

Proceedings of the Bruges Colloquium

Terrorism, Counter-Terrorism and International Humanitarian Law

**17th Bruges Colloquium
20-21 October 2016**

Actes du Colloque de Bruges

Terrorisme, Contre-Terrorisme et Droit International Humanitaire

**17^{ème} Colloque de Bruges
20-21 octobre 2016**



College of Europe
Collège d'Europe



CICR

ICRC Delegation to the EU, NATO and the Kingdom of Belgium
Délégation du CICR auprès de l'UE, de l'OTAN, et du Royaume de Belgique

Guillaume Muller

Sous la direction de
Stéphane Kolanowski

**Members of the Editorial Board, College of Europe/
Membres du Comité d'édition, Collège d'Europe**

Luis Bouza García

Annelies Deckmyn

Riccardo Trobbiani

Domenico Valenza

Notice

Collegium is the academic journal of the College of Europe. Copyright remains with the authors. The proceedings of this Colloquium have been written by the speakers or by the Delegation of the International Committee of the Red Cross (ICRC) in Brussels on the basis of audio recordings of the Colloquium. These texts were then reviewed by the speakers. The responsibility of the views expressed in *Collegium* belongs to the authors. The opinions expressed herein are not necessarily those of the College of Europe nor the ICRC.

Avertissement

Collegium est la revue académique du Collège d'Europe. Tous droits réservés. Les Actes de ce Colloque ont été rédigés par les orateurs ou par la Délégation du Comité international de la Croix-Rouge (CICR) à Bruxelles sur base d'enregistrements audio du Colloque. Ces textes ont alors été revus par les orateurs. Les opinions exprimées dans *Collegium* n'engagent que la responsabilité de leurs auteurs et ne représentent pas nécessairement les vues du Collège d'Europe ou du CICR.

I. PROCEEDINGS OF THE BRUGES COLLOQUIUM/ACTES DU COLLOQUE DE BRUGES p. 5

Opening Remarks

Jörg Monar, *Rector of the College of Europe*

WELCOME ADDRESS

Walter Füllemann, *Head of the ICRC Delegation to the EU, NATO and the Kingdom of Belgium* p. 7

DISCOURS DE BIENVENUE

Christine Beerli, *Vice-President of the ICRC* p. 11

KEYNOTE ADDRESS

Session 1

Setting the scene

Chairperson: **Paul Berman**, *Legal Service of the Council of the EU*

Sandra Krähenmann, *Geneva Academy of IHL and Human Rights* p. 17

LEGAL FRAMEWORK ADDRESSING TERRORISM AND COUNTER-TERRORISM

Tristan Ferraro, *ICRC Legal Division* p. 25

INTERACTION AND OVERLAP BETWEEN COUNTER-TERRORISM LEGISLATION AND INTERNATIONAL HUMANITARIAN LAW

Gert-Jan van Hegelsom, *EEAS Legal Affairs Division* p. 31

THE EUROPEAN UNION APPROACH TO COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

DISCUSSION (EN) p. 39

Session 2

Legal parameters of the fight against terrorism

Chairperson: **Elzbieta Mikos-Skuza**, *University of Warsaw and College of Europe*

Marco Sassòli, *University of Geneva* p. 47

LEGAL QUALIFICATION OF THE FIGHT AGAINST TERRORISM

Rogier Bartels, *International Criminal Court* p. 56

TERRORIST GROUPS AS PARTIES TO AN ARMED CONFLICT

Noam Lubell, *University of Essex* p. 67

LIMITS OF THE GEOGRAPHICAL SCOPE OF APPLICATION OF IHL IN COMBATING TERRORISM

DISCUSSION (EN) p. 72

Session 3

The use of force and other measures of constraint in the fight against terrorism

Chairperson: **Andres Munoz Mosquera**, *SHAPE Legal Office*

- Claire Landais**, *French Ministry of Defence* p. 75
LEGAL CHALLENGES IN FIGHTING ARMED GROUPS EXTRA-TERRITORIALLY
- Françoise Hampson**, *University of Essex* p. 84
THE CONDUCT OF HOSTILITIES VERSUS THE LAW ENFORCEMENT PARADIGM
- Frederik Naert**, *Legal Service of the Council of the EU and Catholic University of Leuven* p. 92
EU COUNTER-TERRORISM SANCTIONS AND IHL BEFORE THE EU COURT OF JUSTICE
- DISCUSSION (EN) p. 102
-

Panel discussion

State responses to foreign fighters

Moderator: **Elizabeth Wilmshurst**, *Chatham House*

p. 107

Panellists:

Vaios Koutroulis, *Free University of Brussels*

Christophe Paulussen, *T.M.C. Asser Institute*

Christian Ritscher, *German Office of the Federal Public Prosecutor General*

Session 4

Criminalisation of humanitarian action

Chairperson: **Ann-Kristin Sjöberg**, *Geneva Call*

- Patrick Duplat**, *International Rescue Committee* p. 135
IMPACT OF COUNTER-TERRORISM MEASURES ON HUMANITARIAN ACTION
- Dustin Lewis**, *Harvard Law School* p. 141
HUMANITARIAN EXEMPTIONS FROM COUNTER-TERRORISM MEASURES: A BRIEF INTRODUCTION
- Kim Eling and Maria Lensu**, *Cabinet of the Commissioner for Humanitarian Aid and Crisis Management* p. 151
HUMANITARIAN ACTION IN TERRITORIES CONTROLLED BY DESIGNATED TERRORIST GROUPS:
A DONOR'S PERSPECTIVE
- DISCUSSION (EN/FR) p. 157
-

Panel discussion

Preventing and countering violent extremism

Moderator: **Pascal Daudin**, *ICRC Policy Cell*

p. 161

Panellists:

Stephan Husy, *Swiss Federal Department of Foreign Affairs*

Dick Clomén, *Swedish Red Cross*

Fulco van Deventer, *Human Security Collective*

Concluding Remarks

- Christine Beerli**, *Vice-President of the ICRC* p. 183
- II. LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS p. 187
- III. PROGRAMME (EN) p. 195
- IV. SPEAKERS' BIOS/BIOGRAPHIES DES ORATEURS p. 198

PROCEEDINGS OF THE BRUGES COLLOQUIUM ACTES DU COLLOQUE DE BRUGES

Opening Remarks

WELCOME ADDRESS

Jörg Monar

Rector of the College of Europe

Distinguished guests, dear friends and colleagues, ladies and gentlemen,

It is a great pleasure for me to welcome you to this Conference organised by the International Committee of the Red Cross, together with the College of Europe, on Terrorism, Counter-terrorism and International Humanitarian Law (IHL).

The challenges, ladies and gentlemen, which terrorism poses to States and societies are daunting, both in their magnitude and in their complexity. In their indiscriminate targeting of innocent civilians, terrorist attacks constitute a challenge for the very fundamentals of human civilisation and for human intercourse.

As terrorists, via their activities, are placing themselves outside the normal standards of human behaviour, there is always a risk that States and other public stakeholders (including international organisations) operate, in their reaction to terrorist attacks, in what may be called “grey zones” of prevention and repression, in which standards of International Humanitarian Law can be put in danger. As this means potentially adding to the long list of victims of terrorist activities, such risks clearly have to be avoided to the greatest possible extent. This, in the first place, for those whose human rights may be endangered by States’ responses. But also, simultaneously for the sake of the legitimacy of States’ action in response to terrorist attacks. I think it is very important to remember that at the height of the aftermath of the September 11 attacks that shocked the international community, the United Nations (UN) put a major emphasis on this challenge. In Security Council Resolution 1456 (2003) and also in several later resolutions, the UN Security Council has said that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law, in particular International Human Rights standards and IHL.

So, in spite of the huge pressure on the international community after the international terrorist challenge context of 9/11, a question of how to ensure that human rights standards would continue to be adhered to has been, right from the start, very high on the agenda.

I think that this gives the topic of today's Conference all of its importance. The College of Europe is very happy that the International Committee of the Red Cross has chosen the College as a partner to host this important international gathering.

Since 1949, it has been enshrined in the College of Europe's statutes that it must make a contribution to cooperation and integration in Europe, as well as to international cooperation between Europe and its partners throughout the world. The College has always endeavoured to make a positive difference to cooperation across borders, to make a positive contribution to the coexistence of citizens of different countries. There is here a clear link with the mission of the International Committee of the Red Cross, and we are therefore very happy that the Red Cross enabled us to fulfil part of our mission through this Bruges Colloquium.

I would just like to mention that the College of Europe has this year 463 Master students, of which 330 are here in Bruges and 133 on our second campus in Warsaw, in Natolin. Our students are very enthusiastic and want to make a positive difference to European and international cooperation after they leave the College. Some of the students are here today. I think they are fully aware of the importance of today's topic. I would also like to mention that the students of the College this year come from sixty-one different nations, so they are recruited from well beyond the borders of the European Union. I think we can say that in terms of international outreach, there is some parallelism between the College and the International Committee of the Red Cross.

Lastly, I would like to say that the College has, over the last few years, always had an excellent practical cooperation with the International Committee. You are one of the most appreciated partners in terms of smooth interaction during the preparation of an event, so thank you very much also for this.

I would then like to hand over to Mr Fülleemann, who is Head of the Brussels Office of the International Committee of the Red Cross, and will add, from his perspective, further reflections on the subject.

Thank you very much.

DISCOURS DE BIENVENUE

Walter Füllemann

Head of Delegation, ICRC Brussels

Monsieur le Recteur, Madame la Vice-présidente, Excellences, Mesdames et Messieurs,

J'ai le grand plaisir de vous accueillir, au nom du Comité international de la Croix-Rouge (CICR), au 17^{ème} Colloque de Bruges qui porte sur « Le terrorisme, le contre-terrorisme et le droit international humanitaire ».

Le titre du Colloque, en soi, pourrait déjà prêter à discussion, tant il est vrai que, par essence, le terrorisme est la négation même des principes qui sous-tendent le droit international humanitaire (DIH) et qu'il s'oppose aux objectifs mêmes que le DIH poursuit. Mais le terrorisme fait aussi partie du paysage des conflits armés, et à ce titre côtoie le DIH de plusieurs manières.

Le phénomène n'est pas nouveau, loin de là... Le terrorisme lié aux conflits armés existe depuis bien longtemps. On le retrouve lorsque des autorités qualifient leurs opposants de « terroristes », ou encore, dans ce que l'on appelle aujourd'hui des « guerres asymétriques », lorsque des parties aux conflits armés utilisent des méthodes destinées à semer la terreur, ou, enfin, lorsque des conflits armés sont une des formes que prend la réaction des Etats ou des organisations internationales à certaines attaques terroristes, comme par exemple le conflit en Afghanistan depuis 2001.

Ce qui est nouveau, en revanche, c'est l'environnement dans lequel ces phénomènes se développent. L'environnement opérationnel, l'environnement politique, l'environnement technologique, l'environnement juridique mais aussi l'environnement socio-économique ont profondément évolué ces vingt dernières années et ont profondément modifié tant la manière dont opèrent les groupes qualifiés de « terroristes » que la manière dont réagissent les autorités nationales ou les organisations internationales.

L'environnement politico-opérationnel a en effet énormément changé et l'on se retrouve aujourd'hui avec plusieurs théâtres d'opération qui voient s'affronter des forces armées étatiques à des groupes armés non étatiques dont bon nombre se retrouvent sur des listes d'organisations terroristes établies par des Etats ou des organisations internationales, telles que les Nations unies ou l'Union européenne (UE). Par ailleurs, ces conflits armés peuvent parfois s'exporter, généralement sous des formes d'actes qualifiables de « terroristes », comme par exemple les attaques du 13 novembre 2015 à Paris ou du 22 mars 2016 à Bruxelles, pour ne

citer que celles qui ont récemment touché des Etats de l'UE. Notons, par ailleurs, que d'autres régions du monde sont bien plus touchées par ce phénomène que ne l'est l'Europe.

Cette « exportation » de la violence est largement facilitée par les technologies de l'information, et ce à plusieurs niveaux. D'une part celles-ci permettent un plus large ralliement à une « cause » et des contacts d'un bout à l'autre de la planète de manière instantanée et discrète. Mais, d'autre part, cela permet aussi de trouver facilement toute l'information nécessaire à la préparation d'actions violentes et d'en assurer une certaine publicité.

Face à ce contexte difficile, de nombreux Etats et des organisations internationales ont été appelés à réagir, y compris sur le plan législatif. C'est bien entendu sur ces aspects-là que nous allons nous concentrer pendant ces deux jours, du moins sur ceux qui peuvent avoir un impact sur le droit international humanitaire et sur les activités humanitaires.

Depuis quelques années, le CICR s'est impliqué dans le débat relatif à l'équilibre entre la lutte contre le terrorisme et le DIH car il a pu constater certaines dérives et certains risques posés tant au respect des droits fondamentaux qu'au respect de l'action humanitaire. Au début du mois d'octobre, à la tribune de la 6ème Commission de l'Assemblée générale des Nations Unies, le CICR rappelait que « the ICRC does not challenge the legitimacy of States to take measures necessary to ensure their security and eliminate terrorism. Nevertheless, when such measures are taken, the safeguards protecting human life and dignity must be upheld ». Cette phrase résume la position du CICR, partagée par un bon nombre d'organisations humanitaires ou de défense des droits de l'homme, ainsi que par une majorité d'Etats. La difficulté est donc de trouver le meilleur équilibre possible entre la préservation de la vie et de la dignité humaine d'une part et les impératifs de sécurité d'autre part. Une recherche d'équilibre que l'on retrouve, *mutatis mutandis*, dans l'essence même du DIH qui repose sur l'équilibre entre les considérations d'humanité et les nécessités militaires...

Certaines activités d'organisations humanitaires impartiales, telle que le CICR, risquent, parfois, d'être considérées comme activités soutenant un groupe qualifié de « terroriste », et dès lors considérées comme criminelles. Cela peut aller du simple contact et *networking* parmi ces groupes – ce qui est indispensable pour assurer un accès aux populations victimes des conflits armés qui se trouvent dans un territoire sous le contrôle de ces groupes – à l'assistance médicale apportée à leurs combattants. On a même vu que des activités de diffusion du droit international humanitaire pouvaient être considérées comme illégales selon certaines législations nationales, ce qui est un comble sachant que le but même de cette diffusion est d'obtenir un comportement plus respectueux de la vie et de la dignité humaine par les parties aux conflits. Madame Beerli reviendra sur ces points dans un instant, et nous aurons un jour et demi pour en discuter.

Les habitués du Colloque de Bruges l'auront remarqué : nous sommes un peu plus serrés que d'habitude dans la salle. En effet, ce 17^{ème} Colloque de Bruges a rencontré un tel succès que nous battons tous nos records en termes de participation. Cela démontre la justesse du choix du thème et l'importance que celui-ci revêt pour vos Etats ou vos organisations internationales, régionales ou non gouvernementales.

A l'heure même où nous parlons, le Conseil de l'Union européenne, la Commission et le Parlement européen sont d'ailleurs réunis en « trilogue », dans la phase finale de rédaction de la nouvelle Directive de l'UE sur la lutte contre le terrorisme. Il s'agit pour l'UE d'actualiser ce qui était précédemment une Décision-cadre adoptée en 2002 et amendée en 2008. Mais entre 2002 et 2016, le monde a connu bien des évolutions, qui ont eu un impact sur les groupes terroristes et sur la lutte contre le terrorisme. Le CICR est confiant que cette future directive conservera une clause de sauvegarde du droit international humanitaire et préservera l'action humanitaire de toute criminalisation.

Il est évident pour tous que nous souhaitons éviter que nos activités humanitaires soient criminalisées. Mais il est tout aussi essentiel que ceux qui combattent en respectant les normes du droit international humanitaire ne soient pas automatiquement poursuivis pour fait de terrorisme. Cela permet d'une part d'éviter un conflit entre différentes normes juridiques, et d'autre part d'inciter les parties non étatiques aux conflits armés à mieux respecter le DIH. Il ne s'agit pas de légaliser ce qui serait illégal par ailleurs, mais, au contraire, d'éviter de rendre illégal un comportement qui serait légal au regard du DIH.

Le Collège d'Europe et le CICR sont très heureux de vos réponses si nombreuses à notre invitation à discuter de cette thématique délicate. C'est en effet devenu une tradition que nous nous retrouvions à Bruges tous les troisièmes jeudis et vendredis d'octobre pour discuter de questions difficiles de DIH dans une atmosphère constructive. Nous n'allons pas déroger à cette tradition cette année, et espérons que ce 17^{ème} Colloque nous permettra à tous de mieux définir certains concepts, ainsi que de trouver l'articulation la plus appropriée entre ceux-ci, de façon à aboutir à de solides pistes vers la meilleure réponse possible au terrorisme. Cette « meilleure réponse possible » a d'ailleurs été joliment décrite, il y a plus de 60 ans déjà, par Albert Camus lorsqu'il écrivait dans ses Chroniques qu'« il s'agit de servir la dignité de l'homme par des moyens qui restent dignes au milieu d'une histoire qui ne l'est pas ».

Avant de céder la parole à Madame Christine Beerli, Vice-présidente du CICR, je voudrais remercier nos orateurs et modérateurs d'avoir accepté de venir partager leurs expertises et confronter leurs idées lors de ce Colloque. Je voudrais également remercier notre partenaire, le Collège d'Europe, non seulement pour son hospitalité dans cette belle ville de Bruges, mais

également, voire surtout, pour la confiance que le Collège nous a renouvelée cette année encore tant pour le Colloque annuel que pour les cours de DIH dispensés aux étudiants des deux campus du Collège. C'est un réel plaisir de travailler avec cette institution académique si sérieuse, professionnelle, respectueuse et ouverte.

Last but not least, je souhaite vivement remercier l'équipe de la délégation de Bruxelles qui a organisé ce Colloque ainsi que nos interprètes qui nous soutiennent depuis des années pour que la langue de Molière puisse continuer à vivre dans cette salle.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons partager pendant ces deux jours qui s'annoncent très stimulants et je vous remercie de votre intérêt et de votre participation. Je vous souhaite un bon colloque.

KEYNOTE ADDRESS

Christine Beerli

Vice-President of the ICRC

Ladies and gentlemen,

It is a great pleasure to be with you at the 17th edition of the Bruges Colloquium and to have the privilege of making a few introductory remarks on the topic that we will be focussing on for the next two days. The chosen theme – Terrorism, Counter-terrorism and International Humanitarian Law – is very timely: it will allow us to look at some of the fundamental legal and operational questions raised by the ongoing fight against terrorism.

Terrorism is a scourge to which the international community has been striving to respond for decades. The obvious challenges it poses are both long-lasting and immediate. Wherever we turn around the world these days, we are confronted with increased risks of terrorist acts. Terrorism is a global phenomenon which the international community is increasingly facing and which is often closely linked to armed conflict.

Terrorism negates the fundamental principles of humanity as well as the essential principles and objectives of International Humanitarian Law (IHL). In this regard, the International Committee of the Red Cross (ICRC) condemns acts of terrorism, irrespective of their perpetrators, be they committed in or outside an armed conflict, and is deeply distressed by their devastating impact on communities and individuals.

Every day we see the dramatic consequences of the fight between States and non State armed groups designated as terrorist, in particular in Africa and in the Levant. Irrespective of the claimed legitimacy of this fight or the causes espoused by or attributed to those involved therein, what we observe in the field is once again the civilian population bearing the brunt of armed violence. Cities are reduced to rubble, civilians are directly attacked, humanitarian and medical personnel, transports and infrastructures are targeted and prevented from fulfilling their functions, the civilian population is deprived of supplies essential for its survival through siege warfare and humanitarian access is denied. Resulting from all of this, hundreds of thousands of people are internally displaced or have fled their country, leaving a home, a job, a plot of land, or even close relatives behind. In the absence of a political solution, compliance with IHL and the fundamental values underpinning this body of law is required more than ever, from all sides, because the prohibition of acts of terrorism and other violations of the law is not just binding on non-State armed groups.

Ladies and gentlemen,

The rise of non-State armed groups resorting to acts of terrorism is a growing concern domestically but also internationally. This situation has led States and international organisations to react by tightening existing counter-terrorism measures and introducing new ones. Of course, the ICRC does not challenge the necessity for States to take legitimate measures to ensure their security. Nonetheless, when States take such measures to eliminate terrorism, the safeguards protecting human life and dignity must be upheld. In the ICRC's view, the international community must be clear and firm on the need for counter-terrorism activities to be conducted in full respect of the protection afforded to all individuals by international law, in particular IHL and Human Rights Law. Such respect is in the interest of the international community, as there is today growing recognition that violations of these bodies of international law may in turn exacerbate the very phenomenon that counter-terrorism purports to fight.

Neither armed conflict nor terrorism are new forms of violence. Both have existed for a long time and have, for the most part, been understood as separate issues, as demonstrated by the different legal frameworks that regulate them. The perception that armed conflict and terrorism differ and that their respective legal rules are distinct has radically changed since September 2001 and the subsequent launching of a "global war on terrorism". Recent years have again seen the rise of non-State armed groups resorting to acts of terrorism and the subsequent engagement of a coalition of States against them. This situation has put the relationship between IHL and the legal framework governing terrorism back into the spotlight and may have even created the perception that there may be a new "global war on terrorism" involving a group or groups of unbounded geographical reach.

The recent actions taken by States against non-State armed groups designated as terrorist and the correlative counter-terrorism discourse in both domestic and international fora have significantly contributed to a blurring of the lines between armed conflict and terrorism and their respective legal frameworks. This is further exacerbated by the fact that, often, counter-terrorism instruments include situations of armed conflict in their scope of application. The resultant overlaps and contradictions between IHL and the legal instruments specifically designed to address terrorism are problematic. Counter-terrorism norms may interfere with IHL regulation of armed violence, notably by prohibiting conduct that is not unlawful under IHL, creating legal confusion and potentially adversely affecting some of the underlying principles of IHL. In this regard, one should carefully study the consequences of such interference and seek creative ways to ensure the integrity of IHL, thereby maintaining its rationale – which is needed more than ever in current armed conflicts.

Ladies and gentlemen,

The fight against terrorism may take various forms, including armed conflict. Determining when IHL applies to particular counter-terrorism activities is not an easy enterprise. Not only because some States may tend to deny the applicability of IHL on the basis that non-State armed groups designated as terrorist organisations cannot be considered party to an armed conflict. How, when and where IHL applies to counter-terrorism activities still raises important legal questions.

First of all, it is important to recall that any use of force against non-State armed groups designated as terrorist – or against members and affiliates thereof – is not necessarily synonymous with a situation of armed conflict governed by IHL. When armed force is used, only the facts on the ground are relevant for determining the legal classification of a situation of violence. Some situations may be classified as international armed conflicts, others as non-international armed conflicts, while various acts of violence may fall outside any armed conflict due to lack of the requisite nexus. In the ICRC's view, this is also true for the fight against terrorism.

Another crucial question relating to IHL applicability is whether non-State armed groups designated as terrorist fulfil the organisation criterion for classifying a situation as a non-international armed conflict. This is all the more difficult in view of the myriad of fluid, multiplying and fragmenting armed groups that frequently take part in the fighting. Often, their structure is difficult to understand. In some cases, some form of leadership structure emerges at some point, claiming to unite different armed groups, often based on pledges of allegiances. This raises the question of what link needs to exist between different armed groups in order to consider formerly distinct entities as one party to an armed conflict. The same question also emerges with regard to different groups that join forces transnationally, such as different armed groups pledging allegiance to the Islamic State group or to Al Qaida.

The spillover of conflicts into neighbouring countries, their geographical expanse and their regionalisation also appear to have become distinctive features of many contemporary armed conflicts involving non-State armed groups designated as terrorist. The transnational nature of such armed conflict involving a non-State armed group capable of operating in various countries – even non-contiguous ones – directly raises the question of IHL's territorial reach. This is still a much-debated area of the law – in particular when it comes to the applicability of IHL for military operations in the territory of non-belligerent States – that will certainly benefit from your insights.

Ladies and gentlemen,

Our discussions will also allow us to examine whether IHL is a relevant body of law – when the conditions for its applicability are met – for those engaged in the fight against terrorism. IHL has sometimes been described – wrongly in the ICRC’s view – as a set of rules which hinders the efforts of States to efficiently address their security concerns and fails to provide adequate tools to deal with non-State armed groups designated as terrorist. I am confident that we will be able to dispel some misconceptions in this regard and highlight the fact that, in situations of armed conflict, IHL should not be considered as an obstacle to the fight against terrorism. On the contrary, IHL can be a powerful tool at States’ disposal while still providing important protections – complemented by Human Rights Law – for those affected by the armed conflict between States and non-State armed groups designated as terrorist. This added value of IHL is significant in the fields of the use of force and detention.

The number of the ‘foreign fighters’ – nationals of one country who travel abroad to fight alongside a non-State armed group in the territory of another State – has increased exponentially over the past few years. In order to quell the threats emanating from foreign fighters, States - in particular within the framework of the United Nations (UN) Security Council - have taken a variety of measures, including the use of force, detention (on terrorism charges, among others), and travel bans.

While most of the measures taken to prevent individuals from joining non-State armed groups or to mitigate the threat they may pose upon return are of a law enforcement nature, the applicability of IHL, where appropriate, should not be overlooked. However, so far, little attention has been paid to how IHL deals with foreign fighters.

The concept of “foreign fighter” is not a term of art in IHL. The general applicability of IHL to a situation of violence in which such fighters may be engaged does not depend on the nationality of those fighting. It depends only on the facts on the ground and on the fulfilment of certain legal conditions stemming from the relevant norms of IHL, in particular common Articles 2 and 3 of the Geneva Conventions. In other words, in situations of armed conflict, IHL will govern the actions of foreign fighters, as well as any actions against them by parties to that conflict, when such actions have a nexus to the armed conflict concerned.

In this regard, it is important to underline that foreign fighters detained in relation to an armed conflict to which the detaining authorities are party must benefit from the protections afforded by the applicable IHL rules, irrespective of the domestic laws that also govern their detention. Unfortunately, States dealing with foreign fighters tend to shy away from

recognising the applicability of IHL to their detention. Our discussions will certainly allow us to understand why this is so and to clear up the misapprehension that IHL would not allow States to prosecute foreign fighters – a misapprehension which, in the ICRC's views, has no legal basis under IHL.

For nearly a decade the idea that the risk of radicalisation potentially leading to violent actions should be addressed through social prevention programmes has significantly progressed. Many States are developing and implementing various domestic plans to address the root causes. These programmes are now usually referred to as preventing or countering violent extremism (P/CVE). States' understanding that 'terrorism' must be fought through more than simply military or hard security means, is in fact not a new avenue. It is mimicking years of counter-insurgency strategies and stabilisation concepts implemented in conflict-affected countries. Yet such P/CVE model has gained considerable ground amongst countries confronting so-called home grown terrorism and the re-occurrence of violent actions against their respective populations. In this political context, international organisations, the Red Cross and Red Crescent (RC/RC) Movement and various civil society stakeholders are being asked to partner with States and support this movement through their existing or specially designed programmes.

The ICRC does not question the merit of these initiatives which may ultimately contribute to limiting the risks of violations and abuses. However, while recognising the general purpose of the P/CVE concept as expressed in the recent UN plan of action, that is to address the root cause of extreme violence, one should not underestimate its potential adverse effects on the existing legal protection frameworks. There may also be a risk that humanitarian organisations associated with CVE/PVE programmes be seen by some States and non-State players as politically motivated and therefore incapable of carrying out a neutral, independent and impartial humanitarian action.

Ladies and gentlemen,

Within the framework of counter-terrorism measures, efforts to curb and criminalise all possible direct and indirect support to organisations designated as terrorist have led to increased control and restraint on all activities, including humanitarian activities, that could in any way be seen as providing support to non-State armed groups or individuals designated as terrorists. Consequently, there is a significant risk that such measures, in particular criminal legislation, may further reduce the humanitarian space which the ICRC and other impartial humanitarian organisations need in order to carry out their neutral, independent and impartial activities.

Since 2011, the ICRC has on various occasions shared its concerns that such counter-terrorism measures have the potential to criminalise a range of humanitarian organisations and their personnel, and may create obstacles to the funding of humanitarian activities. The unqualified prohibition of acts of ‘material support,’ ‘services’ and ‘assistance to’ or ‘association with’ terrorist organisations found in certain criminal laws could, in practice, result in the criminalisation of the core activities of impartial humanitarian organisations, and their personnel, that are endeavouring to meet the needs of victims of armed conflicts or situations of violence below the threshold of armed conflict.

In addition, the potential criminalisation of humanitarian engagement with non-State armed groups designated as terrorist organisations and of humanitarian activities carried out in areas controlled by these groups may be said to reflect a non-acceptance of the notion of neutral, independent and impartial humanitarian action – a notion which the ICRC strives to promote in its operational work in the field.

The ICRC has deployed significant efforts to persuade States to stop legislating against principles they have supported and endorsed through IHL treaties, as well as to ensure that the new legal frameworks being developed as part of counter-terrorism strategies do not challenge principled humanitarian action. So far, our work on this crucial issue has not been as successful as we had expected, but the ICRC is convinced that stakeholders will understand the necessity to harmonise their policies and legal obligations across the humanitarian and counter-terrorism realms.

Ladies and gentlemen

I am confident that the forthcoming discussions on these various topics will be fruitful in bringing more clarity to these controversial but important issues. You are now embarking on two days of debate which I am sure will be substantial and comprehensive. I am looking forward to these exchanges of ideas and to listening to your views and comments on the various points raised in this address. I thank you for your attention and wish you a very successful Colloquium.

Thank you.

Session 1

Setting the Scene

Chairperson: **Paul Berman**

Legal Service of the Council of the EU

LEGAL FRAMEWORK: ADDRESSING TERRORISM AND COUNTER-TERRORISM

Sandra Krähenmann

Geneva Academy of IHL and Human Rights

Résumé

Sandra Krähenmann dresse les contours du cadre juridique relatif au terrorisme et au contre-terrorisme. D'emblée, elle constate qu'il n'existe à l'heure actuelle aucune législation cohérente et universelle s'appliquant au terrorisme. Cela est dû, avant tout, à l'absence de définition commune du terme « terrorisme ». Il s'ensuit qu'au niveau international, le terrorisme est régi par une kyrielle de législations dont les champs d'application varient sensiblement. Dans son exposé, l'oratrice les groupe en deux catégories : celle des traités universels et celle des résolutions du Conseil de sécurité de l'Organisation des Nations unies (ONU).

1. Les traités universels

Bien qu'initiées dans les années 1990 et ravivées suite aux attentats du 11 septembre 2001, les négociations pour un projet de convention générale sur le terrorisme n'ont jamais abouti. Les principales pierres d'achoppement restent, aujourd'hui encore, la question de la définition et des éléments constitutifs d'un acte terroriste ainsi que le débat autour du champ d'application à réserver à la convention, notamment eu égard à la difficulté que poserait son application dans le cadre d'un conflit armé déjà couvert par d'autres législations, dont notamment le droit international humanitaire (DIH).

Face à ces difficultés, une approche sectorielle fut préférée à une approche globale. Il en résulte un système juridique composé de 19 instruments universels portant sur divers types de terrorisme. D'une manière générale, ces conventions internationales ne s'appliquent pas aux conflits armés régis par le DIH.

2. Les résolutions du Conseil de sécurité de l'ONU

A la suite des attentats du 11 septembre 2001, le Conseil de sécurité a développé un cadre normatif et institutionnel détaillé afin de renforcer la prévention des actes de terrorisme et d'en assurer une répression plus sévère. Parmi les mesures adoptées par le Conseil de sécurité figurent trois résolutions dites « législatives » qui viennent influencer le cadre légal de la lutte contre le terrorisme.

Tout d'abord, par sa Résolution 1373 (2001), le Conseil de sécurité élargit le champ d'application et étend aux acteurs non étatiques les obligations contenues dans la Convention de l'ONU pour la répression du financement du terrorisme (1999). Ceci a eu, dans certains cas, un effet négatif sur l'application des droits de l'homme et du DIH, en particulier dans le cadre de l'action humanitaire.

La Résolution 2178 sur les « combattants terroristes étrangers » s'applique aux actes de terrorisme commis, entre autres, « en connexion avec un conflit armé ». Cette résolution étend, par conséquent, un instrument de lutte contre le terrorisme à une situation déjà régie par le DIH et crée de ce fait une confusion quant au régime juridique à appliquer à certaines situations.

Enfin, dans sa Résolution 2242 (2015), le Conseil de sécurité lie pour la première fois son Agenda sur les femmes, la paix et la sécurité à la lutte contre le terrorisme et attire, de la sorte, l'attention sur l'importance d'une approche qui tient davantage compte des différences de genre dans l'élaboration d'instruments juridiques de lutte contre le terrorisme.

En conclusion, l'intervenante affirme qu'il existe bel et bien un ensemble de règles qui régissent la lutte contre le terrorisme mais que celui-ci est fragmenté et contenu dans de multiples législations qui se chevauchent. Le principal défi, au vu de leur évolution rapide, est d'assurer un minimum de cohérence et d'unité entre les diverses règles contenues dans les diverses législations relatives au terrorisme.

1. A discrete law on 'terrorism' or 'counter-terrorism'?

Whenever we speak about terrorism and international law, the question immediately arises whether there is an international legal regime on terrorism in a way similar to how we can talk about International Humanitarian Law (IHL) or Human Rights Law. Or would it be more appropriate to look at terrorism as a concept which does not have a specific legal meaning and to which a mixture of international law rules apply? One of the most important arguments against

the existence of a coherent and unified legal regime addressing terrorism and counter-terrorism is that there is neither a universally agreed definition of terrorism nor a comprehensive treaty addressing terrorism. Instead, even if we limit our enquiry to instruments specifically dealing with terrorism at the universal level, we have a framework comprised of 19 universal treaties and the normative framework established by the United Nations Security Council (UNSC) in the aftermath of 9/11. In my introductory presentation I will focus on these two aspects. It is a rather selective presentation that provides a snapshot of what one may call the criminal justice or law enforcement paradigm. I will address the relationship between these instruments and IHL, but not delve further into the relationship between counter-terrorism, including national counter-terrorism laws, and IHL.

Yet, as it is reflected in the programme of this Colloquium, we would need to look at a broad array of specialised regimes to get a reasonably comprehensive picture of the key rules that address terrorism, ranging from IHL to international criminal law, international financial law, and Human Rights Law. Similarly, a multitude of institutions are involved in multilateral counter-terrorism efforts: in the United Nations (UN) structure alone there are 38 different entities. And to this already complex system, we would have to add the regional frameworks and institutions.

2. Universal treaties

The lack of a unitary, centralised framework to deal with terrorism is reflected in the fact that there is no comprehensive convention on international terrorism.

a. The Draft Comprehensive Convention on International Terrorism

Negotiations for a draft comprehensive convention have been taking place under the auspices of the UN since the mid-90s. The negotiations received a renewed impetus after 9/11 and a possible compromise solution was tabled in 2007. More recently, a working group was established with a view to finalising the negotiations. While there is a consensus that the conclusion of such a comprehensive convention would be important, seemingly intractable disagreements remain.

First, the question of how to define acts of terrorism. Should such a convention adopt a generic definition, or a definition that rests on particular acts of terrorism, or a combination of the two? What are the interests to be protected? Should it be limited to death and serious bodily injury or extended to property damage? Should the scope of the definition be limited to acts with an international or trans-border element? What is the defining or distinguishing feature of an act of terrorism? Is it a political motive or the targeting of innocent bystanders?

Second, there is the crucial question concerning the scope of application of such a definition, namely whether and how it would apply in times of armed conflict as many acts routinely committed by non-State armed groups may amount to acts of terrorism, including acts that are lawful under International Humanitarian Law. Similarly, the thorny issue of the relationship between the right to self-determination – including during a foreign occupation – and acts of terrorism remains to be decided. Regional conventions on terrorism like the Arab Convention, the African Union Convention, and the Convention of the Organization of Islamic Cooperation expressly exclude such acts from their scope. Finally, the question of whether and how it would apply to the activities of military forces, which raises the question of State terrorism.

b. Universal sectoral treaties and their relationship with International Humanitarian Law

Faced with such difficulties, the international community from the outset chose a pragmatic approach, known as the sectoral, piecemeal or enumerative approach: the adoption of numerous treaties that address specific acts of terrorism, but not terrorist activities in general. Initially, the same sectoral approach was adopted at regional level, but from the 90s onwards several general conventions were adopted at regional level. Some of them provide for a generic definition of terrorism, for example the African Union Convention. Others, such as the Council of Europe Convention, apply to the offences contained in the universal sectoral conventions. Some combine the two methods. The regional experience shows that it is possible to adopt a comprehensive treaty on terrorism.

Instead of a comprehensive convention on terrorism at the universal level, we have a framework that is comprised of 19 universal legal instruments that deal with certain types of terrorism:

- a series of treaties addressing acts on board aircraft, ships, and fixed platforms, and at airports;
- a convention on hostage taking and one on internationally protected persons;
- three treaties addressing specific materials, namely nuclear and explosive materials;
- and the most recent treaties addressing terrorist bombings, the financing of terrorism, and acts of nuclear terrorism.

Broadly speaking, these treaties provide for the criminalisation of certain forms of conduct under domestic law and seek to ensure that alleged perpetrators are not able to escape trial and punishment by absconding to another country. They do so by providing extended bases for States to establish jurisdiction and an obligation to extradite or prosecute. They also create frameworks for judicial cooperation and mutual legal assistance.

As we have seen, the question of the relationship with International Humanitarian Law remains one of the obstacles for the adoption of a comprehensive convention on international terrorism. This begs the question of how the sectoral treaties deal with this issue. Many of the earlier treaties remain silent in this respect, presumably because they prohibit activities that do not regularly occur during an armed conflict, such as, for example, the hijacking of an aircraft. Those who do, including the three most recent conventions, tend to exclude acts governed by International Humanitarian Law.

First, the 1979 Hostage Convention specifies that it does not apply during times of armed conflict as defined in the Geneva Conventions and its Additional Protocols insofar as these are applicable to a particular act of hostage taking, and in so far as State parties are bound under these conventions to prosecute or extradite the hostage taker.

Second, the 1997 Terrorist Bombing Convention and the 2004 Nuclear Terrorism Convention both exclude 'the activities of armed forces during an armed conflict, as those terms are understood under International Humanitarian Law, which are governed by that law.' Admittedly, some affirm that the term 'armed forces' does not include non-State armed groups. Yet, the majority opinion, and my own, is that these provisions should be understood as referring to both State and non-State armed groups. Both conventions include a safeguard clause that provides that nothing in the Convention may affect the rights and obligations of States and individuals under international law, including International Humanitarian Law. Moreover, they use a different term, 'military forces of a State', when referring to State armed forces. Finally, arguably the term armed forces under IHL covers both the armed forces of the State and the armed forces of the non-State party.

Third, the 1999 Convention on Terrorism Financing includes the same safeguard clause. Moreover, its definition of acts of terrorism whose financing is prohibited is limited. The definition embodies what may be called the lowest common denominator. It defines acts of terrorism as a) acts criminalised in the other international treaties, and b) any other act intended to cause death or serious bodily injury to a civilian or any other person not taking an active part in the hostilities in a situation of armed conflict. In other words, the 1999 Convention on Terrorism Financing would not apply to lawful acts of war. It is also worth noting that the definition excludes damage to property. Yet, we find such an element in many regional conventions, and the 1997 Terrorist Bombing Convention includes extensive damage to property that results in major economic loss.

In conclusion, I would argue that as a general principle, the international conventions do not apply during times of armed conflicts to acts governed by International Humanitarian Law.

While it is often said that an act may be an act of war and an act of terrorism, a more nuanced approach seems to be called for: depending on the context, the same act may be qualified differently and regulated by different regimes. However, the action taken by the UNSC since 9/11 tends to blur the boundaries between the two regimes.

3. Security Council response

Before 9/11, the UN General Assembly dealt with international terrorism as an issue and the UNSC only reacted in response to particular acts of international terrorism, for instance the Lockerbie bombing. Since 9/11 the Security Council has emerged as the leading player and established a detailed normative and institutional framework in order to strengthen criminal repression, and limit the mobility of terrorists and support for terrorism.

The Security Council framework rests on four pillars. First, the condemnation of discrete acts of terrorism; second, capacity building at national level; third, sanctions regimes, in particular the 1267 Al-Qaida Sanctions Regime. After 9/11, it was extended to become a general regime that is not limited to Al-Qaida in Afghanistan but targets Al-Qaida and its associates wherever located and without time limits. After the Beslan hostage crisis, attempts to adopt a similar general regime for terrorist groups not associated with Al-Qaida were unsuccessful. No agreement could be reached as to which other groups should be covered or how to generically define such groups. Yet, other armed groups may be targeted under the sanctions regimes for a specific country's situation. Fourth, using its Chapter VII powers, the UNSC adopted 'legislative resolutions' to generate a general regulatory framework to combat terrorism that is not limited to a particular situation or time.

a. UNSC Resolution 1373 (2001)

In the immediate aftermath of 9/11, the Security Council adopted Resolution 1373 and set up the Counter-terrorism Committee to monitor its implementation. Amongst others, Resolution 1373 requires States to criminalise, prosecute, and punish the financing of acts of terrorism.

The resolution includes many of the provisions of the UN Convention on Terrorist Financing, thus rendering it binding for non-State parties by virtue of the Resolution. However, the Resolution also goes beyond the UN Convention. For example, despite imposing far-reaching obligations, 1373 does not adopt the definition of acts of terrorism contained in the UN Convention. It does not define acts of terrorism. Hence, the exact scope of the measures to be adopted depends on domestic definitions of terrorism. The Resolution requires the criminalisation of both direct and indirect financing while the UN Convention is limited to direct funding. The Resolution does not include a safeguard clause for other obligations under international law, including Human Rights Law and International Humanitarian Law.

Over the past decade, some progress has been made for mitigating the negative effect of the Al-Qaida Sanctions Regime and Resolution 1373 on Human Rights as well as International Humanitarian Law, in particular in relation to humanitarian engagement. Yet, much of the progress risks being undone by the most recent legislative Resolution adopted by the Security Council in 2014, Resolution 2178, the 'Foreign Terrorist Fighter' Resolution.

b. UNSC Resolution 2178 (2014): the 'Foreign Terrorist Fighter' Resolution

Foreign fighters will be the subject of another panel, so for the purposes of presenting the general framework I will just discuss the main points raised by Resolution 2178. 'Foreign terrorist fighters' are defined as individuals who travel to a State other than their State of residence or nationality for the purpose of participating in various forms of acts of terrorism, providing or receiving terrorist training, including in connection with an armed conflict. Amongst other sweeping obligations, States are to criminalise the travel, attempted travel, funding and other facilitation of such 'travel for terrorist purposes'. The Resolution does not provide for a definition of terrorism nor limits its scope to individuals that travel abroad to join the so-called Islamic State or Al-Qaida. Applying to acts of terrorism 'including in connection with an armed conflict', the Resolution unreflectively extends the acts of terrorism to an armed conflict context. Some argue that the Resolution could be construed narrower, to cover only acts of terrorism that would also be prohibited under International Humanitarian Law, but not participation in hostilities generally. Yet, my point of view is that while this is a theoretical possibility, the intended effect of the Resolution was to criminalise travel abroad to join armed groups that are designated as terrorist and participation in the activities of such groups, regardless of whether or not such acts are lawful under International Humanitarian Law. In addition, neither the Counter-terrorism Committee nor the Al-Qaida Sanctions Committee adopt such a distinction in their reports on the implementation of the Resolution. Similarly, the use of the term 'fighter' conveys the ideas that these are individuals who join armed groups and actively participate in fighting. Yet the current use of the term covers a broader array of forms of assistance, support and association.

There are many additional reasons to be critical of Resolution 2178, but the Resolution's recognition of the importance of addressing the conditions conducive to terrorism and countering violent extremism is in principle a welcome departure from an exclusively security, military and law enforcement approach to terrorism. This will be the subject of another panel.

c. UNSC Resolution 2242 (2015): the gender dimension of terrorism and counter-terrorism

Adopted last year and marking the 15th anniversary of Resolution 1325 (2000) on Women, Peace and Security, UNSC Resolution 2242 links for the first time the Women, Peace and Security Agenda with terrorism, countering-terrorism and countering violent extremism.

The Resolution requests relevant UN agencies and States to adopt gender as a cross-cutting issue in their counter-terrorism strategies and more generally to integrate the Women, Peace and Security Agenda in their counter-terrorism and counter violent extremism strategies, including by boosting UN Women in this context. Some caution is required when linking the Women, Peace, and Security Agenda with counter-terrorism due to the women's lives being endangered in an already vulnerable context where they may find themselves targeted by both terrorist groups and the responses of governments thereto. Yet the Resolution is significant because, as we have seen, the international instruments on acts of terrorism and the framework set up by the Security Council were formulated in explicitly gender-neutral ways that failed to account for the gender dynamics underlying terrorism and counter-terrorism. On the one hand, acts of terrorism have a direct and indirect gendered impact, including owing to the use of gender-based and sexual violence for political objectives. On the other hand, gendered narratives often underpin counter-terrorism policies. In addition, for a long time insufficient attention was paid to the gender-based impact of counter-terrorism measures, such as, for example, the way overly broad definitions of terrorism are abused to target female human rights defenders and sexual minorities. Similarly, the gendered collateral impact of counter-terrorism policies were often neither acknowledged nor compensated.

4. Conclusion

In conclusion, even this cursory and selective introductory presentation shows that there is no lack of applicable rules that govern aspects of terrorism and we will see many more in the sessions to come. So, to come back to the initial question, there is not 'no law on terrorism' because we lack applicable rules. Rather the international legal response to terrorism is fragmented, contained in multiple inter-related and overlapping regimes. Some argue that this is inevitable: the term 'terrorism' has emotive qualities that make it difficult to define, not just legally, but also socially, and is applied to very diverse acts of violence. Focusing on the rather technical explanation that there is no 'law on terrorism' because there is no universally accepted definition and no comprehensive convention fails to acknowledge that different paradigms used to address acts of terrorism in different contexts rest on different policy considerations. If we take into account the rapid development of rules applicable to terrorism since 9/11, arguably we have gradually accumulated a series of norms, policies and practices that amount to an identifiably body of terrorism and counter-terrorism law. Moreover, the law on terrorism and counter-terrorism continues to evolve, as we have seen during the last two years with the adoption of Security Council Resolutions 2178 (2014) and 2242 (2015). The relationship of the law on terrorism and counter-terrorism with other bodies of law, including International Humanitarian Law, remains confused. The challenge is to ensure the coherence and unity of the various rules that we find in different regimes.

INTERACTION AND OVERLAP BETWEEN COUNTER-TERRORISM LEGISLATION AND INTERNATIONAL HUMANITARIAN LAW

Tristan Ferraro

ICRC Legal Division

Résumé

Tristan Ferraro nous explique l'interaction et le chevauchement entre le droit international humanitaire (DIH) et le cadre juridique régissant la lutte contre le terrorisme. Il se propose également de corriger certaines idées erronées selon lesquelles le DIH ne permettrait pas de répondre adéquatement au terrorisme ou mènerait à l'impunité de certains actes de terrorisme commis en situation de conflit armé.

L'orateur observe que l'augmentation du recours à des actions terroristes par des groupes armés non étatiques a, ces dernières années, ramené sur les devants de la scène internationale des questions ayant trait à la pertinence du DIH dans la lutte contre le terrorisme. Ces interrogations sont, par ailleurs, exacerbées par la tendance actuelle en matière de lutte contre le terrorisme qui brouille la distinction entre conflit armé et terrorisme. Les conséquences de cette confusion juridique s'illustrent notamment par le risque que certains Etats qualifient d'illégaux des actes pourtant légaux en DIH pour le motif qu'ils ont été commis par un groupe qualifié de terroriste. De même, certains Etats refusent l'idée qu'un groupe armé non étatique qualifié de terroriste puisse être partie à un conflit armé non international, remettant de ce fait en question les fondations mêmes du DIH.

Bien qu'il ne contienne aucune définition du terme « terrorisme », le DIH prohibe, en situation de conflit armé, la plupart des actes qualifiés de « terroristes » tant en droit interne que dans les conventions internationales. Qu'il s'oppose directement à des actes de terrorisme ou qu'il englobe cette opposition dans des interdictions plus larges (telles que les attaques indiscriminées ou la prise d'otages), le DIH fournit, sur base tant conventionnelle que coutumière, une source juridique solide pour la lutte contre le terrorisme applicable aux acteurs armés étatiques et non étatiques d'un conflit aussi bien international que non international.

Le DIH et le cadre juridique régissant le terrorisme se distinguent toutefois par leurs objectifs, leurs logiques et leurs structures. Le DIH ne s'oppose pas en soi aux attaques directes dirigées contre des cibles légitimes, que ces attaques soient lancées par un groupe armé étatique ou non étatique. De plus, le DIH reconnaît à toutes les parties au conflit les mêmes droits et obligations. Les règles concernant la lutte contre le terrorisme prévoient, au contraire, des obligations

variables en fonction de la nature de chaque partie concernée et considèrent un acte de violence commis par un groupe qualifié de terroriste comme un acte illégal par nature.

En dépit de ces différences, M. Ferraro attire l'attention sur le fait qu'il existe un chevauchement entre le DIH et le cadre juridique régissant la lutte contre le terrorisme. L'application de règles de lutte contre le terrorisme à des situations régies par le DIH et le droit national est la source de plusieurs problèmes : elle ajoute une couche de criminalisation inutile, elle crée un conflit de normes qui fragilise la sécurité juridique, et elle affaiblit l'adhésion par les groupes armés qualifiés de terroristes au respect du DIH. Pour ces raisons, le Comité international de la Croix-Rouge (CICR) s'oppose à ce que l'on qualifie une attaque contre un objectif militaire légitime comme un « acte de terrorisme » que l'on considérerait, dès lors, illégal par nature. Afin d'éviter une telle contradiction entre les règles de lutte contre le terrorisme et le DIH, le CICR exhorte les Etats à inclure dans leurs législations sur le terrorisme une clause de respect du DIH qui exclut les actes légaux en DIH du champ d'application de ces dispositions.

Recent years have again seen the rise of non-State armed groups resorting to acts of terrorism. This is of course an increasing concern domestically but also internationally.

