

INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSE TO TRANSNATIONAL ARMED VIOLENCE

Thiago Braz Jardim Oliveira*

I. Introduction

Transnational armed groups or even localized armed groups but capable of engaging themselves in cross border operations appear to be a major problem challenging the adequacy and suitability of International Humanitarian Law (IHL)¹. At one hand, there are practical conditions to be fulfilled for the laws of war to apply. At the other, the capacity of States to respond to armed violence, whether by military force or not, is limited to the applicable model of law enforcement and by the rules on the use of force among States. IHL instruments were mainly designed for traditional warfare opposing States and already present a much vague regulation of internal conflicts². A further development of the triggering criteria of the laws of non-international armed conflicts has been achieved specially since Yugoslavia³. Nonetheless, state practice has demonstrated the high discretion upon which the effectiveness of this body of IHL depends⁴. Accordingly, conflict situations involving non-state actors with transnational range give rise to questions relative to the qualification of the disputes and to the adequacy of the longstanding state-centered laws of war. The extraterritorial aspect of non-state actors' armed ability which may fall short of the control of Governmental

* Bachelor of Law candidate (Universidade Federal de Minas Gerais Law School) ; Phillip C. Jessup Moot Court Competition Brazilian Rounds Champion and octafinalist to the International Rounds.

¹ See the report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent 2-6 December 2003, at: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/5xrddc>>

² Jean Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949*, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, p.28; Kalshoven, F; Zegveld, L. *Constraints on the Waging of War* (Geneva: ICRC, 2001), pp.28, 37-8

³ See Fenrick, W.J. The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, *Journal of Conflict and Security Law*, n.3, (1998)

⁴ See Cullen, Anthony. Key Developments affecting the Scope of Internal Armed Conflict in International Humanitarian Law, *Military Law Review*, 183, (2005), pp.66-109

entities invariably implicates third States and the realm of traditional conflicts between States and non-state actors might spans through borders without genuinely disrupting into interstate warfare. Consequential on the transnational-based character of such armed groups is the absence of clear-cut conflict delineations both spatially and temporally. The very confines of the theater of war can hardly be determined and the reasons underlying the concerted actions of transnational organizations provides for a general indefinite duration of the fighting in tandem methods of waging war suiting their needs tend towards slow and lingering hostilities.

With all these in mind, it is argued that IHL may adequately cover armed conflicts involving transnational armed violence. The fundamental question is whether every concerted operation engaged by transnational non-state actors is to be considered an armed conflict within its legal meaning and qualifies for the application of the laws of war. That being as it may, equally subject to controversy is the determination of the nature of armed conflicts between one or several States and non-state actors spreading through borders. Due to the absence of special provisions addressing specifically transnational armed groups, there naturally accrues difficulties in that determination and the legal framework to be invoked as dependant on strict threshold conditions may lead to an under-regulated combat area while other branches of international law (mainly Human Rights Law) are of narrower scope as for extra-territorial action. Apart from the scope of the laws of war, conflict situations of such nature would primarily require concerted action between States by means of cooperation. Coordinated law enforcement operation is not a new model of combating international common threats in line with territorial sovereignty. Nevertheless, the need of Governments to respond extraterritorially with military force to transnational groups failing inter-state agreement may engender an abnormal situation pending the proper qualification of an armed conflict and yet a contest between stateless non-state actors and States. In this regard, the law on the use of force (*jus ad bellum*) which regulates what may be the very first step towards the creation of a conflict situation also unfolds into a rather delicate area of discussion in light of internationally-based non-state actors and the classic concepts of armed attack and the right of self-defense. And although the laws of war properly apply to events within established frames of armed conflict, references to IHL while previous to the outbreak of hostilities are needed for the determination of the limits on the armed actions felt in foreign State territory. Also the application of IHL case by case could be anticipated under the auspices of the UN Security Council for each military operation

subject to its authorization. As for the determination of the confines of worldwide conflicts and the implications of non-responsive third States, the rules on State responsibility are constructive for defining geographical boundaries to the laws of war as the attribution of responsibility for acts carried out from foreign soil, although not always possible, may be relevant to the qualification of the legal frameworks.

Still there would remain the major query to be solved, namely, what is the Law's relevance if non-state actors have no stake in abiding by the rules for they are given no protection under IHL and States may resort to force without constraints as no rights are seemed to be afforded to such enemies? The problem seems to lie at how to reconcile IHL and the State targeting of civilians once the core element of transnational groups' strategy is based upon not distinguishing themselves from the populace.

II. The Westphalian paradox of transnationality and statelessness

In a state-centered paradigm which has modeled warfare and the rules on the use of force, the relationship between States and their peers not able of controlling borders or exercising proper authority within their territories is particularly problematic once it comes to non-state actors operating globally or regionally from such failed States. As opposed to unambiguous state-sponsored groups' activities, the new phenomenon of transnational non-state actors has brought concerns about the meaning of the established concept of sovereignty and all its tenets⁵. Although we will attempt to address not only armed groups free from an important amount of state control, it is worth introducing alone theoretical implications in the State ability to respond forcefully in a conflict scenario spreading through borders against stateless entities.

