Editorial

A former Director General of the ICRC said that international humanitarian law always lags behind a war. Do the terrorist attacks of 11 September on the United States and the ensuing "war on terrorism" again constitute a watershed of international humanitarian law?

The high death toll within minutes, the scale of the damage caused and the means employed, combined with the worldwide immediate screening, gave the attacks on the World Trade Centre in New York and the Pentagon in Washington on 11 September 2001 a particular character and called for a particular response.

Several fundamental questions have arisen with regard to the application of international humanitarian law, some of which are mentioned in the following remarks. In upcoming issues the Review *will continue to analyse them and participate in a thoughtful debate in search of effective answers.*

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The devastating attacks reaffirmed the general trend, observed in the last century, towards a marked diminution of inter-State wars and a proliferation of civil wars, guerrilla wars, internal violence and terror attacks, with civilians increasingly the target and certainly the main victims of such events.

The attacks on 11 September were apparently planned, organized, financed and carried out by a non-State player. They showed that non-State players, including both organizations and individuals, can project power in a manner in which only States have acted previously.

First of all, this fact calls into question the State-centred "Westphalian model" which has dominated the international order for more than three centuries. In the aforesaid case, the paradigm that sovereign States are the sole creators and subjects of international law is clearly outdated. The distinction between international and domestic law is already blurred in many fields, including humanitarian law, and individuals have become a significant legal player affecting the international legal order. At the same time, non-State players have emerged at the international level in new forms, some ethically-minded and others reprehensible. They range from transnational corporations to humanitarian organizations, from scientific bodies to terrorist organizations, and even here the borders may sometimes be blurred...

Nonetheless, international law basically still regulates relations between States and does not a priori *take into account the fact that a State may be the victim of an act of violence carried out by a non-State assailant. International rules on aggression, self-defence and retaliation are based upon the assumption of inter-State violence. Even though the terrorist attacks were perceived as a declaration of war, they were not, technically speaking, an "act of war", as they were not easily attributable to a State. The existing rules of* jus ad bellum *do not cover the possibility of a use of force by a State against a non-State assailant that is independent of any State. Therefore the prohibition of a terrorist attack by a non-State actor and the right to respond thereto fit uncomfortably into the current regime regulating the use of force. Within the framework of Chapter VII of the Charter, the Security Council has been able to close that gap for the time being. In this sense, the very comprehensive Resolution 1373 strangely resembles a treaty on the fight against terrorism which could not be agreed to in the normal treaty-making processes.*

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International humanitarian law addresses the reality of a conflict without considering the reasons for or legality of resorting to force, or jus ad bellum. *Its only purpose is to limit the suffering caused by war by protecting and assisting the victims as far as possible: it regulates only those aspects of the conflict which are of humanitarian concern. The article by* François Bugnion *recalls this fundamental distinction between the rules contained in* jus ad bellum *and those of* jus in bello, *which is applicable even in wars of aggression or in an armed conflict engaged to fight "terrorism".*

The "war on terrorism" includes a whole range of measures other than the use of force. If it takes the form of a military operation it is regulated by international humanitarian law. The article by Hans-Peter Gasser *stresses that acts of terror are absolutely prohibited by international humanitarian law, but also emphasizes that the military response to them, in the form of an armed conflict, is equally governed by that law.*

The Afghanistan campaign, as the first military response to the terrorist attacks, raised many questions about the relevance of international humanitarian law in combating terror. The latter deals specifically with non-State players, namely with "parties to an armed conflict". It may be questionable whether the attacks of 11 September 2001 on the United States of America constituted an armed conflict between the US and Al Qaeda since they were an isolated act, even though they caused the death of thousands of people. One year after that cruel attack, a more complex image has materialized and "9/11" is no longer considered as a single event, but as part of a continuum that started several years ago. However, the lack of territorial links of a loosely organized but globally active terrorist network renders not only the fight against that organization more difficult, but also the determination of the applicable legal framework.

It is even more questionable whether Al Qaeda is willing to respect fundamental tenets of the law of war in its declared war against the US. The attacks last year appeared intended to destroy as much civilian life as possible. International humanitarian law is based upon the distinction between combatants and non-combatants, and the apparent strategy of some quasi-military groups and guerrillas, but sometimes also of state actors, to disregard this cardinal principle erodes the credibility of that law. In such circumstances the goal of humanitarian law to guarantee a minimum of humanity in armed conflicts cannot be attained, and the perpetrators of the attacks can not easily be bound by at least a minimum of humane rules or made accountable for compliance with them. The fact that nobody officially claimed responsibility for the attacks seems to indicate that the perpetrators were fully aware of the criminal nature of their acts.