This situation has led States - and international organisations - to react by tightening existing counter-terrorism measures and introducing new ones. Fighting terrorism may take various forms, including armed conflict. As a result, the question of the relationship between the legal frameworks governing International Humanitarian Law (IHL) and terrorism has returned to the forefront of legal discussions, raising a host of legal issues such as the revival of the notion of "war against terrorism", the relevance of IHL for those engaged in the fight against terrorism, the legal status under IHL of those fighting alongside non-State armed groups and subsequently detained, or the determination of the paradigm governing the use of force against these groups and those claiming allegiance to them.

In addition, the current counter-terrorism discourse in both domestic and international fora has significantly contributed to the blurring of lines between armed conflict and terrorism, with potentially adverse effects on IHL. There is a growing tendency by States and the United Nations (UN), to consider that any act of violence carried out in an armed conflict by a non-State armed group, is 'terrorist' in nature and therefore necessarily unlawful, even when such acts are not prohibited under IHL. In parallel, the concern of States that the recognition of a state of armed conflict will legitimise 'terrorists' remains as true today as it has always been.

One result of this current state of affairs is a denial that non-State organised armed groups designated as terrorist could be party to a non-international armed conflict (NIAC) within IHL. This means putting into question not only IHL applicability but also, when applicability is accepted, shaking the foundations on which this body of law is built. This renders more difficult the understanding of the relation between IHL and terrorism.

In this regard, it is important to sharpen the lines between armed conflict and terrorism. Indeed, there are some misconceptions surrounding the relationship between armed conflict and terrorism, between IHL and the legal framework governing terrorism. In particular, we see the need to clear up the misapprehension that IHL would not allow States to address terrorism adequately and would not permit them to quell the threat emanating from individuals or armed groups designated as terrorist. We also need to correct the misconception according to which IHL applicability would lead to the impunity of those committing acts of terrorism in situations of armed conflict.

The necessity to delineate the boundaries between IHL and the legal framework governing terrorism

The IHL perspective on terrorism

IHL does not provide a definition of terrorism. However, in situations of armed conflict, it prohibits most acts that are criminalised as ‘terrorist’ in domestic legislation and international conventions specifically addressing terrorism. For instance, in armed conflict, IHL prohibits direct and deliberate attacks against civilians, based on the principle of distinction, which is a cornerstone of this body of law. It also prohibits indiscriminate attacks (such as bombing in civilian settings) and hostage taking, to name but a few examples. These prohibitions apply in both international armed conflict (IAC) and non-international armed conflict, and are of a customary law nature as well.

Even if IHL does not define terrorism, it is nonetheless not silent on this issue. It expressly prohibits ‘measures of terrorism’ (Article 33 of the Geneva Convention IV) and ‘acts of terrorism’ (Article 4 of Additional Protocol II) against persons not or no longer taking part in hostilities, irrespective of who – among the parties to the armed conflict – commits such acts.

The main objective of these provisions is to ensure that a party to an armed conflict is prohibited from terrorising civilians under its control.

IHL rules governing the conduct of hostilities also expressly cover certain acts of terrorism. Both Additional Protocols (AP) prohibit acts aimed at spreading terror among the civilian

population. The relevant Articles – 51.2 of AP I and 13.2 of AP II – are a key element of IHL rules governing the conduct of hostilities. Their provisions outlaw, for example, campaigns of shelling or sniping at civilians in urban areas. The prohibitions reflected in these provisions are not only binding as treaty law, but are also of a customary law nature.

IHL therefore provides a strong legal framework with explicit prohibitions applicable also to non-State armed groups designated as terrorist whose violations entail individual criminal responsibility at both domestic and international level.

The distinctions between IHL and the legal framework governing terrorism

Even if IHL and the legal framework governing terrorism may have some common grounds in terms of prohibitions, from a more general perspective, they still have different objectives, rationales and structures. In essence, they are not the same.

A crucial difference is that, in legal terms, armed conflict is a situation in which certain acts of violence are lawful and others are unlawful, while any act of violence designated as terrorist is by definition unlawful and criminal. The ultimate aim of armed conflict is to prevail over the enemy. For this reason, parties to the conflict are permitted to attack, or at least are not prohibited from attacking each other's military objectives or individuals not entitled to protection against direct attacks. Violence directed at those targets is not prohibited under IHL, regardless of whether it is inflicted by a State or a non-State armed group. By contrast, acts of violence against civilians and civilian objects are unlawful. Therefore, IHL regulates both lawful and unlawful acts of violence by all parties, while no similar approach can be found in the legal regime governing acts of terrorism.

Another difference lies in the fact that, under IHL, the parties to an armed conflict have the same rights and obligations under IHL (even if that is not the case under domestic law). This principle reflects the fact that IHL's goal is to ensure the equal protection of persons and objects affected by an armed conflict irrespective of the side on which they find themselves during the armed conflict. The legal framework for terrorism obviously does not contain such equal rights and obligations for perpetrators of terrorist acts.

However, it is important to note that while IHL does provide for the same rights and obligations for belligerents, it does not confer any legitimacy to armed groups. Common Article 3 to the Geneva Conventions explicitly states that the application of IHL 'shall not affect the legal status of the Parties to the conflict'. Similarly, Additional Protocol II affirms in its Article 3 that 'Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty

of a State or the responsibility of the government to maintain or re-establish law and order in the State (...):

Despite these differences, overlaps still remain

As already mentioned, if IHL prohibits both specific acts of terrorism committed in armed conflict and a range of other acts committed against the civilian population and civilian objects, and considers them to constitute war crimes, nothing prevents States choosing to designate such acts as terrorist acts under their domestic law or under international conventions aimed at eliminating terrorism. Overlaps will continue and even contradictions between IHL and the legal framework governing terrorism will unavoidably endure if States continue to designate lawful acts of war as terrorist actions.

This is a problem in so far as:

- It creates a conflict of norms at international level and therefore adds legal uncertainty to an already complex legal and operational issue.
- It unnecessarily adds another layer of criminalisation when such acts are already prohibited and punished under IHL for some of them, and under domestic laws for the vast majority of actions carried out by non-State armed groups in armed conflicts. Indeed, it is important to remember that even if IHL applies to acts carried out by non-State armed groups designated as terrorists, States retain at the domestic level the leeway for criminalising actions undertaken by the former during non-international armed conflict - be they lawful or unlawful under IHL - in the absence of combatant privilege and immunity in such situations.
- Eventually, adding a layer of incrimination by designating as 'terrorist' acts that are not unlawful under IHL may discourage IHL compliance by non-State armed groups. All motivation for fighting in accordance with the law would be likely to erode in such cases. Indeed, labelling as 'terrorist' acts that are lawful under IHL renders more difficult the implementation of Article 6.5 of Additional Protocol II, whose objective is to grant the broadest possible amnesty to persons having participated in the hostilities. For obvious reasons, the prospect of amnesty is obfuscated if even lawful acts of war are qualified as acts of terrorism. This may ultimately become an obstacle to peace negotiations and reconciliation efforts in the future. It is true that this discourse is not easy to hear nowadays because of the Islamic State group and affiliated armed groups such as Boko Haram who clearly reject IHL and the values underpinning this body of law. However, one must think beyond this as contemporary belligerency shows that forms of non-international armed conflict involving more "classic" insurgents or non-State organised armed groups with which IHL issues can be addressed still endure (see for instance Colombia, the Philippines, Myanmar, the République Démocratique du Congo, etc.). In

the ICRC's view, it is important to ensure that counter-terrorism measures would not undermine the efforts engaged to reach out to "classic" non-State organised armed groups in terms of compliance with IHL.

That is the reason why the ICRC does not find the term 'terrorist' to be helpful to describe behaviour in armed conflict, with the exception of the few acts specifically designated as such under IHL. Furthermore, in order to reflect the reality of armed conflicts and the rationale of IHL, which is that military objectives can and will be attacked, the ICRC holds the view that attacks against military objectives which are not prohibited by IHL should not be labelled 'terrorist' in international conventions and, ideally, in domestic legislation. Acts directed at military objectives constitute the very essence of armed conflict and should never be legally defined as 'terrorist' under another regime of international law. To do so would imply that such acts are prohibited and must be subject to criminalisation under that other international legal framework.

Because of these overlaps and because international conventions addressing terrorism generally apply in situations of armed conflict, it is essential to have in counterterrorism instruments clauses regulating the relationship between IHL and international conventions addressing terrorism. This would be the only way to avoid, as far as possible, the overlaps and contradictions between the two bodies of law. The issue is complex, as exemplified by the discussions surrounding the UN Draft Comprehensive Convention on International Terrorism whose IHL saving clause is one of the main stumbling blocks for completing the drafting process of this instrument.

The formulation of such a clause will be critical in order to maintain IHL integrity and rationale, but also to avoid ambiguity and misinterpretation detrimental to IHL. From the ICRC's perspective, any political agreement on the UN Draft Comprehensive Convention on International Terrorism should be translated into a legally correct IHL clause and should not be concluded to the detriment of IHL underlying principles. Such a clause should notably exclude from the scope of the UN Draft Comprehensive Convention on International Terrorism lawful acts of war carried out by parties to armed conflicts.

THE EUROPEAN UNION APPROACH TO COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

Gert-Jan Van Hegelsom

EEAS Legal Affairs Division

Résumé

Gert-Jan van Hegelsom nous présente sa vision de l'approche européenne en matière de lutte contre le terrorisme. Pour ce faire, l'auteur retrace brièvement l'évolution de la réponse européenne face au terrorisme, pointe certains éléments de la proposition de nouvelle Directive relative à la lutte contre le terrorisme et expose quelques mécanismes mis en place à l'intérieur et à l'extérieur de l'Union européenne (UE).

Historique de la lutte contre le terrorisme au sein de l'UE

M. van Hegelsom revient sur les origines de l'UE et explique qu'en l'absence d'attribution de cette compétence, la lutte contre le terrorisme est restée essentiellement l'apanage des Etats jusque dans les années 2000. Suite aux traités de Maastricht et d'Amsterdam, la structure de l'UE comporte trois piliers, dont le troisième – la politique étrangère et de sécurité commune (PESC) – permet de développer des mesures de coopération policière et judiciaire entre les Etats membres. C'est dans ce cadre qu'en 2002, le Conseil de l'UE adopta la Décision-cadre relative à la lutte contre le terrorisme, pierre angulaire en la matière. Au fil des années, ce cadre juridique fut complété par d'autres mesures dont le Plan d'action de lutte contre le terrorisme (2011). Depuis l'entrée en vigueur du Traité sur le fonctionnement de l'UE (TFUE), la compétence de l'UE en matière de lutte contre le terrorisme est consacrée dans les articles 82, 83, 85, 86 et 87 de ce traité.

Nouvelle directive sur la lutte contre le terrorisme

Une proposition de directive est actuellement en cours d'adoption en vue de remplacer la Décision-cadre de 2002 et d'y inclure les obligations contractées par les Etats membres dans le cadre du Conseil de l'Europe, du Groupe d'action financière (GAFI) et de l'Organisation des nations unies (ONU). Cette révision vise également à ajouter de nouvelles infractions, telles que les actes préparatoires et le fait de se rendre à l'étranger dans un but terroriste. Des discussions sont en cours quant à l'opportunité de créer une dérogation en faveur de certains acteurs humanitaires afin qu'ils ne soient pas sanctionnés dans leurs interventions auprès de groupes désignés comme terroristes.

Instruments et mécanismes européens en matière de terrorisme

Sur le plan de sa politique extérieure en matière de lutte contre le terrorisme, l'UE a développé plusieurs instruments dont deux nous sont présentés par l'orateur : d'une part, des partenariats privilégiés avec un nombre ciblé d'Etats tiers pour lesquels cette lutte constitue également une priorité, et d'autre part, les missions dans le cadre de la Politique de sécurité et de défense commune (PSDC), telles que la mission EUCAP Sahel Niger, dont le mandat contient explicitement des objectifs de lutte contre le terrorisme.

Sur le plan de la politique intérieure de l'UE, l'article 222 TFUE consacre une « clause de solidarité » par laquelle les Etats membres se sont engagés à venir en aide à tout autre Etat membre victime d'attaques terroristes ou de catastrophe, naturelle ou d'origine humaine. Bien qu'utilisée plusieurs fois ces dernières années, elle ne l'a jamais été dans le cadre du contre-terrorisme. A côté de cela, il existe la « clause de défense mutuelle » contenue dans l'article 42 TFUE que la France a invoquée suite aux attaques du 13 novembre 2015 afin de faire appel à l'aide des autres Etats membres pour remplacer les forces françaises rapatriées en urgence de leurs missions à l'étranger pour assurer la sécurité sur le territoire métropolitain.

En guise de conclusion, l'orateur souligne que l'approche européenne en matière de lutte contre le terrorisme est guidée par les expériences nationales des Etats membres. Une évolution des compétences de l'UE se dessine néanmoins, car les Etats semblent graduellement prendre conscience des avantages à coopérer sur ce sujet transnational.

Preliminary comments

When I was approached to sit on this panel, I considered myself not particularly suited for this presentation and indicated that I would be very brief. For the European Union's (EU) approach to terrorism, the paths of the two components of the title do not cross, except in circumstances where EU missions and operations operate in third countries.¹ The EU's approach to counter-terrorism has historically been governed through the prism of police and judicial cooperation. For those of you who are well versed in EU matters, most of what I would like to mention in this short introduction will not come as a surprise. I hope however that I will be able to offer some insight into the various aspects of relevance to our discussions.

1 For an introduction to that issue, see G.J. van Hegelsom, "The relevance of the law of armed conflict for the conduct of Petersberg tasks", in: Proceedings of the Bruges Colloquium *The impact of International Humanitarian Law on current Security policy trends*, 26th-27th October 2001, Collegium, No.25, Summer 2002.

I would like to emphasise that EU websites, in particular those of the European Commission² and the responsible services contain a wealth of information regarding the various work strands of the EU in matters of counter-terrorism. Hence, I will severely limit myself to the flagging of those which are central to our theme.

In his introductory remarks, Walter Füllemann noted that the approach of States and international organisations to terrorism has changed. He explicitly asked that the on-going legislation process on the Draft EU Directive on Combatting Terrorism regarding the criminalisation of assistance to non-State parties take the concerns of humanitarian organisations into account. I will therefore also briefly touch on the state of play in this area.

Introduction: the TREVI group

From their inception in the 1950s, European institutions have been built on the pursuit of economic integration (European Coal and Steel Community, European Economic Community) and the peaceful uses of nuclear energy (European Atomic Energy Community - Euratom). One should bear in mind that the competences of the institutions are based on the core principles of European law: attribution of the competence by the Treaties, subsidiarity and proportionality. In the absence of attribution of the competence in the Treaties, counter-terrorism could not be addressed by the institutions at European level.

Even with the rise of terrorism in the 70s and 80s, EU counter-terrorism measures remained essentially within the realm of national governments and initially led to the reinforcement of traditional intergovernmental cooperation between the Member States. It has since remained a sensitive matter, and Member States only recently decided to accept the development of legislative measures by the Union to progress to a joint approach. As a first step, the European Council in 1975 established 'the TREVI group', an informal consultation mechanism of high officials of the Ministries of Justice and Interior.

In my contribution, I will not address the specific subject of EU counter-terrorism sanctions and International Humanitarian Law (IHL) before the EU Court of Justice, as this will be discussed by my colleague and friend Frederik Naert in session three.

1. The Treaties of Maastricht and Amsterdam

At the beginning of the 90s and following the adoption of the Single European Act, the development of the EU progressed significantly with the introduction by the Treaties of Maastricht

² See for instance "Fighting terrorism at EU level, an overview of Commission's actions, measures and initiatives", European Commission Fact sheet, 11 January 2015.

and Amsterdam of the 'pillar structure'. The three pillars – economic, foreign and security policy and freedom, security and justice – allowed for a differentiated and gradual development of cooperation between Member States in the latter two areas, subject to specific decision-making procedures and different instruments from those of the first pillar, the traditional forms of supra-national cooperation. Work progressed along the Common Foreign and Security Policy (CFSP) angle³ and – more importantly – through Justice and Home Affairs.

The introduction of the third pillar enabled the use of the institutional structures of the European Union, building upon the achievement of TREVI, and led to the adoption of a variety of legal acts that have been a determining factor for the development of police and judicial cooperation among competent authorities of Member States. The measures adopted since by the Council of the European Union include the facilitation measures regarding cross-border police and judicial cooperation, the European Arrest Warrant and the establishment of the European Police Office (EUROPOL). Counter-terrorism however remained the primary responsibility of Member States.

2. The 2002 Council Framework Decision on combatting terrorism

In conformity with the practice in the third pillar, the Council in 2002 adopted its landmark Council Framework Decision on combatting terrorism⁴ which contains definitions of terrorist offences and of groups, as well as determines the obligations of Member States in criminalising terrorist offences and establishing jurisdiction. The Decision moreover provides for measures to be adopted to protect and assist victims of terrorist acts. As may be expected from the European Union, Article 1, paragraph 2, of the Decision, recalls that fundamental human rights as enshrined in Article 6 of the Treaty on the European Union are to be upheld in all circumstances.

The Framework Decision has since been complemented by a variety of legal acts to promote information exchange and cooperation between the competent national law enforcement authorities.⁵ The measures also addressed the matter of protection and assistance to victims, building on existing measures concerning victims of criminal acts.

3 Council Common position of 27 December 2001 (2001/930/CFSP) on combating terrorism, OJ L 344, 28.12.2001, p.90.

4 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p.3, as amended by Council Framework Decision 2008/919/JHA of 28 November 2008, OJ L 330, 9.12.2008, p. 21.

5 See for instance Council Framework Decision 2006/960/JHA, Council Decision 2008/615/JHA and Council Decision 2005/671/JHA, Regulation (EU) No 603/2013 of the European Parliament and of the Council, Council Framework Decision 2002/584/JHA and Council Framework Decision 2002/465/JHA.

3. The role of strategies

The next major step in developing the capacities of the Union and its Member States in counter-terrorism was the adoption by the European Council of the Counter-Terrorism Strategy 2005.⁶⁻⁷ Whilst recalling the commitment to combat terrorism and the compliance with human rights, the Council agreed on 4 work strands:

- prevention: avoid that people resort to terrorism;
- protect: borders, citizens, infrastructure;
- pursue: cooperation among Member States and with third countries; and
- respond: in a coordinated manner making full use of cooperative mechanisms, including with regard to the protection of victims.

The Counter-Terrorism Action plan of 2011 developed concrete proposals in each of the work strands that are still being implemented today.

With the entry into force of the Treaty on the Functioning of the European Union (TFEU), its Title V 'Area of Freedom, Security and Justice' provides the current legal framework relevant to the Union's approach to counter-terrorism. In particular, Articles 82 (judicial cooperation in criminal matters), 83 (minimum rules on crimes, including terrorism by adoption of directives), 85 (EUROJUST), 86 (police cooperation) and 87 (EUROPOL) set out the basic principles in furthering cooperation among the institutions and Member States.

4. The proposal for a directive on combatting terrorism (2015)⁸

The proposal aims at replacing the Council Framework Decision of 2002 and implementing the obligations already binding on Member States and the Union by the adoption of, and accession to, a variety of instruments, including the Council of Europe Convention on the Prevention of Terrorism and its additional Protocol of 2015, the recommendations of the Financial Action Task Force (FATF) and various United Nations Security Council Resolutions (UNSC).⁹ It

6 The European Union Counter-Terrorism Strategy, Council of the European Union Document 14469/4/05 of 30 November 2005.

7 The dedicated CT strategy straddles the issues identified in the European Security Strategy, *A secure Europe in a better world*, Brussels, 12 December 2003 and those identified in the Internal Security Strategy approved by the European Council On 25/26 March 2010. Such strategies, including the 2016 Global Strategy for the European Union's Foreign and Security Policy, *Shared Vision, Common Action: a Stronger Europe*, assist in focussing the Institutions' and Member States' actions in addressing threats.

8 Proposal for a Directive of the European Parliament and the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combatting terrorism, Brussels 2.12.2015, COM(2015) 625 Final.

9 See *inter alia* UNSCR 2178 (2014) of 24 September 2014 and 2249 (2015) of 20 November 2015.

updates the list of criminalised behaviour, incorporates recommendations by the FATF on the criminalisation of terrorist financing and creates the legal basis for an increased capacity to tackle preparatory acts, including the prevention of travelling abroad for terrorist purposes.

In particular, the provisions on terrorism financing have triggered concerns in the humanitarian community about the potential extra-territorial effect of sanctions that would inhibit their engagement with non-State armed groups in terms of contacts, medical assistance and incentives to comply with IHL. These concerns have, *inter alia*, been addressed in the International Review of the Red Cross¹⁰ following the Supreme Court ruling in the case of *Holder v. Humanitarian Law Project*.¹¹

Calls have therefore been made to create a *caveat* clause for principled humanitarian interaction with non-State armed groups despite their potential designation as terrorist groups by the United Nations, international organisations or States. Such a clause should be akin to the exception of actions by armed forces governed by IHL from the scope of terrorist offences under the relevant instruments.¹² Proposals for language addressing both the actions by armed forces under IHL and humanitarian interaction with non-State armed group are currently under discussion between the European Parliament, the Council and the Commission. It should be noted that – in contrast to the United States (US) – EU Member States’ jurisdictions are much more reluctant to sanction extra-territorial effects with regard to perceived unlawful assistance to non-State armed groups.

5. External aspects of EU policies

Recognising that the internal as well as external security nexus requires the complementarity of external and internal measures, the European Union cooperates extensively within international fora, such as the UN and the Global Counter Terrorism Forum, and on a bilateral basis with third countries through its agreements that generally provide for dialogue and cooperation on counter-terrorism. A new phenomenon is the development of dedicated partnership

10 International Review of the Red Cross, Volume 93, number 883, September 2011, *Humanitarian Engagement under counter-terrorism: a conflict of norms and the emerging policy landscape*, Naz K Modirzadeh, Dustin A. Lewis and Claude Bruderlein.

11 United States Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

12 See, for instance, preambular paragraph 11 of the Council Framework Decision on combating Terrorism, op. cit. note 4: “Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision”. Of note is that the 2015 proposal of the Commission for the Directive on combating terrorism, op. cit., note 7, did not contain a comparable *caveat*.

priorities with a number of third countries recognising that terrorism is one of the main common concerns, also in relation to migration. The Union furthermore substantially invests in capacity-building in third countries through a variety of (financial) instruments including through the Common Foreign and Security Policy, the Instrument Contributing to Stability and Peace and the European Instrument for Democracy and Human Rights, as well as through development cooperation in general. In its cooperation with third countries, the EU conducts evaluation and assessment of projects based on the third country's record and capacity to respect human rights *and* IHL.

The EU also conducts a privileged dialogue on legal issues in counter-terrorism between the legal advisers of the Member States and the legal adviser of the US State Department.

6. Recent developments

Article 222 of the Treaty on the Functioning of the European Union contains the 'solidarity clause'. Its core obligation reads as follows:

'1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) — prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.'

Paragraph 3 of the Article provides that arrangements for the implementation of the solidarity clause will be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council adopted the arrangements on 24 June 2014.¹³ Whilst the 2013 arrangements for the EU Integrated Political Crisis Response to be used in the event of a request by a Member State for assistance following a terrorist attack have been regularly exercised and used in the context of other events, they have not yet been used in counter-terrorism situations.

¹³ Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 1.7.2014, p.53.

In the wake of the 13 November 2015 Paris attacks, France invoked the mutual defence clause laid down in Article 42, paragraph 7, of the Treaty on European Union:

‘If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.’

Following the 17 November 2015 Foreign Affairs Council, France engaged with individual Member States to seek assistance regarding its priorities. In light of its urgent requirement to ensure military and security presence in metropolitan France, it requested Member States and allies to assist in the substitution of repatriated French contributions to UN, multinational and EU missions abroad.

As provided in Article 43 of the Treaty on European Union, Common Security and Defence Policy (CSDP) missions and operations may contribute to the fight against terrorism. The EU Consolidated Appeals Process (EUCAP) Sahel Niger includes projects on training, mentoring and advising on the rule of law, in particular Human Rights Law. For the first time the mandate of this mission explicitly envisages cooperation with the host country in counter-terrorism as a concrete objective: ‘On 27 May 2013, the Council reiterated its readiness to discuss, particularly in the context of the CSDP, the options for urgent support for the Malian authorities in the area of internal security and justice, including the fight against terrorism and organised crime.’¹⁴

7. Conclusion

The EU approach to counter-terrorism is governed by the experience of individual Member States. The gradual evolution of incentives to co-operate within EU structures – and beyond, with third States – as well as the awareness of Member States that challenges may more adequately be addressed by developing their capacity to work together, are obvious. It involves a variety of strands that cut across the internal and external security nexus and therefore offer a continuous challenge to law enforcement authorities on a day-to-day basis. As opposed to IHL, such challenges are – correctly – measured by their compliance with Human Rights Law.

14 Council Decision 2014/219/CFSP of 15 April 2014 on the European Union CSDP Mission in Mali (EUCAP Sahel Mali), OJ L 113, 16.4.2014, p.21.

SESSION 1 – SETTING THE SCENE

At the end of the introductory session, the audience raised questions on nine issues:

1. On the possible *caveat* for humanitarian action

One of the participants referred to the British system where humanitarian engagement with State or non-State parties is not a crime *per se*. Noting that there have been examples of people committing criminal acts while operating in the framework of an international humanitarian organisation, the participant wondered how to insert a *caveat* in counter-terrorism law for humanitarian workers which does not inadvertently provide protection for actions which are illegal under International Humanitarian Law (IHL) or domestic legislation.

A panellist stressed that the question about the *caveat* in anti-terrorism regulations should not be focused on humanitarians only but should also cover non-State armed groups involved in lawful acts of war. Given the scope of application of international conventions and the fact that domestic anti-terrorism laws can have extra-territorial application, it is important that any counter-terrorism instrument contains a clear and unambiguous *caveat* for both humanitarian action and acts of war that are legal under IHL. Instruments like the 1997 Terrorist Bombings Convention have tried to integrate these elements but they often lack clarity and leave much leeway for diverging interpretations.

A second participant remarked that a humanitarian *caveat* exists in the currently discussed Draft European Union (EU) Directive on Terrorism and that this exception is supported by the International Committee of the Red Cross (ICRC).

One of the speakers further elaborated on the ICRC's perspective on the issue. The ICRC's objective is to ensure that it will be able to continue to carry out its humanitarian activities in accordance with the humanitarian principles of neutrality, independence and impartiality. The panellist pointed out that, for the ICRC, the form of the *caveat* does not really matter as long as it enshrines a wide notion of humanitarian activities. In the ICRC's view, the *caveat* should indeed not be restricted to 'humanitarian assistance' as recently suggested by the United Nations (UN) General Assembly, but should rather include larger areas of activities, taking *inter alia* protection activities into account. In order to avoid that the *caveat* provides protection for people committing illegal acts under IHL or domestic law, it is important to clearly define the beneficiaries of the exception. The ICRC's suggestion is to refer to the definition of 'humanitarian organisation' provided in IHL instruments and to give special weight to the

criterion of impartiality. In any case, the ICRC strongly urges States to adopt a *caveat* which ensures that counter-terrorism legislation is not detrimental to IHL.

2. On the Comprehensive Convention on International Terrorism

Pointing at the adoption in recent years of numerous legislative instruments relating to the suppression of terrorism, a member of the audience asked why since 1994 the ongoing discussions concerning the UN Draft Comprehensive Convention on International Terrorism have not really moved forward.

A member of the panel answered that the negotiations on the Draft Comprehensive Convention are probably going to move forward in the near future. The panellist explained that after 9/11 there had been a sense of urgency in giving a legal response to terrorism. States found it easier to adopt new counter-terrorism regulations than look at the existing framework and the broader issues underlying terrorism. With UN Security Council Resolution 2178 (2014) there was even an explicit extension of the counter-terrorism regulation to an armed conflict context. From that moment on, States have tended – including for political reasons – to favour relying on counter-terrorism regulations rather than on IHL when taking action against non-State armed groups. That being said, the speaker believes that the adoption of a Comprehensive Convention on International Terrorism might soon be necessary to allow for some clarification and possibly for the inclusion of some additional elements such as the protection of economic infrastructures and other interests into its scope of application.

Another panellist added a few accounts of the latest developments regarding the negotiations of the Comprehensive Convention. In the speaker's opinion, the fight against the Islamic State and the international consensus on the necessity to eliminate terrorism have triggered in the last years an opportunity to reactivate the negotiations on this Convention. States have, in particular, seized the unusual unity between the UN General Assembly and the UN Security Council on this question to relaunch the discussions in the working group of the United Nations General Assembly 6th Committee. The ICRC was even approached a few years ago in this context by the Chair of the working group carrying out the discussions on the Convention. The prospect of advancing on the content and on the adoption of the Convention is however distant. Since Israel is currently chairing the working group, it is, according to the speaker, very unlikely that questions linked to self-determination or to occupation will be put forward during this presidency.

The panellist further stated that in his view, the main points of disagreement between States in the negotiations of the Comprehensive Convention relate to the IHL saving clause as well as to the scope and the interpretation of the exclusion clause it would contain. States have di-

verging opinions on how to interpret the notion of ‘armed forces’. An observable trend pushes for a narrow interpretation of the notion, which would be restricted to State armed forces. By leaving non-State armed groups out of the exclusion clause, some States want to make sure that groups designated as terrorist enter the scope of the Convention regardless of the legality under IHL of the actions they undertake. The motivation behind this reasoning is political, as some States want to stigmatise and to delegitimise non-State armed groups designated as terrorist, be it at the expense of IHL.

3. On the multiplication of separate terrorism legislations and the relation between IHL and CTL

A member of the panel then enquired about other speakers’ views on the existence of a legitimate need to develop separate terrorism legislation at the international and domestic level rather than simply rely on existing IHL paradigms. Referring to the difficult articulation between IHL and Human Rights Law (HRL), the panellist asked why such articulation does not exist regarding the relationship between IHL and Counter-terrorism Law (CTL).

One of the speakers made the point that, for him, any individual – whether a victim or a perpetrator – in need of protection is entitled to this protection regardless of the atrocities she or he might have committed. Within the EU it is deemed essential to have a common understanding on what constitutes criminal acts and on the way in which to prosecute those criminal acts, including, for instance, how to organise the collection of evidence abroad and on how to share information among Member States. This common understanding is necessary to ensure effective protection for all individual citizens. Such a shared understanding cannot be reached solely at a national level but must be built at a higher level. In spite of the weakening of the Schengen system that has been observed in the last three years, the panellist asserted that the common area of security and justice that exists at the EU level is a good framework to work on the issue. Contrary to what a commentator has written, the speaker believes that working on a common understanding at the EU level would not ‘bring it back to the lowest common denominator’.

The speaker then moved to the distinction between IHL and HRL, which he believes is not as clear-cut as some may claim. In his view, this lack of clarity also applies to the relationship between IHL and CTL. He considers this relation not much different from the relation between IHL and HRL because both relations contain borderline situations. Except for those special cases, the speaker’s view was that that situations cannot be handled within both IHL and CTL frameworks at the same time.

Another panellist expressed the conviction that there is a general consensus on the necessity to address and tackle terrorism but that there is disagreement on how to respond to this need. A good example of this argument is UN Security Council Resolution 2178 (2014). This Resolution was introduced in response to the issue of 'foreign fighters'. The speaker explained that in this Resolution States condemned foreign terrorist fighters but did not organise inter-State cooperation to tackle the problem. Moreover, the speaker regretted that – mainly for political reasons – States had opted for a definition of 'foreign terrorist fighters' and a scope of application of the Resolution that require clarification. More generally, the speaker thinks there is a need to clarify the relationship between CTL and IHL and to ensure greater coherence (especially in terms of the language used) between the different bodies legislating on counter-terrorism related issues.

The last panellist added that there must be space for anti-terrorism legislation but that the creation of new norms has to be exercised with due care in the existing international legal framework, in particular with regard to IHL and to States' obligations under this body of law. The lack of clarity currently existing between IHL and CTL is due not only to the political environment but also to the multiplicity of players and stakeholders involved in creating the right framework for the fight against terrorism.

Summarising the situation, the last speaker recalled that although IHL was not designed initially to deal with terrorism, it still contains provisions allowing it to address – directly or indirectly – terrorist acts in armed conflicts. Hence, according to the ICRC, there is no need to create a new international counter-terrorism framework for acts of terrorism committed within an armed conflict. This is because IHL already encapsulates strong prohibitions covering the most important acts of terrorism (e.g. prohibition of direct attacks against civilians, indiscriminate attacks, prohibition of acts aimed at spreading terror among the civilian population, etc.). The recourse to IHL is however limited to acts committed in situations of armed conflict and needs, sometimes, to be combined with domestic law. This is true, for instance, in non-international armed conflicts (NIAC), where IHL is to be complemented, for the sake of effective repression of acts carried out by non-State armed groups designated as terrorist, by national law, as the latter permits to criminalise almost any acts committed by terrorist groups, even those not prohibited under IHL. This repression on the basis of domestic law is possible because in NIACs there is no combatant privilege and immunity. In the same vein, geographical and other physical hurdles sometimes render the implementation of IHL challenging, especially when investigating actions committed abroad; the recourse to national legislation and the notion of preparatory acts committed on the national territory (e.g. joining some terrorist group, receiving training, travelling abroad, etc.) will then often be favoured for domestic prosecution purposes. In short, the combination between IHL and domestic law

is very important for States willing to prosecute acts committed by non-State armed groups designated as terrorist.

4. On the relevance of other counter-terrorism instruments as models

Pointing at the fuzziness around a potential comprehensive approach to the fight against terrorism and at the absence of a common definition of terrorism, a member of the audience enquired whether efforts made at regional levels (notably in Africa where the African Union (AU) has adopted a convention on the fight against terrorism) could be used as a source of inspiration.

Two speakers welcomed the proposition to use the AU Convention on the Fight against Terrorism as an example of a tool respectful of humanitarian action. In their opinion, international law is too focused on European views and should more often grant importance to ideas developed in other parts of the globe. One of the panellists moreover underlined the ICRC's particular interest in the AU Convention and the Organisation's wish to build on this model to incite other States to make greater efforts to avoid hindering principled humanitarian work in anti-terrorism legislations.

5. On the weak recourse to IHL in domestic courts

One of the participants made a point about the weak recourse to IHL made by domestic judges when dealing with terrorism cases. He wondered how to overcome the fact that IHL is often considered as little known, intricate and difficult to implement given the recurrent lack of access to the field where the incriminated acts were committed.

A speaker explained that IHL is indeed not frequently relied upon in national courts because of three main reasons. The first is, as mentioned by the participant, that IHL is only little known among domestic judges. He emphasised however that the ICRC delegations around the world are actively involved in IHL dissemination activities for all kind of stakeholders, including for members of the judiciary. The second reason is the erroneous conception that some people have according to which invoking IHL would ultimately lead to granting impunity to members of terrorist armed groups. The speaker argued that this conception is wrong, first and foremost because the perpetration of acts of terrorism (i.e. attacks against civilians and attacks with the aim to spread terror amongst civilians) is prohibited under IHL. The status of the person committing such acts does not influence this unlawfulness. Besides, he recalled that what is often referred to as 'combatant's privilege' (i.e. the right of a combatant to use lethal force against his/her opponents) only exists in relation to international armed conflicts. The vast majority of the situations in which terrorist armed groups operate are non-international armed conflict. The status of combatant can thus not be invoked as a protection against proceedings

for acts of terrorism, and even less so when the acts were committed in a non-international armed conflict. The third reason is a judicial efficiency argument. Judges often prefer to rely on national counter-terrorism law rather than on IHL because a violation of the former is much easier to prove than a violation of the latter. Having said that, the speaker explained that the ICRC is not opposed to the recourse to national law instead of IHL but he warned against the automatic use – motivated by political purposes – of counter-terrorism law in cases where general domestic law would suffice.

6. On the exclusion of unlawful acts under IHL from counter-terrorism regulation

Another member of the audience wondered why the speakers merely insisted on excluding *lawful* acts under IHL from counter-terrorism legislation and not on excluding *unlawful* acts under IHL as well, since such acts are already incriminated by IHL and do consequently not need to be sanctioned by another body of law.

One of the speakers stressed that, for the ICRC, the most important element is that *lawful acts of war* should be excluded from the scope of application of counter-terrorism instruments since the contrary would significantly undermine the integrity of IHL as a whole. The question of the inclusion of *unlawful* acts of war is less primordial to the compliance with IHL. The speaker however recalled that the incrimination of *unlawful* acts of war by counter-terrorism law would be a duplication of law, given States already have the needed tools to prosecute terrorist acts in their international and domestic legal arsenal.

7. On the interpretation of some exception clauses

A member of the audience pointed at the confusion between the terms ‘foreign fighter’ and ‘foreign terrorist fighter’ which was created by UN Security Council Resolution 2178. In his view, this Resolution wiped out differences and merged together the two separate regimes existing until then, respectively for terrorism in peace-time and for terrorism in war-time. This confusion has caused much trouble in interpreting the notion of ‘armed conflict’ contained in various exception clauses, like the one contained in the Council of Europe’s Convention on the Prevention of Terrorism.

A speaker confirmed the confusion. As explained *supra* (issue 2), States nowadays tend to understand this notion very restrictively in order to diminish the scope of exclusion clauses whereas they used to do the opposite with older instruments (e.g. the 1997 Bombing Convention) containing similar clauses. For this reason, the speaker and the participant agreed that it is very important to use clear terminology when drafting any future exception clause.

8. On the lack of evaluation mechanisms accompanying EU counter-terrorism legislation

A participant shared his feeling that EU Member States tend to multiply anti-terrorism legislation without ensuring that these new measures are accompanied by relevant evaluation mechanisms, controlling among others that human rights rules are complied with.

One of the panellists argued against the idea that Member States could 'hide behind the European umbrella' to adopt counter-terrorism legislative measures they would otherwise not want to take at national level. The speaker explained that according to the EU system, Member States retain the possibility to adopt additional counter-terrorism measures in their national arsenal if they wish to. He then noted that the EU Commission has conducted four evaluations of the anti-terrorism measures adopted at EU level over the last decade, and that similar evaluations are already envisaged concerning the Draft Directive on Terrorism currently discussed in the EU Parliament.

Another speaker agreed that there has been a multiplication of new anti-terrorism measures over the last two years and that, despite the evaluations that have been conducted, some considerations regarding the respect of human rights have not been taken into account. According to the speaker, the major problem in this regard is the perpetuation and the consequent 'normalisation' of norms which were supposed to be temporary and exceptional. Many issues relating to human rights arise from the fight against terrorism (e.g. freedom of speech on the internet, role of non-State players in preventing radicalisation, freedom of movement, etc.). The panellist therefore stands for sound and regular evaluation mechanisms.

9. On the legal value of UN Security Council legislative resolutions

A last question was asked about the legal value of the 'legislative resolutions' of the UN Security Council in national law.

One of the speakers drew attention to the fact that those resolutions are binding in the EU and are directly applicable in EU Member States as they have been confirmed by two major EU decisions.

A second panellist complemented this response recalling that States have some leeway when pursuing their obligation to implement UN Security Council resolutions. Yet, the speaker warned that this margin of manoeuvre opens the door to many problems due to the lack of a common definition of 'terrorism'. States are free to adopt their own understanding of this term. Unlike Switzerland where the definition of terrorism enshrined in Article 260 *quinquies* of the Swiss Criminal Code (the only national reference to terrorism) includes a very broad IHL saving

clause, some States opt for far broader definitions of terrorism and consequently take measures that are not strictly necessary to reach the purpose of the UN Security Council resolutions. This shows once again the difficulties caused by the lack of a common definition of terrorism.

Session 2

Legal Parameters of the Fight against Terrorism

Chairperson: **Elzbieta Mikos-Skuza**

University of Warsaw and College of Europe

LEGAL QUALIFICATION OF THE FIGHT AGAINST TERRORISM

Marco Sassòli

University of Geneva

Résumé

Marco Sassòli examine quels régimes juridiques s'appliquent à la lutte contre le terrorisme. Il s'attache plus précisément à définir quelles sont les situations dans lesquelles le terrorisme et la lutte contre le terrorisme sont régis par le droit international humanitaire (DIH) des conflits armés internationaux (CAI), par le DIH des conflits armés non internationaux (CANI), ou par un autre cadre juridique que le DIH.

DIH des conflits armés internationaux

Après quelques clarifications préliminaires, M. Sassòli nous explique que, à partir d'un certain seuil de violence, le DIH des CAI est applicable à deux situations distinctes : soit lorsqu'un Etat recourt à des actions terroristes contre un autre Etat, ou lorsqu'un Etat dirige ou contrôle un groupe terroriste agissant contre un second Etat, ou lui donne des mots d'ordre.

L'application du DIH des CAI prête toutefois à controverse dans les cas où un ou plusieurs Etats combattent un groupe armé terroriste sur le territoire d'un troisième Etat n'ayant pas consenti à cette ingérence. Trois approches semblent se dégager dans ce cas précis. Selon la première, il y a application du DIH des CAI, car on considère que l'offensive des Etats intervenant est dirigée contre le territoire du troisième Etat. Ce raisonnement est cependant problématique puisqu'il ne permet pas de qualifier comme partie au conflit le groupe armé terroriste contre lequel l'offensive est dirigée; le DIH ne lui est donc pas applicable. La seconde solution est l'application simultanée, d'une part du DIH des CAI pour ce qui concerne la relation entre l'Etat attaquant et l'Etat hôte et, d'autre part, du DIH des CANI pour ce qui concerne la relation des Etats avec le groupe terroriste attaqué. Pour Marco Sassòli cette solution est néanmoins bancal elle aussi. C'est pourquoi l'orateur propose une troisième approche, qui consiste à n'appliquer que le DIH des CANI, dès lors que, selon lui, il n'existe en soi pas de conflit entre Etats.

DIH des conflits armés non internationaux

Lorsque le DIH s'applique à des cas de lutte contre le terrorisme, il s'agit généralement du DIH des CANI, pourvu toutefois que les conditions d'organisation des groupes visés et d'intensité de la violence soient remplies. L'auteur explique les difficultés qui sont liées à ces deux critères et nous expose les questions qui peuvent se poser dans les cas où le niveau d'intensité des hostilités n'a pas encore été ou n'est plus atteint. M. Sassòli soulève également la question de l'identité des parties à un CANI dirigé contre un groupe terroriste.

Autre cadre juridique que le DIH

Lorsque la lutte contre le terrorisme sur un territoire étranger ne s'inscrit pas dans le cadre d'un conflit armé, il n'y a pas d'application du DIH. D'aucuns estiment que les droits de l'homme sont alors applicables. Il y a néanmoins, au niveau tant des Etats que des experts, des opinions discordantes quant à la possibilité et les conditions exactes d'une application extraterritoriale des droits de l'homme.

En conclusion, Marco Sassòli concède qu'il existe une réelle nécessité de combattre le terrorisme mais celle-ci ne justifie pas, selon lui, que les catégories juridiques existantes soient brouillées. Au contraire, il soutient que le DIH peut s'appliquer tel qu'il existe à la lutte extraterritoriale contre le terrorisme, et ce malgré les nombreuses questions, controverses et enjeux politiques que suscite le contexte particulier du terrorisme.

My presentation will focus on the question of when International Humanitarian Law (IHL) applies to terrorism and the fight against terrorism. More precisely, I will address the question of when such situations are governed by the IHL provisions on international armed conflicts, when they are governed by the IHL provisions on non-international armed conflicts, and when they are not covered by IHL at all. First, however, some preliminary issues must be clarified.

1. Preliminary clarifications

First, it is important to emphasise that what has to be classified under IHL is not terrorism in general – or, for example, one of its subsets such as radical Islamist terrorism – and the reactions of States to counter it, but rather the fight of one or several States against specific armed groups. Second, the fact that a group sometimes or always uses terrorist tactics is not relevant to determining whether it is an armed group engaged in an armed conflict. Not all armed groups are terrorist and not all terrorist groups are armed groups in the IHL sense of the term. Third, as Rogier Bartels will explain later in these proceedings, once an armed conflict

exists, not only is the conduct of the parties to that conflict governed by IHL, but also any act (terrorist or otherwise) with a nexus to that conflict.¹ There must however be a nexus to a genuine armed conflict in the IHL sense of the term. In addition, I have doubts as to whether the very broad concept of “nexus”, developed by international criminal tribunals for the purpose of being able to prosecute as many persons as possible for war crimes, is adequate for IHL, in particular if IHL is seen, as it increasingly is, as not only prohibiting certain conduct (e.g., torturing detainees) or prescribing certain conduct (e.g. caring for the wounded and sick), but also as authorising certain actions which, outside armed conflict, would be prohibited by international law (e.g. depriving persons of their liberty without judicial control).

2. When is fighting terrorism covered by the IHL provisions on international armed conflicts?

First, the IHL provisions on international armed conflicts apply if one State uses terrorist means against another State or targets representing it. It has recently been suggested that this is only the case when the violence between the two States reaches a certain threshold,² but I agree with the International Committee of the Red Cross (ICRC) that State practice does not support this conclusion and that such an interpretation would leave a dangerous *lacuna* in the protection offered by *ius in bello*.³ Second, the IHL provisions on international armed conflicts applies if a State has direction and control over a group using terrorist means against another State or instructs the group to use such means. The degree of control necessary is controversial, but the tendency is to consider overall control as sufficient to bring the IHL provisions on international armed conflicts into application.⁴ Some further suggest that the degree of control necessary to make the IHL provisions on international armed conflicts applicable is higher when the conflict is triggered by a (terrorist) act committed by an armed group than when a non-international armed conflict between the armed group and a State pre-exists

1 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Chamber, Judgement, 1 June 2001, paragraph 444; Jean-Christophe Martin, “Le Terrorisme”, in: Hervé Ascensio, Emmanuel Decaux, Alain Pellet (eds.), *Droit International Pénal*, Paris, Pedone, 2012, p. 292; Ben Saul, “Terrorism and international humanitarian law,” in: *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar Publishing, 2014, p. 214.

2 International Law Association, Use of Force Committee, *Final Report on the Meaning of Armed Conflict in International Law* (The Hague Conference) 2010, available at: <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>> (last accessed 24 November, 2016). See, in particular, p. 2 and pp. 23 and following.

3 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, paragraphs 239-244 (Common Article 2).

4 ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeals Chamber, Merits Judgement, 15 July 1999, paragraph 131; ICRC, *Commentary on the First Geneva Convention op. cit.*, paragraph 271 (Common Article 2).

on the territory of the latter and an outside State gains control over the armed group.⁵ In any case, I would suggest that, unlike a case of direct confrontations between the armed forces of two States, and except for the case of a third State giving instructions to an armed group, a certain minimum level of violence between such an armed group and the State it is fighting against is necessary to make the IHL provisions on international armed conflicts applicable.

The main controversy relating to the applicability of the IHL provisions on international armed conflicts to armed conflicts between one or several States on the one hand and a terrorist armed group on the other concerns the question of whether that law applies if a State uses force against a terrorist group situated in the territory of another State when the territorial State does not consent to such use of force, even if force is exclusively aimed at targets representing the terrorist group, and there is no (or only a hostile) relationship between the government of the territorial State and the armed group. An example of this is found in the current situation in Syria, which involves US and French aircraft and missiles targeting the Islamic State against the declared will of the Syrian government. On this issue, three possible approaches are put forward by scholars and States.

One may view such situations as covered only by the IHL provisions on international armed conflicts, because they are directed against the territory of a non-consenting State.⁶ The territory represents the State and it is indeed uncontroversial that violence does not necessarily have to be directed at the armed forces of a State to trigger the applicability of the IHL provisions on international armed conflicts. This solution does not, however, assist in overcoming most of the humanitarian problems arising in reality. The members of the armed group against which the violence is directed would not be combatants – because they do not belong to the territorial State – but civilians who could be attacked only if and for such time as they directly participate in hostilities. The IHL provisions on non-international armed conflicts would permit such individuals to be targeted as members of an armed group with a continuous fighting function, and this is a more appropriate solution. In addition, most scholars consider today

5 Djemila Carron, *L'acte déclencheur du conflit armé international*, Genève, Schulthess/LGDJ, 2016, pp. 255 and 409.

6 See e.g., Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford, OUP, 2012, pp. 73-79; Sayeman Bula-Bula, *Droit international humanitaire*, Louvain-la-Neuve, E. Bruylant-Academia, 2010, pp. 98-99; Christopher Greenwood, "Scope of Application of Humanitarian Law", in: Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford, OUP, 2008, pp. 54-55; Marco Milanovic, "What Exactly Internationalizes an Internal Armed Conflict?", at: <<http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>> (last accessed 26 November 2016); International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary*, p. 2, <http://www.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf> (last accessed 26 November 2016).

that the IHL provisions on international armed conflicts authorise the targeting of members of the armed forces of the 'enemy', i.e. the (territorial) State, as well as the internment of 'enemy' nationals for imperative security reasons. The protection needs of such internees are indeed often invoked as justification for the application of the IHL provisions on international armed conflicts. However, I wonder whether human rights guarantees, which are more protective, are not more appropriate in this respect. The insistence on applying the law of international armed conflicts to such situations appears to be a kind of sanction for the violation of *ius ad bellum* by the State using force without the consent of the territorial State.⁷ This criticism also applies to the compromise solution suggested by the ICRC according to which the international armed conflict against the territorial State occurs in parallel with a non-international armed conflict directed at the armed group.⁸ This solution raises two questions. First, how is one to know which acts are covered by the IHL provisions on international armed conflicts, and which by the IHL provisions on non-international armed conflicts? Second, what (besides again the undesirable internment of enemy nationals) would remain to be covered by the IHL provisions on international armed conflicts, as most conduct would be covered by the law of non-international armed conflict? Further still, if the parallel situation between the armed group and the attacking State does not fulfil the necessary level of intensity for the IHL provisions on non-international armed conflicts to apply, all events would again be covered by the IHL provisions on international armed conflicts.