Indeed, the United Nations Charter framework governing the use of force is thoroughly based upon the equality among States⁶ and so are the laws of war of which

⁵ See Kelly, Michael J. "Pulling at the Threads of Westphalia: Involuntary Sovereignty Waiver - Revolutionary International Legal Theory or Return to Rule by the Great Powers?" *UCLA Journal of International Law & Foreign Affairs*, vol. 10, n. 2, p. 361-440, 2005; Howard, Russell. "Post Westphalian Realities: Incorporating Anarchy, Transnational Non-State Actors, and WMD into the International Relations Curricula" Paper presented at the annual meeting of the International Studies Association 48th Annual Convention, Hilton Chicago, CHICAGO, IL, USA, Feb 28, 2007

⁶ Charter of the United Nations, Articles 1(2), 2(1), 1 U.N.T.S. XVI; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the

the drafting took full account of the principle of state sovereignty as determinant to the rigid duality of international and non-international armed conflicts⁷.

At the stage preceding a definite recourse to force, the prohibition on the use of armed violence in the international level has always been referred to as a State-to-State relation and the consequential right of self-defense has thus been interpreted as allowing only one State to respond to another's armed attack⁸. However, this approach does not offer a straightforward solution to the contemporary security threat posed by transnational non-state actors. With the ability to launch and sustain highly-destructive attacks against States from another State's territory, transnational organizations constitute a new actor in the international arena playing and being countered under rules not originally predicted for it. In order to combat a transnational threat – which is usually based in foreign territory – States must resort to extraterritorial action and this does not always correspond to agreed operations by the receiving State.

The laws of armed conflict, in turn, currently exist lying in a clear distinction between conflicts opposing States and conflicts opposing States and non-state actors or between such actors. The Geneva Conventions⁹ and Additional Protocol I¹⁰ apply to international armed conflicts while only Common Article 3 of the Conventions and a

Charter of the United Nations, U.N.G.A. Res. 2625, U.N.GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970)

⁷ Stewart, J. G. Towards a Single Definition of Armed Conflict in International Humanitarian Law: a critique of Internationalized Armed Conflict, *International Review of the Red Cross*, vol.85, n.850, June 2003, pp.313-350; see also Pictet, J. La formation du Droit International Humanitaire, *Revue Internationale de la Croix Rouge*, vol.84, n.849, June 2002, pp.321-344

⁸ *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p.94, para.115; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136, para.194.

⁹ Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Convention [III] relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Convention [IV] relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287

¹⁰ Protocol [I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3

very vague Additional Protocol II¹¹ cover non-international armed conflicts. In terms of treaty provision referring to the nature of the parties to a conflict, clashes between States and non-state actors cannot be international in character¹². At the same time, the wording adopted by both Common Article 3 of the Geneva Conventions and Article 1 of Protocol II, which deal with armed conflicts not of an international character, is restrictive as it states they shall apply to struggles “occurring in the territory of one of the High Contracting Parties” and to those “which take place in the territory of a High Contracting Party” respectively. Conflicts involving transnational armed groups threatening from abroad the integrity of States were not foreseen by the drafters as the reality upon which was based these classifications was that of their time, when the threat posed by stateless armed groups was exclusively localized within the boundaries of States fighting those rebels seeking government change¹³. Accordingly, sovereignty is known to have played a fundamental role in the limitation of the applicable rules to struggles against non-state actors¹⁴ for States would naturally not grant insurgents a right to fight established governments. Now, concerns of sovereignty and territorial integrity are confronted with transnationality and the absence of State attribution, with a new type of threat whose objectives and methods challenge the scope and what should be the applicable law.

III. The right of self-defense against transnational armed groups

III.1. Self-defense against non-state actors

In this changing scenario, the eruption of hostilities between States and transnational armed groups capable of constituting an armed conflict is contingent on cross-border violence. The actions leading to the outbreak of such a framework which calls for the application of the laws of war is regulated by *jus ad bellum* norms. As we

¹¹ Protocol [II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609

¹² Geneva Conventions, *supra note* 9, Common Article 2.

¹³ See Bugnion, F. *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, *Yearbook of International Humanitarian Law*, vol.6, pp.167-198.

¹⁴ Jinks, Derek. September 11 and the Laws of War, *Yale Journal of International Law*, vol.28 (2003), pp. 31-38

mentioned before, in a Westphalian paradigm the concept of sovereignty plays a key role in the shape of the rules on the use of force and transnational armed violence is not conceivable without being state-sponsored or state-endorsed. When it happens that States do not endorse or control the activities of armed groups threatening other States from the formers' territories, does international law provide an option to the endangered nations?

There is no consensus among scholars and practitioners whether there is a legitimate right of self-defense against non-state actors and under what circumstances. Some argue that an armed attack within the meaning of Article 51 of the United Nations Charter must be launched by one State against another¹⁵. Others contend that the inherent right of self-defense only require that an armed attack be launched, relying on contemporary State practice and upon the wording adopted by Article 51 which does not contain any reference to the need for a State to be the aggressor¹⁶. The characterization of what constitutes an armed attack is also a critical aspect since it may be argued that an armed attack per definition has to originate from established States.

