IT-95-14-T, pars. 100-101 et 122-123 [cité TPIY, *Blaskic*, jugement (3 mars 2000), IT-95-14-T] ; Cour pénale internationale (ci-après CPI), *Le Procureur c. Thomas Lubanga Dyilo*, « Décision sur la confirmation des charges », Chambre préliminaire I, 29 janvier 2007, Affaire nº ICC-01/04-01/06, pars. 209-211 [cité : CPI, *Lubanga*, confirmation des charges (29 janvier 2007), ICC-01/04-01/06] ; CICR, « Commentaire de 2016 », pars. 265-273 et 406-410 ; Mission d'enquête internationale indépendante sur le conflit en Géorgie, Rapport, Vol. II, septembre 2009, p. 301-304 ; CLAPHAM A., « The Concept of International Armed Conflict », *The 1949 Geneva Conventions: A Commentary*, édits. A. Clapham, P. Gaeta et M. Sassòli, Geneva Academy of International Humanitarian Law and Human Rights, Oxford University Press, Oxford, 2015, pars. 40-43 et 48 ; DE HEMPTINNE J., *Les conflits armés en mutation*, Paris (Éditions A. Pedone), 2019, pars. 193-194 ; KOLB R., *Ius in bello: Le droit international des conflits armés*, Précis, 2e édition, Bâle (Helbing Lichtenhahn), 2009, p. 184-186 ; SASSOLI M.,

degré de contrôle plus élevé, le plus souvent un contrôle effectif, pour l'attribution des agissements du *proxy* au *sponsor* selon les règles générales de la responsabilité internationale des Etats[24]. L'Etat *sponsor* contrôle globalement le groupe *proxy* lorsqu'il, d'une part, équipe, entraîne, finance ou apporte son soutien opérationnel au groupe et, d'autre part, participe à l'organisation, la coordination ou la planification des opérations militaires de ce dernier[25]. En revanche, pour qu'un Etat contrôle effectivement un groupe armé, ce premier doit aussi contrôler les opérations militaires du second au cours desquelles les violations se sont produites[26].

En réalité, que ce soit du point de vue de l'internationalisation du conflit ou de la mise en cause de la responsabilité internationale de l'Etat, la question reste de savoir si l'on peut attribuer des agissements du groupe à l'Etat : dans le premier cas, l'affrontement armé au sens du DIH ; dans le second, la violation d'obligations internationales[27]. De plus, l'Etat *sponsor* sera le plus souvent absent du terrain, ce qui, de l'avis de l'opinion majoritaire, ne fait pas pour autant obstacle à ce que seuls les deux Etats revêtent la qualité de parties au conflit[28]. Dissocier l'attribution aux fins d'internationalisation de l'attribution en matière de responsabilité internationale comporte le sérieux désavantage de créer un vide juridique : de par le contrôle global que l'Etat étranger exerce sur le groupe armé, cet Etat deviendrait une partie au conflit (désormais international) et les comportements de son *proxy* seraient régis par le droit des CAI (ci-après DCAI) sans que l'on puisse lui attribuer ces comportements et engager sa responsabilité[29]. C'est pourquoi il est préférable d'opter pour le même standard dans un cas

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International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Cheltenham/Northampton (Edward Elgar Publishing), 2019, par. 6.17. Voir aussi : Cour internationale de Justice (ci-après CIJ), *Application de la Convention pour la prévention et la répression du crime de génocide* (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, 26 février 2007, C.I.J. Recueil 2007, p. 43, par. 404 [cité : CIJ, *Génocide,* 26 février 2007].

[24] Voir par exemple : CIJ, *Activités Militaires et Paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c. États-Unis d'Amérique), fond, arrêt, 27 juin 1986, C.I.J. Recueil 1986, p. 14, par. 115 [cité : CIJ, *Nicaragua,* 27 juin 1986] ; CIJ, *Génocide,* 26 février 2007, pars. 402-407 ; AKANDE D., « Classification of Armed Conflicts: Relevant Legal Concepts », *International Law and the Classification of Conflicts*, édit. E. Wilmshurst, Oxford (Oxford University Press), 2012, p. 58-60 ; CARRON D., *L'acte déclencheur d'un conflit armé international*, Thèse Université de Genève, 2015, p. 324-325 ; DEL MAR K., « The Requirement of "Belonging" under International Humanitarian Law », *European Journal of International Law,* Vol. 21, No. 1, 2012, p. 116-119 ; KOLB R., p. 185-186. Voir aussi : Commission du droit international (ci-après CDI), Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite et commentaires y relatifs, *Annuaire de la Commission du droit international*, Vol. II (2), 2001, p. 110, 112 et 114 [cité : ArtCDIRE et Commentaires y relatifs].

[25] TPIY, *Tadic,* arrêt (15 juillet 1999), IT-94-1-A, pars. 137 et 145.

[26] CIJ, *Nicaragua,* 27 juin 1986, par. 115 ; CIJ, *Génocide,* 26 février 2007, par. 400.

[27] CDI, Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite, *Annuaire de la Commission du droit international*, Vol. II (2), 2001, art. 8 ; DE HEMPTINNE J., pars. 197-199 ; MACAK K., *Internationalized Armed Conflicts in International Law,* Oxford (Oxford University Press), 2018, p. 173-174.

[28] TPIY, *Tadic,* arrêt (15 juillet 1999), IT-94-1-A, par. 91 ; CPI, *Le Procureur c. Thomas Lubanga Dyilo,* « Jugement rendu en application de l'article 74 du Statut », Chambre de première instance I, 14 mars 2012, Affaire nº ICC-01/04-01/06, pars. 541 et 552 ; CICR, « Commentaire de 2016 », par. 266, 273, 406 et 409 ; CARRON D., p. 464 et 473-477 ; GILDER A., « Bringing Occupation into the 21st Century : The effective implementation of occupation by proxy », *Utrecht Law Review*, Vol. 13, No. 1, 2017, p. 66 ; HOLLAND E., « The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts? », *Suffolk Transnational Law Review*, Vol. 34, No. 1, 2011, p. 163 et 171-172 ; KOLB R., p. 184-186.

[29] Voir par exemple : CICR, « Commentaire de 2016 », pars. 268, 271, 273 et 409 ; GAL T., « Unexplored Outcomes of *Tadic*: Applicability of the Law of Occupation to War by Proxy », *Journal of International Criminal Justice*, Vol. 12, 2014, p. 63-64 et 77-78 ; KOLB R., p. 185, n. 363 ; SASSÒLI M., par. 6.17 ; SPINEDI M., « On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia », *Journal of International Criminal Justice*, Vol. 5, 2007, p. 831-832 et 835.

comme dans l'autre[30]. Privilégier le contrôle effectif aurait pour conséquence que la qualification du conflit changerait constamment selon que l'Etat *sponsor* contrôle ou non l'opération militaire du groupe en question et entacherait la prévisibilité du droit applicable[31]. À l'inverse, lorsqu'un groupe armé organisé est contrôlé globalement, le conflit s'internationalise en bloc, et ce, aussi longtemps que l'Etat contrôle globalement le groupe[32]. Autrement dit, le contrôle global présente l'avantage que la qualification ne soit pas fonction de chaque engagement militaire.

En toute logique, face à un groupe organisé contrôlé globalement qui contrôle effectivement une portion de territoire, la situation devrait être qualifiée d'occupation par *proxy*. En réalité, alors que l'occupation par *proxy* est de plus en plus reconnue, le degré exact de contrôle que doit exercer le *sponsor* sur le *proxy* à cette fin reste débattu. La Cour internationale de Justice, le Tribunal pénal international pour l'ex-Yougoslavie et la Cour européenne des droits de l'homme ont ainsi tous trois affirmé qu'il était possible qu'un territoire soit occupé par l'entremise d'un groupe armé sans pour autant tomber d'accord sur l'intensité du contrôle requise [33]. De façon parfois moins évidente, la Mission d'enquête internationale indépendante sur le conflit en Géorgie, le Conseil de sécurité des Nations Unies, l'Assemblée générale des Nations Unies, une partie grandissante de la doctrine et certains Etats se sont aussi positionnés favorablement à l'occupation par *proxy* mais n'ont pas nécessairement précisé le degré de contrôle exigé à cette fin[34]. Quant au Comité international de la Croix-Rouge, il a intégré explicitement l'occupation par *proxy* dans son nouveau commentaire (« occupation indirecte ») et préconisé qu'un simple contrôle global de la part du *sponsor* suffise aux fins d'établissement de l'Etat d'occupation[35].

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[30] CICR, « Commentaire de 2016 », pars. 268, 271, 273 et 409 ; CASSESE A., « *Nicaragua* and *Tadic* Tests » , p. 656-668 ; DE HEMPTINNE J., pars. 197-201 ; SASSÒLI M., par. 6.17. Pour le contrôle global comme permettant la mise en œuvre de la responsabilité internationale de l'État, voir : TPIY, *Tadic,* arrêt (15 juillet 1999), IT-94-1-A, pars. 104, 122-123 et 131 ; TPIY, *Le Procureur c. Prlic et al.,* « Jugement », Tome 1, Chambre de première instance, jugement (29 mai 2013), IT-04-74-T, par. 86.

[31] CICR, « Commentaire de 2016 », par. 271. Voir aussi : CARRON D., p. 476.

[32] TPIY, *Tadic,* arrêt (15 juillet 1999), IT-94-1-A, pars. 97 et 145 ; CICR, « Commentaire de 2016 », par. 266, 273 et 406 ; DE HEMPTINNE J., pars. 281-284 ; KOLB R., p. 192.

[33] CIJ, *Activités armées sur le territoire du Congo* (République Démocratique du Congo c. Ouganda), arrêt, 19 décembre 2005, C.I.J. Recueil 2005, p. 168, pars. 160 et 177 [cité : CIJ, *Activités armées*, 19 décembre 2005] ; TPIY, *Blaskic*, jugement (3 mars 2000), IT-95-14-T, pars. 149-150 ; Cour européenne des droits de l'homme (ci-après CourEDH), *Affaire Loizidou c. Turquie*, no. 15318/89, 18 décembre 1996, pars. 52, 54 et 56 ; CourEDH, CourEDH, *Affaire Ilascu et autres c. Moldova et Russie,* no. 48787/99, 8 juillet 2004, pars. 314-316 et 392 ; CourEDH, *Affaire Géorgie c. Russie (II*), no. 38263/08, 21 janvier 2021, pars. 164-175.

[34] Voir not. : Mission d'enquête internationale indépendante sur le conflit en Géorgie, Rapport, Vol. II, septembre 2009, p. 311 ; Conseil de sécurité des Nations Unies (ci-après CSNU), Résolution 884 (1993), 12 novembre 1993, UN Doc. S/RES/884 (1993), préambule par. 5 ; CSNU, Procès-verbal de sa 7876e séance, 2 février 2017, UN Doc. S/PV.7876, p. 7 ; Assemblée générale des Nations Unies (ci-après AGNU), « La situation dans les territoires occupés de l'Azerbaïdjan », Résolution 62/243, 14 mars 2008, UN Doc. A/62/243, pars. 2 et 3 ; CICR, « Expert Meeting : Occupation and Other Forms of Administration of Foreign Territory », 2012, p. 23 [cité: « Expert Meeting »]; DINSTEIN Y., *The International Law of Occupation,* 2e édition, Cambridge (Cambridge University Press), 2019, par. 141 [cité : *The International Law of Occupation*] ; GAL T., p. 59ss, en particulier 65-75 ; GILDER A., p. 61-70 ; MACAK K., p. 196-238 ; SASSÒLI M., pars. 8.204-8.205; Royaume-Uni, *The Joint Service Manual of the Law of Armed Conflict*, sect. 11.3.1.

[35] CICR, « Commentaire de 2016 », pars. 328-332

En pratique, il a été par exemple établi que certaines portions du territoire de la Bosnie-Herzégovine furent occupées par le biais respectivement de la *Republika Sprska* et du Conseil de défense croate[36]. Le même raisonnement fut tenu à l'égard de la partie septentrionale de Chypre en relation avec la République turque de Chypre du Nord[37]. Ce serait aussi le cas des républiques autoproclamées de Donetsk et Louhansk dans l'hypothèse où elles auraient été sous le contrôle global de la Russie avant le 24 février 2022.

3. Défis généraux

Puisque la situation est qualifiée de CAI, c'est logiquement le DCAI qui doit s'appliquer. Ceci étant, lorsqu'appliquées littéralement aux rapports *proxy-cible*, les obligations du DCAI, notamment celles du droit de l'occupation, deviennent irréalistes à plusieurs titres. Premièrement, il est hautement improbable que le *proxy* et le *sponsor* reconnaissent au grand jour la relation qui les lie : à notre connaissance, le seul Etat ayant reconnu explicitement prendre part à un CAI par *proxy* est la Géorgie, qui a dénoncé le contrôle russe exercé sur les séparatistes sud-ossètes et abkhazes qu'elle combattait[38]. De ce point de vue, en raison notamment de considérations politiques, le *sponsor* refusera de toute évidence d'assumer les obligations qui pèsent sur lui en sa qualité de partie au conflit. Deuxièmement, les groupes *proxy* sont *a priori* dotés de capacités matérielles comparativement réduites à celles de l'Etat *sponsor*[39]. Il sera donc difficile pour le groupe de se conformer aux obligations du DCAI sans que l'on entreprenne un réel effort de réinterprEtation et d'adaptation. Finalement, le DCAI est conçu comme s'adressant à des Etats[40], ce qui nécessitera parfois de réinterpréter voire de modifier certaines de ses régulations ou les concepts les sous-tendant, sous peine de priver le DCAI de son efficacité dans les relations *cible - proxy*.

4. Défis spécifiques

D'un côté, les enjeux propres à l'occupation par *proxy* découlent de ces défis communs aux différents CAI par *proxy*. De l'autre, ils ne questionneront le DIH que dans le contexte de l'occupation par *proxy*. Mis ensemble, sans pour autant revêtir la même importance, les défis majeurs auxquels doit spécifiquement faire face le DIH en cas d'occupation par *proxy* sont, pour rappel, multiples puisqu'ils touchent tant à l'identité de la puissance occupante (ci-après

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[36] TPIY, *Le Procureur c. Dusko Tadic*, « Jugement », Chambre de première instance, 7 mai 1997, Affaire n° IT-94-1-T, par. 584 ; TPIY, *Blaskic*, jugement (3 mars 2000), IT-95-14-T, pars. 149-150.

[37] CourEDH, *Affaire Loizidou c. Turquie*, no. 15318/89, 18 décembre 1996, pars. 52, 54 et 56 ; CourEDH, *Affaire Chypre c. Turquie*, no. 25781/94, 10 mai 2001, par. 76.

[38] CourEDH, *Affaire Géorgie c. Russie (II)* (déc.), no. 38263/08, 13 décembre 2011, par. 24 ; Mission d'enquête internationale indépendante sur le conflit en Géorgie, Rapport, Vol. II, septembre 2009, p. 300-304 ; Mission d'enquête internationale indépendante sur le conflit en Géorgie, Rapport, Vol. III, septembre 2009, p. 438 et 440. Voir aussi : ZAMIR N., *Classification of Conflicts in International Humanitarian Law : The Legal Impact of Foreign Intervention in Civil Wars*, Cheltenham/Northampton (Edward Elgar), 2017, p. 133-134.

[39] Voir par exemple : CLAPHAM A., par. 43 ; GAL T., p. 73 ; MEYROWITZ H., « Le droit de la guerre dans le conflit vietnamien », Annuaire Français de Droit International, Vol. 13, 1967, p. 171 et 173-175.

[40] Dans ce sens, voir, par exemple : MEYROWITZ H., p. 157-158 et 191.

PO), au degré de contrôle que doit exercer le *sponsor* sur le *proxy*, au statut de civil protégé et les habitants du territoire occupé (ci-après TO), à la mise en œuvre des droits et devoirs de l'occupant qu'à la fin de l'occupation.

A. Identité de la puissance occupante

La PO est conçue comme étant normalement un Etat[41], or, compte tenu de l'autonomie du *proxy* et de la présumée absence du *sponsor*, l'on peut s'interroger sur qui du *sponsor* ou du *proxy* revêt ici la qualité de PO. En réalité, la logique du DCAI veut que l'on continue à assimiler le *sponsor* à la PO[42], mais comme le droit de l'occupation est conçu comme s'adressant à la PO[43], il nous faut savoir selon quelles modalités il est possible de lier le *proxy* au droit de l'occupation.

Il est tout d'abord possible de considérer que le *proxy* agira comme forces armées (ci-après FA) irrégulières d'occupation**.** Plus précisément, comme il suffit que l'Etat accepte tacitement qu'un groupe armé combatte pour son compte pour que le second appartienne au premier au sens de l'art. 4 (A) (2) de la Convention (III) de Genève relative au traitement des prisonniers de guerre (ci-après CG III)[44] et que les parties au conflit ne sauraient déroger aux droits des personnes protégées[45], il est envisageable qu'un groupe contrôlé globalement appartienne en fin de compte à l'Etat qui le contrôle[46] et constitue donc ses FA au titre de l'art. 43 (1) du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) (ci-après PA I)[47]. Toutefois, ce raisonnement ne peut être tenu qu'à l'égard de la branche militaire du *proxy*, soit celle

[41] Convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre (ci-après CG IV), art. 4 (1)-(2) et 29 ; PICTET J., *Les Conventions de Genève du 12 août 1949 : commentaire*, Vol. IV, Genève (Comité international de la Croix-Rouge), 1958, p. 52-55 et 225-229 [cité : CICR, « Commentaires CG IV de 1958 »].

[42] CIJ, *Activités armées*, 19 décembre 2005, pars. 173 et 177 ; CPI, *Lubanga*, confirmation des charges (29 janvier 2007), ICC-01/04-01/06, pars. 209-211 ; TPIY, *Blaskic*, jugement (3 mars 2000), IT-95-14-T, pars. 149-150 ; AKANDE D., p. 44-45 ; DINSTEIN Y., *The International Law of Occupation,* pars. 141-142 et 186 ; FERRARO T., « Determining the beginning and end of an occupation », *Revue internationale de la Croix-Rouge*, Vol. 94, No. 885, 2012, p. 158-159 ; GAL T., p. 65-66 ; SASSÒLI M., par. 8.204.

[43] CG IV, art. 29.

[44] PICTET J., *Les Conventions de Genève du 12 août 1949 : commentaire*, Vol. III, Genève (Comité international de la Croix-Rouge), 1958, p. 64. Voir aussi : CICR, Commentaire de la Troisième Convention de Genève relative au traitement des prisonniers de guerre du 12 août 1949, 2e édition [version anglaise en ligne], pars. 1002-1004 et 1006-1007 ; MELZER N., *Guide interprétatif sur la notion de participation directe aux hostilités en droit international humanitaire*, Genève (CICR), 2010, p. 25 ; MEYROWITZ H., p. 173 (« liaison de fait sur le plan militaire ») ; ROSAS A., p. 258 et 338 ; WATTS S., « Who is a Prisoner of War », The 1949 Geneva Conventions: A Commentary, édits. A. Clapham, P. Gaeta et M. Sassòli, Geneva Academy of International Humanitarian Law and Human Rights, Oxford University Press, Oxford, 2015, pars. 27-31.

[45] CG I-IV, art. 6/6/6/7. Voir aussi : PICTET J., *Les Conventions de Genève du 12 août 1949 : commentaire*, Vol. I, Genève (Comité international de la Croix-Rouge), 1952, p. 79-81 ; CICR, « Commentaire de 2016 », pars. 978-980.

[46] TPIY, *Tadic*, arrêt (15 juillet 1999), IT-94-1-A, pars. 91-95 ; CPI, *Lubanga*, confirmation des charges (29 janvier 2007), ICC-01/04-01/06, pars. 209-211 ; CICR, « Commentaire de 2016 », pars. 266-267, 271 et 273.

[47] Voir not. : DINSTEIN Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge (Cambridge University Press), 3ème édition, 2016, p. 61 ; IPSEN K., « Combatants and Non-Combatants », *The Handbook of International Humanitarian Law*, édit. D. Fleck, Oxford (Oxford University Press), 3e édition, 2013, par. 304; MELZER N., p. 24-25.

composée des membres qui exercent une fonction de combat continue[48], puisque ce sont eux qui mènent les opérations militaires à l'élaboration desquelles le *sponsor* participe.

Étant donné que le *sponsor* est souvent absent du terrain et qu'il refusera d'assumer au grand jour le rôle qui joue dans le conflit, quand bien même les règles du droit de l'occupation s'adressent majoritairement à la puissance occupante, et par extension à ses forces armées régulières, il conviendra ici de se référer au *proxy* seul[49].

En tant que FA irrégulières du *sponsor*, la branche militaire du *proxy* sera liée par tout le DCAI conventionnel pesant sur le *sponsor*[50]. Subsidiairement, le principe d'effectivité pourrait permettre de lier l'ensemble des branches du *proxy* au DCAI coutumier[51].

Enfin, il faut garder à l'esprit que, contrairement à un cas d'occupation militaire classique, le *proxy* peut aussi agir comme autorité locale dans l'hypothèse où il contrôlait déjà effectivement le territoire avant d'être contrôlé globalement par le *sponsor*. Lorsqu'il agit en qualité d'autorité locale, le groupe possédera une plus grande marge de manœuvre et ne sera pas limité par le droit de l'occupation comme il l'est en tant que forces d'occupation. Le *proxy* portera alors une double casquette. Afin de préserver la relative autonomie des autorités locales tout en maintenant le *statu quo ante*, il sera nécessaire de circonscrire avec précision à quel moment le *proxy* agit comme FA d'occupation ou, au contraire, en tant qu'autorités locales.

B. Le degré de contrôle que doit exercer le sponsor sur le proxy

Sachant qu'un territoire, pour être occupé, doit être contrôlé effectivement[52] et que le *sponsor*, qui possède la qualité de PO, est en principe absent du terrain, nous pouvons nous demander si, de ce fait, l'on doit exiger que le contrôle exercé sur le *proxy*, ou du moins sur l'acte donnant naissance à occupation, soit effectif[53] ou si un contrôle global suffit[54] ? Il convient de retenir ici

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[48] Dans ce sens, voir : MELZER N., p. 24.

[49] Il est notamment possible d'argumenter que la conjonction de l'impossibilité matérielle d'exécution comme circonstance excluant l'illicéité et l'indépendance entre le *jus ad bellum* et le *jus in bello* commande que l'on se réfère exclusivement aux capacités du *proxy,* mais ce point ne sera pas davantage développé ici.

[50] Dans ce sens, voir not. : PA I, art. 91 ; CIJ, *Affaire LaGrand* (Allemagne c. États-Unis d'Amérique), demande en indication de mesures conservatoires, ordonnance, 3 mars 1999, C.I.J. Recueil 1999, p. 9, par. 28 ; SANDOZ Y., SWINARSKI C. et ZIMMERMANN B. (édits), *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, Genève (Martinus Nijhoff Publishers), 1986, par. 3660 ; ArtCDIRE et Commentaires y relatifs, p. 101 et 106 ; DEL MAR K., p. 120-121 ; FERDINANDUSSE W., « Out of the Black-Box ? The International Obligation of State Organs », *Brooklyn Journal of International Law*, Vol. 29, No. 1, 2003, p. 45-127.

[51] CAMERON L. et CHETAIL V., *Privatizing war : Private Military and Security Companies under Public International Law*, Cambridge (Cambridge University Presss), 2013, p. 315 et 351-354 ; DAVID E., *Principes de droit des conflits armés,* 5e édition, Bruxelles (Bruylant), 2012, pars. 1.220-1.223 ; KOLB R., p. 200-211.

[52] Convention (IV) de la Haye concernant les lois et coutumes de la guerre sur terre et son Annexe : Règlement concernant les lois et coutumes de la guerre sur terre (ci-après RLH 1907), art. 42 ; CICR, « Commentaire de 2016 », pars. 302-304.

[53] Voir not. : CIJ, *Activités armées*, 19 décembre 2005, pars. 160, 173 et 177 ; CourEDH, *Affaire Catan et autres c. Moldova et Russie,* nos. 43370/04, 8252/05 et 18454/06, 19 octobre 2012, pars. 111-123 ; DINSTEIN Y., *The International Law of Occupation*, par. 141 ; SASSOLI M., pars. 8.204-8.205.

[54] Voir not. : CourEDH, *Loizidou c. Turquie*, no. 15318/89, 18 décembre 1996, pars. 52 et 56 ; CourEDH, *Chypre c. Turquie*, no. 25781/94*,* 10 mai 2001, par. 77 ; TPIY, *Blaskic*, jugement (3 mars 2000), IT-95-14-T, pars. 149-150 ; CICR, « Commentaire de

aussi le critère du contrôle global pour plusieurs raisons, notamment la cohérence de la construction juridique – le CANI devient international de par le contrôle global qu'exerce le sponsor or l'occupation constitue l'une des trois principales de CAI – et la prévisibilité du régime juridique applicable – le contrôle effectif a pour conséquence que la qualification de la situation peut changer à chaque agissement du groupe. En réalité, même s'il n'exerce qu'un contrôle global, il reste possible d'affirmer que le *sponsor*, en tant que PO, exerce un « contrôle effectif indirect **»** en contrôlant globalement le groupe qui contrôle effectivement le territoire[55].

Par ailleurs, cette fois-ci en rapport avec le contrôle que doit exercer le groupe, un groupe armé doit contrôler effectivement un territoire pour pouvoir maintenir en captivité des individus. Or, comme il n'est pas doté d'un territoire propre, un groupe *proxy* qui détient des individus, contrairement à des FA régulières, occupera aussi en principe une portion de territoire. Autrement dit, un *proxy* qui maintient en captivité des individus le fera *a priori* nécessairement dans un contexte d'occupation par *proxy*. Aussi, la *cible* ici ne peut pas occuper un territoire précédemment administré par le *proxy* puisqu'il n'est pas possible pour un Etat d'occuper son propre territoire[56].

C. Est-ce que tous les habitants du territoire occupé possèdent le statut de civils protégés ?

Les habitants du TO possèdent normalement le statut de civils protégés, car ils sont réputés être au pouvoir d'un Etat – ici l'Etat *sponsor*, qui est la PO – dont ils ne sont *a priori* pas les ressortissants[57]. L'on peut néanmoins se demander s'il en va de même pour les membres des autres branches du groupe qui habiteraient le territoire : sont-ils des civils protégés ? Ou doit-on leur refuser le statut de civil protégé en raison de leur appartenance au groupe *proxy* ? En raison de leur allégeance commune avec la branche militaire du *proxy* qui appartient à la PO, il est envisageable de les écarter du statut de civil protégé. Plus concrètement, nous pourrions substituer le critère de l'allégeance à celui de la nationalité formelle, recourir à l'appartenance de la branche militaire pour établir l'allégeance des autres branches du *proxy* et assimiler ses membres civils à des ressortissants de la PO de façon à les exclure de la définition de civils protégés[58].

2016 », pars. 329-332 ; FERRARO T., p. 158-160 ; VITÉ S., « Typologie des conflits armés en droit international humanitaire : concepts juridiques et réalités », *Revue internationale de la Croix-Rouge*, Vol. 91, No. 873, 2009, p. 5-6.

[55] CICR, « Commentaire de 2016 », pars. 329-332 ; CICR, « Expert Meeting », p. 23 ; FERRARO T., p. 158-160.

[56] Dans ce sens, voir : CIJ, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, 9 juillet 2004, C.I.J. Recueil 2004, p. 136, pars. 78 et 95 [cité : CIJ, *Mur* (9 juillet 2004)] ; CICR, « Commentaire de 2016 », pars. 302-303 et 323-324 ; KOLB R. et VITÉ S., *Le droit de l'occupation militaire : Perspectives historiques et enjeux juridiques actuels*, Bruxelles (Bruylant), 2009, p. 137 ; SASSÒLI M., pars. 8.191-8.192 et 8.194.

[57] CG IV, art. 4 (1) ; TPIY, *Le Procureur c. Dusko Tadic,* « Arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence », Chambre d'appel, 2 octobre 1995, Affaire n° IT-94-1, par. 76 [cité : TPIY, *Tadic,* arrêt (compétence) (2 octobre 1995)] ; TPIY, *Tadic*, arrêt (15 juillet 1999), par. 167.

[58] Un raisonnement qu'avait tenu le TPIY afin de concéder et non refuser le statut de civil protégé aux sympathisants civils du *proxy* aux mains de la *cible*, voir : TPIY, *Le Procureur c. Zejnil Delalic et al.*, « Arrêt », Chambre d'appel, 20 février 2001, Affaire

En revanche, sauf à se fonder sur l'attitude du *proxy* et du *sponsor*[59], il est bien plus incertain d'établir l'allégeance des simples prétendus sympathisants civils envers le *sponsor*. Partant, afin de parer à tout risque d'abus, ces simples sympathisants ne devraient pas se voir évincer à ce titre du statut de civil protégé.

Enfin, les habitants qualifiés de civils protégés devront être traités comme tels aussi dans leurs rapports avec les autorités locales, y compris lorsque le *proxy* agit aussi en cette qualité. En effet, les autorités locales sont réputées exercer leurs fonctions sous le contrôle et la supervision de l'occupant, c'est-à-dire des forces d'occupation et plus largement de la PO[60].

5. Droits et devoirs de l'occupant

Face à une occupation par procuration, il convient d'appliquer plus strictement le principe du maintien du *statu quo ante*[61]. À nouveau, le *sponsor* est présumé être absent du terrain et refuser de s'impliquer ouvertement. Par conséquent, quand bien même les règles du droit de l'occupation s'adressent à la PO[62] et, par extension, à ses forces armées régulières, il convient ici de se référer au *proxy* seul, or ce dernier est le plus souvent dépourvu de certaines fonctions et capacités que possèdent les Etats et qui sont nécessaires au respect du droit de l'occupation[63].

Une position qu'il convient toutefois de nuancer quelque peu. Premièrement, le *proxy* peut aussi agir comme autorité locale. À ce titre, il ne sera pas limité comme l'est l'occupant par le droit de l'occupation, mais il sera réputé exercer ses fonctions sous le contrôle et la supervision de ce dernier, soit des forces d'occupation et plus largement de la PO[64]. Deuxièmement, si le droit de l'occupation est à première vue exigeant en termes de ressources, en réalité, le maintien de la vie et l'ordre publics et de nombreuses autres obligations qu'il contient sont des obligations de moyen[65], qui sont donc corrélatives des capacités de leurs destinataires (ici celles du *proxy* seul). En outre, beaucoup des règles de ce droit permettent en réalité de pallier les défaillances du *proxy* lorsqu'il agit comme occupant.

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n° IT-96-21-A, par. 83. Pour l'allégeance comme se substituant à la nationalité formelle pour le statut de civil protégé, voir par exemple : TPIY, *Tadic,* arrêt (compétence) (2 octobre 1995), par. 76 ; TPIY, *Tadic*, arrêt (15 juillet 1999), pars. 166-168.

[59] S'agissant de l'« allégeance perçue », soit la détermination de l'allégeance de l'individu selon l'attitude du belligérant à son égard, voir : TPIY, *Le Procureur c. Prlic et al.,* « Jugement », Tome 3, Chambre de première instance III, 29 mai 2013, Affaire n° IT-04-74-T, pars. 610-611 ; MACAK K., p. 236.

[60] BOTHE M., « The Administration of Occupied Territory », *The 1949 Geneva Conventions: A Commentary*, édits. A. Clapham, P. Gaeta et M. Sassòli, Oxford (Geneva Academy of International Humanitarian Law and Human Rights/Oxford University Press), 2015, pars. 40 et 107 ; DINSTEIN Y., *The International Law of Occupation*, pars. 186-188.

[61] Pour ce principe, voir : RLH 1907, art. 43 ; SASSÒLI M., pars. 8.235, 8.238 et 8.259-8.260.

[62] CG IV, art. 29.

[63] S'agissant des groupes armés comme destinataires d'un droit de l'occupation conçu pour les États, voir : CICR, « Expert Meeting », p.128 ; GAL T., p. 73-75.

[64] BOTHE M., pars. 40 et 107 (où les autorités locales sont décrites comme étant sous le contrôle et la supervision de la PO, ce qui rend leurs agissements attribuables à cette dernière) ; DINSTEIN Y., *The International Law of Occupation*, pars. 186-188.

[65] RLH 1907, art. 43 ; DINSTEIN Y., *The International Law of Occupation*, pars. 154 et 280.

Ainsi, du point de vue de la santé, du ravitaillement, de l'éducation et du travail de la population, mais aussi de l'administration du TO[66], le *proxy* se doit de privilégier le recours aux ressources matérielles et personnelles locales. Si elles sont défaillantes, il a la possibilité de recourir à des réquisitions, l'usufruit, des prélèvements et des astreintes au travail. En revanche, comme le maintien du *statu quo ante* doit être appliqué ici strictement, ce n'est que quand les ressources locales seront inexistantes ou épuisées que le *proxy* pourra envisager de recourir à ses propres ressources. Ce qui veut dire que, par exemple, il ne pourra pas recruter des membres de ses autres branches aussi longtemps que des habitants du TO qui ont le statut de civil protégé possèdent les qualifications nécessaires.

Quant aux droit(s) et tribunaux du TO, conformément au maintien *statu quo ante,* l'occupant ne peut qu'exceptionnellement modifier le droit applicable dans le TO et constituer des tribunaux[67]. Dans un tel cas de figure, les tribunaux de l'occupant devront être militaires[68] et donc ici appartenir à la branche militaire du groupe *proxy*. Il sera aussi nécessaire de reconnaître une certaine mesure de capacité à légiférer aux groupes *proxy.* La capacité législative des groupes armés est une question qui anime surtout le droit des CANI (ci-après DCANI). Dans le cas d'une occupation par *proxy*, ces difficultés sont moindres puisque que le droit ne peut être modifié ou adopté par l'occupant que par ordre militaire du commandant des forces d'occupation, soit ici le supérieur hiérarchique de la branche militaire qui contrôle effectivement le territoire, à l'exclusion d'un quelconque parlement[69].

6. La fin de l'occupation par proxy

L'occupation par *proxy* peut se terminer selon différentes modalités : la conclusion d'un accord de paix, le consentement du nouveau gouvernement, l'interruption du contrôle effectif et la fin du contrôle global sur le groupe.

Dans le cas d'un accord de paix[70], se pose la question de savoir qui, du *proxy* ou du *sponsor,* peut y être partie ? Dans l'hypothèse où le *proxy* serait directement partie à l'accord de paix, la valeur juridique d'un tel accord reste incertaine, le *proxy* n'ayant ni la qualité de partie au conflit ni n'étant un Etat. Alternativement, l'accord pourrait être conclu directement entre les deux Etats, le *sponsor* engageant alors le *proxy*. C'est la solution qui a prévalu lors des

[66] Voir, par exemple : CG IV, art. 50, 51, 54, 55 et 56 ; PA I, art. 69 (1).
[67] RLH 1907, art. 43 ; CG IV, art. 64 (1) ; CICR, « Commentaires CG IV de 1958 », p. 359-360 ; SASSÒLI M., par. 8.259 ARAI-TAKAHASHI Y., « Law-Making and the Judicial Guarantees in Occupied Territories », *The 1949 Geneva Conventions: A Commentary*, édits. A. Clapham, P. Gaeta et M. Sassòli, Oxford (Geneva Academy of International Humanitarian Law and Human Rights/Oxford University Press), 2015, pars. 1 et 5-17 [cité : « Law-Making and the Judicial Guarantees in Occupied Territories »] ; SASSÒLI M., pars. 8.240-8.245.
[68] Voir : CG IV, art. 54 (1), 64 (1) et 66 ; ARAI-TAKAHASHI Y., pars. 24, 33-34 et 40 ; SASSOLI M., par. 8.248.
[69] États-Unis d'Amérique, Instruction de 1863 pour les armées en campagne des États-Unis d'Amérique (Code Lieber), art. 2-3 (« Martial Law ») ; RLH 1907, art. 52 (2) ; SASSÒLI M., par. 8.246. L'annexion d'un TO est implicitement interdite par le droit de l'occupation ; CG IV, art. 47 ; CICR, « Commentaires CG IV de 1958 », p. 296-297 ; SASSÒLI M., par. 8.237.
[70] DINSTEIN Y., *The International Law of Occupation*, par. 823-826 ; SASSÒLI M., pars. 8.228 et 8.230.

Accords de Dayton[71]. Ceci étant, dans la majorité des cas ni le *proxy* ni le *sponsor* ne vont reconnaître au grand jour la nature de leur relation et la conclusion d'un accord de paix comme mettant un terme à l'occupation par *proxy* reste donc une modalité douteuse et essentiellement théorique.

S'agissant du consentement du nouveau gouvernement, il convient de noter qu'un nouveau gouvernement qui serait composé de membres du *proxy* pourrait aussi consentir à la fin à l'occupation aussi longtemps qu'il a été élu démocratiquement[72].

Comme toute occupation, l'occupation par *proxy* peut prendre fin par l'interruption du contrôle effectif du territoire[73]. En revanche, l'occupation par *proxy*, contrairement à l'occupation militaire classique, peut aussi se terminer en raison de la fin du contrôle global sur le groupe[74]. Dans ce dernier cas, l'interruption doit être durable et stable,[75] mais entraînera la fin de l'occupation en bloc, et non selon une approche fonctionnelle.

