

EDITORIAL: UNDERSTANDING ARMED GROUPS AND THE LAW

Even if inter-state wars have become occasional occurrences, organized armed violence is ever-present. Over the past few years, the International Committee of the Red Cross (ICRC) has certainly not observed a decline in the number of non-international armed conflicts; in all likelihood, such conflicts will continue to arise in the future. They will possibly be triggered by phenomena that we already observe today, such as the world financial crisis, state oppression, or competition over resources. Meanwhile, the recent developments in North Africa and the Middle East have given rise to unexpected new conflicts and have the potential to cause further tensions.

The existence of civil wars and armed groups is by no means a new phenomenon restricted to remote countries. The rebellion led by Spartacus in ancient Rome, Oliver Cromwell's military overthrow of the English monarchy in the seventeenth century, the American and Spanish civil wars are all proof of this. After all, the struggles of armed groups, when successful, have resulted in the foundation of many of the states we know today, and the inclusion of former rebels in mainstream political life is seen as a solution to ending many civil wars.

The 'classic model' of war – opposing two or more conventional state armies on a battlefield – continued to be, at least until the end of the cold war, the overriding scenario for which most armies were prepared, equipped, and trained. Even today, despite inter-state conflicts being the exception in reality, tanks, aircraft, missiles, and ships are still the yardstick by which a nation's military power is measured.

In the ICRC's analysis, and applying the criteria for non-international armed conflicts under international humanitarian law (IHL), at least forty-eight non-international armed conflicts occurred or were continuing to occur throughout the world in the course of 2011. This included ongoing conflicts that have been underway for decades, such as those in Afghanistan, Colombia, the Democratic Republic of Congo (DRC), the Philippines, and Somalia. It also includes new non-international armed conflicts, such as those that broke out in Côte d'Ivoire and in Libya. A distinctive feature of the non-international armed conflicts in Afghanistan, the DRC, and Somalia in particular is that they involve foreign troops intervening in support of government forces against one or more non-state armed groups. In 2010, the Uppsala Conflict Data Program similarly saw a trend towards the 'internationalization' of internal conflicts.¹ Although these military confrontations are not taking place on North American or European soil, the involvement of the armed

forces of several major world powers help to shine a spotlight on these otherwise localized conflicts and on the involvement of armed groups therein.

What then is an armed group? We are referring here to organizations that are party to an armed conflict, but do not answer to, and are not commanded by, one or more states. This broad definition belies the wide diversity of such groups and the complexity of contemporary warfare. Estimates of the number of armed groups vary widely from source to source, depending on how they are defined. In 2011 the ICRC identified around 170 active armed groups in the situations in which it operated.² This figure covers the range from small groups only able to carry out sporadic attacks all the way to forces with state-like military resources and significant control over entire populations and expanses of territory. Their origins, motivations, structures, and tactics are highly diverse. A group's cause can sometimes garner the support of the international community and can even mobilize an armed response in their favour, as the recent case of the Libyan National Transitional Council shows. Nevertheless, under national law, armed groups are generally seen as outlaws. Moreover, in the context of the 'war on terror', they are often hastily tarred with the same brush as transnational terrorist groups.

Armed groups play a central role with respect to the humanitarian concerns and legal issues involved in conflicts today. A group may fight against the government of its own country, other rival groups, a foreign state, or several states joined in a coalition. For the affected countries, these armed conflicts stand in the way of stability, prosperity, and development. For their populations, they can spell uncertainty about the future, ruin, exile, suffering, or death.

It is the population at large who is placed centre-stage in this type of conflict by both rebel and regular forces. Civilians are both the prize and the main victims of these wars. In recent years, the ICRC has observed that direct confrontations either between different armed groups or between state armed forces and armed groups tend to be rare. Violence primarily targets civilians,³ who not only suffer from all the pain and destruction that armed conflicts bring, but may also have to choose between allegiance to the government or to the rebels, without knowing which side can guarantee their safety. If they make the 'wrong' choice, they risk bloody reprisals. In many cases, this unbearable situation has forced communities to flee their homes, leaving behind their properties, losing their sources of income, and rupturing their cultural and social ties.