Without a doubt, the right of self-defense must be read in conjunction with the prohibition on the use force embodied in Article 2 paragraph 4 of the U.N. Charter. That general prohibition explicitly binds upon States in the context of their international relations. However, the inherent right of self-defense constituting an exception to the use of force among States not necessarily is circumscribed to the occurrence of an armed attack attributable to one State and neither depends upon a direct violation by one State of this general prohibition. And even if it was the reading, arguably the concept of self-defense has been broadened by contemporary practice involving transnational armed groups as new and prominent actors in the international scene.

¹⁵ See *supra* note 8

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, Separate Opinion of Judge Kooijmans, p.219, para.35 – Declaration of Judge Buergenthal, p.240, para.6; Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, Separate Opinion of Judge Simma, para.11; See also Shah, Niaz A. Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law's Response to Terrorism, Journal of Conflict & Security Law, vol.12, n.1, pp.95-126; Franck, T. Terrorism and the Right of Self-Defense, The American Journal of International Law, vol.95, n.4, pp.839-843.*

In this author's view, the right of self-defense may be triggered by non-state actors provided a number of conditions are fulfilled: the non-state actor must have launched one or several attacks tantamount to an armed attack against the State; it must be based outside the affected State's borders; and the State from which territory the non-state actor operates must at least be negligent in regard to the threatening activities of the transnational organization or incapable of containing it.

First, the fundamental requisite for the existence of a right of self-defense is the initiation of an armed attack against one State. There is no agreed definition of what constitutes an armed attack although many authors have attempted to classify it as the same as aggression¹⁷ and thus mainly dependent on State attribution. But still according to General Assembly Resolution 3314 (XXIX) which provides for guidelines for a definition of aggression, the list provided therein is not exhaustive and the Security Council may determine that others acts constitute aggression under the provisions of the Charter¹⁸. In any circumstances, it is noteworthy that the expression armed attack in the Charter appears under Chapter VII which includes not only actions with respect to acts of aggression but also to threats to the peace and breaches of the peace. Most remarkably in the aftermath of the events of 9/11, the Security Council determined the existence of a threat to the peace posed by terrorist attacks and acknowledged the existence of a right of self-defense although not attributing to one State the responsibility for the attacks against the United States¹⁹. What appeared to be relevant was the intensity and magnitude of the attacks regardless of its authors. Bearing in mind the particularities of transnational armed groups capability buttressed by enduring hostile acts, it may be argued that one single armed attack enacting the right of self-defense may be considered to have occurred following a series of small events taken cumulatively²⁰, in accordance with the reading of the accumulation of events theory

¹⁷ Gaja, G. In What Sense was there an "Armed Attack"? *European Journal of International Law Discussion Forum*, at: < http://www.ejil.org/forum_WTC/ny-gaja.html>

¹⁸ UNGA Res. 3314 (XXIX), 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974), Article 4.

¹⁹ UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001)

²⁰ Feder, N. M. Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack, *New York University Journal of International Law & Politics*, vol.19, p. 415

suggested by the International Court of Justice²¹. Once determined the existence of an ongoing armed attack launched by the non-state actor, the targeted State is entitled to exercise its inherent right of self-defense concurring the following two conditions

Second, for the use of force by one State to be covered under the right of self-defense, the targeted non-state actor must be transnational in character. The organization responsible for an armed attack must use one State's territory to coordinate attacks against another, otherwise there would be no sense in invoking a right of self-defense to combat a threat from within its borders as this would be an exclusive internal matter of the endangered State.

Third, also an imperative criterion for the existence of a legitimate right of self-defense against non-state actors, the State from which a transnational armed group operates must be either unwilling or unable to take the necessary measures to prevent the use of its territory as a platform for hostile acts against other States. The standard for determining whether or not a State has the right to use force in the international level incidentally hitting another State's territory is placed on the ability of the latter to exercise effective authority over its territory or to cooperate with the endangered State. That is not to say that attribution of responsibility to one State for the armed attack is required. If recourse was needed to be made to the rules on State responsibility in these terms, still we would have a situation in which the right of self-defense would be dependent upon an attack being launched by one State against another by means of an armed organization acting on its behalf. In the case of stateless transnational armed groups, the absence of responsiveness from harboring or simply failed States suffices to give legitimacy to extraterritorial incursions targeted at the non-state actor, provided the other two conditions are met. However, assessing whether a State is unwilling or unable to take the necessary measures to prevent the transnational threat from operating within its territory is politically a delicate issue. Even where the hosting State does intend to act, but having dispensed with cooperation in the form wished by the injured State, still there would be room for discussing whether there is an actual willingness on the part of the former State if the expected results are not produced. In any case, inability could be invoked provided the transnational threat is not barred from action.

²¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p.161, para.64

Article 51 of the U.N. Charter is known to reflect customary international law and the emergence of a right of self-defense against non-state actors is essentially by operation of customary law. The subsequent practice in applying the treaty provision – as noticeably States have relied on Article 51 to respond to non-state actors – has been responsible for broadening the meaning of self-defense which appears now to be part of contemporary international law. Relevant state practice has not always been accompanied by the approval of the international community but the most recent events have been followed by a general and consistent reaction demonstrating the belief that a rule of law was indeed involved particularly in situations where the standard of unwillingness or inability was met. It includes the responses of specially affected States to transnational networks called terrorists and the position of other States and international bodies as regards each event²². A brief analysis of some of those cases confirms the need of a three-point condition for the existence of a valid claim recognizable under international law to self-defense against non-state actors without leading to disproportionate outcomes.

For example, the Israeli raid allegedly targeted at Palestinian Liberation Organization (PLO) headquarters in Tunis on 1st October 1985 was met with strong criticisms of the international community²³. Although PLO had assumed responsibility for the killing of three Israeli soldiers in Cyprus on September 25, there had been no evidence of an armed attack coordinated from Tunisia but from Lebanon. And even if it was established an armed attack had occurred using Tunisian territory as a platform, no attempt to cooperate with Tunisian authorities were sought by the Israeli government. Lacking the unwillingness-or-inability condition to be assessed on the part of the hosting State, there can be no legitimate right to self-defense against a transnational armed group based in a sovereign State's territory.

Conversely, the 2007 Turkish airstrikes on Kurdistan Workers Party (PKK) positions in Northern Iraq were followed with no resistance from States and counted with the support of the United States for a claim to self-defense against terrorist organizations²⁴. Certainly there is much place for doubts to be raised as regards the

²² See, for example, UNSC 5489thmtg: *The situation in the Middle East* (2006), pp.12, 15-17.

²³ UN Doc. S/RES/573 (1985)

²⁴ Arsu, S.; Farrell, S. "Turkey Says Its Raids in Iraq Killed 150 Rebels". The New York Times 26 December 2007, at: <<http://nytimes.com/2007/12/26/world/europe/26turkey.html>>

influence of the U.S. government and its relationship with Iraqi authorities. The real inability of Iraq to control the Iraqi-Turkish border is not the controversial matter as the Arab State has been affected by an enduring state of emergency, but the absence of objection against the incursion within its territory might be doubtful. In any case, the tacit acquiescence of such affected States may be read as indicative of a general recognition of the law on self-defense.

But the landmark of the State response to transnational armed violence responsible for the crystallization of a right to self-defense in the terms described above is certainly September 11. The reaction of the international community was unanimous and led to the adoption of mandatory resolution by the Security Council under Chapter VII recognizing a legitimate right to self-defense triggered by attacks launched by stateless entities. As the resolutions validated a claim under Article 51 of the UN Charter and simultaneously condemned harboring States for providing financial support or safe haven to terrorist networks, the unwillingness standard proved its significance combined with the existence of an ongoing armed attack and the transnational aspect of the threat.

III.2. Misreading the permissions of the laws of war as a covert right to self-defense against non-state actors

In fact the laws of war contain permissions on the use of military force in the established context of an armed conflict. As regards cross-border violence before the outbreak of such a framework, the laws of war do not provide a valid basis for authorizing recourse to extraterritorial armed action. It is the nearby domain of the laws on the use of force as two or more States may be implicated. Therefore, the first strike from a State in response to a transnational organization must fall within the sole possibility of ruling out the general ban on the use of force, namely, under the right of self-defense. A legitimate claim for self-defense against non-state actors is conditional upon the occurrence of the three circumstances abovementioned. Depending on the connection between the non-state actor and the State from which it operates – within the third condition – the nature of a resulting armed conflict may bear important consequences and also the permissions on the use of the military may be more or less extended. However, in the absence of armed conflicts covering an area potentially subject to military intervention or failing clear-cut geographical boundaries to

established armed conflicts, reliance on the laws of war to authorize incursions targeted at transnational organizations in the territory of sovereign States amount to wrongfully anticipate the application of IHL. At this stage the laws of war should only be used to determine the limits of the armed actions previously authorized under a legitimate right of self-defense²⁵.

The appraisal of the United States of the nature of a worldwide struggle against Al Qaeda is possibly filled with a misreading of the laws of war in the sense it might be used to serve as a basis for all sorts of extraterritorial military action. In its Instructions to the Military Commissions, the U.S. administration is of the view that an armed conflict “does not require [...] ongoing mutual hostilities [...] A single hostile act or attempted act may provide sufficient basis [...] so long as its magnitude or severity rises to the level of an ‘armed attack’ or an ‘act of war’, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement”²⁶. The idea is that following a single act, regardless of the parties involved, a situation of armed conflict is installed. This appears to be true in the context of traditional wars between States as the employment of armed violence further than the opening response from the offended State is already governed beyond the general prohibition on the use of force. Nevertheless, as long as transnational armed groups are concerned and consequently non-belligerent States come to scene as part of a possible theater of war, actions taken in the context of lingering hostilities against stateless organizations hitting foreign territory need always be answered first by the *jus ad bellum* and not justified under IHL. Although hostilities against transnational armed groups inevitably span through borders, the unilateral use of force against non-state actors incidentally striking the territory of States not fulfilling the unwilling-or-unable standard falls short of the proper exception to use force among States of which assessment is a precondition to the lawfulness of any extraterritorial forcible action.

²⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para.42.*

²⁶ Military Commission Instruction, Crimes and Elements for Trials by Military Commission, Section 5(C), April 30, 2003, at: <<http://www.au.af.mil/au/awc/awcgate/law/d20030228dmci.pdf>>

Targeted killings in the context of the so called War on Terror seem to lie among attempts to overrule the prohibition on the use of force among States and to hinder the meaning of sovereignty. The airstrike conducted by U.S. Forces in Yemeni territory on 4 November 2002 which resulted in the death of six suspected members of Al Qaeda²⁷ is an episode in which the law on the use of force was set aside in the discussions as the focus remained in the lawfulness of the killings. The engagement was qualified by U.S. officials as “military operations against military combatants” while they responded criticisms affirming that the “conduct of a government in legitimate military operations, whether against al-Qa’ida operatives or any other legitimate military target, would be governed by the international law of armed conflict” and concluded that “al-Qa’ida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances”²⁸. The question of the lawfulness of the operation is certainly affected by the relationship between Yemen and the United States and whether the intervention corresponded to an action challenged by the injured State. Allegedly Yemeni authorities would have acquiesced to the U.S. engagement. However, beyond the question about the consent freely manifested and its relation with coercion in the case, an exception to use force in the form of targeted raids which otherwise would amount to an armed aggression cannot be invoked by ordinary circumstances precluding the wrongfulness of acts of States²⁹. The peremptory character of the prohibition on the recourse to force in the international level³⁰ is to be read in light of the only recognizable permission under the inherent right self-defense.

IV. The characterization of conflict situations involving transnational armed groups

²⁷ BBC News. “CIA Killed Al Qaeda Suspects in Yemen” 5 November 2002, at: <http://news.bbc.co.uk/1/hi/world/middle_east/2402479.stm>; Amnesty International. “Yemen: The Rule of Law Sidelined in the Name of Security” September 2003, at <<http://web.amnesty.org/library/Index/ENGMDE310062003>>

²⁸ Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights. E/CN.4/2003/G/80, 22 April 2003.

²⁹ ILC, Draft Articles on State Responsibility, Art.26

³⁰ *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986, p.94, para.190*

In the current stage of development of IHL, conflict situations with transnational armed groups may qualify for the application of the laws of war only if an armed conflict is involved. The subsequent characterization of the nature of such an armed conflict is what determines whether the laws of international armed conflicts or that of non-international armed conflicts is the performing legal framework. It is particularly this actual possibility of the existence of conflicts involving transnational armed groups meeting the threshold of an armed conflict and the rigid duality of the laws of war between international and non-international armed conflicts what poses the question of what effectively is or should be the appropriate rules to regulate this contemporary conflict situation.

The characterization of a given conflict situation as an armed conflict within the meaning of IHL depends upon more or less detailed criteria varying according to the nature of the parties to the dispute and as a result to the nature of the conflict itself. Traditionally, as long as stateless organizations are one of the actors in the fighting, they must fulfill a set of conditions in order to fit within the realm of IHL as an armed group party to a conflict. As part of concerns about State sovereignty, the reasons underlying a higher threshold for the existence of an armed conflict against non-state actors are accountable for drawing the distinction with internal disturbances or tensions, such as riots, isolated and sporadic acts of violence, outside the scope of IHL. The result is that, *inter alia*, for an armed group to be an addressee of IHL it must be at a minimum organized and participate in protracted armed violence³¹. Yet this is the scenario foreseen for classical non-international armed conflicts. On the other hand, when the non-state actor act on behalf of a State as its *de facto* organ and the parties to the struggle are thus one State against another but acting through *partisans*, any act of violence opposing them suffices to determine the existence of an armed conflict international in nature. The armed group's organization is relevant so as to determine the status and therefore the extension of the protection enjoyed by its members, although the laws of war might be in place independently of this criterion.

In the absence of State attribution, lingering hostilities having transnational networks at one pole and one or more States at the other will trigger the applicability of

³¹ ICTY, Decision on Jurisdiction, Tadic, Appeals Chamber, October 2, 1995, para. 70, and Judgement, Delalic, Mucic, Delic, and Landzo, Trial Chamber, November 16, 1998, para. 184.

the laws of war provided there are well-defined parties to such a conflict. The transnational armed group must be sufficiently organized, as if it was acting under a responsible command with a hierarchical chain, in opposition to disconnected and loosely related groups of persons. Otherwise there would be no sense in invoking IHL since there could be no mutual relations of duties and rights between recognizable parties but an empty legal discourse to place armed actions without restraints. Although equality of rights between non-state actors and States is not an attribute of the laws of war, there is a clear framework of legal obligations incumbent upon the parties to minimize collateral human suffering without hindering their military capacity. Still there remains the question earlier raised as to whether transnational armed groups would have stake in abiding by the laws of armed conflict if the regulations regarding their members' statuses may vary according to their way of waging war and in all cases would allegedly offer little protection. The latter question will be dealt with later.