En résumé, similairement à l'occupation en général, le terme de l'occupation par *proxy* ne correspond pas nécessairement à la fin du CAI par *proxy.* Aussi, il ne coïncide pas nécessairement avec la fin de l'application du droit de l'occupation[76]. Toutefois, dans un cas d'occupation par *proxy*, l'Etat d'occupation peut prendre fin selon des modalités spécifiques tandis que d'autres modalités prévues par le DIH sont en pratique inopérantes.

7. Conclusion

Au cours de cet exposé, nous avons eu l'occasion de constater que les défis posés au DIH par l'occupation par *proxy* sont tant d'ordre conceptuel que matériel. Ceux d'ordre conceptuel nécessitent que l'on relise parfois certains concepts ou règles ou, du moins, que l'on recoure à d'autres techniques interprEtatives que celle de l'interprEtation littérale. Quant aux enjeux dits d'ordre matériel, en réalité un bon nombre de solutions intrinsèques du droit de l'occupation sont susceptibles de prendre en compte ou parer aux défaillances du *proxy*. Il reste que les solutions juridiques esquissées dans cette présentation ne sont pas en mesure d'écarter certains obstacles politiques à la bonne application du DIH, en particulier la profonde réticence qu'auront le groupe *proxy* et le *sponsor* à reconnaître et assumer au grand jour la relation qui les lie. Finalement, de grands efforts sont entrepris pour appliquer le DCAI aux relations *proxy – sponsor* mais l'on finit parfois par s'inspirer de solutions provenant du DCANI.

[71] Accord-cadre général pour la paix en Bosnie-Herzégovine (21 novembre 1995), préamb., para. 4.
[72] CG IV, art. 47 *a contrario* ; GRIGNON J., « The Geneva Conventions and the End of Occupation », *The 1949 Geneva Conventions: A Commentary*, édits. A. Clapham, P. Gaeta et M. Sassòli, Geneva Academy of International Humanitarian Law and Human Rights, Oxford University Press, Oxford, 2015, par. 25.
[73] DINSTEIN Y., *The International Law of Occupation*, par. 829 ; SASSÒLI M., pars. 8.228 et 8.230.
[74] Dans ce sens voir : KOLB R., p. 192 (« cessation du *soutien* » [italique ajoutée]). Voir aussi : DE HEMPTINNE J., pars. 281-284.
[75] DE HEMPTINNE J., pars. 269 et 283-284.
[76] CG IV, art. 6 (3)-(4) ; PA I, art. 3 (b).

En somme, si la logique commande que l'on classifie une telle situation de CAI par *proxy*, en pratique les chances que l'ensemble des belligérants appliquent le DCAI sont minces.

Moderated discussion – Discussion moderée

De facto State organs

The first question from the audience related to the difference between a *de facto* State organ and a *de facto* State agent. In the formulation of the question, reference was made to the interpretation of James Crawford who confines the concept of *de facto* State organs to the context of a complete dependence and control test as considered implicitly in Article 4 of the Draft Articles on State Responsibility. Specifically, it was asked whether a non-State actor in the context of an occupation by proxy would be considered as a *de facto* State organ?

In replying the speaker argued that the qualification of an entity as a *de facto* State organ under international law is complex and involves a careful assessment of the criteria outlined in Article 4 of the draft Articles on State Responsibility. There is a divergence of positions between the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Court of Justice (ICJ) as the latter prescribes a higher test for attribution purposes, notably the "effective control-test" rather than the ICTY which allows for an "overall control-test". In reconciling the points of view of the ICTY and the ICJ, the speaker advocated to resort to a *lex specialis* criterion of attribution based on IHL which offers a potential avenue to address this divergence and attribute responsibility in cases where effective control may not be clearly established. This would allow to connect a group to a State and thus closing the gap of responsibility, including from a human rights perspective.

Another speaker added that IHL provides for a clear threshold in international armed conflicts. The State possesses the legal authority, according to its national laws, to include organs, groups, militias, or other similar entities in their armed forces. When such incorporation takes place under national law, these persons are classified as combatants and recognized as part of the State's armed forces.

Legal framework for persistent below threshold cyber activity

Another member of the audience asked how States could potentially address the new trend of persistent engagement through cyber means, since we are now looking at a variety of different activities that are below the threshold of armed conflict – be it through ransomware campaigns, malware, or battlefield preparations. The question remains how are these components that can ultimately lead to strategic gains – either on the battlefield or beforehand – addressed from

a legal perspective? In policy discussions it is being acknowledged both in the US and Europe, but what does the law say?

A panellist replied that persistent activities below the threshold of armed attack through cyber means – which could be referred to as "death by a thousand cuts" – is not addressed by IHL as such. The applicable legal framework to act against those persistent engagement through cyber means is the broader international and national law regime. In addition, the issue of attribution comes up (again) as it is difficult to identify who is behind the cyber activity. There was an interesting study produced by the Center for Strategic and International Studies in the US in 2019 and 2020 "Operating in the Gray zone" which looks at the potential legal avenues for States to take in the cyber domain. However, the term "gray zone" is misleading as it would imply that there is no law while there are a lot of different rules applicable. In short, there is no clear-cut answer or one applicable international framework to address the issue which adds to the complexity.

Threshold for support to result into participation in armed conflict

A third question that rose from the participants relates to how the shift in capability and responsibility in key battle space capabilities – such as logistics and support functions – factor into the threshold determination of when a State becomes a party to an armed conflict. This question was posed in reference to the ongoing international armed conflict between Russia and Ukraine and the support that is being given which makes it possible for the Ukrainian armed forces to focus on the key battlefield capabilities.

A panellist replied that in the context of assessing when a State becomes a party to an armed conflict, particularly considering evolving force structures and support functions, there are several considerations to weigh. The shift of capability and responsibility for crucial battlefield functions like logistics and support present a complex challenge. Ultimately, the question of whether support functions should be considered a factor that cannot be omitted in determining the State's involvement in an armed conflict remains subject to debate. The speaker considers the directness between the support activities and the hostilities important as it is crucial to make the determination. In the end it depends on the specific facts and circumstances and requires a case-by-case assessment.

The same panellist was asked to clarify his position on whether the concept of individual civilian direct participation in hostilities could be relevant in determining when a State becomes a party to a conflict, despite the significant difference in scope between individual actions and State-level involvement?

The panellist in his reply referred to the three criteria as set out by the 2009 Interpretative Guidance on Direct Participation in Hostilities. While stressing that this is not his own idea, he

argues that the notion centres on the threshold for harm and proximity to hostilities as key criteria. In the context of individual civilians, this is when they transition from being considered civilians to losing the protection afforded to civilians due to their direct participation in hostilities. Now, when we apply this concept to State actions it's essential to consider the supporting State's role in causing harm and the causal link between their support and the harm inflicted. This perspective extends beyond the mere presence of an armed conflict and delves into the intention of the supporting State to intervene in favour of one side to the detriment of the other. The panellist encourages IHL practitioners to think about this in understanding and addressing the complex issue of when a State should be considered a party to an armed conflict.

Implication of transition of power

From the audience the question was asked whether the occupation is considered to be put to an end if a sponsor-controlled armed group is democratically elected? Furthermore, the question rose whether in such a scenario the external control ceases or does the sponsor continue to exert control over the State?

A panellist argued that it is possible for the new government to include members of the armed group. However, it is important to consider the adherence to the status quo. This means that the new government cannot be exclusively composed of members of an armed group except if there are no inhabitants that have comparable qualifications. While the occupation might end because of the new government's consent, this does not automatically terminate the international armed conflict by proxy, as hostilities could persist outside of the territory. It would depend on the specific circumstances of the case.

As a follow-up it was asked what it would mean for the sponsor if the armed group that was democratically elected and became the effective government would attack another State, State B.

The answer would depend on whether the proxy – now the new government – is the sole entity involved in the conflict, thereby terminating the occupation, if this is the case it could be considered a conflict solely between the new government and State B. However, if the proxy – now new government – continues to engage in ongoing hostilities in other regions, then, the three States involved would be considered parties to the conflict.

Call for reality check in legal practice

An eminent professor in the audience took the floor to address a – to him – concerning phenomenon whereby tribunals – especially ex post criminal tribunals – apply legally sound theories that in some cases are inherently unrealistic. This concern rises because there is a crucial distinction to be made between the numerous situations worldwide where, unfortunately, IHL is violated and cases where the parties involved are proxies and sponsors.

In the context of proxy conflicts, a proxy entity will never openly admit “I am a proxy” and the same holds true for a sponsor State, if they would admit to being a sponsor State, there would be no need for them to function as a sponsor in the first place as they then could simply deploy their own armed forces. The doctoral thesis of Eugénie Duss delves into the reasons why applying IHL is necessary in such cases. This concern is not unique to this field, there is a tendency of tribunals and academics to develop compelling theories which are legally sound but overlook the reality on the ground, all the while legal development remains essential. However, when confronted with situations where the proposed legal framework will never be effective it raises questions about the credibility of IHL.

The chair closed the panel by thanking the members of the panel.

SESSION 3

PANEL 2: NOT TAKING SIDES: IS THE LAW OF NEUTRALITY STILL RELEVANT IN THE XXIST CENTURY?

PANEL 2: NI PARTIE, NI PARTISAN: LE DROIT DE LA NEUTRALITÉ EST-IL ENCORE PERTINENT AU XXIÈME SIÈCLE ?

CHAIRED BY LUCA FERRO

VRIJE UNIVERSITEIT BRUSSEL

The Law of Neutrality in the XXIst century : evolution or revolution?
–
Le droit de la neutralité au xxie siècle : évolution ou révolution ?

Michael Bothe
Goethe University of Frankfurt

Résumé

Le Professeur Bothe explore le droit de la neutralité dans le contexte des événements récents et des développements potentiels en droit international. Il commence par présenter le contexte historique et la fonctionnalité du droit de la neutralité. Ce concept est enraciné dans le principe du quid pro quo et a historiquement servi à limiter les effets collatéraux de la guerre. Bien que le droit de la neutralité ait été développé au XIXe siècle et partiellement codifié, il reste ancré dans le droit international coutumier. Au XXe siècle, à la suite de la Seconde Guerre mondiale, des défis sont apparus concernant la tension entre l'interdiction de l'usage de la force telle qu'elle est prescrite à l'article 2(4) de la Charte des Nations Unies et les principes de neutralité, en particulier en ce qui concerne les attaques armées et la légitime défense. L'effet pratique du droit de la neutralité après la Seconde Guerre mondiale est difficile à évaluer. La pratique des Etats en matière de droit de la neutralité au XXIe siècle est rare en raison de la rareté des conflits où la neutralité serait applicable.

La deuxième partie de la présentation concerne les événements liés au conflit armé international entre la Russie et l'Ukraine, ce qui soulève des questions sur l'applicabilité du droit de la neutralité et du droit international aux actions des Etats tiers soutenant l'Ukraine ou imposant des sanctions à la Russie et les conséquences qui en découlent. En ce qui concerne le soutien militaire, le panéliste soutient que fournir des armes ou former une partie à un conflit viole la neutralité. Le caractère géographique limité des Etats impliqués n'est cependant pas suffisant pour modifier le droit coutumier existant. L'imposition de sanctions – qui prennent des formes diverses et ont différentes implications juridiques – remet en question le principe de neutralité. Le débat reste cependant ouvert.

En conclusion, le Professeur Bothe indique que le soutien militaire à l'Ukraine ne représente pas une évolution ou une révolution dans le droit de la neutralité, mais illustre plutôt l'application actuelle de celui-ci en conjonction avec le droit interdisant l'usage de la force et l'exception de légitime défense telle que prévue à l'article 51 de la Charte des Nations Unies.

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What is the law of neutrality all about, which, according to the title formulated by the organizers, might have developed or might even be revolutionized, taking into account recent events? A look into its history and historical functions is necessary.

1. History

Neutrality has developed as an important instrument restraining the collateral effect of war. It is based on a simple *quid pro quo:* third States will not be drawn into the conflict at the price of not trying to influence its outcome. This means that the warring parties are equal before the law of neutrality.

That law has developed during the 19th century, was only partly codified, but is firmly anchored in customary law. A first challenge to that law was the Briand-Kellogg Treaty of 1928 outlawing war. Is neutrality, based on the principle of equal rights of the warring parties, still conceptually possible where one side is the outlaw, the other a victim? The answer of international practice was: “yes, it is”. The law of neutrality remained practically important in the Second World War (WW II), although unneutral behavior happened, in particular the massive U.S support for Great Britain before the German declaration of war. That policy was called “non-belligerency”. Neutrality was set aside in this relationship, it remained relevant in others.

After WW II, the legal prohibition of use of force was strengthened, the conceptual tension between that prohibition and neutrality became stronger. A violation of prohibition of use of force, namely the commission of an armed attack triggers a right of individual and collective self-defence. But there is no duty of collective action. Neutrality remained therefore still logically possible.

The Security Council may impose duty to support a victim of aggression. Usually, the Council does not impose a duty to use force, it only “authorizes” such use. It may impose non-military enforcement measures requiring unneutral behavior. With that exception, neutrality remains possible.

The practical effect of the law of neutrality after WW II is difficult to ascertain. There was a lively discourse about maritime neutrality during first Gulf War, there were denials overflight for reasons of neutrality. But there were also cases of unneutral behavior.

The conclusion is: there was at least no general practice able to modify the existing customary law of neutrality. Quite to the contrary: the law of neutrality was applied, it remained part of the discourses connected with armed conflicts.

2. With that result, we enter the 21st century.

As neutrality is a set of legal rules which constitutes customary law, we must look into actual state practice to answer the question whether there has been a modification or even an abrogation of the law of neutrality. The practice is rather scarce. There have been few international conflicts of the type to which the law of neutrality could apply. The official Swiss position concerning the U.S.-British intervention in Iraq 2003 was that the law of neutrality was applicable at least to a certain phase of the conflict. The conflict between Russia and Georgia

in 2008 might also qualify. Objectively, the international armed conflict between Russia and Ukraine qualifies. Yet Russia claims that this is not a 'war', but a "special military operation". Thus, one should conclude that Russia is estopped to claim respect for the law of neutrality by third States. Quite surprisingly, it has nevertheless done so when it rejected the Swiss offer to serve as protecting Power: it argued that Switzerland was no longer neutral.

Be that as it may, the question is on the table: how the actions by third States are, militarily supporting Ukraine or imposing sanction on Russia, to be assessed in light of the law of neutrality and of general international law. The two issues, military support and so-called sanctions, have to be distinguished.

As to military support, there is a group of States (NATO+? Entire Ukraine Contact group, also called Ramstein group, i.e. 40 States?) supporting Ukraine by providing arms or by training soldiers.

- Under the law of neutrality, the parties to a conflict are equal, there is no distinction between aggressor and victim of aggression.
- Furnishing arms to one party of the conflict is a clear violation of the law of neutrality. The construction of a benevolent neutrality, argued by some authors, does not justify an exception to this prohibition. If benevolent neutrality has any meaning, it is political: the law of neutrality does not require political impartiality. Therefore, the condemnation of the Russian aggression by the vast majority States, formulated by two General Assembly resolutions, does not put into question the application of the law of neutrality.
- Members of the armed forces of a party to the conflict who happen to come to the territory of a neutral states must be interned or otherwise prevented to take part in the armed conflict any further. Receiving such members of the armed forces for training and sending them back to fight is a clear violation of the law of neutrality.
- Generally, single violations of the law of neutrality may be countered by the aggrieved party by proportionate reprisals, but an unneutral service does not terminate the application of the law of neutrality. However, the policy and practical measures of the said group of States supporting Ukraine is so massive a violation of the law of neutrality that its application as a whole is no longer possible. These States cannot rely any more on the protection the law of neutrality provides to third States.
- But the massive military support to one party to the conflict, although a violation of the law of neutrality, does not constitute a state practice able to modify the existing law of neutrality. It is the practice of a limited group of States which constitutes a minority. Thus, their practice cannot be called a general practice which would have been necessary to change the existing customary law.

3. Consequences?

The unneutral States do not automatically become parties to the conflict. This is a traditional rule of the law of neutrality. They only become parties to the conflict if they actually take part in the hostilities, which the current supporters of Ukraine have carefully avoided to do.

The non-application of the law of neutrality deprives the unneutral State of the protection of the rule providing for the inviolability of neutral territory. But the protection by general international law remains, in particular that of the rule prohibiting the use of force. The unneutral behavior does not justify a use of military force against the unneutral State.

The law of neutrality has not abolished the right of collective self-defence, enshrined in Art. 51 of the UN Charter. A State not party to the armed conflict may therefore take sides with a victim of aggression by military action which otherwise would violate the prohibition of the use of force.

A conclusion *a maiore ad minus,* taking sides with a victim of aggression by measures below the level of taking part in the conflict is permissible as lawful aid and assistance in lawful action in individual self-defence.

On the other hand, furnishing certain arms to the Russian Federation would constitute an unlawful aid and assistance to an unlawful act of aggression.

The States having imposed “sanctions” are only partly the same as those supporting Russia militarily. Despite the overwhelming condemnation of Russian aggression by the vast majority of States, practically no State of the Global South has adopted sanctions.

These sanctions are so-called autonomous sanctions. They are of diverse nature. There are so-called targeted sanctions against individuals (prohibition of entry, freezing of funds), there are restrictions on certain transactions with Russia. The legal problems posed by these restrictions vary depending on the type of particular measures. This is not the place to discuss them in general. As to the law of neutrality, the problem is that they are only directed against one party to the conflict and may thus constitute a violation of the duty of impartiality, an important element of the law of neutrality. Different treatment is lawful under law of neutrality if it does not involve a change in existing patterns of trade, so-called “courant normal”. This applies to trade in commodities. But to what extent does it apply to other types of transactions? Furthermore, most types of sanctions changing existing flows of transactions, are thus not covered by the courant normal. In these cases, the question arises what kind of measures taken by third States are indeed subject to the obligation of equal treatment. One author who knows the problem very well argues that this duty applies to any transaction which might be militarily useful to a party to the conflict. This distinction is convincing as the very concept of neutrality is one of a military balance. On the other hand, it is difficult to apply in practice. Be that as it may, permanently neutral States, in particular Switzerland, have in the past refrained

from joining sanctions regimes, in particular autonomous sanctions. This position seems to have changed in relation to the Ukraine conflict, but in particular the Swiss policy is not yet definitively clear. Generally speaking, the scope and content of the duty of impartiality in relation to non-military restrictive measures remains to be clarified.

The ensuing question is: Does recent practice indicate an evolution to the effect that the rules of neutrality do not prohibit sanctions where they are an answer to a massive violation of fundamental norms? This seems to be the current Swiss position. Yet is there a general practice to this effect? It is difficult, in light of the complete absence of the Global South among the States having imposed sanctions on Russia, to regard the current practice of sanctions as modifying the customary rules of the law of neutrality and as setting new standards.

4. Conclusion as to the development of the law of neutrality

The massive military support for Ukraine by several States is neither an evolution nor a revolution regarding the legal position of States not parties to a conflict. It is an example of the concurrent application of two different areas of international law, namely the law of neutrality and the law relating to the prohibition of the use of force allowing, as an exception, the use of force in individual and collective self-defence. It is thus a clarification of the legal situation, not a modification.

Sanctions remain an open question, it is too early to speak of evolution or revolution.

Last but not least, I have to emphasize the continued validity of a fundamental IHL rule: humanitarian assistance to populations in need is an obligation imposed on the international community as a whole. It has to be impartial in the sense that its only loadstar is the need of a suffering population, regardless of the question whether it is militarily useful for one side or the other.

How to stay neutral in 2022? A practical approach
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Comment rester neutre en 2022? Une approche pratique.

Hanne Cuyckens
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Résumé

Au cours de sa présentation, Dr. Hanne Cuyckens a traité des questions liées au droit de la neutralité. Après avoir mis en perspective le corps de la loi et rappelé les principales sources du droit, les principales caractéristiques du droit de la neutralité sont abordées. Notamment, l'obligation de non-participation et l'obligation d'impartialité sont mises en évidence et appliquées dans le contexte du conflit armé actuel en Ukraine, en faisant référence aux implications de la livraison d'armes et à l'imposition de sanctions. L'oratrice poursuit sa présentation en exposant la notion de neutralité bienveillante et la question de savoir si et comment les obligations du droit de la neutralité pourraient être modifiées, les considérations liées à la hiérarchie des normes jouant ici un rôle important.

En cadrant le débat, il a été clairement indiqué que différentes discussions doivent être distinguées lors de l'examen du droit de la neutralité. Enfin, et en s'appuyant sur les points précédents, se pose la question de savoir quand une violation du droit à la neutralité a pour conséquence qu'un Etat devient partie à un conflit au sens du DIH. Les développements récents ont ravivé les débats sur le droit de la neutralité et méritent une analyse approfondie car de nombreuses questions restent non résolues.

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Good afternoon, it is a pleasure for me to be present today in Bruges and I would like to thank the organizers for inviting me.

During my presentation I will delve into some of the questions that recently arose about the concept of neutrality in the framework of the war in Ukraine. Interestingly, academic discussion seemed to mostly revolve around the *jus ad bellum* and broader collective security implications rather than potential IHL ones and quite some discussion emerged around the concept of 'benevolent neutrality' which we have briefly heard of in a previous session.

I will pick up on the two preliminary remarks made earlier in the presentation of Dr. Jeroen Van Den Boogaard (panel 1) regarding the link to collective security, the use of force and particularly the law of neutrality. Before I move to provide a critical assessment of the notion of benevolent neutrality, I will first briefly point out some of the relevant characteristics of the law of neutrality that will be useful for the rest of the debate as well as define the main

obligations under the law of neutrality and attempt to briefly apply them to the situation in Ukraine.

As mentioned to our Chair before, I do not pretend to know all the answers to the questions, but my role today is to sketch out the state of the debate to provide structure to the different questions that have recently arisen regarding the notion on neutrality in the context of the situation in Ukraine.

Neutrality can be considered an "old IHL concept" in the sense that its origins go back to the beginning of the 20th century. The main sources of the law of neutrality are customary law as well as the Convention (V) respecting the rights and duties of neutral powers in case of war on land[77] and Convention (XIII) concerning the rights and duties of neutral powers in Naval warfare[78] which were both adopted at the Second Hague Peace conference on October 18, 1907.

It is a concept strictly linked to international armed conflict (IAC). The law of neutrality is intrinsically linked to (external) sovereignty as it obliges the parties to the conflict to respect the sovereignty of neutral states. When we look at non-international armed conflicts (NIAC), the questions that arise are very different given that we are dealing with internal rather than external sovereignty. The main duty concerned in such cases is the duty of non-intervention, *i.e.* the obligation not to interfere in the internal affairs of a State.

As is the case for other older International Humanitarian Law (IHL) concepts strictly linked to IAC, they somehow tend to challenge the confines between the *jus ad bellum* and *jus in bello*. This is something that will come back during this presentation. The distinction between *jus ad bellum* and *jus in bello* may become blurred if we consider that *jus ad bellum* considerations may affect the application of IHL. I am always in favor of keeping both bodies of law as strictly separated as possible, as will also become clear later in this presentation.

Given that nowadays most conflicts are NIACs, recent practice around neutrality was scarce; that is, until the war in Ukraine brought certain discussions back on the table.

In any case, as a spoiler, I do not think that the law of neutrality has become obsolete nor do I believe that we are now seeing an evolution or revolution, but rather a clarification.

1. What does neutrality entail?

Neutrality refers to the particular status, defined by international law, of a State not party to an armed conflict. The status entails specific rights and duties in the relationship between the neutral and the belligerent states. It has two main components: the right not to be adversely

[77] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.
[78] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.

affected by the conflict on the one hand and on the other hand, there is a duty of non-participation and impartiality. By establishing a clear distinction between neutral States and States parties to the conflict, the ambit behind the law of neutrality is to prevent more States from being drawn into the conflict.

Zooming in on the duty of non-participation more particularly (given that quite some questions have come up with regard to this component of neutrality in the framework of the war in Ukraine) – it means more particularly that the neutral State must abstain from supporting a party to the conflict. In light of the duty of impartiality, it should not take sides and should hence treat the belligerents in a similar manner.

If we look at the current conflict in Ukraine, in addition to economic and financial sanctions against Russia, many States have also delivered weapons and other military equipment to Ukraine. Some states have also been providing intelligence information to Ukraine. The main question that arises in relation to law of neutrality is whether these actions would constitute a violation of neutrality. It is mostly clear from the law that: a neutral State must never assist a party to the armed conflict, "in particular it must not supply warships, ammunition or other war materials directly or indirectly to a belligerent power".[79] It is clear that providing weapons to a party to the conflict would violate neutrality. Concerning sanctions, while there might still be some room for discussion, one could argue that this violates the duty of impartiality given that in order to abide by this duty restrictive measures must be adopted in an impartial and non-discriminatory manner towards all belligerents.[80] It does not mean the restrictive measures need to necessarily have equal effects but they should in any case not be adopted towards one side of the conflict alone.

The question as to whether the law of neutrality is breached is different from the question whether it also leads to becoming a party to the conflict. Interestingly the latter issue has not yet really been much discussed. We will come back on this point briefly at the end of the presentation; however, it is important to already note that this really need to stay separated.[81] It is important to specify that the fact that you might breach the law of neutrality does not necessarily make you a party to the conflict.

2. Qualified or benevolent neutrality

Whereas this question of when assistance would lead to becoming a party to the conflict was not very dominant in academic debate in relation to the current armed conflict in Ukraine (at least in the early stages), the *jus ad bellum*/collective security side of the issue has been

[79] See Article 6 of Hague Convention XIII; see also Article 2 of Hague Convention V.
[80] See Article 9 of Hague Convention V and Article 9 of Hague Convention XIII
[81] Reference was made to an earlier presentation by Jeroen Van Den Boogaard « You can be neither a neutral state nor a party to the conflict ».

discussed quite extensively – especially the notion of benevolent neutrality. This is what we are going to focus on now.

The concept of qualified or benevolent neutrality is the position – amongst others voiced by the United States – according to which States are allowed to distinguish between an aggressor and the victim of aggression when providing assistance. While this is what most of the debate has focused on, this remains a rather controversial notion especially when looking into how to justify this.

The question is whether to a certain extent, the obligations under the law of neutrality could be qualified. The law of neutrality, like other international law obligations, can be modified by the UN charter and by UNSC resolutions adopted under Chapter VII more in particular. Some form of qualified neutrality in favor of the victim of the aggression could potentially be acceptable if the UN Security Council (UNSC) has authoritatively identified a specific State as an aggressor. The question as to whether such a qualification of neutrality would also be possible in the absence of such a recognition by the UNSC is less straightforward. Indeed, If States could discard themselves of their obligations under the law of neutrality by simply unilaterally labeling one of the parties as the aggressor, it would deprive the law of neutrality of its very purpose.

In relation to the potential role for the UNSC, reference can be made to Article 103 UN Charter: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*". For me this discussion is mainly a question of hierarchy of norms, and which norm takes precedence.

If the use of force can be legitimate if authorized by a UNSC resolution acting under Chapter VII then it would be difficult to say that a UNSC resolution adopted under Chapter VII could not also to a certain extent modify the neutrality obligation, as this is a less drastic intervention than the use of force. There is still a lot of discussion and unclarity as to what such a UNSC resolution should exactly encompass though. The question one can concretely ask is whether it would be sufficient for a UNSC resolution to just earmark one of the parties as the aggressor or whether it would have to expressly state that supporting the aggressed party in the case at hand would not lead to a breach of neutrality. Some questions remain on how this would look in practice, but the overarching question as to whether an UNSC resolution adopted under Chapter VII could potentially modify the obligations under the law of neutrality, from a perspective of the hierarchy of norms, should be answered in the positive.

Some have tried to extent the notion of benevolent neutrality also in cases where there is no explicit UNSC resolution identifying one of the parties as the aggressor. In the absence of an authoritative resolution adopted under the auspices of Chapter VII of the UN Charter, implying that one could decide on their own to disregard the application of the law would make the entire

concept of neutrality void as already mentioned above. The question that remains however is what would happen if the UNSC is prevented from acting, for example in the case in which the alleged aggressor is one of the permanent members of the UNSC. This specific question arose in the framework of the conflict in Ukraine. In a situation in which the alleged aggressor is a P5 member and has hence the capacity the block any UNSC resolution there would be no possibility to authoritatively determine the 'aggressor'. It also prevents the UNSC from activating any other form of enforcement action under Chapter VII. Regardless of the concrete implications such a situation would create (and the clear failure of the collective security system this implies), allowing the extension of the notion of qualified/benevolent neutrality to such cases would be a bridge too far for me. Additionally, the situation in Ukraine is rather exceptional and unlikely to repeat itself so question is how much of a general conclusion we can deduct from this example.

This discussion concerning potential qualified neutrality – which is what is behind the notion of benevolent neutrality – is mainly a question of collective security*/jus ad bellum* and thus of hierarchy of norms and potential circumstances precluding wrongfulness afterwards. It should therefore be separate from IHL considerations.

3. Conclusion

There is no fixed conclusion to this reflection. However, I want to point out that in a sense there are different debates that should be distinguished. There is the question of hierarchy of norms and whether the wrongfulness of acts can be precluded. Then, the question that revolves around the breach of the law of neutrality. Whether we accept some form of benevolent neutrality or not, it does not take away the fact that the provision of arms to one party to the conflict is generally held to breach the neutrality principle. The main question here is when does this assistance/breach of neutrality lead to becoming a party to the conflict. I strongly believe that the question of when a State becomes a party to a conflict within the meaning of IHL cannot be answered by recourse to the law of neutrality. Merely breaching neutrality does not mean a State automatically becomes a party to the conflict. What is then the threshold for becoming a party to the conflict? What degree of support is needed? It is not an easy question and I also do not pretend to know the answer. It is an important question worth raising though. Given that it may have important/practical consequences. It should in any case be a factual assessment and for that we need to know all the relevant facts.

Is neutrality possible in the cyber/outer space domain?
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La neutralité est-elle possible dans le cyberespace et dans l'espace extra-atmosphérique?

Kevin Kohler
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Résumé

Dans son intervention, Kevin Kohler établit que le droit de la neutralité s'applique aussi bien dans le cyberespace que dans celui de l'espace extra-atmosphérique. Cependant, la question de savoir « comment » ce droit de la neutralité s'applique reste en suspens. Quatre domaines d'intérêt sont explorés plus en détails, notamment des indemnisations financières pour les dommages collatéraux, la situation des satellites, les volontaires d'Etats tiers et l'infrastructure internet.

Tout d'abord, l'orateur discute de l'avantage d'exiger une compensation financière pour les dommages collatéraux causés en territoire neutre par des actes cyber posés par une partie au conflit, car cela encouragerait selon lui les parties belligérantes à donner la priorité au « contrôle » de leurs cyber opérations. Il fournit des informations générales sur les origines de cette pratique et informe sur l'importance de tenir les belligérants responsables de tels dommages collatéraux. Ceci est illustré par une comparaison entre la cyber opération Stuxnet et l'attaque NotPetya.

Deuxièmement, Kevin Kohler discute de l'application du concept de neutralité aux activités satellitaires en relation avec la communication, la télédétection et l'Internet par satellite. Il explique qu'en vertu de la Convention (V) de La Haye, les belligérants peuvent utiliser des réseaux à satellite neutres pour communiquer si ces réseaux sont mis de manière impartiale à la disposition de toutes les parties au conflit. Toutefois, la fourniture d'images de télédétection pouvant être utilisées pour l'acquisition de cibles peut être considérée comme un acte de participation active au conflit. À cet égard, un éclairage est apporté sur l'implication des entreprises privées et des Etats non belligérants, en particulier dans le conflit en cours en Ukraine.

Troisièmement, l'importance de faire la distinction entre l'utilisation civile et militaire de l'Internet par satellite et ce qui est acceptable à des fins de neutralité est soulignée. Par la suite, la dynamique changeante de l'implication des volontaires d'Etats tiers dans le cyber conflits, en particulier dans le cas de l'Ukraine, est discutée. Différentes spécificités sont abordées, telles que la participation de niveau inférieur, la portée mondiale des volontaires, et les défis juridiques et pratiques.

Enfin, le rôle de l'infrastructure Internet et en particulier du système des noms de domaine (DNS) dans les conflits en lien avec le concept de neutralité dans la gestion de cette infrastructure sont examinés.

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Thank you for the kind introduction and for having me. I think I am one of the fey non-lawyers in this room, however, at the ETH we cover cyber security, politics, and policy in Switzerland. Hence, neutrality in cyberspace comes naturally to us.

1. Preliminary questions

Coming to the general question: "can the law of neutrality be applied to cyberspace and outer space?" The short answer is yes. However, the reality is somewhat complicated.

As discussed by previous speakers, the main sources of the law of neutrality are the Hague Conventions which specifically focus on land warfare and maritime warfare. However, in State practice, neutrality has been extended to an additional domain, notably, airspace even though there is no *lex specialis*.[82]

In the last two decades, many have argued that International Humanitarian Law, including the law of neutrality, also applies to the cyber domain. The 1996 ICJ Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, which states that the fundamental principles of neutrality largely apply irrespective of the domain.

In the end, what matters is the opinions of States. When considering cyber space, we have the "United Nations Open-Ended Working Group on security of and in the use of information and communications technologies" (UN OEWG ICT) where States have been invited to share their national views on how to apply international law to cyberspace.

The vast majority of States accept that IHL also applies to cyberspace although there are also still some holdouts, e.g., Russia or Iran. In addition, the Tallinn Manual and legal opinions by the United States, France, Netherlands, Italy, Switzerland all explicitly mention the applicability of the law of neutrality to cyberspace.

Two big caveats remain as the questions rise, notably:

- For whom is the law of neutrality still binding and when?
- Looking at 1907 Hague Convention, how does this translate to be applied to modern technologies?

There is still some "translation" work that needs to be done to put the law into practice, so there is still some ambiguity. Currently, there is not that much *opinio juris* on how to operationalize

[82] Note: there was an attempt made in the 1920s, however, it did not materialize.

it. Today I will highlight a couple of interesting issues, but I cannot authoritatively say how the law will be applied.

2. Four areas of interest

There are four areas of interest that I would like to discuss further, namely, financial compensation for collateral damage, satellites, foreign volunteers and internet infrastructure.

A. Financial compensation for collateral damage

Conflict in cyberspace is more internationalized than in other domains and there are ways of attacking that can have significant cross-border effects. Neutrality may be one instrument to limit the risk of inadvertent horizontal escalation.

In airspace, there is a well-established state practice of financial compensation for damages caused by accidental bombings on neutral territory, which was a common prospect back when pilots strongly relied on visual navigation and target identification. The practice was established through bilateral diplomacy between neutrals and belligerents, and in the absence of any international agreement on how exactly to apply neutrality to airspace. Furthermore, there is evidence that the insistence by neutrals on their right to territorial inviolability has encouraged at least some operational restraint on the side of belligerents. For example, in the Second World War the United States prohibited aerial bombings within 50 miles of Switzerland without positive identification, which was eventually extended to 150 miles to limit the number of accidental bombings.

The main goal of financial compensation for collateral damage on neutral territory would be to influence the belligerent trilemma for cyber operations. This term refers to the trade-offs that actors engaged in cyber operations face among control, speed, and impact, in which optimizing for one factor negatively affects the other factors. The idea would be that if this norm also applied to cyberspace, it might nudge belligerents towards investing more in “control”. To make it more concrete, an example of a cyber operation that had control and impact but required many years of research and preparation was “Stuxnet”, the joint US-Israeli attack on centrifuges in the Natanz nuclear facilities in Iran. Even though the Stuxnet worm infected more than 200,000 computers to get to the facility, it only had a negative effect on a very targeted set of machines. In contrast, if a belligerent wants to create a lot of damage and fast, it will likely compromise on its control over the operation. A good example of this is “NotPetya”. Cyber operations with a high degree of control may have a de-escalatory effect. Stuxnet provided an alternative to a kinetic airstrike that would have destroyed the facility, killed people, and could have caused a war. In contrast, cyber operations with high impact and low control have the potential of leading to a horizontal escalation of a conflict.

Collateral damage on neutral territory from belligerent cyberattacks violates the neutral right to inviolability even if the attack remains below the threshold of an armed attack. First, this would help to reimburse businesses for the fallout of the conflict. Cyber insurance usually explicitly excludes, and will likely refuse to cover, damages occurring from cyberattacks related to a war. Second, in the case at hand, it might be possible to get financial compensation for a hypothetical attack from Russia, even if Russia would refuse to acknowledge responsibility. The reason for this is the vast amounts of Russian assets that are frozen outside of Russia. Third, establishing the general State practice that belligerents are held accountable for collateral damage from cyberattacks in neutral countries provides an incentive for more control in the belligerents' trilemma for cyber operations in (future) conflicts and thereby also decreases the inadvertent horizontal escalation risk for other actors.

B. Outer Space

There is no territorial sovereignty in outer space, however, sovereignty can still apply based on exclusive State control over an object in space. The key question is whether the access and impartiality rules for the telegraph, the telephone, and the radiotelegraph networks (Article 8 and 9 Hague Convention V[83]) can also be applied to satellite constellations and even to individual satellites that communicate through radio waves with ground stations. This is further complicated because satellites are often operated by commercial providers or by international consortia involving several countries. There are three main ways in which satellites are important for warfare, notably Global Navigation Satellite Systems (GNSS), Remote Sensing, and Satellite Internet.

Communication

Article 8 of the Hague Convention (V)'s authorization of the use of neutral **communications** infrastructure extends to the transmission of information of military significance. As such, belligerents may use neutral satellite networks to communicate if they are made available impartially to all belligerents.