Rebel forces, outnumbered as they are, often adopt a survival technique whereby a guerrilla fighter should move through the population, as the Maoists term it, 'like a fish through water'. They cannot be distinguished from civilians and they therefore expose civilians – sometimes deliberately – to violent counter-attacks or reprisals by the government. By blending into the population in this way, armed groups present government forces with a dilemma: to abstain from attacking and let

1 Lotta Themnér and Peter Wallensteen, 'Armed conflict, 1946–2010', in *Journal of Peace Research*, Vol. 48, 2011, p. 525.

2 Internal estimate made by the ICRC's Unit for Relations with Armed and Security Forces.

3 See 'Operational highlights', in *ICRC Annual Report 2010*, p. 98, available at: <http://www.icrc.org/eng/resources/annual-report/index.jsp> (last visited 10 September 2011).

the insurgency grow, or to attack the insurgents at the cost of causing large civilian losses, possibly committing war crimes, and antagonizing the civilian population.

In response, government armed forces often use brutal counter-guerrilla tactics, inherited in particular from the colonial wars. Such tactics advocate cutting off the group from its support among the local population and ‘draining the sea to kill the fish’. ‘Pacification’, ‘law-enforcement operations’, and ‘psychological warfare’ are only a few of the euphemisms used for what is also known as ‘dirty war’. Today, such tactics may not have disappeared from the field but they no longer have a place in military manuals. The wars in Iraq and Afghanistan have been instrumental in changing the way in which strategists approach this type of conflict. Military operations have evolved in response to guerrilla tactics and are increasingly resorting to the use of special forces and to targeted attacks, made possible owing to new technologies such as drones, rather than the mass deployment of troops to occupy territory.

The recent Counter-Insurgency doctrine (COIN) of the US Army states that ‘[t]he protection, welfare, and support of the people are vital to success’.⁴ COIN experts recommend a comprehensive approach to the situation, taking into account not only the security dimension but also the economic, political, and cultural ones. The United States Army is already training its officers in COIN techniques using a sophisticated military-strategy simulator game (UrbanSim) that incorporates factors such as economic conditions and social ties.⁵ The game analyses how these factors can drive the population to back the government or the insurgents. On the ground, this approach requires significant resources and a long-term overall vision. Sophisticated COIN strategies, however, are not without their problems, particularly when humanitarian assistance is exploited in order to ‘win the hearts and minds’ of the local population or, sometimes, of the taxpayers at home, who are less and less supportive of these remote and costly operations. There is no getting around the fact that respecting the population’s rights is crucial to winning their support. Such respect is also the criterion by which an increasingly well-informed international community will judge the operations.

Humanitarian actors, for their part, have no choice but to understand the crucial role played by armed groups in today’s conflicts. Indeed, armed groups often control access to some key areas and communities. In times of conflict, humanitarian organizations face many risks in attempting to reach out to populations in need. These risks are aggravated by the specificities of many armed groups. A loose chain of command or of channels of communication, fragmentation into factions, funding and logistics based on looting or abductions, and a rejection of any kind of foreign presence are just a few of the factors that can endanger those working in the field. In addition, by engaging in dialogue with an armed group, if only to advocate respect for IHL, one runs the risk of incurring the wrath of the state

4 US Department of the Army, Field Manual 3–24, Counterinsurgency, app. D-2 (2006), para. 159.

5 Michael Peck, ‘Confessions of an Xbox general: can a computer game teach the army how to defeat the Taliban?’, in *Foreign Policy*, 28 September 2011, available at: http://www.foreignpolicy.com/articles/2011/09/28/Xbox_general (last visited 5 December 2011).

against which the group is fighting. A government engaged in an all-out war against an internal enemy may view any communication with armed groups as a kind of legitimization of their action. In the era of the so-called ‘war on terror’, some national legislations have added a new dimension to this problem by essentially criminalizing dialogue with entities classified as ‘terrorist groups’.