This could be the scenario as regards the Israeli-Hezbollah conflict between 1 July and 31 August 2006 in Southern Lebanon. Under the conventional rules on State responsibility there is little room for attributing to Lebanon the armed actions undertaken by Hezbollah. Lebanon purportedly did not exercise any degree of control over the armed group's military campaign nor has it endorsed the latter's conduct³². And even most optimistically Hezbollah could not be exercising elements of governmental authority in terms of policy direction as Lebanese officials were not suppressed and remained active and recognizable³³.

As aforementioned, an independent non-state actor cannot be a party to an international armed conflict and this remains true even if the battlefield crosses borders. However, account should be taken of the fact that armed actions undertaken in response to transnational armed groups incidentally damage the territory and other facilities of the hosting States. It is also noteworthy that transnational armed groups as currently recognizable rely upon not distinguishing themselves from the civilian population as a method of war. In such cases, differently from traditional wars with non-state actors, the civilians involved in the combat zone are nationals of another State subject to another authority and may potentially undercover enemy combatants part of the transnational networks at war against different States. As a result, in terms of conventional law the

³² UN Doc. S/RES/1701 (2006)

³³ ILC, Draft Articles on State Responsibility, Art.9

targeting of civilians and civilian objects abroad as part of State response to transnational armed violence at a first sight falls short of the detailed provisions for the protection of civilians as embodied in the fourth Geneva Convention and other relevant rules for international armed conflicts. At the same time, a war waged by one State outside its borders and affecting civilians of a different nationality cannot be equated to an intra-state armed conflict subject to genuine concerns of sovereignty and attached to the internal aspect of the principle of self-determination. Although there is no ground for determining the existence of an armed conflict international in character and still the threshold of violence and nature of the parties confirms the reality of a non-international armed conflict, the rules designed for disputes between States and stateless armed groups do not consider the extra-state extension of the theater of war.

Interestingly, the existence of two different legal regimes accompanying the character of armed conflicts and the applicability of the laws of war to conflict situations reaching a high threshold of armed violence bear the idea that there is no gap between the laws of international armed conflicts and that of non-international armed conflicts. The view is mostly supported by the definition in the negative form of the scope of application of both Common Article 3 and Article 1 of Additional Protocol II as they refer respectively to “armed conflicts not of an international character”³⁴ and to “armed conflicts which are not covered by Article 1 of [...] Protocol I”³⁵. But, as noted earlier, both provisions are ambiguous as they refer to conflicts taking place in the territory of one High Contracting Party. Based upon this confusing literal reading, armed conflicts spreading over the territory of several States opposing States and non-state actors would be neither international nor non-international although still an armed conflict. Some authors argue that, in light of the aim and purpose of IHL, this territorial limitation of the material field of application should be read as simply recalling that treaties only apply to their State parties, otherwise there would be a gap in protection which could not be explained by States’ concerns about their sovereignty³⁶. In our view, this remains true in what regards the absence of a legal black hole in the laws of war, but the classification of all armed conflicts not between States within the scope of the

³⁴ Geneva Conventions, *supra note* 9, Common Article 3

³⁵ Protocol II, *supra note* 11, Article 1

³⁶ Sassòli, Marco. *Transnational armed groups and International Humanitarian Law*. Cambridge: HPCR, Harvard University, July 2006, p.9

laws of non-international armed conflicts departs from what was intended at the drafting of the relevant provisions and from the subsequent State practice in applying those norms. Armed conflicts across borders with transnational armed groups were not planned to be covered by the laws of war designed for traditional civil wars and common sense in assessing the practical consequences of such conflict situations reveals the insufficiency of this body of IHL to deal with the possible outcomes ranging from civilian casualties to detention and treatment of foreigners combatants and non-combatants.

Reference to the Israeli-Hezbollah conflict during middle 2006 may provide a deep understanding of the characterization of armed conflicts with independent non-state actors operating from abroad. The conduct of Israel is of particular interest as the State response to Hezbollah was directly felt by Lebanon. Taking into consideration the nature of the parties to the conflict, the legal framework governing the conduct of hostilities between Israel and Hezbollah would appear to be that of a non-international armed conflict. However, as we mentioned, the range of the armed actions in response to the transnational violence might implicate civilian objects and the civilian population of the non-belligerent State as part of a directly targeting or the result of incidental losses. In this scenario, the unwilling-or-unable standard upon Lebanon authorizing Israel's response to the armed actions coordinated by Hezbollah from Lebanese territory also plays a role into the determination of the proper framework for the conduct of the war effort by the parties to the conflict. Israel has directed attacks throughout Lebanon, Israel's military agents have been deployed into a sovereign State territory and a bombing campaign was engaged aimed at national infrastructures and the Lebanese population suffered directly the effects of the Israeli state of belligerence against Hezbollah. The lack of resistance from Lebanon, which might be explained by its military inability both to contain Hezbollah and to counter Israeli incursions, cannot deprive itself from the protection of the laws of war if an armed conflict is ongoing within its territory and has involved its population and resources. Similarly, once suffering the direct outcomes of a war taking place within its boundaries between another State and a transnational organization, the population of a failed State from which operate armed groups cannot be set aside from IHL by a denial of the applicability of the laws of war simply because the State is unable or unwilling to defend itself militarily. Recognition of a state of belligerency is not a requisite for

determining the applicability of the laws of international armed conflicts nor is it the symmetry of armed violence between the parties³⁷.