I therefore prefer a third solution, which has been forcefully argued and explained in detail by one of my former doctoral students,⁹ that is to apply only the IHL provisions on non-international armed conflicts, because no armed conflict between States exists. This is in conformity with the text of common Article 2 to the Geneva Conventions, which limits their applicability to an 'armed conflict arising *between* High Contracting Parties', and to the well-accepted fact that what makes an armed conflict international is not where it occurs, but the fact that it occurs between States. Furthermore, the IHL provisions on international armed conflicts are simply not suitable to the fighting between a State and an armed group. Admittedly, this approach raises the question of when hostilities on the territory of a non-consenting State can be considered as exclusively directed against an armed group. The answer can be found in applying a presumption. The use of force against targets on the territory of a non-consenting State is normally covered by the IHL provisions on international armed conflicts, except if the use of force exclusively targets the armed group. The latter has to be assessed by taking into account how closely the target is related to the armed group rather than to the territorial State, whether the territory on which the attack occurs is controlled by the armed group and not by the territorial

7 Carron, *op. cit.*, pp. 356-358.

8 ICRC, *Commentary on the First Geneva Convention*, *op. cit.*, paragraphs 257-64.

9 Carron, *op. cit.*, pp. 353-375, whose arguments I summarize in the rest of this paragraph.

government, as well as the history of the relations between the intervening State, the territorial State and the armed group, and the declarations and other relevant conduct of the intervening State. Mistakes, such as the recent bombardment of Syrian government soldiers by US aircrafts in Aleppo,¹⁰ must obviously be solved by reference to the intention of the intervening party¹¹ (which does not bar the liability of the intervening State for any damage caused). The territorial State could obviously, at any moment, turn the conflict into an international armed conflict if it forcibly resisted the armed intervention. Even without such use of force by the government of the territorial State, the IHL provisions on international armed conflicts would apply if ground forces of the intervening State obtained control of any part of the territory of another State, even if that territory was previously under the exclusive control of a (terrorist) armed group.¹² Indeed, the second paragraph of common Article 2 to the Geneva Conventions makes the IHL provisions on international armed conflicts applicable in ‘all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance [by governmental forces of the territorial State]’.

3. When is fighting terrorism covered by the IHL provisions on non-international armed conflicts?

Most frequently, fights against terrorist groups, if at all covered by IHL, are covered by the IHL provisions on non-international armed conflicts, provided that the two traditional conditions for that law to apply are fulfilled, i.e. a sufficient degree of organisation of the group and a sufficient intensity of violence between the group and one or several States and/or armed groups.¹³ Rogier Bartels will discuss later in these proceedings the important questions of how the organisation requirement can be applied to a terrorist network, how much hierarchical control must characterise an armed group under IHL and whether persons declaring their allegiance to a terrorist group, but whose conduct is not effectively commanded by the leadership of the group, can be considered as members of the group in the sense of IHL. Rogier Bartels will also discuss whether violence against civilians can suffice to fulfil the intensity of violence necessary for a non-international armed conflict or whether there must be hostilities with armed forces or another armed group. In my view, IHL must apply according to the facts and independently of the lawfulness of those facts. Attacking civilians is obviously unlawful under IHL, but whether or not

10 New York Times, *U.S. Admits Airstrike in Syria, Meant to Hit ISIS, Killed Syrian Troops*, 17 September 2016, at:

<http://www.nytimes.com/2016/09/18/world/middleeast/us-airstrike-syrian-troops-isis-russia.html?_r=0> (Last Accessed 26 November 2016).

11 Carron, *op. cit.*, pp. 314-317.

12 Carron, *op. cit.*, pp. 372-374.

13 ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1, Trial Chamber II, Judgement, 7 May 1997, paragraph 562; ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, IT-04-84-T, 3 April 2008, paragraphs 49 and 60.

violence encroaches upon IHL cannot matter when determining whether IHL applies. Another question arising when assessing the degree of violence is whether violence can be replaced by territorial control. Most of the time stable territorial control by an armed group with only limited and sporadic acts of violence against governmental forces at the outer limit of the controlled territory is the result of an undeniable international or non-international armed conflict which is then frozen by outside pressure and/or a fragile cease-fire. The real issue is therefore when the IHL provisions on non-international armed conflicts cease to apply, and both judicial precedents and scholarly writings consider that the IHL provisions on non-international armed conflicts do not cease to apply as soon as the level of violence falls below the threshold necessary to trigger a non-international armed conflict.¹⁴ In the rare cases in which the necessary level of violence was never achieved (e.g. in a failed State), I would suggest applying a sliding scale: the stronger and the more stable the territorial control by an armed group is, the less violence is necessary to make the law of non-international armed conflicts applicable. The IHL provisions on non-international armed conflicts do not, however, contemplate occupation without armed resistance. Mere territorial control without any armed resistance does not make IHL applicable.

While IHL applies according to the facts (organisation and intensity of violence) on the ground, I would argue that International Human Rights Law (IHRL) requires a government to repress, whenever possible, terrorist armed groups with law enforcement means and without resorting to the degree and kind of violence which would trigger the applicability of the IHL provisions on non-international armed conflicts. This would mean that the government may not, under Human Rights Law, resort first to fighting a terrorist group according to the rules of the IHL provisions on non-international armed conflict, but may act according to the (less protective) rules on the use of force under IHL only once the group has engaged in the degree and kind of violence which makes the IHL provisions on non-international armed conflicts applicable. It is however obvious that the IHL provisions on non-international armed conflicts equally apply if the government is – in violation of the aforementioned (arguable) Human Rights Law obligation – the first to resort to the degree and kind of violence making IHL applicable.

A non-international armed conflict between a government and an armed group in its territory may spill over into the territory of a neighbouring State and in this case the IHL provisions on non-international armed conflicts apply in the neighbouring State without any need to analyse whether the necessary level of violence to trigger its applicability is also fulfilled in the neighbouring State. In case of a transnational armed conflict against an armed group only based in a neighbouring State or between a State and an armed group based in several other States, the group as such must fulfil the requirements of organisation and must be one single

14 ICTY, *The Prosecutor v. Ramush Haradinaj*, *op. cit.*, paragraph 100; Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Zürich, Schulthess/LGDJ, 2014, pp. 270-275.

armed group under one responsible command, according to IHL. The level of violence against one adversary, even if resulting from coordinated acts worldwide, must equally be reached. The question of where exactly IHL would apply in such situations depends upon the geographical scope of application of the IHL provisions on non-international armed conflicts, discussed later in these proceedings by Noam Lubell. Even where IHL applies IHRL may prevail.

The next question that arises is who exactly are the parties to such a non-international armed conflict directed against a terrorist group (although we have to remember that IHL does not only bind parties to an armed conflict but governs all conduct with a nexus to the conflict). The territorial State will often, but not always, be a party. An international organisation may also be a party, if its organs or agents and not the troop-contributing countries have operational command and control over the armed forces who fight. Several States may be parties in case of a multinational force or of a coalition, if each contributing State retains operational control or command over its troops. In this case it is suggested that, for the purposes of IHL, not only is each State whose forces individually fulfil the necessary threshold of violence to make the IHL provisions on non-international armed conflicts applicable, a party to the conflict, but also those that would be covered by the support-based approach suggested by the ICRC. Under this approach, a State intervening in an existing non-international armed conflict becomes a party to that conflict as soon as its forces undertake actions related to the conduct of hostilities in support of a party to the pre-existing conflict subject to an official decision to support a party involved in that pre-existing conflict.¹⁵

4. When neither the IHL provisions on international armed conflicts nor that of non-international armed conflicts apply

When neither the IHL provisions on international armed conflicts nor that of non-international armed conflicts apply, there is no armed conflict and IHL does not apply. Therefore, the traditional answer is that International Human Rights Law alone applies. However some States and scholars, referring to the wording of Article 2 of the International Covenant on Civil and Political Rights deny that Human Rights Law applies extraterritorially. Even among the vast majority of stakeholders who accept an extraterritorial application of IHRL,¹⁶ including the

15 Tristan Ferraro, "The applicability and application of international humanitarian law to multinational forces", in: *International Review of the Red Cross*, Vol.95 No.891/892, 561, 2013, p. 584.

16 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* ICJ Rep (2004) 136, paragraphs 107-12; *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)* (Merits), ICJ Reports (2005) 116, paragraphs 216-7; UNCHR, 'Concluding Observations of the Human Rights Committee: Israel. 18/08/98', UN Doc CCPR/C/79/Add.93, paragraph 10; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), paragraph 10; UK, Ministry of Defence, *The Manual of the Law of Armed Conflict*, OUP, 2004, p. 282 paragraph 11.19.

International Court of Justice, human rights bodies and most scholars and States, only very few consider that the mere use of force places the target of such use under the jurisdiction of the targeting State and therefore triggers the extraterritorial application of IHRL.¹⁷ For all others, logically nothing would apply to an extraterritorial killing if the threshold of violence to trigger the application of the IHL provisions on non-international armed conflicts was not met. Obviously, if the territorial State consents to such targeting in its territory, or does not oppose it with all available means, it violates its obligation to protect the right to life of those who are on its territory. In other cases, the only remaining protection of those targeted are the principles of necessity and proportionality in *ius ad bellum*, sometimes labelled as 'naked self-defence',¹⁸ which is an unsatisfactory solution, because *ius ad bellum* was made to protect States, while the questions of which individuals may be targeted and according to which rules was left to another regime – *ius in bello* – which would not apply in our hypothesis.

5. Conclusion

Terrorism is a serious threat and it must be fought against vigorously, but for this purpose it is neither necessary nor appropriate to blur existing legal categories. IHL in particular, which prohibits all acts that might be reasonably labelled as terrorist, applies independently of whether the acts which trigger its application are lawful, unlawful or even terrorist under its rules. The problem is, however, that many questions related to whether, when and which rules of IHL apply to an organised use of force remain controversial even outside the fight against terrorism. Furthermore, other questions, which find in my view a clear answer in IHL, have been subject to controversies in the context of the fight against terrorism, with either the aim of denying terrorists the protection of IHL, or of securing, outside an armed conflict, the benefit of 'authorisations' allegedly inherent in IHL to justify acts which are unacceptable in peace time, even when combatting the most serious crimes.

17 Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford, Oxford University Press, 2010, pp. 220-224.

18 See Kenneth Anderson, "Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War'", in: Peter Berkowitz (ed.), *Future Challenges in National Security and Law*, Hoover Institution, Stanford University, 2011, pp. 9-10, at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783> (last accessed 26 November 2016).

TERRORIST GROUPS AS PARTIES TO AN ARMED CONFLICT

Rogier Bartels

International Criminal Court

Résumé

La problématique exposée par Rogier Bartels porte sur les éléments constitutifs d'un conflit armé et sur les conditions qui font d'un groupe armé une partie à ce conflit. Ces questions revêtent toute leur importance car le droit international humanitaire ne définit ni la notion de « conflit armé », ni celle de « partie à un conflit ». Or il est crucial de pouvoir déterminer – dans le cadre de la lutte contre le terrorisme mais également dans un cadre plus large – si un groupe qualifié de terroriste est partie ou non à un conflit armé. Les règles du droit international humanitaire (DIH) qui sont applicables à ce groupe dépendent en effet de cette qualification.

La notion de groupe terroriste

Le terme le plus couramment usité en politique internationale est celui d'« organisation terroriste ». Cette notion désigne généralement des organisations qui commettent, préparent, promeuvent, encouragent ou financent des actes de terrorisme. Ainsi, cette définition ne se superpose qu'imparfaitement à l'acception du terme « groupe armé » développée par les juridictions pénales internationales. Une « organisation terroriste » n'est pas, en d'autres termes, systématiquement synonyme de « groupe armé » au sens du DIH.

Pour déterminer dans quels cas une organisation terroriste est partie à un conflit armé, il faut opérer une distinction entre les conflits armés internationaux et non internationaux.

Conflits armés internationaux (CAI)

Un conflit armé international est un conflit armé entre deux ou plusieurs Hautes Parties contractantes aux Conventions de Genève. Il se déroule donc entre des Etats et se borne a priori à ceux-ci, à l'exclusion des groupes armés non étatiques. Il existe cependant trois cas dans lesquels une organisation terroriste peut être partie à un CAI. Premièrement, lorsqu'une telle organisation représente un Etat (p. ex. les Talibans en Afghanistan en 2002). Deuxièmement, lorsque cette organisation terroriste est un mouvement de libération nationale et est, à ce titre, partie à un CAI en vertu de l'article 1(4) du 1er Protocole additionnel (p. ex. le Front Polisario au Maroc en 2015). Troisièmement, dans le cas où un Etat reconnaît l'état de belligérance avec l'organisation terroriste. Bien que rare, cette reconnaissance transformerait alors le conflit armé non

international en un conflit armé international. Il existe en outre des cas dans lesquels une organisation terroriste n'est pas partie à un CAI mais est une composante d'une partie au conflit. C'est le cas notamment lorsque l'organisation terroriste prend la forme d'une milice intégrée aux forces armées d'un Etat ou lorsqu'elle se présente comme un mouvement de résistants « appartenant » à une partie au conflit. Sont enfin assimilées aux CAI les situations de conflits armés non internationaux qui s'internationalisent suite au contrôle global exercé par un Etat tiers sur une partie non étatique au conflit.

Conflit armés non internationaux (CANI)

Bien que cela soit souvent le cas, toutes les organisations qualifiées de terroristes ne sont pas automatiquement parties à un CANI. Pour qu'il en soit ainsi, il faut en effet que les critères d'organisation et d'intensité des hostilités propres à un CANI soient remplis. Dès lors l'organisation d'un groupe qualifié de terroriste doit être analysée à l'aune de sa structure de commandement, de sa capacité militaire et logistique, de son système de discipline interne, de sa capacité à appliquer le DIH ainsi que de sa capacité à parler d'une seule voix. Si le groupe ne remplit pas suffisamment ces critères, il ne peut être considéré comme partie au conflit. Certains soutiennent toutefois la possibilité de considérer comme partie au CANI des groupes peu organisés appartenant ou associés à un groupe armé non étatique qui, lui, satisfait aux critères pour être partie au conflit.

La notion de « partie au conflit »

L'orateur conclut son exposé par deux remarques sur la notion de « partie au conflit ».

Premièrement, il est souvent difficile de déterminer qui sont les membres d'un groupe terroriste. L'appartenance à un tel groupe ne sera pas évaluée de la même façon pour déterminer les sujets soumis aux sanctions des lois contre le terrorisme que pour identifier les personnes qui constituent des cibles légitimes au regard du DIH. Cette distinction suscite de nombreuses questions, en rapport notamment avec la notion de participation directe aux hostilités.

Deuxièmement, il importe de différencier entre le fait d'être une partie à un conflit armé, d'une part, et le champ d'application du DIH, d'autre part. S'il est vrai qu'un individu n'est pas en soi une partie au conflit, il n'en demeure pas moins que cet individu est soumis au DIH dès lors qu'il agit en lien avec le conflit armé.

Enfin, M. Bartels s'inquiète de la confusion qui existe aujourd'hui encore quant à ce qui constitue une partie au conflit. Dans des affaires de combattants étrangers, les tribunaux belges ont

récemment jugé que les organisations terroristes Front Al Nusra et l'Etat islamique (EI) ne remplissaient pas les critères pour être considérés comme parties au conflit armé non international en Syrie. Aux yeux de l'orateur, ces jugements sont erronés.

Introduction

The question of what is a party to an armed conflict and when an entity becomes such a party, is an important one, because many of the international humanitarian law (IHL) provisions refer to a 'party to the conflict', or 'parties to the conflict', and place certain obligations on, or give rights to, these parties. Yet, none of the relevant treaties tells us what is to be understood as 'a party to the conflict'. For international armed conflict (IAC) it appears self-evident that the parties are States and we know that non-State entities can be parties to a non-international armed conflict (NIAC), but of interest to us now is whether terrorist groups can also qualify as such. Similar to the term 'armed conflict', the phrase 'party to the conflict' is another instance where IHL leaves undefined a term that has an important impact on the scope of application of the law. In this presentation I will try to provide you with some definitions, but before doing so, I will start with a few preliminary words on terrorist groups.

Terrorist groups

In IHL, we are used to talking about groups, namely armed groups, but the more commonly used language when referring to terrorist entities is 'terrorist organisations'. The United Nations' (UN), the European Union's (EU) and the United States' (US) sanction lists, for example, use this wording. Importantly, not every 'terrorist organisation' is an armed group in the sense of IHL, let alone an organised one. The designation of a group as a 'terrorist organisation' is often political. Conduct and operations by organised armed groups involved in (mostly non-international) armed conflicts are often referred to as 'terrorist acts', because these groups oppose the government and are often forced to resort to guerrilla tactics. At the same time, terrorist groups can be very small and, while using armed violence or violent means, do not employ such violence to control territory or to overcome an enemy. Moreover, many terrorist organisations are not at all involved in, or even linked to, an armed conflict.

The definition of a terrorist organisation, such as the one contained in the United Kingdom's (UK) Terrorism Act 2000, generally includes those organisations that prepare for, promote, encourage or finance terrorism, and do not necessarily themselves use force. For the purpose of the present contribution, I will only consider groups that do engage in violent acts which could be qualified as terrorist.

I now proceed to the question of when such a group can be considered a party to an armed conflict. Given the binary system of IHL, this question has to be answered in two parts. I will start with IAC.

International armed conflict

As an IAC pits two States against each other,¹ the parties to this type of conflict are the 'High Contracting Parties'; in other words States, and not groups or organisations – terrorist or otherwise. The concept of 'State sponsors of terrorism' should be noted, however. The US Department of State, for example, lists Iran, Sudan and Syria as such.

When can a terrorist organisation be regarded a party to an IAC? Or perhaps more relevant, when can a terrorist group be *part of* a party? The former is the case in the following three situations. First, a terrorist organisation, or its armed wing, may make up the armed forces of a State. The obvious example is the Taliban, which was the government of Afghanistan prior to its defeat by the US-led coalition after the conflict that started following 11 September 2001. During the IAC between the coalition and Afghanistan that took place in 2001 and 2002,² the Taliban itself was often referred to as a terrorist organisation. In addition, it was said to be virtually indistinguishable from, or at least aligned with, and fighting together with, Al-Qaeda, that had been designated as a terrorist organisation by a significant number of countries and international organisations. Many have also referred to Al-Qaeda, as having been a party to that same conflict. However, as will be discussed below, this is not so straightforward.

A similar situation, where a terrorist group could be a party to an IAC, would occur if Hezbollah were to become the government of Lebanon and subsequently engaged in fighting with, for example, Israel. With respect to Israel, an interesting question is whether the Palestine Liberation Organization (PLO), at the time, qualified as a party to the IAC that was in existence by virtue of the (then) ongoing occupation of the Palestinian territories.

The second situation where an entity designated as a terrorist group qualifies as a party to an IAC would be if a national liberation movement, which is likely to be designated by the government concerned as a terrorist group as a result of having taken up arms against the government, is fighting against colonial domination and alien occupation, or against racist regimes in the exercise of their right of self-determination. In other words, if it falls under Article 1(4) of Additional Protocol I. However, an important limitation in this regard is the fact that Article 1(4) only applies when the State concerned (i.e. the State of which the government is

1 See common Article 2 of the 1949 Geneva Conventions.

2 After the new Afghan government was formed during Loya Jirga (Afghan national assembly) in Bonn in 2002, the conflict transformed into a NIAC.

being fought) is a party to Additional Protocol I. This was hardly ever the case, as precisely for that reason, States that were confronted with a minority striving for self-determination refrained from ratifying the protocol. In such a case any Article 96(3) declaration submitted by a national liberation movement to the depositary of the Geneva Conventions, i.e. the Swiss government, would be rejected. However, in 2015, the Polisario Front, which has been fighting Morocco and has been listed as a terrorist organisation, re-submitted its declaration pursuant to Article 96(3) because Morocco had ratified Additional Protocol I. This time, the Swiss government accepted the declaration and notified the State parties to the Geneva Conventions – a first in terms of such declarations. The conflict between Morocco and the Polisario Front therefore transformed into an IAC, to which the Polisario Front remained a party.

The third possibility may be rare, but should nonetheless be mentioned. Whereas the doctrine of belligerency has not been used in a long time, and even though recognition of a terrorist group seems unlikely to happen (at least not explicitly),³ the recognition of the belligerency of such a group would result in the application of the laws of IAC; and – arguably – make the group a party to an IAC.⁴ The debate that arose some years ago as to whether the Revolutionary Armed Forces of Columbia (FARC), which had been designated by many countries and international organisations as a terrorist organisation, had been recognised by Colombia as a belligerent, shows that this possibility is not entirely unrealistic.

I should also mention that a minority of scholars consider that extraterritorial or transnational operations by a State against an organised armed group on the territory of another State are to be classified as IACs in case the territorial/host State does not consent to the use of force against the group. Proponents of this view submit that such use of force is, at all times, also directed against the territorial/host State and therefore forms part of an IAC. If the organised armed group is a terrorist organisation, it could be considered a party to such an IAC.⁵

We can conclude that a party to an IAC can be defined as a State, or an entity with State-like status under IHL that fights in an IAC, and that a terrorist organisation in certain circumstances can qualify as such. Then there are also cases where a terrorist group would not itself be a party to an armed conflict, but rather is to be qualified as a *part of a party*. This would be the case if the group can be characterised as a ‘militia or volunteer corps’ that forms part of

3 It has been argued that Israel, by using the IAC concept of a naval blockade to close off the Gaza Strip, implicitly recognised Hamas as a belligerent.

4 There are two schools of thought as to whether recognition of belligerency results in the application of the laws of IAC to a NIAC, or whether the previously non-international situation is transformed into an IAC.

5 The geographical scope of armed conflicts is discussed by Noam Lubell in these proceedings and will therefore not be further elaborated on here.

the armed forces of a State, as per Article 4 of the third Geneva Convention. Another situation where a terrorist group would not be a party itself, but still take part in the IAC is when it 'belongs to a Party to the conflict', as referred to in Article 4 of the third Geneva Convention. This provision was intended to cover groups, such as the Partisans and resistance movements during World War II. Interestingly, at the time, Germany actually used to refer to members of resistance movements as terrorists.

It is important to note that 'belonging to' is not the same as being under 'overall control', although this was initially misunderstood by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadic* when it first developed the notion of overall control. For a terrorist group to belong to a party to an IAC, it has to be fighting for or on behalf of a State, and that State has to – either explicitly or tacitly – accept that the group is fighting on its behalf. Article 4 of the third Geneva Convention lists several requirements a group has to fulfil, such as 'being commanded by a person responsible for his subordinates'. One can wonder whether these are essential for a group to be recognised as 'belonging to', or whether these requirements only become relevant when entitlement of the group's members to prisoner of war (POW) status becomes an issue.

I will now turn to NIAC, but conclude this IAC part by noting that in case of an internationalised NIAC, which – due to the overall control of a State over a non-State entity fighting another State – has transformed into an IAC, a terrorist group under such overall control only *participates* in an IAC. In my view, fighting while under overall control of a party to an IAC means that the fighting non-State entity is part of a party to the conflict (i.e. the State controlling it), not a party itself. It is further important to realise that in such an internationalised NIAC, the terrorist organisation under overall control does not itself need to fulfil the organisation criterion – which will be discussed next.

Non-international armed conflict

Examples of well-known parties to a NIAC that are at the same time designated as terrorist organisations are Boko Haram and Al-Shabaab, both listed as terrorist organisation by *inter alia*, the UN and the UK. However, also in more traditional NIACs, the armed groups opposing the governments have often been listed as such. Examples include the FARC and the Liberation Tigers of Tamil Eelam (LTTE), which were both listed as terrorist organisations by, *inter alia*, the EU. An arguable case is the US considering Al-Qaeda and, even more arguably, its associated forces, parties to a NIAC.

The existence of a NIAC requires minimum degrees of intensity and organisation.⁶ In the 1995 *Tadic* Jurisdiction Decision, and subsequently the *Tadic* Trial Judgment, the ICTY used, in its own words, the criteria of intensity and organisation as a way to distinguish an armed conflict ‘from banditry, unorganized and short-lived insurrections, or *terrorist activities*’.⁷ However, that statement should not be misunderstood as meaning that terrorist activities cannot be part of an armed conflict. Indeed, as later clarified in *Boskoski and Tarčulovski*, it merely means that ‘certain terrorist activities committed in peace time, would not be covered by common Article 3’.⁸

As to the intensity requirement, it has been argued that terrorist acts should not be taken into account when assessing the existence of an armed conflict. In *Boskoski and Tarčulovski*, the Trial Chamber correctly stated that ‘terrorist acts may be constitutive of protracted violence’ and that ‘while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.’⁹

For a terrorist group to be a party to a NIAC, it has to fulfil the organisation requirement. The ICTY and the International Criminal Tribunal for Rwanda (ICTR) identified various factors and indicators of organisation in cases where the existence of a NIAC was challenged, such as *Limaj*, *Haradinaj*, and the already mentioned *Boskoski and Tarčulovski* case. These factors and indicators may have been developed in order to assist in assessing the existence of a NIAC, but since a NIAC can only exist if there are at least two parties, the manner in which to assess whether a non-State side to the conflict existed, i.e. whether an armed group is sufficiently organised, also serves as a useful guidance for the assessment of who can qualify as a party to a NIAC. The ICTY factors can be grouped into five categories:

- 1) the existence of a command structure; indicators for this factor are, inter alia, the existence of headquarters, the issuing of political statements or communiqués, and having identifiable ranks and positions;
- 2) the existence of military (operational) capacity; an example of the indicators is the ability to carry out large scale or coordinated military operations and the control of certain territory;

6 See Marco Sassoli’s presentation for a more detailed discussion.

7 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Trial Judgment, 7 May 1997, paragraph 562.

8 ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Trial Judgment, Case No. IT-04-82-T, 10 July 2008, paragraph 185.

9 *Ibid.*, paragraphs 187 and 190.

- 3) the existence of logistical capacity; such as having supply chains (for weapons and other military equipment);
- 4) the existence of an internal disciplinary system and the ability to implement IHL; e.g., the existence of disciplinary rules or mechanisms within the group;
- 5) the ability of the group to speak with one voice; e.g. the capacity to conclude cease- fire agreements.

These factors are only indicative and need not all be fulfilled, or all apply at the same time. Importantly, whether or not a group pursues criminal aims is not determinative of the existence of a NIAC. However, one may wonder whether a terrorist organisation that completely refrains from attacking government structures and only targets civilians can qualify as a party. In this regard, the International Committee of the Red Cross's (ICRC) reluctance to classify, at least publicly, the Mexican drug-related violence as a NIAC may indicate that such terrorist groups should perhaps not be regarded as parties.

If there are at least two organised sides and the threshold of NIAC is fulfilled, it is further interesting to consider whether other armed entities that are involved in the conflict but which are not themselves sufficiently organised, also qualify as parties. The answer to this question depends on the approach one takes to parallel NIACs. Is the fighting in Syria one NIAC with many different parties? Or are there instead many separate NIACs, each with the Syrian government (and Russia) on one side and one organised armed group on the other, as well as NIACs between some of these armed groups? The latter approach would mean that any group that does not in itself fulfil the organisation requirement is not a party to a NIAC, while following the former approach, such a group could be a party, even if it is not itself sufficiently organised to trigger the NIAC threshold.

Another way of looking at this question would be to introduce, as some have proposed, the IAC concept of 'belonging to' and concept of co-belligerency under the international law of neutrality to the debate. In my view, these concepts should not be imported into the NIAC framework, as non-State entities are substantially different from States and not all State-related legal concepts can be applied to non-State actors. However, be that as it may, in practice we see that individuals or groups conduct terrorist or terrorist-like acts at various places in the world, seemingly without a (direct) link to Islamic State of Iraq and the Levant (ISIL), for example, but nonetheless pledge allegiance to this organisation; and ISIL generally seems to accept these pledges and claims responsibility for the attacks.

Yet another concept is that of 'associated armed forces'. The US, for example, considers itself at war with AL-Qaeda and its associated armed forces. The question then arises whether these

associated forces form one and the same party to an armed conflict, because they have the same command and control structure, for example, or whether they constitute separate parties to the same conflict, fighting alongside Al-Qaeda? Interesting also is the question of whether the fact that a terrorist organisation is situated in multiple States, and is being targeted in each of these States, means that the organisation requirement has to be fulfilled in each individual State.

Scope of the ‘party’ and its membership

If it has been determined that a terrorist group is a party to an armed conflict, who then is a member of that party? Terrorist groups are often diffuse, making it a challenge to determine which persons form part of these groups. With respect to Al-Qaeda, for example, a 2010 US Senate report stated that this organisation had ‘transformed into a diffuse global network and (...) [by then was] made up of semi-autonomous cells which often have only peripheral ties to either the leadership in Pakistan or affiliated groups elsewhere.’¹⁰

In an IAC, the members of the armed forces of a party are combatants and can thus be targeted, at all times. In a NIAC, the situation is less clear. Common Article 3 still recognises the existence of ‘members of armed forces’, also for non-State actors. If a terrorist group is party to a NIAC this does not mean that all its members have a fighting function. The answer to the question of who is a member of a terrorist group for the purposes of sanction lists, which include persons engaging in, *inter alia*, fundraising, is very different from the question of who can be targeted under IHL. Moreover, also in light of the ongoing debate about what constitutes direct participation in hostilities, one has to be conscious that membership for the purposes of IHL should not be interpreted too broadly.

Difference between being a party to an armed conflict and the scope of application of IHL

It is important to note that there is a difference between which entities can qualify as a party to an armed conflict and the entities that are bound by IHL, or rather fall within IHL’s scope of application. On the basis of the language of common Article 3, it may appear that only ‘each party to the conflict shall be bound to apply’ the minimum rules. However, also groups or persons that do not themselves constitute parties to the armed conflict but do take up arms and fight during an armed conflict are bound by IHL. If they were not, they would also not be able to violate IHL; hence, not be able to commit war crimes. Although it is possible to view the law in this manner, the *ad hoc* tribunals, mainly the ICTR, have taken another approach

¹⁰ *Report to the Committee on Foreign Relations of the United States Senate, ‘Al Qaeda in Yemen and Somalia: A Ticking Bomb’* (111th Congress, 2nd session, 21 January 2010), p. 5

when adjudicating cases where civilians who participated in the genocidal violence were convicted for war crimes. The nexus requirement in international criminal law is used to determine whether certain conduct can qualify as a war crime, but in effect what is being determined is whether IHL was applicable to the conduct, as that has to be the case for provisions of this body of law to be violated. In my view, the definition of the nexus requirement, as set out in *Kunarac*,¹¹ for example, can also serve to assess the personal scope of IHL.

Belgian case law on armed forces involved in armed conflict

At the end of this presentation, I would like to highlight the impact that incorrect application of IHL terms, such as ‘party to an armed conflict’, may have on related issues. In Belgium, there have recently been a number of criminal cases dealing with ‘foreign fighters’, that is persons who have travelled to Syria or elsewhere, to join or otherwise support groups fighting against the government or other armed groups. In the first case, the Belgian judges had analysed whether two groups in Syria, which qualified as terrorist groups under Belgian law, would at the same time constitute ‘armed forces engaged in an armed conflict’.¹² Its determination would therefore be similar to assessing whether these groups were parties to a NIAC in Syria. Indeed, the Court of Appeal in Antwerp,¹³ whose findings on this issue were confirmed by the Court of Cassation in Brussels,¹⁴ answered this question by considering whether these groups fulfilled the organisation requirement, and did so by looking at the ICTY factors. The approach started off well, but the findings made are very questionable, or in some later cases, including one dealing with ISIL, plainly incorrect. One of the groups in the first case was the Al Nusra Front. Even according to the facts as reflected in the judgment, - and these seem very conservative when compared to some of the figures that are given by monitoring bodies such as Human Rights Watch which estimated it to have a few thousand members - the Al Nusra Front was at the relevant time a sizable group. According to the judgment, it was ‘a large group of armed rebels’ and carried out nearly 600 attacks, posted statements on its own online forum and had a clear leader.

Yet, somehow, using an unjustifiably strict application of the ICTY factors and indicators, in which the Court of Appeal required all of them to be fulfilled, it was found that the Al Nusra Front was not a party to a NIAC in Syria. Apart from the unreasonably strict application of the

11 ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23-A, 23/1-A, Appeals Judgment, 12 June 2002, paragraphs 57-59.

12 Article 141bis of the Belgian Criminal Code refers to ‘handelingen [acts] van strijdkrachten tijdens een gewapend conflict’.

13 Hof van Beroep Antwerpen, Appeal Judgment of 26 January 2016, 2015/FP/1-7, FD35.98.47-12; generally known as the *Sharia4Belgium* case.

14 Hof van Cassatie van België, Judgment of 24 May 2016, P.16.0244.N.

factors, such a finding is very problematic in terms of the application of IHL. To be clear, I do not advocate lowering the NIAC threshold, but the conclusion that a group like Al Nusra Front was not a party to a NIAC in Syria is, in my view, incorrect. Moreover, since that first case, the Belgian courts have in later cases even found ISIL not to be a party to a conflict in Syria or Iraq. It is therefore clear that we still have work to do in discussing and clarifying the question of parties to an armed conflict.

LIMITS OF THE GEOGRAPHICAL SCOPE OF APPLICATION OF IHL IN COMBATING TERRORISM

Noam Lubell¹

Essex University

Summary

Noam Lubell nous présente les limites du champ d'application géographique du droit international humanitaire (DIH) dans le contexte de la lutte contre le terrorisme.

Il souligne d'abord la complexité de la notion d'intervention extraterritoriale lors d'un conflit armé non international. En effet, les experts sont divisés sur la façon de qualifier le cas lorsqu'un Etat A agit en légitime défense contre un groupement armé situé dans un Etat B, ce dernier n'ayant pas donné son consentement à l'intervention. Certains soutiennent que la simple utilisation de la force armée par un Etat sur le territoire d'un second Etat sans l'autorisation de ce dernier constitue automatiquement un conflit armé international entre les deux Etats. Noam Lubell s'oppose néanmoins à cette lecture dans la mesure où elle revient, selon lui, à faire entrer dans le champ d'application du DIH des situations qu'il serait préférable de traiter dans le cadre du droit national et du paradigme de maintien de l'ordre et des droits de l'homme.

Face aux difficultés de localisation d'un conflit, l'orateur présente les controverses sur le champ d'application géographique du DIH. Il affirme qu'il est impossible de dresser les contours exacts de l'espace géographique dans lequel le DIH a vocation à s'appliquer dès lors que les règles de DIH s'attachent non pas à une réalité géographique mais bien à des actes en lien avec un conflit armé, peu importe que ces actes soient commis sur le théâtre des opérations militaires ou en marge de celui-ci.

Enfin, l'auteur attire l'attention sur les complications qui naissent de l'interaction entre le DIH et les droits de l'homme lorsque l'on considère que le DIH s'applique en temps de guerre, même pour des actions extraterritoriales.

1 Professor of International Law of Armed Conflict, School of Law & Human Rights Centre, University of Essex; Swiss Chair of International Humanitarian Law, the Geneva Academy of International Humanitarian Law and Human Rights. This is a summary of the conference presentation. For a detailed version with further development of the issues, see forthcoming publication: Lubell, Noam, "Multi-territorial Fragmented Armed Conflicts: A New Legal Landscape?" in: Ford, Williams (eds.) *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare*, Oxford, Oxford University Press 2017.

In the past 15 years there has been extensive discussion about extraterritorial NIAC. More recently this notion has further fragmented and shattered: the idea of a single armed group in a defined location has given way to concepts of conflicts engaging multiple groups across numerous territories.

Although it is still a contentious topic, I'm going to take as a starting point that States may claim the right to self-defence when they are attacked by a non-State player (NSP) operating from the territory of another State. The usual requirements of self-defence – primarily necessity and proportionality – will apply; and the so called 'unwilling or unable' test is but one element within the necessity test – i.e. if the territorial State is willing and able to stop the attacks by the NSP, then there would be no necessity to engage in self-defence.

Before dealing with fractured and multiple armed groups, let us proceed at this stage on the assumption that there is a single armed group with a unified command and control structure, overseeing different units located in more than one territory.

Let us also assume for the facts of the case that State A has already engaged in forcible operations against Group X in the territory of State B, and that the justification given was one of self-defence following attacks against State A, launched by X from the territory of State B.

The question before us is whether State A can also use force against cells of X located in State C. The answer must be that the *ius ad bellum* rules need to be reapplied to this new context. Using force on the territory of State C would be in contravention of the Charter unless a case can be made under self-defence in relation to State C's territory. Accordingly, State A must demonstrate that it is subject to armed attacks which necessitate force in the territory of State C, and that there is no other option to prevent these attacks.

The next, and potentially more complex, scenario to consider is a situation in which it is unclear whether the armed groups based in State B and State C are simply cells of the same group, or separate entities. In other words, we still have X in State B, but the group in State C is now Y, whose relationship to X is in question. Such a scenario does not, in fact, have much bearing on the earlier analysis with regard to State A's right to use force in State C. Since it has been determined that even if Y and X were one and the same, State A would still need to make a self-defence case for the use of force in State C, and clearly it would also need to do so if Y were not as obviously connected to X.

The fragmentation of conflict and multiplicity of territories presents complex challenges not only for the rules of the resort to force in the territory of other States, but also for the application of IHL and the determination of the rules governing the way force is used.

A primary concern is to establish whether or not the situation between State A and Group Y in State C should be classified as an armed conflict, in order to determine whether the rules of IHL are applicable.

Hostilities between an NSP and a State cannot be an international conflict as they are not between two (or more) States. Despite the cross-border element it is the identity of the parties that determines the classification of conflict. The rules of international armed conflict (IAC) were clearly designed to regulate hostilities between States, whereas the NIAC rules are suited for non-State players.

Nevertheless, there is an additional question as to whether cross-border force against an armed group also triggers an armed conflict between the two States. There may be a separate armed conflict between State A and State B which would be an international armed conflict, but international law recognises the possibility of separate categories of conflict occurring alongside each other.

There exist opinions that any force by one State on the territory of another without consent must automatically be classified as an armed conflict between the two States. According to this view, if State A engages in a single strike against a remote camp of Group X out in the unpopulated hinterland of State B, the fact that State B did not consent would automatically mean that there is now an IAC.

I would suggest that this is a problematic position, as it does not account for situations in which force is used in a context which would be more appropriately governed under the law enforcement and domestic criminal law paradigm (for example intelligence agents from State A abducting or assassinating an individual in State B in a context which is not a NIAC). Rather, there should be criteria to determine which situations of force against a NSP do trigger an international armed conflict between the States and which do not.

A further question arises in relation to the link between armed groups. In recent years reference has been made to terms such as 'co-belligerents' and 'associated forces'. Two groups operating under a unified command and control structure will not present a serious challenge in this regard, but the reality is often far from such a description. There is a need to develop clearer criteria with regard to matters such as control between groups (with a certain analogy

to control of a group by a State). Coordination and support between groups may also affect the classification.

Nevertheless, the current use of such terms as 'co-belligerents' can lead to a misplaced analogy to IAC, as the threshold for entering an armed conflict is very different in a non-international armed conflict. If the situation with the second group does not itself pass the NIAC threshold, it would be advisable to avoid relying on notions of co-belligerency unless clearer and acceptable criteria are agreed. The current subjective and loose definition risks unwarranted expansion of conflicts.

The next matter to be addressed is the controversy in relation to the geographical scope of the battlefield. There exists no clear legal delineation of the battlefield, and there is significant inconsistency in the literature and case law on the matter. The crucial issue for the purposes of governing military operations and uses of force should not be artificial attempts to draw a neat line around a particular area, but rather to determine when and where specific rules of IHL might apply.

It is impossible to have one predetermined area for all IHL rules, since some of them are context-dependent and apply only to particular situations regardless of territory – for example rules relating to the handling of detainees and prisoners during an armed conflict. IHL was not designed and does not attempt to determine the boundaries of conflict. It is quite the opposite: IHL is designed to apply to actions taken as part of an armed conflict, wherever they may occur.

Crossing borders is a matter for the *ius ad bellum*, not for the applicability of IHL. If an armed group steps across the border, this would not affect the classification of the conflict between the latter and the State. Similarly, it cannot be a question of distance from the more central fighting zone. Commanders and drone operators can often be based far from the battlefield but would still be taking part in the conflict.

The final matter I wish to cover is the applicability and influence of International Human Rights Law (IHRL). This body of law continues to apply during the armed conflict, even extraterritorially.

There are three issues at hand here:

- The applicability of IHRL during armed conflict;
- The extraterritorial applicability of IHRL obligations;
- The interplay between IHRL and IHL

These are separate issues that often get conflated, even though they can present themselves independently.

The right to life will be engaged when State agents use lethal force against individuals. In situations of armed conflict the IHRL obligation will be affected both by the factual circumstances and by the legal interplay between the bodies of law.

In situations of active hostilities, use of force between the fighting parties will usually be in conformity with IHRL so long as it was lawful under IHL. However, it is submitted that the interplay between the bodies of law is affected by a number of factors, including the nature of operations and the surrounding circumstances. For example, in operations taking place far from the battlefield in which the intended target is not actively engaged in fighting at the given moment, and the State (or another State in cooperation) is able to detain the individual, IHRL may become predominant in the interplay and require detention rather than lethal force. Force used in such circumstances would have to be based on a graduated approach as found in law enforcement.

In summary, the fragmentation of conflict against armed groups is presenting numerous challenges across the *ius ad bellum*, *ius in bello*, and International Human Rights Law. In all of these there remain certain controversies that require further work, but ultimately it is possible to address current challenges using existing law, and to remain true to the law's objectives.

SESSION 2 – LEGAL PARAMETERS OF THE FIGHT AGAINST TERRORISM

At the end of this second session, the audience raised four issues.

1. On the qualification of an unauthorised intervention overseas

A participant enquired how the speakers would qualify a situation in which State A sends its special forces into State B with a view to repatriating its nationals fighting in a non-international armed conflict (NIAC) in State B and bring them before the courts in State A.

A panellist explained that he used to qualify such situations as international armed conflicts since a State was intervening in another State's territory without the latter's consent. The speaker however admitted that he had changed his opinion because this reasoning could lead to absurd conclusions such as in e.g. the Rainbow Warrior case where France sank a Netherlands-registered Greenpeace ship in New-Zealand waters; a situation which would have amounted to an international armed conflict if the rule explained above had been applied literally. In such cases, the speaker believes it is preferable to refrain from qualifying the situation as an IAC and have recourse to International Humanitarian Law (IHL) but rather to apply the *ius ad bellum* and International Human Rights Law (IHRL).

2. On the qualification of a low intensity intervention overseas

A second issue, linked to the first, was touched upon by a participant who underlined that in most current armed conflicts (e.g. Mali, Nigeria, Somalia, Iraq and Yemen), when States fight abroad, they do so with the consent of the territorial State in which they intervene. The participant wondered how to qualify a conflict existing between an intervening State and a non-State armed group, if the hostilities between them do not reach the threshold of intensity necessary for a NIAC but that this level of intensity is reached between the non-State armed group and the host State which the intervening State is assisting. Is the fact that the foreign State is assisting the territorial State sufficient to exempt the former from reaching the intensity requirement to be a party to the NIAC and to rely on the intensity of the hostilities between the host State and the non-State armed group?

A panellist answered that, according to the International Committee of the Red Cross's (ICRC) support-based approach, any State contributing – be it only a little – to direct participation in hostilities is automatically a party to the conflict. The intervening State in the example mentioned above would be part of the ongoing NIAC between the territorial State and the non-State armed group. The speaker however emphasised that this question is not important

in practice since the conduct of a State's armed forces is governed by IHL even though the State is not a party to the conflict.

Another panellist pointed out that this issue becomes even more complicated when the hostilities between the territorial State and the non-State armed group do not reach the intensity requirement. For instance, this may be the case of counter-terrorism contexts. In these cases, the panellist believes that the intervening State has to abide by the same human rights obligations as the host State.

3. On the role of territorial control in a NIAC

One of the members of the audience referred to the example of Puntland given by a speaker during his presentation. In this instance, a non-State armed group had taken control over Puntland (a region in Somalia) without much resistance from the Somalian authorities, and hostilities had come to an end. In the panellist's view, the situation nevertheless had to be considered as a NIAC, the intensity requirement being replaced (at least partially) by the control exercised over a part of Somalian territory. Building on this example, the participant asked whether the panellist would support the same argumentation if the hostilities had reached a high level of intensity at first but had then ceased totally.

The panellist admitted that this would simplify the situation since it would allow considering that there was a NIAC at the moment of the high level hostilities and that this NIAC continues as long as the non-State armed group controls a part of the territory. The speaker did not however have any practical example where a sufficiently organised non-State armed group took control over a part of the territory without ever reaching the threshold of a NIAC.

Completing the response, a second member of the panel referred to the recent *Omari* judgment by the Trial Chamber of the International Criminal Court in which the Chamber took as a factor for intensity of the hostilities the fact that the non-State armed group took control over Timbuktu for a prolonged period of time. The reasoning behind this decision is that, notwithstanding the low intensity of the violence that was necessary to take control of a part of the territory, a substantial level of violence would be necessary for the State to regain control over this. For the speaker, this argument is of particular relevance given the situation in countries like Mali where huge parts of the territory are deserts that could be controlled without encountering much physical resistance.

4. On the recourse to human rights derogations in conflicts overseas

Lastly, someone from the audience questioned whether States had a growing tendency, in their fight against terrorism, to invoke derogations to human rights such as those enshrined

in Article 15 of the European Convention on Human Rights pertaining to armed conflicts and situations of public emergency threatening the life of the nation.

A speaker confirmed that the United Kingdom has introduced a proposition to adopt such a derogation in order to reduce the number of vexatious litigations against its armed troops operating abroad. The process has however been frozen. The panellist noted that human rights derogation in times of war would not free the State from its obligation under IHL to investigate allegations of breaches of law. The proposition formulated by the British government is thus irrelevant when addressing the problem of vexatious litigations. The idea to derogate from International Human Rights Law in the context of an extra-territorial armed conflict (be it international or non-international) is however a step that the speaker warmly welcomed because it illustrates States' acknowledgment that IHRL is normally applicable in this context.

Session 3

The Use of Force and Other Measures of Constraint in the Fight against Terrorism

Chairperson: **Andres Munoz Mosquera**

SHAPE Legal Office

LEGAL CHALLENGES IN FIGHTING ARMED GROUPS EXTRA-TERRITORIALY LES DEFIS JURIDIQUES QUE POSENT LES ACTIONS EXTRATERRITORIALES CONTRE LES GROUPES ARMES

Claire Landais

French Ministry of Defence

Summary

Building on her knowledge of the current French military operations in several noninternational armed conflicts (NIAC) in North Africa and in the Middle East, Claire Landais addresses in this presentation some of the challenges faced by States when fighting terrorist armed groups extra-territorially.

Legal issues surrounding an extraterritorial fight against terrorism can be divided into three categories: the first consists of overall International Humanitarian Law (IHL) challenges, the second covers “classical issues” common to all noninternational armed conflicts (be they extraterritorial or not), and the third concerns issues specific to the extraterritorial nature of such a fight.

Overall IHL challenges

The first challenge relates to the qualification to give and the legal framework to apply to cases where a State uses armed violence against an armed group initially situated on the territory of a single State but then moving to neighbouring States, thereby spreading the conflict over different national territories. A second challenge concerns the existence of the possibility to extend the application of IHL to members of a terrorist armed group (e.g. Daesh) situated on the national territory of a State that is combatting this armed group extra-territorially.

Classical NIAC issues

A particularity of current NIACs is the fact that armed groups often resort to the use of civilian or other protected objects for military purposes. Before attacking such objects, the other party must gather the needed information to carefully appreciate whether the object represents a real military advantage or is a mere support to the war effort. Another difficulty peculiar to NIACs is the application of the principle of distinction not only between civilians and military but also between non-State armed groups since in many instances not all armed groups present on a territory are part of the same conflict.

Specific extra-territoriality related issues

A State intervening alongside a host State to combat a terrorist armed group usually has no competence regarding judiciary detention against members of the non-State armed group. The intervening State is dependent on the host State for detention matters and the latter's acts could engage the former's responsibility (e.g. in the case of torture of the transferred detainees). Questions arise as to the scope of posttransfer obligations of the State handing over the detainees as well as to the solution to be adopted in cases where the host State is not willing or simply cannot be trusted to treat the detainees in accordance with the international standards binding upon the transferring State.

A further issue relates to foreign terrorist fighters. When the intervening State has the competence to exercise national jurisdiction over a suspect, but this person is found on the territory of the host State, neither extradition nor expulsion seem to be ideal mechanisms to ensure transfer of the suspect to the national territory of the intervening State.

Je voudrais tout d'abord remercier chaleureusement le Comité international de la Croix-Rouge (CICR) et le Collège d'Europe pour leur invitation. C'est un honneur et un plaisir pour moi de contribuer à ces discussions sur l'utilisation de la force – entendue ici au sens large – dans la lutte contre le terrorisme, phénomène auquel la France est actuellement confrontée.

Le fait de combattre des groupes armés en dehors de son propre territoire, « extra-territorialement », soulève effectivement de nombreuses questions juridiques, qui viennent s'ajouter aux multiples défis d'ordre matériel et logistique que doivent relever les forces armées engagées sur des théâtres d'opérations extérieures.

Je parlerai en revanche assez peu de terrorisme ; c'est tout l'objet de cette conférence mais je crois que cette qualification, empruntée au droit pénal, est en réalité assez peu pertinente pour répondre à la question qui m'a été posée des défis juridiques liés au fait d'intervenir à l'étranger pour combattre des groupes armés. Elle est en tout cas assez peu pertinente – mais j'y ferai néanmoins quelques références, bien sûr – dès lors que la situation en cause est bien celle d'un conflit armé.

Et de ce point de vue – cela a été dit plusieurs fois ce matin –, le fait que les groupes armés utilisent des méthodes qu'on peut qualifier de terroristes (engins explosifs improvisés, boucliers humains, attentats suicide, ...) ne change rien à la qualification de la situation, qui repose sur deux critères d'un autre ordre : le niveau de violence et la capacité d'organisation des groupes.

Pour mémoire, les forces françaises sont actuellement engagées dans plusieurs situations de conflits armés non internationaux (CANI) extraterritoriaux : au Mali et dans la bande sahélo-saharienne, au Niger, en Mauritanie, au Burkina Faso, au Tchad, en République centrafricaine, en Irak et en Syrie.

Cet engagement extraterritorial des forces françaises a d'abord posé des problèmes de qualification des situations en cause et, partant, d'identification du droit applicable à ces situations.

