

EDITORIAL: ENGAGING ARMED GROUPS

Following on from the previous issue, entitled ‘Understanding armed groups and the applicable law’,¹ this time the *Review* pursues its study of the phenomenon of non-state armed groups by looking at processes of engaging with these actors.

Most wars today pit states against armed groups or groups against each other, and talking with such groups is therefore vital for all those working to promote compliance with the law and to strengthen the protection of conflict victims.² Reaching them, however, involves overcoming material, security-related, legal, and political obstacles. What arguments can be invoked to convince armed groups? How can their adherence to international humanitarian law (IHL) be strengthened when they are themselves outlaws according to domestic law? How can there be engagement with armed groups in an international context in which any dialogue may be perceived as a form of betrayal or complicity? The overarching question that this issue seeks to cover is how to make tangible progress towards convincing armed groups to comply with their obligations under international law.

The phrase ‘engaging armed groups’ can be understood to refer to various forms of interaction: from measures of repression to negotiation but also an entire range of indirect measures relating to the causes of conflict and the environment in which an armed group operates. This issue’s first article recapitulates the various options for engaging armed groups: Claudia Hofmann of Johns Hopkins University and Ulrich Schneekener of Osnabrück University invoke international relations theory to describe the choices available to the different conflict players depending on their approaches, capacities, and objectives. The *Review* then broaches the issue from the respective points of view of states, armed groups, humanitarian practitioners, and victims.

Any discussion of the engagement of armed groups has to take account of the position of their principal adversary: the state. In addition, raising this question ten years after the 11 September 2001 terrorist attacks on the United States means looking back at the lessons learned from the confrontations, in particular in Afghanistan and Iraq, between the US and its allies, on the one hand, and armed groups, on the other, during that period. In 2010, the US State Department broke with its previous policy of complete marginalization of armed groups.³ In June 2011,

almost ten years after the start of the intervention in Afghanistan, the US acknowledged the beginning of a dialogue with the Taliban.⁴

In the field, how states approach the phenomena of armed groups and counter-insurgency has a direct impact on humanitarian action. To examine these questions, the *Review* interviewed David Kilcullen, who has emerged in recent years as one of the most influential authors and military advisers on counter-insurgency activities. Rather than using the term ‘counter-insurgency’, Kilcullen would prefer states to speak of interventions in ‘complex humanitarian emergencies’, so as to underscore the struggle against the causes underlying the phenomenon of armed groups. He gives his views on recent developments relating to armed groups and military tactics but also on some of the humanitarian community’s main concerns: the potential instrumentalization of aid to ‘win hearts and minds’ and the importance of respect for the law by the armed forces engaged in counter-insurgency activities.

Historically, states have been loath to see armed groups as anything but enemies to be destroyed by firepower. Some governments thus deny, prohibit, and even criminalize any form of contact with armed groups, even by humanitarian agents. In the ten years since 11 September 2001, certain countries have enacted legislation penalizing the provision of material support to organizations identified as terrorist, including many armed groups that are parties to non-international armed conflicts. States have a right and even a duty to protect their citizens from acts of terrorism. However, a broad or vague definition of what constitutes such material ‘support’ could, in practice, preclude any interaction with armed groups, including for the purpose of enhancing compliance with the law or assisting the victims. Claude Bruderlein, Dustin Lewis, and Naz K. Modirzadeh of HPCR (the Harvard Program on Humanitarian Policy and Conflict Research) analyse the rules of international law allowing humanitarian players to interact with armed groups and discuss recent developments that risk criminalizing such contact. They also suggest ways in which those players can tackle the new dilemmas posed by anti-terrorist legislation.