In this author's view, conflict situations opposing one or several States and stateless armed groups reaching another States' territory may be two-folded. The definition of a mixed legal framework is primarily contingent upon the nature of the parties and upon how the belligerent State's response implicates the territory, the population and the government of non-belligerent States part of the extraterritorial theater of war. A conflict situation shaped into or by two armed conflicts will contain events subjected to both the laws of non-international and to that of international armed conflicts to govern each event in accordance with the elements involved in each military action. Despite earlier criticisms, reliance is still placed upon the two longstanding categorizations of armed conflicts and upon their triggering criteria in order to give a conventional-based support to a contemporary reading. Beyond the qualification of the nature of the armed conflict, each particular case seems to require an accurate analysis of the role played by the parties to the struggle and their relation towards foreign non-combatants in the territory of sovereign non-belligerent States.

V. Status, capture and detention of transnational armed groups' members under the laws of war

Established the proper framework to govern the conduct of hostilities between States and transnational armed groups, the determination of the status of the persons finding themselves in the battlefield is the following step to give full applicability to IHL and the principle of distinction. According to the status of persons object to targeting and capture, the lawfulness of each armed action may be assessed and the applicable rules to each military engagement including detention and treatment of prisoners determined. Bearing in the mind the changing nature of armed conflicts involving transnational non-state actors and the ambiguities inherent in contemporary practice of the affected States in response to transnational networks, we will attempt to

³⁷ Geneva Conventions, *supra note 9*, Common Article 2; Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various Problems relative to the Red Cross, Geneva, 1947, p. 15 apud Commentaries on the III Geneva Conventions, *supra note 2*, p.20

provide a general reflection on the possibilities of the laws of war to adequately govern transnational military engagements.

Should the laws of non-international armed conflict be the performing legal scenario, there is no such a distinction between civilians and combatants. IHL tenets of protection for non-combatants are put in place by virtue of the notion of direct participation in hostilities. Once in the hands of the adversary party to the conflict and thus out of combat, both active fighters and non-combatants enjoy the same amount of protection under that law. As particularly in non-international conflicts the applicable rules are restricted to Common Article 3 and to Additional Protocol II, it is legally impossible for the enemy combatant to be a lawful combatant for combatant status itself does not exist outside the laws of international armed conflicts. And although at times misplaced, in such contexts the term unlawful combatant could apply to every person taking up arms against the State as also to transnational armed group's members who cannot enjoy the privileged of belligerency in accordance with rules originally designed for civil wars.

Arguably, in the interest of the fighting States, the laws and customs of war could be used to provide a legal basis for capture and detention of transnational armed group's members fitting into the notion of direct participation in the war effort. However, the absence of detailed provisions in this regard leaves the question opened as to whether the absence of regulations on the confinement of individuals during non-international armed conflicts could be interpreted by reference to the controversial idea that in the silence of law States remain free to act as they intend³⁸. We are of the opinion that the principles of the laws of war *per se* authorize capture and detention of persons taking part in the hostilities for the duration of the conflict, as it is also provided in the laws of international armed conflicts. However, in the situation of a lasting state of war as it is usually submitted by States in the case of asymmetric warfare involving transnational groups, the prolonged confinement of persons apprehended in connection with a conflict not of an international character reveals the problem posed by the absence of a definite categorization of individuals implicated in the conflict. As the degrees of participation in the conflict may vary from one person to another and still

³⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1 C.J. Reports 1996, p. 287, Separate Opinion of Judge Guillaume, para.9.*

represent a direct participation in the hostilities, evaluation of each particular case seems to be required in order to give legitimacy to prolonged detention.

What is sure in our view is that IHL may provide a sufficient basis for detention of persons in the context of a non-international armed conflict although the proceedings to establish the applicability of the laws of war with regard to continued detention should be assessed within the laws in force of the detaining State³⁹. But being the reality of conflict situations with transnational armed groups also linked to the territory of non-belligerent States, it worth mentioning that confinements of detainees maintained within another State's territory should be reviewed in relation to the laws of that State. Following the principle of territoriality, the enforcement of the local law relies on either the consent of the hosting State as regards the military intervention or a situation of occupation is in place, bringing into force the parameters of the laws of occupation besides internationalizing the conflict.

