

International Institute of Humanitarian Law



International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

# After the Conflict Before the Peace: Legal, Military and Humanitarian Issues during the Transition

STUDI



**Politica**



**FrancoAngeli**



I lettori che desiderano informarsi sui libri e le riviste da noi pubblicati possono consultare il nostro sito Internet: [www.francoangeli.it](http://www.francoangeli.it) e iscriversi nella home page al servizio "Informatemi" per ricevere via e-mail le segnalazioni delle novità.

International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

# **After the Conflict Before the Peace: Legal, Military and Humanitarian Issues during the Transition**

45<sup>th</sup> Round Table on Current Issues  
of International Humanitarian Law  
(Sanremo, with live broadcasting online,  
7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> September 2022)

Editor Gabriella Venturini

Associated Editor Edoardo Gimigliano

 **FrancoAngeli**

*Gabriella Venturini* is Professor Emerita of International Law, University of Milan, Italy and Council Member, IIHL. She is an Associate Member of the *Institut de Droit International*, and past President of the Italian Branch of the International Law Association. She has taught and written extensively in the field of public international law and EU law and has collaborated with the Italian Ministry of Foreign Affairs and International Cooperation as a member of the Italian delegation at several international meetings, conferences and negotiations.

*Edoardo Gimigliano* holds a Master's Degree in International Politics and Diplomacy and is currently the Coordinator of the Special Projects Department of the International Institute of Humanitarian Law. His experience has developed in different areas including international legal research and international cooperation. Mr. Gimigliano's expertise mainly relates to the study of disarmament and peacebuilding processes, IHL and International Human Rights Law.

The International Institute of Humanitarian Law would like to thank Ms. Shirley Morren, who was involved in the painstaking task of proofreading the publication, and Ms. Alessia Ibba, who contributed to the realization of the work.

*Cover image:* U.S. Air Force photo by Senior Airman Brennen Lege.

Copyright © 2023 by International Institute of Humanitarian Law.

Stampa: Litogi, Via Idro 50, 20132 Milano.

## Table of Contents

<b>Preface</b> <i>Edoardo Greppi</i>	p.	9
<b>Opening session</b>		
<b>Welcome address</b> <i>Alberto Biancheri</i>	»	13
<b>Opening remarks</b> <i>Pasquale Ferrara</i>	»	15
<i>Pierpaolo Ribuffo</i>	»	20
<i>Edoardo Greppi</i>	»	21
<b>Message</b> <i>Gilles Carbonnier</i>	»	23
<b>I. Scene setter: military, humanitarian and legal challenges during transition from conflict to non-conflict</b>		
<b>The Kabul evacuation: first-hand chronicle of an operation driven by emergency</b> <i>Stefano Pontecorvo</i>	»	27
<b>Humanitarian challenges during transition from conflict to non-conflict</b> <i>Christian Cardon De Lichtbuer</i>	»	33
<b>Winning the post-conflict by seeking a better state of peace</b> <i>James Hill</i>	»	39

## **II. Historical analysis of conflict-peace transition from Solferino to Afghanistan**

<b>Europe between war and peace in 1945</b> <i>Keith Lowe</i>	p.	49
<b>Humanitarianism, law and the post-war era: the case of the International Committee of the Red Cross</b> <i>Daniel Palmieri</i>	»	54
<b>Two examples of evacuations organized and managed by the military</b> <i>Oreste Foppiani</i>	»	62
<b>Some lessons on accountability for war crimes and other international crimes: from Bosnia and Herzegovina to Ukraine</b> <i>Iva Vukušić</i>	»	68
<b>III. Humanitarian issues in transition: who is responsible and what for?</b>		
<b>Responsibilities of armed groups and <i>de facto</i> authorities controlling territory</b> <i>Sara Gamha</i>	»	83
<b><i>Jus post bellum</i> as a parameter for involving local constituencies in the transition processes</b> <i>Barbara Scolart</i>	»	90
<b>Who is responsible and what for? A humanitarian perspective on healthcare in the aftermath</b> <i>Kelisiana Thynne</i>	»	97
<b>Transition from hostilities to non-hostilities: legal and practical aspects</b> <i>Nadav Minkovsky</i>	»	103

#### **IV. Legal and military challenges in non-combatant evacuation operations (NEOs)**

<b>Legal challenges in non-combatant evacuation operations: the practitioner's perspective</b> <i>Chris Adair</i>	p.	107
<b>Legal and operational considerations for humanitarians engaging in evacuation of civilians during armed conflict</b> <i>Itay Epshtain</i>	»	113
<b>Evacuation of the Italian Embassy: situation report, Kabul 14-27 August 2021</b> <i>Ettore Martano</i>	»	120

#### **V. Legal status of evacuees from NEOs and legal responsibility for them**

<b>The international legal framework</b> <i>Gabriella Venturini</i>	»	129
<b>Evacuation of IDPs, asylum-seekers and refugees: the coordination role of UNHCR</b> <i>Aurvasi Patel</i>	»	138
<b>No woman left behind: legal and military challenges in NEOs</b> <i>Chan Kristy Tin Wing</i>	»	141
<b>Preparing for post-conflict: a disability-responsive perspective</b> <i>Victoria Riello</i>	»	149