Remote sensing

However, the provision of remote sensing imagery used for target acquisition may be considered by belligerents as an act of active involvement regardless of impartiality. Article 47 of the drafted 1923 Hague Rules of Aerial Warfare states that "*A neutral State is bound to take*

[83] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.

- Art 8. « A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals. »
- Art 9. « Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents. A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus. »

such steps as the means at its disposal permit to prevent within its jurisdiction aerial observation of the movements, operations or defences of one belligerent, with the intention of informing the other belligerent." The use of the word jurisdiction rather than territory and the fact that in 1923, "aerial observation" was understood to apply to a space that extends outwards indefinitely, would indicate that neutrals could have a duty to ensure that a company registered in their country does not sell military-relevant remote sensing data to a belligerent. Yet, even if this prevention duty is rejected, it is important to highlight that a neutral satellite may still qualify as a lawful military target.

It is also worth highlighting that the United States (US) has in the past explicitly insisted on the belligerent's right to lawfully target any satellite that generates military intelligence for its opponent. In its 1999 DoD Assessment, the United States distinguished between relaying information through satellites and satellites as information-generating systems. The provision of the latter, which includes satellite imagery, weather data, and navigation systems, to a belligerent may give the opposing belligerent the right to take proportional acts in self-defence. Similarly, in the 1991 Gulf War the United States delayed the release of commercial Landsat imagery to US news media and France denied Iraq access to commercial satellite imagery from its SPOT satellites, as this could have revealed the position of US troops.

This is highly relevant in the current conflict where there are private companies and non-belligerent States that provide satellite images and there is also an interesting role for Satellite internet.

Role of private companies and non-belligerent States

Several Western States appear to extensively share remote sensing data with Ukraine. For example, the European Parliament recommends that Member States share satellite intelligence. Moreover, at least five Western commercial firms including the Canadian MDA Ltd. provide satellite intelligence to Ukraine. As the New York Times writes "in Washington and Germany, intelligence officials race to merge satellite photographs with electronic intercepts of Russian military units, strip them of hints of how they were gathered, and beam them to Ukrainian military units within an hour or two."

To incentivize companies to work with the military despite the risk of being targeted, some have suggested that the US should create an indemnification program for commercial satellite operators that would cover any losses incurred due to an armed conflict.

Satellite internet

The second interesting aspect in Ukraine is satellite Internet. The difference between cable internet and satellite internet is that the former has a higher bandwidth and has a high level of civilian traffic while the latter has a low bandwidth but a higher share what passes through is

military. Satellite Internet is really independent from fixed wired infrastructure this means it is great if you have some hut high up in the mountains or if you are on a battlefield and you cannot or do not want to use civilian mobile phone networks.

Interestingly, the US satellite provider Viasat, which inter alia provides services to the US military, has been the victim of a targeted cyberattack on the day of the invasion and has had issues with its satellite Internet offer in eastern Europe with various knock-on effects. It seems that Ukraine has used and continues to use satellite Internet for command-and-control communications as well as artillery coordination, except that they have switched to Elon Musk's Starlink.

The law of neutrality seems quite clear that the Internet does not have to be restricted to belligerents. However, there are two relevant questions here: 1) Is there some minimum amount of civilian traffic share necessary in order not be qualified as a purely military communication infrastructure? 2) What about the neutral impartiality duty?

In summary, belligerents may use neutral satellite networks to communicate if they are made available impartially to all belligerents. However, the provision of remote sensing imagery may be viewed as "war material of any kind" and therefore a violation of neutral impartiality. Arguably, registration States of commercial satellites also have a corresponding prevention duty. In the case of Ukraine, the affected States are non-belligerents anyway.

Another question that raises is how permanent neutral States, such as Switzerland, can ensure that they do not violate the law of neutrality? On the one hand, Schmitt argues that in general, "individual States do not avoid responsibility by virtue of multinational ownership". On the other hand, it is unclear whether this also applies to a small stake in a project. Switzerland's involvement in the French remote sensing system *"Composante Spatiale Optique*" provides an interesting model for addressing neutrality concerns in a multinational collaboration. It boils down to two factors. First, the share of the Swiss participation in the system's total costs may not be significant. Second, a suspension clause must ensure that Switzerland can interrupt its participation in and payments for the project at any time if they would undermine its neutrality.

C. Foreign volunteers

Another interesting element related to neutrality is the concept of foreign volunteers, which is nothing new. However, cyber adds two new dimensions, notably:

First, volunteers do not necessarily have to cross borders anymore to participate in the conflict. This is relevant because neutral States have a prevention duty in the sense that they cannot allow for their territory to be used. That prevention duty has different levels of strictness depending on the domain. For the land domain it is quite absolute, for the maritime domain it is more based on the means at their disposal. I guess that in the cyber reals it will also be

based on the “means a the disposal” and the “actual knowledge” of something happening. However, you can still argue that individuals that neutral States have to respond when they are informed that individuals are participating in cyber operations from within neutral countries.

The second interesting aspect is that cyber makes it easier for volunteers to participate with a low level of involvement. Through cyber means there are easy-to-use means that civilians can use which results in more civilians that could qualify as directly participating in hostilities (DPH) either from within or outside the country.

For instance, if someone would want to join armed conflict in Ukraine, they don’t have to cross borders or join regular or irregular armed forces. Effectively, the cyber conflict in Ukraine stands out as there is an extensive involvement of volunteers situated all across the globe. The well-known hacker collective Anonymous declared “cyberwar” on Russia on February 24, 2022. Overall, dozens of non-State groups are involved, most of them on the side of Ukraine. On February 26, 2022, the Ukrainian Ministry of Digital Transformation announced the formation of IT Army, which directs the efforts of global volunteers and publicly distributes targets, such as IP-addresses, and port numbers to volunteers through their telegram channel.

The implications in terms of neutrality are the following. First it is important to note that Article 4 of the Hague Convention (V) prohibits the formation of a corps of combatants, nor is it allowed to open recruitment agencies on the territory of a neutral power to assist the belligerent. Bearing this in mind and considering the targeting rules of persons, we can note that individuals lose their neutrality status if they join a belligerent’s armed forces or if they commit hostile acts against a belligerent. There are three different scenarios to consider:

- Volunteers that join regular armed forces qualify as combatants and can be targeted for the duration of active duty.
- Volunteers that are functional members of other organized armed forces that are non-State parties to a conflict can be targeted as long as a combat function is assumed.
- Volunteers that do not qualify as combatants are civilians or participants in a spontaneous and unorganized form of resistance and can only be directly targeted during the time in which they directly participate in hostilities.

TABLE: TARGETING OF PERSONS IN INTERNATIONAL & NON-INTERNATIONAL ARMED CONFLICTS

Categories:	Targeting criterion:	Temporal scope:
I. Regular armed forces[75] All armed forces regularly constituted or formally incorporated in accordance with national law, incl. regular armed forces having turned against their government (dissident armed forces).	**Formal membership:** Enrolment in accordance with national law.	For the duration of active duty (until formal discharge, retirement, etc. or, for dissident forces, until full *de facto* disengagement).
II. Irregular armed forces[76] All other organized armed forces, groups, or units *de facto* conducting hostilities on behalf of a State or non-State party to an armed conflict.	**Functional Membership:** Exercise of a continuous combat function.	For as long as a continuous combat function is assumed (until full *de facto* disengagement from combat function).
III. Civilians[77] *(& levée en masse)*[78] All persons directly participating in hostilities on a merely spontaneous, sporadic, or unorganized basis.	**Individual Participation:** Direct participation in hostilities (spontaneous, sporadic, or unorganized).	For the duration of each hostile act or operation (including preparation, deployment & return).

Volunteers for the IT army cannot be categorized homogenously. Stefan Soesanto has written a quite comprehensive report on the structure and tasking within the IT Army, and there is a likely a core of Ukrainian intelligence officers leading this project.

Most of the volunteers engaged in this conflict do not qualify as combatants as they don't openly carry "cyberweapons" and don't have insignia. Indeed, many of them will just be spectators and civilians. There is a disagreement between "who is considered a direct civilian participant in a conflict and for how long that person is subject to repercussions". The ICRC takes a restrictive stance that focuses on the protection of civilians. By contrast, US legal scholars such as Michael Schmitt have traditionally held that military necessity requires that the rules for attacking these participants need to be permissive. However, this debate occurred in a context where it was presumed that the US would be the traditional military dealing with such cyber-volunteers. So, I would not be surprised if their stance has evolved.

What further complicates the situation is that military personnel from the US and potentially other States are likely blending into this mix of volunteers. Such activity could potentially violate the neutral non-participation duty without reaching the threshold of an armed attack. As the New York Times writes "Hidden away on bases around Eastern Europe, forces from United States Cyber Command known as 'cyber mission teams' are in place to interfere with Russia's digital attacks and communications." Indeed, Russian actors with offensive capabilities such as the Russian ransomware gang Conti and the FSB have apparently been affected by hacks and data leaks.

D. Internet infrastructure: Do we need a neutral public core of the Internet that provides some basic connectivity services regardless of geopolitics?

Lastly, I want to address the Internet Infrastructure. There are institutions and processes that are very important for the functioning for the global internet. The Internet has the domain name system, a global system that translates unique names that are easy to remember for humans like “icrc.org” into unique numbers for routing data packets. As the Internet is the globalization of an American network, the organization of this domain name system was originally awarded as a contract by the US government to a private company. Nowadays, this is handled by an independent Californian non-profit organization called ICANN.

After the start of the international armed conflict between Russia and Ukraine earlier this year, the Ukrainian Ministry of Digital Transformation has asked the ICANN to remove Russian country-code top-level domains from the root file of the domain name system. This would be “.ru”, “.ru” in the kyrillic version, and “.su”.

In the short run, this would be close to deleting a country’s Internet, creating a lot of indiscriminate chaos. In the long-run, people can obviously switch to other Top Level Domains (TLDs) and Internet Service Providers (ISPs) can manually ensure that requests for the affected TLDs are forwarded to the correct registry. However, more importantly if that vulnerability is exploited, we would probably not ever go back to having one single global namespace. Rather countries would insist on their national namespace.

ICANN rejected this request, highlighting that the Domain Name System (DNS) must remain neutral and that this neutrality acts in support of the global Internet. If ICANN were to restrict access to segments of the Internet as a punitive action, this “would have devastating and permanent effects on the trust and utility of this global system”. This sentiment was echoed by many civil society organizations, which highlighted the crucial importance of the Internet for the local population, including of course, to get somewhat independent information.

However, neutrality is mainly a legal concept for sovereign States. ICANN is within the jurisdiction of the US and as ICANN itself acknowledges, “there is a tension between ICANN’s goal of administering the Internet as a neutral global resource and the imposition of sanctions by the U.S. on other countries.” So, if we are being fully honest ICANN can only be as neutral and as predictable as the current US president.

In terms of the law of neutrality, one can very reasonably view a decision of a State to remove a belligerent from the DNS as a violation of the neutral impartiality duty in Art. 9 of the Hague Convention (V) regarding access to communication infrastructure described in Art. 8 of the same Convention. However, if States insist on their right to choose “non-belligerency” only countries that have their permanent neutrality enshrined somewhere are bound to this.

So realistically, if the exceptionalism of the last 30 years of the Internet in the history of telecommunications is deemed worth protecting, we should consider putting multistakeholder Internet governance organizations on a more credibly neutral and sustainable ground as global public goods that should be protected from unwarranted State interference. This would make domain name server (DNS) root servers an illegitimate target for belligerents while also prohibiting their weaponization against a belligerent.

The best model for how to do this is probably the host State agreement between Switzerland and the International Committee of the Red Cross (ICRC). ICANN is not a regular NGO and granting legal immunity within the scope of its mission from local jurisdiction would somewhat insulate the public core of the Internet from geopolitics and provide a solid, long-term fundament for a global Internet governed by the multistakeholder community. In principle, any potential host State (e.g., US, Switzerland, Netherlands) can offer such a host State agreement. In practice, the US has opposed an agreement or shift of headquarters that would hand over full control to the multistakeholder community, even though it also insists that it has no intention of ever weaponizing its jurisdiction over the DNS. A change in ICANN headquarters would also require an amendment of standard bylaws, which requires a qualified majority of the ICANN Board of Directors. Specifically, article 24.1 of the ICANN bylaws States that “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America”. Hence, for the foreseeable future, ICANN remains as neutral as the current US president allows it to be.

Moderated discussion – Discussion moderée

A critical voice in the audience did not agree with the conclusion that there is no evolution nor revolution with regards to the law of neutrality but rather a clarification of the law following the ongoing international armed conflict between Russia and Ukraine. This person argued that before February 22, 2022, there were many States who defended the opinion that every State is either belligerent or neutral. However, nowadays there are many States that – while considering their actions as lawful – are violating their obligations under the law of neutrality. Hence the question, has the law of neutrality become obsolete?

In tackling the question whether the law of neutrality still matters considering it is often violated, two of the speakers argued that the mere violation of a rule does not imply that the rule is no longer relevant or that it no longer exists. One of the panellists refined by stating that the acts of a minority of States cannot be considered "general practice" abrogating the law of neutrality.

Another speaker considered that there is a need for more research on this question, while noting that this is not the most pressing debate that needs to take place. In addition, it was argued that the fact that some States continue to try to qualify their neutrality demonstrates that this is still being taken into consideration. Although further discussions on the contours of the law of neutrality need to happen, the speaker concluded that the law of neutrality is not void in and out of itself.

Linked to the previous question, a member of the audience contemplated that the whole discussion on the law of neutrality is too much focused on the early 20th century without considering the evolutions of the past century, particularly the adoption of the UN Charter in 1945. Therefore, this participant argued that there should be a post-1945 law on neutrality. The question rose whether actions taken based on the UN Charter can be lawful under the law of neutrality. If this is not the case, then not much remains from the law of neutrality.

One of the panellists in his reply emphasized the consequences of violating the law of neutrality – such as the provision of weapons and training of soldiers. Contrary to the prohibition of reprisals in IHL, a violation of the law of neutrality could invoke States' right to take reprisals.

An eminent professor in the audience came in to point out the differences between the legal situations in the UN Charter and the law of neutrality.

The reaction of Switzerland in light of the international armed conflict between Russia and Ukraine, the Swiss neutrality was put into question by one of the participants who argued that Switzerland should have abandoned the 1945 declaration of neutrality.

SESSION 4

PANEL 3: REACHING THE THRESHOLD(S): WHEN DO NON-STATE ACTORS BECOME PARTIES IN AN ARMED CONFLICT?

PANEL 3: FRANCHIR LE(S) SEUIL(S): À PARTIR DE QUAND LES ACTEURS NON ETATIQUES DEVIENNENT-ILS PARTIES AU CONFLIT ARMÉ?

CHAIRED BY VAIOS KOUTROULIS
UNIVERSITÉ LIBRE DE BRUXELLES

Stronger together? Understanding how IHL applies to non-State armed group coalitions

–

Plus forts ensemble ? Comprendre comment le DIH s'applique aux coalitions de groupes armés non Etatiques

Ezequiel Heffes
Geneva Call

Au cours de son intervention, le Dr. Ezequiel Heffes explore le sujet des coalitions de groupes armés non Etatiques (GANE). Il met en évidence la nature dynamique de ces groupes et leurs interactions avec d'autres acteurs sur le terrain. Il a analyse également le concept de coalition trouvé dans le rapport 2019 du Comité International du Croix-Rouge (CICR) sur les défis contemporains dans les conflits armés. Ezequiel Heffes étudie la formation des coalitions de GANE et affirme que ces coalitions sont opportunistes, formées pour atteindre des objectifs liés à leur engagement dans la lutte armée et renforcer leur position après le conflit.

Il propose ensuite des pistes d'avenir, prônant l'engagement sur le droit international humanitaire (DIH) avec des GANE dans le but de protéger efficacement les populations civiles.

L'intervenant conclut en soulignant l'importance de poursuivre les discussions pour assurer l'application efficace et cohérente du droit international aux coalitions de GANE.

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This short piece addresses the topic of coalitions of non-State armed groups (NSAGs), which is of relevance in different operational contexts. Given that the Colloquium examines different humanitarian concerns, and not just the issue of NSAGs, I have decided that the first part of this presentation will serve to set the scene and tackle the following question: "what do we see nowadays in conflict settings?"

1. Setting the scene

In contemporary armed conflicts, we are witnessing a rise in the number of NSAGs. The ICRC has identified in 2023 more than 450 armed groups worldwide causing humanitarian concerns.[84] Approximately 100 are parties to non-international armed conflict (NIACs) and are therefore legally bound by International Humanitarian Law (IHL).[85] Around the world, these groups vary significantly in their nature, goals, objectives, and structures. While some may have strong individual leaders and a rather vertical structure, the authority of other groups may

[84] Matthew Bamber-Zryd, 'ICRC engagement with armed groups in 2023', *ICRC Humanitarian Law & Policy Blog*, 10 October 2023, accessed 17 October 2023.
[85] This number corresponds to 2021. *See* Bruno Demeyere, 'Editorial' (2021) 102 International Review of the Red Cross 979, 979.

be more dispersed and decentralized. It is also important to emphasize from the outset that these non-State entities are dynamic and evolving, experiencing changes during the conflicts to which they are party.[86]

The *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC-EP) is a clear example of these phenomena, as it was actively engaged in armed conflicts in Colombia for more than 50 years and also provided services in some of the regions it operated.[87] Throughout this period of time, the FARC-EP modified its structure significantly through a three-stage process: from a peasant self-defence movement, it transformed itself into a 'mobile guerrilla formation' before finally assuming the form of a rather centralized 'army'.[88]

In addition to these structural changes, NSAGs do not operate in isolation: they interact with a range of stakeholders, including other non-state armed groups, local communities, the humanitarian sector, the territorial State, third States, and transnational companies operating (or trying to operate) in the territories that these NSAGs control. These interactions have different implications, which may be of humanitarian, economic or military nature, and may also involve what is known as rebel governance, which has been defined as "the manner in which an insurgent group regulates life within a defined territory and provides public service".[89] These various stakeholders often affect how NSAGs behave and position themselves with respect to international law, including IHL.

NSAGs might also change their names, split or form alliances and/or coalitions, or they might disappear and re-emerge. The issue of coalitions directly relates to the dynamic nature of these non-State entities.

2. Coalitions of Non-State Armed Groups

What can be noticed regarding coalitions of NSAGs is that this concept only recently gained attention in the legal realm, with the ICRC discussing it in its 2019 Challenges report.[90] From a social sciences perspective, the issue of alliances and coalitions among armed groups has been extensively discussed over the past few years.

While often depicted as cohesive and unified entities, numerous contemporary NSAGs are actually coalitions that encompass various groups with diverse affiliations, spanning from well-

[86] *See* generally Ezequiel Heffes, *Detention by Non-State Armed Groups under International Law* (Cambridge University Press 2022) 31–33.
[87] For an examination of this NSAG, *see* Ezequiel Heffes, 'Case Study: Fuerzas Armadas Revolucionarias de Colombia–Ejército Del Pueblo (Revolutionary Armed Forces of Colombia – People's Army, FARC-EP)' (Geneva Academy of IHL and Human Rights & Geneva Call 2021), accessed 3 March 2021.
[88] Francisco Gutiérrez-Sanín, 'The FARC's Militaristic Blueprint' (2018) 29 Small Wars & Insurgencies 629, 636.
[89] Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law* (Oxford University Press 2017) 40.
[90] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions, 2019, pp. 50- 52.

integrated coalitions to opportunistic "schemes polling resources for a limited objective".[91] In trying to understand the reasons behind the formation of these coalitions, various views have been put forward. It has been suggested, in this regard, that coalitions are primarily instrumental and opportunistic in nature. Armed groups may consider forming coalitions as part of their strategic equation during armed conflicts, weighing two specific goals. On the one hand, these coalitions are formed to enhance the chances of winning the war, thus serving their military goals. On the other hand, they also aim to maximize their position in the potential redistribution of power in a post-conflict scenario. It is crucial to recognize, however, that most of these coalitions are temporary in nature. As mentioned before, NSAGs may face changes in their organizational structure, leading to the formation and dissolution of coalitions. For instance, a group might split or decide to leave the coalition, or new groups might join at later stages. Consequently, when armed groups make decisions regarding coalitions, they often view them as instrumental and opportunistic, depending on the moment, the respective (individual) group's goals and the dynamics of the conflict.

Why do we need to discuss about coalitions of non-State armed groups?

The next question that I would like to address is related to the reasons why we nowadays examine the international law applicable to NSAGs' coalitions. While the main one being the fact that many contexts, several NSAGs join forces fighting against a common enemy, two additional reasons can be identified.

The first one is rooted in a protection rationale. It is well-known that the threshold for a NIAC to exist is found "whenever there is…protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[92] Once the existence of a NIAC is confirmed based on these objective criteria, NSAGs (and States) are obliged to respect IHL. As a result, the application of IHL to these non-State entities' coalitions can have consequences on various humanitarian matters, notably by providing a legal framework that aims at protecting individuals on the ground and regulating the activities of these non-State actors. The ICRC has also identified that this would affect "the legal regime applicable to the use of force or deprivation of liberty by States in their operations against armed groups".[93] The fact that IHL would be applicable to these coalitions of NSAGs would also entail that impartial humanitarian bodies, such as the ICRC, may offer their services to these coalitions, and that these groups would be prohibited from undertaking certain activities.

[91] ICRC, 'Allies, Partners and Proxies. Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War' (2021) 37, accessed 12 July 2023.
[92] *Prosecutor v Dusko Tadić a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995) IT-94-1-T, T.Ch. II (International Criminal Tribunal for the former Yugoslavia) [70].
[93] ICRC 2019 Challenge Report, *op. cit.*, p. 50.

The second reason is linked to individual criminal accountability. As the discussion unfolds, it becomes clear that some groups within a coalition might not have been originally bound by IHL, while others were. This is because the aforementioned criteria for a NIAC may not be present for every bilateral situation. This raises the question of how to deal with those groups that were not initially subjected to this legal regime but find themselves part of a coalition where such obligations apply. As it will be seen below, the suggestion put forward has been that, when certain elements are present, IHL should apply to the entire coalition. From an accountability standpoint, this approach would entail that those groups' members that were not originally bound by IHL, now suddenly might be held accountable for the commission of war crimes.

How does IHL apply to non-State armed groups' coalitions?

As mentioned, the core question underlying this issue is how IHL applies in the context of a coalition of NSAGs. When multiple groups participate in a NIAC and some may not have been parties to such conflicts initially, the situation becomes complex. The ICRC addressed this matter by proposing the concept of an "aggregated intensity," suggesting that when these groups come together, they might form a new entity engaged in a NIAC against the State. In the 2019 Challenges report, the ICRC noted that: "*when several armed groups display a form of coordination, it might be more realistic to examine the intensity criterion collectively by considering those actions carried out by all the groups fighting together." From an ICRC perspective, this approach is considered as "legally sound and practically operative*".[94]

In the ICRC's view, this is based on the reality observed on the ground, which would make it difficult for a government to apply different paradigms (i.e., law enforcement or conduct of hostilities) to different groups that operate together. In a 2020 blog post, ICRC's legal advisors further developed the position adopted in 2019, focusing also on the protective nature of IHL. The authors stated that applying IHL to the use of force in such circumstances would lead to the protection of all the persons who are not or no longer fighting in these situations and limit the effect of the violence on the civilian population as a whole.[95] This view is certainly of practical importance and serves to clarify the legal regulation of complex scenarios. At the same time, it does not seem to consider the protective role that international human rights law (IHRL) may offer and its complementary application alongside IHL in NIACs, which would need further examination.

Importantly, the 2020 blog introduces non-legal elements to determine the existence of a coalition of NSAGs. The authors suggest several factors, such as "*the establishment of a*

[94] Jelena Nikolic, Thomas de Saint Maurice and Tristan Ferraro, "Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups", *Humanitarian Law & Policy*, 2020.
[95] *Ibid*.

centralized joint command; the allocation of areas of responsibilities; sharing of operational tasks (detention, procurement, equipment, transport of troops and other logistics); joint declarations or agreements describing the tasks assigned to coalition members; the existence of Common Standard of Operating Procedures (SOP) or Rules of Engagement (RoE); exchanges of tactical/strategic information; and the existence of an umbrella platform dealing with political issues and communication in the name of the members of the coalition."

When reflecting on these various elements, one important point to highlight is the focus on the States fighting these coalitions and the legal framework applicable to government forces. Indeed, determining that IHL is applicable to the entire coalition would provide clarity regarding the rules to be relied on by the State(s) engaging in a NIAC against the coalition.

3. **Challenges**

While I firmly believe that IHL should apply to these coalitions under certain conditions, there are several intricate details that necessitate further examination.

Firstly, it is imperative to address the role of IHRL with respect to States' use of force. The assertion that IHL offers greater protection and should be applied might create confusion for States when differentiating between the law enforcement and the conduct of hostilities paradigms. It is important to remember that States have obligations under IHRL, including during armed conflicts, and arguing that IHL should apply merely to protect individuals and to "limit the effect of the violence on the civilian population as a whole" might not fully tackle, for instance, the obligation of States to safeguard the right to life.

The second point that would need to be assessed revolves around the application of IHRL to highly organized non-state armed groups lacking intensity. Jann Kleffner's work highlights that "bilateralizing intensity" in such scenarios would "give rise to a significant regulatory void", since some bilateral relations would fall outside the ambit of IHL, and that this is "particularly in light of the controversies surrounding" the applicability of IHRL to NSAGs.[96] The concern lies in the fact that some non-state armed groups might be organized enough to be parties to NIACs, yet they might not fulfil the intensity criterion. If it is nonetheless confirmed that IHRL binds NSAGs, then this difficulty is solved by relying on this legal regime, as there would not be any "regulatory void". Although this debate is not yet settled, some organizations have already noted that NSAGs exercising a *de facto* authority may be bound by IHRL, at least by the rules considered to have a customary status.

[96] Jann K. Kleffner, 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 International Law Studies 161, 176.

Hence, the discussion regarding the application of international law to coalitions of NSAGs cannot neglect the one focused on the relation between IHRL and these non-State entities, in particular those with a high level of organization.

In addressing these challenges, we must engage in further discussions and examinations to ensure the effective and coherent application of the law to coalitions of non-state armed groups.

4. Steps forward

As we conclude this discussion, this piece shares the ICRC's view on the matter that "aggregating intensity" reflects the realities on the ground and would help solving difficult scenarios. However, there are a few crucial points worth considering when moving forward.

Firstly, it is essential to also engage on IHL with organized non-state armed groups that do not reach the intensity criterium at the time of that engagement. This is because when we consider the elements that are used to determine whether a non-State armed group is bound by IHL from an organizational perspective, then we see that there is a clear IHL component, *i.e.,* for example the group being able to respect IHL, being able to enforce IHL rules, being able to have internal rules displaying IHL provisions. From an operational perspective it is important to engage on IHL with these groups that are sufficiently organized even if the intensity criterium is not necessarily (yet) fulfilled. This conclusion is an operational one that sees engagement as an important tool to prevent potential conflicts that might arise in the future.

Secondly, the existence of a coalition should not hinder separate IHL engagement with each armed group within the coalition. As armed groups are dynamic and rapidly changing, it is essential to assess each faction separately and not to dismiss the possibility to engage separately. Although this needs to be assessed on a case-by-case basis, the internal power distribution within the coalition might fluctuate, making it important for the humanitarian sector to interact with all factions independently and not limit engagements to the leadership. Engaging with all factions can enhance IHL compliance and anticipate compliance in case of potential fragmentation.

As a final point, I suggest not to overlook the importance of IHRL when dealing with highly organized groups and to bring this body of law into the equation. While IHL is crucial, at least 195 million people live in areas controlled by armed groups, and 64 million live in areas that are fully controlled by these entities.[97] In some of these contexts, IHL might not suffice, and then IHRL might be beneficial to safeguard the rights of these individuals effectively.

[97] Matthew Bamber-Zryd, *op. cit*.

Military support and IHL: A critical view of the fragmented approach
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Le soutien militaire et le DIH : Une vue critique de l'approche fragmentée

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Résumé

Dans cet article, Dr. Pauline Lesaffre examine les situations dans lesquelles un groupe armé soutient militairement une partie belligérante à un conflit armé non international (CANI) préexistant. Dans ces situations, l'approche fragmentée implique de considérer séparément, d'une part, la relation bilatérale entre le groupe armé intervenant et la partie belligérante adverse et, d'autre part, la relation bilatérale préexistante entre la partie belligérante soutenue et cette même partie belligérante adverse (Section 1). Bien que séduisante à première vue, l'approche fragmentée s'avère problématique à au moins trois égards. Premièrement, elle ne constitue pas le droit existant des CANIs. Les traités pertinents, leurs travaux préparatoires et la pratique des Etats ne soutiennent pas l'approche fragmentée. Celle-ci s'apparente ainsi à une solution de lege ferenda permettant d'appliquer les critères traditionnels d'intensité et d'organisation à la relation bilatérale entre le groupe armé intervenant et la partie belligérante adverse, par analogie avec la situation de la naissance d'un nouveau CANI dans un nouveau théâtre d'hostilités (Section 2). Deuxièmement, l'application du critère traditionnel d'intensité aux actes de soutien militaire n'impliquant pas un engagement direct dans les hostilités soulève un certain nombre de difficultés. Entre autres, il n'est pas aisé d'évaluer l'intensité de tels actes à l'aide des facteurs indicatifs proposés en jurisprudence qui considèrent très clairement des circonstances de confrontation directe avec l'adversaire. Par ailleurs, à supposer qu'une telle évaluation soit réalisable, il apparaît compliqué d'établir à partir de quel moment de tels actes de soutien militaire atteignent d'eux-mêmes le critère traditionnel d'intensité des hostilités (Section 3). Troisièmement, l'approche fragmentée ne respecte pas l'esprit du droit international humanitaire. D'une part, elle n'est pas conforme au principe d'effectivité du DIH en ce qu'elle ignore la relation de coopération ou coordination existant sur le terrain entre le groupe armé intervenant et la partie belligérante soutenue. D'autre part, en retardant (souvent) l'applicabilité du DIH par rapport à une « approche non fragmentée », l'approche fragmentée ne poursuit pas l'objectif du DIH d'une meilleure protection pour les victimes de situations conflictuelles (Section 4). En conclusion, il est préférable de ne pas retenir cette approche dans les situations étudiées de soutien militaire d'un groupe armé à une partie à un CANI préexistant (Section 5).

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1. Introduction

This article focuses on specific circumstances of military support that raise questions and issues falling under the general theme of the third panel, i.e., when non-State actors become parties in an armed conflict, more specifically in a non-international armed conflict (NIAC).[98] Thus, it is necessary to briefly explain, first, what are the factual situations under examination **(A)** and, second, what the fragmented approach could mean in such situations **(B)**.

A. Factual situations of military support under examination

This article concerns military support in situations where a non-State actor, that is an armed group, provides military assistance (but below the level of control) to another actor – whether a State or another armed group – which is already involved in a NIAC against a third actor. In other words, at least three actors are involved in the situations under discussion: (1) the intervening armed group providing military support to a belligerent party (hereafter, the intervening armed group); (2) the belligerent party to the pre-existing NIAC benefiting from the military assistance provided by the armed group (hereafter, the supported belligerent party), and (3) the other belligerent party to the same pre-existing NIAC, which suffers from the military assistance provided by the armed group and which is the common enemy to the group and the supported belligerent party (hereafter, the adverse belligerent party). Such military support by an armed group in favor of the supported belligerent party can occur either through direct confrontation with the adverse belligerent party (direct involvement in hostilities), such as through acts of targeting, or through acts of support that do not imply such a direct confrontation, such as through intelligence sharing.[99] Practical examples of the situations under examination are the *Mouvement de Libération du Congo* (MLC)'s assistance to Central African authorities against Bozizé rebels[100] and Hezbollah's support to Syrian authorities against the Islamic State as well as other armed groups.[101] This type of military support by an

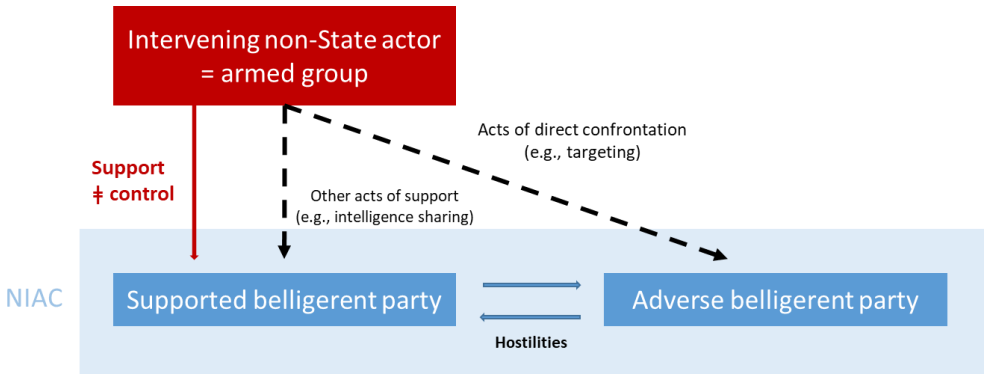
[98] The general theme of this panel does not specifically mention NIACs but, under International Humanitarian Law (IHL), non-State actors can only become parties to NIACs. They can never be parties to international armed conflicts (IACs).

[99] Sometimes, the intervening armed group is directly involved in the hostilities against the adverse belligerent party, and simultaneously provides military assistance to the supported belligerent party for the latter to conduct its own operations against the same adverse belligerent party.

[100] *See*, *e.g.*, Prosecutor v. Bemba, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (March 21, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF, ¶¶ 131, 379 and 380; "En République centrafricaine, les putschistes gagnent du terrain", LE MONDE (Oct. 29, 2022), https://www.lemonde.fr/archives/article/2002/10/30/en-republique-centrafricaine-les-putschistes-gagnent-du-terrain_4246076_1819218.html; Amnesty International, *Amnesty International Report 2003 – Central African Republic*, 28 May 2003, https://www.refworld.org/docid/3edb47d18.html.

[101] *See*, *e.g.*, "Syrie : le chef du Hezbollah reconnaît la participation du mouvement aux combats", LE MONDE (April 30, 2013), https://www.lemonde.fr/proche-orient/article/2013/04/30/syrie-le-chef-du-hezbollah-reconnait-la-participation-du-mouvement-aux-combats_3169077_3218.html; "Hezbollah leader vows to stand by Syrian regime in fight against rebels", THE GUARDIAN (May 25, 2013), https://www.theguardian.com/world/2013/may/25/hezbollah-leader-syria-assad-qusair; "Liban : le Hezbollah et l'armée syrienne lancent une opération à la frontière libano-syrienne", AL-MANAR (July 21, 2017), http://french.almanar.com.lb/497737; Julien Abi Ramia, "Nashrallah : Le Hezbollah ne se retirerait de Syrie que sur demande du régime d'Assad", L'ORIENT LE JOUR (June 8, 2018), https://www.lorientlejour.com/article/1119924/nasrallah-le-hezbollah-ne-se-retirerait-de-syrie-que-sur-demande-du-regime-dassad.html.

armed group leads to the following question under International Humanitarian Law (IHL): when does the intervening armed group become a belligerent party and must respect IHL?



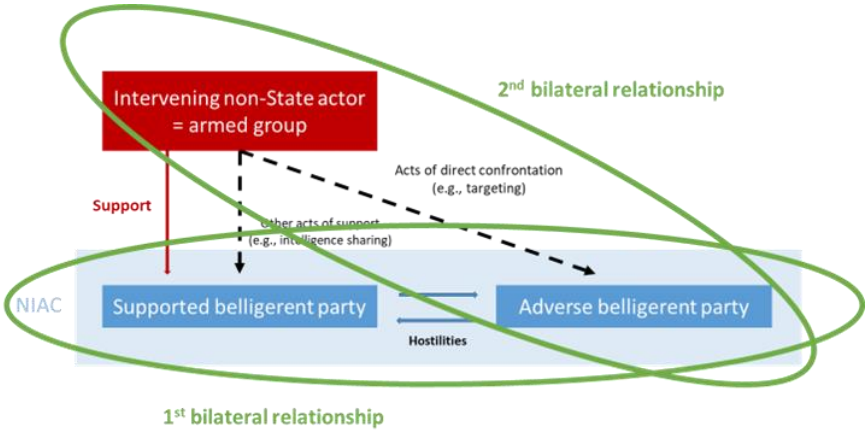
B. The fragmented approach in situations under examination

The fragmented approach constitutes one possible answer to the aforementioned question. The International Committee of the Red Cross (hereafter, ICRC) has defined this approach in its "position on the notion of armed conflict involving foreign intervention": the "fragmented approach" is an approach "based on the *factual relationships* between the belligerents and the *traditional criteria for determining the existence of an armed conflict* established in the relevant provisions of IHL*"*.[102] This approach also implies to determine the applicable law "by examining *each bilateral relationship* between belligerents *separately* in light of the *facts on the ground*".[103]

The fragmented approach has been used in situations other than the ones under discussion, such as situations resulting in parallel IAC and NIAC, for instance when a State supports an organized armed group against another State, making this last State a party to both a NIAC against the organized armed group and an IAC against the intervening State.[104] This article does not address these aforesaid situations.

[102] Tristan Ferraro, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", 97 INT'L REV. RED CROSS 1227, 1229 (2015). Emphasis added.
[103] *Ibid.*, at 1241. Emphasis added.
[104] *See*, *e.g.*, *Ibid.*, at 1245-47.