Lorsque les forces françaises sont intervenues au Mali en janvier 2012 en soutien du gouvernement malien dans la lutte contre les groupes armés agissant sur son territoire et d'ailleurs avec un mot d'ordre politique de lutte contre le terrorisme, la qualification de la situation en CANI extraterritorial était évidente, compte tenu de l'intensité des affrontements constatés et du degré d'organisation des groupes armés contre lesquels nous combattions. En revanche, lorsque ces mêmes groupes armés ont commencé à mener leurs actions depuis ou sur des territoires voisins du Mali, les choses sont devenues plus compliquées et il s'agissait alors de répondre à la question suivante : le droit international humanitaire (DIH) continuait-il de s'appliquer aux actions des forces françaises qui seraient conduites contre ces mêmes groupes sur ces territoires ?

Nous avons considéré qu'il convenait de répondre à cette question par l'affirmative. A notre sens, le conflit malien initial a débordé sur le territoire de plusieurs Etats voisins et le DIH est bien applicable à nos relations avec les groupes armés agissant initialement au Mali, puis sur les territoires des Etats voisins de celui-ci dès lors que le continuum territorial et opérationnel est établi, et évidemment avec l'autorisation de ces Etats, avec lesquels nous avons conclu des accords.

La qualification de notre engagement en Syrie, ensuite, n'a pas non plus été sans soulever certaines interrogations qui tournaient cette fois autour de ce qu'est « Daech », organisation qui par beaucoup d'aspects s'apparente à un Etat, d'où l'idée que l'article 51 de la Charte a pu être invoqué à son encontre, mais certainement pas suffisamment pour que la situation puisse être qualifiée de conflit armé international (CAI). Après réflexion, nous considérons en tout cas que nos affrontements avec Daech sont régis par le droit des CANI.

Nous nous sommes également intéressés aux questions du champ d'application territorial du DIH – déjà abordées dans le précédent panel – et plus particulièrement à la question de savoir si les règles régissant la conduite des hostilités en DIH étaient ou non applicables sur le territoire français, à l'égard des membres des groupes contre lesquels nos forces combattent à l'étranger. Nous répondons à cette question par la négative. Nous estimons en effet que l'applicabilité des règles d'usage de la force est étroitement liée au(x) lieu(x) où se déroulent les hostilités et à leur intensité. Ce raisonnement rejoint celui adopté par la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) dans son arrêt *Tadic* du 2 octobre 1995, puisqu'elle a affirmé qu'« *indéniablement, certaines des dispositions [du DIH] sont clairement liées aux hostilités et le champ géographique de ces dispositions devrait y être limité* »¹.

Concrètement, cela signifie notamment qu'à ce stade en tout cas, l'usage de la force sur le territoire français, même s'il s'agit de mettre hors d'état de nuire des auteurs d'attentats organisés depuis le théâtre irako-syrien, est bien régi par les règles de l'opération de police et donc, en France, et pour simplifier, par la règle de la légitime défense et donc par les principes de nécessité absolue et de stricte proportionnalité.

J'en reviens à mon sujet.

En ce qui concerne l'utilisation de la force dans le cadre de la conduite des hostilités, les problématiques soulevées extra-territorialement sont à mon sens assez peu différentes de celles auxquelles ferait face un Etat en proie à un CANI qui se déroulerait sur son propre territoire (1). En revanche, les problèmes soulevés deviennent effectivement de véritables défis lorsqu'il s'agit d'utiliser à l'étranger d'autres moyens coercitifs contre les groupes armés et les personnes participant directement aux hostilités (2).

1 TPIY, *Le Procureur c. Dusko Tadic*, Arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence, affaire n° IT-94-1-AR72, 2 octobre 1995, § 68.

1. Des problèmes juridiques presque classiques dans le cadre de la conduite des hostilités.

Dans le cadre de la conduite des hostilités, les problèmes juridiques rencontrés extra-territorialement ont principalement trait au respect des principes qui régissent cette conduite et tout particulièrement du principe de distinction entre les objectifs militaires et les biens à caractère civil (A) d'une part, ainsi qu'entre les personnes protégées contre les attaques directes et celles qui ne le sont pas (B), d'autre part.

a. Problématiques liées au respect du principe de distinction entre les objectifs militaires et les biens à caractère civil

L'une des particularités des CANI contemporains – particularité qui fait d'ailleurs écho à la notion de terrorisme –, qu'ils soient extraterritoriaux ou non, réside dans le fait que les groupes armés utilisent souvent des biens civils et parfois des biens bénéficiant d'une protection spéciale, tels des biens culturels, pour mener leurs opérations militaires. Ainsi au Mali et surtout en Irak et en Syrie, nos forces doivent redoubler de vigilance lorsqu'il s'agit d'apprécier l'avantage militaire précis apporté par le bien en cause. Il s'agit en outre de toujours veiller à faire la différence entre les biens qui apportent une contribution effective à l'action militaire et ceux qui apportent seulement un soutien à l'effort de guerre et qui ne peuvent pas, eux, faire l'objet d'une attaque.

Le caractère extraterritorial d'un CANI est à cet égard un facteur de difficulté supplémentaire pour des forces armées de l'Etat intervenant extraterritorialement. Pour acquérir une connaissance précise de l'utilisation des biens, il faut en effet disposer de capteurs de renseignements divers et surtout fiables et appréciables de manière autonome. Or, il n'est pas toujours aisé de pouvoir en disposer à l'étranger, particulièrement lorsque la présence militaire au sol est limitée.

Lorsque le renseignement fait défaut ou qu'un doute subsiste malgré tout sur la qualité d'objectif militaire du bien, les dossiers d'objectifs présentant les différentes frappes envisagées ne peuvent évidemment pas être validés. Ceci ajoute à la complexité et à la durée de l'opération militaire en cause.

b. Problématiques liées au respect du principe de distinction à l'égard des personnes.

Le respect du principe de distinction à l'égard des personnes constitue également un défi car des considérations politiques viennent bien souvent s'ajouter aux difficultés juridiques existantes. Ainsi, au Mali et dans la bande sahélo-saharienne, nous devons non seulement faire la distinction entre les civils et les membres des groupes armés organisés, mais également entre les groupes armés signataires de l'accord de paix conclu avec le Mali – à l'égard desquels il

convient de ne pas faire usage de la force –, les groupes armés ennemis et des groupes souvent composés de narcotrafiquants, qui sortent du cadre du CANI auquel nous sommes partie. De la même manière en Irak et en Syrie, nous devons distinguer entre les différents groupes armés agissant dans les zones concernées et Daech, seul groupe contre lequel les forces françaises agissent.

Par ailleurs, et cette fois d'un point de vue plus juridique, le principe de distinction nous impose de faire la différence entre les branches politiques et les branches armées des parties non étatiques à un conflit. Or, certains groupes sont dotés d'une structure particulièrement élaborée et complexe, surtout au début des hostilités, comme tel était, par exemple, le cas au début du conflit au Mali. Ils comportent une branche armée à proprement parler, mais également des forces presque comparables à des forces de police, dont les membres ne participent pas forcément aux combats. Ce n'est que lorsqu'il est établi que ceux-ci participent directement aux hostilités qu'ils peuvent faire l'objet d'une attaque et uniquement pendant la durée de cette participation. Vous imaginez sans peine la pédagogie que doivent développer nos conseillers juridiques pour expliquer ces subtilités, s'agissant du conflit irako-syrien, compte tenu des difficultés de distinction entre les activités « civiles » de Daech – notamment celle d'administration de la population et du territoire qu'il contrôle – et ses activités militaires.

Ainsi à notre sens, les défis juridiques soulevés par l'usage de la force sont sensiblement les mêmes en CANI « classique » qu'en CANI extraterritorial. En revanche, l'utilisation de moyens coercitifs tels que la détention oblige l'Etat qui envoie des troupes à relever des défis juridiques majeurs lorsqu'il s'agit de lutter contre des groupes armés dans le cadre de CANI extraterritoriaux.

2. De véritables défis dans la détention des membres de groupes armés et des personnes participant directement aux hostilités.

La détention est évidemment un outil indispensable en période de conflit armé. Cependant, lorsqu'un Etat intervient en dehors de son territoire au côté d'un autre Etat qui lutte contre des groupes armés, il n'a pas compétence pour engager lui-même des poursuites judiciaires contre certains individus capturés pour des raisons de sécurité mais qui s'avèrent également être soupçonnés d'avoir commis des infractions pénales, notamment précisément sur le terrain de la législation relative au terrorisme. L'Etat qui intervient extraterritorialement reste donc tributaire des autorités de l'Etat hôte et peut engager de ce fait sa responsabilité sur le long terme au regard de ses engagements conventionnels (A). En outre, lorsqu'il est compétent pour engager des poursuites sur son propre territoire, se pose la question de savoir selon quelles modalités la personne capturée sur le théâtre des hostilités dans le cadre d'une déten-

tion administrative – et non pas judiciaire – peut être ramenée sur son territoire pour y être jugée (B).

a. Problématiques liées à la détention administrative, aux transferts d'individus à l'Etat hôte et aux suivis post-transfert.

La détention administrative est bien souvent la seule forme de détention à la disposition des forces armées d'un Etat engagé dans un CANI extraterritorial. Cette forme de détention, fondée uniquement sur des raisons impératives de sécurité liées à la situation de conflit armé en cours doit cesser dès que les causes qui l'ont motivée n'existent plus. Le cas échéant, deux alternatives s'offrent donc à nos forces : libérer l'individu capturé ou le remettre aux autorités de l'Etat hôte aux fins d'enquête et de poursuite. Or, en vertu de la jurisprudence de la Cour européenne des droits de l'homme (CEDH), nous devons au préalable nous assurer que l'individu ainsi transféré aux autorités de l'Etat hôte de l'intervention ne sera pas soumis à la peine de mort, à la torture, à des traitements inhumains ou dégradants, voire à un risque de déni de justice flagrant.

Au début de l'intervention au Mali, nous avons pris conscience de ce problème juridique de taille et estimé qu'il convenait d'obtenir des assurances diplomatiques de la part des autorités maliennes avant tout transfert de personnes détenues et de mettre en place un mécanisme de suivi de la mise en œuvre des assurances ainsi données. Ceci impliquait de se voir accorder le droit d'aller visiter les détenus transférés par les forces françaises, c'est-à-dire d'effectuer un « suivi post-transfert » dans les prisons maliennes. Plutôt que de conclure un accord *ad hoc* destiné à couvrir spécifiquement cette question, nous avons choisi d'insérer une clause nouvelle dans notre Accord sur le statut des forces (*Status of Forces Agreement* – SOFA), conclu avec les autorités maliennes en mars 2013.

Cependant, les conditions de détention dans certains Etats peuvent aussi nous conduire à interdire tout transfert par nos forces, malgré les assurances diplomatiques obtenues. Parfois aussi, aucun accord ne peut être négocié avec l'Etat hôte, même lorsqu'il consent à l'intervention. Le message juridique est particulièrement difficile à faire passer car les forces armées françaises sur le terrain doivent alors se contenter de relâcher les individus qu'elles capturent – alors même qu'ils continuent de présenter un certain danger, pour les forces et/ou pour la population civile – ou de les détenir elles-mêmes, ce qui est aussi contraignant, notamment en termes de sécurisation des installations de détention et de perte de mobilité.

Nous avons également été confrontés à un autre défi juridique en matière de suivi post-transfert cette fois, consistant à déterminer le moment à partir duquel ce suivi ne s'imposerait plus. Nous n'avons trouvé aucun indice véritablement éclairant en jurisprudence ou en doctrine

permettant de répondre à la question de savoir quand l'obligation de suivi prend fin. Cesse-t-elle lorsqu'un procès devant les juridictions de l'Etat hôte commence ? Ou bien la cessation peut-elle s'apprécier au cas par cas, en fonction des risques encourus par chaque individu transféré ? Ces questions restent actuellement ouvertes.

b. Défis juridiques soulevés par l'exercice de la compétence des juridictions françaises à l'égard d'une personne capturée par les forces françaises sur le théâtre d'un CANI extraterritorial.

Lorsque les conditions d'exercice de la compétence des juridictions françaises sont remplies, mais que les suspects se trouvent encore sur le théâtre des opérations, d'autres véritables défis juridiques surviennent. Ceci sera mon dernier point.

Les militaires français (hors gendarmerie) n'ont en effet pas le pouvoir d'effectuer des arrestations de type judiciaire, que ce soit sur le territoire national ou à l'étranger. Ils ne sont pas officiers de police judiciaire : ce n'est pas leur métier. La question qui se pose est donc celle de savoir comment organiser le rapatriement en France des « combattants étrangers », c'est-à-dire des Français ou des personnes ayant leur résidence habituelle sur le territoire français contre lesquels les autorités judiciaires françaises souhaitent engager des poursuites ?

Il existe évidemment le mécanisme de l'extradition, mais cela suppose de remettre l'individu aux autorités de l'Etat hôte pendant une durée relativement longue. Il convient donc dans ces cas-là d'obtenir au préalable des assurances diplomatiques relatives au non-prononcé de la peine de mort et aux mauvais traitements. Cela n'est pas toujours possible.

Il existe également la solution de l'expulsion pour séjour irrégulier sur le territoire de l'Etat hôte de l'intervention, qui peut être plus aisée à mettre en œuvre et qui suppose un transfert de l'individu aux autorités de l'Etat hôte d'une durée plus courte. C'est ainsi que nous avons procédé pour les deux Français qui avaient été capturés par les forces françaises au Mali.

En revanche, lorsque le transfert à l'Etat hôte n'est pas envisageable, nous nous retrouvons confrontés à un véritable dilemme juridique, puisque seules trois solutions s'offrent à nous : soit relâcher l'individu, ce qui n'est évidemment pas satisfaisant d'un point de vue sécuritaire et judiciaire ; soit le remettre aux autorités de l'Etat hôte, ce qui pourrait nous conduire à nous rendre potentiellement responsables d'une violation de nos engagements conventionnels ; soit, enfin, rapatrier l'individu en France en dehors de tout cadre juridique, ce qui pourrait poser des difficultés en terme de solidité des poursuites ultérieures, car il est probable que certains avocats mettraient en cause la régularité du début de la procédure judiciaire.

Le prochain panel traitera précisément des réponses des Etats à la problématique des combattants étrangers et dégagera sans doute d'autres pistes de solutions à ces véritables défis juridiques, particulièrement d'actualité.

Je vous remercie de votre attention.

THE CONDUCT OF HOSTILITIES VERSUS THE LAW ENFORCEMENT PARADIGM

Françoise Hampson

Essex University

Résumé

Françoise Hampson examine quelles sont les lois applicables aux activités terroristes menées sur le territoire national d'un Etat. Elle s'emploie plus particulièrement à identifier les différences entre, d'une part, les législations propres au maintien de l'ordre public et aux droits de l'homme (MO/DH), et d'autre part, celles relatives à la conduite des hostilités et au droit des conflits armés (CdH/DCA).

Comme elle l'explique, les actes de terrorisme commis sur le territoire d'un Etat relèvent par défaut des législations sur le maintien de l'ordre et des droits de l'homme. Dans la mesure où la jurisprudence relative à ce régime législatif en a considérablement assouplis les règles, le paradigme MO/DH semble se rapprocher du paradigme CdH/DCA. Certaines différences importantes persistent néanmoins entre les deux types de législation, en particulier lorsqu'ils sont appliqués à une situation de conflit armé.

Revenant brièvement sur les conditions d'application de l'article 3 commun aux Conventions de Genève et du régime de CdH/DCA qu'il consacre – à savoir l'existence d'un conflit armé sur le territoire d'une Haute Partie Contractante entre au moins cette partie contractante et un groupe armé suffisamment organisé – Mme Hampson se base sur l'opinion majoritaire émise par les participants du Colloque de Bruges pour illustrer le décalage qu'il existe fréquemment entre la qualification de jure qu'il convient de donner à une situation de violence armée et la qualification de facto qui en est donnée par les Etats concernés.

Après quelques précisions sur la position du Comité international de la Croix-Rouge (CICR) face à l'application du paradigme CdH/DCA, l'oratrice se penche sur les éléments qui pourraient expliquer la réticence de nombreux Etats à appliquer ce paradigme. Elle relève, dans un premier temps, les avantages qu'il présente par rapport au paradigme MO/DH et conclut que le seul réel avantage du régime CdH/DCA ne joue que dans les cas où le conflit armé englobe également des combattants d'un Etat tiers. Dans un second temps, Mme Hampson rassemble les éléments qui, selon elle, motivent la décision des nombreux Etats de ne pas reconnaître l'application de l'article 3 aux situations de violence sur leur territoire. Bien que ces arguments ne soient en réalité que des perceptions erronées au regard du droit international humanitaire, l'oratrice nous explique

qu'ils font en générale pencher la balance des Etats en faveur de la non-reconnaissance de l'applicabilité du droit des conflits armés. Cette tendance entraîne un certain nombre de conséquences pour les parties au conflit. Parmi celles-ci figure notamment le risque qu'un Etat qui recourt au régime MO/DH dans le but de masquer l'existence d'un conflit armé sur son territoire soit tenté de renforcer cette illusion par la dissimulation d'autres faits en lien avec le conflit.

Enfin, à titre de conclusion et afin de stimuler l'échange, Françoise Hampson aborde deux questions non encore résolues. La première touche au régime juridique à appliquer à des combattants d'un Etat B lorsqu'ils commettent des actes terroristes sur le territoire d'un Etat A en lien avec le conflit armé se déroulant sur le territoire de l'Etat B. La seconde question concerne la difficulté qui peut apparaître lorsqu'un Etat A vient en soutien à un Etat B et prétend que le régime CdH/DCA est applicable à la situation en cause alors que l'Etat B affirme le contraire.

In order to avoid an overlap with the session on the legal parameters of the fight against terrorism and the presentation by Noam Lubell on issues relating to actions committed outside national territory, this presentation will focus on the case where terrorist activities are exclusively carried out on a national territory, regardless of whether these activities constitute an armed conflict or not.

The default law enforcement/human rights paradigm

The default legal framework to deal with terrorist activities committed on a State's national territory is what I call the law enforcement (LE) or human rights (HR) paradigm. In this presentation, I will refer to both as constituting a single framework as I consider them to cover almost the same scope (with the small nuance that the human rights paradigm is, in my view, slightly broader than the law enforcement paradigm). This LE/HR paradigm is the default position, i.e. it applies unless something else replaces it.

In spite of the impression it gives, the law enforcement paradigm does not have a fixed content. On the contrary, it can be modified both at the domestic level by a declaration of a state of emergency or at the international level by a derogation to the relevant international legislative instrument. Of course, a state of emergency can exist without a derogation, and a derogation can exist without a state of emergency (although this is becoming more difficult in light of the case law of the European Court of Human Rights – ECtHR).

As the LE/HR paradigm is the default position, it will cease to apply as soon as the conduct of hostilities (CoH) paradigm under the law of armed conflict (LOAC) is applicable. Two conditions must be fulfilled for LOAC to be applicable. First, this body of law must be *de jure* ap-

plicable. This means that it will not be applicable in the event that there is *de facto* no armed conflict but a State merely wants to apply LOAC because it thinks it will give it more flexibility. Second, the State must acknowledge the applicability of LOAC. As a consequence, a State that denies the applicability of this body of law cannot later on – for instance when it is brought before a human rights court – seek to rely on provisions of LOAC.

Difference between the LE/HR and CoH/LOAC paradigms

There may be a temptation to ask whether there is a difference between the law enforcement / human rights and conduct of hostilities / law of armed conflicts paradigms. The answer to that is obviously yes, there is. The real question is: how significant is this difference?

It is clear from the case law of human rights bodies that, even in cases where none of the parties nor the human right body itself rely on LOAC, the latter will nonetheless take account of the existence of an armed conflict in the situation it is addressing. For instance, the ECtHR accepted the idea of an airstrike against a civilian convoy, whilst expressing surprise at airstrikes as part of law enforcement, in a case addressed under the default paradigm. The Court showed remarkable flexibility in a situation not governed by LOAC. Another example of this flexibility is the case law developed by the ECtHR allowing States to intern persons representing a threat to national security without relying on LOAC. The very first case which reached the Court dealt with this issue. In *Lawless v. Ireland*, the Court accepted that Ireland had derogated from the European Convention on Human Rights (ECHR) and that, in the circumstances, it was entitled to do so and that it had established the necessity for internment. At no time was there any suggestion that there was an armed conflict in Ireland. It is on account of this flexibility that it is suggested that there is more room for manoeuvre under the HR paradigm than under the law enforcement paradigm, as usually understood.

Yet one should not conclude from the examples above that there is no difference between the LE/HR and the CoH/LOAC paradigms. The distinction, however, is not a binary one. Rather, law enforcement is at one end of a spectrum, with Human Rights Law in the middle, and LOAC at the opposite end of the spectrum. The difference between the two ends of the spectrum can be observed in the way the ECtHR deals with cases under the LE/HR paradigm. Even applied with some flexibility, the human rights concept of proportionality will remain very different from the *ius in bello* concept of proportionality. Differences can also be seen in rules affecting the use of weapons (cf. *Gulec v. Turkey*) or the right to recourse to security detention outside national territory. While it is clear that a State may intern in a national emergency, I do not believe that the human rights paradigm would ever justify security detention outside national territory. In my view, a derogation to the HR paradigm would then be necessary.

In times of factual armed conflict, there is a significant difference between the LE/HR and the CoH paradigms but it is not as marked as the difference that exists between the peacetime LE/HR paradigm and the CoH/LOAC paradigm.

Application of the CoH/LOAC paradigm

The next question to be asked concerns the conditions of applicability of the LOAC regime. This question usually returns to asking whether common Article (CA) 3 of the Geneva Conventions is applicable. This provision relates to any ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. As specified in Additional Protocol II (Article 1), LOAC does not apply to ‘isolated and sporadic acts of violence’ but to armed conflicts, which have been defined by the International Criminal Tribunal for Yugoslavia as situations of ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ (*Tadic*, paragraph 70). To be of a ‘protracted’ nature, the armed violence must present a certain degree of intensity and/or duration. Indicative criteria to measure these conditions are provided in case law (see *Haradinaj et al.*, paragraph 49; *Boskoski et al.*, paragraphs 177 and 186). Lastly, LOAC will only apply to armed groups that fulfil some organisational requirements whose indicative criteria can, again, be found in case law (*Haradinaj et al.*, paragraph 60; *Boskoski et al.*, paragraphs 198-203).

Discussions on the possible application of CA 3 in some European examples

During the Bruges Colloquium I presented a series of cases of violence across Europe and asked the members of the audience to give their opinion on whether common Article 3 to the Geneva Conventions would have applied in these situations (be it only at certain times and in certain places). The results can be summarised as follows:

Country, context and dates	Majority opinion of the audience
United Kingdom: Northern Ireland & IRA (1968-1994)	CA 3 was not applicable
Spain: Basque country & ETA (1975-1998)	CA 3 was not applicable
Turkey: Eastern Turkey & PKK (1984-1999)	CA 3 was applicable
Russia: Second Chechen war (1999-2009)	CA 3 was applicable

The interesting lesson to draw from this survey is the difference that might exist between what the audience would qualify as a non-international armed conflict and the attitude taken by the concerned States. In none of the situations above did the concerned State admit that LOAC was applicable. In the case of Northern Ireland, the United Kingdom (UK) allowed the International Committee of the Red Cross (ICRC) to visit detainees but only on the basis of the statute

of the ICRC. The UK did derogate under the ECHR but never invoked LOAC. In the case of Spain, there was no derogation with regard to the Basque conflict. In the case of Turkey, the State derogated under Article 5 ECHR but never mentioned LOAC. Finally, in the case of the second Chechen war, Russia did not even derogate. It defended itself with ordinary Human Rights Law.

Why do States routinely fail to recognise that CA 3 is applicable when, in the eyes of the majority of the audience at the Bruges Colloquium, the law of non-international armed conflicts is factually applicable? What is it that is causing them not to invoke it?

ICRC and the applicability of CoH/LOAC

Before getting to the position of States, I would like to share a brief word on the position of the International Committee of the Red Cross. The ICRC is not going to waste time and energy in arguing with a State that denies the applicability of CA 3. This would be counterproductive. More generally, the primary focus of the ICRC is on meeting the needs of the victims of war. For this reason, the ICRC will, for example, refrain in some situations from seeking to obtain the right to visit detainees on the basis of the Geneva Conventions but will instead rely on an offer of services under Article 4 of its statute, which is applicable regardless of the armed conflict situation recognised by the host State.

Reasons behind States' positions regarding the applicability of CA 3

As illustrated with some European examples, we have seen that States routinely refrain from acknowledging the application of common Article 3 to the Geneva Conventions. In an attempt to understand, I will try to identify the major motivations behind a State's decision to refuse to apply the law of non-international armed conflicts to situations that seem to qualify as requiring such a legal framework.

Reasons to acknowledge the applicability of CA 3

There are two major reasons which might prompt a State to recognise the applicability of the law of non-international armed conflict. The first is that States might think they have a greater freedom to manoeuvre when relying on the CoH/LOAC rather than on the LE/HR paradigm. The second is that under the CoH paradigm all fighters are bound (both as a party and individually) to abide by LOAC.

That being said, there is a certain amount of flexibility under the LE/HR paradigm, too. If a State, as explained earlier, is allowed to launch airstrikes against civilian convoys under the LE/HR paradigm, maybe it does not need the flexibility and the larger freedom to manoeuvre of LOAC. Furthermore, while it is unlikely that a State when participating in an internal conflict will be allowed under the LE/HR paradigm to target members of an organised armed group

simply because they are members of this group, I am not sure whether that would be permitted under LOAC when the NIAC in question is of a low level of intensity. Additionally, we have already seen that a State is entitled to resort to internment under the LE/HR paradigm, provided that it derogates from the ECHR. So where exactly is this greater freedom to manoeuvre under the CoH/LOAC in the case of conflicts in national territory?

There is a significant advantage in applying the CoH/LOAC framework. It concerns the people bound by the rules. Whereas the LE/HR paradigm will only bind the State, LOAC will be applicable to any individual taking part in the hostilities, whether a national of the State fighting or not. This difference is only of benefit to intervening States, since the territorial State can pursue fighters for violations of its national criminal law based on the mere fact that they are members of the armed group.

Reasons to deny the applicability of CA 3

Most of the elements leading States to deny the applicability of the law of non-international armed conflicts are based on perception rather than on reality. The first element is the concern of States that recognition of applicability might imply the loss of some degree of control. This does not necessarily relate to loss of territorial control but rather to the overall control of the situation. The second fear is that the application of LOAC would affect the status of the fighters and offer them additional protection. The third concern is that it would affect the perceived legitimacy of the fighters and the conflict. The fourth fear is that it would legitimise expressions of concern by third States on what is happening on the State's own territory. This was the case, for example, during the Northern Ireland Troubles, where the UK was afraid that some States would start to raise concerns at the Council of Europe if the UK openly acknowledged that a non-international armed conflict was taking place within its territory.

The question now is whether these perceptions are real. On the face of International Humanitarian Law, it is absolutely clear that the applicability of CA 3 and Additional Protocol II (i.e. the law of non-international armed conflicts) does not affect the status of the fighters. Nor does it affect the legitimacy of the conflict. Nor does it justify foreign intervention. There is thus a contradiction between the legal arguments and the perceptions by States. All in all, from a State's perspective, the reasons not to recognise the applicability of CA 3 in national territory – though legally incorrect – are likely to outweigh the reasons to acknowledge it. This is a troubling conclusion. This does not mean that States are able to avoid legal obligations. They will remain bound by the LE/HR paradigm, which applies by default.

Implications of the failure to acknowledge the applicability of CA 3

In this section I will try to identify the main consequences of the refusal by a State to acknowledge the applicability of the law of non-international armed conflicts to situations within their own territory. Research is needed on this topic and I encourage the ICRC to take the lead in this regard.

In my view, the first implication is that States cursorily choose to be judged under the LE/HR paradigm, which constitutes a generally higher standard than LOAC. At first sight, choosing the default LE/HR may seem positive. This would, however, be a hasty conclusion.

The second implication is that a State cannot deny the *de jure* applicability of common Article 3 and then seek to rely on the CoH/LOAC rules, so as to displace or modify the rules otherwise applicable.

Third, there is a danger that by opting for the default paradigm, States merely seek to conceal the fact that an armed conflict is taking place on their territory. If concealment is indeed the motivation behind the choice for the LE/HR paradigm, I believe the risk increases that States would be tempted to reinforce the denial of armed conflict by hiding real facts. They might be encouraged to have recourse to hidden military activities (e.g. armed forces fighting without uniforms) which might have been permitted under LOAC, or to engage in the enforced disappearance of people who might otherwise have been lawfully targeted under LOAC.

These three implications show that the choice of the LE/HR paradigm is not necessarily good news as it entices States to be involved in more violations of both LE/HR and CoH/LOAC norms than if they had admitted the applicability of LOAC.

Two complications

To conclude this presentation, I would like to address two unresolved issues.

The first complication relates to the case, mentioned by Claire Landais, where State A is party to an armed conflict in State B against an organised armed group, in relation to which it accepts the applicability of CA 3. Which paradigm has to be applied to deal with fighters of the organised armed group entering State A to carry out terrorist attacks linked to the armed conflict on State B's territory? For the political reasons I highlighted earlier, States are more likely to opt for the application of the LE/HR paradigm, even to deal with situations within their territory stemming from a foreign conflict where the applicability of the LOAC is acknowledged. An example of this can be found in France's current counter-terrorism measures. Although linked to the conflict in Syria and Iraq where France recognises the applicability

of the LOAC, counter-terrorism inside French territory is, in my view appropriately, regulated under the LE/HR paradigm.

The second complication concerns the paradigm to be applied to the situation where State A is assisting State B, which is fighting an organised armed group in the territory of State B. An example is the conflict in Afghanistan. Unlike the previous example, it seems that, in this situation, State A is perfectly willing to admit that there is an armed conflict requiring the application of LOAC. This difference of attitude is due to the fact that the armed conflict is not happening on State A's own territory. To combat the organised armed group, State A will be far more likely to want to rely on LOAC, including on alleged customary rules of a permissive character. Yet, for State B the conflict is an internal conflict and hence the reasons persuading it to deny the applicability of LOAC will still operate. There will thus be a difference of opinion between State A and State B. Can a State, which is assisting another State on the territory of the latter, rely on the CoH/LOAC paradigm when the latter denies its applicability? I wonder how human right bodies will deal with this issue.

EU COUNTER-TERRORISM SANCTIONS AND IHL BEFORE THE EU COURT OF JUSTICE

Frederik Naert¹

Legal Service of the Council of the EU and Catholic University of Leuven

Résumé

Pour clôturer cette session sur l'utilisation de la force et les régimes de sanctions contre le terrorisme, Frederik Naert se penche sur les régimes de sanctions de l'Union européenne (UE) et sur la jurisprudence de la Cour de Justice de l'Union européenne (CJUE) relative à ces régimes de sanctions lorsqu'ils sont en conflit avec le droit international humanitaire (DIH).

Régimes de sanctions antiterroristes de l'Union européenne

A titre préliminaire, Frederik Naert souligne que les régimes de sanctions ne sont qu'une partie de l'approche adoptée par l'Union européenne en matière de lutte contre le terrorisme. Les sanctions adoptées par l'UE sont notamment des mesures de prévention et non de criminalisation et se subdivisent en deux régimes. Il y a en premier lieu les mesures restrictives dites « autonomes », qui mettent en œuvre la Résolution 1373(2001) du Conseil de sécurité de l'Organisation des Nations unies (ONU) et qui consistent principalement en un gel des avoirs des personnes ou entités sanctionnées. En deuxième lieu, il a y le régime qui met en œuvre les sanctions de l'ONU contre Al-Qaida (qui couvrent aujourd'hui également les sanctions contre ISIL/Daech), mais qui comprend aussi toute autre sanction décidée par l'UE ne se basant pas sur une résolution du Conseil de sécurité, y compris à l'encontre des « combattants étrangers ». Les mesures de ce second régime incluent en un gel des avoirs, une interdiction de voyager et un embargo sur les armes.

DIH et sanctions visant le terrorisme devant la Cour de justice de l'UE

A la connaissance de l'orateur, trois groupes qualifiés de terroristes ont invoqué le DIH devant la CJUE pour se défendre des sanctions prononcées à leur encontre en plaidant l'incompatibilité : le Hamas, les Tigres de libération de l'Ilam Tamoul (LTTE) et le Parti des travailleurs du Kurdistan (PKK). La plupart des affaires étant pendantes, il est difficile de tirer déjà des conclusions. Il ressort néanmoins des décisions rendues jusqu'ici que la Cour rejette les arguments avancés par les parties demanderesse car elle estime qu'un acte terroriste commis dans le cadre d'un conflit armé peut être jugé tant dans le cadre du droit international humanitaire que dans celui des

1 The views expressed are those of the author and do not bind the Council, its General Secretariat, or its Legal Service.

lois internationales relatives au terrorisme. L'auteur souligne par ailleurs que la Cour semble confondre l'immunité des combattants avec le principe de légalité en droit pénal.

En conclusion, plusieurs mesures restrictives ont été prises par l'UE à l'encontre de groupes armés non étatiques qualifiés de terroristes pour des faits commis en situation de conflit armé. A l'heure actuelle, la CJUE considère ces mesures compatibles avec le droit international humanitaire.

1. Introduction

The European Union (EU) has a broad approach to counter-terrorism, as explained in the presentation by Mr Van Hegelsom. EU counter-terrorism sanctions ('restrictive measures' in EU terminology) are only one part of this approach and it is the only part that I will address in this contribution. In particular, I will provide a brief overview of these restrictive measures and will then discuss a few cases referred to the Court of Justice of the EU (CJEU) in which International Humanitarian Law (IHL) issues have arisen in relation to these measures, before drawing some short conclusions.

2. Overview of EU counter-terrorism restrictive measures

The EU's counter-terrorism sanctions, which are preventive measures and not criminal sanctions, include two regimes.

First, the EU has adopted "autonomous" restrictive measures to implement United Nations (UN) Security Council Resolution 1373(2001), namely Council Common Position 2001/931/CFSP² and Council Regulation (EC) No 2580/2001³ (as well as their implementing acts, which are updated every six months⁴). The individual designations of persons or groups under this

2 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, p. 93.

3 Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28.12.2001, p. 70.

4 For recent updating acts, see e.g. Council Decision (CFSP) 2016/1136 of 12 July 2016 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2015/2430, OJ L 188, 13.7.2016, p. 21 and Council Decision (CFSP) 2016/2384 of 22 December 2016 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and amending Decision (CFSP) 2016/1136, OJ L 352, 23.12.2016, p. 92, as well as Council Implementing Regulation (EU) 2016/1127 of 12 July 2016 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) 2015/2425, OJ L 188, 13.7.2016, p. 1 and Council Implementing Regulation (EU) 2016/2373 of 22 December 2016 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and amending Implementing Regulation (EU) 2016/1127, OJ L 352, 23.12.2016, p. 31.

regime are based on ‘competent authority decisions’⁵ and the measures consist primarily of an asset freeze⁶.

For the purposes of this contribution, it is worth noting that Article 1(3) of Common Position 931/2001 defines a ‘terrorist act’ as follows:

‘(...) one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation (...)

There is no provision excluding acts committed in armed conflict and groups designated under this sanctions regime, among others Hamas, PKK (Partiya Karkerên Kurdistanê – the Kurdistan Workers’ Party), LTTE (Liberation Tigers of Tamil Eelam) and FARC (Revolutionary Armed Forces of Colombia),⁷ although the measures against the latter were recently suspended.⁸

5 Pursuant to Article 1(4) of this Common Position: *The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list. For the purposes of this paragraph ‘competent authority’ shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.*

6 Ibid., Articles 2 (freezing of assets) and 3 (prohibition to make available funds to a listed person or group). Furthermore, there is an obligation for Member States to ‘afford each other the widest possible assistance’ ‘through police and judicial cooperation in criminal matters (...)’ in the framework of the EU (ibid., Article 4). For the asset freeze and prohibition to make available funds, see also Council Regulation (EC) No 2580/2001, *op. cit.*, note 2.

7 See e.g. Council Decision (CFSP) 2016/1136, *op.cit.* note 3, Annex, respectively points II.8, II.13, II.14 and II.19.

8 See Council Decision (CFSP) 2016/1711 of 27 September 2016 amending Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ L 259 I, 27.9.2016, p. 3, and Council Regulation (EU) 2016/1710 of 27 September 2016 amending Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 259 I, 27.9.2016, p. 1. The second recital of the former act explains that *‘In view of the Colombia peace agreement the measures against one entity should be suspended, subject to a specific review by the Council after six months.’*

Second, the EU has adopted restrictive measures to implement the UN Al-Qaida sanctions regime (based on UN Security Council Resolutions 1267(1999), 1333(2000) and 1390(2002)). This was initially done through Common Position 2002/402/CFSP⁹ and Council Regulation (EC) No 881/2002¹⁰ (as well as their implementing acts¹¹). These measures consisted of an asset freeze (and prohibition to make funds available), an entry/travel ban in the EU, and an embargo on arms and related material.

In March 2016 these acts were amended to add the Islamic State of Iraq and the Levant (ISIL)/Da'esh in accordance with UN Security Council Resolution 2253(2015). This was achieved through Council Decision (CFSP) 2016/368¹² and Council Regulation (EU) 2016/363.¹³

In September 2016 the EU further amended and expanded its Al-Qaida plus ISIL/Da'esh regime to also include autonomous EU designations, i.e. EU designations not based on UN designations. This expanded regime *inter alia* addresses 'foreign fighters'. It is set out in Council Decision (CFSP) 2016/1693¹⁴ and Council Regulation (EU) 2016/1686¹⁵. So far, no autonomous designations have been made under this regime. Furthermore, Council Regulation (EC) No 881/2002 remains in force for implementing UN designations.

9 Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, OJ L 139, 29.5.2002, p. 4.

10 Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139, 29.5.2002, p. 9.

11 See e.g. Commission Implementing Regulation (EU) 2015/2245 of 3 December 2015 amending for the 239th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network, OJ L 318, 4.12.2015, p. 26.

12 Council Decision (CFSP) 2016/368 of 14 March 2016 amending Common Position 2002/402/CFSP concerning restrictive measures against members of the Al-Qaida organisation and other individuals, groups, undertakings and entities associated with them, OJ L 68, 15.3.2016, p. 17.

13 Council Regulation (EU) 2016/363 of 14 March 2016 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network, OJ L 68, 15.3.2016, p. 1.

14 Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, OJ L 255, 21.9.2016, p. 25. At the time of its adoption, no actual designation had yet been made (see the empty annex).

15 Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them, OJ L 255, 21.9.2016, p. 1.

3. Counter-terrorism cases before the CJEU in which IHL issues have arisen

There are, to my knowledge, cases before the CJEU relating to three groups designated under the EU's counter-terrorism sanctions in which IHL issues have been raised by these groups: Hamas, LTTE and PKK.¹⁶

First, Hamas raised IHL issues in Case T-400/10. In particular, it invoked general international law and IHL arguments to claim that its activities were justified and lawful under international law. However, the General Court did not address this in judgment of 17 December 2014.¹⁷ An appeal against this judgment is pending¹⁸ but does not cover IHL issues. Hamas has also raised IHL arguments in Case T-289/14, which is pending before the General Court.

Second, there are several cases before the CJEU concerning the LTTE. The first is Joined Cases T-208/11 and T-508/11. In this case, the General Court issued its judgment on 16 October 2014.¹⁹ It rejected arguments based on IHL and international law which the LTTE had invoked:

‘54. (...) the LTTE maintains, in essence, that, in a case of armed conflict within the meaning of [IHL] (...) only that law is applicable to any unlawful acts committed within the context of that conflict, and not the law organising the prevention and suppression of terrorism. LTTE is, it claims, a liberation movement which led an armed conflict against an ‘oppressive government’. The placing of the LTTE on the list relating to frozen funds constitutes an infringement of the principle of non-interference under international humanitarian law (...)

62. (...) the perpetration of terrorist acts by participants in an armed conflict is expressly covered and condemned as such by [IHL].

63. Further, the existence of an armed conflict (...) does not appear to preclude, in the case of a terrorist act committed in the context of that conflict, the application not only of provisions of that humanitarian law on breaches of the laws of war, but also of provisions of international law specifically relating to terrorism.

68. (...) the fact that terrorist acts emanate from ‘freedom fighters’ or liberation movements engaged in an armed conflict against an ‘oppressive government’ is irrelevant. Such

16 I should point out that I am an agent for the Council in some of these cases.

17 EU:T:2014:1095.

18 Case C-79/15 P.

19 EU:T:2014:885.

an exception to the prohibition of terrorist acts in armed conflicts has no basis in European law or even in international law. In their condemnation of terrorist acts, European law and international law do not distinguish between the status of the author of the act and the objectives he pursues.

72. In order to contest the applicability of Regulation No 2580/2001 to terrorist acts committed in the context of an armed conflict, the LTTE is also wrong to rely on Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (...) and, in particular, recital 11 to that Framework Decision, according to which '[a]ctions by armed forces during periods of armed conflict, which are governed by [IHL] within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by that Framework Decision. (...)

73. Regulation No 2580/2001 was not adopted pursuant to Framework Decision 2002/475, which concerns criminal law, but pursuant to Common Position 2001/931. Framework Decision 2002/475 cannot therefore determine the scope of Regulation No 2580/2001.

74. Moreover, Common Position 2001/931, just like Security Council Resolution 1373 (2001) which it implements at EU level, does not contain any provision comparable to recital 11 to Framework Decision 2002/475.

75. It follows that the LTTE's reference to Framework Decision 2002/475 and to a statement of the Council accompanying that Framework Decision is irrelevant.

76. The LTTE's reference to Article 6(5) of Additional Protocol II (...) is irrelevant. That provision (...) concerns the criminal proceedings that may be brought by the government concerned against, *inter alia*, members of armed groups having taken up arms against it, whereas Regulation No 2580/2001 does not concern the imposition of such criminal proceedings and sanctions, but the adoption by the European Union of preventive measures on terrorism.

77. As for the expression 'as defined as an offence under national law' found in Article 1(3) of Common Position 2001/931 - an expression from which the LTTE deduces the recognition (...) in [the] Common Position, of an immunity from the application of measures to freeze funds in cases of lawful acts of war. it should be stated that that expression actually relates to the immunity of combatants in armed conflicts for lawful acts of war, an immunity which Additional Protocols I and II (...) express in the following similar terms: no

one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed (...).

80. The presence of that expression in Common Position 2001/931 therefore does not alter the fact that Regulation No 2580/2001 is applicable to terrorist acts, which still constitute unlawful acts of war when committed within the context of armed conflicts.

81. (...) Regulation No 2580/2001 is applicable to terrorist acts committed within the context of armed conflicts.

82. The LTTE cannot therefore invoke the existence of an alleged armed conflict between it and the Government of Sri-Lanka in order to exclude itself from the application of Common Position 2001/931 for any terrorist acts which it committed in that context.'

I would only make one comment on this judgment: in its paragraph 79, the General Court seems to confuse 'combatant immunity' with the legality principle in criminal law. An appeal against this judgment is pending,²⁰ but it does not cover IHL issues.

Another case concerning the LTTE is a preliminary ruling requested by a Dutch court: Case C-158/14 (*A and Others*). This case is still pending but on 29 September 2016 Advocate General Sharpston issued her opinion in this case,²¹ in which she rejected arguments based on IHL and international counter-terrorism conventions invoked by the LTTE:

'3. The Raad van State (Council of State) has made a request for a preliminary ruling asking in essence about the definition of 'terrorist acts' used when adopting the Council implementing regulation and whether possible inconsistencies between that definition in EU law and international law (in particular, the body of international law on the combating of terrorism and international humanitarian law) might affect the validity of the implementing regulation in question.

93. (...) There is nothing in the wording of either EU measure [Regulation No 2580/2001 and Common Position 2001/931] suggesting that that concept may not cover actions committed during an armed conflict and which are governed by international humanitarian law.

20 Case C-599/14 P.

21 EU:C:2016:734.

94. Nor do the objectives of Common Position 2001/931 and Regulation No 2580/2001 support such an interpretation. (...)

104. I reject the submission made by the applicants in the main proceedings that, because the LTTE was a non-State armed force engaged in a non-international armed conflict in Sri Lanka, [IHL] precluded the attacks and kidnappings which it committed between 2005 and 2009 from being regarded as 'terrorist acts'. First, Common Article 3 of the Geneva Conventions, which specifically governs non-international conflicts, prohibits violence to life and person at any time and in any place whatsoever, in particular murder of all kinds, and the taking of hostages when committed against 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause'. (...) Although implicitly, that provision clearly prohibits acts of terrorism which may produce such consequences (...).

105. Article 4(2)(d) of Protocol II is more explicit when it states that participants in a non-international armed conflict may not at any time and in any place whatsoever commit acts of terrorism against persons who do not take a direct part or who have ceased to take part in hostilities. (...) Nor may they, under Article 13(2) of Protocol II, commit acts or make threats of violence the primary purpose of which is to spread terror among the civilian population.

106. Protocol I applies primarily to international armed conflicts (...) and therefore does not appear immediately relevant to the present proceedings. Even if that protocol applied to the conflict between the Sri Lankan Government and the LTTE, (...) however, the conclusion would not be different as Protocol I also prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' (...) [IHL] thus 'prohibits acts of terror in both international and non-international armed conflict, irrespective of whether they are committed by State or non-State parties' (...).

107. What is the position as regards actions directed at persons actively taking part in an armed conflict or against military objectives and which do not spread terror among the civilian population? Combatants in an international armed conflict have the right to participate directly in hostilities and therefore enjoy immunity with respect to their actions as combatants provided they comply with [IHL]. By contrast, participants in a non-international armed conflict do not enjoy immunity even when their actions are in conformity with Common Article 3 of the Geneva Conventions and Articles 4(2)(d) and 13(2) of Protocol II (...). So, for example, a soldier of a non-State armed force who,

without breaching [IHL], killed an enemy combatant belonging to the government forces in a non-international conflict can be tried for murder. That results from the principles of sovereignty and non-intervention in domestic affairs (...). Accordingly, participants in a non-international conflict do not escape repressive or preventive measures which a State may find appropriate in the circumstances (...). provided it has jurisdiction for imposing those measures and respects applicable counter-terrorism conventions and other rules of international law binding upon it (...).

108. It has been argued that characterising actions of participants in a non-international armed conflict as 'terrorist' might reduce their incentive to comply with [IHL], on the basis that such participants will have little reason to comply with (in particular) Common Article 3 of the Geneva Conventions and Articles 4(2)(d) and 13(2) of Protocol II if such compliance is not ultimately rewarded in terms of criminal liability (...).

109. It is true that the protection offered by Article 6(5) of Protocol II is relatively weak: that provision is drafted in purely programmatic terms (...) ('... shall endeavour to grant the broadest possible amnesty ...') and thus offers no reward comparable to the 'combatant' immunity for those who respect [IHL] during the hostilities. (...) The fact that [IHL] does not impose immunity might undermine the effectiveness of that law and increase its enforcement costs. However, this (allegedly) less than optimal state of international law is not as such capable of altering international humanitarian law as it stands today (...).

110. In any event, even assuming that the concept of 'terrorist act' has a narrower meaning in the context of a non-international armed conflict than it has in peacetime, the applicants in the main proceedings have neither demonstrated nor even argued that the attacks and kidnappings which formed the basis of LTTE's inclusion on the Article 2(3) list did not, in whole or in part, constitute violations of [IHL]. In particular, there has been no suggestion that none of these actions was directed against civilians or other persons not actively taking part in hostilities between the LTTE and the Sri Lankan Government. The applicants in the main proceedings rather submit that, as the LTTE has been involved in a non-international armed conflict within the meaning of [IHL], its activities could in no circumstances be regarded as 'terrorist' (...) For the reasons that I have explained, that submission must be rejected.

121. I therefore conclude (...) that actions by armed forces during a non-international armed conflict, governed by international humanitarian law, may constitute 'terrorist acts' within the meaning of Common Position 2001/931 and Regulation No 2580/2001, inter-

preted in the light of relevant rules of international humanitarian law and international law on combating terrorism and hostage-takings.’

Again, I would only make one comment on this judgment: in paragraphs 107-109, Advocate General Sharpston shows a better understanding than the General Court of the meaning of ‘combatant immunity’.

Third, in Case T-316/14, the PKK has invoked extensive arguments based on IHL to contest its designation. This case is still pending so I cannot comment further on it.

4. Conclusion

Several armed groups that were and/or are engaged in armed conflict have been designated under the EU’s counter-terrorism measures, both those implementing UN sanctions and EU autonomous sanctions under Common Position 931/2001. This has been judged to be compatible with IHL by the EU’s General Court and by Advocate General Sharpston.

SESSION 3 – THE USE OF FORCE AND OTHER MEASURES OF CONSTRAINT IN THE FIGHT AGAINST TERRORISM

During the discussion, six issues were raised by the audience:

1. On the difficulties arising from the differences between Ministries of Defence and Ministries of Foreign Affairs

When highlighting the difference one may observe between the legal qualification given to a conflict by academics and civil society on the one hand, and by the States themselves on the other, a panellist mentioned that even within a State different readings are sometimes supported by the Ministry of Foreign Affairs (MFA) and the Ministry of Defence (MoD). One of the participants stated that, to his knowledge, such variations in readings between MFA and MoD do not exist in Belgium. In his opinion, contradictions in interpretation are easy to prevent provided legal advisers of the MoD stick to the Law of Armed Conflict (LOAC) and refrain from policy considerations.

The panellist insisted, however, that she believes that disagreements between MFA and MoD are common. She explained that a lot depends on the organisation of the legal advice within the armed forces. She warned that in cases of civilian and military legal advisers not communicating sufficiently with each other, a number of internal problems could soon appear.

2. On the legal qualification to be given by an intervening State to an armed conflict whose existence is denied by the host State

In her presentation, one of the speakers asked how State A should qualify the armed conflict in which it is intervening if host State B is denying the existence of such a conflict on its territory. A member of the audience explained that in his view the qualification of the conflict given by the host State (or absence of such qualification) could not be taken into consideration by the intervening State since it is itself bound to abide by national and international law; hence the denial of the armed conflict by the host State cannot influence the drafting of the legal framework under which the intervening State is allowed to operate under its own legal system.

The panellist disagreed with the argument given by the participant. In her opinion, the intervening State cannot disregard the legal qualification given by the host State to the situation on its territory because imposing the intervening State's legal reading of the situation would very likely cause the host State to refuse the intervention of the second State on its territory. This opinion is further supported by the Working Group on Arbitrary Detention under the Office

of the United Nations High Commission of Human Rights (UN OHCHR) which states that an intervening State may only proceed to internment in a NIAC if that is justified by the law of the territory where the internment is taking place. In the speaker's opinion, the legal framework in which the intervening State is operating may thus not be more permissive than the one in which the territorial State is itself operating.