Nobody doubts that the attacks, both in New York and in Washington, are first and foremost criminal, and if committed during an armed conflict they constitute war crimes. Like other acts of big criminality, they come under national penal legislation and are banned by certain international conventions, such as those governing the repression of acts of terrorism and the protection of civilian aviation. They may also amount to crimes against humanity, both under customary international law and under the Rome Statute of the International Criminal Court.

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The 11 September attacks were the epitome of "asymmetrical warfare": Amateur pilots armed with pocket knives attacked and seriously harmed the world's biggest military power with its huge arsenal of sophisticated weapons and missile shields. The ensuing armed conflict in Afghanistan was a further example of every aspect of asymmetrical warfare: the United States, assisted by other militarily powerful States, was combating an unrecognized de facto *regime and its armed forces which barely resembled traditional armies, a loose network of fanatical Islamist extremists and an individual surrounded by about a hundred close associates and bodyguards with their base (Al Qaeda) in Afghanistan. The country was simultaneously still being ravaged by an internal armed conflict.*

Asymmetrical warfare is not a new phenomenon and all wars are asymmetrical to varying degrees. But it was not surprising that pillars of the law of war were questioned in such an unequal war. The belligerents' equality under humanitarian law was recognized with difficulty vis-à-vis the rather unconventional fighters of the Taliban. In addition, the Taliban regime was accused of harbouring terrorists and Afghanistan was consequently considered to be a "rogue State" for supporting international terrorism. Equality was absolutely refused vis-à-vis members of Al Qaeda, officially branded a terror organization.

Reciprocity, an illegal form of conduct but nonetheless a fundamental element of and a strong motivation to respect the law of the war, was in reality not expected from unequal enemies. The dilemma was and still is mostly concerned with the question whether the persons captured in Afghanistan and transferred to Guantánamo are prisoners of war, "unlawful combatants" or civilians.

In this connection, the article by Yasmin Naqvi *looks into the establishment of a "competent tribunal" in the case of uncertain prisoner-of-war status. Such a tribunal should be established if there is any doubt that detainees fail to meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention to qualify as prisoners of war. The status of a captured person has far more than theoretical implications; in particular, conditions of internment, the length of detention and the question of repatriation depend upon it. It is, however, not decisive as to whether detained persons are to be prosecuted for offences committed before their capture, namely international crimes.*

The delicate balance between security interests of the State and humanitarian considerations has also been questioned in the wake of the events of 11 September 2001. In particular it has been argued that judicial guarantees, and especially the presentation of intelligence surveillance information in court, would prevent the effective combating of terrorists operating worldwide. Although calls for revision of international humanitarian law have been rare and no direct proposal has been put forward, there is a danger that the interpretation of the law by States may alter owing to a changing perception of the balance of harms and benefits in the war against terrorism. To combat unequal enemies, States themselves may be tempted to resort to asymmetrical warfare and reintroduce unlimited and private warfare.

At the very least nobody should be excluded from the rule of law. Even persons accused of the most heinous crimes are entitled to legal protection. If the international law of armed conflict is applicable, the existing legal framework gives quite appropriate

answers to the problems involved, despite the absence of any provisions relating to special treatment for "terrorists" and "terrorism" distinct from that laid down for combatants or civilians.

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Terrorism and acts of terror have often initiated and always accompanied warfare. In the light of terrorist organizations operating worldwide, new efforts are being made to grasp the phenomenon of global terrorism and shape a response to it.

The 11 September attack and the subsequent "war on terror" have also highlighted cultural divides and opened new rifts. The world is nowadays often described as beset by the "clash of civilizations", especially between the West and Islam. This perceived clash may also impact upon the universality of international humanitarian law. A more dynamic and constructive approach is taken by James Cockayne *in his article on "Islam and international humanitarian law: From a clash to a conversation between civilizations".*

Humanitarian organizations and in particular the ICRC, mostly working in violent environments and confronted with every conceivable manifestation of terror, must ask themselves serious policy and operational questions on how to deal with global terrorism and, equally important, how to respond to it. In the new context of the "war on terrorism", the work of humanitarian organizations may be affected. Considerations similar to those for international humanitarian law apply to humanitarian action, in particular the possibility that increased national security interests may limit humanitarian work.

Humanitarian organizations rightly place human life, health and dignity at the centre of their endeavours. The context of terrorism and counter-terrorism may change the parameters of humanitarian action and certainly do not make the work easier. The traditional guiding principles of those organizations for their activities, such as independence from political influence, impartiality and non-discrimination in providing assistance and even more the principle of neutrality, may not be understood and thus be open to challenge, especially when working in pariah States of the international community and being in contact with real or perceived terrorists, even if those persons are in detention.

Operating in cooperation with National Red Cross and Red Crescent Societies of all civilizations, religious and cultural circles, the ICRC can help to heal rifts, avert clashes and build bridges in places where terrorism breeds. In those extremely difficult environments the relationship between the delegates and the victims remains crucial for the success of any humanitarian undertaking.

The Review