When applied to the situations of military support at the core of this article, the fragmented approach requires separate consideration of, on the one hand, the bilateral relationship between the intervening armed group and the adverse belligerent party and, on the other hand, the bilateral relationship between the supported belligerent party and this same adverse party. Therefore, the fragmented approach encourages one to isolate the intervention from the existing NIAC and assess independently whether military actions between the intervening armed group and the adverse belligerent party trigger a new and distinct NIAC according to the traditional criteria of intensity and organization. The adverse belligerent party could thus



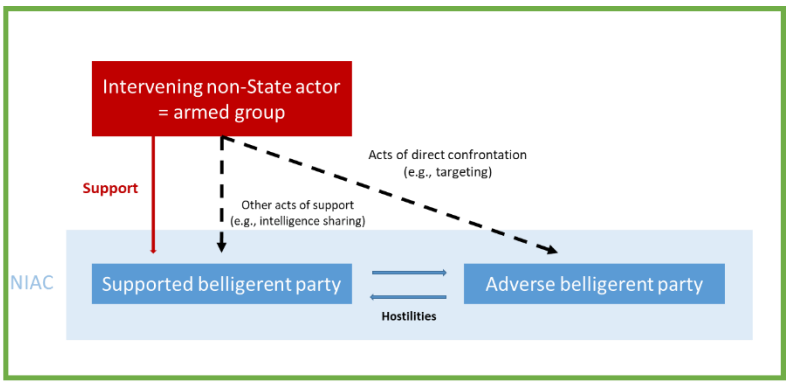
be party to two separate NIACs: a first NIAC against the supported belligerent party, and a second NIAC against the intervening armed group. Therefore, the fragmented approach could be referred to as the "multiple NIACs" approach in the situations under examination.[105]

The fragmented approach differs from a "non-fragmented approach", which argues that the supportive intervention of the armed group should be contemplated within the framework of the pre-existing NIAC. Thus, the armed group becomes a potential participant in this pre-existing NIAC. The "non-fragmented approach" is a "unique NIAC" approach[106] – which is preferred by the ICRC itself when it comes to the situations under discussion.[107]

[105] In favor of such an approach in the situations under discussion, *see*, *e.g.*, Annyssa Bellal, "ICRC Commentary of Common Article 3: Some questions relating to organized armed groups and the applicability of IHL", EJIL: TALK! (Oct. 5, 2017), https://www.ejiltalk.org/icrc-commentary-of-common-article-3-some-questions-relating-to-organized-armed-groups-and-the-applicability-of-ihl/. In favor of such an approach in situations of supportive State interventions in a pre-existing NIAC (against an organized armed group), *see*, *e.g.*, Noam Zamir, "Chapter 4: The Armed Conflict(s) Against the Islamic State", 18 YEARBOOK INT'L HUM. L. 91, 107-111 (2015); NOAM ZAMIR, CLASSIFICATION OF CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW: THE LEGAL IMPACT OF FOREIGN INTERVENTION IN CIVIL WARS 88-91, 111 and 212 (2017).

[106] The "non-fragmented approach" seems to receive support from numerous scholars and experts in situations of supportive State interventions in a pre-existing NIAC (against an organized armed group). *See*, *e.g.*, Robert Chesney, "The United States as a Party to an AQAP- Specific Armed Conflict in Yemen", LAWFARE (Jan. 31, 2012), https://www.lawfareblog.com/united-states-party-aqap-specific-armed-conflict-yemen; *Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen*, Situation of human rights in Yemen, including violations and abuses since September 2014, A/HRC/42/CRP.1 (Sept. 2, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/A_HRC_42_CRP_1.PDF, ¶ 50. Relevant literature, including literature in favor of a "non-fragmented approach", is more limited when it comes to the situations under discussion (in favor of such an approach, *see*, *e.g.*, and in addition to the relevant reference in note 132 regarding the support-based approach developed by the ICRC, Noam Lubell, "Fragmented Wars: Multi-Territorial Military Operations against Armed Groups", 93 INT'L L. STUD. 214, 242 (2017)).

[107] For more information, *see infra* Section 5 (Conclusion) and note 132.



Following these necessary introductory remarks, at least three fundamental questions must be answered in relation to the fragmented approach. Section 2 investigates whether the existing law of NIAC embraces the fragmented approach. Section 3 analyzes whether this approach is easy to implement in practice. Section 4 examines whether this approach is in conformity with IHL spirit.

2. The fragmented approach as a *de lege ferenda* suggestion

Despite using the traditional criteria of intensity and organization, the fragmented approach *does not* constitute the existing Law of NIAC for supportive interventions of armed groups in a pre-existing NIAC.

First, Common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II defining its scope of application do not appear to contemplate supportive interventions of a new actor in an existing NIAC, but, rather, the emergence of a *new* NIAC in a *new* theatre of war.[108] These provisions do not establish the appropriate approach for supportive interventions in a pre-existing NIAC.

Second, as a supplementary means of interpretation,[109] preparatory works only offer an explanation as to why treaties do not solve this issue. Preparatory works of the Geneva Conventions show that their drafters did not consider supportive interventions in a pre-existing NIAC. Further, preparatory works of AP II make clear that States feared, and therefore mostly discussed, *State* interventions in favor of their *non-State* enemy. State interventions that benefit belligerent States or non-State interventions were not the core of the discussions.

[108] Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Additional Protocol (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609.

[109] Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

Interestingly enough, the few occurrences on supportive interventions in a pre-existing NIAC rather support a "non-fragmented approach".

Third, as another supplementary means of interpretation, current State practice does not support the fragmented approach.[110] Whether for State interventions or for non-State interventions in a pre-existing NIAC, States *appear* to prefer the "non-fragmented approach." The U.S. practice on "associated forces" is an obvious example of such a position.[111] Thus, the limited available State practice certainly does not support an evolution of customary international law in favor of the fragmented approach.

To conclude, the fragmented approach does not constitute the existing Law of NIAC, nor does, actually, the "non-fragmented approach" (at least, not yet).[112] Therefore, the fragmented approach is nothing more but a *de lege ferenda* suggestion, often based on an (implicit) analogy with the well-known situation of the emergence of a *new* NIAC in a *new* theater of war.[113] This analogy allows us to apply the traditional criteria of intensity and organization to the situations under examination.

3. The difficulties in applying the fragmented approach

As introduced in the previous section, the fragmented approach leads to the application of the traditional criteria of intensity and organization to the bilateral relationship between the intervening armed group and the adverse belligerent party. At first glance, this approach seems a convenient solution because it relies on well-known criteria that have been defined in case law. Hence, some rely on the fragmented approach as a safety net.[114] Yet, this approach is not easy to implement in practice.

There is no doubt that to become a party to any NIAC, the intervening armed group must be organized. The organization criterion is essential to ensure that the armed group can respect IHL obligations resulting from the Law of NIAC,[115] and its application does not present any special difficulty here.

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[110] Thus, the available State practice certainly does not express an interpretive agreement in favor of the fragmented approach. *See ibid.*, art. 31(3)(b).

[111] *See*, *e.g.*, Jeh C. Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, Dean's Lecture at Yale Law School (Feb. 22, 2012), 31 YALE L. & POL'Y REV. 141, 146 (2012).

[112] For more developments and references on the ideas presented in this section, *see* Pauline Lesaffre, *Participation in a Non-International Armed Conflict: A Failed Analogy with Co-belligerency*, 41 B.U. INT'L L. J. (2023) (forthcoming).

[113] This analogy is not convincing because it negates at least two key features of the situations under examination: (1) the preexistence of a NIAC between the supported belligerent party and the adverse belligerent party and (2) the supportive relationship between the intervening armed group and the supported belligerent party. On this last feature, *see* also *infra* Section 4.

[114] *See*, *e.g.*, Annyssa Bellal, "ICRC Commentary of Common Article 3: Some questions relating to organized armed groups and the applicability of IHL", *supra* note 106.

[115] *See*, *e.g.*, SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 177 (2012); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 36 (2002).

However, several difficulties appear when applying the intensity criterion to the situations under discussion, particularly to circumstances where the intervening armed group is not directly involved in the hostilities against the adverse belligerent party. Naturally, when this intervening armed group directly engages in the hostilities against the adverse belligerent party, the circumstances are comparable – but only to some extent – to armed interactions during the emergence of a new theatre of war. Thus, although this does not mean that the fragmented approach is the correct approach, one can apply the intensity criterion without difficulty in these circumstances. It is quite the opposite when the intervening armed group provides military assistance to the supported belligerent party, and not in direct confrontation with the adverse belligerent party. In such situations, there are several challenges, and this article discusses two of them.

The first challenge consists in assessing the intensity of "hostilities" between the intervening armed group and the adverse belligerent party while simultaneously ignoring the direct confrontation between the supported belligerent party and the adverse belligerent party. Indicative factors designed by international case law, especially the ICTY's case law, do not address military acts of support that do not rise to a level of direct confrontation, but are limited to clear instances of direct confrontation between two actors.[116] For instance, in the *Boškoski* case, the non-exhaustive list of indicative factors includes "the seriousness of attacks", "the spread of clashes over territory and over a period of time", or "the extent of destruction and the number of casualties caused by shelling or fighting".[117] Such factors clearly presuppose direct armed interactions between actors. It is difficult to know how to proceed when such direct armed interactions are missing.

Second, even if there would be a good way to assess the intensity of military acts of support independently of any direct confrontation with the adverse belligerent party, the second challenge becomes determining when the traditional intensity threshold would be met by these military acts of support. At the very least, it is expected that such a threshold would require the accumulation of a higher number of military acts of support by comparison with acts of direct involvement in hostilities. But how many of them? The intensity threshold would probably only be reached after a long amount of time or could, potentially, never be reached.[118] This is a significant difference with the "non-fragmented approach", which does not rely on the traditional intensity threshold (already reached in the pre-existing NIAC) and, therefore, could

[116] In this sense (but in a different context), *see*, *e.g.*, Annyssa Bellal, *The War Report: Armed Conflicts in 2018*, Geneva Academy of International Humanitarian Law and Human Rights (April 2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf, at 27.

[117] Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

[118] On a similar idea, *see also* Nele Verlinden, *"Are We at War?" State Support to Parties in Armed Conflict: Consequences under* Jus in Bello*,* Jus ad Bellum *and Neutrality Law* 103 and 118 (Nov. 25, 2019) (unpublished manuscript, on file at the University of Leuven Law Library).

lead to a faster IHL applicability, not only in case of acts of military support,[119] but also often in case of direct confrontation with the adverse belligerent party.[120]

In conclusion, although appealing at first, the fragmented approach would call for a significant rethinking of the traditional assessment of the intensity threshold. This is far from being convenient and already questions the adequacy of the approach.

4. The non-conformity of the fragmented approach with IHL spirit

The fourth section relates to the conformity of the fragmented approach with IHL spirit. It investigates whether this approach is desirable at all in IHL. It seems that the fragmented approach is *not* in line with IHL spirit for two mains reasons.

First, the fragmented approach does not conform with IHL principle of effectiveness.[121] This principle relies on the idea that IHL must reflect what is happening on the ground.[122] The ICRC underlines that the fragmented approach is designed to lead to a "legal outcome [that is] more consistent with the reality of the conflict on the ground".[123] If this is the case, this approach does not achieve its end in the situations under discussion. Here, on the ground, the intervening armed group is engaged in *two* meaningful relationships: on one side, a hostile relationship with the adverse belligerent party and, on the other side, a supportive and often cooperative relationship with the supported belligerent party. It is not rare that the armed group intervenes at the request of the supported belligerent party. Additionally, the armed group often coordinates its operations with the supported belligerent party. Yet, the fragmented approach ignores this cooperative relationship and exclusively focuses on the hostile relationship with the adverse belligerent party.

Second, the fragmented approach does not better protect victims than the "non-fragmented approach". As previously explained in the third section, the fragmented approach often delays IHL applicability in comparison with a "non-fragmented approach", in both situations where the intervening armed group provides military assistance to the supported belligerent party or directly engages in hostilities with the adverse belligerent party. Thus, it is interesting to explore

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[119] A "non-fragmented approach" would also rely on a series of conditions, even though these conditions would not include the traditional intensity threshold. Therefore, a "non-fragmented approach" would not guarantee IHL applicability in all circumstances of military acts of support.

[120] It is not excluded that a very small number of acts of direct confrontation with the adverse belligerent party (even possibly one single act) have large consequences and reach very quickly the traditional intensity threshold. If this is the case, a "non-fragmented approach" might not lead to a faster IHL applicability in comparison with the fragmented approach, but rather to a similar result.

[121] On the importance of this principle under IHL, *see*, *e.g.*, JÉRÔME DE HEMPTINNE, LES CONFLITS ARMÉS EN MUTATION 112 *et seq.*, ¶¶ 127-52 (2019).

[122] On the meaning of the principle of effectiveness under International Law in general, *see*, *e.g.* KATHARINE FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW 242 (2017); Salvatore Zappalà, *Can Legality Trump Effectiveness in Today's International Law?*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 105 (Antonio Cassese (ed.), 2012).

[123] Tristan Ferraro, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", *supra* note 103, at 1242.

whether delaying IHL applicability is a good thing for the people impacted by the situations under examination. In other words, do these people benefit from a better protection when IHL is applicable or, reversely, do these people benefit from a better protection when IHL is *not* applicable? This article considers the first three categories that probably come in mind:[124] it analyzes the protection of (1) the members of the adverse belligerent party and (2) the citizens of the territorial State (i.e., the State where hostilities occur) *vis-à-vis* the intervening armed group, and the protection of (3) the members of the intervening armed group itself *vis-à-vis* the adverse belligerent party.

(1) Concerning the *members of the adverse belligerent party*, they benefit from a better protection against the intervening armed group when IHL is applicable to the group. Indeed, when IHL is not applicable to the armed group itself, the group is basically not accountable under International Law. Although there is a growing trend to impose human rights obligations on non-State actors,[125] it is probably still correct to consider that non-State armed groups do not have any obligations under existing International Human Rights Law.[126] Therefore, the intervening armed group gets involved in the hostilities against the adverse belligerent party or provides military assistance to the supported belligerent party with no constraints, *except* of course for the few IHL obligations binding its members as individuals when their actions have a belligerent nexus to the conflict.[127] On the contrary, when IHL is applicable, the intervening armed group must abide by the whole body of the Law of NIAC. Therefore, members of the adverse belligerent party enjoy a broader protection against the group.

(2) The reasoning is identical for the *citizens of the territorial State*. Indeed, they also benefit from a better protection against the intervening armed group when IHL is applicable to the group. When IHL is not applicable to the group, the territorial State's citizens only have a limited protection resulting from IHL obligations binding the group's members as individuals. The armed group itself does not need to abide by IHL, nor by International Human Rights Law. Instead, when IHL is applicable to the intervening armed group, these citizens enjoy the broadest protection possible under the Law of NIAC.

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[124] There are other categories of people whose protection under International Law should be examined, e.g., the protection of the citizens of the State where the intervening armed group is mainly located – when this group is located outside the territorial State's territory (protection *vis-à-vis* the adverse belligerent party). Additionally, one could also study the protection of the territorial State's citizens *vis-à-vis* the adverse belligerent party. Nevertheless, it would not change the overall assessment and conclusion of this author.

[125] *See*, *e.g.*, TILMAN RODENHAÜSER, ORGANIZING REBELLION – NON-STATE ARMED GROUPS UNDER INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW, AND INTERNATIONAL CRIMINAL LAW 210-12 (2018); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 58, 275-85 (2006); DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 169-71 (2016); Commentary of Geneva Convention (III) relative to the Treatment of Prisoners of War ¶ 551 (2020).

[126] *See*, *e.g.*, MARCO SASSÒLI, *International Humanitarian Law and International Human Rights Law*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 388 (Ben Saul et Dapo Akande (ed.), 2020); MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 430 (2019).

[127] Individual obligations under IHL are IHL obligations that have been criminalized as war crimes under International Criminal Law. *See*, *e.g.*, ANTONIO CASSESSE e.a., CASSESE'S INTERNATIONAL CRIMINAL LAW 65-67 (2013).

(3) Finally, as far as the *members of the intervening armed group* are concerned, it is clear that they benefit from a better protection when IHL is *not* applicable to the group itself. Indeed, when the intervening armed group becomes a party to a NIAC, the whole body of the Law of NIAC applies. Members of the group become legitimate military targets: they can be targeted at all times, no matter what they do (except when International Human Rights Law is applicable and applies as a *lex specialis* to the adverse belligerent party). Otherwise, when IHL is not applicable to the group itself, members of the group can only be legally targeted when they directly participate in the hostilities, in support of the supported belligerent party and to the detriment of the adverse belligerent party.[128] Although the intervening armed group itself is not a party to a NIAC, its members could indeed qualify as civilians directly participating in the hostilities occurring in the context of the pre-existing NIAC. In light of these developments, members of the intervening armed group do enjoy a better protection when IHL is not applicable. This said, the intervening armed group took itself the decision to engage in the hostilities or provide military support. It should not be overly shocking that, when its support reaches a certain level, its members bear a greater risk of being targeted.[129]

Overall, these developments allow to assert that, although IHL applicability puts members of the intervening armed group at a greater risk of being targeted, it provides a better protection both to the adverse belligerent party and to the territorial State's citizens *vis-à-vis* the intervening armed group. Consequently, by delaying IHL applicability, the fragmented approach does not really conform with IHL purpose to better protect victims.

5. Conclusion

Considering the answers to these three fundamental questions, the fragmented approach should not be favored to determine when an intervening armed group becomes a belligerent party to a NIAC.[130] Although not yet part of the existing Law of NIAC, the "non-fragmented approach" is more in tune with realities on the ground and provides a better overall protection to victims. Therefore, it is not surprising that State practice steers IHL in this direction and that the ICRC accepted an exception to the fragmented approach in situations under discussion through its so-called "support-based approach".[131]

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[128] On the notion of direct participation in hostilities, *see* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.

[129] On this idea, *see also* Nele Verlinden, *"Are We at War?" State Support to Parties in Armed Conflict: Consequences under* Jus in Bello*,* Jus ad Bellum *and Neutrality Law*, *supra* note 119, at 161-62.

[130] This article is inspired by the ideas developed by this author in her doctoral thesis "Le droit international humanitaire à l'épreuve des conflits armés transfrontières". Expected to be published in 2023.

[131] Tristan Ferraro, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", *supra* note 103, at 1230-33; International Committee of the Red Cross, "International humanitarian law and the challenges of contemporary armed conflicts", Report for the 32rd International Conference of the Red Cross and Red Crescent, https://www.icrc.org/en/document/international-humanitarian-law-and-

Contemporary challenges arising from fighting NSAG abroad: a State view

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Défis contemporains posés par la lutte contre les groupes armés non Etatiques à l'étranger : une vision Etatique

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Summary

This session addresses challenges from a State's perspective that rise from addressing Non-State Armed Groups. After having set out the legal framework, two categories of challenges are discussed.

The first challenge relates to the qualification of conflicts and the identification of the parties to the conflict. In reviewing the evolution of the qualification curve of parties to the conflict, the speaker addressed the evolution of the qualification of a conflict over time going from an IAC to a NIAC through examples of US-led coalition of NATO Member States in 2001-2002 Afghanistan and Libya. The evolution from international disturbances and tensions to a NIAC or an exported NIAC is illustrated through the evolution of the characterization of the situation in Burkina Faso. Thirdly the beginning and the end of a conflict and its impact on the evolution of operational rules of engagement are discussed while referring to the case of the Central African Republic. The case of Mozambique 2020-2021 and Daesh are discussed in addressing how to determine the control of a territory by an armed group and what the consequences in terms of the conduct of hostilities.

The second set of challenges covered are related to conflict classification and the geographical context in dealing with non-State armed groups. The consequences of affiliations and alliances between groups as well as the operational consequences of an exported NIAC are discussed. The speaker argues that if a State intervenes in response to a request for assistance from a host State and/or based on a UN Security Council resolution or Article 51 UN Charter, then it becomes a party to a pre-existing NIAC. Lastly, arguments are presented to refute the concept of a "global battlefield".

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challenges-contemporary-armed-conflicts, at 22-23. For the applicability of the "support-based approach" to intervening armed groups, *see* Tristan Ferraro, "Military support to belligerents: can the provider become a party to the armed conflict?", Proceedings of the 19th Bruges Colloquium (Oct. 18-19, 2018), https://www.coleurope.eu/sites/default/files/uploads/page/Collegium%2049.pdf, 55 (also 59, in Q&A session). For an analysis of this approach, *see* Raphaël van Steenberghe and Pauline Lesaffre, *The ICRC's 'support-based approach': A Suitable but Incomplete Theory*, 59 QUESTIONS OF INT'L L. 5 (2019).

Mesdames, messieurs, chers amis,

Je vous remercie pour cette invitation à l'édition 2022 du colloque de Bruges. C'est pour moi un plaisir et un honneur de participer à ce rendez-vous prestigieux de réflexion sur le droit international humanitaire, sur un sujet aussi stratégique qu'actuel que celui des différents acteurs engagés sur le champ de bataille.

Dans un contexte international et européen marqué par la déflagration de la guerre en Ukraine, par l'irruption de nouveaux acteurs sur les champs de bataille, la thématique du colloque et la qualité de nos échanges nous permettrons je n'en doute pas d'éprouver de nouveau toute la capacité du droit international humanitaire (DIH) à se saisir des problématiques nouvelles inhérentes à l'actualité des opérations militaires.

Les questions de qualification sont déterminantes pour identifier le droit applicable en opération (qu'il s'agisse des conventions de Genève, des protocoles additionnels ou du droit coutumier dont les principes fondamentaux relatifs à la conduite des hostilités).

La définition d'un seuil voire de plusieurs, lorsque la réunion de plusieurs critères est nécessaire pour permettre une qualification juridique, est donc aussi difficile que déterminante en matière d'opération.

A vrai dire, la notion de seuil semble davantage s'appliquer à la résultante d'une qualification des faits. Car les critères posés par les textes, les commentaires des Conventions de Genève, s'apparentent davantage à un nuage de point d'une galaxie dans lesquels il convient de se repérer, sans autorité appelée à statuer, si ce n'est *a posteriori* s'agissant de la Cour internationale de justice ou de la Cour pénale internationale.

Qu'il me soit permis de rappeler brièvement, s'agissant de la qualification des conflits armés, la galaxie en présence de laquelle nous sommes s'agissant des conflits armés non internationaux [132]:

- L'article 3 commun aux Conventions de Genève et son interprEtation par le tribunal pénal international pour l'ex-Yougoslavie (TPIY) s'agissant de l'intensité de la violence d'une part et des critères d'organisation des groupes armés d'autre part (qui entraîne l'application du DIH, en particulier du standard minimum d'humanité prévu à l'article 3 commun, des règles coutumières relatives à la conduite des hostilités (distinction,

[132] En matière de conflits armés internationaux (CAI), la question semble pouvoir être évacuée rapidement. Pour mémoire, l'article 2 commun aux 4 CG stipule que « *la présente convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs HPC, même si l'état de guerre n'est pas reconnu par l'une d'elles* ». Un CAI est constitué dès lors qu'il y a recours à la force armée entre deux ou plusieurs États, y compris lorsqu'un État occupe militairement le territoire d'un autre État.
Le DIH ne requiert pas de seuil spécifique quant à la durée ou l'intensité des affrontements en CAI, mais pose l'exigence d'une intention belligérante.

proportionnalité, précaution, interdiction des maux superflus et des souffrances inutiles) par les parties au conflit) ;

- Le miroir inversé des troubles et tensions internes qui ne permettent pas de caractériser un conflit armé ;
- Le second Protocole additionnel introduisant une différence s'agissant des parties au conflit et du contrôle d'un territoire par un groupe armé, qui s'applique « *à tous les conflits armés* […] *qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées* [*sustained and concerted*] *et d'appliquer le présent Protocole* [133]» (nous soulignons) ;
- Enfin, les définitions retenues par le Statut de Rome, qui viennent non pas ajouter une nouvelle catégorie (« conflit prolongé ») selon notre analyse, mais conforter ces qualifications.

Les défis contemporains induits par la lutte contre des groupes armés non Etatiques en territoire étranger sont multiples :

- En termes spatiaux tout d'abord, à la dilatation des espaces de conflictualité (il faut parcourir l'équivalent quotidien d'un Paris-Varsovie pour une opération donnée au Sahel par exemple) s'ajoute une difficulté croissante à cerner le périmètre précis des zones de conflits ;
- En termes de rapports de force ensuite, s'agissant d'un adversaire asymétrique organisé en réseau qui se fond dans les populations et refuse le combat frontal ;
- En termes de perceptions enfin à l'heure des manipulations et batailles des images et de l'information.

Pour éclairer cette table ronde, j'aborderai de façon la plus illustrée possible les défis induits par les questions de qualification juridique s'agissant des groupes armés non Etatiques et les conséquences opérationnelles qui en résultent pour les forces armées Etatiques.

[133] Outre l'article 3 commun aux CG, qui continue de s'appliquer aux CANI (de haute intensité) dans la mesure où il prescrit un standard minimum de normes à garantir en toutes circonstances, les CANI de haute intensité sont également régis par les dispositions du PA II.
Ces dernières développent et complètent les garanties fondamentales de l'article 3 commun.
Le PA II prévoit ainsi des dispositions particulières applicables à des catégories de population spécifiques, comme les enfants (article 4 al. 3). Par ailleurs, le PA II impose des obligations plus nombreuses à l'égard des personnes privées de liberté, qui doivent, entre autres, « être autorisées à recevoir des secours individuels ou collectifs ; pratiquer leur religion ; bénéficier d'examens médicaux… » (article 5).
Les normes de DIH de nature coutumière – dont les principes fondamentaux régissant la conduite des hostilités – s'appliquent également en situation de CANI de haute intensité.

1. Premier défi : la qualification des conflits et l'identification des parties au conflit

A. <u>Retour sur l'évolution de la courbe des qualifications des parties au conflit,</u>

a) Evolution de la qualification du conflit dans le temps : cas de l'Afghanistan ou de la Libye : du CAI au CANI

Initialement, l'opération d'octobre 2001 de la coalition des Etats membres de l'OTAN dirigée par les Etats-Unis, s'est inscrite dans une phase qualifiable de conflit armé international (CAI) entre la coalition et le régime des Talibans qui contrôlaient 90% du territoire.

Puis à l'issue de la formation du nouveau gouvernement installé en juin 2002 par une *Loya Jirga* (grande assemblée), on a pu qualifier un conflit armé non international (CANI) entre la coalition soutenant le régime afghan et les talibans et d'autres groupes armés non Etatiques.

Cette série de qualifications a cependant fait l'objet de divergences d'interprEtations. Ainsi, l'Allemagne l'a qualifié de CAI puis d'opération de stabilisation intégrant une mission de maintien de la paix. Je vous renvoie également aux écrits de Mme Françoise Hampson sur le sujet.

L'évolution des qualifications dans le temps a été similaire dans le cas de l'intervention en Libye en 2011, sur laquelle je ne m'étends pas.

b) Passage de troubles et tensions internes à un CANI ou un CANI exporté

Evolution de la qualification de la situation au Burkina Faso

A partir des années 2020 nous avons échangé avec nos partenaires, dont le CICR, sur l'évolution de la situation au Burkina Faso, jusqu'alors qualifiée de situation de troubles et tensions internes.

Les forces de défense et de sécurité, les ONG, ainsi que de nombreux civils étaient la cible d'actions armées de plus en plus fréquentes par des groupes armés organisés (dont l'Etat islamique au Grand Sahara (EIGS) et le Groupe de soutien à l'Islam et aux musulmans).

A la lumière des critères du DIH, il ne faisait pas de doute que l'intensité des violences et le degré d'organisation des groupes armés qui sévissaient sur les territoires du Burkina Faso atteignaient le seuil d'un conflit armé non international.

Le Burkina Faso était, après le Mali, l'Etat du G5 Sahel le plus touché par les violences armées. D'après le Haut-Commissariat de l'ONU pour les réfugiés, 7000 Burkinabés se sont ainsi réfugiés, depuis l'année dernière (2021), dans le nord-ouest de la Côte d'Ivoire pour fuir les attaques djihadistes. La décision récente du chef de la junte au pouvoir au Burkina Faso, le Lieutenant-Colonel Damiba, de créer un commandement des opérations du théâtre national atteste également de l'Etat de la situation sécuritaire dans cet Etat.

Pour autant, fait notable, nous n'avons pas identifié de groupe armé contrôlant une ou des parties du territoire, ce qui tendait à restreindre l'application du DIH à l'article 3 commun.

En tout Etat de cause, s'agissant des conséquences concrètes de cette opération de qualification pour les forces françaises, passage d'une qualification de troubles et tensions internes à un CANI, alors que nous intervenions sur le fondement d'un *CANI exporté* depuis le Mali n'avait pas d'incidences sur l'application du second protocole additionnel (P.A.II) par l'opération Barkhane.

c) Le début de la fin d'un conflit, le cas de la RCA et de ses incidences sur l'évolution des règles opérationnelles d'engagement

En République Centrafricaine (RCA), la qualification de CANI a mis un peu de temps à s'établir, les affrontements entre les *Seleka* et *anti-Balaka* observés dès 2012, ayant pu être considérés un temps comme des troubles et tensions internes.

L'adaptation des règles d'engagement a été calquée sur l'évolution des qualifications de ce conflit « [l]*e premier ensemble de règles, qui correspondait à la phase de « haute intensité » du conflit était très permissif et très coercitif : les forces françaises étaient face d'un adversaire déterminé, bien organisé et équipé, et surtout parfaitement identifiable.*

Après la bataille des Adrar des Ifoghas (18 février au 31 mars 2013) et la destruction du dernier sanctuaire des groupes armés, cet ensemble [de règles opérationnelles d'engagement] a évolué afin de restreindre l'action et l'autonomie de l'aviation, pour empêcher les dommages collatéraux.

Enfin, un dernier set de règles opérationnelles d'engagement, dit de « basse intensité » a été adopté à la fin de l'été 2013 pour accompagner le début de la normalisation au Nord Mali[134] ».

Ces exemples permettent d'illustrer les enjeux qui s'attachent à la courbe des qualifications, c'est-à-dire la bonne temporalité pour procéder à un réexamen et à un dialogue avec le CICR sur la justesse de ces qualifications et leur prise en compte dans l'emploi de la force.

B. <u>Comment déterminer le contrôle d'un territoire par un groupe armé et quelles en sont conséquences en termes de conduite des hostilités ?</u>

a) Le cas du Mozambique en 2020-2021

[134] Propos tenus le général de division Marc Foucaud, ancien commandant de la force de l'opération Serval (Mali) lors du colloque du 22 octobre 2014 organisé par le ministère de la défense, Ecole militaire, Paris, [http://combatsdroitshomme.blog.lemonde.fr/2014/10/14/les-relations-entre-le-droit-international-et-humanitaire-et-le-droit-europeen-des-droits-de-lhomme-colloque-ministere-de-la-defense-22-octobre-2014-paris/].

Après l'intensification des attaques armées en 2020, la prise de contrôle des villes portuaires de Mocimboa da Praia[135] (août 2020) et de Palma[136] (mars 2021) au terme d'opérations progressives de coupure et de contrôle des routes desservant ces villes, de même que l'intensification des attaques dans les villages alentours avant des assauts coordonnés depuis plusieurs points dans la province Nord-Est de Cabo Delgado (même si des raids transfrontaliers sur le territoire tanzanien ont été constatés) par Ahlu Sunna wal Jamaa, ont constitué autant d'indices d'une qualification de conflit armé non international (CANI) *relevant de l'article 3 commun*.

A cet égard, le CICR a officiellement déclaré en octobre 2021, que « *depuis quelques années, le Mozambique subit de plus en plus les effets conjugués du conflit armé et du changement climatique, qui pèsent sur la santé de la population* »

En l'espèce, le critère de l'organisation de la partie non-Etatique semblait être satisfait. Les renseignements indiquaient qu'Ahlu Sunna wal Jamaa s'organisait essentiellement en petits groupes d'unités mobiles disposant pour chacun d'un chef et d'un ancrage local. Ce groupe était en mesure de mener des actions concertées et continues et d'exercer un contrôle territorial, disposait d'une capacité de coordination et d'une forme de commandement centralisé. Au regard de l'allégeance d'une partie des membres de ce groupe à Daech, ce dernier pouvait également constituer une partie non-Etatique au conflit, sous réserve d'investigations complémentaires.

Des éléments complémentaires nous ont également paru nécessaires pour étayer le contrôle territorial réellement exercé.

Concernant le second critère de qualification relatif à l'intensité des affrontements, certains des facteurs indicatifs identifiés par la jurisprudence du TPIY précité semblaient réunis s'agissant de la situation au Nord du Mozambique :

- la fréquence, la durée et l'intensité des affrontements armés a pu être observée : depuis 2017, les attaques des insurgés ont été réalisées de manière continue avec une escalade de la violence en 2020[137]. Des affrontements ont fréquemment eu lieu entre les forces gouvernementales, appuyées par voie aérienne par la société militaire privée sud-africaine Dyck Advisory Group et les insurgés. Des attaques régulières contre les localités de la province de Cabo Delgado ont été constatées[138], notamment dans les

[135] « Après la prise de Mocimboa da Praia, les Chabab mozambicains inquiètent l'Afrique australe », *Le Monde*, 14 août 2020,
[136] « L'enfer de l'attaque djihadiste contre la ville de Palma, au Mozambique », *Le Monde*, 29 mars 2021; « Au Mozambique, les djihadistes prennent Palma », *Libération*, 28 mars 2021.
[137] « Ten conflicts to worry about in 2021 – Mozambique », ACLED, disponible sur : https://acleddata.com/blog/2021/02/02/ten-conflicts-to-worry-about-in-2021/
[138] Voir les rapports hebdomadaires de Cabo Ligado, Mozambique Conflict Observatory, qui démontrent une systématicité des attaques perpétrées par Ahlu Sunna wal Jamaa, disponibles sur : https://acleddata.com/cabo-ligado-mozambique-conflict-observatory/.

principales villes côtières ou situées le long d'axes routiers stratégiques. La prise de contrôle de Mocimboa da Praia et la prise d'assaut de la localité de Pemba constituaient des attaques de grande ampleur ;

- la nature des armes et des moyens utilisés était également révélatrice : les insurgés étaient équipés d'armes légères, de fusils d'assaut, de lance-roquettes, de mortiers et de véhicules blindés de transport de troupes[139]. La société militaire privée sud-africaine Dyck Advisory Group intervenait directement dans les hostilités, en soutien au gouvernement mozambicain, par le biais de frappes aériennes[140]. Des hélicoptères, des lance-grenades, des fusils d'assaut et de l'artillerie lourde auraient été employés ;
- la fréquence des violences, le nombre de victimes et l'étendue des destructions matérielles causées étaient documentés : plus de 2 000 civils seraient morts depuis 2017[141]. Les insurgés visaient délibérément les populations civiles visées par des attaques systématiques caractérisées par la diffusion de la terreur, des exactions, des décapitations, des séquestrations et enlèvements, le recrutement forcé d'hommes et de mineurs, ainsi que des agressions sexuelles[142]. Deux épisodes de massacre, notamment en novembre 2020 lors duquel cinquante civils ont été assassinés à Muidumbe[143], des destructions d'habitations et de biens civils, ainsi que les opérations de pillage systématiques ont été relevés. Les forces armées gouvernementales seraient également à l'origine d'attaques délibérées à l'encontre de civils, d'exécutions extrajudiciaires et de traitements inhumains et dégradants[144] tandis que des attaques de Dyck Advisory Group auraient été menées en violation de l'interdiction des attaques indiscriminées. La Haute commissaire aux droits de l'homme avait ainsi appelé de ses vœux des enquêtes sur toutes les violations et abus présumés du DIH et du DIDH commis par les groupes armés et les forces de sécurité[145].

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[139] « L'enfer de l'attaque djihadiste contre la ville de Palma, au Mozambique », *Le Monde*, 29 mars 2021, disponible sur : https ://www.lemonde.fr/afrique/article/2021/03/29/l-enfer-de-l-attaque-djihadiste-contre-la-ville-de-palma-au-mozambique_6074846_3212.html

[140] « « What I Saw is Death » : War Crimes in Mozambique's Forgotten Cape », Rapport, Amnesty International, mars 2021, disponible sur :

[141] « Mozambique. Pas de justice pour les victimes du conflit qui déchire le Cabo Delgado depuis trois ans et a fait plus de 2 000 morts », Amnesty International, 7 octobre 2020, disponible sur : https ://www.amnesty.org/en/documents/afr41/3545/2021/en/

[142] *Ibidem*. Voir également « « Ils les ont décapités un par un » : au Mozambique, la terreur des rescapés des attaques djihadistes », *Le Monde*, 11 décembre 2020, disponible sur : https ://www.lemonde.fr/afrique/article/2020/12/11/ils-les-ont-decapites-un-par-un-au-mozambique-la-terreur-des-rescapes-des-attaques-djihadistes_6063001_3212.html

[143] Voir également « Plus de 50 civils « massacrés » par les islamistes dans un village du Mozambique début avril », *Le Monde*, 22 avril 2020, disponible sur : https ://www.lemonde.fr/afrique/article/2020/04/22/plus-de-50-civils-massacres-par-les-islamistes-dans-un-village-du-mozambique-debut-avril_6037407_3212.html

[144]« Mozambique : Michelle Bachelet est consternée par l'escalade du conflit dans la province de Cabo Delgado », Haut-Commissariat des Nations unies aux droits de l'Homme, novembre 2020, disponible sur : https ://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26497&LangID=E.