3. On the possibility for the ECtHR to interpret HRL in accordance with LOAC

The same participant wondered whether, in cases where a State denies the armed conflict in which it is operating, it would be possible for the European Court of Human Rights (ECtHR), when dealing with the situation, to apply Human Rights Law while leaving a margin for interpretation in light of the Law of Armed Conflict (LOAC), which would have been the applicable legal framework if the State had recognised the armed conflict. This interpretation would permit, for instance, to move from the strict proportionality test in Human Rights Law (HRL) to a more flexible proportionality assessment in line with LOAC. According to the participant, this relaxed application of HRL would allow for a more realistic understanding of the situation because it would avoid dealing artificially under a strict HRL framework with a situation that qualifies in fact as an armed conflict.

A member of the panel disapproved the idea of ECtHR applying HRL while relaxing its standards in view of the fact that LOAC would have been applicable to the situation if the State had not failed to recognise it. The speaker asserted however that the Court in Strasbourg should refrain from mixing both legal frameworks when it refers to 'civilians' in human rights cases. When dealing with a situation of armed conflict where the State has denied the applicability of LOAC, the speaker would rather encourage the Court to clearly state that it believes LOAC could have been applicable but that, since the State has not chosen to invoke this body of law, the Court will follow HRL whose standards are, generally speaking, higher than those under LOAC.

4. On the obligation to investigate under IHL and States' civil responsibility

Another participant shared her frustration regarding situations of apparent IHL violations that are not investigated because the State that committed the alleged misconduct does not deem it necessary to activate the investigation mechanisms enshrined in the Geneva Conventions.

One of the speakers acknowledged this problem and tried to explain its origins. In her opinion, commentators, States and lawyers have forgotten that LOAC is civil in its character and therefore it can be enforced by the International Court of Justice. The speaker insisted that people should recall that any violation of LOAC gives rise to State responsibility. This civil liability of

States exists independently of criminal and disciplinary liability. The ECtHR has made it clear in the *McCann* case (1995) where it found that the United Kingdom (UK) is responsible for the killings perpetrated by Special Air Service (SAS) soldiers on three Irish Republican Army (IRA) suspects because, although no crimes in the sense of the ECHR were committed, the UK had failed to organise the operation in such a way as to reduce the likelihood of the need to use lethal force. In this example, the UK was thus not held liable under criminal law, but under civil law. The panellist admitted that, in practice, States neglect their civil responsibility for violations of LOAC (e.g. the report into the Kunduz bombardment by US forces). Throughout Western Europe some States have even contested rulings of the ECtHR condemning them on the basis of their civil responsibility for acts committed in Iraq and Afghanistan. States should not complain about condemnation on the basis of their civil responsibility, the speaker said, because they have bound themselves to LOAC by choosing to sign the Geneva Conventions.

5. On the applicability of IHL on French territory

A member of the audience noted that France had decided not to apply IHL on its territory in the wake of the terrorist attacks in Paris and Nice. She enquired whether that was a purely strategic choice or whether it was because IHL was, legally speaking, not applicable to this situation. In case of the second possibility, the participant wondered if that was due to the fact that the acts committed on French soil could not be sufficiently linked to ISIS or because the intensity level of a NIAC had not been reached in France.

According to one of the speakers there was indeed a legal obstacle to the application of IHL on French soil since the intensity level required to qualify the situation as a NIAC had not been reached. She explained however that some have claimed that the intensity had been reached but that France had virtuously decided not to apply IHL and to stick to the human rights and law enforcement paradigm. Despite some very martial speeches by political leaders of the country after the attacks, France wishes to refrain from applying IHL on its territory. This being said, the speaker pointed out that the decision did not exclude the possibility that France's attitude could change in the future. Addressing the question of accountability of ISIS for the acts committed during the attacks in Paris (January 2015 and November 2015) and Nice (July 2016), the panellist explained that the matter had to be analysed separately for each context. The speaker said that traceability is very complicated for the attacks in January 2015 and that it is not sure whether there is a link between these attacks and the conflict in Iraq and Syria. The attacks in Nice were acknowledged by ISIS but not claimed, hence the problem remains the same. According to the speaker, only the attacks in November present a clear link with ISIS and can be attributed to this organisation.

6. On the interaction between EU restrictive measures and the new EU directive on terrorism

A participant asked whether the new EU Directive on Combating Terrorism would influence the EU's sanctions mechanisms. The participant particularly wondered whether the definition of terrorism and the inclusion of criminal offences for foreign fighters and for glorification of terrorism in the new EU directive would influence the existing sanction mechanisms, leading in practice to the prosecution and possible freezing of assets of Kurds going abroad to join the Kurdistan Workers' Party (PKK) or of people defending and justifying terrorist actions led by Hamas or the PKK.

The panellists to whom the question was directed admitted he did not know what would happen if the definition adopted by the final version of the new EU directive on terrorism was different from the one that is being used with regards to sanction mechanisms. Yet, the speaker recalled that the instruments at stake were very different in substance since the sanction mechanisms are preventive tools whereas the directive on terrorism is about criminal prosecution. The question of a possible mismatch between definitions would furthermore depend on the manner in which Member States exercise their discretion while transposing the directive in their own domestic system. In case of effective contradiction between the two definitions, difficult situations could arise.

Panel Discussion

State Responses to Foreign Fighters

Moderator: **Elizabeth Wilmshurst**

Chatham House

HOW HAVE THE BELGIAN COURTS DEALT WITH THE INTERPLAY BETWEEN IHL AND COUNTER-TERRORISM OFFENCES?

Vaios Koutroulis

Free University of Brussels

Résumé

Pour entamer la table ronde à propos des réponses apportées par les Etats au phénomène des combattants étrangers, Vaios Koutroulis nous offre un aperçu de la façon dont les cours et les tribunaux belges ont tenté de gérer l'interaction entre le droit international humanitaire (DIH) et la législation relative au terrorisme. Il évoque successivement le cadre législatif belge et la jurisprudence développée en la matière.

Le cadre législatif

Depuis 2003, le Code pénal belge, sur base du droit européen, dédie une section (le titre Iter) aux infractions terroristes. Ce titre contient une définition des actes constituant des infractions terroristes ainsi que d'autres actes punissables en relation avec de telles infractions (p. ex. l'incitation, le recrutement, l'entraînement, etc.). Il contient également des dispositions ayant trait aux sanctions des infractions terroristes ainsi que deux clauses d'exemptions. L'une d'entre elles, l'article 141bis, est particulièrement pertinente pour traiter de la question qui nous occupe, car elle exclut du champ d'application du titre sur les infractions terroristes les activités des forces armées en période de conflit armé ainsi que les activités menées par les forces armées d'un Etat dans l'exercice de leurs fonctions. Invoquée devant les cours et les tribunaux, cette clause a suscité de nombreuses questions quant à l'interprétation à donner aux termes « conflit armé » et « forces armées », obligeant les juges belges à se plonger dans le droit international humanitaire.

La jurisprudence

Dans l'affaire de la « filière iraquienne », l'application de l'article 141bis fut refusée, d'abord en raison de l'absence de conflit armé en Irak en novembre 2005, puis – cet argument ayant été réfuté en appel – sur base de l'impossibilité de prouver que le combattant étranger en cause avait effectivement rejoint un groupe armé impliqué dans la conduite des hostilités.

Dans l'affaire « Sharia4Belgium », ce n'est pas l'existence d'un lien entre le groupe armé et le combattant étranger qui fit défaut aux yeux des juges mais bien le fait que les groupes Al-Nusra et Majlis Al Choura Moudjahidin ne rencontrent pas, selon eux, des critères pour être qualifiés de groupes armés organisés. En l'absence de tels caractéristiques, les groupes armés ne pouvaient pas, selon les juges, être considérés comme parties au conflit et, de ce fait, ils écartèrent l'application de la clause d'exemption.

Dans une autre affaire encore, le tribunal d'appel de Bruxelles confirma un jugement rendu en première instance selon lequel les objectifs et les méthodes utilisés (p. ex. : la clandestinité, l'autonomie des cellules ainsi que l'absence de hiérarchie) par les groupes Kativa Al-Muhajirin, Jabhat Al-Nursa et ISIS, faisaient de ceux-ci des groupes qui, par nature, ne peuvent répondre aux critères de groupe armé organisé et ne peuvent dès lors être qualifiés de forces armées au sens dudit article 141bis.

Bien que contestables, les jugements précités ne font, selon M. Koutroulis, qu'illustrer une évolution plus large de la jurisprudence, au travers laquelle les juges, tout en reconnaissant l'existence d'un conflit armé, semblent s'appuyer sur l'absence du critère d'organisation du groupe armé ou de la preuve que l'individu en question ait rejoint les rangs d'un tel groupe pour justifier le rejet de l'application de l'article 141bis du Code pénal belge. En dépit de leurs références à la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), ces jugements établissent des standards d'application très exigeants, difficilement conciliables avec le fait que tous les groupes armés ne peuvent, au vu de la réalité matérielle dans laquelle ils opèrent, être organisés comme des forces armées étatiques. En outre, il appert que ces décisions s'opposent à l'idée – pourtant soutenue par le TPIY – que le recours par un groupe armé à des actes de terrorisme ne signifie pas pour autant que ce dernier ne remplit pas le critère d'organisation nécessaire pour être considéré comme une partie au conflit.

En conclusion, l'orateur exprime ses doutes quant au bien-fondé de l'interprétation du DIH faite par les juges belges. Il souligne, d'une part, la lecture très restrictive adoptée par ces juges, et d'autre part, la difficulté pour ceux-ci d'appliquer le DIH à des groupes désignés comme terro-

ristes dans la mesure où, à leurs yeux, un groupe terroriste ne peut être considéré comme un groupe armé organisé, car il ne pratique pas la lutte armée, mais le terrorisme.

The interplay between terrorism and international humanitarian law has been the object of intense scholarly debate, particularly since the 09/11 attacks, the ‘war against terror’ and everything that has followed since¹. In the more recent context of the operations by and against the Islamic State (ISIS), discussion has focused, among other topics, on ‘foreign fighters’ and the legal responses to them². Aside from questions on the status of foreign fighters under international law³, one particularly interesting aspect of this issue has to do with how national courts have dealt with foreign fighters and terrorism in times of armed conflict. Case law from Belgian courts⁴ is interesting in this respect, since the Belgian judges have been confronted with the interplay between Belgian counter-terrorism legislation and international humanitarian law (IHL), both in recent cases dealing with the conflict involving ISIS in Iraq and Syria and in earlier ones. Given the difficulty in identifying and accessing relevant national decisions, the developments below are not based on an exhaustive analysis of the relevant

-
- 1 See, in general, among many, H. Duffy, *The ‘war on terror’ and the framework of international law*, 2nd ed., Cambridge, CUP, 2015; G. S. Corn, *The war on terror and the laws of war: a military perspective*, 2nd ed., Oxford, OUP, 2015; A. Bianchi – Y. Naqvi, *International Humanitarian Law and Terrorism*, Oxford; Hart Publ., 2011; M. Sassoli, “Terrorism and War”, in: *J.I.C.J.*, vol. 4, 2006, pp. 959-981; D. O’Donnell, “International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces”, in: *I.R.R.C.*, vol. 88, 2006, pp. 853-880; Jelena Pejic, “Armed Conflict and Terrorism: there is a (Big) Difference”, in: A. M. Salinas de Frias et al. (eds.), , Oxford, OUP, 2012, pp. 171-204.
 - 2 See, S. Kraehenmann, *Foreign fighters under international law*, Geneva Academy of International Humanitarian Law and Human Rights, 2014, at: < <http://www.rulac.org/publications/briefing-no-7-foreign-fighters-under-international-law>>; A. De Guttry et al. (eds.), *Foreign Fighters under international law and beyond*, The Hague, Asser Press, 2016; F. Capone, “Countering ‘Foreign Terrorist Fighters’: a Critical Appraisal of the Framework established by the UN Security Council Resolutions”, in: *It.Yb.I.L.*, vol. 25, 2015, pp. 227-250; A. Jacobs – D. Flore (eds.), *Les combattants européens en Syrie*, Paris, L’Harmattan, 2015.
 - 3 See, S. Kraehenmann, op. cit., note 2; C. Deprez – I. Wittorski, «Des combattants qui n’en sont pas vraiment: les Européens partis se battre en Syrie et en Irak vus par le droit international humanitaire», in: A. Jacobs – D. Flore, *ibid.*, pp. 43-84 ; E. Sommaro, «The Status of Foreign Fighters under International Humanitarian Law», in: A. De Guttry et al., *ibid.*, pp. 141-160.
 - 4 For other examples of national case law, see M. Mancini, “Defining Acts of International Terrorism in Time of Armed Conflict: Italian Case Law in the Aftermath of September 11, 2001 Attacks”, in: *It.Yb.I.L.*, vol. 19, 2009, pp. 115-128; A. Coco, “The Mark of Cain: the Crime of Terrorism in Time of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v. Mohammed Gul*”, *J.I.C.J.*, vol. 11, 2013, pp. 425-440; K. N. Trapp, “The Interaction of the International Terrorism Suppression Regime and IHL in Domestic Criminal Prosecutions : The UK Experience”, in D. Jinks et al. (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies – International and Domestic Aspects*, The Hague, T.M.C. Asser Press, 2014, pp. 165-182.

material. Nevertheless, the cases examined are enough to give a first impression of the way Belgian judges have dealt with the counter-terrorism *versus* international humanitarian law dilemma (B). However, before we delve into Belgian case law, it is necessary to present a brief overview of the relevant legal framework that constitutes the judges' point of reference (A).

1. The legal framework: terrorist offences (*infractions terroristes*) in Belgian law

The Belgian criminal code has a specific section (Titre *Iter*) on terrorist offences⁵. Based on the European Union (EU) Council Framework Decision of 13 June 2002 on combatting terrorism⁶, this section was introduced into the Belgian criminal code in 2003 and came into force in January 2004⁷. Further modifications and additions were introduced by subsequent laws, mainly in the last four years (2013-2016). These incorporated the developments of EU legislation on the matter. The section spans Article 137 to Article 141*ter*. It contains the definition of the acts constituting terrorist offences as well as of punishable acts in relation to such offences (publication or dissemination of messages inciting to the commission of terrorist offences, recruitment of persons for the commission of terrorist offences, giving and receiving instructions or training etc.), the sentences applicable to terrorist offences, as well as two saving clauses: Articles 141*bis* and 141*ter*. Article 141*ter* is a saving clause in favour of human rights and lies outside the scope of this essay. It is Article 141*bis* which is relevant for the issue under discussion here because it deals with the relations between terrorist offences and IHL. The article reads as follows:

‘Le présent titre ne s’applique pas aux activités des forces armées en période de conflit armé, tels que définis et régis par le droit international humanitaire, ni aux activités menées par les forces armées d’un État dans l’exercice de leurs fonctions officielles, pour autant qu’elles soient régies par d’autres règles de droit international’.⁸

5 See Code penal belge, at: http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi#LNK0037

6 Framework Decision 2002/475/JAI, *J.O.*, L 164/3, 22 June 2002. See M.-A. BEERNAERT, «La loi du 19 décembre 2003 relative aux infractions terroristes : quand le droit pénal belge évolue sous la dictée de l’Union européenne», in: *J.T.*, vol. 123, no 6144, 2004, pp. 585-590.

7 Loi du 19 décembre 2003 relative aux infractions terroristes, *M.B.*, 29 December 2003, p. 61689, entry into force: 7 January 2004.

8 ‘Activities by armed forces during an armed conflict, as these terms are defined and governed by international humanitarian law, and actions by the armed forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this title.’

The origin of the article is the eleventh preambular paragraph of the 2002 Framework Decision on Combatting Terrorism⁹. Similar provisions are found in some international treaties dealing with terrorist activities, such as the 1997 International Convention for the Suppression of Terrorist Bombings and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism¹⁰. The Defence of some of the accused in cases relating to terrorist offences has invoked Article 141*bis*, claiming that their clients cannot be charged with such offences because their actions were in reality ‘activities by armed forces during an armed conflict’. Thus, in order to determine whether the saving clause set down in Article 141*bis* can be applied to the defendants, the Belgian judges had to interpret the IHL terms of ‘armed conflict’ and ‘armed groups’. In general, when faced with a claim based on Article 141*bis*, the Belgian courts proceed as follows: they first examine whether there is an armed conflict and then they determine whether the relevant groups are armed forces in the sense of Article 141*bis*. As it will be seen below, the Belgian courts have refused to apply Article 141*bis*, adopting extremely restrictive interpretations of these terms.

2. The restrictive interpretation of IHL by the Belgian courts

Article 141*bis* has been invoked before Belgian courts before the rise of ISIS and the conflicts in Iraq and Syria. One relevant example in this respect is the *Iraqi network case (affaire de la filière iraquienne)* relating to activities of a network in Belgium sending volunteers to Iraq in order to fight foreign troops present in Iraqi territory¹¹. Using this network, a woman of Belgian nationality conducted a suicide attack against a US convoy in Iraq on 9 November 2005. Faced with the invocation of Article 141*bis*, the Brussels First Instance Tribunal (*Tribunal correctionnel de Bruxelles*) found that there was no armed conflict at all in Iraq during the period relevant to the case, that is from January 2004 to November 2005¹². This highly questionable interpretation was rightly overturned by the Court of Appeal, which, while admit-

9 Framework Decision 2002/475/JAI, op. cit., note 6: ‘Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision’.

10 International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UNTS 2149, p. 256, entry into force: 23 May 2001, Art. 19, paragraph 2; International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UNTS 2445, p. 89, entry into force: 7 July 2007, Article 4, paragraph 2; the text of both articles is the same: ‘The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention’.

11 O. Venet, «Infractions terroristes et droit humanitaire», in: *J.T.*, vol. 129, no 6387, 2010, pp. 169-172.

12 *Ibid.*, p. 171.

ting that there was indeed an armed conflict in Iraq at the relevant time, also refused to apply Article 141*bis* because it was not proven that the persons sent to Iraq had joined an armed group involved in the conflict or that they were closely linked to hostilities¹³. This reluctance to apply Article 141*bis* has been consolidated in the cases dealing with the recent hostilities in Iraq and Syria.

One of the landmark cases before Belgian courts linked to the question of foreign fighters leaving for Syria is the *Sharia4Belgium* case. This case concerned a group which indoctrinated and recruited young people in order to send them to Syria to fight mainly alongside Jabhat Al Nosra and Majlis Shura al-Mujahideen. The first instance judgment was handed down on 11 February 2015¹⁴. In this case, while accepting that an armed conflict existed in Syria during the relevant period, the tribunal refused to apply Article 141*bis*, holding that AL-Nusra and Majlis Al Choura Moudjahidin are not organised armed groups. The reasons invoked in order to justify this conclusion are the following: the members of the groups do not carry arms openly since their method consists mainly in committing suicide attacks; their leaders are not identifiable and are known only by an assumed name (*nom de guerre*); they do not have a military staff (*état major*), military grades nor identifiable functions; they do not have an internal disciplinary system allowing for compliance with IHL; and they do not engage in military actions but in terrorist activities.

It should be noted that the tribunal's reasoning is not clear as to the classification and the parties to the conflict. Normally, the question of whether an armed group can be considered as organised or not comes up at the stage of determining whether a non-international armed conflict involving the said group exists or not. In other words, given that the criterion relating to the intensity of the hostilities is not problematic here, either a group is not sufficiently organised to be considered a party to an armed conflict or it is. In the first case, there will not be an armed conflict; in the second there will. Thus, the tribunal's simultaneous finding in favour of the existence of an armed conflict but against the organised character of the groups is puzzling.

Unfortunately, this problem persists in other relevant judgments as well. In general, Belgian judges prefer not to doubt that an armed conflict exists in the relevant situations – although they do not specify which exactly are the belligerent parties in each case – and reject the

13 Ibid., pp. 171-172.

14 Rechtbank van eerste aanleg, 2014 – Antwerpen, FD35.98.47-12 – AN35.F1.1809-12, vonnis, 11/02/2015 (*Sharia4Belgium*), at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20150211-2; For a comment on this judgment, see V. Koutroulis, "Le jugement du Tribunal correctionnel d'Anvers dans l'affaire dite « *Sharia4Belgium* » et l'article 141*bis* du Code pénal belge", in : A. Jacobs – D. Flore, op. cit., note 2, pp. 85-103.

application of Article 141bis because of the absence of an organised armed group and/or of proof that the accused have joined such a group.

Another example in this regard is given by a judgment delivered on 29 July 2015 by the Brussels First Instance Tribunal (*Tribunal de première instance francophone de Bruxelles*), in a case concerning Belgians and other nationals who left for Syria and joined the forces of Katiba Al-Muhajirin, Jabhat Al-Nusra and ISIS as well as a cell operating in Belgium that recruited and sent fighters to Syria¹⁵. The part of the judgment which is supposed to deal with conflict classification gives a historical overview, quotes extensively UN Security Council Resolution 2170 classifying ISIS and Al-Nusra as terrorist groups, admits that some of the accused did integrate groups fighting in Syria, underlines that they did not integrate the Free Syrian Army, and says nothing about the classification of the conflict and the parties to it. The tribunal then moves on to question whether Katiba Al-Muhajirin, Jabhat Al-Nusra and ISIS constitute organised armed groups, by maintaining that due to their objectives and methods, they *by nature* do not meet the conditions necessary to be considered as an organised armed group. Much weight is given to the clandestine nature of the group and to the absence of hierarchy: the fact that the cells of each group operate with some autonomy and do not know each other leads the court to conclude that the defendants did not participate in the activities of an armed force in the context of an armed conflict¹⁶. Both the conclusion and the reasoning of the first instance

15 Tribunal de première instance francophone de Bruxelles, FD35.97.15-12, FD35.97.5-13, FD35.98.144-15, 29 July 2015 (on file with the author).

16 It is instructive to present the judges' reasoning extensively; the relevant excerpts of the judgment are the following (*ibid.*, feuillets 24 ff.; footnotes omitted):

‘I.A. Quant à l’application à la situation d’espèce de l’Article 141bis du Code pénal

Attendu qu’il n’est guère contesté que certains prévenus ont gagné la Syrie où ils se seraient intégrés à des groupes combattants ;

Qu’au vu des éléments objectifs consignés au dossier, ces groupes sont connus, étant tantôt KATIBA AL MUHAJIRIN, tantôt JABHAT AL NUSRA ou encore l’ETAT ISLAMIQUE EN IRAK ET AU LEVANT (...)

Que [l]es conseils [de certains prévenus] soutinrent (...) que le conflit syrien constitue un conflit armé non international et que les groupes rejoints par certains prévenus étaient des forces armées au sens de cet article (...)

Attendu qu’il résulte du dossier que certains prévenus se sont intégrés à des groupes combattant en Syrie ;

Que (...) aucun de ces prévenus ne paraît avoir rejoint les rangs de l’Armée Syrienne Libre, à l’égard de laquelle d’autres prévenus ont d’ailleurs manifesté une haine farouche (...)

Que tout indique, en revanche, qu’ils se sont intégrés dans des groupements salafistes djihadistes dont ils portaient systématiquement les insignes sur d’innombrables photos ;

Que les indications figurant au dossier permettent d’inférer qu’ils ont rejoint soit Katiba al-Muhajirin, soit Jabhat al-Nusra, soit EIIL [État islamique] (...)

Attendu que toutes ces entités constituent des groupements terroristes (...)

Que ces constats sont capitaux dès lors qu’ils démontrent :

- que quoi qu’en disent les prévenus concernés, leur intention n’était pas de se rendre en Syrie pour y combattre un régime sanguinaire et y restaurer les libertés publiques, mais pour s’y livrer au djihad

tribunal were upheld at the appeal stage of the proceedings by the Brussels Court of Appeal which unequivocally stated that the groups in question, namely Katiba Al-Muhajirin, Jabhat

dans des groupes terroristes afin d'imposer par la force et la terreur un régime salafiste sunnite régi par la charia (...) et prenant la forme d'un khalifat s'étendant au-delà des frontières de la Syrie,

- (...)
- qu'il est d'ailleurs révélateur d'observer qu'aucun des prévenus partis « sur zone » n'a rejoint le groupe de libération nationale ASL, mais tous se sont agrégés à des groupements salafistes terroristes (...)

Si tant les objectifs que les méthodes de ces groupes ne sont pas les critères fixés pour leur qualification en DIH force est de constater que ceux-ci les empêchent, par nature, de remplir les conditions pour constituer une « force armée » dans le cadre d'un conflit armé non international.

En effet, ils fonctionnent, par nature, dans une clandestinité, tant à l'égard des autres membres du groupe, qu'à l'égard des dirigeants de celui-ci et des tiers et lesdits dirigeants ne sont pas formellement identifiés ou identifiables.

Le terme « nébuleuse » utilisé par [sic] qualifier Al-Qaïda illustre parfaitement le mode de fonctionnement de ces groupes qui sont composés de cellules éparses inconnues les unes des autres et dont « l'affiliation » au groupe « mère » apparaît fréquemment, y compris pour ce dernier, lors de la revendication éventuelle d'une attaque ou d'un attentat.

Ces caractéristiques font dès lors intrinsèquement obstacle :

- au port, ouvertement, d'armes ou de signes distinctifs,
- à la capacité d'établir un régime disciplinaire de nature à pouvoir faire respecter le DIH,
- à la capacité de mener des actions communes et concertées,
- à la capacité de parler d'une seule voix.

A titre d'exemple, ces groupes n'ont pas la capacité d'instaurer un régime disciplinaire et de faire respecter, par leurs membres, le DIH à défaut de pouvoir identifier leurs propres membres (...)

L'autonomie dont disposaient les prévenus résulte de l'ignorance dans le chef des « dirigeants » des membres composants [sic] leur groupe et de leurs activités.

Cette ignorance exclut de manière certaine, d'une part, l'organisation suffisante permettant tant de mener des opérations militaires, continues et concertées, que de faire appliquer le DIH et mettre en place un système disciplinaire et, d'autre part, l'existence d'un commandement responsable disposant d'une chaîne de commandement, même rudimentaire.

En conclusion, quelle que soit la nature des groupes combattants en Syrie et du conflit s'y déroulant, le tribunal constate que certains prévenus ont, quant à eux, rejoint ou participé aux activités de groupes dont les membres étaient rassemblés en « groupes isolés d'individus sous un commandement » et ne formaient pas « une organisation militaire incorporant des unités et ayant une chaîne de commandement, même rudimentaire, et une structure complète unifiant les membres du mouvement.

Ainsi, les prévenus n'ont pas participé aux activités de forces armées en période de conflit armé, tel que définis et régis par le DIH, au sens de l'article 141bis du Code pénal.

Attendu que (...) les causes I et II visent chacune une filière de recrutement et d'acheminement de djihadistes vers la Syrie, filières actives au départ de la Belgique.

Il n'est pas contestable que ces filières étaient :

- des associations structurées,
- composées de plus de deux personnes,
- établies dans le temps,
- composées de personnes agissant de manière concertée,
- destinées à commettre des infractions terroristes (...)

Il n'est pas plus contestable que ces filières, en Belgique, ne constituaient pas une force armée au sein d'un conflit armé non international.

Al-Nusra and ISIS, are ‘manifestly’ not armed forces engaged in an armed conflict to which Article 141bis would be applicable, but terrorist groups¹⁷.

As is seen from the cases presented above, the legal basis invoked by the judges in order to reject the application of Article 141bis to the defendants relates to the nature of the groups joined by the defendants as ‘armed forces’ and their classification as ‘organised armed groups’.

En conséquence, les prévenus pour lesquels il sera établi qu’ils ont, soit, rejoint un des groupes précités en Syrie, soit, participé aux activités de l’une de ces filières en Belgique, ne peuvent bénéficier de la clause d’exclusion prévue à l’article 141bis du Code pénal (...):

See also, in very similar terms, Tribunal de première instance francophone de Bruxelles, 70ème chambre du tribunal correctionnel, FD35.98.212/11, judgment, 6 November 2015 (feuillets 6-15) (on file with the author).

- 17 Cour d’appel de Bruxelles, 12ème chambre, Affaires correctionnelles, arrêt no. 2016/1262, 9 FC 2015, 14 April 2016 (feuillet 14 ; on file with the author) : ‘Ces groupes ne sont manifestement pas des forces armées en période de conflit armé au sens du droit international humanitaire (...) mais bien des groupes terroristes.’ The judges of the Court of Appeals subscribed to the reasoning of their first instance colleagues (feuillet 15):

‘Relevons tout d’abord que ces groupements figurent sur la liste des groupements terroristes de l’ONU. Cet organisme international releva notamment que ceux-ci commettaient des meurtres aveugles de civils, des exécutions massives extrajudiciaires, des persécutions de personnes et de groupes entiers en raison de leurs convictions ou de leur religion, des exactions graves contre des enfants ou leur enrôlement, des viols et autres formes de violences sexuelles, des détentions arbitraires, des destructions d’écoles, d’hôpitaux, de sites culturels et religieux.

Par ailleurs, après avoir opportunément rappelé les principes du droit international humanitaire qui régissent la matière, le premier juge a, à bon droit, constaté qu’en l’espèce ces groupes que divers prévenus concernés par le présent dossier avaient rejoints poursuivaient des objectifs et surtout utilisaient des méthodes qui ne permettaient pas de les considérer comme des forces armées agissant dans le cadre d’un conflit armé.

Il en est ainsi de la clandestinité, à tout le moins partielle, dans laquelle ils fonctionnent : clandestinité entre les différents membres des groupes ; clandestinité et anonymat relatif des dirigeants de ceux-ci.

Il s’agit en réalité à chaque fois d’une « nébuleuse » de groupes épars, affiliés, certes, à un groupe « mère » mais qui œuvrent bien souvent en autonomie sans objectifs concertés.

Ils n’ont ni structures communes ni discipline commune. Ils n’ont pas d’autorité ayant la capacité de mettre en œuvre les règles du droit international humanitaire – si tant est qu’ils le souhaiteraient – et pouvant ou devant répondre des violations de ce droit.

Comme l’a relevé à juste titre le premier juge, il ressort des déclarations de divers prévenus (...) des écoutes téléphoniques, de données informatiques et bancaires, de renseignements relatifs au transport aérien utilisé par des prévenus et à leur passage des frontières, que loin de rejoindre des groupes structurés et hiérarchisés, ces prévenus avaient la liberté d’aller et venir entre la Syrie, la Turquie et la Belgique sans autorisation ; qu’ils devaient bien souvent pourvoir eux-mêmes à leur armement, à leurs munitions, à leurs vêtements de combat voire à leur nourriture.

Ces éléments de terrain et l’inexistence d’une chaîne de commandement, même rudimentaire, reliant ces groupes épars et qui permettrait des opérations militaires continues, planifiées et concertées démontrent que les prévenus n’ont pas rejoint une organisation militaire. La cause d’exclusion prévue à l’article 141bis du Code pénal n’est dès lors pas d’application.’

It should be noted that in some judgments, such as the first instance judgment of 29 July 2015, the judges go to considerable lengths to explain the criteria allowing them to conclude in favour of the existence of an organised armed group. They refer, among others, to the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (namely the 2005 *Limaj* judgment) and the elements taken into account in order to conclude that the Kosovo Liberation Army (UCK) was an organised armed group. The problem is that the Belgian judges seem to set the standard very high for this criterion to be fulfilled. Indeed, the criteria used clearly indicate that the judges were looking for a hierarchical, State army-like, organisation, which is of course clearly not the way all armed groups are organised. In the words of Sandesh Sivakumaran,

The context in which the armed group operates must be borne in mind when assessing its degree of organization. For example, armed groups will usually be underground organizations that operate in conditions of secrecy and that are faced with military operations by the state. For these reasons, the structure of the group and the identity of all its members may not be known¹⁸.

As for the argument relating to the armed groups' methods consisting in systematic violations of IHL and the absence of an authority capable of ensuring compliance with IHL and to be held responsible for these violations, the ICTY case law points to a rather flexible interpretation of these criteria. Thus, in the *Limaj* judgment, the ICTY has held that 'some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation'¹⁹. Along the same lines, it is important to note that a reasoning similar to the one followed by the Belgian judges was put forth by the defence of *Johan Tarčulovski* before the ICTY in order to preclude the existence of an armed conflict involving the Albanian National Liberation Army (NLA) operating in the former Yugoslav Republic of Macedonia and with it the relevant war crimes charges that the accused was facing. According to Tarčulovski's defence, the 'terrorist' nature of the activities of the NLA and alleged violations of international humanitarian law argued against the NLA being considered a party to an armed conflict because they showed that the 'NLA did not have the authority to control the forces on the ground'.²⁰ The ICTY rejected the argument by stating that

18 S. Sivakumaran, *The Law of Non-International Armed Conflict*, OUP, Oxford, 2012, p. 172.

19 ICTY, *The Prosecutor v. Fatmir Limaj et al.*, IT-03-66-T, judgment, Trial Chamber II, 30 November 2005, paragraph 89, at: <<http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>>.

20 ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, IT-04-82-T, judgment, Trial Chamber II, 10 July 2008, para. 204, at: <http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf>.

‘the Chamber (...) recognises that some terrorist attacks actually involve a high level of planning and a coordinated command structure for their implementation. In other words, this question is a factual determination to be made on a case-by-case basis.

Where members of armed groups engage in acts that are prohibited under international humanitarian law, such as ‘acts of terrorism’ (...) they are liable to prosecution and punishment. However, so long as the armed group possesses the organisations *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict. The Chamber cannot merely infer a lack of organisation of the armed group by reason of the fact that international humanitarian law was frequently violated by its members²¹.

One final element that is worth mentioning is that in all the aforementioned cases, the courts held that the cell operating in Belgium which was responsible for the recruitment and sending of the foreign fighters in Syria was a terrorist group in its own right, distinct from the ones operating in Syria and therefore that the exception clause of Article 141*bis* could not be applied to the activities of that group²². Along the same lines, the court in the *Sharia4Belgium* case held that there was no armed conflict in Belgium during the relevant period and thus that Article 141*bis* cannot be applied with respect to the activities of that group on Belgian territory.

3. Concluding remarks

In conclusion, the cases relating to foreign fighters before Belgian courts have given rise to judgments which seem problematic in terms of the interpretation of basic IHL terms. In defence of the courts, it is certainly not easy for the national judges to grapple with concepts with which they are not familiar, and when they are faced with a highly complex situation which departs from classic clear-cut cases of non-international conflicts. However, in my view, the analysed case law shows mainly two things.

Firstly, judges have adopted a very restrictive reading of the relevant concepts of IHL, namely ‘armed conflict’ and ‘armed group’; in this respect, it is important to note the conflation between two distinct questions:

²¹ *Ibid.*, paragraphs. 204-205.

²² See, e.g., the 29 July 2015 judgment by the Brussels First Instance Tribunal, namely the last part of the excerpt reproduced *supra* at note 16.

- (a) is there an organised armed group for the purposes of establishing the existence of a NIAC?
- (b) have the defendants joined and are they part of the 'armed forces' of this organised armed group?

In view of the facts of each case, the defendants may indeed not have proven that they had joined the armed forces of an organised armed group. However, the problematic aspect of the Belgian case law is that the judges seem to question whether groups such as ISIS or Al-Nusra can be considered as being sufficiently organised to be parties to an armed conflict.

Secondly, the judgments show how difficult it is for national judges to deal with – and, it seems, even to conceive – the application of IHL to groups which are classified as terrorist groups. Indeed, the judgments examined start from the premise, stated explicitly in some of them, that a terrorist group and an organised armed group are two different things that need to be distinguished. In this respect, the following statement of the judges is certainly telling :

'[l'intention des prévenus] n'était pas de se rendre en Syrie pour y combattre un régime sanguinaire et y restaurer les libertés publiques, mais pour s'y livrer au djihad dans des groupes terroristes afin d'imposer par la force et la terreur un régime salafiste sunnite régi par la charia'²³.

From this starting point, everything follows naturally and in a circular reasoning: terrorist groups cannot be considered as organised armed groups because they do not conduct military activities but terrorist acts...

23 *Op. cit.* note 16 ('the intention of the accused was not to go to Syria to fight a bloodthirsty regime and restore public freedoms but to carry out a jihad within terrorist groups in order to impose by force and terror a sunnite salafist regime under sharia law'). The same passage is repeated in the 6 November 2015 judgment of the Brussels First Instance Tribunal, *op. cit.*, note 16, feuillet 10.

FOREIGN FIGHTERS AND STATE RESPONSES: HUMAN RIGHTS CONCERNS

Christophe Paulussen

T.M.C. Asser Institute

Résumé

Lors de son intervention à la table ronde consacrée aux réponses des Etats face aux combattants étrangers, Christophe Paulussen commence par définir le concept même de « combattants étrangers ». Il décrit ensuite certaines mesures prises à l'échelon européen pour répondre à ce phénomène et décrit les impacts qu'ont ces mesures sur l'application des droits de l'homme.

Partageant le constat dressé par Sandra Krähenmann, M. Paulussen revient sur l'absence de définition du terrorisme et sur les dangers que présente la définition de « combattant terroriste étranger » du Conseil de Sécurité des Nations unies. Avançant sa propre définition, l'orateur argue que cette pratique n'a de neuf que son ampleur et son impact grandissant sur la sécurité globale.

Les réponses des Etats européens face au phénomène des combattants étrangers sont de trois ordres. Il y a tout d'abord les mesures de sécurité que l'on peut observer dans le renforcement des contrôles aux frontières, dans l'utilisation de méthodes particulières d'enquête, ou dans le durcissement des règles en matière d'obtention de permis de séjour. Il y a ensuite les mesures législatives et judiciaires qui visent à faciliter l'inculpation de combattants étrangers pour des faits tels que le voyage à l'étranger à but terroriste, les actes préparatoires à des actions terroristes, ou encore l'appartenance à un groupe terroriste, et ce en l'absence même de tout autre crime de droit commun. Enfin, il y a les mesures préventives qui, elles, ont pour objectif de s'attaquer aux causes profondes de la radicalisation, en encourageant, par exemple, le dialogue inter-religieux dans nos pays.

Cette démultiplication de mesures contre le terrorisme a été dénoncée par de nombreuses organisations comme étant disproportionnée, voire excessive. En guise de conclusion, l'orateur nous donne des exemples concrets en France, aux Pays-Bas et en Grande-Bretagne qui illustrent ce propos.

Because this is the first panel of this Colloquium explicitly dealing with the issue of foreign fighters, I thought it would be a good idea to first devote a few minutes introducing the concept. I will then look at some of the measures that have been adopted in Europe to respond to this, before sharing with you some human rights concerns that I have.¹

But first of all: what are we talking about? In the recent book on foreign fighters co-edited by Prof. Andrea de Guttry, Dr. Francesca Capone and myself, we have defined foreign fighters as ‘individuals, driven mainly by ideology, religion and/or kinship, who leave their country of habitual residence to join a party engaged in an armed conflict’.²

In international law, one usually does not see references to the concept of foreign fighters as such, but to foreign *terrorist* fighters. The most authoritative definition can be found in United Nations (UN) Security Council Resolution 2178 of 24 September 2014. It refers to foreign terrorist fighters as ‘individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict’.³ As has become clear from Sandra Krähenmann’s presentation, this definition is not without problems, *inter alia* because terrorism itself is not defined, and because of its potentially problematic correlation with International Humanitarian Law.

More generally, it should be noted that even though this Resolution focuses on foreign terrorist fighters, not all foreign fighters are terrorists, nor are they all fighting. I think we should be careful not to consider foreign fighters solely from a counter-terrorism perspective.

Although it has received a lot of attention in the past few years, “foreign fighter” is not a new concept. Bin Laden was a foreign fighter, and the same goes for George Orwell, who fought against Franco’s troops in the Spanish Civil War. What *is* new in the current circumstances, however, is the scale of it, and of the potential threat it poses. For instance, Prof. Edwin Bakker and Mark Singleton, two contributors to the aforementioned book, arrived at a combined estimate of a total number of more than 30.000 foreign fighters for the entire conflict in Syria

1 This text is based on an initial version of the (now finalised ICCT Research Paper) C. Paulussen, “Repressing the Foreign Fighters Phenomenon in Western Europe: Towards an Effective Response Based on Human Rights”, *ICCT Research Paper*, November 2016, at: <<https://icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf>> (last accessed 25 November 2016).

2 A. de Guttry, F. Capone and C. Paulussen, “Introduction”, in: A. de Guttry, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, The Hague, T.M.C. Asser Press/Springer Verlag, 2016, p. 2.

3 UN Security Council Resolution 2178, S/RES/2178 (2014), 24 September 2014.

and Iraq since 2011, far exceeding the number of foreign fighters in the decade-long Afghanistan war in the 80s of last century.⁴

Although it is of course important to have a clear idea of the scope, numbers do not say everything. After all, you only need one (or a few) foreign fighter(s) to stage an attack. Moreover, increasingly, we have all seen the risk of frustrated *wannabe* foreign fighters – people who have not even left for Syria or Iraq, but who are instructed or simply inspired by organisations such as the one that calls itself ‘Islamic State’ or ‘IS’.

Hence, the problem is serious, as foreign fighters 1) contribute to the conflict in the region, 2) may return on a fighting mission – especially now that IS is losing ground in the Middle East and North Africa – and 3) inspire other people to stage attacks.

Having provided this introduction, what can I say about the responses in Europe? Before I delve into the specific responses, I would like to make a general observation: it is remarkable to see how often these responses are framed in war-like rhetoric. As we have also heard earlier today, on the streets of France or Brussels there is no armed conflict taking place, but you would be surprised to find out that I have even heard counter-terrorism experts – I am not talking about politicians such as Valls or Hollande now – saying – and I am paraphrasing now – that if these terrorist attacks get worse, we should perhaps adopt a tougher regime based on the laws of war.

Such language is very dangerous in my view. Terrorists want to provoke us. They want our governments to overreact. They want our governments to enact harsh measures and draw us into the war paradigm. This is because in practice, these measures often target a specific group in society, and that group, the Muslim community, will feel even more alienated from the majority group. This can lead to further exclusion and even radicalisation. So, by overreacting and polarising, we potentially increase the pool of new recruits for the organisations we are trying to fight. We should definitely not fall into this trap set by the terrorists.

After this general observation, let us now look at some of the responses in more detail.

4 E. Bakker and M. Singleton, “Foreign Fighters in the Syria and Iraq Conflict: Statistics and Characteristics of a Rapidly Growing Phenomenon”, in: A. de Guttery, F. Capone and C. Paulussen, “Introduction”, in: A. de Guttery, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, *op.cit.*

In the 2016 International Centre for Counter-terrorism (ICCT) Report on Foreign Fighters in the EU, which I co-authored,⁵ the different measures from governments were divided into three categories, namely security measures (including administrative measures), legislative measures (including prosecutions), and preventive measures.

As to the security measures: in the wake of the January 2015 terrorist attacks in Paris, Member States have strengthened or announced the strengthening of their security and intelligence services. Border controls have also been stepped up. Moreover, the use of special investigation methods has been expanded. Interestingly, the ICCT Report also shows that countries increasingly adopt administrative measures. Examples are the stripping of citizenship, tougher regulations and laws regarding the issuance of passports and identity cards, and travel bans. I will come back to these later.

With regard to legislative measures and prosecutions: whereas regular criminal law provisions have been used to convict travellers, or potential travellers as well, it seems that prosecutors are increasingly charging them under terrorist-related provisions. We have not seen many war crimes prosecutions of foreign fighters, but I am sure Mr. Ritscher will say more about this.

Finally, it is notable that sometimes, a certain prosecutorial approach is taken that avoids dealing with the difficult evidentiary problems that are caused by the chaotic situation in the conflict areas. In such cases, prosecutors opt for the prosecution of preparatory acts, even the simple fact that one has joined a terrorist organisation as such (regardless of any acts they may or may not have committed).

Hence, the general impression is that countries have a broad set of security and legislative measures at their disposal to prevent and counter the problem of foreign fighters.

As to the third category: prevention and addressing the root causes of radicalisation. These have been mentioned by many – but not all – countries as an element of their approach to the foreign fighters issue, with some Member States labelling prevention even as the primary goal of their policies. I need to stress that prevention should indeed have our main attention. Repression is also essential, but we should not overestimate its effect either. In the end, repression is about fighting symptoms, which does not target the underlying issues. For that, a long-term vision and

5 B. Van Ginkel, E. Entenmann, B. Boutin, G. Chauzal, J. Dorsey, M. Jegerings, C. Paulussen, J. Pohl, A. Reed and S. Zavagli, "The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies", ICCT Research Paper, April 2016, at: <https://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf> (last accessed 25 November 2016).

a focus on prevention are absolutely necessary. Examples of preventive measures are inter-cultural and inter-religious dialogue, engagement with the Islamic communities, and the use of counter-narratives. I guess my ICCT colleague Fulco van Deventer will say more about this tomorrow, but on the basis of our report and other sources, it can be concluded that, even though Member States often refer to the issue of prevention, law enforcement and security measures are still dominant.

Finally some human rights concerns.

Although I argued earlier that States should not fall into the trap set by the terrorists by over-reacting and undermining the principles and values we stand for, I see a worrying trend, in which measures are taken which raise human rights concerns.

I will provide a few examples at the national level. They concern France, the Netherlands and the UK.

Since 2012, one can see that France, the 'cradle of human rights', has gone through a period of what one could call 'legislative fever', constantly adopting new and tough counter-terrorism laws and measures. Moreover, we have seen that the state of emergency was declared (in the hours following the November 2015 attacks), and extended several times.

This exceptional regime - and its application in practice - has been heavily criticised by many organisations. It goes beyond the scope of this presentation to delve into this too much, but to just give an example: the extensive use of warrantless searches has raised questions of necessity. It was reported that, 'of the 3,289 administrative searches recorded as of 3 February of this year, only 28 offences linked to terrorism were recorded, with 5 of these resulting in a referral to the anti-terrorism Prosecutor in Paris.'⁶ Their use has also raised questions of proportionality, in view of reports that on numerous occasions house searches have resulted in the use of excessive physical and psychological violence by police forces as well as unnecessary material damage, with these measures discriminatorily targeting Muslims.⁷

6 Commission Nationale Consultative des Droits de l'Homme, "Statement of Opinion on the State of Emergency", 18 February 2016, at: <http://www.cncdh.fr/sites/default/files/english_avis_statement_of_opinion_on_the_state_of_emergency.pdf> (last accessed 25 November 2016), paragraph 16.

7 See Amnesty International, "Amnesty International Report 2015/16: The State of the World's Human Rights", 23 February 2016, at: <<https://www.amnesty.org/en/documents/pol10/2552/2016/en/>> (last accessed 25 November 2016), p. 159; Amnesty International, "France: Upturned lives: The disproportionate impact of France's state of emergency", 4 February 2016, at: <<https://www.amnesty.org/en/documents/eur21/3364/2016/en/>> (last accessed 25 November 2016) and Human Rights Watch, "France: Abuses Under State of Emergency", 3 February 2016, at: <<https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>> (last accessed 25 November 2016).

Also in the Netherlands, criticism was voiced.

One example is the draft legislative proposal on the 'Temporary Administrative (Counter-terrorism) Measures Act', which seeks to implement UN Security Council Resolution 2178. This proposal enables the Minister of Security and Justice, when needed to protect national security, *inter alia* to take a measure restricting the freedom of movement of an individual when that person can be connected to terrorist activities or the support of such activities, based on his/her behaviour.

The Netherlands Institute for Human Rights noted, and this criticism was repeated by the Council of State and other organisations, that the aforementioned criterion does not form a sufficiently clear and precise legal basis for the justification of the limitation of human rights. Moreover, the Institute had doubts about the decision to adopt administrative measures rather than criminal law provisions. According to the Institute, Dutch criminal law already includes a number of provisions designed to prevent terrorism, and the added value of this proposal was not clear.⁸

Finally the UK – very briefly: here, the Home Secretary can strip a naturalised person of British nationality, even if it renders that person stateless, where there are 'reasonable grounds to believe' that he or she can acquire another nationality. However, Dr. Laura Van Waas, in our foreign fighters book, has pointed out that this theoretical possibility is not the same as the actual acquisition of that nationality and that one can wonder which country would be willing in practice to extend its citizenship to someone who has conducted themselves in a manner that is 'seriously prejudicial to the vital interests' of the UK.⁹ Are such measures really necessary and effective or is it simply a symbolic measure, meant to brand the foreign fighter as an outcast of society?

This is of course a rhetorical question. I think measures such as revoking citizenship arguably send the wrong message. Especially when it leads to such medieval practices as statelessness, which basically leads to the loss of the right to have rights.¹⁰ It is not only a purely symbolic

8 Netherlands Institute for Human Rights, "Recommendations Temporary administrative (counterterrorism) measures Act – summary", 28 April 2015, at: <<https://mensenrechten.nl/publicaties/detail/35933>> (last accessed 25 November 2016). The full (Dutch) version is available at: <<https://mensenrechten.nl/publicaties/detail/35614>> (last accessed 25 November 2016).

9 L. Van Waas, "Foreign Fighters and the Deprivation of Nationality", in: A. de Guttry, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, *op.cit.*

10 See also C. Paulussen and L. Van Waas, "UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture", in: *ICCT Commentary*, 5 June 2014, at: <<https://icct.nl/publication/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture/>> (last accessed 25 November 2016).

measure whose efficiency has not been proven, it also ensures that the problem is not dealt with, but simply left to other States. This leads – and this will be my concluding remark – to a “passing the buck” mentality and a fragmentation of the responses to a global problem that, instead, demands a global response, characterised by international solidarity, trust and cooperation.

FOREIGN FIGHTERS AND THE INTERNATIONAL CRIMINAL LAW

Christian Ritscher

Federal Public Prosecutor, Office of the Federal Public Prosecutor General, Karlsruhe, Germany

Résumé

Comme contribution à la discussion sur les mesures adoptées par les Etats en réponse au phénomène des combattants étrangers, le Procureur Ritscher nous présente l'approche développée par les cours et tribunaux allemands.