On the other hand, being the applicable law that of international armed conflicts, the definition of the status of transnational armed groups' members is contingent upon the organization of the group itself and upon compliance with the principle of distinction by their members. The conditions for armed groups acting on behalf of a State to be granted combatant status are set forth in Article 4 of the Third Geneva Convention and include compliance with IHL. The loss of the right to take part in the hostilities by the individual member of an armed group qualifying to Prisoner-of-War status only operates if the he fails to distinguish himself from the civilian population while engaged in the fighting. With respect to the possibility recognized in Additional Protocol I for combatants to resort to guerrilla tactics and not to be identified as members of the enemy forces, still there is a need for compliance with the principle of distinction by the armed group's member during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack⁴⁰.

³⁹ For a different approach, see Zayas, Alfred de. Human rights and indefinite detention, *International Review of the Red Cross*, vol.87, n.857, Mar. 2005, pp.15-38

⁴⁰ Henckaerts, J.M. Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, *International Review of the Red Cross*, vol.87, n.857, March 2005, p.207, rule 106

In the commonly debated picture of combating transnational terrorist organizations – assuming it is a case to apply IHL of international armed conflicts – criticisms are found to be placed on the categorization of unlawful belligerency, on the targeting of civilians by States and on the detention and treatment of unlawful enemy combatants. Transnational armed groups as we currently know usually resort to methods of war in blatant violation of the laws of war for several reasons⁴¹. Still they are organized and may constitute a recognizable party to the international armed conflict, though acting in cooperation or on behalf of another State. It is particularly in this scenario with transnational armed groups engaged in lingering hostilities having its members melted into the civilian population that the categorization of transnational armed groups' members as unlawful combatants would seem to be natural. However, according to the Geneva Law, an unlawful combatant is a civilian who take up arms and is to be treated as a civilian under the detailed protection of the Fourth Geneva Convention provided the criteria of nationality and allegiance are met. Within its limited range of options, the State response to such individuals might include prosecution for acts committed during the hostilities and the State is not barred from targeting them in the battlefield as long as they are engaged in the fighting. The lawfulness of the targeting of civilians as part of the State response to transnational violence is thus a practical issue although difficulties in determining military and non-military objectives is reflected in common incidental civilian losses. Certainly, the major difficulty posed to by unlawful combatants, transnational armed group's members hiding as civilians, lies at how to determine the moment there is actual participation in hostilities and how to lawfully counter such individuals by means of military force while they are with arms down. A revolving door would be opened for transnational armed groups to during day perpetrate acts of war and during night be immune from armed attacks.

In what concerns detention and treatment of unlawful combatants, surprisingly to some, the provisions for international armed conflicts intended for civilians may provide a somehow adequate framework for dealing with transnational armed groups' members. The State prerogative to derogate from substantive rights granted in the Fourth Geneva Convention to protected civilians for security reasons comprises the

⁴¹ See Mohammad-Mahmoud Ould Mohamedou, *Non Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States*. Cambridge: HPCR, Harvard University, July 2005

possibility of internment and restrictions on communication⁴². The detention of unlawful enemy combatants may thus be supportable for the duration of the hostilities. As civilians who have forfeited their immunities from attack and with no right to participate in warfare, they may also be remanded in custody even after the general close of the fighting but until completion of pending proceedings leading to penal prosecution for acts committed in relation with the armed conflict⁴³.

VI. Conclusion

Struggles against transnational armed groups are frequently fought outside the opposing State's borders in the sovereign territory of another States. Questions are therefore to be answered first regarding the degree of participation of hosting States in the transnational groups' armed ability to launch cross-border armed attacks and, as result, in relation to the existence of a right to respond and sustain response against a stateless actor incidentally implicating non-belligerent States.

The consequent qualification of legal frameworks governing contemporary conflict situations reveals several misgivings about the law. Exchanges of disconnected worldwide violence not armed conflict at all could be used so as to invoke the logics of the laws of war and create a legal discourse to place a model of combating international threats outside the rule of law. IHL, provided it is used in the circumstances foreseen in its material field of application, still encloses adequate rules to tackle armed violence engaged by armed groups. However, applying established categorizations of armed conflicts to rising armed violence between States and transnational organization requires the confirmation in practice of the existence of several particular elements to determine which body of IHL is the prevailing.

As we briefly mentioned earlier in this paper, the rules designed for traditional wars between States in what regards the protection of the civilian population could be regarded, in all cases of extra-state conflict involving transnational armed groups, as providing guidelines for State action in foreign territory. In this respect, the laws of non-international armed conflict appear to be insufficient. Furthermore, by virtue of the extraterritorial aspect of the military operations, in the extra-state scenario short of

⁴² Convention IV, Art.5(1) and (2), respectively

⁴³ Convention IV, Art.133

occupation, there remain no more than the laws of war to bind the belligerent State in its military engagements during conflict situations.

Finally, one might contend that contemporary practice in applying the law has proven to be much more state-oriented on the permissions on the use of force instead of concerned with the protection of victims. Besides the existence of a heated debate regarding the permissions of the laws of war, in this author's view, the ability of States to properly respond to transnational armed groups may only be found within that law provided we accept in some instances the overruling effect of IHL over certain peacetime commitments and embrace the idea that armed conflicts are indeed states of exception.