[145] *Ibidem*.

- le nombre de civils déplacés était considérable : le Haut-commissariat des Nations unies pour les réfugiés (UNHCR) identifiait 670 000 personnes déplacées du fait des hostilités dans la province de Cabo Delgado[146].

b) Cas de Daesh au Levant : un groupe armé non Etatique au contrôle territorial inédit

Pour mémoire, l'intervention de la coalition conduite par les Etats-Unis au Levant s'est inscrite dans un CANI contre Daesh, et non dans un CAI contre la Syrie ou la Russie.

La particularité de ce conflit, à l'apogée de la puissance de Daesh, résidait notamment sur le contrôle territorial atteint par Daesh en Syrie et en Irak.

Outre l'application du droit international humanitaire, avec les possibilités qu'offre ce droit en matière d'usage de la force létale contre les cibles militaires et de destruction d'objectifs militaires, s'est imposée la prise en compte de ses activités d'administration du territoire placé sous son contrôle et de la population placée sous sa « juridiction ».

Ces activités d'administration, déconnectées de la conduite des hostilités, ont été qualifiées de nature civile.

L'imbrication des branches militaire et politique ou civile de Daesh n'excluait pas différents degrés d'affiliation des individus et différents niveaux de contribution à ses activités militaires.

Ainsi, les individus *non-membres de la branche armée* de Daesh (par exemple qui occupaient des fonctions strictement civiles, sans lien avec les activités militaires) ont été considérés comme des personnes civiles, protégées contre les attaques et les effets des attaques, sauf si elles participaient directement aux hostilités et pendant la durée de cette participation[147].

En cas de doute, les biens et les personnes en cause ont été considérés comme civils, et de ce fait protégé contre les attaques et les effets des attaques.

S'agissant des individus et en application du principe de distinction, l'appartenance à la branche armée de Daesh, seule de nature à justifier le ciblage, a été déterminée uniquement par des preuves de participation à la lutte armée, c'est-à-dire à la conduite des hostilités. Cette appartenance a été déduite de faits, établis par des informations raisonnablement fiables, montrant l'appartenance de la personne à Daesh (port d'un uniforme ou d'un signe distinctif,

[146] « Le HCR est alarmé par les attaques brutales d'un groupe armé insurgé au Mozambique », UNHCR, 30 mars 2021, disponible sur : https://www.unhcr.org/fr-fr/news/briefing/2021/3/60633b25a/hcr-alarme-attaques-brutales-dun-groupe-arme-insurge-mozambique.html

[147] Les personnes civiles perdent en effet leur protection pendant la période où elles préparent, effectuent et viennent d'effectuer des actes de participation directe aux hostilités (PDH). La PDH se définit comme le fait de prendre part à des actes de guerre ou à des activités en rapport avec des actes de guerre qui, par leur nature ou leur but, sont destinés à frapper concrètement des objectifs militaires ou les forces d'une partie au conflit, et/ou le fait de prendre part à des actes profitant militairement à une partie au conflit et qui sont destinés à porter gravement et concrètement atteinte à des personnes ou à des biens protégés contre une attaque directe.

indices d'une incorporation de la personne dans l'organisation, *etc*.) et qu'elle participait directement aux combats (action armée), ou à des activités en rapport avec les combats.

Lorsqu'elle était avérée, cette participation signait l'appartenance à la branche armée de la partie non-Etatique au conflit, justifiait que les intéressés puissent être pris pour cible à tout moment, dans le respect du principe de nécessité militaire et des autres principes du DIH qui gouvernent la conduite des hostilités.

2. Deuxième catégorie de défis : qualification et espaces.

A. Quelles peuvent être les conséquences des affiliations, allégeances ou franchises entre groupes armés ?

La simple affiliation d'un groupe armé à une « centrale » du type Daesh, Al Qaeda, ne permet pas de présumer que les critères du DIH et du TPIY précités sont remplis.

Cette qualification, s'agissant de l'organisation des groupes armés, appelle une approche concrète, de terrain, en fonction de la réalité opérationnelle observée, aussi fragmentée soit-elle.

La réalité d'un éventuel contrôle du territoire doit en toutes circonstances être investiguée.

Par ailleurs, ces affiliations ne permettent pas davantage d'étendre le champ géographique d'un conflit au lieu sur lequel opère le groupe armé de référence ou au profit duquel une allégeance est proclamée.

Le cas du G5 Sahel est illustratif, de rivalités entre franchises. Fin 2019, une coexistence pacifique pouvait être observée, anomalie notable au regard du reste du monde. Cette situation a cessé en 2020 à la suite de l'affrontement entre Al Qaeda et l'EIGS (on a pu constater l'éclatement alliance en 2019 et l'expansion territoriale de l'EIGS), qui a conduit à une dilution et une instrumentalisation des tensions entre les populations.

Daesh faisait de la propagande mais la réalité opérationnelle était très fragmentée.

B. CANI exporté et conséquences opérationnelles

Certains conflits opposant un gouvernement à un (ou plusieurs) groupe(s) armé(s) peuvent se dérouler sur le territoire de deux ou plusieurs Etats.

Les forces armées parties à un CANI peuvent *continuer leurs combats* sur le territoire d'un ou de plusieurs Etats tiers avec le consentement du ou des Etats concernés.

Il s'agit alors d'un *CANI exporté* : les forces gouvernementales impliquées combattent le ou les groupes armés parties au CANI d'origine sur le territoire d'un ou de plusieurs Etats voisins dans lequel le ou les groupes armé(s) opèrent, sous réserve que deux conditions soient satisfaites.

D'une part, le consentement exprès des Etats concernés est un préalable nécessaire (en l'absence d'un tel consentement, l'action des forces armées poursuivantes pourrait être constitutive d'une violation de la souveraineté territoriale de ces Etats, conduisant potentiellement au déclenchement d'un CAI).

D'autre part, l'intervention sur le territoire de l'autre Etat doit s'inscrire dans un *continuum opérationnel* établissant un en lien avec leur action militaire sur le territoire de l'Etat théâtre du CANI originaire.

Ainsi, dans le cadre du *CANI exporté*, seuls les groupes armés qui sont parties au CANI initial pourront être ciblés sur le territoire du ou des Etat(s) frontalier(s).

Les normes du DIH applicables au *CANI exporté* sont les mêmes que celles applicables au CANI d'origine. Cependant, les règles du DIH ne régissant que les situations de conflits armés, elles devront s'effacer dès que celles-ci cessent, notamment après la neutralisation du groupe armé à l'origine de « l'exportation » du conflit armé.

L'opération des forces françaises dans la zone sahélo-saharienne (Mauritanie, Mali, Burkina Faso, Niger, Tchad), qui a succédé en 2014 à l'opération Serval (opération Barkhane), s'inscrivait initialement dans le cadre d'un *CANI exporté*.

En effet, les groupes armés opposés à la force Serval au Mali ont continué à mener leurs activités armées au-delà des frontières maliennes, avec l'installation notamment de bases arrières dans les Etats voisins et la présence de flux logistiques à travers les frontières des Etats de la bande sahélo-saharienne.

C. Quelles sont les conséquences d'une telle qualification ?

L'intervention de la force Barkhane sur le territoire des Etats voisins au Mali n'a pas eu pour effet *d'internationaliser le conflit* puisque celui-ci n'oppose pas des forces Etatiques entre elles.

En outre, les Etats concernés ont expressément consenti à l'intervention des forces françaises.

L'article 3 commun aux CG, le PA II ainsi que les normes coutumières du DIH sont applicables à ce théâtre d'opération.

Ainsi, le concept de *CANI exporté* n'est pas un blanc-seing pour réaliser des opérations coercitives sur *l'ensemble du territoire* d'un Etat voisin sur lequel le conflit a débordé, à l'égard de n'importe quel groupe.

Il s'agit d'identifier les groupes qui agissaient initialement en territoire malien et d'adapter les règles d'emploi de la force à la volatilité des situations et à la proximité géographique avec le CANI malien.

Les règles opérationnelles d'engagement sont moins offensives car leur emploi ne se situe pas au cœur des hostilités.

D. Soutien à un Etat et qualité de partie à un conflit armé

En intervenant en réponse à une demande d'assistance d'un Etat hôte et/ou sur le fondement de résolutions du Conseil de sécurité des Nations unies et/ou de la légitime défense collective, la France devient partie au CANI préexistant.

Il n'y a pas lieu selon cette analyse de distinguer autant de CANI que d'Etats parties au conflit.

E. Il n'existe pas de champ de bataille mondial

En raison des conditions strictes qui l'encadrent, le concept de *CANI exporté* ne permet pas aux forces armées de combattre, dans le cadre du DIH, des groupes armés organisés où qu'ils se trouvent.

En cela, ce concept diffère de la notion de *conflit armé transfrontière* dans lequel des forces armées Etatiques entrent en confrontation avec un groupe armé organisé situé sur le territoire d'un autre Etat, sans qu'il y ait débordement ou exportation d'un conflit préexistant.

Une partie minoritaire de la doctrine, ainsi que certains Etats, ont pu considérer qu'un CANI transfrontière pouvait acquérir une dimension mondiale, notamment, dans le cadre de la lutte contre certains groupes armés comme Al-Qaïda.

Dans cette hypothèse, ces groupes armés pourraient être combattus militairement partout où ils se trouvent, et cela, même sans le consentement des Etats sur les territoires desquels les membres du groupe se trouvent. Le DIH serait ainsi applicable sur tous les territoires où se réfugieraient les membres de ces groupes.

Cette interprEtation du DIH est majoritairement contestée par la doctrine et ne reflète pas la position de la France qui a toujours contesté la notion de conflit armé non-international mondial.

3. Conclusion

En conclusion, je souhaiterais insister sur les enjeux de telles qualifications. Il est frappant de relever l'évolution constante des modes d'action de ces groupes armés, caractérisée par la surenchère de la terreur, la recherche de l'implosion des sociétés, l'instrumentalisation des frontières par les réseaux.

Tout l'enjeu des qualifications est d'articuler respect du droit et prise en compte des nécessités de l'action militaire, condition de la légitimité et du succès des opérations.

Le respect du droit constitue également une source de protection des militaires par leurs chefs, et la condition d'une force morale et d'une éthique irréprochable.

La courbe des qualifications s'inscrit nécessairement dans le temps long, celui de la résolution des crises.

Je vous remercie pour votre attention et reste à votre disposition pour répondre à vos questions.

Moderated discussion – Discussion moderée

Qualification of Daesh as an occupying power

La première demande de clarification de l'audience portait sur l'intérêt de la France à qualifier « Daesh comme puissance occupante » pour des questions de ciblage qui concerne des personnes, car une telle qualification peut être dangereuse pour plusieurs raisons, à tout le moins politiquement.

Une panéliste a répondu que certains partenaires de la coalition considéraient Daesh comme une entité unique. La France a essayé de raffiner l'analyse en utilisant la notion d'occupation, pour distinguer une partie du groupe armée qui rendait des services à la population d'une autre qui menait des opérations armées. Elle a précisé que l'utilisation du terme « occupation » n'est qu'une analogie et une référence visant à effectuer une distinction dans le cadre du ciblage, rien de plus, et qu'il aurait été possible d'utiliser un autre mot.

Additional Protocol II

La question des raisons sous-tendant l'application extraterritoriale du Protocole Additionnel II par la France a ensuite été soulevée.

Dans sa réponse, la panéliste a fait référence à l'exemple évoqué lors de la présentation de l'intervention française au Burkina Faso, qui relève d'un CANI exporté, avec l'accord des Etats concernés pour la conduite des opérations sur les territoires du Mali et du Burkina Faso. De plus, il y a la continuité opérationnelle avec les groupes armés lorsqu'ils franchissent la frontière avec le Burkina. Dans d'autres régions du Burkina Faso, il s'agissait de troubles internes, mais étant donné que la France est partie au Protocole et pour des raisons pratiques, il n'est pas opportun d'appliquer différentes règles juridiques au cours d'une même opération.

Un membre de l'audience a questionné les raisons de la différence de traitement concernant la capture de personnes au Mali, d'une part, et au Burkina Faso et au Niger, d'autre part. Dans ces derniers cas, il n'y avait selon lui pas d'obligation juridique de reconnaître le droit de visite du CICR et seule l'obligation de respecter la Convention contre la torture de 1984 s'appliquait. Pourquoi alors appliquer le Protocole Additionnel II pour la conduite des hostilités ?

L'oratrice a répondu qu'Il y avait une différence de texte entre les ordres d'opération Serval au Mali et Barkhane, mais que ce n'est pas parce que le texte ne le mentionne pas explicitement que le CICR n'a pas le droit de visiter les personnes capturées. Il y a un dialogue. La France est parfaitement consciente de ses obligations et des enjeux liés à la juridiction sur les personnes capturées.

Fragmented approach

One attendee voiced agreement over most of the substance of the presentation on “military support and IHL: a fragmented approach” but criticizes the overarching assessment of the fragmented approach by arguing that getting rid of it would be a slippery slope towards many risks, including legitimizing theories such as the “global battlefield”.

The panellist clarified that she did not intend to imply that the fragmented approach never has any advantages. The argument was to say that in the specific situation when you have military supporting a pre-existing NIAC whether it comes from a NSAG or a State supporting another State fighting an organized armed group, the non-fragmented approach would make more sense. However, in other circumstances the fragmented approach would make more sense. When a State is supporting an organized armed group fighting another State, it may be useful to have the fragmented approach, parallel IAC and NIAC, or to decide on an “internationalized armed conflict”.

Caution: ICRC only classifies based on legal criteria and facts

An ICRC attendee cautioned for the dangers related to disseminating the wrong idea that the ICRC or any other organization seek to classify situations for reasons of operational access. It was clarified that the ICRC only classifies situations of violence based on legal criteria and facts on the ground, not for political or operational reasons.

On this, the speaker clarified that he did not intend to say that the ICRC classifies for operational interests and understands that classification is a factual exercise. The comment was made to explain that coalitions are being discussed because it is a reality on the ground and it is important to provide clarity on the applicable legal framework.

Human rights law

On behalf of the ICRC, it was clarified that regarding the protective objective of the fragmented approach, the ICRC does not consider that IHL as such is more protective. It is based on the fact that if the legal framework in practice is not applicable for the State or the armed group, then it puts the people concerned at risk. In most circumstances the most protective framework would be human rights law, however, when it is not in accordance with the reality on the ground then it becomes less protective – notably in situations where the conditions for an armed conflict to exist are there.

The panellist replied that the comments related to human rights law are relevant to consider both from a State and NSAG perspective, it should not be dismissed too quickly, especially because many highly organized armed groups committed openly to respect human rights law and there are some specific treaties that specifically apply to organized armed groups (e.g., Optional Protocol on the Protection of the Rights of the Child of 2000).

A critical voice in the room questioned the legal basis to support the statements that human rights law is applicable to non-state armed groups and cautioned that “we cannot *wish* this problem away”.

Coalition is not a legal entity as such

On the ICRC suggestion of the coalition approach, it was clarified that this would not imply that the coalition as such is a legal entity. The ICRC considers that each organized armed group in the coalition are parties to the armed conflict, remaining each accountable for their own acts.

Consequences of an armed group joining a coalition

In the second round of questions, an attendee asked whether a group not meeting the criteria which joins an armed group that is considered organized for the purposes of IHL, would be considered organized itself. A panellist replied that it would depend on the circumstances and on the type of relation that exists between these groups. Elements to consider include the level of control, whether it is a coalition and the level of organization in the “new group”. Another panellist added that in terms of armed groups not being organized but who could potentially reach the organizational requirement through its relationship with another armed group, it is important to clarify that if the organization comes through control with another group, then there may be some kind of absorption of a sub-armed group by the controlling armed group which then raises the question, who is a party to the armed conflict?

In a similar vein the panellists were invited to identify which are the indicative versus the essential criteria to eventually conclude to a sufficient level of organization. One panellist clarified that the elements that are provided by the jurisprudence are minimum elements that should be considered.

The question rose whether there is a difference between the requirement of organization for an armed group in NIACs and a militia group in an IAC (Art. 4.A.2. GC III). The panellist argued that the elements are different and can be found on paper, the elements in GC III are different than the ones provided by the jurisprudence of the ICTY and the ICC. Additionally, there is a different goal as the jurisprudence aims to provide a framework to regulate the behavior of non-State entities.

Call for simplification

During the third and last round of interventions a participant headed a call for a simplification of the debates while expressing concerns about the level of complexity the debates are reaching and questioned the practical relevance of it. A panellist defended the importance of technical discussions to address complex questions that arise.

Accountability

The same person advocated to include the question of accountability of armed groups under international law in the debate as it had not been addressed. A panellist agreed on the importance of the accountability question of the group itself. One could refer to individual responsibility under international criminal law, however, she argued that IHL obligations binding individuals are not as large as the whole body of the law of NIAC that could apply to the group. The question of the accountability of armed groups is important and currently there is no real framework on the responsibility for non-State armed groups; the panellist agrees that this should be addressed. Another speaker added that some armed groups have put compensation and indemnification measures in place in case of IHL violations committed by their members.

On this note the chair closed the first day of the Colloquium.

SESSION 5

PANEL 4: ON THE BATTLEFIELD: THE MULTIPLICITY OF ACTORS AND CHALLENGES FOR THE APPLICATION OF IHL – PART I

PANEL 4: SUR LE CHAMP DE BATAILLE: LA MULTIPLICITÉ DES ACTEURS ET LES DÉFIS QU'ELLE POSE POUR L'APPLICATION DU DIH – PARTIE I

CHAIRED BY ELŻBIETA MIKOS-SKUZA

UNIVERSITY OF WARSAW AND COLLEGE OF EUROPE

You're in the army now: who is a combatant in 2022?
–
Vous êtes dans l'armée maintenant : qui est un combattant en 2022?

Jelena Pejic
IHL Expert

Résumé

Dans sa présentation, Jelena Pejic explore la définition et le statut des combattants dans les conflits armés de 2022. Elle débute en soulignant l'importance de distinguer entre les civils et les combattants, mettant en avant que la compréhension légale du statut de combattant n'a pas beaucoup évolué récemment. La présentation se concentre sur quatre éléments essentiels : les membres des forces armées, la participation directe aux hostilités, le droit d'être reconnu en tant que prisonnier de guerre en cas de capture et la complexité des régimes juridiques qui se chevauchent.

L'article 4 de la Troisième Convention de Genève est décortiqué pour comprendre les catégories de combattants, les critères pour être considéré comme combattant et le lien avec les privilèges des prisonniers de guerre. L'impact du Protocole additionnel I est discuté, en particulier sa définition plus large des combattants, la controverse entourant le relâchement de l'obligation de distinction et la compréhension unifiée qu'il offre.

Un cas particulier, celui des "combattants illégaux", suscite un intérêt important en raison des points de vue divergents entre les Etats. La présentation conclut en mettant en avant les conséquences sérieuses auxquelles les combattants sont confrontés, notamment le ciblage, l'internement et la poursuite en justice. Dans l'ensemble, la présentation offre un aperçu complet du statut de combattant dans le contexte de cadres juridiques complexes.

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Good morning to all of you in the room and online, I'm very honored and pleased to be here and to see so many friends and colleagues whom I haven't seen in a while. I too would like to thank the organizers – the ICRC and the College of Europe – for inviting me to this session.

1. Introduction

The topic is: who is a combatant in 2022? Let me start by saying that as opposed to some of the mind-bending discussions we had yesterday and the cutting-edge reflections that were going on, this presentation will go back to issues and controversies that are decades old. At least in the last ten years things have not changed. While I will mention controversies, please note that they are not really developing ones. To give you an answer to the question: who's a

combatant in 2022 up front – it remains the same as it has been for a while now, at least in legal terms, as there have simply not been noteworthy legal developments.

Preliminary remarks

Let's start with a brief reminder of the principle of distinction which, *inter alia*, requires all parties to distinguish between civilians and combatants at all times. A “combatant” is a fundamental concept to the entire edifice of the rules governing the conduct of hostilities, and thus knowing who is a combatant is incredibly important. Before going further allow me to emphasize three points:

First, as we know, combatant status applies exclusively to international armed conflicts (IACs). This is because States were not, and are not, willing to grant the privileges related to combatant status to members of organized non-State armed groups. Secondly, while not identical, combatant status and prisoner of war (POW) status are closely linked, almost like two sides of the same coin. Understanding this connection is important, and we'll explore it further in this discussion. Thirdly, determining *who qualifies* as a combatant is a complex matter of law that has evolved as different treaties were adopted. As a result, we are currently faced with a somewhat confusing overlap of at least three different regimes, *i.e.,* Article 23 of The Hague Regulations of 1907, Article 4 of the Third Geneva Convention (GC III), and Articles 43 and 44 of Additional Protocol I (AP I). These regimes do not cancel each other out, each remains valid and applicable. Therefore, it can be challenging to navigate and choose a specific approach.

2. Definition

For the purposes of this presentation, I will focus on four key elements related to the definition of a combatant in 2022.

The first element is that all members of the armed forces, except medical and religious personnel, are considered combatants.

This raises the second question of who qualifies as a member of the armed forces. “Members of the armed forces” – at least as a matter of customary law based on the ICRC’s definition, but also more broadly – consist of all armed forces units and groups that are under a command responsible to a party for the conduct of its subordinates.

Another legal feature of combatants is that they have the right to directly participate in hostilities (DPH), granting them a privilege that other actors involved in armed conflicts do not have. It should be recalled that civilians who directly take part in hostilities (DPH) do not violate IHL *per se*, but there can be serious consequences for their DPH under both IHL (they lose protection from attack), and under the domestic law of the detaining State (they may be interned or criminally tried upon capture, depending on the circumstances, more on this later).

I want to stress, as a last point here, that upon falling into the hands of the enemy, combatants have the right to be recognized as prisoners of war (POWs) provided they have distinguished themselves from the civilian population. The term "falling into the hands of the enemy" was deliberately chosen in Article 4 of the Third Geneva Convention to encompass all possible situations, including surrender, capitulation or capture, regardless of the circumstances in which a combatant is apprehended.

While there is some controversy about the duration of the obligation to distinguish themselves, it is widely agreed that as a minimum combatants must identify themselves as such during military engagements – meaning during attacks and in operations preceding an attack.

Given the various overlapping norms, I will primarily focus on Article 4 of the Third Geneva Convention, as it is universally recognized as customary law accepted by all States. Later, I will briefly discuss the situation under AP I.

3. Article 4 of the Third Geneva Convention

Article 4 of the Third Geneva Convention is relevant to determining who is a combatant, even though it does not expressly mention combatant status, but instead lists persons deemed prisoners of war. It prompts an indirect evaluation of who qualifies as a combatant in order the determine who has the right to be recognized as a prisoner of war.

The text is dense, so it may be easier to break it down into its key categories. Relevant for this presentation are Article 4 A subparagraphs 1, 2, 3 and 6.[148] The persons specified in the two remaining paragraphs, 4 and 5, are not combatants but civilian prisoners of war – even though this may sound counterintuitive – because it is possible for civilians to be prisoners of war in certain cases.

A. <u>Article 4 (A) 1 GC III</u>

The first category of persons deemed prisoners of war, listed in Article 4 A 1 of GC III, comprises individuals who are members of the regular armed forces of a party to an international armed conflict and members of militia and volunteer units who form part of such forces. The term encompasses various services/branches such as the Army, Navy, Air Force – and more recently – members of military Cyber and Space Commands, reflecting the evolving domains of armed conflict due to new technology. Determining who is a member of a State's armed forces is not a matter of IHL, but of the domestic law of each State.

[148] The *leveé en masse* category covered in subparagraph 6 of Article 4 A 2 was not dealt with in the presentation as it was addressed in another panel at the Colloquium.

Members of militia and volunteer units must undergo official integration into the regular armed forces to be entitled to combatant status and the privileges associated with prisoners of war. Which formations are thus incorporated is also a matter of domestic law.

B. Article 4 (A) 2 GC III

The second category of persons deemed combatants, who are thus also eligible for POW status, is found in Article 4 A 2 and relates to various groups such as militia and volunteer corps, including those of organized resistance movements who belong to a party to the conflict. I will refer to them as "other groups" rather than using the label "irregular forces". This category arose as a result of the Second World War when detaining powers denied POW status upon capture to members of such groups (e.g., partisans) fighting against the respective invading and occupying forces. In order to be deemed combatants and granted POW status and the accompanying privileges upon capture, members of these other groups must meet certain criteria specified in the text.

A threshold issue is whether a group “belongs” to a party to the conflict, i.e. is fighting for it on the same side. This is a *de facto* relationship that could be explicit, tacit, or evidenced by the group being under the overall control of a State party to an international armed conflict.

Four additional conditions need to be met. The first condition (specified in Article 4 A 2 a), is that the group as a whole must be commanded by a person responsible for his/her subordinates. A structured military hierarchy is essential for mounting effective military operations, which in practice depends on internal military discipline, and is also essential for the implementation of and compliance with International Humanitarian Law (IHL).

The second condition (Article 4 A 2 b) pertains to the obligation of members of other groups to distinguish themselves, which entails adopting a recognizable, fixed distinctive sign recognizable from a distance. While questions about the nature of what constitutes "fixed," "distinctive," and "recognizable" may arise, these will not be dwelled on during this presentation due to time constraints.

The third requirement (Article 4 A 2 c) is that members of other groups must carry their arms openly. It is understood that this applies at least during an attack or in a military operation preparatory to or preceding an attack. Notably, the US Department of Defense Law of War Manual suggests that the temporal aspect as just mentioned might be too short.

The fourth condition (Article 4 A 2 d) pertains to complying with the laws and customs of war. I will come back to it in a moment.

There are differing views on the collective and individual nature of these conditions. It is my sense – and I think it is widely accepted – that other groups falling under the scope of Article

4 A 2 GC III must collectively satisfy all four criteria. If any of the conditions are not met, the group as a whole is considered ineligible for POW status, and thus by implication so is each of its individual members. "Collectively" means that a failure by the group to adhere to any of the four criteria in a widespread or systematic manner will disqualify it. Needless to say, there may in practice be situations in which this overall determination will need to be made, not an easy task.

Furthermore, there is the issue of the “individual” fulfillment of the conditions by each combatant. Recent guidance from the 2020 ICRC Commentary on GC III and this Article is extremely helpful as it clarifies that “belonging to” and “being commanded” are “collective” conditions. However, for individual members of other groups to be eligible for prisoner of war status upon capture, they each have to also personally distinguish themselves from the civilian population by wearing a fixed distinctive sign, recognizable at a distance and carry their arms openly, pursuant to subparagraphs b and c of Article 4 A 2.

Going back to Article 4 A 2 d and the obligation of members of other groups to conduct their operations in accordance with the laws and customs of war, this criterion must also be fulfilled by the group as a whole and by each of its individual members. The issue is whether, if a group collectively fulfils the criteria and generally adheres to the laws and customs of war, non-compliance by an individual means that he or she may be deprived of prisoner of war status. The prevailing view is that it may not, as such an outcome would defeat the purpose of GC III and the Geneva Conventions as whole, which is to ensure the protection of persons covered. However, it is worth noting that certain States have entered reservations on the relevant article. Originally more numerous, there are now still around 7 or 8 States, including Russia and China, which maintain that if an individual, even a member of the regular armed forces, fails to comply with subparagraph d – in other words violates the laws and customs of war and is tried for war crimes, a conviction automatically deprives them of their prisoner of war status. Instead, their protection and treatment post-conviction would be subject to domestic law, and prisoner of war status would be regained after the sentence is served. This view remains contentious.

C. Article 4 (A) 3 GC III

Article 4 A 3 GC III addresses the status of combatants "who profess allegiance to a government or authority not recognized by the Detaining Power". Similar to the second category, this norm arose as a result of events in the Second World War. The question of whether combatants aligned with non-recognized authorities qualified for prisoner of war status emerged in 2001 during the initial, international armed conflict phase of the hostilities in Afghanistan. In this instance, the Taliban – who according to the ICRC were members of the regular armed forces of the State and should have been granted prisoner of war status – were denied such status by the United States.

4. Additional Protocol I

As is well-known to most of you, the next evolution of IHL law took place in 1977 with the adoption, *inter alia*, of the First Additional Protocol to the 1949 Geneva Conventions (AP I). This Protocol was partly a response to the armed conflicts that took place in the process of decolonization. Some party of it remain controversial for a certain number of States.

A. Article 43 AP I

The general definition of armed forces I gave at the beginning of this presentation is derived from Article 43 of AP I[149]. It specifies that the armed forces of a party to the conflict consist of all organized armed forces, groups and units who are under command responsible to a party to the conflict, and that members of the armed forces so defined (other than medical and religious personnel) are combatants.

It is noteworthy that Article 4 GC III and Article 43 AP I have some overlaps and in fact convey the same message to a large extent. The key difference lies in the broader scope of the AP approach, which has unified the definition of who qualifies as a combatant that covers members of the regular armed forces and the "other groups" provided they meet the requirements. The obligation of responsible command has been retained, albeit in a different formulation. It is specified that armed forces must have an internal disciplinary system that will enforce compliance with IHL. Notably, Article 43 clearly establishes that combatants have the right to directly participate in hostilities, which GC III does not do as it deals indirectly with combatants. Lastly, Article 43 also states that the incorporation of a paramilitary or armed law enforcement agency into a State's armed forces must be notified to the other parties, striving to ensure certainty as to the scope of a State's regular armed forces.

B. Article 44 AP I

The relaxation of the obligation of combatants to distinguish themselves from the civilian population was a main controversy related to this Article.

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[149] AP I, Article 43:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 AP I reaffirms that members of the armed forces are required to distinguish themselves. However, there are specific situations in which, owing to the nature of hostilities, an individual can maintain their combatant status and consequently, their status as prisoner of war upon capture if they simply carry arms openly during each military engagement and while they are visible to the enemy during deployments preceding an attack. This loosening of the conditions for POW status resulted in several important States – "important" in the sense that they are often engaged in armed conflict – refraining from ratifying AP I. Importantly, it cannot be claimed – in my opinion, but it is also a widely held view – that the relaxation of the obligation to distinguish constitutes customary law.

Even certain States who are parties to AP I and therefore "signed up" for Article 44 have sought to restrict the exception in different ways. Some States have issued declarations to the effect that they will accept the Article 44 exception solely in situations of occupation or in wars of national liberation.

They have likewise clarified that when referring to the term "deployment" the text, in their view, does not mean deployment to a firing position, but movement towards a place from which an attack will be launched. A lingering dispute also remains regarding the term "visible to the adversary", centering on whether this signifies "visibility to the naked eye" or "visibility achieved through technical means".

To sum up, the legal issues related to combatant status have remained substantially unchanged in 2022, which is probably a good thing given current events. There is a presumption that combatants will be granted prisoner of war status upon falling into the hands of the adversary. In case of doubt, Article 5 GC III comes into play, necessitating the establishment of a competent tribunal to determine status. Prisoner of war status implies the protections of GC III in terms of treatment and conditions of detention, but most importantly, it entails combatant immunity based on combatant privilege, which means that a captured combatant, i.e. a prisoner of war cannot be prosecuted or tried for lawful acts of war, but only for violations of IHL, specifically war crimes committed prior to capture (or ordinary criminal acts committed during capture).

Special case: "unlawful combatants"

In conclusion, I would like to touch upon a couple of specific situations related to status. First, I would like to briefly address the concept of "unlawful combatants" which, it should be recalled, is not a term of art found in the treaties of IHL. It gained prominence in both international and more recently, in non-international armed conflict, and denotes persons who for one of the reasons that are laid down in the treaties do not fulfill the criteria for combatant/prisoner of war-

status. It has most often been used to refer to civilians who take direct part in hostilities, a legal issue that remains controversial.

Divergent viewpoints exist among States concerning unlawful combatants. Some assert that while these individuals do not qualify as combatants and prisoner of wars, they also fall outside civilian status and are thus denied the protections of the Fourth Geneva Convention (GC IV). Consequently, they are considered a “third” legal category and are protected by Common Article 3 as customary law or by Article 75 AP I.

An alternative perspective subscribed to by other States and the ICRC, posits that if a person is not eligible for prisoner of war status in an IAC, he or she will automatically be protected under GC IV based on the explicit text of its Article 4, provided they fulfill the nationality criteria.

My “pet” question on the issue of unlawful combatants pertains to the very existence of a “third” legal category of persons under IHL. The consequences of “unlawful combatancy” or, more correctly phrased, unprivileged belligerency, are already very serious under existing law. Persons directly participating in hostilities without being authorized to do so under IHL (e.g. civilians), may be: 1. targeted and killed during such participation, 2. may be interned by the capturing State based on the serious security threat they pose and be held - *in extremis* - until the end of active hostilities with appropriate procedural safeguards, 3. may be prosecuted for a violation of domestic law for the mere fact of direct participation, as well as for any war crimes committed, and 4. may, according to Article 5 of GC IV be deprived of some of the rights and privileges accorded to civilians under the Fourth Geneva Convention. (The exact scope of this last point is uncertain, as Pictet’s commentary on GC IV makes certain observations which are controversial, and State practice is uneven).

So, my question is: what is missing under existing law that gives rise, in the view of some, to the need for a “third” category of persons who would be protected by only minimal standards rather than be covered either by GC III or GC IV? To identify a “gap” between the Conventions risks allowing or leading to behavior that is unlawful under IHL. Unfortunately, recent practice has confirmed such fears.

While I intended to also address other special cases such as spies, mercenaries, medical and religious personnel, and “terrorists”, due to time constraints I will end my presentation here. However, I am hopeful we can pick up some of the elements in the discussions.

Thank you for your attention.

L'évolution du statut des civils, la levée en masse et la participation directe aux hostilités (PDH)

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The changing status of civilians, levée en masse and direct participation to hostilities (DPH)

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Résumé

Dans son intervention, le Dr. Annyssa Bellal explore le concept de levée en masse. Après avoir exposé les éléments constitutifs d'une levée en masse en élaborant sur la définition énoncée à l'article 4 de la troisième Convention de Genève, elle se penche sur les origines et l'importance juridique du concept de levée en masse dans les conflits armés contemporains.

La distinction entre levée en masse et personnes participant directement aux hostilités (PDH), ainsi que les différences en termes de statut juridique, de champ d'application, de nombre de personnes impliquées et d'implications pour la responsabilité des Etats sont abordées au cours de sa présentation. Dans les deux cas, il s'agit de personnes ordinaires qui prennent les armes et ne sont pas des soldats professionnels. Dans une levée en masse, les participants peuvent être légalement qualifiés de combattants, tandis que dans le cas de PDH, l'individu reste un civil. D'autres éléments divergents incluent le champ d'application, la levée en masse n'ayant lieu que dans les conflits armés internationaux, alors que la PDH sont possibles à la fois dans les conflits armés internationaux et non internationaux. De plus, la levée en masse est soumise à une stricte fenêtre temporelle avant l'invasion, concerne un grand nombre de personnes et doit être spontanée, tandis que dans le cas de la PDH, il n'y a pas de restriction temporelle, ni d'exigence concernant le nombre de personnes impliquées ou la manière dont cette participation se déroule.

L'intervenante se penche sur les défis et les ambiguïtés entourant la levée en masse, en particulier le manque de clarté sur qui peut être considéré comme un habitant prenant les armes et les interprEtations diverses de la spontanéité. Elle questionne également l'adhésion des participants aux lois et coutumes de la guerre.

Enfin, se tournant vers l'avenir, l'oratrice envisage la pertinence de la levée en masse dans les conflits armés modernes. Les avancées technologiques et la prévalence des conflits armés non internationaux pourraient limiter son application, mais la nature durable du concept est reconnue. Le Dr. Bellal suggère de considérer un concept similaire pour les individus résistant aux régimes oppressifs afin de leur offrir une protection en vertu du droit international des droits de l'homme, à l'instar de la levée en masse dans les conflits armés internationaux.

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First and foremost, allow me to thank the organizers for inviting me. It is a great pleasure for me to be present and see my colleagues this year. I am delighted to have the opportunity to meet my former students here in the audience. I must admit that when the organizers asked me to speak on this topic, I hesitated. I was a bit nervous because the concept of levée en masse is not a well-studied subject that one can easily discuss. Jurisprudence remains largely silent, or one might even say, completely silent. Nevertheless, it is worth noting that this notion dates back to the 18th century and has not changed much since then. It is a stable concept that has not evolved much since then. The organizers knew exactly why they wanted me to address this issue and why they thought it was highly relevant to the theme of "who is who on the battlefield in 2022" in light of the conflict in Ukraine and the discussions on the levée en masse that occurred in the early days of the conflict.

1. Concept: levée en masse?

What is a levée en masse

The concept of levée en masse can be found in Article 4 of the Third Geneva Convention, which States:

> *« (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. »*[150]

There are some key words that are very important in this paragraph. There is the notion of spontaneity, the requirement for individuals to continuously participate in resisting invading forces in a non-occupied territory, the requirement to carry arms openly, and the obligation to adhere to the laws and customs of war. These are important aspects to be observed in practice. If these criteria are met, the participants of levée en masse are entitled to POW status and enjoy immunity.