Humanitarian and academic actors are increasingly studying armed groups and their environment, and the applicable law and its limits in regulating them. Understanding armed groups and international rules that apply to them is an essential prerequisite for dialogue with a view to bringing about their compliance with the law. It is vital to comprehend why armed groups choose to respect or flout the law. To this end, the *Review* has chosen to devote this issue and the next to examining three main questions:

- 1) *What do we know about armed groups and the practical leverage we have to influence their action, in order to achieve greater compliance with the law?*
- 2) *How far does the current normative framework foster compliance with the law by armed groups?*
- 3) *How can tangible progress be made towards convincing such groups to comply with the law?*

The *Review* has worked on the assumption that a pragmatic approach should be adopted, taking into consideration the perspective, history, and structure of armed groups rather than seeing them merely as a threat to or an anomaly of the international system.

What do we know about armed groups and the practical leverage we have to influence their action, in order to achieve greater compliance with the law?

The *Review* opens the edition by giving a former member of an armed group the chance to share his perspective. Ali Jalali was successively an officer, a mujahideen fighter, and Interior Minister in the Karzai government from 2003 to 2005. He discusses the extent to which the action of armed groups in Afghanistan has changed since the Soviet intervention.

What is the situation at the end of a decade marked by the action of Islamist armed groups and by major wars in Iraq and Afghanistan? What consequences could the ‘Arab Spring’ have for the activity of armed groups in the region? Are we witnessing the dawn of a new era for armed groups and intra-state conflicts? The *Review* asked Arnaud Blin, from the French Institute for Strategic Analysis (IFAS), to give an overview of the activity of armed groups today. In his article, Blin looks at the phenomenon of ‘new wars’ to shed light on recent developments in non-international conflicts and, ten years on from the 11 September 2011 terrorist attacks on the United States, to sketch out what the future might hold.

Those seeking to engage in a serious dialogue with armed groups in order to foster their compliance with the law or to negotiate a peaceful outcome look

beyond those armed groups' stated political motivation and discourse. Their economic strategies, the complex ties between those groups and the population, and the historical, geographical, or political factors that fuel the conflict can ultimately determine its outcome. Professors Abdulkader Sinno, from Indiana University, and Achim Wennmann, from the Graduate Institute of International and Development Studies in Geneva, make a structural and economic reading, respectively, of the strategic choices made by armed groups. These two studies unravel the paths open to armed groups, depending on how they are organized, on the economic climate, and on the available options for engagement with them.

Many people associate armed groups with unfettered violence. At the risk of stating the obvious, armed groups are not always the ones responsible for violations of the law. Just like states, armed groups have to choose between several options and decide whether or not to comply with the law. This decision may be influenced by practical considerations or constraints, but political will remains key. Olivier Bangerter sets out and analyses the reasons for which the law is or is not respected, drawing on his field experience of contact with dozens of groups of this kind, in his capacity as ICRC adviser for dialogue with armed groups.

How far does the current normative framework foster compliance with the law by armed groups?

International law is drawn up by states. The criminalization of the act of rebellion and states' historical reluctance to take on obligations that impinge on the preserve of domestic security, continue to impact on the scope of applicable rules and on the legal status granted to parties to internal conflicts. Although there are rare historical exceptions, such as the 1793 French Declaration of the Rights of Man and of the Citizen, which conferred upon the people the 'sacred right' to rise up against any government that violated their rights, armed rebellion is generally seen by states as an illegitimate form of protest and a serious offence against security. In theory, states have a monopoly on the use of force and the members of their armed forces are the only ones empowered to wield it. It is always the state that determines who the enemy is and, under *jus ad bellum*, no entity other than the state has the right to resort to force.

When it comes to the rules governing the conduct of hostilities and protection afforded to war victims (*jus in bello*), treaties historically also reflect this state-centric vision. In 1949 and 1977 respectively, Article 3 common to the four Geneva Conventions and the adoption of Additional Protocol II extended the scope to application of IHL to non-international armed conflicts. In recent decades, several significant developments in international law have expanded the responsibilities of armed groups and strengthened the protection for victims of non-international armed conflicts. In particular, there have been developments in international criminal law, the adoption of new treaties, and the publication of the

ICRC's study on customary IHL, all of which cover both international and non-international armed conflicts.