- 1 See *International Review of the Red Cross*, Vol. 93, No. 882, June 2011.
- 2 ‘Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups’. Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2010/579, 11 November 2010, para. 52. In the words of the ICRC president, Jakob Kellenberger, ‘to get better compliance with IHL, the ICRC needs to talk to non-State armed groups and that is what we do, worldwide’. Jakob Kellenberger, ‘Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations’, 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, available at: <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-260909.htm> (last visited July 2011).
- 3 The first Quadrennial Diplomatic and Development Review (QDDR) published by the US State Department in December 2010, entitled ‘Leading through civilian power’ insists on the importance of ‘engaging beyond the state’, available at: <http://www.state.gov/documents/organization/153108.pdf> (last visited September 2011).
- 4 See BBC, ‘Robert Gates confirms US–Taliban talks in Afghanistan’, 19 June 2011, available at: <http://www.bbc.co.uk/news/world-south-asia-13830750> (last visited September 2011).

Having looked at the matter from the point of view of states, the issue moves on to two articles that consider the means of strengthening adherence to the law by armed groups. Armed groups generally have no say in the development of the rules by which they are bound. Indeed, states are the authors of the rules of international law in general and of the rules applicable in time of armed conflict in particular. This may well make armed groups less likely to feel that they have a stake in or to respect those rules, when they do not reject them outright.

Many scholars advocate the participation of armed groups in the development and interpretation of the rules. This raises numerous issues both of feasibility and also, again, of the so-called legal or political 'recognition' that this participation might confer. Sophie Rondeau, legal adviser at the Canadian Red Cross, analyses the arguments that speak in favour of such participation. She then presents possible avenues for involving armed groups in the development and interpretation of the rules of IHL.

The many practical and legal difficulties notwithstanding, participation in the development of IHL might be a path to explore in the future. Implementation of existing rules by armed groups is, however, a constant challenge. In its 2008 study, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*,⁵ the International Committee of the Red Cross (ICRC) identified a series of concrete measures that could be taken to strengthen compliance with the law by armed groups: special agreements, unilateral declarations, inclusion of IHL in codes of conduct or in ceasefire or peace agreements, and granting amnesty for mere participation in hostilities. The non-governmental organization Geneva Call has set a tangible example since 2000, encouraging many armed groups from around the world to agree to abide by specific rules of IHL and establishing monitoring, reporting, and verification mechanisms for that purpose. After presenting such mechanisms in general, Pascal Bongard and Jonathan Somer describe the inclusive approach used by Geneva Call in its efforts to have deeds of commitment relating to the prohibition of anti-personnel landmines adopted and respected by armed groups.

The third perspective is that of humanitarian practitioners. Organizations active on the ground must negotiate with all the parties to the conflict to ensure respect for the law and to have access and deliver assistance to the victims on both sides, impartially. Being active in non-international armed conflicts implies, for example, negotiating humanitarian access with armed groups and government forces to visit persons detained by both camps. Developing a meaningful humanitarian operation in the midst of a civil war is an undertaking fraught with danger and

5 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2008, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (last visited September 2011).

difficulty. In 1871, Henry Dunant, the founder of the Red Cross, took it upon himself to organize relief and evacuations during the Paris Commune, which opposed government troops and insurgents. As for the ICRC itself, it has been carrying out humanitarian activities in non-international conflicts for almost a century.⁶

The *Review* has chosen to illustrate that concrete commitment by presenting an operation that is emblematic of the ICRC's work during the period of decolonization. Fifty years after the independence of Algeria, the historians Françoise Perret and François Bugnion (the latter a member of the International Committee) go back over their research on the organization's activities during the conflict,⁷ focusing in particular on the interactions between the ICRC and the Front de Libération Nationale (FLN). In addition to being of historical interest, the painful experiences of that war hold a wealth of lessons for today's conflicts. They influenced ICRC practice in the ensuing years, as well as the wording of the 1977 Protocols Additional to the 1949 Geneva Conventions. Many of the humanitarian issues of the time, such as the treatment of detainees in non-international armed conflicts, are just as topical today.