2. Origins of the concept

Interestingly, this well-articulated legal concept was originally not a legal one, but a social concept created for operational and practical reasons. While the exact origin story can vary, there is a consensus that this concept was developed in the 18th century when the revolutionary French government needed a significant larger number of soldiers to resist attacks of different States wishing to destroy the new revolutionary regime. The revolutionary government did not want to establish a mandatory army, so they encouraged people globally

[150] Article 4(A)6 GC III.

to volunteer to defend their nation. Thus, the creation of this notion of rallying people to defend the nation is based on the concept of patriotism.

This notion evolved over time, transitioning from a political concept to a legal one. This transition was clear in the context of the US Civil War, particularly when the Lieber Code recognized that people in the invaded part of the country, not yet occupied, would be considered public enemies but, under levée en masse, if captured, they would be treated as prisoners of war. These are the principles and rules embraced by the Lieber Code. Thus, the concept of the levée en masse departed from a generic notion to encourage the population to defend the country to something more sophisticated allowing to grant POW status if specific conditions are met. In the following years, this concept was incorporated into different treaties, and eventually, we find its latest version in Article 4 of the Third Geneva Convention, with little change to its essence.

A. Difference between DPH and levée en masse

Perhaps now, it will be interesting to explore the similarities and differences between on the one hand a levée en masse and on the other hand persons directly participating in hostilities (DPH), as it could lead to confusion.

When looking at the facts, there is a fundamental analogy between the two, as both involve ordinary individuals. I won't refer to them as "civilians" but they are regular people who are not professional soldiers and take up arms to engage in acts of hostilities. While this is where the similarity lies, it can be misleading because from a legal perspective, participants in a levée en masse are combatants, not civilians. Legally speaking, the distinction between combatants and civilians is satisfied concerning levée en masse. The individuals involved in a levée en masse are combatants, while persons who are DPH are civilians. When parties participate in a levée en masse, they benefit from combatant status and the privileges that come with it including POW status upon capture.

Another obvious difference is that a levée en masse, as the French term suggests, involves a large number of people. DPH, on the other hand, may only refer to a single person engaging in acts of hostilities. Hence, there are different conceptual aspects to consider. Levée en masse refers to a considerable number of people who could supplement the acts of the official army.

An additional legal difference resides in the acts within the framework of levée en masse that could result in State responsibility. The Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) make it clear that certain acts within the context of levée en masse could lead to State responsibility as the levée en masse can bind States as the responsible authority. This illustrates the link between the levée en masse and the State, which is not necessarily the case for DPH.

Another difference is that when discussing levée en masse, very strict conditions apply under the Third Geneva Convention. Specifically, there is a restricted temporal window for a levée en masse, as it must occur before the occupation takes place. Once the occupation begins, the levée en masse ceases to exist. Additionally, the concept of spontaneity is crucial for a levée en masse, which is not the same as DPH, which can occur at any moment. There are no such restrictions on DPH. Lastly, a levée en masse can only exist within the context of international armed conflicts, whereas DPH could apply both in international and non-international armed conflicts.

In conclusion, the levée en masse is a specific category of combatants that has been recognized over the years in the field of law. On the other hand, the concept of DPH, though protected in the context of IACs and NIACs, does not carry the same designation of combatant status.

	DPH	**Levée en masse**
Similarity	Ordinary people who take up arms and who are not professional soldiers	
Scope	IAC and NIAC	IAC only
Legal status	Civilians	Combatants
Upon capture	Civilians	POW status
Numbers	Individual	Group – « en masse »
State responsibility	Not necessarily	Can be triggered (ARSIWA)
How	Does not matter	Spontaneous
Temporal scope	Anytime during armed conflict	Strict temporary window prior to occupation
Purpose of category	Loss of protection	Combatants recognized in law

B. <u>Challenges and ambiguities</u>

There have been certain remarks and observations regarding the limitations of the concept of the "levée en masse."

One of the key questions is “who can be considered an inhabitant taking up arms?”. Unfortunately, there is a lack of clear information on this matter. In terms of interpretation, alongside the ICRC commentaries, I would argue that the notion of nationality is not relevant. Instead, it is suggested that all those who reside within a territory – regardless of their nationality – and wish to take up arms in collective uprising, could be considered as participants falling under this category of levée en masse.

There are also other unanswered questions, such as what does the requirement of "spontaneity" entail concretely? There are different interpretations but to illustrate this let's look back at the example of Ukraine. In February 2022, President Zelensky made a call to arms through a tweet, urging the entire population to resist the invasion. Some individuals took up arms in response and some scholars argue that this is a clear example of a levée en masse before the invasion formally took place. On the other hand, others contend that this action contradicts the notion of spontaneity. Consequently, there are varying interpretations as to whether the conditions for a levée en masse were met in Ukraine.

Another difficulty discussed by scholars concerning this notion is related to the conditions stipulating those participants in a levée en masse must adhere to the laws and customs of war. This raises questions about the State's ability to disseminate IHL and ensure its compliance both internally and externally. Specifically, it is questioned whether these conditions were met in Ukraine, where extensive training took place, but the level of knowledge about the laws of armed conflicts among the participants remains uncertain. If there were specific prohibitions or details regarding the laws of armed conflicts that the participants were unaware of, it begs the question of whether the condition was genuinely satisfied.

In conclusion, the notion of levée en masse presents several challenges and ambiguities. The lack of clarity on who qualifies as an inhabitant taking up arms and the diverse interpretations of what constitutes spontaneity and compliance with IHL make the implementation of this concept complex and open to debate.

C. ***Quid* for the future?**

To conclude, what about the future? Is this a revival of the concept of levée en masse? Some authors argue that there is indeed a renewal. In any case, it is my opinion that it is premature to announce the death of this concept. It is reassuring to know that IHL has established a concept that has been able to endure steadily and remains relevant in 2022 even though it finds its origins in the 19th century.

However, I do not believe that it will become a frequent occurrence, and we will not witness it regularly in armed conflicts, as some have suggested. The advancement of technology renders it unlikely that people will be able to resist certain attacks spontaneously. Additionally, while we are witnessing large-scale international armed conflicts, the majority of armed conflicts are still non-international. Thus, this concept may not be truly relevant in such situations.

Now, let me present my final, somewhat provocative remarks. I would like to discuss the issue of contemporary conflicts, which are mostly non-international armed conflicts. When preparing my intervention, I was disturbed by something: the situation in Syria in 2011 before the armed

conflict, where many individuals took up arms not against invaders but to resist the oppression from the Syrian government at the time.

For me, this was quite interesting, not from a legal perspective, but conceptually. All these people spontaneously took up arms and later formed what would become the Free Syrian Army. Although we are in a non-international armed conflict, not an international one, I would like us to think more out of the box. The striking point here is that States and various scholars have come to accept that the concept of levée en masse is legitimate, and it is a natural consequence of people wanting to defend their nation. In international law, we are having a legal limbo when the persons arm themselves against tyrannical leader. These persons are considered criminals under domestic law. Could we instead come up with a sense of legitimacy to perceive these persons who arm themselves against such a regime to be somehow protected the same way as in a levée en masse in IACs?

In conclusion, while the concept of levée en masse endures in some form, its applicability may be limited in modern conflicts. Nevertheless, it remains an interesting and legitimate concept, especially when we consider the motivations and actions of people in armed conflicts, whether international or non-international.

Third Nationals in IAC - A State perspective
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Les ressortissants de pays tiers au sein du CAI - Le point de vue d'un Etat

Pierre Degezelle
Ministry of Defence, Belgium

Resumé

Au cours de sa présentation, le lieutenant-colonel Pierre Degezelle évoque la situation des militaires belges qui ont quitté le pays pour rejoindre la Légion internationale de défense de l'Ukraine sans autorisation appropriée, en mettant particulièrement l'accent sur le cas d'un soldat ayant quitté la Belgique sans démissionner. Son analyse se concentre sur les conséquences d'un point de vue de la défense, tant au niveau interne qu'externe.

En ce qui concerne les conséquences pour la défense intérieure, de multiples considérations doivent être prises en compte. Tout d'abord, le soldat belge qui a quitté le pays pour s'enrôler dans une armée étrangère sans démissionner a violé les devoirs et les règlements militaires. Le lieutenant-colonel Degezelle expose tout d'abord que les soldats ont besoin d'une autorisation particulière pour exercer des activités non liées à leurs fonctions. Par ailleurs, rejoindre la Légion entre directement en conflit avec les devoirs militaires. S'il existe des dispositions prévoyant un congé temporaire, il est explicitement interdit de s'engager dans une armée, une milice ou des organisations paramilitaires étrangères. L'absence non autorisée peut entraîner des mesures disciplinaires et peut également aboutir à considérer les faits sous l'angle de l'infraction de désertion, punie pénalement.

Sur le plan de la défense extérieure, il existe, d'une part, le risque d'attribution lié au port d'un uniforme militaire d'un Etat tiers – en l'occurrence la Belgique – en dehors du service actif : ceci pourrait potentiellement aggraver le conflit. Quitter le service sans raisons valables constitue par ailleurs un délit. Les accusations possibles incluent l'exercice de fonctions militaires non autorisées, la désertion, l'insubordination et l'exposition de l'Etat à des hostilités étrangères.

*Les soldats belges qui rejoindraient la Légion pourraient bénéficier du privilège du combattant car la Légion est juridiquement et en pratique complètement intégrée dans les forces armées ukrainiennes conformément au décret présidentiel, mais pourraient faire face à des accusations de désertion à leur retour en Belgique. En conclusion, la participation non autorisée aux conflits internationaux emporte des conséquences disciplinaires et pénales pour les soldats belges, ainsi qu'un risque d'escalade du conflit sur la scène internationale, pouvant exposer l'*Etat *belge à des hostilités étrangères.*

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On March the 15th, the Belgian newspaper Le Soir published a news article with the following title: *Deux militaires belges sont partis pour le front ukrainien, dont un déserteur* – two Belgian soldiers left for the Ukrainian front, including a deserter[151].

Soon after these revelations, the Belgian Ministry of Defence (MOD) stated that one of the soldiers communicated his intention to leave the country in order to join the International Legion of Defence of Ukraine (hereafter referred to as "the Legion"). Belgian Defence tried to dissuade him to leave but did not succeed. He resigned from service and left for the Ukrainian front. The second soldier left for the war without resigning which is a more problematic situation. The first question popping up was: did they leave with weapons and their Belgian military uniforms? Answers to this question may lead to uncontrolled escalation and have serious consequences from an international law point of view.

The Chief of Defence stated in a communiqué addressed to the Belgian military personnel that it would be a bad idea to join the fighting in Ukraine as a soldier or ex-serviceman. Such individual initiatives could have very serious consequences and are strictly prohibited – even when on leave.

This analysis focuses on the soldier who left to the Ukrainian front without resigning from service. What are the consequences from the internal Defence point of view (statutory and disciplinary matters)? What are the issues from the external Defence point of view (criminal law and international law)?

1. Internal Defence: what is at stake?

The situation is clear: one Belgian soldier leaves the country on a voluntary basis to join the Legion in an international armed conflict without resigning from military service. The Chief of Defence explicitly prohibits such actions in a directive communicated through the whole chain of command. This was translated at unit level into orders by military commanders to their respective subordinates and these orders must be considered as valid orders.

From a disciplinary and statutory point of view, military personnel need to ask permission to the Ministry of Defence (hereafter referred to as "MOD"), if he/she wants to have an additional professional activity, besides his/her official duties as military personnel[152]. The idea behind this regulation is that these additional "remunerated" activities need to be in line with Defence values and are to be compatible with the profession of military personnel. In our case, the Belgian soldier leaving the country for the Legion against a financial contribution did not ask

[151] Colart, L. and Delepierre, F., *Deux militaires belges sont partis pour le front ukrainien, dont un déserteur,* Le Soir, available at: https://www.lesoir.be/430162/article/2022-03-15/deux-militaires-belges-sont-partis-pour-le-front-ukrainien-dont-un-deserteur.

[152] Article 176, 28 February 2007 Act fixing the statute of military personnel and military candidates of the regular component.

the authorisation to have an additional remunerated professional activity. This violates military duties and the prohibition on cumulating the official duties with an additional "professional" activity. The following question can be raised: is joining the Legion incompatible with the quality of Belgian military?

Belgian nationals joining Ukrainian armed forces remain outside of the scope of the existing legal framework with regard to Foreign Terrorist Fighters, militias or activities as part of a criminal/terrorist organisation.[153] The Minister of Defence and the Government have the authority to forbid and criminalise Belgian nationals to travel with the aim to join foreign armed forces.[154] However, the Belgian Government never implemented this option.

Another point is the mere fact of not showing up at the unit without taking leave or without any other recognised ground of absence, which is considered as an illegal absence and may result in disciplinary measures[155] as a first step that can lead to the criminal charges of desertion.[156] The MOD can approve a derogation for this in advance as long as this does not jeopardize the general interest of the service. Granting derogations in advance would jeopardize the general interest of the service in this particular case.

There are also statutory provisions providing grounds for military personnel to leave the service for a certain period for personal reasons. These provisions foresee literally that if permission is granted to temporarily leave the service, it is forbidden to render his/her services in any form whatsoever, neither to a foreign army, nor to a militia, nor to any public or private paramilitary organization.[157] This answers the question pertaining to the incompatibility between the quality of Belgian soldier and member of the Legion.

2. External Defence: what are the issues?

Belgian military personnel may only wear his/her uniform in "active service". A Belgian soldier that distinguishes himself/herself from the civilian population as part of a military unit by, for example, wearing his/her Belgian uniform or carrying his/her military ID card, may have consequences for the Belgian State. In these cases, belligerents may attribute the actions of these nationals to Belgium as they would (wrongly) assume that this person is a member of the armed forces of Belgium on active duty. Such an attribution, even when based on wrong assumptions, could lead to the use of force against Belgium in alleged self-defence and thus escalate the conflict (up to and including a collective NATO response). The associated

[153] Belgian Criminal Code, Law of 29th of July 1934 on private militia.
[154] Law 1st of August 1979, Article 2, decision by Royal Decree
[155] Article 10, 14 January Act on disciplinary regulations in the Armed Forces.
[156] Article 43 and following, Belgian Military Penal Code.
[157] DGHR-REG-TRAVARB-001: The regulations on working time, holidays, exemptions from service and temporary withdrawals from employment request for the military.

consequence of course is that Belgium would become involved in the ongoing international armed conflict in Ukraine.

Beside the attribution risk and consequences on the international scene, there are also consequences from a criminal law point of view.

Wearing a uniform if not "in active service" and involving the Belgian State in a conflict constitutes a criminal offence[158]. It is the same for leaving service without valid reasons and disregarding the appropriate procedures.

Which criminal offenses could that be? This is at the discretion of the Public prosecutor's office, and it will depend on the facts: is the person involved in active duty, is he/she a reservist or an ex-military? Depending on the answer to these questions, different grounds for prosecution may be explored:

- Assuming a military function, publicly wearing military uniforms, grades or titles you are not entitled to[159];
- Desertion[160];
- Insubordination[161];
- Exposing the State to the hostilities of a foreign power (*"Whoever, by hostile actions not approved by the government, will have exposed the State to hostilities on the part of a foreign power, will be punished by imprisonment from five to ten years, and if hostilities have ensued, detention from ten to fifteen years."*[162]). Dragging your country into an international armed conflict might cost you ten to fifteen years imprisonment.

Moreover, what about the claims in possible civil actions derived from criminal proceedings? They could be massive.

A last point to mention is the combatant status. As Belgian soldiers integrated in the Legion, they would benefit from combatant privilege and are immune to criminal charges for the sole fact of participating to the hostilities[163]. The Legion is indeed legally and in practice completely integrated into the Ukrainian Armed Forces and foreigners are explicitly allowed to join its ranks in accordance with a Ukrainian Presidential Decree.[164] This is in stark contrast with Russian claims that these are "*mercenaries*" who "*cannot be considered combatants or enjoy POW status*", a claim which is clearly in violation of the Geneva Conventions.[165] The moment they

[158] Article 228 Belgian Penal Code.
[159] Article 228 Belgian Penal Code.
[160] Article 43 and following, Belgian Military Penal Code.
[161] Article 28 and following, Belgian Military Penal Code.
[162] Article 123 Belgian Penal Code.
[163] Belgian nationals can be prosecuted for crimes they have committed abroad (active personality principle).
[164] Presidential Decree n°248, 10th of June 2016
[165] Spokesman Russian Ministry of Defense Igor Konashenkov, 3rd of March 2022 [statement made to the press] link: https://tass.com/politics/1416131

will re-enter the Belgian territory, after hostilities, they will have to face charges for desertion or the other above-mentioned “national” criminal offenses. To mitigate the risks of uncontrolled escalation, existing Belgian command-and-control ties over active military personnel are cut as soon as they would join the otherwise lawful and legitimate fight in defence of Ukraine. As the ties with Belgian Defence are cut (by discharging them from the Belgian Armed Forces by unilateral decision) after desertion, their combatant status (and entitlement to POW status) is fully based on their integration into the Legion and therefore their membership of the Armed Forces of Ukraine[166].

As a conclusion, Belgian soldiers participating in an international armed conflict in their capacity are committing disciplinary and criminal offenses; and this may lead to uncontrolled escalation if they are wearing Belgian uniforms and/or carry their military ID card, which may have consequences on Belgium’s participation to the ongoing international armed conflict.

[166] Desertion does not equal the termination of membership to the Belgian Armed Forces, see also ICRC Commentary 2020 on Article 4 GC III, §992-993

Art. 5 GC III tribunal

An online participant asked whether there is a guide that offers solutions for the challenge of finding proof or verifying a detainee's claim of POW-status in armed conflicts before the tribunals mentioned in Art. 5 GC III. The panellist clarified that there is no such guide as the tribunal set up and its procedure referred to in Article 5 GC III are a matter of national law. Concerning the question of proof, it was added that in cases of an IAC it can be difficult to establish one's right to POW status. However, combatants would usually be wearing a uniform or a distinctive sign - as required by IHL. Other elements that can serve as proof include carrying an identity card. Evidence may also be gathered by questioning other combatants for confirmation of a person's status. In some States, the tribunal created in accordance with Article 5 GC III is an administrative board; in others, legislation foresees that it will be a civilian court.

Presumption of POW status

A participant in the room added a remark arguing that there is a presumption of prisoner of war status. The panellist confirmed that the term "presumption" can be found in Article 45 AP I pursuant to which a person who takes part in hostilities and falls into enemy hands "shall be presumed to be a prisoner of war, …, if he claims the status of a POW, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power". However, the phrasing in Article 5 GC III and Article 45 AP I diverge, and it cannot be assumed that a presumption of POW status would be granted by States not yet party to AP I.

Levée en masse

Another question with multiple sub-questions from the online audience related to the levée en masse. First, it was explained that a levée en masse in the framework of the armed conflict in Ukraine would not necessarily mean that the entire population would be deprived of protection within the context of this levée en masse. The reasoning can be found in Article 4 GC III which requires them to openly carry arms to be considered a participant in a levée en masse. Most of the civilian population does not openly carry weapons *ergo* they are not considered part of the levée en masse and retain their protection as civilians. Subsequently, in replying to the question how long a levée en masse can last, the limited timeframe was emphasized. The resistance needs to occur before the invasion takes place and it can only continue until the State has had the opportunity to organize it as an armed mobilizable unit. A third sub-question relates to the interpretation of "spontaneity", notably when does it need to come to an end? In

the same vein, the panellist shared that the window of opportunity is very tight as it begins before the invasion and ends once the State has had the time to organize.

Nationality and treason

The panellist distinguished two aspects arising from a question related to nationality and treason. The first one is whether a State that captures its own nationals who fought for the opposing side will grant them prisoner of war status. States have different approaches and national jurisprudence is not uniform. The Third Geneva Convention does not prescribe enemy nationality as being a prerequisite for granting prisoner of war status. There are experts who argue that combatants who fall into the power of their State of nationality should be considered prisoners of war and enjoy combatant immunity for lawful acts of war. According to this view nationals could, however, be charged and prosecuted by their State of nationality for treason. The issue of granting POW status to nationals lack international consensus. It will be decided by States individually.

Vision on "total defence approach"

An online participant asked the panellists to address their views on the consequences of States adopting a "total defence" approach, *i.e.,* mobilizing their population in case of an invasion. A panellist argued that it would undermine and potentially jeopardize the principle of distinction because the line between civilians and combatants could blur. Secondly it was argued that disseminating IHL among the civilian population is challenging and thus complicates the implementation of the obligation to respect and ensure respect for the law.

Reservations made to the Geneva Conventions

A participant asked whether the position taken by some States in the Diplomatic Conference according to which GC III was not applicable to POWS upon conviction for war crimes has remained the same. The panellist mentioned certain States that still take that position and invited the audience to consult the ICRC's new Commentary to GC III for the full group. Another panellist added that the reservations on this issue were made not only by Russia, but also by a number of countries that used to be part of the Soviet Union, including Poland. After a long procedure, Poland withdrew the reservations in 2000.

Terrorism and armed conflict

One of the participants asked a clarification on the linkage between acts of terrorism and armed conflict. The panellist recalled that IHL is the body of law that has a dual objective, namely, protecting those who are not or no longer participating in the conflict and regulating the conduct of hostilities. She continued by saying that if an act can be classified as an act of terrorism, it is prohibited in all manifestations wherever or whenever it occurs, whereas IHL has a bifurcated

approach to violence: certain uses of force are allowed (against military objectives and combatants), while others are not (deliberate attacks against civilians and civilian objects). Thus, referring to terrorism in the context of an armed conflict severely complicates matters. The view of the panellist is that in the context of an armed conflict, the concept of terrorism is not useful or necessary, except for the IHL prohibition of intentionally spreading terror among the civilian population. Qualifying non-State armed groups as "terrorist" implies that everything they do is considered a criminal act, even if it would be lawful according to IHL – e.g., armed groups are not prohibited from attacking a State's armed forces as a matter of IHL (but not domestic law), as long as the rules on the conduct of hostilities are respected. Additionally, the label entails important ramifications. Labelling an armed group involved in a NIAC as terrorist has far-reaching humanitarian consequences, including in relations to sanctions, and may prevent or hamper peace talks.

SESSION 6

PANEL 5: ON THE BATTLEFIELD: THE MULTIPLICITY OF ACTORS AND CHALLENGES FOR THE APPLICATION OF IHL – PART II

PANEL 5: SUR LE CHAMP DE BATAILLE : LA MULTIPLICITÉ DES ACTEURS ET LES DÉFIS QU'ELLE POSE POUR L'APPLICATION DU DIH – PARTIE II

CHAIRED BY MARCO SASSÒLI

UNIVERSITY OF GENEVA

IHL and Private Military and Security Companies
–
DIH et des Entreprises Militaires et de Sécurité Privées

Matt Pollard
ICRC

Résumé

La présentation a porté sur l'application du droit international humanitaire en relation avec les activités des entreprises militaires et de sécurité privées (EMSP). À travers le Document de Montreux sur les EMSP, le Dr. Matt Pollard a souligné les obligations pertinentes en vertu du droit international existant et les bonnes pratiques pour les Etats dans leur mise en œuvre. La présentation a également examiné les contours de la définition étroite du terme « mercenaire » dans le cadre du droit international humanitaire et les conséquences pour les personnes qui entrent dans cette catégorie. L'orateur a conclu en soulignant les défis actuels liés aux EMSP et les négociations en cours en vue d'un éventuel futur instrument des Nations unies.

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These remarks discuss how IHL is relevant to the operations of Private Military and Security Companies (PMSCs). They also touch on some of the best practices, and contemporary challenges, in implementing relevant obligations under International Humanitarian Law (IHL) and reducing negative humanitarian impacts of PMSC activities. Finally, potential future normative developments will be discussed.

1. Key references on IHL and PMSCs

The key reference on IHL and PMSCs is the *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (Montreux Document) adopted in 2008 as the result of a joint initiative of Switzerland and the ICRC.[167] The Montreux Document is the primary lens through which the ICRC approaches PMSCs from a legal perspective and will be the main frame for this presentation. However, the limited time for discussion means the presentation cannot provide a comprehensive description of everything that is in the Montreux Document.

The Montreux Document has two parts. Part One summarizes existing international law obligations relevant to PMSCs in situations of armed conflict. The Document does not itself create new legal obligations. Instead, it reaffirms and clarifies the interpretation of the obligations that States already have under international law. For this reason, from the ICRC's perspective, the Montreux Document is a useful reference or resource regardless of whether

[167] Available in Arabic, Chinese, English, Finnish, French, Spanish and Russian at https://www.montreuxdocument.org/about/montreux-document.html.

a particular State has endorsed it. Part Two of the Montreux Document compiles good practices for States in developing national regulatory systems for PMSCs as part of implementing the State's obligations set out in Part One.

The Montreux Document mainly addresses States. It is complemented by an "International Code of Conduct for Private Security Service Providers" adopted in 2010,[168] which is more specifically aimed at the companies themselves.[169]

Both instruments are accompanied by institutions dedicated to promoting their effective implementation. The Montreux Document Forum is made up of the 58 States and three international organizations (NATO, the EU and the OSCE) that have endorsed the Montreux Document.[170] The Geneva Centre for Security Sector Governance (DCAF) serves as its secretariat. The Forum serves as a platform for sharing practical experience, producing technical guidance, and providing advisory services to States on implementation of the Montreux Document. Implementation of the International Code of Conduct is overseen by an association that brings together governments, private security companies and civil society organizations (ICoCA).[171] It undertakes capacity-building, certification for companies, provides advisory services, and monitors and handles complaints about member associations.

2. Defining PMSCs

The term "Private Military and Security Company" is not an international legal concept. The definition in the Montreux Document merely aims at describing a factual phenomenon for the purpose of providing guidance on how existing international law applies in relation to it. Accordingly, in analyzing particular companies or situations, the Montreux Document definition should not be treated as if it were a legal definition in a treaty. Strict interpretation of the definition is generally unnecessary and unhelpful since an entity slightly outside of the Montreux Document definition may well engage the range of obligations described in Part One in any event.

With this caveat in mind, the Montreux Document includes the following definition:

> "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys,

[168] https://icoca.ch/the-code/.
[169] A third reference, adopted in 2000, is the Voluntary Principles on Security and Human Rights (https://www.voluntaryprinciples.org/), which includes references to IHL. The Voluntary Principles aim to guide companies, originally targeting mainly extractive industries but over time other sectors as well, in assessing risks in their engagement with public and private security providers. Additional resources on the Voluntary Principles are available at https://www.securityhumanrightshub.org/.
[170] https://www.montreuxdocument.org/.
[171] https://icoca.ch/

buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.[172]

The term “private business entities” is intended to be as broad as possible, essentially covering any group of people acting together for business purposes. It is not restricted to entities that gain separate legal personality through incorporation under national laws.

The list of “military and/or security services” included in the definition is illustrative and not exhaustive. The inclusion of the phrase “irrespective of how they describe themselves” reflects that, in practice, even entities that provide services of a more military character often describe themselves ambiguously as “security” providers or may use even more general terms to deliberately obscure the nature of their activities. A general contractor may offer a much wider range of services that are more prominent, with the security or military aspects appearing less prominent. The guidance is relevant to private entities that provide any one of these services, or similar services not listed, even if the provision of such services is not the exclusive or even primary field of operations of the entity. The decision not to pursue separate definitions of military services and security services reflects that these are overlapping concepts difficult to distinguish in practice[173] and is intended to prevent entities or States seeking to avoid their obligations and responsibilities by relying on such distinctions. In short, in determining how IHL applies in relation to the activities of a private entity, the activities it carries out are generally more important than its name or legal structure.

In reality, the vast majority of the personnel of PMSCs present in situations of armed conflict are engaged in activities more similar to peacetime civilian private security as opposed to activities similar to the combat roles of State’s regular armed forces. Individuals performing military and combat functions within a PMSC tend to attract the most media and such involvement raises intriguing legal and policy questions that prompt lawyers and humanitarians to spend more time analyzing them. This creates the impression that combat roles constitute a more significant proportion of overall PMSC activities than is actually the case.

3. General obligations of States

Part One of the Montreux Document is based on existing obligations, primarily under IHL and the law of State responsibility. It provides guidance on how these existing obligations apply to the factual phenomenon of PMSCs. As mentioned, it does not purport to create new legal obligations. Several paragraphs in the Montreux Document also rely on international human rights law, but these are not the focus of this presentation

[172] Montreux Document, p. 9.
[173] See Montreux Document, explanatory comments, p. 38.

Among the obligations that form the foundation of Part One of the Montreux Document, and are in fact pertinent for all States whether or not they have specifically endorsed the Montreux Document, are the following:

- the obligation to respect and ensure respect for IHL;[174]
- the obligation to investigate and prosecute war crimes;[175]
- the obligation to repress violations of IHL, including those that do not necessarily constitute war crimes;[176]
- the rule that in certain circumstances acts by private actors may become attributable to a State, which has an obligation to make reparation where such acts violate the State's international obligations;[177]
- the obligation to ensure instruction and disseminate awareness and knowledge of IHL.[178]

The Montreux Document itself does not provide a detailed mapping of its contents against existing international law; an article by Marie-Louise Tougas published in the International Review of the Red Cross in 2015 sets out the analysis in more detail.[179]

4. Obligations of States specifically in relation to PMSC activities

Part One of the Montreux Document sets out the obligations of several categories of States, based on the nature of the State's relationship with the PMSC: "Contracting States" (that retain the services of PMSCs), "Home States" (where PMSCs are based), "Territorial States" (where PMSCs operate), and "all other States".[180]

Although the Montreux Document lists the obligations for each category of State separately, there are significant commonalities across the categories. All contracting, home and territorial States must ensure, within their power, that PMSCs and their personnel respect IHL. This entails an obligation for each such State to disseminate IHL to PMSCs and their personnel, with Contracting States having the further, more specific, obligation to ensure that PMSC personnel actually receive appropriate training on IHL. It also entails obligations for all three categories to refrain from encouraging or assisting in any violations, and to take measures to

[174] See e.g. common article 1 of the 1949 Geneva Conventions; ICRC Study of Customary IHL, Rules 139 and 144.
[175] See e.g. the 1949 Fourth Geneva Convention articles 146-148; 1977 First Additional Protocol, Article 85; ICRC Study of Customary IHL, Rule 158.
[176] See e.g. the 1949 Fourth Geneva Convention article 146; 1977 First Additional Protocol, Article 86; ICRC Study of Customary IHL, Rule 139.
[177] See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10, 2001, para. 76 (text of the draft articles) and para. 77 (text of the draft articles with commentaries); ICRC Study of Customary IHL, 149.
[178] See e.g. the 1949 Fourth Geneva Convention, Article 144; ICRC Study of Customary IHL, Rules 142 and 143.
[179] M. TOUGAS, Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflict , *International Review of the Red Cross* 2014, vol. 96, pp. 305 - 358.
[180] For more detailed definition of these terms, see Montreux Document, pp. 9 to 10.

prevent and suppress any violations that do occur, including through such measures as military regulations, administrative orders, regulatory measures, and administrative, disciplinary and/or judicial sanctions.

The Montreux Document provides that, in relation to grave breaches of the Geneva Conventions and First Additional Protocol, all three categories of States have an obligation to ensure that legislation is in place to enable criminal accountability, and to ensure that effective investigations are actually carried out into suspected violations[181] and that, where warranted, perpetrators are prosecuted or extradited. It further specifies that similar obligations apply, where provided for by international law, to other crimes under international law. This would include war crimes that do not constitute grave breaches of the Geneva Conventions and Protocol.[182]

The obligations of States other than contracting, home, and territorial States are slightly less detailed, but similarly include the obligation to ensure, within their power, respect for IHL, including not to encourage or assist violations. Other States are also required to ensure effective penal legislation, and actually investigate, and prosecute or extradite, in case of grave breaches and, as provided for by international law, other crimes. The main difference between the obligations of 'other' States and those of contracting, home and territorial States, is the absence of any mention of a more general need for 'other' States to adopt military regulations, administrative orders, regulatory measures and administrative, disciplinary and/or judicial sanctions, that address PMSCs and their personnel.

The Montreux Document provides guidance on the circumstances when a State has "home State" obligations. It defines the Home State as the State of nationality of a PMSC, typically where the PMSC is registered or incorporated. However, it specifies if the State where it is incorporated is not the one where it has its principal place of management, then the State where it does have that "principal place of management" is the Home State. Again, since the Montreux Document is not a legal treaty, it is ultimately this practical criterion, the State where the 'principal place of management' is in fact located, that can best guide States to recognizing their obligations as 'home States' under existing international law.

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[181] See also ICRC and Geneva Academy, *Guidelines on investigating violations of international humanitarian law: law, policy and good practice*, 2019, available at: https://www.icrc.org/en/download/file/123868/guidelines_on_investigating_violations_of_ihl_final.pdf.

[182] See, e.g., Montreux Document pp. 11 and 12. The ICRC Study of Customary IHL, Rule 158, concluded that States "must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects" and "must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects". The list of acts considered war crimes under customary international law extends far beyond those specifically constituting grave breaches of the Geneva Conventions and Protocol (see ICRC Study of Customary IHL, commentary on Rule 156, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule156). Consequently, while the Montreux Document addresses grave breaches of the Geneva Conventions and Protocol separately from other crimes under international law, the relevant obligations in fact apply to all war crimes.

Contracting States retain their IHL obligations even if they contract activities to PMSCs. Giving responsibility to a PMSC to do something the State is required to do or ensure is done under IHL, cannot be a means for the State to avoid its responsibilities. Additionally, States have an obligation not to contract PMSCs to carry out activities that IHL explicitly assigns to State agents or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.

The Montreux Document reminds States that acts of PMSC personnel can in certain circumstances become attributed to a contracting State under the more general rules of State responsibility under customary international law. It affirms that the simple existence of a contractual relationship does not, in itself, engage the contracting State's responsibility for all acts of the PMSC and its personnel. However, acts can for instance be attributed when PMSCs or their personnel: are incorporated by the State into its regular armed forces; are members of organized armed forces, groups or units under a command responsible to the State; are empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or are in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct). Determining whether acts are attributable to the State involves, then, both a review of the contract and other factual and legal factors. Furthermore, the Document recognizes that, when the acts of PMSCs or personnel are attributed to the State and violate the State's IHL obligations, the State comes under an obligation to provide reparations to affected States. Although not specifically recognized in the Montreux Document, given that the rules of State responsibility are of more general application, certain acts of a PMSC could in principle be attributable to a home State, a territorial State, or other States, although this is perhaps less likely to arise in practice than in relation to contracting States.

It is important to recognize that, when the Contracting State is also the State on whose territory the PMSC will carry out activities and/or the Home State, then that State is subject to all sets of relevant obligations.

5. PMSCs and their personnel

While the Montreux Document primarily addresses the obligations of States, several paragraphs directly address PMSCs and their personnel.

As the explanatory comments to the Montreux Document detail, IHL does not directly bind corporate entities, but IHL does apply directly to the individuals who direct or act on behalf of

the company (in relation to a situation of armed conflict).[183] The separate legal existence of a corporation arises only by operation of national laws of given States and has not traditionally been recognized by general international law, or by IHL in particular. On the other hand, it has long been established that individuals can be directly bound by rules of IHL, as is evidenced by the fact that individuals have been prosecuted before international tribunals for violations of rules of IHL that constitute war crimes.

As regards the legal obligations of the corporate entity, then, the Montreux Document refers only to applicable national laws. However, it notes that such national laws may themselves impose IHL on the corporate entity (and arguably, whereas it is generally the case a State recognizes corporate legal personality under its national laws, ensuring that IHL is applicable to such persons can be seen as an essential element of the State's broader obligation to 'ensure respect' for IHL by private persons under its authority[184]). The Montreux Document also emphasises that the individual personnel of PMSCs 'are obliged, regardless of their status, to comply with applicable international humanitarian law', and are subject to prosecution if they commit crimes under national or international law.[185] Furthermore, it specifies that superiors of PMSC personnel, whether military or civilian government officials, or the directors or managers of the PMSC itself, can be liable for crimes under international law committed by PMSC personnel 'under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law.'[186]

Two further pertinent considerations, not explicitly mentioned by the Montreux Document, are worth mentioning. First, even if a given State's domestic laws do not specifically make IHL applicable to corporate entities, national laws in practice often provide for 'vicarious' civil liability (and sometimes criminal responsibility) of corporate entities for wrongful acts of an individual that directs or acts on behalf of the entity. Consequently, companies should be motivated to adopt measures to ensure respect for IHL by their personnel not only from a moral, humanitarian or corporate social responsibility perspective, but also out of recognition of the potential for actual civil or criminal liability under national laws. Second, although the Montreux Document does not directly address this possibility, if applying the same criteria ordinarily applies to non-State armed groups more generally, in given circumstances a PMSC itself were to become a party to a conflict, then IHL would directly apply to the company (just as it would for any other non-State armed group that meets the relevant criteria).

[183] See Montreux Document, Explanatory Comments, pp. 36-37.
[184] See for instance, the ICRC Commentary on the 1949 Third Geneva Convention, common Article 1, 2020, https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020.
[185] Montreux Document, paras 26(a) and (e).
[186] Montreux Document, para. 27.