Nevertheless, many differences still exist between the rules governing international and non-international armed conflicts. The provisions applicable to non-international armed conflicts are far fewer and still less detailed. In addition, members of armed groups, if captured, do not enjoy combatant privilege (and consequently prisoner-of-war status), which is granted to enemy soldiers in international armed conflicts. Zakaria Daboné, from the University of Geneva, analyses the 'anomaly' of armed groups in an international legal framework that reflects the Westphalian system of international relations. He demonstrates that, while states and armed groups have equal rights and obligations under IHL, they do not enjoy equal status. Moreover there are few armed groups with resources comparable to those of states. For example, how can a rebel group operating in the jungle offer the same judicial guarantees as a state with a properly functioning court system? Is it realistic to impose the same rules on states and armed groups when they do not possess the same resources and their status remains profoundly unequal? Should their obligations to each other really be the same under IHL?

This is the question that the *Review* put to Marco Sassòli from the University of Geneva and Yuval Shany from the Hebrew University of Jerusalem. These two professors defend opposing positions, with Marco Sassòli arguing in favour of a sliding scale of obligations for armed groups, depending on the degree to which they are organized, while Yuval Shany makes the case for equality. René Provost from McGill University then comments on their discussion and deconstructs the idea of formal equality in international law. This debate is the first contribution to a new section in the *Review* aimed at highlighting the main legal, ethical, and practical aspects of controversial humanitarian issues.

Armed groups are in any event not exempt from treaty and customary law governing non-international armed conflicts. Whether they like it or not, they have obligations under IHL, as shown by the number of legal proceedings undertaken before the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, and the International Criminal Court against rebel leaders for violations of the law. However, before the stage of criminal proceedings is envisaged, the focus should be on using all possible means to foster compliance with the law's provisions and to prevent violations. There are major conceptual obstacles standing in the way of armed groups' willingness to adhere to those provisions: unlike states, they do not take part in treaty-making. Furthermore the provisions were adopted (or at least endorsed) by the very states against which armed groups are fighting. By that logic, their ownership of the norms of IHL would be reduced or even non-existent. And yet, ownership is said to be one of the most effective ways to increase armed groups' compliance with the law.

Jann Kleffner, from the Swedish National Defence College, makes a critical analysis of different legal propositions of how exactly international law binds armed groups. One of the aspects that Professor Kleffner mentions is the consent of the group itself, which might be expressed through the adoption of its own code of conduct. The armed-groups expert Sandesh Sivakumaran, from the University of

Nottingham, asserts the importance of these internal codes. He analyses some of them, and in particular their content regarding the identification of targets and treatment of captives. Sivakumaran calls for greater attention to be paid to such codes, not only as a basis for dialogue with armed groups to increase their compliance with the law, but also as a complementary area of investigation alongside the study of treaties, customary law, and legal rulings that make up the law governing non-international armed conflicts.

Although codes of conduct of armed groups may not necessarily correspond to international law, they offer a rare insight into armed groups' own perceptions of their humanitarian obligations. Hence, following on from the publication in the previous issue of 'The Layha for the Mujahideen' or the Taliban code of conduct,⁶ the *Review* continues with a selection of codes of conduct collected by the ICRC's Unit for Relations with Armed and Security Forces. These codes range from the 'Three Main Rules of Discipline and the Eight Points for Attention' set out by Mao Zedong in the 1920s, to the instructions issued by the Libyan National Transitional Council in 2011. Although the legal significance of these codes falls into a grey area, they nonetheless present valuable material for humanitarian organizations working in the field and for researchers studying the practices of armed groups.

Drawing on the abovementioned practical and legal dimensions, the next issue of the *Review*, entitled 'Engaging armed groups', will address the third question: ***how can tangible progress be made towards convincing such groups to comply with the law?***

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6 Muhammad Munir, 'The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, p. 103.