Avant d'examiner la jurisprudence, Christian Ritscher dresse les contours de la législation allemande sur la lutte contre le terrorisme. D'après le droit pénal allemand, le crime de génocide ainsi que les crimes de guerre et les crimes contre l'humanité peuvent constituer des manifestations de terrorisme. Celles-ci sont punissables tant en droit national qu'en vertu des dispositions du Statut de Rome de la Cour pénale internationale (CPI). Etant donné la compétence universelle que le Code allemand des crimes internationaux reconnaît à ses cours et tribunaux, toute situation impliquant l'un de ces crimes peut être instruite par les juridictions allemandes, peu importe que la situation en question présente ou non un lien avec l'Allemagne. A ce titre, la qualité de « combattant étranger » n'est donc pas pertinente en droit pénal puisque la compétence de juge s'attache non pas à l'identité de l'auteur du délit mais bien à la nature du crime commis. La notion de combattant étranger revêt néanmoins une certaine importance en droit procédural. Le Code de procédure pénale opère en effet une distinction entre les cas concernant des nationaux ou résidents allemands partis combattre à l'étranger et les cas d'étrangers n'ayant pas vécu préalablement en Allemagne. Dans le premier cas, le juge a l'obligation de mener une enquête, tandis que dans le second, le juge dispose d'un pouvoir de discrétion quant à l'opportunité d'ouvrir une enquête ou non.

De son expertise au sein du Ministère public fédéral allemand, M. Ritscher retient deux affaires particulièrement éclairantes en matière de lutte contre le phénomène des combattants étrangers. Le premier cas concerne un combattant étranger condamné pour avoir posé en photo avec des têtes décapitées de soldats syriens. La haute Cour régionale de Francfort a reconnu dans cette affaire que la dépouille mortelle d'un soldat était protégée en droit international humanitaire et que les photographies prises avec celle-ci constituaient dès lors une atteinte à la dignité humaine, et donc un crime de guerre. Le second cas concerne des faits similaires. Outre une condamnation pour crime de guerre, le suspect a été également sanctionné pour appartenance à un groupe terroriste. Cet arrêt prononcé par la Cour suprême fédérale demeure à l'heure actuelle le jugement du plus haut échelon judiciaire en matière de combattants étrangers en Allemagne.

Le Procureur Ritscher conclut des exemples exposés que les cours et tribunaux allemands ont une propension croissante à combiner le droit pénal international et la législation relative à la lutte contre le terrorisme. Cette tendance constitue, à son avis, une réponse cohérente aux nombreux défis juridiques que posent les groupes terroristes actifs dans les conflits armés de par le monde.

1. Legal basis: The German International Crimes Code ('Völkerstrafgesetzbuch').

The German International Crimes Code was established in 2002, at the same time as the International Criminal Court's (ICC) Rome Statute. It makes genocide, crimes against humanity and war crimes punishable offences under national German law and expresses its complementarity to the Statute of the ICC.

The German International Crimes Code implements universal jurisdiction into the national legal system with relation to the core crimes genocide, crimes against humanity and war crimes. This means that the German International Crimes Code is applicable to all of these crimes worldwide, regardless of whether there is a link to Germany or not.

2. 'Foreign Fighters' and the international criminal law

The term 'foreign fighter' meaning persons who immigrate into the area of an armed conflict in order to take part in hostilities is not a term of the International Crimes Code, neither at national nor at international level.

International criminal law does not distinguish between perpetrators coming from abroad or those who are citizens of the area of the conflict.

Therefore from the perspective of the substantive criminal law itself, 'foreign fighter' is not a relevant category for the investigations and prosecution of international crimes.

3. 'Foreign Fighters' under the German Code of Criminal Procedure

From the perspective of procedural law however, it does make a difference if a person suspected of international crimes departed from Germany to a war zone or if she/he is an inhabitant of an area of armed conflict. Under section 153f of the German Code of Criminal Procedure it is possible to stop the investigation in cases with no link to Germany. The competent prosecutorial authority is not obliged to investigate cases without a realistic chance of acquiring evidence.

If the alleged perpetrator is of German nationality or at least used to live in Germany before departing, there will be no such discretion to investigate or not. This means that foreign fighters who, for example, depart for Syria or Iraq will generally be subject to investigation if they are suspected of having committed war crimes or other international crimes.

At the moment the practice of prosecution of international crimes demonstrates a higher number of people arriving in Germany for the first time from a conflict area after committing war crimes than foreign fighters returning to Germany after participation in an armed conflict.

4. International Criminal Law and Counter-terrorism Law

According to section 129a paragraph 1 number 1 of the German Criminal Code a terrorist organisation is a firmly organised group of persons who *inter alia* intend to commit international crimes defined by the German International Crimes Code, including war crimes. Therefore under German criminal law there is always a strong nexus between international core crimes and terrorism. According to the inherent structure of German criminal law, genocide, crimes against humanity and war crimes are manifestations of terrorism.

5. German Cases

Two cases within the competence of the War Crimes Unit of the competent German law enforcement authority, the Office of the Federal Public Prosecutor General, will be presented as follows:

a) The Case of Aria L.

Aria L., a person of German-Iranian descent who had lived near Frankfurt, was indicted for war crimes. He departed for Syria in 2014 where he became a member of an armed group of unknown name, opponent to the regime. The Prosecution could not prove that he became a member of one of the known militias, so he was not indicted for membership of a terrorist organisation.

The nuclei of the indictment were some pictures of him posing with two decapitated heads on sticks. The faces of these heads can be seen on the photos, so the corpses could be identified by people who knew them.

Aria L. was charged with war crimes against persons under section 8 paragraph 1 number. 9 of the German International Crimes Code ('treating a person who is to be protected under International Humanitarian Law in a gravely humiliating or degrading manner') can be compared to Article 8 number. 2 (c) (ii) of the Rome Statute ('committing outrages upon personal dignity, in particular humiliating and degrading treatment').

The most important question to be answered in this case was if a corpse is protected under International Humanitarian Law. This was affirmed by the competent court, the Regional Higher Court of Frankfurt, referring to existing judgements (foremost International Criminal Tribunal for the former Yugoslavia (ICTY) *Prosecutor v. Brđanin*), to the International Committee of the Red Cross's (ICRC) Rules on Customary International Law (Rule 113. '[e]ach party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited') and to the ICC's Elements of Crimes. As it was most probable that the heads belonged to corpses of soldiers of the Syrian army, one had to answer the question if a soldier who is not protected under humanitarian law as long as he is alive and is part of the army will he be protected once he is killed. This was also affirmed by the Court, because dead soldiers have no means of defence.

Therefore, after nine days in session Aria L. was convicted as charged by the Federal Public Prosecutor General. He was found guilty of war crimes against persons protected by International Humanitarian Law and was sentenced to two years imprisonment (without parole).

This judgement is very important for the prosecution of international crimes because posing with decapitated or mutilated corpses is currently quite common in the context of the war in Syria and in Northern Iraq.

Aria L. appealed against the judgement. It is probable that the competent appeal court, the Federal Supreme Court (BGH) will confirm the judgement of the Regional Higher Court in Frankfurt.

b) The Case of Abdelkarim El-B.

A similar trial was held in Frankfurt against a suspect named Abdelkarim El-B. This man was charged with war crimes under section 8 paragraph 1 number. 9 of the German International Crimes Code and for membership of a foreign terrorist organisation (section 129a and b of the German Crimes Code), because investigators found some videos made by the defendant in Syria in 2013 using his smartphone, showing himself present in a war scenario and – this is most important – during the mutilation of a dead soldier presumably of the Syrian army. One can see some militia cutting off the soldier's ears and nose and finally shooting his head, whilst the defendant is shouting and kicking the corpse.

During this trial, the defendant filed an appeal against his arrest warrant. The Federal Supreme Court however, which is the competent court concerning appeals against warrants during the trial, decided that clearly a dead soldier is a person protected under International Humanitarian Law, mainly referring to the ICC's Elements of Crime.

This decision marks an important step for international criminal law in Germany and even for international customary law, as two similar judgements have already been made in Finnish courts on this and a case pending in Sweden which is expected to be tried in the very near future.

Abdelkarim El-B. was sentenced to eight years and six month of imprisonment. The Court found him guilty of war crimes and of membership of a terrorist organisation.

6. Prospects

International criminal law is going to establish itself as a relevant and important part of the architecture of German criminal law. The merging of international criminal law and counter-terrorism law will continue in future times as warfare by militias using different conflict zones will continue to exist. That might be the answer for national prosecuting authorities to the challenges created by groups acting globally and militias in armed conflicts.

PANEL DISCUSSION

STATE RESPONSES TO FOREIGN FIGHTERS

At the end of the panel discussion, a questions and answers session allowed the audience to direct questions to the speakers. Five issues were raised:

1. On the leniency of the sanctions for mutilation of corpses

Referring to the judgment rendered by the Regional Higher Court in Frankfurt in the case of Aria L., a member of the panel shared her surprise at the light sentence given for a war crime against persons protected by International Humanitarian Law (IHL).

A panellist admitted that the sentence of two years imprisonment is one of the lowest enshrined in the German international crime code. Under its provision, the sentence can vary from one to fifteen years imprisonment whereas for most of the other offences the sentences start at a minimum of five years. For example, rape in relation to an armed conflict could be punished by a minimum of 10 years, and killing someone by a lifetime sentence. In the case of Aria L., the sentence was mild because the conviction was based solely on the fact that the man had posed with decapitated heads and not on the fact that he had killed the captured soldiers or mutilated their corpses, as the prosecution had not succeeded in proving these offences. The sentence was much heavier in the case of Abdelkarim El-B., as in this case it could be proven that the man had actively participated in the mutilation of the corpses. The speaker concluded by underlining that the identification of the victims is often a difficulty that arises in the prosecution of foreign fighters based on videos and images of them posing with dead soldiers. As pointed out by the Chair of the panel, German prosecutors try to sue foreign fighters for the war crimes they have allegedly committed rather than on the basis of their membership of a terrorist organisation, because the sentences are much higher for the first type of crimes than for the second.

2. On the interaction between national counter-terrorism law and IHL

Someone from the audience emphasised that German prosecutors sometimes prosecute for both war crimes and membership of a terrorist organisation. The person therefore wondered if German courts and tribunals had to interpret terrorism in accordance with IHL.

One of the panellists explained that, under German law, membership of a terrorist organisation is understood as being a member of an organisation that commits or tries to commit certain crimes, including international crimes. Hence, an organisation which systematically commits

war crimes is by definition considered a terrorist organisation under German law. So there is a close relationship between war crimes and terrorism.

Another speaker noted that the situation is different in Belgium: the prosecutor needs to prove a link with the mother organisation (e.g. IS, Al Nusra, etc.) in order to consider the members of a terrorist cell in Belgium to be members of the terrorist organisation abroad. Hence, foreign fighters cannot be prosecuted in Belgium for war crimes they have allegedly committed unless a link can be established with an armed conflict. For the time being no such connection has been established in the cases presented before the national courts and tribunals of the country.

3. On women and children foreign fighters

A member of the audience asked the panellists whether they knew about new laws and measures applying to families of foreign fighters. The participant referred to French case law where a court refused the defence's argument that the prosecuted teenagers, who had travelled to Syria and Iraq to take part in hostilities, should be considered as child soldiers and thus be protected under IHL. In this particular case, the court treated the returned children as they would treat any other members of a terrorist organisation, but was concurrently very lenient in the sentence pronounced against them, trying to balance the children's guilt with their young age. With the expectation of potentially hundreds of teens coming back to Europe in the coming months, the participant asked the speakers their opinion on whether courts would deal with the teenagers as child soldiers or as adult terrorist fighters.

One of the speakers said that, according to the International Centre for Counter-Terrorism Report from April 2016, 17 percent of the foreign fighters are female. This proportion is likely to grow since many men are dying in the battle. In the Netherlands, children are taken to juvenile institutions when they come back with their parents. There, they are investigated in order to check that they have not been party to the commission of any crime. In view of the very low average age of foreign fighters in Syria and Iraq, the speaker suggested that courts apply juvenile justice and consider children foreign fighters as victims rather than as perpetrators.

A speaker from a previous session commended the Dutch courts' decision to refrain from applying IHL in cases of foreign fighters presented before them. In the speaker's opinion, courts in the Netherlands were right to prosecute foreign fighters under domestic law and abstain from risking uselessly stretching IHL into situations which it was not designed for. This furthermore made it easier to take juvenile law into account.

A second panellist pointed out that the problem of child soldiers is not new. He recalled that children are protected under IHL and that recruiting them is a criminal offence. The soldiers themselves might however be criminals as well as protected persons. The solution found under German law is to prosecute the child as an adult but to render a lighter sentence that takes account of their young age.

4. On the scope of foreign fighting activities

Asking about the scope of activities that are comprised under the idea of foreign fighting, a member of the audience noted that there had been doubts as to whether a medical student who travelled to Syria to provide medical assistance to wounded combatants should be prosecuted under this concept or not.

One of the panellists answered that he had no examples of such cases in mind, especially since condemnations on the basis of travelling with terrorist intentions were quite exceptional. Judges indeed prefer to convict suspected people on the grounds of preparatory acts or membership of a terrorist organisation. An example of this is the very first case about foreign fighters in the Netherlands, where the suspects were convicted for preparatory acts of murder and arson. Contrary to German judges, Dutch judges try to avoid relying on war crimes and rather base their decisions on domestic criminal law.

5. On the *caveat* to the new EU Directive on Combating Terrorism and prosecution for membership of a terrorist group

Lastly, a member of the audience shared his confusion concerning the scope of the IHL saving clause in the new EU Directive on Combating Terrorism. He enquired how this *caveat* could be reconciled with the possibility to prosecute someone for joining a group systematically committing war crimes. In his view, the IHL saving clause would prevent prosecuting someone for joining a terrorist group when it cannot be proven that that individual has committed war crimes him/herself.

A panellist reacted to this question by explaining that, in his view, the participant was taking a wrong approach to coping with terrorism. In his opinion, many politicians start from the premise that the individual joining a terrorist organisation has to be put in prison regardless of whether he/she has actually committed any action that is prohibited under the law applicable to a situation of armed conflict. It is because of the wrong approach of Belgian judges that Belgian case law has developed a restrictive interpretation of IHL. The IHL saving clause is there precisely to ensure that people – when acting in the framework of an armed conflict – can be prosecuted for the crimes of war that they have committed but not for actions that are lawful under IHL.

Session 4

Criminalisation of Humanitarian Action

Chairperson: Ann-Kristin Sjöberg

Geneva Call

IMPACT OF COUNTER-TERRORISM MEASURES ON HUMANITARIAN ACTION

Patrick Duplat

International Rescue Committee

Résumé

Pour entamer cette session à propos des risques de criminalisation auxquels l'action humanitaire est confrontée dans le contexte de la lutte contre le terrorisme, Patrick Duplat nous livre certaines des conclusions qu'il a tirées de sa collaboration à l'écriture du document « Study of the Impact of Donor Counter-terrorism Measures on Principled Humanitarian Action » commandé par le Bureau des Nations unies pour la Coordination des Affaires humanitaires (UN OCHA) et le Conseil norvégien pour les Réfugiés (NRC) en 2013.

1. Interaction entre mesures contre le terrorisme et action humanitaire

L'action humanitaire est régie par le cadre juridique que consacre le droit international humanitaire (DIH). Elle se fonde sur les principes d'humanité, d'impartialité, de neutralité et d'indépendance. A ce titre, les acteurs humanitaires ont l'obligation de faire preuve des mêmes égards envers les différentes parties d'un conflit armé, qu'elles soient étatiques ou non étatiques. La mise en œuvre d'une telle approche peut néanmoins être mise à mal par les limites et interdictions qu'érigent les Etats au travers des mesures de lutte contre les groupes qu'ils qualifient de terroristes. En dépit des contradictions qui peuvent apparaître entre l'action humanitaire et la lutte contre le terrorisme, M. Duplat souligne que ces deux objectifs présentent également des points de convergences, en particulier en matière de protection des civils.

Bien que leur fréquence et leur intensité varient d'une organisation et d'un contexte à l'autre, trois points de frictions éventuelles entre principes humanitaires et mesures contre le terrorisme peuvent être distingués : les contacts avec des groupes désignés comme terroristes et leurs membres (p. ex. des négociations pour autoriser de l'aide, des cours de DIH); les transactions accessoires nécessaires à la mise en œuvre de l'assistance et de la protection (p. ex. : des paye-

ment aux points de contrôle); l'assistance ou la protection accordée à un membre d'un groupe désigné comme terroriste (p. ex. des soins médicaux).

2. Incidence des mesures contre le terrorisme sur l'action humanitaire

Les mesures contre le terrorisme affectent l'action humanitaire de trois manières: (1) structurellement, en s'attaquant au cadre même de l'aide humanitaire; (2) opérationnellement, car elles touchent aux décisions en matière de programmes; et (3) sur le plan interne, en nuisant au fonctionnement de l'organisation et à la coordination des organisations humanitaires entre elles. Comme l'illustre l'orateur, ces incidences se reflètent immanquablement dans la capacité ou dans la volonté des organisations humanitaires à fournir l'assistance nécessaire aux populations dans le besoin. L'impact des mesures contre le terrorisme n'est cependant pas uniformément ressenti, car certaines organisations, telles le Comité international de la Croix-Rouge, bénéficient d'immunités ou de régimes préférentiels auxquels d'autres organisations non gouvernementales n'ont pas accès.

3. Suggestions concrètes

Là où d'aucuns ont opté pour « l'option de sécurité » en évitant d'agir dans les zones contrôlées par des groupes qualifiés de terroristes, d'autres ont développé des politiques efficaces de gestion des risques. C'est le cas notamment du NRC qui a créé un ensemble d'outils pour la gestion des risques encourus dans le cadre de la lutte contre le terrorisme. En guise de conclusion, l'auteur affirme qu'il existe de nombreux exemples de réconciliation entre exigences sécuritaires et humanitaires, et invite, pour atteindre cet objectif, à un plus grand dialogue entre les Etats et les organisations humanitaires.

This presentation largely draws on a 2013 study commissioned by the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council (NRC), which sets out the relevant counter-terrorism (CT) laws and measures impacting humanitarian action, the corresponding donor requirements, and also distinguishes the types of impact such measures and requirements have on humanitarian action.

The study is part of a body of work which the International Committee of the Red Cross (ICRC), the Harvard Law School, the Overseas Development Institute's Humanitarian Policy Group and the Norwegian Refugee Council, among others, continue to develop. One of the key recommendations arising from the study, as well as from other reports and articles on the subject, is 'sustained and open dialogue between the humanitarian community and member

States', across all relevant sectors of government (security, justice, financial and humanitarian branches) – hence the importance of this year's Bruges Colloquium.

1. Why are counter-terrorism measures relevant to humanitarian action?

The framework for humanitarian action is provided by International Humanitarian Law (IHL), which calls for parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. This framework is based on humanitarian principles: humanity and impartiality, asserting human dignity and the obligation to relieve human suffering wherever it is found. Neutrality, between parties to a conflict, as well as independence from political agendas, are said to be principles that enable these humanitarian principles to be translated into action, but also tools to seek acceptance from parties to the conflict or to access greater proximity to affected populations.

These principles require humanitarian players to treat State and non-State parties to an armed conflict on a virtually equal basis and to respond to affected people in proportion to their needs. Such an approach may run afoul of CT laws and measures. Indeed, these may prevent engagement with non-State entities designated as terrorist groups or prohibit access to populations under their control. Conversely, compliance with CT measures may lead to compromising humanitarian principles.

Nevertheless, it is equally important to note that there are points of convergence between CT and humanitarian objectives. Both seek to protect civilians from harm. IHL is underpinned by the principle of distinction, which calls for parties to an armed conflict to differentiate civilians from combatants. IHL also prohibits most acts which could be considered terrorist if committed in peace time (i.e. deliberate attacks against civilians, or threats of violence intended to spread terror among the civilian population). Neutrality and impartiality require humanitarian assistance and protection to relieve suffering while not supporting the efforts of any party to an armed conflict. Such a stance can be seen as compatible with efforts undertaken to prevent designated terrorist groups from benefiting from humanitarian operations.

One can broadly distinguish three types of interactions that could potentially be regulated under CT law: (i) engagement with designated terrorist groups and their members (e.g. negotiating access, IHL trainings); (ii) incidental transactions necessary for the provision of assistance and protection (e.g. payments at checkpoints); (iii) provision of humanitarian assistance and protection to an individual member of a designated terrorist group in need (e.g. medical care).

The type of interaction and frequency will vary according to the organisation. While engagement is generally not criminalised, policies exist which might restrict it. For instance, in certain contexts the presence of a designated terrorist group is likely to be so pervasive and deeply ingrained in daily life that aid workers and humanitarian organisations working there will have to have some degree of interface with the terrorist group. In some cases, *knowledge* or *reasonable grounds to suspect* that the group is listed as terrorist may be sufficient to make giving assistance to the group illegal. Perhaps most troubling for organisations like the ICRC or Médecins sans frontières is the provision of assistance to a designated individual or member of a designated terrorist group. There are usually exemptions but, for instance, the prohibition of material support in United States (US) law allows for the provision of medicine and religious material, but a literal interpretation would prohibit medical care.

2. What are the impacts of CT measures on humanitarian action?

When one discusses the impact of CT measures on humanitarian action, it also implies their impact on a humanitarian crisis (and how populations are affected). Assessing the impact of CT measures does not negate the main causes or the dynamics of a conflict. In any context the political, economic and social forces play a greater role in the ability of people to survive and be protected than humanitarian action. That being said, we have to assume that impacts on the work of humanitarian organisations do have consequences for populations. Documented negative impact on humanitarian operations may translate into decreased quantity or quality of assistance and protection, and is therefore important to consider.

One can broadly distinguish three types of impacts: *structural*, affecting the framework of action itself; *operational*, affecting programmatic decisions; *internal*, affecting functioning and coordination. The latter refers not just to the additional time and resources spent on compliance – though one can make the argument that any resources diverted away from operations translates into less assistance – but also to the reluctance to share information between organisations, which undermines collaboration in the humanitarian sector. The structural impact is difficult to measure, but it is clear that any measures such as vetting that enlist humanitarian organisations into a system with security objectives compromise humanitarian organisations' neutrality. The operational impact encompasses the suspension of programmes or the acceptance of programmes based on constraints (what we are allowed to do) rather than on needs. The following examples illustrate the structural and operational impacts:

- In 2009-2011, Somalia was in the midst of a severe food security crisis and large parts of southern Somalia were de facto controlled by Al Shabaab, an entity subject to sanctions by the UN and listed as a terrorist organisation by a number of Member States. Over that period assistance from the US had decreased considerably – from \$237m in 2009 to \$29m in 2011 – when humanitarian needs were in fact growing. At least three non-

governmental organisations (NGOs) stopped operating in southern Somalia, due to lack of funding. US conditions meant that the humanitarian branch of the US government could not fund activities in Al Shabaab- controlled areas. While there was a relatively acrimonious debate as to who and what was to blame, a cable from the US Embassy in Nairobi to the US Secretary of State stated that a 'lack of resolution within the USG[overnment] regarding funding to Somalia due to US Department of Treasury Office of Foreign Asset Control (OFAC) licensing restrictions, threatens the ability of USAID partners to continue to implement life-saving programs (...) The continued delay of humanitarian assistance will have a devastating impact on the 3.2 million Somalis in need of life-saving assistance'. The US government was privately acknowledging that their own policies were preventing humanitarian assistance from reaching people in need.

- In 2016 in Iraq certain CT provisions directly written into NGO grant agreements clearly prevented humanitarian organisations from implementing any programmes in areas controlled by designated terrorist groups (ISIS was at the time in control of large parts of the country). Though there were provisions to apply for waivers, NGOs reported a 'chilling effect' which discouraged agencies working in these areas. As a consequence, NGOs were over-represented in areas where they were allowed to work by donors, which called into question not only their independence but also their impartiality (because the response was not dictated by needs).
- The impact of CT measures on humanitarian action extends to resettlement. Despite safeguards in international law excluding perpetrators of violence from refugee status and resettlement, the US introduced legislation which expanded the grounds for excluding certain individuals from enjoying refugee protection or resettlement. Terrorism Related Inadmissibility Grounds (TRIG) provisions deny entry to a person who is affiliated with a designated terrorist group or persons who harbour or provide support to terrorists. TRIG has been described as highly problematic in its interpretation and implementation because it has in effect denied resettlement to some who should have been eligible. It should be said that NGOs report limited progress through waivers that allow immigration and refugee adjudicators to take into account the circumstances of each case.

The impact of CT measures also differs across the humanitarian sector. The UN, and to a certain extent the ICRC, benefit from immunities or negotiated agreements that are not available to NGOs. It would be inappropriate for the UN to screen individual members or groups against a list developed by one Member State, for obvious reasons. Civil society doesn't have that leverage in negotiations. Somewhat disconcertingly, UN agencies themselves are known to insert more draconian clauses in implementing partners' contracts than their own donors require. Importantly, the application of national laws depends on where an organisation is based, and

the nationality of its staff and donors. Islamic NGOs appear to face greater scrutiny (not just from donors but also from financial institutions) and there still exists a general climate of suspicion towards Muslim charities.

3. What is being done?

Inevitably, over the past few years, many large international NGOs have become more risk-averse. In Iraq, as was illustrated, the 'safe option' was not to operate in proscribed zones. However it should be emphasised that over the past few years NGOs have developed robust risk management policies, procedures and systems covering security, human resources, finance and administration.

The NRC – which should be commended for their advocacy in this area – has developed a Risk Management Toolkit in relation to counter-terrorism measures that helpfully provides examples of practical steps that humanitarian organisations can take to strengthen risk management through an approach underpinned by humanitarian principles. This toolkit includes clarifying partnership agreement language, as well as ensuring that codes of conduct, human resources policies and anti-diversion policies are established and implemented.

When discussing the impact on humanitarian action, the objective is not to incriminate States, or States as donors or those that are affected by humanitarian crises. Dialogue is meant to prevent opposing humanitarianism and counter-terrorism, and a growing body of work is helpful in that regard. In the opening statement of this Colloquium, it was said that 'the safeguards protecting human life and dignity must be upheld without negating the legitimate measures to ensure security'. The positive examples of reconciling (not aligning) security and humanitarian demands abound – and those stem from frank exchanges of views and negotiations.

HUMANITARIAN EXEMPTIONS FROM COUNTER-TERRORISM MEASURES: A BRIEF INTRODUCTION

Dustin A. Lewis

Harvard Law School

Résumé

Dans le cadre de la session sur les risques de criminalisation de l'aide humanitaire, Dustin Lewis examine la notion d'exemption humanitaire dans les législations relatives à la lutte contre le terrorisme. Pour ce faire, M. Lewis s'emploie à en définir le concept, à en dresser la raison d'être, à en fournir quelques exemples et à dégager les principaux points de controverse que suscite cette notion.

Les « exemptions » humanitaires, bien qu'elles n'aient pas de définition universellement reconnue, signifient que des garanties d'immunité judiciaire sont accordées à certains, en dérogation à la règle générale à laquelle sont soumises les autres personnes. Au-delà de leurs formes et modalités variables, il existe deux grands types d'exemptions humanitaires : celles qui accordent l'immunité des poursuites à des terroristes afin de leur permettre de bénéficier de traitements humanitaires auxquels l'accès leur serait normalement défendu par les lois relatives au terrorisme, et celles, les exemptions « sectorielles », qui visent à protéger les personnes et organisations humanitaires. Cela a le but d'assurer la libre mise en œuvre de l'action humanitaire basée sur les principes d'humanité, d'impartialité, d'indépendance et de neutralité.

La raison d'être de ces exemptions est bien entendu le souhait d'assurer que l'aide humanitaire ne soit pas entravée par les mesures de lutte contre le terrorisme. Des exemples de pareilles exemptions peuvent être trouvés au niveau national (par exemple en Australie et aux Etats-Unis) ainsi qu'au niveau international (par exemple dans certaines résolutions du Conseil de sécurité de l'ONU). L'orateur nous en livre les détails.

M. Lewis termine son exposé en relevant les éléments en faveur et ceux en défaveur des exemptions humanitaires sectorielles. Parmi les avantages de telles exemptions figurent le gain de cohérence et de clarté de la protection juridique de l'action humanitaire ainsi que l'encouragement à fournir cette aide dans des zones contrôlées par des groupes armés désignés comme terroristes. Les éléments en défaveur d'une exemption sectorielle incluent, quant à eux : la crainte qu'une telle protection n'incite des acteurs peu scrupuleux à abuser de l'action humanitaire pour servir des objectifs terroristes ; la crainte aussi que cette protection supplémentaire ne dévalorise les protections consacrées par ailleurs dans le droit international humanitaire, le droit national et

les protections reconnues par les Nations unies ; et enfin l'argument selon lequel des exemptions sectorielles limitées aux mesures contre le terrorisme seraient insuffisantes pour assurer la libre mise en œuvre de l'aide humanitaire.

En conclusion de son intervention, Dustin Lewis met en garde contre les risques que comporte chacune de ces options. S'il y a en effet un besoin de protection de l'aide humanitaire contre des mesures visant le terrorisme qui pourraient obérer sa libre mise en œuvre, le développement d'exemptions sectorielles pourrait, quant à lui, résulter en un contrôle croissant de l'aide humanitaire. Ce contrôle viendrait alors enfermer l'aide humanitaire dans une définition de plus en plus restrictive.

1. Introduction

Some humanitarian stakeholders are increasingly interested in exemptions from counter-terrorism laws. The background concern is that counter-terrorism measures – whether in the form of laws, policies, or regulations and whether at domestic or international level (or both) – may be interpreted or applied in ways that could impede humanitarian action.¹ That concern is articulated perhaps most sharply in relation to situations of armed conflict where designated terrorist entities effectively control access to, or otherwise exercise power over, civilian popu-

1 See, e.g., *Report of the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator*, U.N. doc. S/2016/827, 30 September 2016, paragraph 19 (stating that '[c]ounter-terrorism measures have continued to inhibit humanitarian action, increasing the perceived risk of operating in areas under Al-Shabaab control, which are the areas in which humanitarian needs are believed to be the highest. Some donor Governments have requested the introduction of specific clauses in funding contracts and partnership agreements with humanitarian organizations referring to their national anti-terrorism legislation and/or policies and making it mandatory for direct recipients to carry out detailed background checks on any implementing partner. Such caveats have continued to undermine the ability of humanitarian organizations to address all needs wherever they are'). For its part, the International Committee of the Red Cross (ICRC), initially in 2011, called attention to some 'core activities of humanitarian organizations' and their personnel at risk of being 'criminalized' due to '[t]he prohibition in criminal legislation of unqualified acts of 'material support', 'services' and 'assistance to' or 'association with' terrorist organizations (...)', ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.2, Geneva, October 2011, p. 52. According to the ICRC, those activities could include (among others): visits and material assistance to detainees suspected of or condemned for being members of a terrorist organisation; first-aid training; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.

lations in need.² In recent years, such areas have included parts of Afghanistan, Colombia, Gaza, Iraq, Mali, Nigeria, Somalia, Syria, and Yemen (among others).³ Exemptions – in short, grants of immunity from liability to which others are subject – are seen by some humanitarian organisations as a (partial) remedy to those counter-terrorism measures. The basic idea is that a humanitarian exemption, if suitably crafted and prudently applied, would preclude the otherwise applicable counter-terrorism based liabilities from attaching to principled humanitarian action. The larger question of whether humanitarian exemptions are desirable and feasible implicates an array of cascading concerns that merit scrutiny from various perspectives.

In this brief analysis, I aim to summarise and reflect upon some of the research on humanitarian exemptions from counter-terrorism measures undertaken by the Counter-terrorism and Humanitarian Engagement (CHE) Project of the Harvard Law School Program on International Law and Armed Conflict.⁴ I will thus largely draw on existing legal and policy analysis to sketch the main contours of the issue.⁵ I am grateful to the International Committee of the Red Cross (ICRC) and the College of Europe for the opportunity to raise this topic – which has been the focus largely on policy- and practitioner-oriented discussions – for international-law scholars at the seventeenth Bruges Colloquium.

2. Four Framework Issues

Four issues are central to understanding the debate on humanitarian exemptions from counter-terrorism measures. Those issues concern the definitions, the logic, and the relevant examples of humanitarian exemptions, as well as the range of arguments for and against such exemptions.

a. Defining humanitarian exemptions

There is no generally accepted definition in international law of ‘exemption’. Nonetheless, the *Oxford English Dictionary* outlines some basic contours: to ‘exempt’, in its current use, generally means ‘[t]o grant (a person, etc.) immunity or freedom from a liability to which others are

2 See, e.g., Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, OCHA and the NRC (July 2013); Jessica Burniske with Naz K. Modirzadeh and Dustin A. Lewis, “Counter-terrorism laws and regulations: what aid agencies need to know”, in: Humanitarian Practice Network Paper, Overseas Development Institute, No. 79, November 2014.

3 See, e.g., “Counterterrorism and Humanitarian Engagement Project, Counterterrorism and Humanitarian Engagement in Somalia and Mali”, *Research and Policy Paper*, Harvard Law School, March 2013.

4 The research and analyses of, and more information about, the CHE Project are available online, at: <<https://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/>>.

5 The analysis herein draws extensively on Katie King with Naz K. Modirzadeh and Dustin A. Lewis, “Understanding Humanitarian Exemptions: U.N. Security Council Practice and Principled Humanitarian Action”, *Working Group Briefing Memorandum*, Counterterrorism and Humanitarian Engagement Project, April 2016.

subject.⁶ Among the listed examples of what the grant of immunity or freedom from liability may be from include a fine, the control of laws, a penalty, or a burden.⁷

A review of legal sources, policy documents, and academic commentaries reveals at least two types of ‘humanitarian exemptions.’ (neither, however, is a legal term of art). The first might be thought of in terms of “bad actor” humanitarian exemptions. These exemptions grant immunity from counter-terrorism measures in respect to designated terrorists so that, for instance, an individual may obtain medical care by accessing funds or conducting travel that would otherwise be prohibited. The second type – and the focus here – might be thought of in terms of “sectoral” humanitarian exemptions. These exemptions grant immunity from counter-terrorism measures in respect to those individuals and entities involved in (principled) humanitarian action. ‘Principled’, in this context, is often defined in relation to such humanitarian principles as humanity, impartiality, independence, and neutrality.⁸

As with many other exemptions, sectoral humanitarian exemptions from counter-terrorism measures may take a range of forms and may exhibit various characteristics. For instance, sectoral humanitarian exemptions may be of a general or of a specific character. They may apply indefinitely or be time-bound. They may arise from domestic law, international law, partnership agreements or contracts, or other sources.⁹ They may apply in respect to all relevant organisations or only to a subset of them. And they may apply only in relation to counter-terrorism measures or (also) in relation to other anti-diversion (or pro-beneficiary) regimes, such as anti-bribery, anti-corruption, and anti-money laundering frameworks.¹⁰

b. Why some counter-terrorism laws exempt certain forms of humanitarian action

Drafters of some counter-terrorism measures have recognised – expressly or implicitly – that those measures are capable of functioning in a way that could prohibit or otherwise impede forms of humanitarian action (see the next section for examples of such exemptions). In July

6 Oxford English Dictionary Online, ‘exempt, v.’ OUP, September 2016.

7 *Ibid.* ‘Exemption’ is often framed as an umbrella concept under which certain sub-categories fall. Those sub-categories include a license (in short, an authorization to conduct certain activity that would otherwise be prohibited), a safe harbor (in short, a legal provision to reduce or eliminate liability in certain circumstances so long as designated criteria are met), and the like.

8 See, e.g., Phoebe Wynn-Pope *et al.*, “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation”, *op. cit.*, pp. 237–241.

9 See, e.g., *Counterterrorism and Humanitarian Engagement Project*, “An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts”, *Research and Policy Paper*, Harvard Law School, 2014.

10 See generally *Counterterrorism and Humanitarian Engagement Project*, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations”, *Research and Policy Report*, Harvard Law School, May 2014.

2016 for instance, the United Nations (UN) General Assembly implicitly recognised the general underlying concern.¹¹ For its part, the ICRC – first in 2011 and again in 2015 – used similar logic in issuing calls for States to ensure that counter-terrorism measures do not impede humanitarian action.¹²

It might be considered somewhat artificial to distinguish, in this context, humanitarian exemptions from counter-terrorism *measures*, on the one hand, and humanitarian exemptions from other anti-diversion (or pro-beneficiary) restrictive *regimes*, on the other. That is because counter-terrorism measures and certain other restrictive regimes often overlap.¹³ Thus, while the focus here is in relation to counter-terrorism measures, it merits emphasis that certain other forms of restrictive measures – such as those entailed in some anti-bribery, anti-corruption, or anti-money laundering frameworks – might also be capable of functioning in ways that could impede forms of humanitarian action.¹⁴

c. Examples of existing humanitarian exemptions from counter-terrorism measures

Humanitarian exemptions from counter-terrorism measures have been established by some States in their domestic laws, as well as – in some respects – by the United Nations Security Council. Certain limited humanitarian exemptions in domestic counter-terrorism law arise, for example, in the contexts of Australia and the United States (US).¹⁵ (In claiming extraterritorial jurisdiction over certain anti-terrorism offences, both Australia and the US prescribe

11 U.N. General Assembly, Res. 70/291, *The United Nations Global Counter-Terrorism Strategy Review*, paragraph 22, UN Doc. A/RES/70/291, 1 July 2016 ('Urges States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law').

12 ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", 31IC/11/5.1.2, Geneva, October 2011, p. 53 ('Measures adopted by governments, whether internationally and nationally, aimed at criminally repressing acts of terrorism should be crafted so as not to impede humanitarian action. In particular, legislation creating criminal offences of 'material support', 'services' and 'assistance' to or 'association' with persons or entities involved in terrorism should exclude from the ambit of such offences activities that are exclusively humanitarian and impartial in character and are conducted without adverse distinction'); ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts', 32IC/15/11, Geneva, October 2015, p. 21.

13 See generally *Counterterrorism and Humanitarian Engagement Project*, 'An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,' *op.cit.*

14 *Ibid.*

15 Concerning the Australian context, see Phoebe Wynn-Pope *et al.*, 'Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation,' *op.cit.*, pp. 235–261. Concerning the U.S. context, see, e.g., Naz K. Modirzadeh *et al.*, 'Humanitarian engaging under counter-terrorism: A conflict of norms and the emerging policy landscape,' *International Review of the Red Cross*, Vol. 93, no. 883, September 2011.

legislative jurisdiction over conduct in foreign territories where principled humanitarian action might occur in relation to situations of armed conflict involving designated terrorists).

Some of the Australian counter-terrorism law provisions that seem capable of impeding forms of humanitarian action contain humanitarian exemptions while other such provisions do not. For instance, provisions in Australian law on the offence concerning terrorism-related ‘association’ identify several exemptions to that offence. Included among those exemptions is association for the sole purpose of ‘providing aid of a humanitarian nature.’¹⁶ In a similar vein, the provision in Australian law concerning the offence relating to intentionally entering, or remaining in, an area of a foreign country that the Minister of Foreign Affairs has labelled a ‘declared area’ includes an exemption for those remaining ‘solely for legitimate purposes.’¹⁷ (The Minister for Foreign Affairs may ‘declare’ an area in a foreign country if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area¹⁸). Such purposes expressly include providing ‘aid of a humanitarian nature.’¹⁹ However, Australian law does not establish humanitarian exemptions in respect to certain terrorism-related offences concerning training²⁰ and funds.²¹

US federal law penalises the provision of ‘material support or resources’ – ‘except medicine or religious materials’²² – to designated terrorists or others engaged in acts of terrorism.²³ A federal appeals court, however, interprets that ‘medicine’ exemption rather narrowly: in short, that exemption ‘shields only those who provide *substances* qualifying as medicine to terrorist organisations.’²⁴ For its part, the International Emergency Economic Powers Act (IEEPA) authorises the President to freeze certain assets, including in connection with individuals or entities listed by the President or the Department of the Treasury as ‘specially designated

16 Criminal Code, div. 102.8(4)(c).

17 Criminal Code, div. 119.2(3).

18 Australian Government, *Declared Area Offence*, <https://www.nationalsecurity.gov.au/WhatAustraliais-doing/Pages/DeclaredAreaOffence.aspx>

19 Criminal Code, div. 119.2(3)(a).

20 Criminal Code, div. 102.5.

21 Criminal Code, div. 102.6. See generally Phoebe Wynn-Pope *et al.*, ‘Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation’, *op.cit.*

22 18 U.S.C. § 2339A(b)(1).

23 18 U.S.C. § 2339A and 2339B.

24 *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011) (italics original). See more broadly: Dustin A. Lewis *et al.*, *Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism, Legal Briefing*, Harvard Law School Program on International Law and Armed Conflict, September 2015.

global terrorists’ (SDGTs).²⁵ IEEPA expressly exempts ‘donations (...) of articles such as food, clothing, and medicine, intended to be used to relieve human suffering.’²⁶ Yet the President is authorised to freeze those donations if they would ‘seriously impair’ his or her ability to respond to the emergency, are a result of coercion, or would endanger US military forces engaged in hostilities.²⁷ Over the past decade and a half, the President has repeatedly instituted such freezes in relation to armed groups or terrorism.²⁸

The UN Security Council has not established a sectoral humanitarian exemption in either of its two primary counter-terrorism related sets of resolutions: the (now) Islamic State of Iraq and the Levant (ISIL) and al-Qaeda line of resolutions²⁹ and the more general counter-terrorism obligations line of resolutions.³⁰ (The Security Council has laid down some “bad actor” humanitarian exemptions from counter-terrorism measures³¹). Yet, as explained elsewhere,³² in principle, some of the obligations laid down in those two sets of resolutions could be interpreted to impede certain forms of principled humanitarian action, such as impartial wartime medical care to wounded and sick terrorists *hors de combat*. For instance, the Security Council has imposed on UN Member States a general obligation to ‘[e]nsure that any person who participates (...) in supporting terrorist acts is brought to justice (...).’³³ More specifically, as a part of the basis for listing two individuals and two entities under the Security Council’s ISIL and al-Qaeda sanctions, the relevant Sanctions Committee has referenced – alongside more traditional grounds for a terrorist designation, such as funding associated with al-Qaeda – certain medical activities.³⁴ Those references suggest that the Sanctions Committee and, by

25 See Department of the Treasury, Office of Foreign Assets Control, *Terrorism*, at: <<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf>>.

26 50 U.S.C. § 1702(b)(2) (2001).

27 50 U.S.C. § 1702(b)(2) (2001).

28 See Antonio Galli, “The U.S. Humanitarian Assistance Facilitation Act: Maintaining Humanitarian Space in U.S. Legislation”, in: *Journal of International Humanitarian Legal Studies*, Volume 5, 130, 133 (2014).

29 U.N. Security Council, Resolution 1267 (1999) sqq.

30 U.N. Security Council, Resolution 1373 (2001),sqq.

31 E.g., U.N. Security Council, Resolution 1267 (1999), paragraph 4(a)–(b); U.N. Security Council, Resolution 1333 (2000), paragraph 11; U.N. Security Council, Resolution 1452 (2002), paragraph 1(a); U.N. Security Council, Resolution 1904 (2009), paragraphs. 7 and 34.

32 See generally: Dustin A. Lewis *et al.*, *Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism*, *op.cit.*, pp. 102–111.

33 U.N. Security Council, Resolution 1373 (2001), paragraph 2(e) (*italics added*).

34 See Dustin A. Lewis *et al.*, *Medical Care in Armed Conflict: International Humanitarian Law and States Responses to Terrorism*, *op.cit.*

extension, its supervisory body (the Security Council) view certain types of medical care and medical supplies as forms of impermissible support to al-Qaeda and its associates.³⁵

However, the Security Council has established a limited sectoral humanitarian exemption in relation to the Eritrea and Somalia sanctions regime. That regime overlaps with the Security Council's counter-terrorism approach to ISIL and al-Qaeda because association with al-Shabaab is referenced as part of the basis for two ISIL and al-Qaeda sanctions-related designees³⁶ and because al-Shabaab is itself designated under the Eritrea and Somalia sanctions regime.³⁷ Beginning in Resolution 1916 (2010), the Security Council established a limited sectoral humanitarian exemption from the Eritrea and Somalia related asset freeze. The most recent version of that (partial) sectoral humanitarian exemption, established in Resolution 2317 (2016), provides, in a binding decision of the Security Council, that until 15 November 2017,

[T]he [asset-freeze] measures imposed by paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the United Nations Humanitarian Response Plan for Somalia (...)³⁸

35 Somewhat paradoxically, while the Security Council has clarified that the al-Qaeda asset freeze does not apply to funds that the relevant state has determined to be necessary for basic expenses – such as ‘medicines and medical treatment’ – of the designee, in principle a person who provides medical care or medical supplies to someone associated with al-Qaeda or any of its derivatives remains susceptible to designation herself to the extent such care constitutes ‘otherwise supporting’ al-Qaeda. On the limited exemption for ‘medicines and medical treatment,’ see U.N. Security Council, Resolution 1452 (2002), paragraph 1(a); on the ‘otherwise supporting’ al-Qaeda basis for listing, see U.N. Security Council, Resolution 1617 (2005), paragraphs 2 and 3; U.N. Security Council, Resolution 1822 (2008), paragraphs 2(d) and 3; U.N. Security Council, Resolution 1904 (2009), paragraphs 2(d) and 3; U.N. Security Council, Resolution 1989 (2011), paragraphs 4(c) and 5; U.N. Security Council, Resolution 2083 (2012), paragraphs 2(c) and 3; U.N. Security Council, Resolution 2161 (2014), paragraphs 2(c) and 4.

36 See ‘Other information’ concerning ‘QDe.002’ and ‘QDi.362’ in: *The List established and maintained pursuant to Security Council res. 1267/1989/2253*, at: <<https://scsanctions.un.org/en/?keywords=al-qaida>>.

37 SOe.001, in: *The List established and maintained pursuant to Security Council res. 751 (1992) / 1907 (2009)*, at: <<https://scsanctions.un.org/en/?keywords=somalia>>.

38 U.N. Security Council, Resolution 2317 (2016), paragraph 28.

Since first establishing in 2010 a (partial) sectoral humanitarian exemption concerning Eritrea and Somalia, the Security Council has regularly requested that the Emergency Relief Coordinator report to the Council on any impediments to the delivery of humanitarian assistance in Somalia.³⁹

d. Elements of the debate concerning humanitarian exemptions from counter-terrorism measures

Among certain humanitarian organisations and their supporters, there is increased interest in obtaining sectoral humanitarian exemptions from counter-terrorism measures. Yet to date the humanitarian community as a whole – to the extent that such a unitary community and its views can be established⁴⁰ – seems to lack unanimity as to whether to pursue such exemptions. Admittedly however, there is little scholarly writing or empirical evidence concerning this issue.

Several arguments in favour of and against sectoral humanitarian exemptions can be discerned. Those favouring such exemptions often emphasise that sectoral humanitarian exemptions might:

- provide legal cover and clarity and would thereby boost confidence in conducting principled humanitarian action, including in relation to areas under the de facto control of designated terrorists;
- reaffirm States' support of principled humanitarian action; and
- strengthen, and possibly help standardise, legal protections for all humanitarian stakeholders (for instance, by augmenting legal protections for humanitarian organisations who do not benefit from UN privileges and immunities).

Arguments against sectoral humanitarian exemptions from counter-terrorism laws have been articulated along the following lines:

- some governments and experts are concerned that sectoral humanitarian exemptions could be abused by unscrupulous players to support acts of terrorism;
- calls for such exemptions might be inferred to imply that, where applicable, existing protections for principled humanitarian action in International Humanitarian Law, in domestic law or in UN privileges and immunities, are insufficient;

39 The most recent such request is made in U.N. Security Council, Resolution 2317 (2016), paragraph 29; the most recent report is *the Report of the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator*, U.N. doc. S/2016/827, 30 September 2016.

40 On the diversity of the sector, see, e.g., L. Saavedra and P. Knox-Clarke, "Working together in the field for effective humanitarian response", *ALNAP Working Paper* (London: ALNAP/ODI, 2015).

- if limited to counter-terrorism measures, sectoral humanitarian exemptions may not be broadly effective, considering other restrictive measures, (such as those laid down as part of anti-bribery, anti-corruption, or anti-money laundering framework); and
- calls for exemptions raise the possibility of creating a perception that humanitarian organisations endorse counter-terrorism approaches, which, in turn, might implicate those players' (perceived) neutrality and independence.

3. Conclusion

If the analysis above is correct, then much seems to be at stake in the debate concerning sectoral humanitarian exemptions from counter-terrorism measures. Against that broader backdrop, several trends and trajectories – and the intersections between them – might merit close monitoring.

For instance, more domestic counter-terrorism legal cases might adjudicate, if indirectly, what constitutes 'legitimate' humanitarian action, including in relation to armed conflicts involving designated terrorists conducted outside – sometimes, far outside – the State where the legal proceedings are instituted. There may be more demand for, and scrutiny of, principled humanitarian action, perhaps especially in areas where designated terrorists control access to civilian populations in need. Cash programming in humanitarian response seems likely to increase,⁴¹ despite 'fungibility' concerns from a counter-terrorism perspective.⁴² New and expanded due diligence and other anti-diversion (or pro-beneficiary) measures seem likely to be imposed – whether internally, externally, or both – on humanitarian organisations.⁴³ More broadly, the web of overlapping, converging, and diverging legal obligations, other requirements and policies incumbent on principled humanitarian stakeholders seems likely to become even more intricate. Finally, if sectoral humanitarian exemptions are pursued further, there might be new, or renewed, attempts to certify humanitarian players in order to establish what does and does not constitute 'legitimate' humanitarian action.

41 See, e.g., U.N. General Assembly, *Outcome of the World Humanitarian Summit: Report of the Secretary-General*, UN doc. A/71/353, 23 August 2016, paragraphs. 38 and 52.

42 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31, 130 S. Ct. 2705, 2725, 177 L. Ed. 2d 355 (2010) ('Money is fungible, and [w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.' (citing to *McKune Affidavit*, App. 134, 9)).

43 See, e.g., Norwegian Refugee Council, *Risk management toolkit in relation to counterterrorism measures*, Geneva, NRC, 2015.

HUMANITARIAN ACTION IN TERRITORIES CONTROLLED BY DESIGNATED TERRORIST GROUPS: A DONOR'S PERSPECTIVE

Kim Eling and Maria Lensu

Cabinet of the Commissioner for Humanitarian Aid and Crisis Management

Résumé

Lors de ce troisième exposé sur le risque de criminalisation de l'aide humanitaire, Kim Eling nous offre la perspective d'un donateur sur la problématique du financement de l'action humanitaire dans des territoires contrôlés par un groupe qualifié de terroriste.