#### **VI. Responsibility for refugees and IDPs in the transition**

<b>Discussion panel</b> <i>Claudio Delfabro, Mathilde De Riedmatten, Aurvasi Patel, Joanna Darmanin</i>	»	159
--	---	-----



**VII. Planning for post-conflict from  
the military and humanitarian perspectives:  
necessary interactions between actors**

<b>The dilemma of determining the dividing line between the war of arms and war of ideas: legal and humanitarian consequences</b> <i>Godard Busingye</i>	p.	187
<b>The legal and military aspects of the management of secessionist conflicts after the war and before the peace: with and without international peacekeeping</b> <i>Sossi Tatikyan</i>	»	194
<b>The Complexities of Planning</b> <i>Mark Dakers</i>	»	203

**VIII. Infrastructure and remnants of war**

<b>The rehabilitation and reconstruction of water infrastructure</b> <i>Mara Tignino</i>	»	211
<b>The impact of unexploded ordnance contamination on critical infrastructure and essential services</b> <i>Nibras Fakhir Matrood Al Tameemi</i>	»	216
<b>Geneva Call's humanitarian engagement on landmines and ERWs (before, during and after)</b> <i>Mariam Ismail</i>	»	222

**Concluding session**

<b>Closing remarks</b> <i>Edoardo Greppi</i>	»	231
<i>Eva Svoboda</i>	»	234
<b>Acronyms</b>	»	237
<b>Acknowledgements</b>	»	241

## Preface

The transition from armed conflict to post-conflict scenarios is permeated by challenges of different nature, including legal issues related to the implementation of transitional military justice, the reconstruction of a common identity and sense of unity in the local population (particularly in the case of NIACs), as well as other crucial issues such as the conduct of disarmament and reintegration programmes, the full restoration of the rule of law and public institutions, and the reconstruction of urban areas and economic environments.

When underestimated or voluntarily overlooked, such issues can seriously jeopardise the whole transition to the detriment of the most vulnerable categories of the civilian population. The multilayered process towards peace, intended as the absence of armed conflict, thus implies the establishment of long-term cooperation between military and non-military law enforcement bodies, public institutions, civil society organisations, private entities (e.g. financial and economic stakeholders), NGOs and humanitarian actors.

After two years of online editions, the 45<sup>th</sup> edition of the Sanremo Round Table on current issues of international humanitarian law was finally held in a hybrid format, from 7 to 9 September 2022, at Villa Ormond in Sanremo and broadcasted worldwide. The Round Table was able to convene more than 170 international experts and practitioners from the humanitarian, military, academic, and civil society sectors, gathered from all over the world.

The flagship event of the Sanremo Institute, jointly organised with the International Committee of the Red Cross, focused on “After the conflict before the peace: legal, military and humanitarian issues during the transition”, trying to shed light on the main military, humanitarian, and legal challenges occurring in the transition periods, from conflict to non-conflict scenarios. Starting from the historical analysis of the transition from conflict to non-conflict, the Round Table studied the legal cruxes of such transition, with regard to the issues related to the role and position of regular armed forces, armed non-state actors, humanitarian actors and civilian population.

These proceedings are meant to reaffirm once again the role of the Sanremo Institute in the promotion of the application and respect of international humanitarian law, with the essential purpose of continuing the mission to disseminate the fundamental principles and provisions of IHL.

This brief introduction takes me to warmly thank all those who contributed to the organisation of the Round Table and actively took part in its sessions. I am sure that this renowned international appointment, along with its proceedings, will continue to feed the universally known “humanitarian dialogue in the Spirit of Sanremo” and enhance the compliance with international humanitarian law and international human rights law provisions.

*Edoardo GREPPI*

President of the International Institute of Humanitarian Law

## **Opening session**



## Welcome address

*Alberto BIANCHERI*

Mayor of Sanremo

Sono particolarmente onorato di porgere, a nome dell'Amministrazione Comunale, il più caloroso benvenuto a tutte le personalità che prendono parte a questa Tavola Rotonda sui problemi attuali del diritto internazionale umanitario, organizzata congiuntamente dall'Istituto Internazionale di Diritto Umanitario di Sanremo e dal Comitato Internazionale della Croce Rossa di Ginevra, che giunge quest'anno alla 45<sup>a</sup> edizione.

Dopo una parentesi di due anni a causa della pandemia, in cui l'Istituto di Diritto Umanitario ha comunque continuato la sua opera di diffusione dei principi fondamentali di diritto umanitario e dei diritti umani, anche con l'organizzazione di due edizioni "online" della Tavola Rotonda, il ritorno al tradizionale appuntamento di settembre costituisce per la Città di Sanremo un ulteriore segno del ritorno verso la normalità.