According to the Montreux Document, whether individual personnel is to be considered a civilian is to be determined by IHL 'on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.'[187] The mere fact of being employed by a PMSC is not sufficient, in itself, to cause someone to lose their status as a civilian. The Montreux Document affirms that, if they are civilians under IHL, the personnel of PMSCs may not be the object of attack unless and for such time as they directly participate in hostilities.[188]

6. Good Practices in implementing relevant international legal obligations

Part Two of the Montreux Document compiles good practices that States can follow to implement the obligations set out in Part One. It details the key elements of effective national contracting procedures and regulatory regimes for PMSCs. To highlight a few key recommendations as examples:

For Contracting States, when selecting a company, it is important to establish a formal selection procedure and to set criteria for contracts, including vetting companies and their personnel for relevant past misconduct. Contracting States should also clearly establish ahead of time which services may or may not be contracted out to PMSCs, giving particular attention to the risk that a particular service could cause PMSC personnel to become involved in direct participation in hostilities. This factor receives prominence both because direct participation in hostilities exposes the personnel to being made the object of attack, and because the conduct of hostilities carries a heightened risk of negative humanitarian consequences for the civilian population.[189]

The Territorial State and the Home State of a PMSC should have effective regulatory systems in place to oversee the activities of PMSCs. Key elements include the requirement for PMSCs to obtain authorizations (permits or licenses, e.g.), and specification of the conditions for obtaining and maintaining such authorizations. The law should establish and provide the necessary powers to a regulatory authority responsible for assessing the qualifications and compliance of PMSCs, through adequate monitoring and enforcement procedures.

When, as mentioned earlier, the Contracting State is also the Territorial or Home State, then it should have regard to all the relevant good practices set out in Part Two.

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[187] Montreux Document, para. 24.

[188] See also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* 2009.

[189] PMSC responsibility for detention operations also carries a heightened risk of negative humanitarian consequences, as is reflected in the fact that the Geneva Conventions require that responsibility for Prisoner of War and Civilian internee camps must only be given to public officials (which means, as is recognized in para. 2 of the Montreux Document, these functions cannot be contracted to PMSCs).

7. Mercenaries

In news reporting and other discussions for general audiences, PMSCs and their personnel are often collectively referred to as 'mercenaries'. As legal concept in IHL, however, the definition of 'mercenary' is much narrower.

Under IHL, a 'mercenary' is an individual who meets all of the following criteria: is specifically recruited to fight in an international armed conflict, actively participates in hostilities, is motivated by private gain and receives above-normal compensation, is not a national of the Party to the conflict (or territory controlled by the Party), is not a member of the Party's armed forces, and is not a member of a non-Party's armed forces on official duties. [190]

The only direct consequence under IHL of falling within this definition is that the individual is not entitled to combatant or prisoner of war status. This can however have significant implications for the individuals because it means that they become liable to be prosecuted under a State's national laws for the mere fact of having participated in hostilities and other acts that would be lawful for a combatant. However, like all persons regardless of status, every individual that qualifies as a 'mercenary' remains entitled under IHL to a fair trial, humane treatment and other fundamental guarantees.[191]

A number of elements thus demonstrate why, from an IHL perspective, PMSCs and 'mercenaries' are not terms that can be used inter-changeably. Under IHL, the definition of 'mercenary' relates only to individuals and not to groups or companies. In turn, as the explanatory comments to the Montreux Document indicate, the various elements of the IHL definition exclude most though not necessarily all individual PMSC personnel.[192] Furthermore, as combatant and prisoner of war status are only relevant in international armed conflicts, under IHL, the concept of 'mercenary' has no application in non-international armed conflicts.

Looking beyond IHL, however, it should be noted that the concept of 'mercenary' has been given a wider definition and broader application in treaties adopted in 1977 by the African Union and in 1989 by the United Nations.[193] These conventions establish additional legal obligations for the States that are party to them. The scope of application of the conventions are broader in that they cover both international and non-international armed conflicts, as well as acts of violence aimed at overthrowing a government or compromising the territorial integrity of a State.[194] They require States parties to prohibit and criminalize the recruitment, use, financing, or training of mercenaries, as well as their participation in hostilities or covered

[190] AP I art. 47; CIHL Rule 108.
[191] AP I art. 75; CIHL Rules 87 and 100.
[192] Montreux Document, Explanatory Comments, p. 40.
[193] 1977 OAU Convention for the Elimination of Mercenarism in Africa; 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.
[194] The AU Convention also relaxes somewhat the 'above-normal remuneration' requirement.

violence.[195] The conventions also require a range of measures designed to prevent mercenary activities, such as obliging States to prevent movements of relevant personnel and equipment.[196] The UN treaty explicitly specifies that it shall be applied "without prejudice to: (a) The rules relating to the international responsibility of States; (b) The law of armed conflict and IHL, including the provisions relating to the status of combatant or of prisoner of war".[197] A significant proportion of the African Union Member States, 32 of 55, are party to the AU Convention, while only 37 of the 193 UN Member States are party to the UN Convention.

8. Current Challenges

Prior to the development of the Montreux Document, it was often claimed that the key concern with PMSCs was that they operated in a 'legal vacuum'. The Montreux Document demonstrates that, at least in situations of armed conflict, PMSCs do not operate in a 'legal vacuum' in terms of international law.[198] Nevertheless, a range of practical concerns continue to pose ongoing challenges in addressing negative humanitarian consequences of certain PMSC operations.

First, there is frequently a lack of transparency surrounding PMSC operations, sometimes even as to their presence or existence, both from the companies themselves and from contracting, home and territorial States. This can impede external assessment of their activities, and engagement with a view to preventing or responding to possible violations of IHL or other negative humanitarian impacts.

Second, many States have not adequately implemented their international obligations into national laws, practices, and institutions. As a result, while no 'legal vacuum' exists at the international law, gaps in national laws and regulatory and enforcement systems too often lead de facto 'regulatory and accountability' vacuums at the national and transnational levels.

Third, insufficient IHL training of PMSC personnel, insufficient monitoring of compliance, and insufficient measures of enforcement and accountability, create further space for violations of IHL to occur and recur.

Fourth, the commitment of PMSCs to respect IHL and humanitarian values varies. Members of ICoCA make formal commitments and are subject to ongoing consistent support and evaluation. For the vast majority of companies that operate outside of that framework, however, the degree of commitment is more variable and frequently difficult to ascertain.

[195] The effect of the IHL rule on mercenaries is that a State may, but is not required to, remove prisoner of war and combatant status and thus prosecute the individual for participating in hostilities, whereas the effect of the mercenaries conventions is to transform this possibility into an obligation.
[196] See Article 6 of the AU Convention and the more general reference to 'preventing preparations' in Article 6 of the UN Convention.
[197] Article 16.
[198] See Montreux Document, Explanatory Comments, p. 38.

Fifth, it is often asserted that there is an increasing trend towards greater PMSCs involvement in direct participation in hostilities and responsibility for detention operations. Limited data exists to confirm whether or not globally there is indeed such a sustained and widespread change compared to previous periods. However, any such trend would be of concern because operations involving use of force and detention can obviously carry higher risks of negative humanitarian consequences, relative to other kinds of activities. PMSCs involvement in this area raises general concerns given that the distinct corporate form and financial motivation of PMSCs can create challenges for the effective operation of regular chain of command and other mechanisms of control and countability applicable to States' regular armed forces, that would normally be expected to be the primary means for preventing and responding to violations of IHL.

9. Towards a future international instrument?

Finally, it should be mentioned that the UN Human Rights Council has mandated an Intergovernmental working group on PMSCs (IGWG) which is tasked to develop an international regulatory framework, without prejudice to its eventual character (treaty versus non-legally binding instrument).[199] South Africa has led the initiative for this process since 2010. An initial draft of an instrument was first presented and discussed in 2022. To date there has not been a consensus among States as to the need for a further international instrument, and there is even deeper division on whether or not any such instrument should take the form of a legally binding treaty. For its part, the ICRC has stated that it views the work of the IGWG to be complementary to the Montreux Document. It has particularly welcomed draft proposals by which States would adopt new commitments or obligations not to employ PMSCs in direct participation in hostilities, to establish and operate effective systems of regulatory oversight in national law, and to provide individual victims of violations of IHL with access to remedy and reparations.

[199] See https://www.ohchr.org/en/hr-bodies/hrc/pms-cs/igwg-index1.

Media, disinformation, and propaganda : what's new?
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Médias, désinformation et propaganda : quelles sont les nouveautés?

Christie Edwards
American Society of International Law / Geneva Call

Resumé

Dans sa présentation, Le Dr. Christie Edwards, nous offre ses réflexions sur le rôle des médias dans les conflits armés. Elle rappelle que l'impact des médias sur les conflits armés et la société dans son ensemble n'est pas nouveau et elle met également l'accent sur l'orientation sélective des médias en réponse aux conflits, en fonction du niveau d'accès au contenu. Les sources médiatiques internationales ont une portée mondiale et dès lors « l'agenda setting power » alors que les médias locaux peuvent jouer un rôle dans la prévention des conflits et contribuer à la paix. L'oratrice explique que lorsque les médias peuvent occuper un espace à la base de la société civile, il existe un réel potentiel de guérison après les conflits et de renforcement de la communauté afin de prévenir une future résurgence de la violence.

L'avènement des médias sociaux a selon elle entraîné à la fois des conséquences positives et négatives. D'une part, il a offert une plateforme aux individus pour se mobiliser politiquement en faveur de la démocratie et des droits humains, permettant ainsi aux "journalistes citoyens" et aux "influenceurs" de s'exprimer sur des plateformes telles que Twitter, TikTok, Facebook, Instagram, et autres. Les médias sociaux sont également de plus en plus utilisés pour renforcer les principes humanitaires. Geneva Call et le CICR y rappellent ainsi régulièrement leur mission, leur mandat et leurs modalités de travail au public. Cependant, ces plateformes ont également été utilisées pour réprimer la dissidence interne, interférer dans les élections démocratiques, inciter à la violence, recruter des terroristes, diffamer les organisations humanitaires et contribuer à des crimes contre l'humanité. La dépendance croissante aux médias sociaux pour la consommation de l'information a déplacé le pouvoir de contrôle des éditeurs et des journalistes, qui respectent des codes d'éthique professionnelle et des lignes éditoriales, vers les entreprises technologiques dont l'allégeance principale est envers leurs actionnaires. Les fournisseurs de médias sociaux ont évité ainsi généralement de jouer le rôle d'"arbitres de la vérité".

L'intervenante conclut en recommandant des messages fondés sur des valeurs et en soulignant les cadres de communication les plus efficaces.

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First, let me emphasize that the remarks and views are my own and do not necessarily reflect the position of the American Society of International Law or Geneva Call. To set the scene, allow me to start with a quote from the strongly isolationist US Senator Hiram Warren Johnson who in 1918 said: "*The first casualty when war comes is truth".* This brings us back to the role of the media in armed conflicts which is the topic of this presentation.

1. The role of media in armed conflicts historically

Historically, the media has played a significant role in armed conflict. In Germany, Hitler created the Reich Ministry of Public Enlightenment and Propaganda in 1933, headed by Joseph Goebbels. Nearly all aspects of German culture were subject to the Propaganda Ministry's control, including films, theatre, music, the press, and radio broadcasts. Goebbels quickly set out an ambitious agenda to indoctrinate the German people in Nazi ideology and to influence the behavior of the entire society. The principles of Nazism, including the anti-Semitism which was at the core of much of its dogma, were incorporated into nearly every newspaper, radio broadcast, and film produced in the Third Reich. These carefully crafted messages where Jews were portrayed as an intrinsic threat – as vermin to be exterminated, were designed to mobilize the German population to support all Nazi military and social efforts, including the deportation of Jews and others to concentration camps.

In 1993 in Rwanda, media outlets such as the newspaper Kangura, Radio Rwanda, and Radio Mille Collines (RTLM) became tools of mass propaganda. These media sources portrayed extreme ethnic distinctions, defining Tutsis as "the enemy" and Kangura published the infamous Hutu "Ten Commandments," which revived historically divisive ethnic myths. Kangura and RTLM regularly referred to Tutsis as Inyenzi (cockroaches), creating a dehumanising discourse. What made propaganda particularly effective was the simultaneous dehumanization of Tutsis and the legitimization of their extermination. The emphasis on inherent differences was crucial in presenting the risk posed by Tutsis. The RTLM also broadcasted the names of targeted individuals and reported the locations of victims hiding from the militias, as did Radio Rwanda. This propaganda created a sense of urgency, compelling Hutus to act quickly in response to the perceived danger.

In the interest of time, I will not delve into other examples of "othering" discourse in the media from other contexts such as the Balkans and Cambodia, but you can see from these examples that the perception of "us" versus "them" was transmitted over long periods of times by senior political and military figures and became institutionalized in the way various groups interacted, as well as in formal legal structures and norms.

Generally, group formation *per se* is not the source of conflict, but conflict is likely to arise if distinct groups are extremely exclusive and group members perceive their security to be under threat, and this can be exacerbated by heightened rhetoric in public media outlets. As an

alternative example, the media can also have a quelling effect on public support for armed conflict. The American media had a strong role – among other factors – in turning the tide of public opinion against the war in Vietnam, illustrated by the public reaction to the “Napalm Girl” photo that graced the cover of many newspapers around the world.

Traditional media sources may have other effects on armed conflict. The selective focus of the media response to conflict is shaped or distorted by several factors. For example, situations which cannot be captured on film, or to which photographer cannot get access, tend to be under-reported. Visually dramatic, acute events (such as battles or bombings) receive more coverage, while longer-term, wide-spread situations which contribute to armed conflict (such as famine or poverty) get less. Additionally, while international media sources such as the BBC, CNN, and Al Jazeera have a global reach, and as such have an "agenda-setting effect," this effect revolves around the ideological components of political disagreements, and more specifically the way key actors in conflict seek to manipulate public perceptions of the disagreement and even high-level policy reactions. By contrast, local media can play a different role in conflict prevention. It is often local media that can contribute to peace merely by restoring levels of trust and self-worth in a population on the brink of or emerging from violence.

For example, radio stations in refugee camps in Chad put the focus on the voices of local community and to relay the tales of those who were recovering after the outbreak of violence. The airwaves became a forum for witness and testimony. Community members told stories of where they were when attacks happened, described previous and current relationships with their neighbours, and gave other personal yet socially relevant information. Another radio program brought together various communities on a regular basis to talk through potentially divisive issues in a structured environment. This gave the opportunity for community members in conflict to release some of their tensions through radio rather than through armed conflict and to counter misinformation and disinformation that they may have previously heard from other sources.

Therefore, where the media can occupy space in the grassroots of civil society there is potential for healing and community building. Such activity not only rebuilds societies after conflict, but also prevents against future resurgence of violence.

2. The rise and role of social media in social revolutions and armed conflict

Social media technology has created opportunities for people to mobilize politically in defence of democracy and human rights through the rise of “citizen journalists” and “influencers” on platforms such as Twitter, TikTok, Facebook, Instagram, and others. In 2009 in Moldova, for example, young people relied on Twitter to oppose the country’s communist leadership. During the Arab Spring in 2011, protestors in Egypt and Tunisia took to social media platforms to

organize, spread their message internationally, and ultimately overthrow dictatorial regimes. Particularly in repressive regimes, social media has been a communication channel for people to stand up for human rights or share evidence of human rights abuses despite government monopolization of traditional sources of information.

At the same time, social media platforms have been used to suppress internal dissent, meddle in democratic elections, incite armed violence, recruit members of terrorist organizations, or contribute to crimes against humanity, as in the case of persecution of the Rohingya in Myanmar. In 2020, there was evidence of social media manipulation in 81 countries and of firms offering 'computational propaganda' campaigns to political actors in 48 countries. Additionally, even well-meaning global social media campaigns can interfere in conflict dynamics. For example, the #BringBackOurGirls social media campaign to free the high-school girls kidnapped by Boko Haram in 2014 hindered rescue attempts and may have encouraged the group's growing reliance on gender violence and kidnapping for international attention and ransom.

According to the Pew Research Center, in 2020, 71% of Americans get at least part of their news input from social media platforms. The rise of consumption of news via social media platforms has shifted the gatekeeping power from editors and journalists — who are bound by professional codes of ethics, principles of limiting harm, and editorial lines —to tech companies who owe their primary allegiance to their shareholders. Professional news outlets across the globe now compete with content producers who produce "junk news" that is sensational, conspiratorial, extremist, and inflammatory commentary which is packaged as news. Social media providers have typically shied away from becoming "arbiters of truth." Social media companies have also created sophisticated tools which filter information and place people in "virtual echo chambers" to maximize profit by growing user engagement and participation. These confirm or even radicalize the users' world views by highlighting or reinforcing only limited perspectives or sources of information. Currently, the algorithms underlying social media platforms' business model amplify the angry and divisive voices which drive engagement, pushing users towards ever more extreme content and leading to the rise and spread of misinformation and disinformation, particularly around topics as divisive as armed conflicts.

There are also risks that adverse social media reactions pose to peacebuilders or humanitarian efforts, such as systematic online campaigns to defame humanitarian organizations. For example, between 2013 and 2017, hundreds of humanitarian White Helmet volunteers were killed in Syria after manufactured social media claims that they were terrorists with links to al-Qaeda and the Islamic State. Other organizations like Geneva Call, which engages non-State armed groups and *de facto* authorities to strengthen the respect of humanitarian norms and principles, has faced questions as to whether they provide "legitimacy" to these groups.

In recent months, misinformation, and disinformation campaigns on social media channels about the mandate and work of humanitarian organizations such as the ICRC in Ukraine and Russia have led the ICRC and others to publicly address these issues, as it could have a major impact on people affected by the conflict in Ukraine. This misinformation also puts humanitarian staff and volunteers on the ground at risk and could jeopardize their access to people in need of urgent aid.

3. Reinforcing humanitarian principles in the media to counter misinformation and disinformation

This audience will be familiar with the humanitarian principles of neutrality, independence, and impartiality for humanitarian actors. While the day-to-day operations of many humanitarian actors and organizations have not traditionally been featured in traditional or even social media outlets, the last few years and certainly the last few months have seen a fairly significant shift, and the role of humanitarian organizations is now much more visible. This visibility is excellent for accountability purposes, and prioritizing humanitarian responses to the greatest needs. It is also important, however, for humanitarian organizations to use these channels themselves to educate the public on humanitarian norms and principles and to counter misinformation and disinformation.

For example, in the last few months, at the beginning of the hostilities between Russia and Ukraine, Geneva Call's office in Ukraine used social media campaigns to boost some basic IHL messages and recently launched a campaign on prisoners of war-status in Ukraine. In South Sudan, Geneva Call recently launched a campaign with videos in 6 local languages on the prevention of sexual violence, protection of civilians and civilian objects, and prevention of child recruitment. Our teams in Afghanistan and Mali have both recently broadcasted IHL messages on local radio stations as part of our outreach to armed groups and *de facto* authorities, as well as local communities.

In addressing the concerns around Geneva Call's engagement with non-State armed groups and *de facto* authorities, we have long maintained that our aim is to strengthen protections for civilians under the control of these groups. Additionally, Geneva Call's engagement contributes to build their overall capacity to interact with international actors and to better articulate their political positioning so they can be more effective in peace process negotiations by finding common ground and maintaining a minimum level of trust between all parties.

Additionally, the ICRC has used social media channels to remind public audiences of its mandate to build and maintain a dialogue with all parties to a conflict, which is essential to get access to all people affected, by obtaining necessary security guarantees for their teams to deliver life-saving aid. They have also addressed the misinformation and disinformation campaigns by reminding audiences of the importance of confidential dialogue, the requirement

for the ICRC's equal access to prisoners of war, and their support to civilian populations in areas of armed conflict, amongst several other issues.

4. Using "values-based messaging" to counter misinformation and disinformation

With my remaining time, I will offer a few recommendations to address misinformation and disinformation campaigns, as well as to shift the narrative to humanitarian values and protection of civilians. Values-based messaging can create a positive frame of the important humanitarian issues, and a focus on key stakeholders and the "moveable middle" within the public and parties to a conflict who would most benefit from a deeper understanding of humanitarian norms and principles.

The most effective messaging framework for key stakeholders includes identifiable common values; simplifying models such as analogies or chains of causation; a balanced tone of identifying a problem/fear and offering a solution/hope (frame as "we" and "us" not "them"); storytelling, solutions, or a call to action.

As humanitarian organizations increasingly engage with both traditional and social media platforms in armed conflicts, it is imperative that values-based messaging, consistent reinforcement of the humanitarian principles, and commitment to humanitarian norms form the cornerstone of how we communicate with parties to the conflicts, civilian populations, community stakeholders, and policy and decision-makers at all levels in order to better protect civilians in armed conflict who are most at risk when disinformation and propaganda proliferate.

The participation of Digital Service Providers in Armed Conflict
–
La participation des fournisseurs de services numériques dans un conflit armé

Tsvetelina van Benthem
University of Oxford

Resumé

Dans son intervention, le Dr. Tsvetelina van Benthem se concentre sur l'implication du secteur privé, plus précisément du secteur des technologies de l'information et de la communication (TIC), dans les conflits armés contemporains. Elle rappelle que les conflits impliquant des sociétés militaires privées et les discussions académiques sur ce sujet ne sont pas nouveaux et souligne l'importance de l'identification des règles actuelles par rapport aux nouveaux développements sur le champ de bataille.

Elle expose l'impact de l'implication grandissante des fournisseurs de services numériques (notamment SpaceX ou Microsoft) dans les conflits armés contemporains, notamment le conflit armé en Ukraine, et souligne la nécessité de prendre en compte les conséquences juridiques de cette implication. L'oratrice se penche en particulier sur certaines conséquences juridiques de la participation du secteur privé dans les conflits. Elle aborde tout d'abord le statut des employés des entreprises technologies à l'une de la distinction entre civils et combattants et son importance pour la protection des civils dans les conflits. Elle explore également le concept de "participation directe aux hostilités" et souligne la nécessité d'une analyse au cas par cas pour déterminer leur statut. Se penchant ensuite sur l'étendue géographique du conflit, elle soutient que des actes contribuant aux hostilités peuvent provenir d'Etats situés en dehors du territoire belligérant, la proximité géographique n'étant pas un critère décisif pour la détermination du statut d'une personne.

Abordant ensuite les obligations positives de l'Etat, l'intervenante insiste sur la nécessité d'informer des circonstances entraînant la perte de qualité de personnes civiles et sa conséquence en termes de protection et souligne l'importance de diffuser le droit international humanitaire (DIH) tant auprès des militaires que de la population civile.

Dans ses remarques finales, elle souligne la nécessité de garantir une approche neutre des normes juridiques afin de faire face aux scénarios en évolution sur le champ de bataille.

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It is my pleasure and honour to be here today. At the outset, it is important to emphasise that private-sector contributions to armed conflict are not a new phenomenon. Academic discussions on these matters, including in relation to private military companies, have been

ongoing for many years, and have yielded significant results. Even if we are not faced with a new phenomenon, there is a need to consider recent developments on the battlefield and to reflect on the substantive boundaries and limitations of existing rules.

I will elaborate on emerging trends on the battlefield, draw conclusions regarding the applicability of existing rules, and call for the identification and development of rules in a neutral and principled way.

Roadmap

In my remarks, I will focus on the involvement of the private sector in armed conflicts and address the participation of Digital Service Providers in such contexts. The private sector plays an important role in ensuring the security of internet infrastructure and information availability. Drawing from the conflict in Ukraine, I will illustrate the specific contributions of non-State actors, which have the capacity to alter the course of conflicts. Then, I will concentrate on the legal consequences that attach to such contributions by examining the status of employees within such companies under the concept of direct participation in hostilities. Finally, I will cover the geographical scope of conflicts and the positive obligations of States in this respect.

1. The role of Digital Service Providers in contemporary conflicts

First, let us have a look at what we observe in contemporary armed conflicts, and more specifically at the role of Digital Service Providers in the war in Ukraine.

At the outset of the Russian full-scale invasion of Ukraine, the Ukrainian Minister of Digital Transformation – Mykhailo Fedorov – issued a call to Elon Musk to provide Ukraine with Starlink stations. Elon Musk heeded the call and made Starlink stations available, thus ensuring internet connectivity at this critical stage of the conflict.

This is only one example among many. Private sector companies have indeed shown active support to Ukraine. Microsoft, for instance, established a secure communication line with key cyber officials in Ukraine, including 24/7 threat intelligence-sharing infrastructure.

While we often hear and read about these contributions, it is essential to carefully consider their legal implications under international law.

2. Legal consequences

A. Employees of private sector companies and direct participation in hostilities

A first relevant question concerns the qualification of these contributions in relation to the protection of company employees from direct attack. Private-sector contributions may pose challenges to the application of the principle of distinction, a cardinal principle of International Humanitarian Law (IHL), especially for contributions in cyberspace.

Obligations to distinguish between civilians and combatants lie at the heart of the legal regime on the protection of civilians. For the protection of objects, a distinction must be made between civilian objects and military objectives. Civilians are protected from attack unless and for such time as they take a direct part in hostilities. Not only do civilians taking a direct part in hostilities render themselves liable to attack, but they also do not benefit from immunity from domestic prosecution for their acts.

While it is possible for parties to conflict to incorporate a private sector company into their armed forces, this is not the dynamic we see in relation to the conflict in Ukraine. These private sector employees remain civilians. However, depending on the nature and the context of their specific conflict-related contributions, they may be characterised as civilians directly participating in hostilities.

A key first question is one of interpretation. What does it mean for someone to take a direct part in hostilities?

For starters, there is little doubt that International Humanitarian Law, including the regulation of direct participation in hostilities, applies to cyber contributions:

> *"Civilians operating in cyberspace can be considered as taking direct part in hostilities with the result of losing their protection from attack and the effects of the hostilities".*[200]

Turning to the elements of this concept, while Article 51(3) Additional Protocol I[201] lays down the outline of such participation, its discrete elements are left unspecified. Significant interpretative strides were made through the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities, which explains that:

> *"In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:*
>
> 1. *The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attacks (threshold of harm), and*
> 2. *There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and*

[200] Position Paper on the Application of International Law in Cyberspace, Germany, March 2021.
[201] Art. 51(3) AP I : '*Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities*.'

3. *The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."* [202]

For the sake of time, I am going to focus on the first and third criteria only, that is, threshold of harm and belligerent nexus.

The threshold of harm, according to the ICRC Guidance, means that:

> *The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attacks.* [203]

Any consideration of the threshold of harm criterion requires a case-by-case analysis. What we are looking at is a likelihood of harm: the materialisation of harm is not necessary. Further, if the likely harm is of a specific military nature, quantitative gravity is irrelevant. Lastly, military harm does not presuppose a use of force, or the infliction of death, injury, or destruction. For example, providing tactical intelligence on targets would suffice.

According to some academics, acts that increase the capacity of a party to conflict (without concrete and direct negative impact on the other party) are also included under this criterion. Such an interpretation would be very broad – indeed too broad.[204] This question is particularly relevant in relation to private-sector participation. Many companies seek to increase the capabilities of (one of) the parties to armed conflict by training their personnel and patching cyber vulnerabilities, among others.

Turning to belligerent nexus, this is a requirement for a specific act to be designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.[205] The ICRC Guidance clarifies that there is a distinction between belligerent nexus and concepts such as subjective or hostile intent. Intent relates to the State of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. Belligerent nexus is generally not influenced by factors such as personal distress or preferences, or mental capacity to form will.[206] According to the Guidance, only in exceptional situations will the mental state of civilians call into question the belligerent nexus of their conduct. This would be the case when civilians 'are totally unaware of the role they are playing in the conduct of hostilities' or 'completely deprived of their physical freedom of action'. In the context of private-sector contributions, the applicability of this criterion becomes strained given,

[202] ICRC Interpretative Guidance on the Notion of DPH.
[203] *Ibid*.
[204] T. van Benthem, 'Privatized Frontlines: Private-Sector Contributions in Armed Conflict', in Proceedings from CyCon 2023, 15th International Conference on Cyber Conflict: Meeting Reality (2023), pp. 61-62.
[205] ICRC Interpretative Guidance on the Notion of DPH.
[206] *Ibid.*, p. 58-59.

first, the wide teams of persons often working on aspects of projects without necessarily seeing their overall purpose or impact, and second, the contractual obligation to carry out tasks mandated by the employer. As mentioned earlier, the analysis is always context dependent.

B. Targeting direct participants in hostilities and the *jus ad bellum*

Acts that contribute to hostilities do not come exclusively from the territory of parties to conflict. Indeed, many private sector companies that have been assisting Ukraine in its war efforts are based in Western Europe and North America. Geographical distance is immaterial to the qualification of an act as direct participation under International Humanitarian Law: you can participate from anywhere and thus render yourself liable to attack.

That being said, the constraints on the use of force in such scenarios could come from other regimes of international law, such as the *jus ad bellum* and International Human Rights Law. Most relevantly, the *jus ad bellum* posits a general and comprehensive prohibition on the use of force between States, subject to only two exceptions – self-defence and Security Council authorisation. That persons located in a third State directly participate in hostilities does not open that third State's territory to a use of force, unless the use of force can be fitted within one of the recognised exceptions.

C. Positive obligations

A final substantive point relates to positive obligations under IHL and international human rights law entailed by acts of direct participation in hostilities (or risk thereof).

From one angle, such positive obligations may be conceptualized as a means of protecting those who were (or could be) directly involved in hostilities. From another, positive obligations may be necessary for the protection of the rights of those who are at risk of being affected by harm because of the direct participation in hostilities of other persons (for example, people located in the vicinity of someone who is directly participating in hostilities).

Regarding the protection of those directly involved in hostilities, it is essential to mention the obligation of disseminating IHL. This obligation extends beyond the military to the entire civilian population. Raising awareness about the qualification and consequences of such acts is crucial, even if the probability of being exposed to a direct attack while in a third State might be very low.

Regarding the protection of other persons from harm, more specifically from threats to life and limb, States have positive obligations arising from the right to life. According to General Comment 36 on the right to life published by the Human Rights Committee, 'the duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats.'

Now, it is important to determine what these foreseeable risks are and whether there is a link between the trigger for this obligation and the (il)legality of the threat. The better view is that the lawfulness or unlawfulness of an attack from the other side has no bearing on the existence of a relevant threat, and thus the obligation is triggered in any case of a reasonably foreseeable threat to life.

3. Conclusions

There are two points that I would like to emphasize at the end of my remarks.

First, there is a need to delve deeper into the interpretation and specification of the relevant legal standards. The example of the notion of direct participation in hostilities shows that, while there is a good general sense of its elements, its contours remain blurred, including in ways that are significant to the types of civilian contributions to armed conflict we see today. It is essential to determine how we can operationalize the principle of distinction, especially at a time where the vast capacity of private sector companies and the opportunities afforded by cyberspace reshape battlefields. States must continue to articulate their views on the content of these rules, including in their positions on the application of international law to cyberspace.

Second, we need rules that are identified in a principled way. The international community should not yield to the temptation of acting impulsively in response to crises by attempting to extend or shrink the application of rules in light of short-term military operational interests. The content of rules cannot oscillate depending on whether it is our perceived enemies or allies that are on the receiving end of violence. A conflict-neutral and principled approach to the specification and elaboration of legal standards is the only viable way forward.

PMSCs as members of armed forces?

In the online audience someone raised the question of whether PMSCs can become members of the armed forces when they facilitate military cyber operations, and if this is to be the case does it release them from the rules enshrined in the Montreux Document.

In the reply, one of the panellists first emphasized that the Montreux Document does not create any new obligations, it explains how IHL applies and there is little difference whether it governs PMSCs or other companies who provide services to the armed forces as IHL applies in the same manner. Additionally, it was stressed that the Montreux Document aims to support States to identify and apply their obligations in situations of armed conflict; however they can also be a useful guidance in other situations. The Montreux Documents examines both International Humanitarian Law (IHL) and International Human Rights Law (IHRL).

The good practices that States should apply, and their obligations, should be reflected into national legislation and regulations. A PMSC that provides services to the army needs to be registered, demonstrate that certain measures are in place, as well as – among other things – demonstrate that it has the knowledge and capacity to control its employees. In essence, to determine whether a company is indeed a PMSC, the State will consider the provided service and context, rather than the nature of the company.

Another panellist added that this relates to positive obligations that are incumbent on States to regulate the way in which actors and companies act. It was argued that many of the new situations – e.g., information and communication technologies – can fit within IHL categories that have existed for a long time.

Determination of the status of PMSCs

A two-pronged question was posed by a member of the audience, notably whether a member of a PMSC who falls into enemy hands can be considered a prisoner of war and how this should be assessed by the Article 5 GC III-tribunal in the absence of a State's declaration.

The panellist explained that a tribunal is only seized *should any doubt arise* concerning the status of a person. It was clarified that it is quite rare for individuals working for a PMSC to qualify as POWs, considering the commentary on the Article 4 GC III[207]. Most individuals

[207] In principle, members of PMSCs might qualify for prisoner-of-war status under Article 4A(1) (if the PMSC is incorporated into the armed forces) or Article 4A(2) (if the PMSC is contracted to perform a combat role, belongs to the State and fulfils the four conditions of that subparagraph). In practice, most PMSCs operate independently of the armed forces and are contracted in non-combat roles. Personnel of PMSCs may be entitled to prisoner-of-war status under Article 4A(4) as persons accompanying the armed forces without being members thereof if they are authorized by the armed forces to accompany them, and depending on the functions they carry out.

working for PMSCs do not fall into this category, they are considered civilians until proven otherwise. The tribunal's duty is to establish the facts and apply the law to those facts. The position of the State is something that must be taken into consideration; however, in situations where there is no clear declaration one cannot simply assert that there are doubts regarding whether the State accepts or claims that the members of the PMSC are part of the armed forces. Arguing otherwise would indeed mark the end of the inquiry for the tribunal. Therefore, the tribunal cannot rely solely on the absence of a declaration, it must arrive independently to the conclusion. It was added that if the tribunal has evidence that the person is part of the chain of command, then it would be inconsistent with the objectives of the article and with what is mentioned in the commentary not to consider this evidence. These data should be assessed in good faith and based on factual evidence.

As a follow-up question to the determination of prisoner-of-war status, someone asked whether there should not be a control mechanism in place to monitor decisions watch over the courts, to avoid so-called « puppet trials ».

On this, the panellist referred to an earlier presentation to reiterate that it is up to the States to decide which court is competent. In IHL there is no "supreme authority", "global appeals board" or "inspection officer" to monitor or to impose the respect of obligations. Additionally, it is clearly stated in Article 5 GC III that the courts "must act in good faith" and there must be an objective process whereby the rules are applied in good faith. There are tools in case of non-compliance of IHL that may or may not bear fruit. Another member of the panel added that 95% of public international law does not have a supreme authority or a court of appeal, it is not unique to IHL.

Enforcement of the AU Convention on Mercenaries

A participant in the audience asked whether there is data available on the impact the African Union Convention on Mercenaries has had in terms of accountability. One of the speakers clarified that no studies have been done yet on the practical implications of the AU Convention. Additionally, it is important to be aware that the AU Convention on Mercenaries was adopted in the context presented as linked to the use of mercenaries by non-African States with the aim to undermine African governments. Both the AU and UN Conventions have been mostly dormant, however, that does not mean that they should not be applied to the contrary.

Journalism and social media

A panellist was asked to give insights on the protection of reporters on the battlefield and to discuss the impact of social media on their work.

It was explained that war correspondents and journalists are protected by the Geneva Conventions and its Additional Protocols. They are civilians who while retaining their civilian status also enjoy additional protection, as prescribed in Article 79 AP I. To illustrate this, when a war correspondent is captured, they enjoy prisoner-of-war status. The impact from social media is quite significant. It is important to remember that journalists working for big media outlets are obligated to respect deontological codes. Effectively, the panellist believes that the majority of reporters do abide by these rules. However, one can only report what one sees which is one point of view but rarely the full picture. There is the saying “for a blind person it is difficult to describe an elephant” because it depends on the angle. Therefore, it is important to consult different sources of information each from a specific angle. The speaker specifies that usually there is no malicious intent from war correspondents, but it is simply impossible to report and describe everything. Integrity and ethics are very important guidelines. The panellist has more trust in a reporter who lives and works with the army and has the ability to request for more information rather than a picture taken by a civilian bystander that only captures a moment in time without any context or background information.

Related to this, someone asked about the recent practice whereby civilians are encouraged by certain States and actors to track and share the movement of troops. The panellist warned for the dangers of false information – which can easily be created through editing – insisting on the enormous consequences it can have in the context of the conduct of hostilities. It is a thorny concept on which the IHL community must reflect thoroughly: how to address this and how responsibilities should be assigned?

Different actors with different obligations

Someone in the audience asked whether it makes a difference in the legal analysis in terms of obligations when an IT company is a foreign company and services are not provided by the State itself. One of the speakers clarified that different actors bear different obligations. First, it depends on who participates in the hostilities. When State bodies are involved, extra caution is required because once certain thresholds are reached the State becomes a party to the conflict. When private actors are involved, the Articles on States Responsibility for Internationally Wrongful Acts – as well as rules of attribution – need to be considered to determine whether a private actor could entangle a State in a conflict. Turning to the obligations, when a State becomes a party to a conflict there are several negative obligations – depending on regime that applies. In case tech companies and private actors are involved it is important to emphasize the positive obligations under International Humanitarian Law and International Human Rights Law.

Difference PMSCs and Mercenaries

The difficulty in distinguishing a member of a PMSC and a mercenary in the field struck one of the participants. It prompted two questions, notably, the relevance of this distinction and how it applies in cyberspace, and whether there are tools available to help this determination.

One of the speakers replied that the distinction between different categories makes a difference when it comes to the targeting rules, while another speaker argued that the consequence of being a mercenary is drastic for an individual. Mercenaries are individuals while private security companies are groups. Mercenaries do not enjoy privileges and may be prosecuted for their actions during the hostilities.