Revenant sur le constat – dressé entre autres par une étude du Bureau des Nations unies pour la Coordination des Affaires humanitaires (BCAH/OCHA) et du Conseil norvégien pour les Réfugiés (NRC) – que les mesures de lutte contre le terrorisme ont un impact négatif sur le secteur humanitaire, M. Eling nous explique la politique de financement humanitaire de l'Union européenne (UE) et les défis auxquels elle est confrontée dans ce domaine.

Le service European Civil Protection and Humanitarian Aid Operations/Protection civile et opérations d'aide humanitaire européennes (ECHO), de la Commission européenne ne finance qu'un nombre limité d'acteurs humanitaires (parmi lesquels le Mouvement de la Croix-Rouge et du Croissant-Rouge). Le financement accordé ne peut porter que sur de l'aide conforme aux principes du droit international ainsi qu'à ceux d'impartialité, de neutralité et de non-discrimination. ECHO est parmi les donateurs les plus exigeants en matière d'obligation d'évaluation des activités qu'il finance. Cette rigueur, ainsi que son approche basée sur les besoins, permettent à ECHO d'assurer, d'une part, que l'argent attribué soit bien utilisé pour le but annoncé et, d'autre part, que cette aide ne soit pas assujettie à des conditions sans rapport avec ses missions.

S'il appert que certaines mesures de lutte contre le terrorisme peuvent avoir une influence sur la mise en œuvre de l'aide humanitaire, l'orateur nuance néanmoins le propos, précisant que, dans de nombreux cas, ce ne sont pas les règles de la lutte contre le terrorisme qui constituent un obstacle à l'aide humanitaire dans les territoires contrôlés par des groupes armés qualifiés de terroristes, mais bien le contexte lui-même, dès lors que nombre de ces groupes refusent l'accès de l'aide humanitaire neutre et impartiale aux territoires qu'ils contrôlent. Dans le cadre de cette précision, M. Eling nous informe qu'aucune des études menées par l'UE n'a identifié d'« effet paralysant » sur le terrorisme et sur l'aide humanitaire fournie par les bénéficiaires des financements européens. Cela n'exclut toutefois pas qu'un tel effet puisse être observé dans certains

contextes, en particulier dans le cadre de petites ONG locales disposant de moins de capacité d'adaptation aux circonstances que des organisations internationales.

En conclusion, Kim Eling souligne l'importance d'un dialogue constant entre les acteurs humanitaires et le législateur, ainsi qu'entre les différents donateurs et leurs bénéficiaires, afin d'assurer une compréhension mutuelle de leurs missions respectives ainsi qu'une meilleure coopération.

Introduction

In many crisis-affected regions, humanitarian work is becoming increasingly difficult. Needs are becoming more severe and displacement is on the rise worldwide. In a number of crises, humanitarian access is not only under pressure, but becomes virtually impossible. In this increasingly challenging context, substantial attention has been recently given from within the humanitarian community to the impact of counter-terrorism (CT) legislation and measures on humanitarian work. More specifically, there is an assumption by many humanitarian organisations that in crises where groups designated as terrorist either by the United Nations (UN) or by other jurisdictions are present on the ground, CT measures have affected the ability of humanitarian players to deliver assistance effectively to beneficiaries, either because of restrictions on contacts with certain stakeholders on the ground, or because of prohibitions on providing material support to listed groups or individuals.

As the 2013 Study on the Impact of Donor CT Measures on Humanitarian Action by the United Nations Office for the Coordination of Humanitarian Affairs/Norwegian Refugee Council (UN OCHA/NRC)¹ demonstrated, there is at least strong *prima facie* evidence that CT measures have in some specific crises had an impact on the presence or *modus operandi* of some humanitarian organisations. However, as the study also underlines, donors are not a homogeneous group, and the evidence of a limiting (or 'chilling') effect of CT measures also depends on the peculiarities of different crises.

In this presentation, we will be looking at the issue from the very specific perspective of the European Union² (EU) as a humanitarian donor. How does the EU seek to ensure that its humanitarian funding is used only for the benefit of beneficiary populations? Do specific CT-

1 Mackintosh, K. and Duplat, P., *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, UN-OCHA and Norwegian Refugee Council, 2013

2 Specifically, the European Commission's Directorate-General European Civil Protection and Humanitarian Aid Operations (ECHO), which is responsible for implementing the EU's humanitarian aid policy and managing its humanitarian aid budget (some € 1.5 bn in 2015).

related measures have an impact on this? It should be stressed that the overview provided here is not exhaustive, and it should also be emphasised that a donor's perspective may be different from that of an operational player.

1. The European Union as a humanitarian donor and counter-terrorism

a. The normative and regulatory framework

Before discussing the specific impact (if any) of CT measures on the EU's humanitarian funding, it will be useful to set out how the EU manages its humanitarian funding – and how it seeks to ensure that its support ends up with the intended beneficiaries. EU humanitarian aid is provided only through the UN, the Red Cross and Red Crescent Movement and European non-governmental organisations (NGOs) with which the EU (specifically, the European Civil Protection and Humanitarian Aid Organisation (ECHO), as the humanitarian aid department of the European Commission) has concluded a Framework Partnership Agreement.³ Crucially, according to the EU Treaty, EU humanitarian aid is provided 'in compliance with the principles of international law and the principles of impartiality, neutrality and non-discrimination'.⁴ The European Consensus on Humanitarian Aid⁵ similarly reaffirms the humanitarian principles, and stresses that humanitarian aid should be provided on the basis of need alone. In this context, it is also worth emphasising that the EU's reporting requirements for humanitarian aid are generally seen as being among the most stringent in the sector, due to a strong focus on accountability and results, as well as to the approach applied by the EU's anti-fraud authorities and Court of Auditors.

Why does this matter in the context of the issue at hand? It matters because a strict focus on getting assistance to where it is needed across the board has two distinct but complementary implications in the context of the debate on the impact of CT measures. On the one hand, it entails a strong concern with avoiding and preventing aid diversion – whether to a listed entity, to other groups that are parties to a conflict, or to anyone else other than the intended beneficiaries. On the other, it means EU humanitarian aid is not and should not be subject to extraneous conditionality.

3 There are currently around 200 NGOs with an ECHO FPA; all of these have gone through an in-depth legal, financial and operational assessment.

4 Treaty on the Functioning of the European Union, Article 214.2.

5 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission: The European Consensus on Humanitarian Aid.

There are no specific CT clauses in the EU's Framework Partnership Agreements or in individual funding agreements, and vetting requirements for beneficiaries would be considered incompatible with the humanitarian principles. But once again, one cannot emphasise enough the importance attached to preventing aid diversion as a key concern in any crisis (but all the more important and relevant in a conflict situation, with or without listed entities among the parties to the conflict).

b. Humanitarian aid and CT in practice: a nuanced picture

As the OCHA/NRC study has made clear, the impact of CT measures on humanitarian action varies from one crisis to another, and, as we emphasised earlier, donors approach the issue in a variety of ways. What do the facts tell us?

As regards EU humanitarian aid, and on the basis of a very impressionistic and non-exhaustive survey of a number of past and current crises, one key element stands out. In a number of large-scale crises in which listed entities control or are active in substantial territories where there are significant humanitarian needs, the primary issue appears to be *access* for humanitarian organisations. In crises such as Syria, Iraq or Somalia, humanitarian action is confronted with the presence of non-State armed groups that do not accept any humanitarian action in the territories they control or where they are active. The principal challenge in such contexts (at least as regards the scope of EU-funded humanitarian assistance) is the refusal by certain groups to accept any of the underlying premises of humanitarian action (and notably the intrinsic desirability of ensuring that affected populations receive life-saving assistance to meet their basic needs). Thus, external regulatory constraints may in such contexts be rather counter-productive. Moreover, we have not been able to document a 'chilling' effect of EU CT legislation or of the rules governing EU humanitarian assistance (which, as we have underlined, do not include specific CT-related measures, but do include rigorous general reporting and accountability requirements). Nor have we observed an impact on, for example, the availability of EU humanitarian funding for faith-based NGOs.⁶

We would emphasise, again, that this does not mean that there is no impact from CT legislation in general (either from individual countries, or from the UN or other mechanisms). Nor does it imply that the impact may not in some contexts be significant. And, leaving aside the specificities of CT measures, it is clear that restrictive measures (e.g. sanctions not related to terrorism) in general may affect the operating environment for humanitarian and other international stakeholders in certain conflict settings – for example, by restricting or conditioning

⁶ The list of NGOs having concluded an ECHO Framework Partnership Agreement includes a number of faith-based NGOs, both Islamic and Christian. We have not observed any diversion of funding away from these as a consequence of CT measures.

access to certain resources or types of infrastructure. More generally, the findings of the OCHA/NRC study clearly do point to a documentable impact of CT measures on some donors' funding or policy in some crises. And there are also *prima facie* indications that small NGOs (and local NGOs) are likely to be more impacted than either large international NGOs or international organisations – which may have better capacity to assess the implications of, and adapt to the requirements flowing from specific CT-related measures in the environments they work in.

2. What implications for humanitarian action and CT?

Our overall conclusion when examining the impact of CT measures on humanitarian action is thus a very nuanced one. We could not find specific impacts from EU CT measures (or from individual States' or United Nations' CT-related restrictive measures) on EU humanitarian aid policy or funding flows. And we were confronted again and again, in the main crises in which listed groups were active, with access (specifically: serious threats to the safety of humanitarian workers, combined with disregard for International Humanitarian Law and for principled humanitarian action) as the primary challenge to humanitarian organisations. But we also note the evidence set out in the OCHA-NRC study that in some crises, an impact on the presence and behaviour of humanitarian agencies is discernible.

Against this background, the importance of dialogue between different stakeholders cannot be emphasised enough: between humanitarian and CT players, to ensure a proper understanding of the scope and implications of CT measures (but also to raise awareness of the specificity of humanitarian aid, and of the importance of preserving the conditions in which principled humanitarian action can be carried out), between different donors, and between different departments concerned by the issue within administrations. We would also emphasise the important role that the International Committee of the Red Cross can play in facilitating the kind of dialogue that can make progress on the issue possible, and in providing legal advice.

It is worth mentioning in the context of the European Union that the EU Human Rights and Democracy Action Plan for 2015-19 (endorsed by the Council of the EU) includes a specific reference to 'enabling principled humanitarian action' in the section relating to counter-terrorism.⁷ Moreover, the inclusion of specific humanitarian exemption clauses in CT measures – widely discussed, not least in the OCHA/NRC study,⁸ can be helpful in providing legal clarity and circumscribing the scope of CT measures with regard to humanitarian action, provided that their wording is sufficiently clear.

7 EU Action Plan on Human Rights and Democracy (European Union, 2015): https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf

8 Cf page 117, Recommendation 4.

As the OCHA/NRC study indicates, there are points of convergence in principle between CT and humanitarian action, as ‘both humanitarian action and counter-terrorism seek the protection of civilian populations from harm’⁹, and the humanitarian principles are themselves incompatible with funding or otherwise providing support to belligerents in a conflict. This is an important starting point for dialogue and for seeking solutions in cases where CT measures may impact on humanitarian action.

9 Cf page 112.

SESSION 4 – CRIMINALISATION OF HUMANITARIAN ACTION

At the end of the session, speakers were asked to elaborate on a range of subjects:

1. On the distinction between the impacts on assistance and protection activities

One of the participants wonders whether research on the impact of counter-terrorism (CT) measures on principled humanitarian action had resulted in different outcomes when distinguishing between the assistance part (e.g. medical care, food aid, provision of life-saving items) and the protection part (e.g. contacting terrorist groups or the civilian population, providing IHL training, visiting detainees).

Another participant added that, in his view, IHL training is the most likely to be subject to restrictions caused by CT measures. This, the participant explained, is because, when providing the training, the humanitarian organisations will try to reach all combatants who are not *hors de combat* to teach them what is prohibited under IHL, but also what is legal under this body of law. Doing so will by definition enhance the knowledge of the combatants. The participant thus wondered how one could reconcile the provision of humanitarian action with the requirement not to help armed groups designated as terrorists.

A panellist confirmed that protection activities such as the training of armed forces are indeed more likely to be subject to greater scrutiny than assistance activities. Scrutiny about protection activities can be explained through the “fungibility approach” adopted by some anti-terrorism measures. The idea behind criminalising the provision of some forms of help or assistance resides in the fact that these actions, as soon as they are provided by a humanitarian organisation, free the resources of the group, thereby clearly providing them with an advantage. The difference between the impact on protection activities and on assistance activities is however hard to define. The panellist announced in this regard that the Harvard Law School Program on International Law and Armed Conflict was about to launch a project to try to measure empirically the effects of counter-terrorism measures on assistance and protection activities.

A second panellist said that, as a representative of a donor organisation, he did not believe that his organisation had been inhibited by CT legislation in providing support to humanitarian organisations engaging with armed groups, even when providing IHL trainings.

2. On the impact on quantity and quality of humanitarian action

Alluding to the important amount of resources necessary to ensure compliance with CT measures, a member of the audience raised the concern that one of the major impacts of CT legislation was the reduction of humanitarian assistance by small organisations that have only limited funds at their disposal. As an example, the participant referred to the situation in Syria where a few years ago a lot of very small charities were running aid convoys throughout the country but they have gradually disappeared as the crisis got worse, leaving only big non-governmental organisations (NGO) and international organisations to provide assistance. The participant asked whether it would be right to say that humanitarian action is now providing fewer but better quality actions as they are channelled through bigger organisations able to provide the necessary degree of assurance in terms of compliance with CT measures.

A second participant supported the observation made on the impact of CT measures on small humanitarian organisations. She particularly underlined the importance of the banking system in this. As the financial sector is under obligations and liabilities regarding the provision of funds to designated entities, banks have imposed a number of restrictions on charities operating in difficult contexts. Given that most small-size charities are low profile clients for the banks, the banks are less reluctant to impose strong conditions than for bigger organisations. These restrictions have led to delays in receiving funds or high transfer fees difficult to bear for small organisations. The participant informed the audience that Chatham House is currently analysing this problem.

One of the panellists emphasised that CT measures *may* lead to a decrease in quantity and quality of aid but do not automatically do so. He confirmed that the effect of counter-terrorism legislation is hard to measure and is not always synonymous with a decrease in humanitarian aid. In Syria for example, the amount of funds allocated by the donors has increased over the last years due to political imperatives and the dire humanitarian situation. Yet, examples like in Somalia show evidence of cases where a government acknowledges that its CT measures can prevent or limit humanitarian action.

According to the panellist, the most obvious impact of CT legislation is the *internal impact* on humanitarian organisations. The strenuous and resource-heavy consequences it causes are difficult to digest for donors although, in the speaker's view, they are the inevitable consequence of perfectly justified compliance mechanisms. Concerning the *structural impact*, the panellist pointed out that, according to many NGOs, accepting a counter-terrorism framework – be it through vetting, screening, or signing up to clauses – is necessary in order to receive funding and ultimately provide humanitarian assistance and protection; unfortunately it is also contributing to a general perception that NGOs are working with a party to the conflict and thus

taking sides. An example of that is the humanitarian exemption in United Nations Security Council (UNSC) Resolution 1916 concerning Somalia. Humanitarian organisations, in order to be able to receive funds, had to report to the humanitarian coordinator all instances of aid diversion or payments to Al-Shabaab. While this reporting obligation was essential for access to the funding, it also increased the perception that the humanitarian organisations were part of the counter-terrorism system and thus that they were taking sides in the conflict.

3. On the disproportionate impact of CT measures on local stakeholders

Referring to the specific impact of CT measures on local humanitarian players, another participant enquired how the interests of these local organisations had been taken into account in shaping CT measures.

A member of the panel answered that for the EU this is only an indirect issue because the EU only funds international NGOs. Yet, according to the speaker the EU is very conscious of the fact that the implementation of the funded projects is often only possible through or with the help of local organisations. Therefore, the EU wants to increase the training of international NGOs on how to engage with national organisations outside the EU.

4. On the implication of DG ECHO in the drafting of the new EU Directive on Combatting Terrorism

A member of the audience asked the representative of the EU Commission whether Directorate-General (DG) European Civil Protection and Humanitarian Aid Operation (ECHO) had cooperated with DG for Migration and Home Affairs (HOME) and DG Justice and Consumer (JUST) to prepare the draft of the new EU Directive on Combatting Terrorism. The participant especially wondered about differences in opinions between Directorates General on the inclusion of a humanitarian exemption in the Directive.

The speaker answered that he could not comment on the ongoing legislative process regarding the new Directive. He however confided that humanitarian exemption clauses could, in his opinion, be useful if they are properly phrased and if they do not undermine the overall normative context of a particular instrument.

5. On emerging case law about NGOs' support to terrorist activities

One of the speakers from another panel asked whether there was any emerging case law about NGOs or humanitarian organisations being sued for activities amounting to supporting groups designated as terrorist.

One of the panellists answered that some recent institutional legal proceedings exist on this issue regarding Gaza. He indicated that further examples could be found with respect to Australia where last year an extensive parliamentary debate took place concerning this issue. According to the speaker, apart from those examples, no real case law seems to be developing on the topic. That being said, the speaker underlined that humanitarian action could be hindered in many other ways (unlike criminal and civil cases) such as the refusal of access to a country.

Panel Discussion

Preventing and Countering Violent Extremism

Moderator: **Pascal Daudin**, ICRC Policy Cell

TERRORISM, COUNTER-TERRORISM AND HUMANITARIAN LAW: A STATE PERSPECTIVE

Stephan Husy

Ambassador, Federal Department of Foreign Affairs, Switzerland

Résumé

Pour entamer la table ronde sur la prévention de l'extrémisme violent et les réponses à lui apporter, Stephan Husy nous expose son expérience en tant qu'Ambassadeur suisse en mission spéciale pour la lutte contre le terrorisme.

S'il en existe des exemples plus anciens, l'inclusion de la lutte et de la prévention contre l'extrémisme violent (P/CVE) dans le cadre plus large de la lutte contre le terrorisme a particulièrement gagné en importance en 2014 lors de la montée en puissance du groupe « Etat islamique en Iraq et au Levant » (ISIL) et du phénomène des combattants terroristes étrangers. La P/CVE est reconnue notamment par la Résolution 2178 du Conseil de sécurité de l'Organisation des nations unies (ONU) ainsi que dans les principes de non-intervention et de précaution en droit international coutumier. Cette politique de P/CVE figure à présent parmi les priorités à l'agenda international.

Le Plan d'action pour la prévention de l'extrémisme violent de l'ONU fournit, selon M. Husy, une analyse pertinente des facteurs de radicalisation menant à l'extrémisme violent, et distingue les conditions qui y conduisent d'une part, et le processus de radicalisation à proprement parler, d'autre part. Les conditions favorables à la radicalisation, appelées « push factors », incluent des éléments sociaux, culturels, politiques et religieux ainsi que des dimensions liées au chômage, à la marginalisation, et à des situations de fragilité ou de conflit. Le processus de radicalisation est marqué, quant à lui, par des « pull factors » qui incluent des motivations psychologiques et personnelles, le sentiment de victimisation, le sens du devoir et de l'honneur, ainsi que la recherche d'identité ou de pouvoir. Ces deux types d'incitants doivent être abordés de façon distincte et individualisée dès lors qu'ils varient d'une personne à l'autre.

Le Plan d'action de l'ONU propose une série de mesures à mettre en place pour lutter contre l'extrémisme violent. Sur cette base, le gouvernement suisse a engagé un plan d'action propre qui met la priorité sur les jeunes et les femmes. De plus, la Suisse développe à l'heure actuelle un plan national de P/CVE auquel participent des acteurs privés et des autorités publiques.

L'un des enjeux de ce plan national est de définir l'extrémisme violent. Il convient en outre d'assurer le bon fonctionnement des mécanismes de monitoring et d'évaluation de sa mise en œuvre. Il est essentiel en effet de garantir le respect des droits de l'homme dans la poursuite de ces politiques de P/CVE et de ne pas affaiblir la crédibilité et la sécurité des acteurs impliqués.

When I started working as Ambassador-at-Large for International Counter-terrorism in March 2014, preventing and countering violent extremism (P/CVE) was not an issue debated by the international community. However, the recognition that a counter-terrorism response cannot be confined to security measures is not new. The Plan of Action of the 2006 United Nations (UN) Global Counter-terrorism Strategy includes measures addressing the conditions conducive to the spread of terrorism (Pillar I) and measures to ensure compliance with human rights for all and the rule of law as the fundamental basis for the fight against terrorism (Pillar IV).

P/CVE gained traction mid 2014 in relation to the rise of Islamic State of Iraq and the Levant (ISIL) and what are called 'foreign terrorist fighters' (FTF) (I won't tackle the many semantic and legal difficulties related to the term FTF). Thousands of mainly young men from all over the world, including five thousand from Europe, travelled to Syria and Iraq to join the 'Caliphate' proclaimed in June 2014. The following question arose: what encourages them to turn to extreme ideologies resulting in shocking brutality, abroad and more and more at home as well?

In response to the rise of FTF, United Nations Security Council Resolution 2178 was adopted in September 2014. It also deals with countering violent extremism by encouraging Member States to 'engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion'.

The customary principles of non-intervention and "no harm" may also be applied to prevent the departure and transit of FTFs. According to these principles, no State should tolerate ter-

rorist activities or allow their territory to be used in a way that is harmful to other States. These principles may require States to take steps to prevent foreign terrorist fighters from joining an armed group abroad. In this vein, Switzerland's Counterterrorism Strategy of September 2015 aims to prevent the "export" of and support for terrorism from its territory.

P/CVE also completes the approach which aims to cut off the resources of organisations like Al-Qaida and ISIL. With regard to economic resources, there are sophisticated legal frameworks and mechanisms in place (sanctions, Financial Action Task Force (FATF) recommendations, etc.). On the other hand, there is less due diligence when it comes to weapons. Concerning FTFs, the main approach is the criminal justice response, in particular the criminalisation of travel, as well as border management and administrative measures that limit the freedom of movement. However, as we know, all these measures cannot prevent radicalisation to violent extremism.

In the last two years, P/CVE has become a priority topic ranking high on the international agenda. A good reference document is the Plan of Action to Prevent Violent Extremism of the UN Secretary-General (A/70/674), published in December 2015. Switzerland is very supportive of this plan and organised with the UN the Geneva Conference on Preventing Violent Extremism – The Way Forward in April 2016. The conclusions of the discussions are summarised in the Joint Co-chairs Conclusions.¹

The Secretary General places his PVE Plan of Action in the wider framework of the prevention agenda of the UN, especially with respect to preventing armed conflict, atrocities, disasters, violence against women and children, and conflict-related sexual violence. This illustrates how preventing violent extremism should lead to the prevention of extreme violence which encompasses the most serious crimes such as terrorist attacks, war crimes, crimes against humanity and genocide.

The UN PVE Plan of Action contains a good template for analysing the drivers of radicalisation to violent extremism, differentiating between conditions conducive to violent extremism, i.e. the structural context of violent extremism, and the process of radicalisation.

The first category is also called the 'push factors'. Examples include social, cultural, political, religious or ethnic marginalisation and discrimination, lack of employment or other socio-economic opportunities, corruption, bad governance, violations of human rights, situations of fragility and conflict (these are basically the same structural factors that can also lead to

1 Available online at: <<https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/GVAPVEConfJointCoChairsConclusions.pdf>>.

migration). These 'push factors' are best addressed by aligning national development policies with the Sustainable Development Goals (Agenda 2030).

The second category is called the 'pull factors', which have a direct individual impact. These include psychosocial and personal incentives, like a sense of identity or self-esteem, support for the family or other economic incentives, collective grievances and victimisation, distortion of beliefs, political ideologies, ethnic and cultural differences, a sense of duty and honour, adventure, and the desire of power and to commit violence. Part of the factors attracting individuals could also be called 'enabling factors' like mentors, online forums or radicalisation in prisons.

The radicalisation to violent extremism is a complex process and research shows that the path of individuals is not linear, with a number of common 'push' and 'pull' factors, but no single determining feature. Generally, there seems to be an over-emphasis on religious identity, at the expense of considering other potential political, social or economic factors.

The UN PVE Action Plan does not define violent extremism. However, the Secretary General cautions that although definitions of 'terrorism' and 'violent extremism' are the prerogative of Member States, they must be consistent with their obligations under international law, in particular International Human Rights Law. This is an important comment as even well-intended, non-coercive preventive measures can be intrusive and raise serious human rights concerns. Two recent reports in the framework of the Human Rights Council focus on PVE and human rights: the Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (A/HRC/31/65, in particular chapter II entitled 'Preventing and Countering Violent Extremism: a Human Rights Assessment') and the Report of the UN High Commissioner for Human Rights on Best Practices and Lessons Learned on how Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism (A/HRC/33/39).

The UN PVE Action Plan takes a practical approach and contains guidance for a number of spheres of action: dialogue and conflict prevention, strengthening good governance, human rights and the rule of law, engaging communities, empowering youth, gender equality and empowering women, education, skills development and employment facilitation, strategic communications, the internet and social media. Obviously there is an overlap with other broad concepts linked to security and development, such as peace building or Women, Peace and Security. With regard to international funding, it is important to note that the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC)

in February 2016 revised the reporting directives on Official Development Assistance (ODA) in the field of peace and security and set the criteria for PVE.

Based on the UN PVE Action Plan, Switzerland has developed a Foreign Policy Action Plan on Preventing Violent Extremism, stating youth and women as strategic priorities. To a large extent, the spheres of action fall into the remit of the Swiss Agency for Development and Co-operation and the Human Security Division of the Swiss Federal Department of Foreign Affairs.

The UN PVE Action Plan also recommends the development of national action plans to prevent violent extremism. Switzerland is currently developing its national PVE Action Plan which involves the participation of authorities on a federal, cantonal and municipal level as well as that of private stakeholders.

A key challenge for a national plan is to define violent extremism. A legal or policy framework that fails to clearly define the issue it seeks to address not only risks leading to ineffective measures but may easily infringe on human rights.

The Secretary General also puts emphasis on the need for effective monitoring and evaluation of the mechanisms implemented by the national action plans. It is encouraging that over the last two and a half years, more efforts have been undertaken to monitor what works and what does not work. Nevertheless, much more needs to be done and it is reassuring to see that the PVE research community as well as the practitioners' networks are growing (Hedayah, www.hedayah.ae, RESOLVE www.resolvenet.org, the EU Radicalisation Awareness Network RAN, etc.).

There is an increase in good practices and standards concerning PVE. The Global Counterterrorism Forum (GCTF) (www.thegctf.org) offers a platform for such activities. For example, Switzerland proposed an initiative on juvenile justice which led to the adoption of the Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context. Currently, in the framework of the GCTF CVE Working Group, Switzerland, together with the United Kingdom, has taken the lead on the work strand on Strategic Communications and Social Media Aspects in Preventing and Countering Violent Extremism.

In addition, there is an increase in practical experience. The Geneva based Global Community Engagement and Resilience Fund (GCERF, www.gcerf.org), UNDP and others are greatly contributing to that cause. It becomes clear that good cooperation and trust among a broad range of players are required, including government authorities and civil society organisations and representatives. However, it is important to note that the rules of engagement of these different stakeholders have to be clarified and need to be based on human rights and the rule of law.

We should not forget that the duty to protect people's human rights, enforce these rights and comply with them is an obligation and an objective in its own right, and is not subordinated to the agenda related to preventing or countering terrorism or violent extremism.

We also have to be careful with the branding of measures as P/CVE which in certain contexts could jeopardise the credibility or safety of players such as teachers, social workers, community and religious leaders, youth and women.

Overall, we are convinced that all these efforts to promote and strengthen PVE activities will lead to a more balanced implementation of the UN Global Counter-terrorism Strategy which is the right approach to sustainably reducing the global terrorist threat.

COUNTER VIOLENT EXTREMISM – A NATIONAL HUMANITARIAN ORGANISATION'S PERSPECTIVE

Dick Clomén

Swedish Red Cross

Résumé

Dans cette contribution, Dick Clomén nous offre la perspective d'une organisation humanitaire nationale, celle de la Croix-Rouge (CR) suédoise, sur la lutte contre l'extrémisme violent.

Le contexte suédois en matière de lutte contre le terrorisme est marqué depuis 2010 par un niveau de menace terroriste considéré comme élevé. Dès 2011, le gouvernement présente un plan d'action visant à protéger la démocratie et une société ouverte contre l'extrémisme violent. En Suède, l'extrémisme violent est prôné par le « mouvement autonome » de gauche, le mouvement « White Power » et les mouvements islamistes extrémistes. En 2014, un Coordinateur national pour la lutte contre l'extrémisme violent est nommé et des tâches de promotion d'une société résiliente, de prévention du recrutement et de préemption à l'égard des individus suspects et de leurs familles lui sont assignées, ceci aux niveaux tant local que national. L'ensemble des acteurs (agents de police, militaires, travailleurs sociaux, enseignants, société civile, etc.) sont impliqués dans la mise en œuvre de cette politique.

M. Clomén nous explique le rôle que la Croix-Rouge suédoise a joué dans la lutte contre l'extrémisme violent et les difficultés que cette coopération avec les autorités a engendrées. Approchée par le Coordinateur national, la CR suédoise a mis en place en 2015 une ligne d'assistance téléphonique pour fournir du soutien et de l'information sur l'extrémisme violent. Les questions que posait l'existence de cette ligne d'assistance étaient multiples : premièrement, elle faisait paraître la CR comme acteur d'une politique plus large de lutte contre le terrorisme ; deuxièmement, elle plaçait la CR en porte-à-faux vis-à-vis de son principe de confidentialité étant donné les informations critiques qui lui étaient confiées par les personnes aidées ; et troisièmement, elle était sujette à de vives critiques mettant en cause sa conformité avec son but humanitaire.

Comme organisation humanitaire, la CR suédoise n'a pas pour mission de lutter contre l'extrémisme violent. Par ailleurs, en qualité de membre du Mouvement international de la Croix-Rouge et du Croissant-Rouge, la CR suédoise se doit de respecter en tout temps les principes de neutralité, d'indépendance et d'impartialité de l'aide humanitaire. La Croix-Rouge peut-elle apporter ses soins et son aide humanitaire à des individus partis combattre à l'étranger ou promouvant d'une

façon ou d'une autre l'extrémisme violent ? Oui, l'assistance de la CR s'applique impartialement à tout individu, quel qu'il soit.

Rappelant le mandat de la Croix-Rouge suédoise, Dick Clomén insiste sur le danger d'oubli de leurs valeurs propres pour les organisations humanitaires qui acceptent des fonds publics conditionnés par des objectifs de lutte contre l'extrémisme violent. Ces conditions peuvent mener l'organisation humanitaire à devenir un agent au service d'une politique étatique. Ceci étant dit, l'orateur confirme qu'il est du devoir de la CR de dénoncer la violence, en particulier celle exercée à l'encontre de personnes protégées par le droit international humanitaire. Par conséquent, dénoncer aux autorités des cas de violence, particulièrement lorsque celle-ci vise des personnes protégées par le droit international humanitaire ou les droits de l'homme, n'est pas en soit contraire au mandat de la CR, mais doit cependant entrer dans le cadre strict des règles du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

First, we must recognise how extremely politicised this field currently is. In our experience, it does not matter what incentive you may have for engaging in activities to prevent extreme violence; in the eyes of the general public you will be perceived to be part of a broader political national security agenda. As a concept, "counter violent extremism" (CVE) is first and foremost a matter of national security. So, what role could a national humanitarian organisation take in relation to violent extremism? And what are the implications *vis-à-vis* humanitarian principles?

The Swedish Context

Like other governments, over the last six years the Swedish government has increased its efforts to fight violent extremism and terrorism. After having previously been categorised as 'low', in October 2010 Sweden's terrorism threat level has been categorised as 'high'. The current global situation was one reason, but there was also a shift regarding Sweden as a potential target, in particular for attacks from violence-promoting Islamist extremist movements.

On 11 December 2010 a suicide bomb attack occurred in central Stockholm but the bomb failed to explode and only the suicide bomber died in the attack. A second bomb was ready in a car nearby, but that explosion also failed.

On 22 October 2015 a school killing claimed four deaths including the attacker. The attacker, a 21-year-old man, was apparently targeting foreign-looking people.

On 11 October 2016 a Shia facility in Malmö was torched. No one was harmed but the incident was serious.

Yesterday, 20 October 2016 an accommodation facility for asylum-seekers close to Arlanda airport was torched.

These are just a handful of examples of attacks involving extreme violence against individuals, but it is not possible to establish whether they were carried out on the base of a violent extremist agenda. The majority of related incidents in Sweden involving violence with potential deadly outcome are directed towards immigrants and religious minorities.

Since 2009 Sweden has taken a number of measures to counter violent extremism including terrorism. In 2011 the government presented its first plan of action to protect democracy against violent extremism.¹ The overall political goal was and is *to protect democracy and the open society*.

In Sweden the term 'violence-promoting extremism' is used, and it is defined as 'an umbrella term for movements or environments that do not accept a democratic society and promote violence to achieve an ideological goal'. This mainly concerns three different "movements":

1. 'the 'Autonomous movement' (autonomous left-wing violence-promoting groups);
2. the 'White Power movement'; and
3. the 'Islamist extremist movement'

all engaging in threats or violence aimed at changing the form of government.

Individuals travelling with the intention to take part in, or to train for, fighting in other countries represent an important concern. The threat of attacks from the violence-promoting Islamist extremist movement in Sweden comes from people who return with experience and knowledge and from people who are in Sweden and can act on the calls to carry out attacks in European countries. It is estimated that around 140 ex-fighters have returned to Sweden from Syria alone. To develop measures to promote reintegration and to stop recourse to violence is a priority for the Swedish authorities. Individuals who have allegedly committed criminal acts are being investigated.

In June 2014 the Swedish government appointed a national coordinator on CVE, The National Coordinator for Protecting Democracy against Violent Extremism, to promote cooperation and

1 Regeringens skrivelse 2011/12:44 Handlingsplan för att värna demokratin mot våldsbejakande extremism, Stockholm den 8 december 2011

concrete preventive measures, and to develop a national strategy to counter violent extremism.

The strategy developed has three core dimensions: promotion, prevention and pre-emption.

Promotion refers to inclusive work to strengthen democracy and to create a resilient society.

Prevention focuses on groups and individuals receptive to recruitment to violent extremism.

Pre-emption focuses on measures geared towards individuals in violent extremist environments and their relatives.

The Coordinator sets out a roadmap at local and national level. The actions include:

At local level:

- cooperation between municipalities and civil society must be expanded;
- each municipality should have a coordinator;
- joint reports should be drawn up in cooperation with the players involved;
- information sharing within the regulatory framework that is in place;
- support for relatives;
- support for leaving violent extremism should be available in a municipality;
- the non-profit sector should be a cooperative partner.

At national level:

- national coordination;
- national network of experts to develop specific initiatives;
- healthcare should be included in work to combat violent extremism;
- training for the players involved;
- propaganda and the media to increase knowledge on preventive work.

Central in the strategy is to broadly mobilise against violent extremism; bringing together all concerned stakeholders including the police, the military and other authorities, the first line players (social workers, schools and other public service providers) and civil society. For the Swedish government it is natural that all the different kinds of organisations join forces against all forms of violence, in particular extreme forms of violence. There has been a strong push for cooperation with civil society, the non-profit sector, and in particular organisations

who may come in direct contact with individuals at risk, such as faith-based organisations and sports clubs.

The Role of the Swedish Red Cross

The National Coordinator quickly identified that there was a lack of a national contact point for the people directly concerned (relatives, teachers, social services, etc). In 2015 the Swedish Red Cross was approached by the National Coordinator with a request to establish a national telephone hotline to provide support and information. The Swedish Red Cross, at the time, already had a well-established support hotline for vulnerable people who needed someone to talk to. Based on this experience, the Swedish Red Cross accepted the challenge to open a hotline as a pilot project. However, the Swedish Red Cross hotline on CVE was from its early days criticised by many: the hotline did not provide enough measures to counter extremism, and it was perceived to be an emergency hotline or even a line for tipping the police off. There were different views on what the hotline should offer. While the Swedish Red Cross maintained that the purpose was humanitarian, to support concerned relatives, school personnel and others, external expectations were that it should be able to provide concrete recommendations to prevent young people, in particular, to resort to violent extremism and to counter violent extremism in general.

I can see three major issues in relation to our role.

First, the Swedish Red Cross is viewed to be part of the greater political effort to fight and hinder violent extremism.

Second, the limited ability to share information about the hotline. As an independent and neutral organisation with an exclusively humanitarian mission, working for the best interests of the people we serve, the Swedish Red Cross applies a principle of confidentiality. Hence, we cannot share any detailed information, data or analysis with the media, nor with the National Coordinator or the government. (However, the Swedish Red Cross is bound by law to disclose information to stop serious crimes).

Third, due to external perceptions and expectations it has been difficult to communicate about the hotline and its humanitarian purpose.

‘So, if you are not working against violent extremism, does that mean you approve such practice?’, one commentator asked.

The objective of the Swedish Red Cross hotline has always been to provide emotional support and information to the people concerned, focusing on family members. But since the hotline was established on the initiative of the National CVE Coordinator and also funded by the Coordinator, it has been, in my view, challenging to maintain independence. The hotline is currently being evaluated and most likely the service will not remain under the auspices of the Swedish Red Cross.

Our role with regard to individuals promoting violent extremism has also been discussed in relation to other humanitarian services and activities. Can the Swedish Red Cross accept patients who are traumatised after having participated in extreme violence in armed conflicts at its treatment centres for victims of torture and people traumatised by war? How do we handle individuals who have taken part in violent activities within our programmes to assist asylum seekers or to re-establish family links? Here, we must be clear on our objective. As a humanitarian organisation, our role is not to provide services that are intended to counter violent extremism *per se*. If individuals at risk are eligible for our humanitarian services, we will offer those services impartially. Hence, a returning fighter, suffering from trauma due to his experiences in armed conflict, may receive treatment at a Swedish Red Cross treatment centre.

Other humanitarian organisations have been asked to partner with their governments in CVE programmes to demobilise returning fighters, sometimes child soldiers, men and women, boys and girls who may be labelled 'violent extremists' or 'terrorists'. Most organisations are striving to be viewed as relevant in light of current domestic and international challenges. CVE is definitely one such current challenge recognised by all. When an issue is considered a top political priority, considerable funding will be available. Without pointing the finger at any one specific organisation, I must observe that many actually follow the money, sometimes without reflecting on their own incentives, risks and possible negative impact.

For humanitarian organisations such as the Red Cross and Red Crescent Movement, with a mission to work neutrally and impartially on the battlefield to protect and assist victims, it is extremely important to be clear about the purpose of engaging in certain activities. The principles of neutrality, independence and impartiality are our main tools to access the most vulnerable, and to ensure security in complex environments. We must always make sure that these principles are not compromised. The fact that the world is becoming more and more global and inter-connected is increasingly affecting our operations. Our activities and programmes in one country may affect the Movement's perceived neutrality and impartiality in a totally different context. Among young people leaving Sweden you will find individuals who join groups active in armed conflicts, for example in Syria, Iraq and Somalia, countries in which we have major

humanitarian operations. This must be taken into account when engaging with the same group of individuals in Sweden.

As a national Red Cross society, the Swedish Red Cross works to prevent and alleviate human suffering, to protect lives and health, to promote dignity for all human beings. We have a mandate to disseminate International Humanitarian Law and the principles and humanitarian ideals of the Red Cross and Red Crescent Movement. We cooperate with our government to ensure compliance with International Humanitarian Law. In this we work to make sure that any political or legal measure taken by the government to stop terrorism, financing of terrorism, violent extremism, are in accordance with International Humanitarian Law and International Human Rights Law, and that impartial humanitarian action is not being criminalised, hindered or limited.

Promotion of humanitarian principles and humanitarian action, International Humanitarian Law and human rights is an important contribution to peace and to countering violent extremism, even though it is not the primary purpose of our activity.

Even if a humanitarian programme may have the objective to reduce violence, e.g. by promoting social inclusion or creating alternatives for individuals at risk, such programmes should be clearly separated from action aiming at stopping terrorism or travelling. Humanitarian “contributions” to countering violent extremism should come from humanitarian action. It must remain within the humanitarian mission and objective to save lives, protect health and human dignity. It should not be driven by, or mixed with, politically motivated measures to fight terrorism or ideology-based extremism. In an increasingly polarised world it is even more important to maintain the integrity of humanitarian action.

At the same time, we must denounce violence, in particular indiscriminate violence or violence directed against any person protected under International Humanitarian Law or Human Right Law. We must also be clear on where we as humanitarians stand regarding the protection of the inherent dignity and equal value of all human beings, the fight against discrimination, racism and hatred.

ENGAGING CIVIL SOCIETY IN THE PREVENTION OF VIOLENT EXTREMISM

Fulco van Deventer

Human Security Collective

Résumé

A l'occasion de son intervention sur la prévention de l'extrémisme violent et les réponses à lui apporter, Fulco van Deventer nous expose son point de vue sur le rôle de la société civile dans la lutte contre l'extrémisme et les défis auxquels elle est confrontée dans ce domaine.

L'espace tant politique qu'opérationnel de la société civile a été réduit suite aux attentats du 11 septembre 2001. Ce n'est qu'avec l'introduction du concept de lutte contre l'extrémisme violent (« Countering Violent Extremism » - CVE) que la société civile s'est vu offrir un rôle dans la lutte contre le terrorisme. L'avancée en matière de CVE s'illustre notamment dans l'élaboration au niveau des Nations unies d'un Plan d'action transversal de prévention de l'extrémisme violent.

L'implication de la société civile se heurte néanmoins à plusieurs obstacles. D'une part, les mesures législatives en matière de lutte contre le terrorisme peuvent dans certains cas empêcher les organisations de la société civile (OSC) d'approcher des groupes à risque de radicalisation, alors même que cette proximité est essentielle pour assurer la crédibilité et la légitimité de leur travail auprès de ces groupes. D'autre part, l'agenda sécuritaire des Etats a parfois tendance à instrumentaliser les OSC afin, par exemple, d'en obtenir des informations sur les groupes auprès desquels elles interviennent.

Face à une acceptation tacite d'un agenda sécuritaire dont la priorité n'est pas l'identification des causes de la radicalisation, M. van Deventer propose de redéfinir la sécurité à partir d'une approche basée sur l'humain plutôt que sur l'Etat, et ce afin d'inclure des dimensions supplémentaires, en matière notamment d'emploi, de santé, de sécurité politique et communautaire, ainsi que du droit à vivre sans peur et du droit à la dignité. En outre, l'orateur détaille une série de conditions qu'il estime nécessaires pour assurer un engagement constructif de la société civile dans le développement de stratégies nationales de sécurité.

En guise d'invitation au débat, Fulco van Deventer termine sa présentation en pointant quatre raisons qui rendent problématique l'implication de la société civile dans la lutte contre le terrorisme : la notion d'isolation (« isoler et exclure ») ; la tolérance zéro poursuivie par les stratégies de contre-terrorisme ; le manque de clarté quant aux sources d'information des agences de

renseignements ; et la dissociation entre les objectifs à court terme du contre-terrorisme et les objectifs à long terme la de lutte contre les causes profondes du terrorisme.

From counter-terrorism to the prevention of violent extremism: just semantics?

In the wake of 9/11, the slew of anti-terrorism laws and measures has greatly affected the political and operational space of civil society, impacting its role as peacebuilder, protector of human rights, and provider of humanitarian action and development writ large. This has been mainly due to the fact that counter-terrorism by its very nature is based on the notions of *isolation and exclusion*: of designation of persons and organisations on terrorist lists, and of denying them mobility, access to financing and a safe haven. A military- and intelligence-driven approach that follows the paradigm of isolation does not allow space for more nuanced action: space for civil society stakeholders to criticise those in power and to build bridges between opposing parties.

Towards the end of the last decade, the introduction of “countering violent extremism” (CVE) was much more than just a relabelling of the counter-terrorism grammar. It opened the door to a more inclusive approach in which civil society could play a role in clarifying and addressing the root causes of violent extremism in a non-coercive manner, promoting and facilitating dialogue with groups ‘at risk’ (those not yet recruited by terrorist groups but sensitive to and supportive of some elements of their ideology). The instrumentalisation of non-governmental organisations (NGOs) by and for security-driven policies started becoming an important issue, with the legitimacy and autonomy of many civil society players entering the CVE domain now being at stake.

At the beginning of this year, the United Nations (UN) introduced its PVE (Prevention of Violent Extremism) Plan of Action¹. It was widely welcomed, though it has not yet been formally approved within the UN. This PVE plan is an appeal to all bodies of the UN to put on a violent extremism lens in order make an effort, through their respective actions, to prevent processes of radicalisation and recruitment into violent extremism at a very early stage. It is also an acknowledgement of the notion that many different root causes and grievances can collectively add up to violent extremist behaviour and possibly lead to terrorism. It is a human security, multi-disciplinary domain approach, where justice, human rights, development, education, conflict transformation, peacebuilding and rule of law intersect in order to enable an environ-

1 At: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/674>

ment that can truly prevent the turn to violent extremism. It is a domain where civil society together with its traditional UN partners have an extensive track record and vast experience, and where they have proven to be most relevant and legitimate. But it is important to keep in mind that the main goal and agenda of these entities and disciplines is to bring about prosperous, peaceful and just societies with a well-functioning rule of law. The ultimate goal could never be to prevent violent extremism. At best it is a positive side effect of joint developmental, educational, humanitarian and human rights efforts. It is important to mention that after years of struggling with the issue, the United Nations Development Programme (UNDP) has taken the lead in developing national PVE actions plans², motivated by the fact that violent extremism has a devastating influence on development in all countries, but disproportionately in developing countries.

Is there a role for civil society to play in CVE/PVE?

It is problematic that, from a security perspective, civil society is often approached as a single sector. As an example, regulators define formalised and registered civil society organisations as just not-for-profit organisations (NPOs), whereas civil society itself emphasises the diversity of positions, constituencies, agendas, strategies and degrees of organisation therein, making it impossible to frame it all under the same banner. In order to avoid disproportionate regulatory measures and/or overregulation, civil society has been advocating for a risk-based analysis of the sector and specific measures for subsets of civil society organisations (CSOs) where certain risks exist.

Civil society can definitely play a role in the prevention and also the countering of violent extremism. In general, we could say that the closer civil society is to the groups at risk of radicalisation and recruitment, the more effective it can be, due not only to the depth of knowledge, the experience and the relationships built, but also to the credibility and legitimacy it engenders. But counter-terrorism laws and measures create obstacles for civil society organisations to get close to the heart of the matter. At the same time, security agendas and security policies tend to instrumentalise civil society stakeholders in order to gather information and implement State-centric security interventions. When, for example, there is a substantial support base for groups that are labelled violent extremist or terrorist (as for instance in Mali), the risk that CSOs face while working on PVE, which is seen as part of a State-centric or international security agenda, is high. But when there is a common notion of “the enemy” “the criminal group”, as for instance in the case of Boko Haram in north-east Nigeria, then most parts of civil society are willing to cooperate, even with a partner who is not trusted – in this case, the Nigerian government.

2 At: <<http://www.undp.org/content/dam/norway/undp-ogc/documents/PVE%20special%20news%20update%20of%20GP%20cluster.pdf>>

The security agenda is seldom made explicit when it comes to planning a PVE strategy. There is a tacit understanding of a common acceptance of the labelling of terms such as ‘terrorist’, ‘terrorist organisations’ and their acts, and very little in-depth research done to identify the root causes and underlying grievances in a local setting that may lead to radicalisation and, finally, to recruitment into a terrorist organisation. In ‘ungoverned areas’, especially, as for instance in the Sahel region, where governments have historically failed to put in place governance that brings about citizenship, development, security and justice for all, and where informal players involved in illicit trade and criminal actions call the shots, it is impossible to imagine one single notion of security. Here it is important that civil society plays a role in redefining security agendas, in fostering dialogue between communities and security stakeholders (both formal and informal ones), and in working with the notion of a diversity of security agendas that create a myriad of options that need to be negotiated and developed into practical security strategies. Both the concept of human security and the process of developing a national PVE plan of action can be beneficial for defining practical security strategies.

The human security approach is helpful in redefining security: from being more State-centric to becoming more human-centric. It deals with security dimensions that go beyond just the aspects of physical security, developing employment, food, health, political and community security, and putting centre stage the freedom from fear and want, to live in dignity.

The process of developing a PVE plan of action can provide an entry point to engage civil society in the development of a national security strategy which could potentially be positive when the engagement:

- is based on principles of partnership and mutual ownership;
- is a long-term process, in which trust building, conflict transformation and reconciliation are central;
- enables conditions of safety and respect, provided and safeguarded by the international community;
- is multi-stakeholder, meaning that it allows for a variety of players, both across government and across civil society;
- enables the analysis of root causes and grievances, and the push and pull factors of radicalisation – made collectively and dealing with different views and understandings, and progressively building up to a shared vision.

Why is the counter-terrorism domain problematic for civil society?

There are various reasons why the engagement of civil society in countering terrorism is problematic:

- as mentioned at the beginning, counter-terrorism is based on the notion of isolation and exclusion. It seeks to identify those who have committed or have the intention to commit terrorist acts as well as those who support these acts in material and immaterial ways. After identification, isolation can take place in physical, legal and financial terms. This is problematic for civil society in many ways. First, civil society seeks inclusion by participation and uses argumentation and dialogue as tools to strive for conflict transformation, instead of solely turning to law enforcement. Secondly, civil society itself has in many cases had its operational and political space restricted by counter-terrorism measures. This is due to the fact that civil society might take critical positions against those in power, including reaching out to those parts of society where there is a support base for terrorism;
- counter-terrorism is a zero-tolerance approach. It does not allow for mistakes and trial-and-error. In the dynamics of conflict transformation and social construction in which civil society operates, it is impossible to work with this zero-tolerance notion. Piloting, trial-and-error, enabling an environment for dialogue and inclusion, and seeking for continuous improvement of performance are common practices. The zero-tolerance approach and the severe legal consequences of trespassing barriers have led to risk averseness of, in the first place, international non-governmental organisations bound to follow international rules and highly vulnerable to reputational damage, but, in the second place also of private financial sector and governmental institutions like banks and their regulators, making 'risky' organisations and their activities un-bankable. One of the direct consequences here is that entities hit by de-risking are turning to underground banking and informal cash-transfers, which in itself adds to risks of criminal and terrorism financing. This is a clear example of how counter-terrorism measures can become counter-productive;
- the use of classified information and the lack of transparency in terms of the sources of information held by intelligence agents and law enforcers obstruct the creation of a level playing field and a true partnership between civil society and the security sector. National administrative regulation requires formal civil society stakeholders to be fully transparent on their sources and strategies. Civil society also has a moral obligation to be as transparent and open as possible;
- counter-terrorism is a targeted approach that needs to provide results in the short term. Addressing the root causes of terrorism by political processes, changes in power structures and the building of comprehensive processes that include both preventive and repressive elements, are all long-term strategies and clearly not the focus of the average counter-terrorism policies.