Indeed, among the questions on which humanitarian players wish to engage armed groups, the protection of persons captured by such groups is one of the most sensitive to tackle from both the legal and the practical angles. Whether for military, political, or other reasons, the capture of prisoners by armed groups is a reality: the case of the Israeli soldier Gilad Shalit, for example, but also more recently that of anonymous Libyan soldiers and civilians taken captive by the National Liberation Army, are emblematic of the phenomenon. Detention by armed groups nevertheless has no basis in domestic or human rights law, and only an implied basis in IHL. While most of the essential rules of IHL, such as the prohibitions of torture and summary execution, can be applied directly by insurgents with a minimum of hierarchical organization, the same cannot be said of certain rules applying to deprivation of liberty, particularly those relating to judicial guarantees, which call for consequential means. The *Review* has chosen to devote two articles to the question of how to enhance the protection of persons detained by armed groups. Deborah Casalin of Coopération Internationale pour le Développement et la Solidarité (CIDSE), starts by exploring the legal options for ensuring that armed

6 The ICRC conducted its first meaningful operation in a non-international armed conflict in 1918, in revolutionary Russia. It also acted the following year in a similar situation: the revolution led by Béla Kun in Hungary. See Jacques Moreillon, 'Le Comité international de la Croix-Rouge et la protection des détenus politiques', in *Revue internationale de la Croix-Rouge*, Vol. 56, No. 671, 1974, pp. 650–661.

7 See Françoise Perret, 'L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie', in *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 917–951; Françoise Perret and François Bugnion, *Histoire du Comité international de la Croix-Rouge. Volume IV: De Budapest à Saigon, 1956–1965*, Georg, Geneva, 2009. Although France treated the war in Algeria as an internal conflict, it must be borne in mind that the Provisional Government of the Algerian Republic acceded to the 1949 Geneva Conventions in June 1960 – thereby underscoring that it saw the conflict as an international war – and that the war ended with the signing of the Evian Accords, which are considered an international treaty. One of the main achievements of the 1974–1977 Diplomatic Conference was to have wars of national liberation placed on an equal footing with international armed conflicts.

groups respect the prohibition of arbitrary detention. She draws parallels with the law of international armed conflicts – which provides prisoner-of-war status for captured combatants and offers the possibility of interning civilians for imperative reasons of security – to call for a broadening of the rules pertaining to the protection of detainees. David Tuck, former adviser at the detention unit of the ICRC Protection Division and currently ICRC legal adviser in Pakistan, presents the challenges inherent in approaching armed groups with a view to improving the conditions of the persons they detain. After presenting the detention-related humanitarian problems and the obstacles lying in the path of humanitarian endeavour, Tuck explores the options open to humanitarian practitioners and describes ICRC practice in this field, including its limits, thus sharing the unique knowhow that the organization has acquired.

Finally, one of the most delicate questions concerning armed groups' relation with the law is their accountability and the possibility for victims of war to obtain reparation for the harm suffered. All too often, victims simply receive no remedy. The question of whether armed groups can provide such remedy has thus far only been considered as a hypothetical one. Ron Dudai, from Queen's University Belfast, demonstrates in his article that there could be circumstances in which armed groups could provide some measures of reparations to their victims. Drawing some parallels with the cases of the ANC in South Africa and the IRA in Northern Ireland, Dudai extrapolates possible avenues for armed groups to engage in the reparation process for victims.

In presenting these contributions, the *Review* hopes to further enhance the understanding of the phenomenon of armed groups, of the applicable law, and of the modes of engagement with them. In the complex reality of non-international armed conflicts, where the support of the civilian population is sometimes the only thing being fought over, it is not unusual for the parties to combine, successively or simultaneously, the carrot and the stick: that is, to use violence but also assistance, to win people's 'hearts and minds'. While human development is no doubt key to the resolution of many conflicts, and while it is obviously desirable to help populations, a moral line is crossed when the parties to the conflict use, divert, or even prevent humanitarian aid for political purposes. In bucking that trend, it remains as crucial as ever constantly to remind the parties to the conflict that they must respect and facilitate the impartial action of humanitarian agencies, even if doing so implies contact with 'the other side', or the enemy.

Protection of the victims of today's armed conflicts requires respect for international humanitarian law, not only by states but also on the part of those who

remain the outcasts of the international system: armed groups. That paramount requirement no doubt obliges us to rethink the way in which we approach them and to continue improving the arsenal of those defending the victims, who in war have no weapon but the law.

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