CLOSING REMARKS – REMARQUES DE CLÔTURE

Stephanie Siklossy,
ICRC

Ladies and gentlemen, dear colleagues,

We have now reached the end of the 23rd Bruges Colloquium.

It has been an honour to welcome you all for these two days of thought-provoking debates. We were proud this year to introduce many new faces and emerging voices in the field of IHL, alongside the familiar people whose faithfulness to the Colloquium remains unwavering, and very much appreciated.

Thanks for the quality and clarity of interventions of our very articulate and eloquent speakers and chairs.

It is, of course, not possible to summarize the discussions of this week in a few minutes, and, for that, you will have the proceedings that will be published next year on our new website that I invite you to visit: www.brugescolloquium.org.

In my very short closing remarks, I will highlight a few salient points from our discussions this week.

Before that, I would like to thank you all for ensuring the Colloquium lived up to its tradition, commitments and promises, with a very smooth organization, a warm atmosphere, and a high level of engagement.

In my opening remarks, I shared with you my hope that this Colloquium would allow us to discuss IHL in a constructive and decontextualized manner. This was very much the case.

The way the last days have unfolded has exceeded my expectations in every way. We talked already about the high attendance, both online and in person, from many regions of the world and very different backgrounds and positions, ranging from diplomats to students, from justice professional to international organizations representatives, from members of the military to humanitarian actors.

Second, In terms of content. In their presentations but also answers, the speakers – even when under heavy fires – were able to share with us their theoretical and practical knowledge of the interpretation and implementation of the law, illustrating their thoughts with numerous examples drawn from practice, thus proving – if proof were needed – that international law provisions have a concrete dimension (that is sometimes disputed as was reflected in our discussion on the law of neutrality).

And third, in terms of exchanges of views. These included reflections and proposals for pushing further the analysis and pointing out practical details that should be taken into considerations when ensuring the fulfilment of IHL obligations.

This shows – if need be – that the Bruges Colloquium spirit survived both COVID and the current state of the world, which is both an encouraging and inspiring prospect for the many years to come.

In our discussions, many questions related to the technicity of some interpretations of IHL have emerged and derive directly from the changing nature of the battlefield and its actors.

During the first panel, experts discussed the threshold to be reached for a State to become a party in the conflict, in particular when support to a warring party includes significant logistical, operational contribution directly linked to the hostilities. While the consensus on the possibility for a State to enter a conflict via cyber means was recalled, the absence of agreement on the needed scale and effect to trigger such participation was highlighted. Finally, the many challenges relating to occupation by proxy situations where underscored, including the identity of the occupying power, the status and rights of the inhabitants of the occupied territory and the implementation of rights and obligations of the occupying power.

In the second panel on neutrality, our experts examined the consequences – or the absence of consequences – of the breach of neutrality law. In particular, they stressed that a violation of neutrality by a State doesn't make it *ipso facto* a Party to the conflict.

They also affirmed that the law of neutrality applies in the cyberspace, although it raises new challenges, notably regarding territoriality and the possible involvement of foreign volunteers. Speakers made a clear delineation between neutrality from a legal *vs* from a political point of view and brought in the debate the hierarchy of norms, questioning the impact that a UNSC resolution under Chapter VII of the UN Charter would have on the violation – or not – of the law of neutrality. Ultimately, it was reassessed that the law of neutrality should be kept separated from IHL, as the latter only applies from the moment that there is an armed conflict.

As we moved to panel 3, the relevance of speaking about organized NSAGs and their involvement in armed conflict was highlights for three main reasons: protection, accountability and operationality. The need to engage those groups not only on IHL but also on IHRL was underlined, even if the intensity criteria is not met "yet". The transposition of the fragmented approach adopted by the ICRC in IAC to situations where a NSAG is supporting a party in a NIAC was then challenged. Several questions were raised, notably regarding the operational effectiveness of this approach and the potential delay it would create in the application of IHL. Finally, the many challenges relating to the military engagement of NSAGs abroad were touched upon, referring to very practical situations. One of the main affirmations however was

that a mere affiliation to a NSAG does not amount to participating in the conflict, and that transborder conflicts do not globalize the battlefield.

During the second day of our Colloquium, we moved to the status of persons and entities in armed conflict. In the fourth panel of the Colloquium, speakers recalled the importance of maintaining the integrity of protection afforded to combatants under IHL, despite the evolution of the functions and tasks of persons who can fall under this definition, notably those working in cyber commands. They discussed the evolution of the concept of levée en masse, shifting from a political to a legal existence, and the possible revival of this notion while recalling that persons participating in a levée en masse are combatants under IHL: civilians directly participating in hostilities are not. The final speaker highlighted the consequences from a domestic point of view of soldiers joining a foreign armed force. The issue was explored from a disciplinary, criminal accountability and international law perspective.

In the last panel of this years' event, experts discussed the status of private military and security companies, States' obligations in relation to their activities, the narrow definition of 'mercenaries' in IHL, and current challenges including the lack of transparency regarding the operations of these groups, the failure to integrate into the chain of command, and gaps in accountability. The role of media and social media networks in contemporary conflicts was underlined, notably in relation to the risks posed by misinformation and disinformation and also in relation to the opportunities these new channels offer to improve respect for IHL and respect for the mandate and the work of humanitarian actors. The legal consequences deriving from the increasing participation of Digital Service Providers in Armed Conflict were then discussed, including how to answer questions relating to the application of the principle of distinction. The question of whether there is a need to further develop rules to better clarify the role and status of those actors was also highlighted.

Conclusion

I think that you will all agree with me that we have covered a lot of ground from legal, to operational and sometimes strategic, political and even ethical points of views.

Let me conclude by sincerely thanking the many persons who worked extremely hard to make the series of events possible. I will start, of course, with our moderators and speakers who provided a wealth of information and reflection, our friends from the College of Europe, and in particular Maureen Welsh, Jonas Corneille and Claire Lawrence for their constant, efficient and tireless support, our interpreters Nanaz Shahidi-Chubin, Gaëlle Le Gall interpreting in English and French and our colleagues from the ICRC Moscow delegation Olga Zalogina and Nataliya Kataeva interpreting in Russian, without whom such an inclusive event across regions, would not be possible. And, of course, there are our colleagues from Geneva, which helped designing the programme, and took an active part in the discussions during the last two

days. Finally, my colleagues from the ICRC Brussels delegation – our Bruges Colloquium team – who all worked with a lot of dedication: Olga Peykrishvili, Céline Cattin, Janet Craven, Andrea Sciorato, Fatima El Kaddouri and Pauline Warnotte. A huge thanks to all of you!

Now, several speakers posited that we may end our exchanges with more questions than answers. That may well hold true, but I only have one question for you: will you be back next year for our annual RDV? And with this, I close the 23rd Bruges Colloquium and wish you safe return home.

ANNEX

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ANNEXE

LIST OF ABBREVIATIONS – LISTE DES ABRÉVIATIONS

Acronyms in English

Additional Protocol I (AP I)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
Additional Protocol II (AP II)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
Common Article 3	Article 3 common to the Geneva Conventions of 12 August 1949
DPH	Direct Participation in Hostilities
EU	European Union
GC or Geneva Conventions	The Four Geneva Conventions of 12 August 1949
First Geneva Convention (GC I),	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949
Second Geneva Convention (GC II)	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
Third Geneva Convention (GC III)	Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949
Fourth Geneva Convention (GC IV)	Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949
IAC	International Armed Conflict
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
Montreux Document	Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008
NATO	North Atlantic Treaty Organization
NIAC	Non-International armed conflict
PMSC	Private Military and Security Companies

ROE	Rules of Engagement
UN	United Nations
UN Charter	Charter of the United Nations, 26 June 1945

Acronymes en français

Article 1 commun	Article 1 commun aux quatre Conventions de Genève de 12 août 1949
CAI	Conflit armé international
CANI	Conflit armé non international
CG ou Conventions de Genève	Conventions de Genève de 12 août 1949.
GC I ou première Convention de Genève	Convention (I) pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949
GC II ou deuxième Convention de Genève	Convention (II) pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, 12 août 1949
GC III ou troisième Convention de Genève	Convention (III) relative au traitement des prisonniers de guerre, 12 août 1949
CGIV ou quatrième Convention de Genève	Convention (IV) relative à la protection des personnes civiles en temps de guerre, 12 août 1949
CICR	Comité International de la Croix-Rouge
CIJ	Cour internationale de Justice
DIH	Droit international humanitaire
DIDH	Droit international des droits de l'homme
EMSP	Entreprises Militaires et de Sécurité privées
GANE	Groupes armés non Etatiques
ONU	Organisations des Nations Unies
OTAN	Organisation du Traité de l'Atlantique Nord
PA I ou Protocole I ou Protocole	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux, 8 juin 1977
PA II ou Protocol additionnel II	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux, 8 juin 1977
PDH	Participation directe aux hostilités
UE	Union Européenne

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PROGRAM – PROGRAMME

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23rd Bruges Colloquium on International Humanitarian Law
20-21 October 2022

WHO IS WHO ON THE BATTLEFIELD?
THE ACTORS ENGAGED IN CONTEMPORARY ARMED CONFLICTS

QUI EST QUI SUR LE CHAMP DE BATAILLE ?
LES ACTEURS ENGAGÉS DANS LES CONFLITS ARMÉS CONTEMPORAINS

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Hybrid edition, online and in Bruges
Edition hybride, en ligne et à Bruges

Simultaneous translation into French / English / Russian
Traduction simultanée en anglais/français/russe
Синхронный перевод на французский / английский / русский языки

Day 1: Thursday, 20 October 2022
08:45-17:45 (CET)

08.45 – 09.15 **Welcome and Registration**
Accueil et Inscription

09.15 – 09.45 **Opening Statements**
Discours d'ouverture

Federica Mogherini, Rector, College of Europe

Gilles Carbonnier, Vice-President, ICRC

Stephanie Siklossy, Deputy Head of Delegation, ICRC Brussels

09.45 – 10.45 **Setting the Scene: Global trends and contemporary landscapes of armed conflicts**

Vue d'ensemble: Dynamiques mondiales et panorama des conflits armés contemporains

Introduction to the topic by the Chair **Elizabeth Wilmshurst**, Royal Institute of International Affairs, Chatham House and University College of London

1. A legal perspective on the relevance of IHL criteria to classify contemporary conflicts
   Julia Grignon, Institut de Recherche Stratégique de l'Ecole Militaire, France
2. Classifying conflicts in 2022 – reflections on a practical challenge
   Thomas de Saint Maurice, ICRC
3. Global trends in armed conflicts: the perspective of a military institution
   Nathalie Durhin, NATO SHAPE

10.45 - 11:00 Coffee break

11.00 – 12.30 **Panel 1: International armed conflict: when does a State become a Party to the conflict?**

Panel 1 : Conflit armé international : quand un Etat devient-il une Partie au conflit ?

Introduction to the topic by the Chair **Frank Hoffmeister**, EEAS

1. From supporter to party in the conflict: when does support amount to co-belligerency?

   Jeroen Van Den Boogaard, Ministry of Foreign Affairs, The Netherlands

2. Entering an international armed conflict through cyber means: virtual or real possibility?

   Mark Dakers, International Institute of Humanitarian Law

3. Le renouveau de l'occupation: le défi de l'occupation par procuration

   Eugénie Duss, University of Geneva

12:00- 12:30 Moderated Discussion and Q&A

12:30 – 14:00 **Lunch**

14:00-15:45 Panel 2: Not taking sides: Is the Law of Neutrality still relevant in the XXIst century?

Panel 2 : Ni Partie, ni partisan : Le droit de la neutralité est-il encore pertinent au XXI^{ème} siècle ?

Introduction to the topic by the Chair **Luca Ferro**, Free University of Brussels

1. The Law of Neutrality in the XXIst century: evolution or revolution?

   Michael Bothe, Goethe University of Frankfurt

2. How to stay neutral in 2022? A practical approach

   Hanne Cuyckens, Leiden University

3. Is neutrality possible in the cyber/outer space domain?

   Kevin Kohler, ETH Center for Security Studies, Zürich

15:00- 15:45 Moderated Discussion and Q&A

15:45 - 16:00 Coffee break

16:00-17:45 Panel 3: Reaching the threshold(s): when do non-State actors become parties in an armed conflict?

Panel 3 : Franchir le(s) seuil(s) : à partir de quand les acteurs non Etatiques deviennent-ils parties au conflit armé ?

Introduction to the topic by the Chair, **Vaios Koutroulis,** Université Libre de Bruxelles

1. Stronger together? Understanding how IHL applies to non-State armed group coalitions

   Ezequiel Heffes, Geneva Call

2. Military support and IHL: A critical view of the fragmented approach

   Pauline Lesaffre, Université Catholique de Louvain

3. Contemporary challenges arising from fighting NSAG abroad: a State view

   Camille Faure, Ministère des Armées, France

17:00 – 17:45 Moderated Discussion and Q&A

18:30 - 20:30 **Standing dining reception**

Day 2: Friday, 21 October 2022 09:00-13:00 (CET)

09:00-10:45 **Panel 4: On the battlefield: the multiplicity of actors and challenges for the application of IHL – Part I**
Panel 4 : Sur le champ de bataille : la multiplicité des acteurs et les défis qu'elle pose pour l'application du DIH – Partie I

Introduction to the topic by the Chair, **Elżbieta Mikos-Skuza**, University of Warsaw and College of Europe

1. You're in the army now: who is a combatant in 2022?

   Jelena Pejic, IHL Expert

2. The changing status of civilians, levée en masse and DPH

   Annyssa Bellal, Graduate Institute of International and Development Studies

3. Third nationals in IAC – A State perspective

   Pierre Degezelle, Ministry of Defence, Belgium

10:00 - 10:45 Moderated discussion and Q&A

10:45 - 11:00 Coffee break

11:00-12:45 **Panel 5: On the battlefield: the multiplicity of actors and challenges for the application of IHL – Part II**

Panel 5 : Sur le champ de bataille : la multiplicité des acteurs et les défis qu'elle pose pour l'application du DIH – Partie II

Introduction to the topic by the Chair, **Marco Sassòli,** University of Geneva

1. IHL and Private Military and Security Companies

   Matt Pollard, ICRC
2. Media, disinformation and propaganda: what's new?

   Christie Edwards, American Society of International Law / Geneva Call
3. The Participation of Digital Service Providers in Armed Conflict

   Tsvetelina van Benthem, Oxford University

12:00 - 12:45 Moderated discussion and Q&A

12:45 – 13:00: **Closing Statement by Stephanie Siklossy**, ICRC Brussels

Day 1: Thursday, 20th October 2022

Welcome and Opening Addresses
Allocutions de bienvenue et discours introductifs

Ms. Federica Mogherini is the Rector of the College of Europe since September 2020 and Director of the Pilot Programme of the European Diplomatic Academy, implemented by the College of Europe, since September 2022. Previously she has served as the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, from 2014 to 2019. Prior to joining the EU, she was Italian Minister for Foreign Affairs and International Cooperation (2014), and a Member of the Italian Chamber of Deputies (2008-14). In her parliamentary capacity, she was Head of the Italian Delegation to the NATO Parliamentary Assembly and Vice-President of its Political Committee (2013-14); member of the Italian Delegation to the Parliamentary Assembly of the Council of Europe (2008- 13); Secretary of the Defence Committee (2008-13); and member of the Foreign Affairs Committee. She also coordinated the Inter-Parliamentary Group for Development Cooperation. She has co-chaired the United Nations High Level Panel on Internal Displacement from January 2020 until September 2021. Federica Mogherini is a member of the High Level Reflection Group of the Council of Europe, of the Board of Trustees of the International Crisis Group and of the Rockefeller Brothers Fund, Fellow of the German Marshall Fund, and member of the Board of Directors of the Italian Institute for Foreign Affairs (IAI). She has a degree in Political Science from the University of Rome "La Sapienza". She was born in Rome in 1973, lives in Belgium and has two daughters.

Dr. Gilles Carbonnier is the Vice-President of the International Committee of the Red Cross (ICRC) (appointed in 2018). Since 2007, Dr. Carbonnier has been a professor of development economics at the Graduate Institute of International and Development Studies (Geneva), where he also served as director of studies and president of the Centre for Education and Research in Humanitarian Action. His expertise is in international cooperation, the economic dynamics of armed conflict, and the nexus between natural resources and development. His latest book, published by Hurst and Oxford University Press in 2016, is entitled Humanitarian Economics: War, Disaster and the Global Aid Market. Prior to joining the Graduate Institute, Dr. Carbonnier worked with the ICRC in Iraq, Ethiopia, El Salvador and Sri Lanka (1989–1991), and served as an economic adviser at the ICRC's headquarters (1999–2006). Between 1992 and 1996, he was in charge of international trade negotiations (GATT/WTO) and development cooperation programmes for the Swiss State Secretariat for Economic Affairs.

Dr. Knut Dörmann is Head of Delegation of the ICRC Brussels delegation to the EU, NATO and the Kingdom of Belgium since June 2020. Previously he was ICRC's Head of the Legal Division and Chief Legal Officer (December 2007 - May 2020), Deputy Head of the Legal Division (June 2004 - November 2007) and Legal Adviser at the Legal Division (December 1998 - May 2004) (in charge of among others the law applicable to the conduct of hostility, cyber warfare, the protection of the environment, international criminal law). He holds a Doctor of Laws (Dr. jur.) from the University of Bochum in Germany (2001). Prior to joining the ICRC, he was Managing Editor of Humanitäres Völkerrecht - Informationsschriften (1991-1997), Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Dr. Dörmann has been a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international humanitarian law, international law of peace and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book 'Elements of War Crimes under the Rome Statute of the International Criminal Court', published by Cambridge University Press.

Session One - Setting the Scene: Global trends and contemporary landscapes of armed conflicts

Première session - Vue d'ensemble: Dynamiques mondiales et panorama des conflits armés contemporains

Prof. dr. Elizabeth Wilmshurst CMG KC is Distinguished Fellow, International Law, at Chatham House. She was a Legal Adviser in the United Kingdom diplomatic service between 1974 and 2003. Between 1994 and 1997 she was the Legal Adviser to the UK mission to the United Nations in New York. She took part in the negotiations for the establishment of the International Criminal Court. She has contributed to numerous publications, including Perspectives on the ICRC Study on Customary International Humanitarian Law (Cambridge, 2007); International Law and the Classification of Conflicts (Oxford, 2012)); Practitioners' Guide to Human Rights Law in Armed Conflict, Oxford 2016.

Mr. Thomas de Saint Maurice is Head of the Operational Legal Advisers Unit at the International Committee of the Red Cross (ICRC) since 2017. He joined the ICRC in 2001, working both in the field (Africa) and at headquarters where he occupied several positions dealing with humanitarian action and international humanitarian law and policy. He notably worked as a legal adviser to operations for five years (covering Near East and Africa) and as an adviser in the Policy Unit for three years. He also worked for two years in the Arms Unit as a legal adviser, focusing on the use of explosive weapons in populated areas and their humanitarian impact. He has a degree in political sciences (Institut d'Etudes Politiques de

Lille), a LLM in public international law (Université Libre de Bruxelles) and a MA in international relations (University of Kent).

Col Nathalie Durhin graduated in Public Law from "*Sciences Po Paris*". She joined the French Air Force in 1995 and got a specialization in International Humanitarian Law. She also obtained a master's degree in international Relations and Military Strategy from the Universities of Milan and Rome. She was Legal Advisor for the Balkans region at NATO JFC Naples, and Chief Admin of Nancy Air Base. She headed the LOAC bureau within the Department of legal affairs at the French Ministry of defense, then the Operational Law section at the French Joint Staff. She was also LEGAD of the Inspector-General for the French Air Force. She has been deployed as LEGAD in Kosovo and Bosnia, two times in Afghanistan, at Naples CJTF for Operation Unified Protector (Libya), and for the French operations Serval and Barkhane in Mali and Chad. In 2016, she has been assigned in New York, as a military expert within the team of the Special Coordinator on improving UN response to sexual exploitation and abuse (SEA). Since September 2019, she is the Operational Law Branch Head within NATO/SHAPE Office of Legal Affairs, in Mons (Belgium).

Prof. dr. Julia Grignon is an Associate Professor of the Faculty of Law at Laval University (Canada) and a Research Fellow Law of Armed Conflict at the Institute for Strategic Research (France), where she will hold the position of Scientific Director as of November 1st. Specialized in the Law of Armed Conflict, which has been her field of research for the past 15 years she has led a research project relating to the extraterritorial application of International Human Rights Law in the context of external military operations and a development partnership that aims at promoting and strengthening International Humanitarian Law. Julia Grignon has taught and supervised student academic work in all the fields of International Law pertaining to the protection of human beings (International Human Rights Law, International Refugee Law, International Criminal Law). She has authored numerous publications in peer-review journals as well as in collective works and edited the book Tribute to Jean-Pictet (Cowansville/Genève: Yvon Blais/Schulthess). She is also one of the co-authors of the *Online Casebook How Does Law Protect in war?*. In addition to occasional teachings and/or research as a visiting professor in North America, Europe and Africa, Julia Grignon spent a year of study and research at the Institut des droits de l'homme et de la paix of the University of Cheikh Anta Diop in Dakar (Sénégal). She holds a Ph.D from the University of Geneva (Switzerland) focused on the *Temporal Scope of Applicability of International Humanitarian Law*, that was awarded the Paul Reuter and Walther Hug Prizes and published at Schulthess/LGDJ. At Laval University, she co-founded and then co-directed the Interdisciplinary Research Centre on Africa and the Middle East and co-directed the International Criminal and Humanitarian Law Clinic. In addition to belonging to several learned societies, she was a member of the IRSEM Scientific Council

from 2016 to 2021 and has been a member of the Committee for the Jean-Pictet Competition since 2008.

Session Two - 1st Panel: International armed conflict: when does a State become a Party to the conflict?

Deuxième session - 1er Panel: Conflits armés internationaux: à quel moment un Etat devient-il une Partie au conflit ?

Dr. Frank Hoffmeister holds a PhD from the University of Heidelberg (1998) and served as academic assistant at the Walter Hallstein-Institute for European Constitutional Law from 1998 until 2001. He then joined the European Commission where he worked first in the Cyprus Unit in DG Enlargement before becoming a member of the Commission Legal Service (external relations and institutional team). From 2010 to 2014 he acted as Deputy Head of Cabinet of the EU Trade Commissioner De Gucht, and as of 2015 he was Head of Unit dealing with anti-dumping at DG Trade. He joined the European External Action Service in November 2021 as Director for General Affairs and Head of the Legal Department. He teaches international economic law at the Free University of Brussels and has written extensively on EU and international law matters. He edited (together with J. Wouters, G. Debaere and T. Ramopoulos) *The Law of EU External Relations, Cases, Materials and Commentary on the EU as an International Legal Actor (*Oxford, OUP, third edition 2021*).*

Dr. Jeroen van den Boogaard is legal counsel for international law at the Ministry of Foreign Affairs of the Netherlands and lecturer in international humanitarian law at the University of Amsterdam. Jeroen is also a reserve military lawyer of the Royal Netherlands Army. Previous working experience includes assistant professor of military law at the Netherlands Defence Academy; senior legal counsel and trial lawyer on military administrative law matters for the Ministry Defence; head of the international humanitarian law department of the Netherlands Red Cross, and several positions as a military lawyer of the Royal Netherlands Army. Jeroen van den Boogaard holds an LL.M in international law from the Erasmus University Rotterdam and a Ph.D. of the University of Amsterdam.

Col Mark Dakers graduated in law from the University of Aberdeen in 1990 and qualified in Scotland. After a short period in private practice doing primarily court work, he joined the army in 1995 and was posted to Bielefeld, Germany. He spent most of the next 14 years in Germany in a variety of roles including a large amount of time prosecuting at Courts Martial. He also deployed on operational tours to Bosnia, Kosovo and Iraq. In 2009 following a tour with the last UK HQ in Southern Iraq and at the US Embassy in Baghdad he took up the post as the senior military legal adviser at the UK Permanent Joint Headquarters which commands all UK overseas deployments. This tour included deployment to Kabul as part of ISAF. He then moved

to Supreme Headquarters Allied Powers Europe (SHAPE), NATO's strategic HQ during which time he advised on the planning and conduct of all NATO operations including in Afghanistan, Libya and the Indian Ocean. After SHAPE he attended staff college in the UK and served as the legal adviser to the UK Intelligence Corps before returning to Staff College as an instructor. His last role before taking up post at the Institute in 2018 was within the Ministry of Defence providing legal advice on specific operations.

Ms. Eugénie Duss is completing a doctoral thesis on the law applicable to international armed conflicts by proxy under the supervision of Prof. Marco Sassòli, Eugénie Duss also holds a Certificate of advanced studies in legal professions and a Master of Laws degree from the University of Geneva, where she was awarded the prize for the best Master thesis. After having been a research and teaching assistant at the Faculty of Law of the University of Geneva for several years, Eugénie Duss undertook a research trip to Colombia where she interviewed former members of the Revolutionary Armed Forces of Colombia about their past detention and territorial administration practices. Recently, she also assisted as a researcher Prof. Marco Sassòli in his mandate as a member of the expert mission appointed by the Organization for Security and Cooperation in Europe (OSCE) in application of the "Moscow mechanism".

Session Three – 2nd Panel: Not taking sides: Is the Law of Neutrality still relevant in the XXIst century?

Troisième Session – 2ème Panel : Ni Partie, ni partisan : Le droit de la neutralité est-il encore pertinent au XXIème siècle ?

Dr. Luca Ferro is Assistant Professor of International Law at the Vrije Universiteit Brussels (VUB) and affiliate member of the Ghent Rolin-Jaequemyns International Law Institute (GRILI, Ghent University). He also serves as the Belgian delegate of the International Law Association's Committee on the Use of Force. His research and teaching focus is on topics of the law of armed conflicts and international criminal law.

Prof. Michael Bothe is Professor emeritus of Public Law at the J.W. Goethe University Frankfurt/Main. He held a Chair in Public International Law at the Universities of Hannover and Frankfurt (where he also was Dean), and served as a visiting professor in many universities around the world. He was a research fellow at the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, later served as chair of the Institute's Scientific Advisory Board and is currently a member of the Kuratorium. He was president of the German Society for International Law and of the European Environmental Law Association as well as President of the International Humanitarian Fact-finding Commission and Chairperson of the German Committee for International Humanitarian Law. He served as a delegate or adviser in a number of international conferences (including the Diplomatic Conference for the

Reaffirmation and Development of International Humanitarian Law 1974-1977) and as a counsel before the International Court of Justice and the German Federal Constitutional Court. He is the author of many books and articles on questions of international law (in particular as it relates to legal restraints on the use of military force and to the protection of the environment), comparative public law, European law and constitutional law

Dr. Hanne Cuyckens is an assistant professor of international law at Leiden University College. Her PHD (University of Leuven, 2015) assessed to what extent the law of occupation was still suited to deal with contemporary situations of occupation and has led to a monograph entitled "Revisiting the law of occupation" published by Brill Nijhoff in 2017. She has a general interest in contemporary IHL issues, and the focus of her current research lies mainly on foreign fighters and more particularly on the interaction between international humanitarian law and counter-terrorism they generate.

Mr. Kevin Kohler is a Senior Researcher in the Risk and Resilience Team at the Center for Security Studies (CSS) at ETH Zurich. His research interests include the long-term trajectory and politics of digital technologies, disaster risk management, and strategic foresight. Relevant publications include The Law of Neutrality in Cyberspace, Cyberneutrality: Discouraging Collateral Damage, and One, Two, or Two Hundred Internets?

Session Four – 3rd Panel: Reaching the threshold(s): when do non-State actors become parties in an armed conflict?

Quatrième session – 3ème Panel : Franchir le(s) seuil(s) : à partir de quand les acteurs non Etatiques deviennent-ils parties au conflit armé ?

Prof. Vaios Koutroulis is a professor of public international law at the ULB Faculty of Law and Criminology. He also teaches at the Royal Military School of Belgium and has given numerous lectures on international humanitarian law (IHL) and international criminal law, including courses for professionals. His publications focus mainly on IHL and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris) in 2010. Vaios Koutroulis was an adviser to the Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice (2012) and is currently consulting the Belgian Ministry of Foreign Affairs on international criminal law questions relating to the negotiations of an international convention on mutual legal assistance for core international crimes (MLA initiative). In November 2021, he has been elected as a member of the International Humanitarian Fact-Finding Commission, the only treaty-based standing body addressing compliance with the 1949 Geneva Conventions and their first additional protocol.

Dr. Ezequiel Heffes is a Senior Policy and Legal Advisor at Geneva Call, a humanitarian NGO that promotes respect of humanitarian norms by armed groups and de facto authorities. He holds a PhD from the University of Leiden (Grotius Centre for International Legal Studies), an LL.M. in IHL and Human Rights from the Geneva Academy, and a law degree from the University of Buenos Aires School of Law. Prior to joining Geneva Call, he worked as a field and protection delegate and as a head of office for the International Committee of the Red Cross in Colombia, Afghanistan and the Democratic Republic of Congo. Ezequiel has also published widely on different international law issues and participates in different research projects. He is the author of Detention by Non-State Armed Groups under International Law (Cambridge University Press, 2022), the co-editor of International Humanitarian Law and Non-State Actors. Debates, Law and Practice (T.M.C. Asser/Springer, 2020) and of Armed Groups and International Law. In the Shadowland of Legality and Illegality (Edward Elgar, Forthcoming 2023).

Dr. Pauline Lesaffre, Ph.D., is a FNRS Postdoctoral Researcher (Belgian National Fund for Scientific Research) at the University of Louvain. Prior to her FNRS mandate, she worked as a BAEF Postdoctoral Research Fellow (Belgian American Educational Foundation) at the U.S. Naval War College (Stockton Center for International Law) and at Yale Law School (Paul Tsai China Center). She previously was a Visiting Researcher at the Geneva Academy of International Humanitarian Law (IHL) and Human Rights and will soon undertake a research stay at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, DE) as a Humboldt Postdoctoral Research Fellow. Dr. Lesaffre's work has been (or will be) published in *International Law Studies*, *Boston University International Law Journal*, *The Military Law and the Law of War Review*, *Articles of War* (blog), as well as in other journals, monographies and collective volumes. Dr. Lesaffre defended her Ph.D. thesis – on the challenges of cross-border armed conflicts for IHL – at the University of Louvain and holds two Master's Degrees: a Master's Degree in Civil and Criminal Law from the same University of Louvain and a Master's Degree in Human Rights and International Humanitarian Law from the University of Paris II Panthéon-Assas.

Ms. Camille Faure is, since 2017, the Deputy head of the Department of legal affairs, for the armed forces. Before this, she was the Head of the International and European Law Division, Department of Legal affairs, Ministry of Defense (between 2015-2017). Previously, she was *Chargée de mission* for the Legal adviser of the Department of legal affairs of the Ministry of Foreign Affairs (2011-2015), the Head of the International Law Office, Department of legal affairs, Ministry of Defense, (2008-2011), the Deputy Head of the planning of investment expenditures Office, Department of finance, Ministry of Defense (2007-2008), the *Chargée de mission* for the Hospitalization and Care Organization Division (DHOS), Health Ministry (2002-

2004), and the Hospital deputy director, Regional University Hospital Center of Nancy (1998-2002). She studied at the Graduate of Ecole nationale d'administration (ENA), (2005-2007), the Graduate of Ecole nationale de la Santé publique (ENSP), (1996-1998), the Graduate of Institut d'Etudes Politiques de Strasbourg, (1989-1992). She also has a Master's Degree in health law and bioethics, Faculty of law and political sciences, Rennes, (1997)

Day 2: Friday, 21st October 2022

Session Five – 4th Panel: On the battlefield: the multiplicity of actors and challenges for the application of IHL – Part I

Cinquième session – 4ème Panel : Sur le champ de bataille: la multiplicité des acteurs et les défis qu'elle pose pour l'application du DIH – Partie I

Dr. Elżbieta Mikos-Skuza is a senior lecturer at the Faculty of Law, University of Warsaw, Poland and a visiting professor at the College of Europe in Natolin. Her fields of specialization include public international law, international humanitarian law and peaceful resolution of international disputes. She is the Director of Master Studies on Humanitarian Action (joint studies organized by the consortium of European universities called NOHA – Network on Humanitarian Action) and Postgraduate Studies on Humanitarian Assistance at the University of Warsaw. For many years she has been volunteering with the Polish Red Cross, including the function of PRC's vice-president. She is also vice-president of the International Humanitarian Fact-Finding Commission established under Protocol Additional I of 1977 to the Geneva Conventions of 1949.

Ms. Jelena Pejic is a former Senior Legal Adviser in the Legal Division of the International Committee of the Red Cross (ICRC) in Geneva. In over twenty years with the ICRC, Ms. Pejic was responsible for the organization's legal policy and practical work on a range of IHL issues. Prior to joining the ICRC, Ms. Pejic headed the International Justice Program at Human Rights First in NY and was a lecturer in International Law at Belgrade Law School. Ms. Pejic holds an LL.M. degree from Columbia University Law School in New York, and a law degree from Belgrade University Law School.

Dr. Annyssa Bellal is an international lawyer with more than 18 years of experience in the area of conflict studies, both at the academic and policy levels, with a particular expertise on the issue of armed non-State actors. Dr Bellal was formerly a Strategic Adviser on International Humanitarian Law and Senior Research Fellow at the Geneva Academy of International Humanitarian law and Human Rights. She also worked as a legal adviser for the Swiss NGO Geneva Call, the Office of the United Nations High Commissioner for Human Rights as well as the Swiss Department of Foreign Affairs. In 2011, she acted as the Head of the International Humanitarian Customary Law Project at the International Committee of the Red Cross. She

has engaged directly with armed non-State actors in the field, notably in Syria, Iraq and the DRC. In 2019, she was invited to brief the UN Security Council on the occasion of the 70th anniversary of the 1949 Geneva Conventions, along with the President of the ICRC and the UN Under-Secretary-General for Legal Affairs. Her research was awarded several fellowships and grants notably from the UK Research and Innovation and the British Foreign, Commonwealth & Development Office, the Swiss National Science Foundation, McGill University, New York University and the Graduate Institute of International Studies and Development. She was also an Assistant Professor in public international law at the Irish Centre for Human Rights in Galway, Ireland and currently teaches at Sciences Po, Paris, the University of Bern and the Geneva Academy. Dr Bellal holds a PhD (summa cum laude) in Public International Law from the Graduate Institute of International and Development Studies and an LLM in Philosophy of Law from the University of Grenoble. She also holds a Master of Advanced Studies in International Relations and an MA in Law from the University of Geneva.

Maj Pierre Degezelle graduated from law school at KU Leuven (1997). He obtained his degree in Political Sociology in 1998 from the Université libre de Bruxelles. Pierre Degezelle was a Parliamentary assistant at the Federal Parliament and Legal Advisor in the local administration of Saint-Gillis from 1998 to 2003. He joined BEL Defence in 2003 and held different positions over the years, including: International Litigation / claims Officer, Operational law Branch, International law Branch and Strategy Department: bilateral relation MENA zone. Major Degezelle is currently head of the Operational law branch at the Directorate General Legal Support. His operational deployments include ISAF, UNIFIL, OIR, EUTM-Mali.

Session Six – 5th Panel: On the battlefield: the multiplicity of actors and challenges for the application of IHL – Part II

Sixième session – 5ème Panel : Sur le champ de bataille : la multiplicité des acteurs et les défis qu'elle pose pour l'application du DIH – Partie II

Prof. Marco Sassòli is professor of international law at the Faculty of Law of the University of Geneva, Switzerland. From 2001-2003, he 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 (ICRC) 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. He also chaired from 2004-2013 the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules. From 2018-2020 he has been director of the Geneva Academy of International Humanitarian Law and Human Rights. Marco Sassòli has published

widely on international humanitarian law, human rights law, international criminal law, the sources of international law, and the responsibility of States and non-State actors.

Dr. Matt Pollard is a Legal Adviser at the International Committee of the Red Cross (ICRC). As a thematic Legal Adviser, he addresses starvation and hunger in situations of conflict, private military and security companies, and torture and other ill-treatment. He is also part of the team updating the ICRC's legal commentaries to the 1949 Geneva Conventions and their Protocols. He has a law degree from the University of Victoria, Canada, and an LLM and PhD in international law from the University of Essex, United Kingdom.

Dr. Christie J. Edwards, JD, LLM is an internationally recognized and published legal expert with over twenty-two years of experience working on international humanitarian and human rights law, gender, international policy and advocacy, and civilian protection. Christie has led successful non-profit management and implementation programs, strategic planning, and grants management in senior leadership roles at national and international levels with prominent international organizations and NGOs. Christie is the Head of Policy, Programmes, and Legal at Geneva Call, an international humanitarian organization which endeavours to strengthen the respect of humanitarian norms and principles by armed groups and de facto authorities, in order to improve the protection of civilians

Dr. Tsvetelina van Benthem is a lecturer in Public International Law at the Oxford Diplomatic Studies Programme, and a researcher at the Oxford Institute for Ethics, Law and Armed Conflict (ELAC) and Merton College. She co-convenes the Oxford Transitional Justice Research group and is the president of the Bulgarian-registered educational NGO Centre for International Law 'Erga Omnes'. Tsvetelina is a generalist international lawyer whose current research focuses on the law of armed conflict, international human rights law and international criminal law. At ELAC, she works on projects related to the regulation of cyberspace and artificial intelligence under international law. She is a qualified lawyer in Bulgaria, and holds degrees from Oxford (MJur, MPhil) and Sofia University (LLM).