PANEL DISCUSSION PREVENTING AND COUNTERING VIOLENT EXTREMISM

Moderator: **Pascal Daudin**

ICRC Policy Cell

At the outcome of the panel discussion on preventing and countering violent extremism, speakers were asked to elaborate on three main issues.

1. On the non-coercive nature of preventing and countering violent extremism (P/CVE) and on the criteria to qualify a person as constituting a risk to security

A participant came back to the notion of non-coercive P/CVE policies mentioned by the chairperson and argued that non-coercion does not necessarily entail non-intrusion. The participant enquired what criteria permit distinguishing a person at risk from a person constituting a risk.

Reacting to the observation on non-coercion, a speaker insisted on the importance of linking violent extremism ideology and narratives with concrete and consistent practice enabling the targeted people to speak out. In his opinion, the huge budgets that are currently spent by the European Union (EU) on collaboration with Google and Yahoo to counter narratives of jihadist groups on the internet will only be effective if they are implemented in parallel to the opening of a space where the population can express itself. Civil society has arguably a significant role to play in this regard.

Turning to the criteria to qualify someone as a threat to security, the speakers admitted the dilemma in P/CVE regarding the moment at which law enforcement must take action against a person. Social workers and community police officers are sometimes confronted with cases that could potentially evolve into threats. They have to choose whether to refer those cases to a higher echelon of the law enforcement system or to deal with them in their own way. The problem lies in the fact that in most cases, the reported people are not real threats. The overreaction of a social worker or police officer will then completely destroy his/her relation with the entire neighbourhood and will seriously damage the acceptance of their institution within the local community.

A second speaker agreed that 'non-coercive' does not mean 'non-intrusive'. This is backed by the very nature of the institutions implementing the non-coercive measures, i.e. teachers, social workers, integration services, etc., who have a relationships with the population as op-

posed to intelligence officers, law enforcement officers or militaries, who remain more distant. This reality creates an unavoidable intrusion into people's life. This is criticised by a report of the United Nations (UN) High Commissioner for Human Rights.

Concurring on the important role of civil society and the private sector as a whole, the speaker illustrated what he calls the 'resilience' of the sector. In some cases, civil society has taken security into its own hands as, for instance, on Facebook, where the users themselves can signal inappropriate content that should be removed for security reasons. This tendency will certainly have an impact on the free flow of information and hence it appears some guidelines are needed. A body of good practice standards is emerging and could evolve into soft law. Yet, an essential question remains to be answered: what is the due diligence obligation of a State to prevent the export of violence abroad? A kind of due diligence exists regarding weapons in the Arms Trade Treaty, why not establish a similar obligation regarding the export of fighters? Would such an obligation mean that the State is obliged to ensure an effective integration policy? How far would this obligation go? The questions were left open by the speaker.

A third speaker took the floor to support the idea of a due diligence obligation of States to prevent the export of violence abroad. This duty is part of the broader obligation to comply with and ensure compliance with IHL, which is binding on all States. The speaker however confesses that in practice things are not always easy.

Regarding the non-coercive nature of P/CVE, the third speaker insisted on the need to act locally and to involve as much as possible stakeholders such as municipalities, healthcare providers, faith-based organisations and sport clubs. Those players unfortunately often lack the guidance and legal framework to draw the line between when to call the police and when to keep information internally. The Swedish Red Cross for example, as an organisation under Swedish law, has the legal obligation to report to the police when it identifies a risk of terrorist crime.

In reaction to the call to involve the local level as much as possible in P/CVE policies, a participant shared some examples of Belgian radicalisation prevention programmes. As part of a three year old security plan of action, a major focus is put on the coordination of radicalisation prevention activities at regional and local levels. The participant informed us that great importance is given to collaboration with the Belgian Regions and local municipalities in order to reach all local players and involve NGOs and social workers in the programmes.

2. On the lessons learnt from the situation in Nigeria and in Mali

Another participant asked whether there were lessons to be drawn from the situation in Northern Mali where Boko Haram lost substantial support among the population.

A speaker explained that Boko Haram was set up early in 2000 as a sectarian radical Islamic group aiming at creating a safe haven freed of the corrupted Western world. As such the purpose of the group was peaceful, but it changed drastically when the group's leader was killed in 2009. The event inspired violence and the new leader soon lost support. This loss is thus only due to the internal problems of the group and not to a positive role that the Malian government have played in countering violent extremism. In this sense, no positive lessons can be drawn from the State's action. On the contrary, it is the lack of State action to ensure authority over some areas that caused the rise of Boko Haram as a service provider (health care, education, security, justice) in ungoverned regions. In the centre of Mali, three regional groups are currently appearing to fill the void left by the State, which was unable to care for its people.

3. On the definition of violent extremism

Lastly, a member of the audience argued that the main issue regarding CVE relates to the scope of its definition. What does radicalisation exactly entail? Is radicalisation a crime in itself? Based on British experience, the participant explained how CVE programmes have for years been criticised by human rights NGOs and the UN Special Rapporteur for being too broad and consequently creating an atmosphere of distrust. In the participant's view, it is part of the growing process that teenagers explore different ideas – possibly even extremist Islamic ideas. If properly accompanied, a teenager could easily move forward and leave his/her extremist ideas behind. In contrast, there is a high risk of freezing this process once the police are involved. Hence, the participant affirmed that the approach from a security angle is the most suitable to tackle the problem of violent extremism.

A member of the panel agreed with this reflection and confirmed the risks linked to an excessively broad understanding of violent extremism. The speaker suggested shifting from what he calls 'CVE specific' (i.e. counter-narratives, religious profiling etc.) to 'CVE relevant' (i.e. job creation, regulation of hate speech, etc.). In his opinion, one should avoid bringing all the good work done in terms of countering violent extremism under the umbrella of counter-terrorism because this is very stigmatising and it hinders the creation of a dialogue between the relevant players.

A second member of the panel recalled that the purpose of P/CVE is to prevent crime. As such, its objective is to reduce violence and criminal offences. It must thus be accompanied by the

“do no harm” principle. Moreover, it is clear that most fighters leaving for Syria and Iraq do not know the criminal code nor the IHL rules. Hence, it appears that counter-terrorism measures alone are not sufficient to tackle the issue. Prevention is all important, though it is a challenging field with many risks.

The chair concluded the session by emphasising the unease one can feel while dealing with the notion of countering violent extremism. This difficulty is due to the fact that the notion is still a work in progress and that it touches upon multiple aspects of our society. Furthermore, there is a rising awareness of the narrowness of the partition between virtuous intentions and the temptation to create an Orwellian system of control. Vigilance must be exercised when dealing with these questions.

Concluding remarks

Christine Beerli

Vice-President of the ICRC

Mesdames et Messieurs,

Je suis fascinée. Je dois dire que j'ai eu le privilège de passer une journée et demie absolument passionnante en votre compagnie. J'ai beaucoup appris et j'ai, une nouvelle fois, pris conscience de la complexité de la matière dont nous avons traité durant ce Colloque et de la multitude de questions encore ouvertes quant à l'application du droit international humanitaire (DIH) au terrorisme et à la lutte contre le terrorisme. Ce qui m'a particulièrement fascinée est l'interaction entre le savoir académique, qui était de très haut niveau, et l'expérience pratique de nos orateurs et oratrices. Je pense que nous pourrions encore facilement discuter longtemps ensemble mais je propose de nous laisser le temps de réfléchir un peu et de décanter les choses avant de nous rassembler à nouveau une autre fois.

Merci beaucoup, Mesdames et Messieurs, de nous avoir donné non seulement de votre temps précieux, mais aussi de nous avoir fait part si clairement et librement de vos pensées. Je pense que c'est extraordinaire d'avoir eu la possibilité de discuter sans trop de détours diplomatiques.

Je ne vais pas vous faire un résumé des discussions dans le temps qui m'est imparti; ce serait totalement impossible. Je vais plutôt vous mentionner quelques points qui m'ont particulièrement frappée.

Dans la problématique que nous avons abordée durant ce Colloque, nous avons été confrontés à deux cadres juridiques distincts: d'un côté nous avons le DIH qui règle les situations de conflits et qui nous est familier; et de l'autre côté, nous avons une multitude impressionnante de normes réglant la lutte contre le terrorisme (un phénomène qui ne connaît, soit dit en passant, toujours pas de définition commune). Comme il a été exposé au début du Colloque, il existe au sein de l'Organisation des Nations unies (ONU) trente-huit instances différentes qui traitent de près ou de loin de la lutte contre le terrorisme. Cette matière est par ailleurs régie par 19 conventions sectorielles et plusieurs résolutions du Conseil de sécurité de l'ONU (dont les trois plus connues sont les Résolutions 1373, 2178 et 2242). Face à un tel univers juridique, il n'est pas toujours aisé de trouver la bonne norme applicable au cas d'espèce. Il nous paraît par ailleurs indispensable de veiller à garantir la cohérence entre les différents cadres juridiques existants.

In defining a group as ‘terrorist’, States often tend to avoid the applicability of International Humanitarian Law (IHL). They do this under the erroneous impression that IHL would confer impunity for acts of terrorism or would not allow terrorist threats to be efficiently eliminated. Although terrorism is not defined in IHL, all the acts of a terrorist nature (e.g. indiscriminate attacks, attacks against civilian objects, spreading terror, etc.) are prohibited under this body of law. By refraining from applying IHL and favouring the definition of new criminal acts under domestic or international law, States develop an unnecessary layer of law and risk qualifying lawful acts of war as terrorist acts, which would most certainly discourage armed groups designated as terrorist to comply with IHL.

‘Foreign fighters’ are an issue of great importance to a lot of countries. The discussion yesterday afternoon showed the diversity of regulations in different countries and the gaps sometimes existing between the law and its implementation. It was nevertheless confirmed that it is possible to convict perpetrators of war crimes without having recourse to counter-terrorism legislation.

Today we had very interesting panel discussions. One thing I would like to highlight is what has been said by Ann-Kristin Sjöberg. She renamed the title of her contribution ‘countering criminalisation of humanitarian action’. This is something which is very close to our heart. For us, it is very important to have the possibility to work as humanitarians, respecting our principles of neutrality, independence, and impartiality. In our view, this is the only way – even though it is sometimes difficult – to gain access to the people most in need. We will defend our principles with all our energy.

The last discussion was extremely interesting. We were able to identify and discuss some of the dilemmas we face when doing our work.

I would like to finish these concluding remarks by recalling what was quoted by Walter Füllemann at the beginning of the Colloquium. C’est une citation d’Albert Camus que je trouve extrêmement belle et très pertinente par rapport au Colloque que nous venons de passer ensemble ici :

« Il s’agit de servir la dignité de l’Homme par des moyens qui restent dignes au milieu d’une Histoire qui ne l’est pas ».

Gardons cette invitation au centre de nos discussions !

Il me reste à vous remercier toutes et tous pour votre participation très active à cette 17^{ème} édition du Colloque de Bruges. Je souhaiterais remercier également Stéphane et Guillaume ainsi que toute leur équipe. Ils ont merveilleusement organisé ce Colloque et cela nous donne, comme chaque année, l'envie de revenir l'année suivante. Je tiens à remercier aussi Nanaz et François pour leur travail d'interprétation qui n'a pas dû être facile mais qui a été mené de main de maître.

Enfin, j'ai le plaisir de vous inviter, d'ores et déjà, à noter les dates du Colloque de l'année prochaine dans vos agendas. Le Colloque 2017 aura lieu les 19 et 20 octobre prochains. Je me réjouis de vous retrouver ici à Bruges pour cette prochaine édition.

PARTICIPANTS LIST

LISTE DES PARTICIPANTS

- **ABDULRAHMAN ABDALLA Abdullahi**
Kalshoven-Gieskes Forum on IHL
- **ADYNS Julie**
Amnesty International Belgium
- **AICHELER Miriam**
Allied Joint Force Command Naples (JFCNP)
- **AL-SARAF Wisam**
Embassy of Iraq
- **ALSHAMMAS Sami**
Kuwait Embassy in Brussels
- **AMAMOO David**
US Army Northern Law Center
- **APRAXINE Pierre**
ICRC Brussels
- **AYLETT Lydia**
ICTY
- **BALDWIN Clive**
Human Rights Watch
- **BANDZA Martynas**
SHAPE
- **BAQUERIZO LOZANO Victoria**
SHAPE
- **BARNETT Charles**
British Ministry of Defence
- **BARTELS Rogier**
International Criminal Court / Netherlands Defence Academy
- **BASS Léa**
French Ministry of Defence
- **BEERLI Christine**
ICRC
- **BEHRMANN Christian**
EEAS
- **BERMAN Paul**
Council of the EU
- **BIALA-HETTINGA Berber**
Amnesty International's European Institutions Office

- **BIDOUNG Josué Noël**
Ambassade du Cameroun
- **BIRMANN Cindy**
Royal Military Academy
- **BOEVA Antoaneta**
NATO
- **BRANDAO Caroline**
French Red Cross
- **CARIO Jérôme**
Centre interarmées de concepts, de doctrines et d'expérimentations (France)
- **CASIER Frédéric**
Belgian Red Cross (Fr)
- **CLOMÉN Dick**
Swedish Red Cross
- **CROMPTON Rebecca**
NATO Parliamentary Assembly
- **CROTTAZ Claude**
Ambassade de Suisse
- **CUENOUD Jonathan**
Swiss Ministry of Foreign Affairs
- **CULVER Michael**
SHAPE
- **CUSCHIERI Justine**
Permanent Representation of Malta to the EU
- **CUYCKENS Hanne**
University of Utrecht
- **DA SILVA MIGUEL Jose**
SHAPE
- **DARUT Axel**
Solicare/College of Europe
- **DAUDIN Pascal**
ICRC Geneva
- **DE BRUIN Mirjam**
Netherlands Red Cross
- **DE GREVE Laura**
Belgian Red Cross (Fl)
- **DE KOKER Cedric**
Universiteit Gent
- **DE VIDTS Baldwin**
Sanremo International Institute of IHL

- **DEBRULLE Claude**
Ligue belge des droits de l'Homme (Fr)
- **DECOCK Chris**
Belgian Ministry of Defence
- **DELFIN OLIVER**
Philippine Embassy / Mission to the EU
- **DI GIACOMO Pierre**
College of Europe
- **DOUCET Ghislaine**
ICRC Paris
- **DUCROT Charlene**
French Red Cross
- **DUPLAT Patrick**
International Rescue Committee
- **DURAN ILLAN Sara**
SHAPE
- **EDWARDS Christie**
American Red Cross
- **EL ALAMI EL FELLOUSSE Sidi Mustapha**
Mission of the Kingdom of Morocco to the EU
- **ELING Kim**
Cabinet of the Commissioner for Humanitarian Aid and Crisis Management
- **ELIZONDO Ernesto Emilio**
Embassy of Mexico to Belgium, Luxembourg and Mission to EU
- **EMIRALOEVA Oxana**
Embassy of Russia
- **EPRINCHARD Audrey**
ICRC Brussels
- **FERRARO Tristan**
ICRC Geneva
- **FÜLLEMANN Walter**
ICRC Brussels
- **GALLAGHER Peter**
National University of Ireland, Galway
- **GARCIA Luis**
SHAPE
- **GERHOLD Dominik**
SHAPE
- **GILLARD Emanuela-Chiara**
Chatham House

- **GOES Benjamin**
Chancellery of the Prime Minister (BE)
- **GOLDMAN Alexis**
SPF Affaires étrangères (BE)
- **GOLOBINEK Robert**
Ministry of Justice (Slovenia)
- **GRADITZKY Thomas**
Université Libre de Bruxelles
- **GREEN Laura**
SHAPE
- **GRÜNWARD Éva**
Ministry of Foreign Affairs and Trade of Hungary
- **HAMPSON Françoise**
University of Essex (UK)
- **HANSOUL Gilles**
ICRC Brussels
- **HASLWANTER Walter**
NATO
- **HENRY Etienne**
Université Libre de Bruxelles
- **HØJFELDT Helene**
Aarhus University / Asser Institute
- **HOURY Nadim**
Human Rights Watch
- **HUBERT Lea**
MSF
- **HUSY Stephan**
Swiss Government
- **JACHEC-NEALE Agnieszka**
University of Exeter (UK)
- **KARAMANE Viktorija**
Latvian Foreign Ministry
- **KELETZIS Symeon**
Permanent Representation of Greece to the EU
- **KESSLER Margot**
College of Europe
- **KIRIZLIEV Dmitry**
Russian Mission to the EU
- **KOCO Brunilda**
Mission of Albania to the EU

- **KOLANOWSKI Stéphane**
ICRC Brussels
- **KORMOSS Sylvie**
Federal Public Service Home Affairs (BE)
- **KOUTROULIS Vaios**
Université Libre de Bruxelles
- **KRÄHENMANN Sandra**
Geneva Academy of IHL and Human Rights
- **KRAUZE Maris**
Permanent Representation of Latvia to the EU
- **LANDAIS Claire**
French Ministry of Defence
- **LENSU Maria**
European Commission / ECHO
- **LESAFFRE Pauline**
University of Louvain
- **LETTINGA Doutje**
Amnesty International, the Netherlands
- **LEWIS Dustin**
Harvard Law School
- **LORIAUX Gérard**
Studiecentrum voor militair recht en oorlogsrecht
- **LUBELL Noam**
University of Essex (UK)
- **MANEA Andreea**
Nato
- **MARCHAND Christophe**
JusCogens Lawfirm
- **MARQUET David-Pierre**
ICRC Brussels
- **MARTIN Jean-Christophe**
Université Nice Sophia Antipolis
- **MATLOCK John Farrow**
Northern Law Center
- **MAZLIAH Michael**
ICRC London
- **MÉLOT Bénédicte**
Allen & Overy
- **MIKOS-SKUZA Elzbieta**
University of Warsaw and College of Europe

- **MILLET-DEVALLE Anne**
Université de Nice
- **MONAR Jörg**
College of Europe
- **MONTES TOSCANO Francisco de Borja**
SHAPE
- **MULLER Guillaume**
ICRC Brussels
- **MUMBALA ABELUNGU Junior**
Universiteit Gent
- **MUNOZ MOSQUERA Andres**
SHAPE
- **NAERT Frederik**
Council of the EU / Catholic University of Leuven
- **OEHMAN Linda**
NATO Parliamentary Assembly
- **OLLIVIER Eric**
NATO / Joint Force Command Brunssum
- **ORESHINA MARIA**
Russian Mission to the EU
- **PACIOS GARCIA Paula**
SHAPE
- **PAGE Delphine**
MSF
- **PAULUSSEN Christophe**
T.M.C. Asser Instituut
- **PEYKRISHVILI Olga**
ICRC Brussels
- **PEYS Marijke**
Belgian Red Cross (Fl)
- **PISANI Mikhail**
Permanent Representation of Malta to the EU
- **PLAMENAC Jelena**
International Criminal Court
- **POLICINSKI Ellen**
ICRC Geneva
- **POTHELET Elvina**
Geneva Academy
- **REISENFELD Alain**
GRIP

- **REMY Catheline**
Royal Higher Institute for Defence
- **REYPENS Pascale**
SPF Intérieur belge
- **RITSCHER Christian**
German Federal Court of Justice
- **RÜEGGER Manuela**
Kalshoven-Gieskes Forum on IHL
- **SAGON Hilde**
ICRC Brussels
- **SASSÒLI Marco**
University of Geneva
- **SHUEY Joshua**
SHAPE
- **SIAS Barbara**
Cabinet d'avocats Evrard-Lacomble
- **SILVA Margarida**
EEAS
- **SIMAKOVA Michaela**
NATO
- **SIMON Pierre**
Centre interarmées de concepts, de doctrines et d'expérimentations (France)
- **SJÖBERG Ann-Kristin**
Geneva Call
- **SONCZYK Barbara**
Coventry University London Campus
- **STEINMYLLER Eric**
Freelance, training & consulting
- **TAN Floris**
Leiden University
- **THIBAUT Annabelle**
Independent
- **THIELEN Emeline**
Université catholique de Louvain
- **TODD Amelia**
International Criminal Court
- **TOOGOOD Nick**
Home Office, UK Government
- **TOSATO Mattia**
UNOCHA

- **TROPINI Julien**
Université Libre de Bruxelles & Université Grenoble Alpes
- **van DEVENTER Fulco**
Human Security Collective
- **VAN GROOTENBRUEL Aude**
SPF Chancellerie du Premier Ministre (BE)
- **VAN HEGELSOM Gert-Jan**
European External Action Service
- **VAN HOVE Marin**
Universiteit Leiden
- **van STEENBERGHE Raphaël**
Université Catholique de Louvain / Fonds National de la Recherche Scientifique
- **VANDECASTEELE Jean-Pierre H.A.**
Belgian Armed Forces
- **VAZQUEZ Inma**
MSF
- **VERLINDEN Nele**
Leuven Centre for Global Governance Studies (KU Leuven)
- **WARNOTTE Pauline**
Belgian Ministry of Defence
- **WILLEMS Saskia**
College of Europe
- **WILMSHURST Elizabeth**
Chatham House
- **ZOH ONDO Gilles Fabrice**
Tribunal de Yaounde Ekounou

Terrorism, Counter-Terrorism and International Humanitarian Law

17th Bruges Colloquium – 20-21 October 2016

Simultaneous translation into French / English

Traduction simultanée en anglais/français

DAY 1: Thursday, 20th October 2016

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Prof. Dr. Dr. Jörg Monar**, Rector of the College of Europe

9:40 – 9:55 **Welcome address by Mr Walter Füllemann**, Head of Delegation, ICRC Brussels

9:55 – 10:15 **Keynote address by Christine Beerli**, Vice-President of the ICRC

Session One: SETTING THE SCENE

Première Session : Cadre général

Chairperson: **Paul Berman**, Legal Service of the Council of the EU

10:30 – 10:50 **Legal framework addressing terrorism and counter-terrorism**

Speaker: **Sandra Krähenmann**, Geneva Academy of IHL and Human Rights

10:50 – 11:10 **Interaction and overlap between counter-terrorism legislation and international humanitarian law**

Speaker: **Tristan Ferraro**, ICRC Legal Division

11:10 – 11:30 **European approach to counter-terrorism and international humanitarian law**

Speaker: **Gert-Jan van Hegelsom**, EEAS Legal Affairs Division

11:30 – 12:15 **Discussion**

12:15 – 14:00 **Sandwich lunch**

Session Two: LEGAL PARAMETERS OF THE FIGHT AGAINST TERRORISM

Deuxième Session : Paramètres légaux de la lutte contre le terrorisme

Chairperson: **Elzbieta Mikos-Skuza**, University of Warsaw and College of Europe

13:45 – 14:05 **Legal qualification of the fight against terrorism**

Speaker: **Marco Sassòli**, University of Geneva

14:05 – 14:25 **Terrorist groups as parties to an armed conflict**

Speaker: **Rogier Bartels**, International Criminal Court

14:25 – 14:45 **Limits of the geographical scope of application of IHL in combating terrorism**

Speaker: **Noam Lubell**, Essex University

14:45 – 15:15 **Discussion**

15:15 – 15:30 **Coffee break**

Session Three: SESSION THREE: THE USE OF FORCE AND OTHER MEASURES OF CONSTRAINT IN THE FIGHT AGAINST TERRORISM

Troisième Session : L'utilisation de la force et d'autres mesures de contrainte dans la lutte contre le terrorisme

Chairperson: **Andres Munoz Mosquera**, SHAPE Legal Office

15:30 – 15:50 **Legal challenges in fighting armed groups extra-territorially**

Speaker: **Claire Landais**, French Ministry of Defence

15:50 – 16:10 **The conduct of hostilities versus the law enforcement paradigm**

Speaker: **Françoise Hampson**, Essex University

16:10 – 16:30 **EU Counter-Terrorism sanctions and IHL before the EU Court of Justice**

Speaker: **Frederik Naert**, Legal Service of the Council of the EU and Catholic University of Leuven

16:30 – 17:00 **Discussion**

17:0 – 18:00 **PANEL DISCUSSION: STATE RESPONSES TO FOREIGN FIGHTERS**

Table ronde : Réponses des Etats face aux combattants étrangers

Moderator: **Elizabeth Wilmshurst**, Chatham House

Panellists:

Vaios Koutroulis, Free University of Brussels

Christophe Paulussen, T.M.C. Asser Institute

Christian Ritscher, German Office of the Federal Public Prosecutor General

19:30 – 22:30 **Dinner (*registration required*)**

DAY 2: Friday, 21st October 2016

Session Four: CRIMINALISATION OF HUMANITARIAN ACTION

Quatrième session : Criminalisation de l'action humanitaire

Chair person: **Ann-Kristin Sjöberg**, Geneva Call

9:00 – 9:20 **Impact of counter-terrorism measures on humanitarian action**

Speaker: **Patrick Duplat**, International Rescue Committee

9:20 – 9:40 **Humanitarian exemption in counter-terrorism law**

Speaker: **Dustin Lewis**, Harvard Law School

9:40 – 10:00 **Funding of humanitarian action in territories controlled by terrorist groups**

Speaker: **Kim Eling**, Cabinet of the Commissioner for Humanitarian Aid and Crisis Management

10:00 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: PREVENTING AND COUNTERING VIOLENT EXTREMISM**

Table ronde : Préventions et réponses à l'extrémisme violent

Moderator: **Pascal Daudin**, ICRC Policy Cell

Panellists:

Stephan Husy, Swiss Federal Department of Foreign Affairs

Dick Clomén, Swedish Red Cross

Fulco van Deventer, Human Security Collective

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**

Christine Beerli, Vice-President of the ICRC



College of Europe
Collège d'Europe



Natolin



CICR

SPEAKERS' BIOGRAPHIES CURRICULUM VITAE DES ORATEURS

Welcome addresses and keynote speech

Allocutions de bienvenue et discours introductif

Jörg Monar is Rector of the College of Europe (Bruges/Natolin, Warsaw campuses) since 1 September 2013. His former positions include Director of the Department of Political and Administrative Studies of the College of Europe (2008-2013), Professor of Contemporary European Studies and Co-Director of the Sussex European Institute, University of Sussex (Brighton, UK), EU Marie Curie Chair of Excellence and Director of the SECURINT project on EU internal security governance at the Robert Schuman University in Strasbourg (France), Professor of Politics and Director of the Centre for European Politics and Institutions at the University of Leicester (UK), and Director for the Institute for European Politics (IEP) in Bonn (Germany). In addition to his research and teaching functions Professor Monar also held consultancy assignments with the European Parliament, the European Commission, the Planning Staff of the German Ministry of Foreign Affairs, the Dutch Scientific Council for Government Policy (WRR, The Hague), the German Bundestag, the French Commissariat général au Plan (Paris) and the British House of Lords and House of Commons (London). He has also been elected a Fellow at the Royal Historical Society (London). Professor Monar holds a Ph.D. in Modern History (University of Munich, 1989) and in Political and Social Sciences (European University Institute, 1991). He is the author of over 200 articles and books on the political and institutional development of the EU, EU justice and home affairs and EU external relations. He is also a founding editor of the European Foreign Affairs Review.

Walter A. Füllemann has been with the International Committee of the Red Cross (ICRC) since 1989. His field missions include Nicaragua (1989-1990), Peru (1991), South Africa (1992-1994), as well as Croatia and Bosnia-Herzegovina (1994-1995). He served as Head of the ICRC delegation in Baku, Azerbaijan, from 1996 to 1997. Between 1997 and 1999, he worked as delegate and spokesperson for the ICRC delegation to the United Nations in New York. At ICRC Headquarters in Geneva, he headed the operational desk for the former Yugoslavia from

1995 to 1996. From 1997 to 2002 he worked as Deputy Head of the External Resources Division (donor relations and fundraising), and from 2002 to 2009 as ICRC's Deputy Director of Operations. During the period 2009-2014 he served as Permanent Observer of the ICRC to the United Nations in New York. Since October 2015, he has been the ICRC Head of Delegation to the EU, NATO and the Kingdom of Belgium in Brussels. He is fluent in English, French, Spanish and German, and holds a master's degree in International Relations from the University of Saint-Gallen, Switzerland.

Christine Beerli, Vice-President of the International Committee of the Red Cross (ICRC), was born in 1953. A member of a law firm in Biel, Ms Beerli began her political career on that city's municipal council, where she served from 1980 to 1983. From 1986 to 1991 she was a member of the legislative assembly of the Canton of Bern. In 1991 she was elected to the upper house of the Swiss parliament, where she remained until 2003, chairing the foreign affairs committee (1998-1999) and the committee for social security and health (2000-2001). Ms Beerli chaired the caucus of the Free Democratic Party in Switzerland's federal assembly from 1996 to 2003. She also served on committees dealing with security policy and economic and legal affairs. She retired from politics in 2003. Since 1st January 2006 she has headed Swissmedic, the Swiss supervisory authority for therapeutic products. She is former director of the School of Engineering and Information Technology at Bern University of Applied Sciences. In January 2008, Ms Beerli was appointed permanent Vice-President of the ICRC. As such she is a member of the ICRC Assembly – the institution's supreme governing body – as well as the Assembly Council and the Presidency, where she works closely with the President and deputises for him whenever necessary. This includes handling the ICRC's external relations, representing the ICRC on the international scene and, in close cooperation with the directorate general, handling the ICRC's humanitarian diplomacy. Her particular areas of focus include helping to ensure the cohesion, smooth running and development of governance mechanisms and internal control, as well as strengthening and developing relationships within the International Red Cross and Red Crescent Movement.

Session One: Setting the scene

Première Session : Cadre général

Paul Berman joined the Legal Service of the Council of the European Union in 2012 where is currently the Director for External Relations. He holds degrees from the Universities of Oxford and Geneva and is qualified as a barrister in England and Wales. Paul joined the legal cadre of the British Diplomatic Service in 1991. As well as working in the Foreign and Commonwealth Office in London, he has served as legal adviser in the International Humanitarian Law Advisory Service of the International Committee of the Red Cross in Geneva, as international law

adviser to the UK Attorney General, as Legal Counsellor at the UK Permanent Representation to the European Union in Brussels and as Director of the UK Cabinet Office European Law Division. He is a member of the Advisory Board of the Centre for European Law at King's College London and a Visiting Professor at the College of Europe in Bruges.

Sandra Krähenmann is a Research Fellow at the Geneva Academy of International Humanitarian Law and Human Rights where she has been working on various issues related to counter-terrorism and countering violent extremism, including in connection with armed conflict and so-called foreign fighters. She is the author of a Geneva Academy Briefing and several academic publications that analyse various issues raised by the phenomenon of so-called foreign fighters under international law, including under international humanitarian law and human rights law. She also worked with OHCHR on a project on countering violent extremism online with a particular focus on underlying concepts, freedom of expression, the right to privacy and gender aspects. She holds a PhD in International Law from the Graduate Institute of International and Development Studies in Geneva.

Tristan Ferraro is thematic legal adviser at the Legal Division of the ICRC (HQ Geneva). He is the in-house responsible for legal issues relating to multinational forces, occupation (head of the ICRC project on occupation), protection of civilians and the notion of armed conflict. He is also in charge of the files relating to humanitarian access as well as to IHL & terrorism. Before coming back to the Legal Division at the ICRC HQ in 2007, he has served with the ICRC some years in the field - in particular as legal coordinator - in Afghanistan, Pakistan and Israel/Palestinian occupied territory. Prior to joining the ICRC in 2002, Tristan Ferraro worked as senior lecturer at the University of Nice-Sophia Antipolis (France), teaching inter alia Public International Law, including International Humanitarian Law. He holds a Doctor of Laws from the University of Nice-Sophia Antipolis.

Gert-Jan van Hegelsom is the head of the legal affairs division of the European External Action Service. From March 2001 till January 2011, he was the representative of the Council Legal Service (External Relations Team) to the European Union Military Committee and dedicated Legal Adviser to the Director-General of the European Union Military Staff. He was transferred to the European External Action Service upon its establishment on 1 January 2011. G-J van Hegelsom was born at Eindhoven, Netherlands, on 12 August 1955. He followed primary and secondary schooling education in Belgium and Luxembourg. He read law at Leyden University (specialised in Public International Law) and graduated in 1980 (LLM equivalent). He performed his military service as a reserve officer in the Royal Netherlands Navy, lecturing on public international law issues at the Naval War College in Den Helder and developing operational training modules. He joined the Directorate of Legal Affairs of the Ministry of Defence

of the Kingdom of the Netherlands as a junior legal adviser in 1981. His latest assignment was Head of the Department of International and Legal Policy Affairs of that Directorate, a position that he held from 1994 till February 2001. Mr van Hegelsom is a graduate of the NATO Defence College (Course 68) and holds the Diploma (Public International Law) of the Hague Academy of International Law. He lectured at the University of Nice-Sophia Antipolis as a visiting Professor in 1995-1996. He has published on legal aspects of military operations.

Session Two: Legal parameters of the fight against terrorism

Deuxième Session : Paramètres légaux de la lutte contre le terrorisme

Elzbieta Mikos-Skuza is an associate professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw, director of NOHA (Network on Humanitarian Action) master studies and director of postgraduate studies on humanitarian aid at the same university. She served as Faculty's vice-dean in 2008 – 2012. She is also a visiting professor at the College of Europe in Natolin. Dr E. Mikos-Skuza for thirty years has been volunteering with the Polish Red Cross, mainly in the field of dissemination of IHL. In 2004 – 2012 she was a vice-president of the Polish Red Cross. She is also a member of the International Humanitarian Fact Finding Commission established under 1977 Protocol Additional I to the 1949 Geneva Conventions and of the San Remo International Institute of Humanitarian Law. She is the author and co-author of numerous publications on Public International Law and International Humanitarian Law, including the collection of IHL documents published in Polish language.

Marco Sassòli, a citizen of Switzerland and Italy, is professor of international law at the University of Geneva, Switzerland. From 2001-2003, he has been professor of international law at the Université du Québec à Montréal, Canada, where he remains associate professor. He is also commissioner and alternate member of the Executive Committee of the International Commission of Jurists (ICJ). Marco Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. He has worked from 1985-1997 for the International Committee of the Red Cross (ICRC), at the headquarters, inter alia as Deputy Head of its Legal Division, and in conflict areas, inter alia as Head of Delegation in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC delegation in Islamabad. He has also served as registrar at the Swiss Supreme Court, and from 2004-2013 as chair of the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules. From 2009-2016, he was director of the Department of international law and international organization at the University of Geneva. He has published on international humanitarian law, human rights law, international criminal law, the sources of international law and the responsibility of states and non-state actors.

Rogier Bartels is a Legal Officer in Chambers at the ICC and a research fellow at the Military Law Section of the Netherlands Defence Academy. He holds law degrees from Utrecht University and the University of Nottingham. He previously worked, e.g., as an associate legal officer at the ICTY, at the Dutch national prosecutor's office (where he worked on the first Dutch genocide case, as well as a war crime and terrorism case against LTTE members), and as a legal adviser on international humanitarian law at the Netherlands Red Cross. His PhD research at the University of Amsterdam concerns the legal regime applicable to armed conflicts involving non-state actors that take place across borders. He publishes mainly on IHL and international criminal law. His recent publications address the interplay between these two branches of public international law. Rogier regularly contributes to conferences and he lectures at universities or as part of (summer) courses and trainings, and blogs at www.armedgroups-internationallaw.org.

Noam Lubell is Professor of Law of Armed Conflict in the School of Law at the University of Essex, and was appointed Head of the School in January 2014. In previous years he has taught in a number of academic institutions including in Ireland, Israel, the UK and the US, and has worked for NGOs as International Law Advisor, and Director of a Prisoners & Detainees Project. He has also provided consultancies and training for international bodies such as Amnesty International, government bodies, and the BBC. He is the Rapporteur of the International Law Association's Committee on the Use of Force, and holds the Swiss Chair of International Humanitarian Law at the Geneva Academy. He has published on a variety of topics including on self-defence, new technologies, and the scope of the battlefield, and is the author of the book 'Extraterritorial Use of Force Against Non-state Actors' (Oxford University Press).

Session Three: The use of force and other measures of constraint in the fight against terrorism

Troisième Session : L'utilisation de la force et d'autres mesures de contrainte dans la lutte contre le terrorisme

Andres B. Munoz Mosquera served in the Spanish Armed Forces in two cavalry regiments as secretario de causas (case officer/paralegal) and tank commander until 1991. From 1991 to 1999 he worked at the Spanish CHOD as a permanent member of the Spanish inter-ministerial delegation before the International Telecommunications Union (ITU). Mr Munoz-Mosquera joined NATO in year 2000 as a civilian and he is the NATO Commander's Legal Advisor (ACO/SHAPE Legal Advisor, Director) since 2014. He deployed in Bosnia i Herzegovina and performed press information duties for General Rose. He was involved in the negotiation of anti-sniping agreements and exchange of prisoners and corpses in the area of Sarajevo. In years 1997 and 1998 he was assigned for the identification and collection of evidence of war crimes commit-

ted between 1991-1995. Mr Munoz Mosquera is author of several publications relating to international law and international relations. He was visiting professor of the UNICIT in Nicaragua. He is a member of the Society of the Military Law and Law of War, the Madrid Bar Association. He is also a CCB European Lawyer. He holds a *honoris causa* Master in International Relations from UNICIT and is an Honor Graduate for his academic achievement at the Keesler Technical Centre, USA. Mr Munoz Mosquera has been awarded several decorations, among them: the NATO meritorious medal, and the French Republic medal of the Ex-Yugoslavia. He is Caballero de la Orden de San Hermenegildo. Mr Munoz Mosquera is a Fletcher School of Law and Diplomacy (Tufts) graduate.

Claire Landais est diplômée de l'École supérieure des sciences économiques et commerciales (ESSEC - 1995), diplômée de l'Institut d'études politiques (IEP) de Paris (1997) et ancienne élève de l'École nationale d'administration (ENA), promotion Averroès (2000). En 2000, elle est nommée rapporteur à la 1^{ème} sous-section de la section du contentieux du Conseil d'Etat (contentieux santé, sécurité sociale, travail notamment) et ce jusqu'en 2004. Dans le même temps, elle exerce les fonctions de rapporteur à la section des travaux publics de 2003 à 2004. De 2004 à 2008, Claire Landais est maître de conférences à l'ENA. Elle exerce également les fonctions de co-responsable du centre de documentation du Conseil d'Etat (confection du recueil Lebon et gestion d'un service d'aide à la décision d'une quinzaine d'agents) jusqu'en 2006. Entre 2007 et 2008, elle occupe les fonctions de commissaire du gouvernement à la 10^{ème} sous-section (libertés publiques, outre-mer, contentieux fiscal). Elle est nommée directrice des affaires juridiques des ministères de l'éducation nationale et de l'enseignement supérieur et de la recherche en mai 2008. En octobre 2010, elle est nommée rapporteur public à la 1^{ère} sous-section (droit social, droit de l'urbanisme). Claire Landais, maître des requêtes au Conseil d'Etat, est nommée, en conseil des ministres du 29 août 2012, directrice des affaires juridiques au sein du secrétariat général pour l'administration (SGA) du ministère de la défense. En septembre 2015, elle a été nommée conseillère d'Etat. Elle est officier dans l'ordre national du mérite. Claire Landais est mère de deux enfants.

Françoise Hampson is an Emeritus Professor of Law at the University of Essex. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the United Kingdom (UK), United States, Canada and Ghana. She represented Oxfam and Save the Children Fund (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. From 1998 to 2007, she was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded Human Rights Lawyer of the

Year in 1998 jointly with her colleague from the Human Rights Centre, Professor Kevin Boyle. More recently, together with her colleague Professor Noam Lubell, she has submitted third party interventions to the European Court of Human Rights on the relationship between Law of Armed Conflicts and the European Convention on Human Rights (ECHR). She has taught, researched and published widely in the fields of armed conflict, International Humanitarian Law and on the ECHR.

Frederik Naert is a member of the Legal Service of the Council of the European Union, where he deals with EU external relations and acts as an agent for the Council in several cases before the EU Court of Justice. He is also an affiliated senior researcher at Leuven University. He was previously a legal advisor at the Belgian Ministry of Defence (2004-2007) and an assistant at Leuven University (1998-2004). Dr. Naert is the author of *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, 2010) and co-editor of *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue* (Martinus Nijhoff, 2004). He has inter alia published and lectured on counter-terrorism, international humanitarian and human rights law, peace operations and EU external relations law.

Panel discussion: State responses to foreign fighters

Table ronde : Réponses des Etats face aux combattants étrangers

Elizabeth Wilmshurst is Distinguished Fellow, International Law, at Chatham House (the Royal Institute of International Affairs). She was a legal adviser in the United Kingdom diplomatic service until 2003, and then a visiting professor at University College, London University in international criminal law. She is editor of *International Law and the Classification of Conflicts* (Oxford, 2012) and co-editor of *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, 2007); a co-author of *An Introduction to International Criminal Law and Procedure* (Cambridge, three editions). She has, with others, just concluded work on a publication on human rights in armed conflict (*Practitioners' Guide to Human Rights Law in Armed Conflict*, OUP 2016)

Vaios Koutroulis is Lecturer at the International Law Centre of the Université Libre de Bruxelles since 2013. He studied law at the University of Athens and the Université Libre de Bruxelles (ULB). He received his PhD in 2011 for a thesis on the relations between *jus contra bellum* and *jus in bello*, currently under publication from Bruylant editions (Brussels). Vaios teaches at the *Université Libre de Bruxelles*, the Catholic University of Lille and the Royal Belgian Military School. His courses include law of armed conflict, international criminal law, law of international responsibility, and public international law. He was also an adviser to the

Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. His publications focus mainly on *jus in bello* and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris).

Christophe Paulussen LL.M M.Phil is a senior researcher at the T.M.C. Asser Instituut – Centre for International and European Law and coordinator of its research strand ‘Human Dignity and Human Security in International and European Law’, coordinator of the inter-faculty research platform ‘International Humanitarian and Criminal Law Platform’ and research fellow at the International Centre for Counter-Terrorism – The Hague (ICCT). Dr Paulussen is also member of the Editorial Board of the journal *Security and Human Rights* and Managing Editor of the *Yearbook of International Humanitarian Law*, member of the Executive Board of the Royal Netherlands Society of International Law and jury member of the J.P.A. François Prize (Royal Netherlands Society of International Law). Before moving to The Hague in 2011, Christophe worked as an assistant professor at Tilburg University. Christophe’s areas of interest are international humanitarian law, international criminal law, in particular the law of the international criminal(ised) tribunals, and counter-terrorism & human rights, in particular the issue of foreign fighters. On the latter topic, he has advised the UN and the Council of Europe. He is also a contributor to and co-editor of the collected volume *Foreign Fighters under International Law and Beyond* (T.M.C. Asser Press/Springer Verlag, 2016) and co-author of the 2016 ICCT report *The Foreign Fighters Phenomenon in the EU – Profiles, Threats & Policies*.

Christian Ritscher has been working in the judicial branch since 1992. From 1992 until 1996, he worked as judge and prosecutor at the Local Court of Aschaffenburg/Bavaria. Between 1996 and 2000, he served as Prosecutor at the Office of the Federal Public Prosecutor General in Karlsruhe, Germany. During the Period 2000 and 2001, he worked as judge at the District Court in Munich. Since 2002, Christian Ritscher has been working at the office of the Federal Public Prosecutor General in different functions in the department of prosecution of Espionage and of International Crimes. From 2009 on he has been founding member of the War Crimes Unit S4 at the Office of the Federal Public Prosecutor General. Since 2014, he has served as Head of the War Crimes Unit which is currently consisting of 6 prosecutors. In this function, Mr Ritscher was team leader of the prosecutors in the trial at the Regional High Court of Stuttgart against Ignace M. and Straton M., leaders of the Rwandan-Congolese militia FDLR, which started in 2011 and ended in 2015. He is fluent in German and English and holds a law degree of the University of Passau.

Session Four: Criminalisation of humanitarian action

Quatrième session : Criminalisation de l'action humanitaire

Ann-Kristin 'Anki' Sjöberg, Programme Director in charge of Latin America and the Kurdish region. She first joined Geneva Call in 2004 and occupied a variety of positions within the organization. She received her Ph.D. in International Relations with a specialization in Political Science from the Graduate Institute of International and Development Studies in Geneva. Her work has focused on research and operational work with and on armed non-State actors. She has also worked on issues related to gender, armed conflict and security sector reform in Colombia, Nepal, South Sudan, and West Africa. In June 2011 she became Chair of the NGO Gender and Mine Action Programme.

Patrick Duplat is the Geneva Director for the International Rescue Committee (IRC), a humanitarian non-governmental organization. Prior to his current position, he worked for a number of humanitarian actors including Médecins Sans Frontières (MSF), Refugees International, as well the UN Office for the Coordination of Humanitarian Affairs (OCHA). He is the co-author of a "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," published in July 2013. Patrick is a graduate of McGill University and the London School of Economics and Political Science.

Dustin A. Lewis is a Senior Researcher at the Harvard Law School Program on International Law and Armed Conflict (PILAC). With a focus on public international law sources and methodologies, Mr. Lewis leads PILAC research projects on the theoretical underpinnings and application of international norms related to contemporary challenges concerning armed conflict. He explores legal—as well as policy, technical, and ethical—dimensions of such topics as autonomous (weapons) systems; wartime medical care for terrorists; extraterritorial use of lethal force; the goals of war and the end of war; and dilemmas at the intersection of counterterrorism frameworks and principled humanitarian action. Mr. Lewis oversees the Program's publications, research assistants, and online platforms. And he regularly briefs government officials, United Nations system actors, members of the media, and NGOs.

Kim Eling is the Deputy Head of Cabinet of Christos Stylianides, European Commissioner for Humanitarian Aid and Crisis Management. Mr Eling has previously been posted in the European Union Delegation to the United Nations in Geneva, where he dealt with humanitarian and refugee affairs, and within the European Commission he has worked on a range of external relations issues including conflict prevention and sanctions policy. Mr Eling is a graduate of Oxford University, the London School of Economics and the Ecole Nationale d'Administration.

Panel discussion: Preventing and countering violent extremism

Table ronde : Préventions et réponses à l'extrémisme violent

Pascal Daudin is currently Senior Policy Advisor at the International Committee of the Red Cross (ICRC). After a short career as free-lance journalist, he joined the ICRC in 1986 and has occupied various positions of line manager, protection expert, HR policies as well as humanitarian action specialist. During this term with the organisation he was deployed in major conflict situations such as Pakistan, Afghanistan, Lebanon, Iraq, Iran, Central Asia, Caucasus, Saudi Arabia and the Balkans. After leaving the ICRC in 2002, he worked as senior analyst and deputy-head of a counter terrorism unit attached to the Swiss Ministry of Defence. In 2007, he joined Care International as Global Director for safety and security affairs attached to International Secretariat of the organization. In 2011, he was requested by the ICRC to create a Policy Unit attached to the Multilateral diplomacy division. He holds a master in International Relations and has obtained various diplomas in Human Rights, Humanitarian Law as well on Public Administration. He has published various scientific articles on humanitarian policy area and security topics. Since 2010, he is associated to the Geneva Centre for Security Policy (GCSP).

Stephan Husy took office as Ambassador-at-Large for International Counter-Terrorism in March 2014. He has the primary responsibility of developing Switzerland's foreign policy on counter-terrorism (CT) and preventing violent extremism (PVE). His responsibilities include coordinating the Swiss Government's engagement to foster CT and PVE cooperation with foreign governments, international organizations, civil society organizations, research institutions and the private sector. Dr. Stephan Husy, a lawyer by training, has been working as a diplomat for the Swiss Federal Department of Foreign Affairs since 1987. In 1995, he transferred to the Swiss Agency for Development and Cooperation to lead efforts on cooperation with central European and CIS countries. From 2000, he was in charge of the Swiss Human Rights Policy before leading the Swiss Expert Pool on Civilian Peace-Building and the Section for Peace Policy within the Political Directorate. In 2007, Stephan Husy served as the Commissioner and Secretary General of the 30th International Conference of the Red Cross and Red Crescent which took place in Geneva in November 2007. From 2008 to 2013, he was the Director of the Geneva International Centre for Humanitarian Demining (GICHD).

Dick Clomén is Head of Policy and Strategic Advisor to the Secretary General at the Swedish Red Cross. He is an expert in International Humanitarian Law and International Human Rights Law and was for many years Senior Legal Advisor of the Swedish Red Cross. During his fifteen years with the Red Cross he has specialized in the field of protection – activities and programmes aiming at ensuring the rights of individuals under Human Rights Law, International Humanitarian Law and International Refugee Law – in particular relating to the consequences

of armed conflicts and violence. He has been coordinator of the Swedish Red Cross programme Assistance to Asylum Seekers and an expert in refugee law and migration. Mr. Clomé n has also been a member of the Swedish Government's International Humanitarian Law Commission (Totalförsvarets folkrättsråd) and an expert in other Governmental Councils and Commissions of Inquiry.

Fulco van Deventer studied psychology and business administration. The first stage of his professional life he dedicated on governmental reform in the Caribbean Island States and on post-war reconstruction in Lebanon. In a long-term assignment for Dutch funding agencies he worked with a large variety of civil society organizations in Vietnam, India, Colombia, Guatemala, West-Africa and the Middle-East in building their institutional capacities. For the last 15 years he has focused mainly on civil society actors in conflict areas and fragile states and their role in conflict prevention and countering violent extremism. In 2008 he joined Cordaid, an international development organization, to work on counter terrorism measures, security and civil society engagement. In order to take this work further, he co-founded Human Security Collective in 2013. He facilitates dialogue with international policy makers, national governments and civil society on regional/national CVE action planning and works on necessary conditions for NGOs to play an effective role in security and prevention of violent extremism. He is civil society constituency board member for Global Community Engagement and Reconciliation Fund (GCERF).