In particolare, il fatto poi che quest'anno la Tavola Rotonda abbia luogo per la prima volta in oltre 50 anni di vita dell'Istituto, presso Villa Ormond, questa nostra bellissima e prestigiosa sede, è ulteriore motivo di grande vanto per la città e per tutti i Sanremesi.

Mi limito a qualche parola per sottolineare la grande soddisfazione e il sincero orgoglio che provo nel rappresentare la città in cui ha sede questo prestigioso Istituto – di cui il Comune di Sanremo è cofondatore – che dal 1970 lavora instancabilmente per promuovere in tutto il mondo il rispetto del diritto internazionale umanitario e dei diritti umani.

L'Istituto, grazie al suo prestigio internazionale, costituisce, non solo per la città di Sanremo ma per il Ponente Ligure e tutta la Regione, una risorsa fondamentale, le cui attività hanno un impatto incredibilmente rilevante sul territorio.

La Tavola Rotonda di Sanremo, organizzata ogni anno nel mese di settembre costituisce un consolidato ed apprezzato appuntamento internazionale che approfondisce le problematiche umanitarie di maggiore attualità.

Il tema affrontato quest'anno è particolarmente interessante. Il passaggio da una situazione di conflitto armato a una di pace è infatti un fenomeno complesso sotto numerosi aspetti. Dal disarmo dei combattenti al ripristino delle istituzioni, passando per la ricostruzione delle infrastrutture chiave, il processo di sviluppo di una pace duratura porta con sé importanti sfide che devono essere affrontate sotto diversi aspetti: in primis sul piano

giuridico, tanto militare quanto civile, oltre che sul piano sociale, culturale ed economico.

Ricordiamo tutti le drammatiche immagini delle operazioni di evacuazione dei civili dall'Afghanistan risalenti a un anno fa, durante le quali bambini, anziani, donne e uomini chiesero disperatamente alle truppe occidentali una via d'uscita dal paese nel timore di violente rappresaglie contro sé e i propri cari.

Sono convinto che la Tavola Rotonda di Sanremo sarà, ancora una volta, l'occasione per un costruttivo scambio di punti di vista e di esperienze tra tutte le parti interessate, grazie anche al contributo degli autorevoli esperti provenienti dalle diverse aree geografiche del mondo.

A nome di tutta la cittadinanza, vorrei esprimere il mio augurio di buon lavoro, con il più sincero auspicio che nel corso di questo breve soggiorno potrete trovare anche il tempo per scoprire, o riscoprire, le bellezze della nostra città.

Spero di rivedervi nuovamente a Sanremo, grazie a tutti.

## Opening remarks

*Pasquale FERRARA*

Ambassador, General Director for Political Affairs and International Security at the Italian Ministry of Foreign Affairs and International Cooperation, Italy

Excellencies, Ladies and Gentlemen.

I am pleased to attend this 45<sup>th</sup> Round Table organized by the Sanremo International Institute of Humanitarian Law in co-operation with the International Committee of the Red Cross. I wish to express my appreciation for the relevance of the topic identified for this edition. The “legal, military and humanitarian issues during the transition” is indeed one of the most challenging issues we are facing today in different areas of the world.

Before I deliver my speech, let me briefly read out a short poem, written by the famous Polish poetess Wisława Szymborska – “The End and the Beginning” – that impressively photographs the grim realities and difficulties of the post-war.

*After every war  
someone has to clean up.  
Things won't  
straighten themselves up, after all.  
Someone has to push the rubble  
to the side of the road,  
so the corpse-filled wagons  
can pass.  
Someone has to get mired  
in scum and ashes,  
sofa springs,  
splintered glass,  
and bloody rags.  
Someone has to drag in a girder  
to prop up a wall.  
Someone has to glaze a window,  
rehang a door.  
Photogenic it's not,  
and takes years.  
All the cameras have left  
for another war.*



*We'll need the bridges back,  
and new railway stations.  
Sleeves will go ragged  
from rolling them up.  
Someone, broom in hand,  
still recalls the way it was.  
Someone else listens  
and nods with unsevered head.  
But already there are those nearby  
starting to mill about  
who will find it dull.  
From out of the bushes  
sometimes someone still unearths  
rusted-out arguments  
and carries them to the garbage pile.  
Those who knew  
what was going on here  
must make way for  
those who know little.  
And less than little.  
And finally as little as nothing.  
In the grass that has overgrown  
causes and effects,  
someone must be stretched out  
blade of grass in his mouth  
gazing at the clouds.*

Transition from conflict to peace is a delicate phase that requires the utmost attention: civilians and persons “*hors de combat*” are exposed to enormous human suffering; and the risk of a humanitarian disaster is always around the corner.

Forced displaced people have to voluntarily and safely return to their homes; families have to reconnect with their relatives, often detained or disappeared; women and girls are exposed to different and specific forms of violence, including rape, harmful practices and other forms of gender-based and sexual violence; persons with disabilities and diseases can be subject to violence or abandon; electricity, clean water and other basic services have to be restored; unexploded landmines and other explosive hazards, including cluster munitions, have to be marked, removed and destroyed; educational and health facilities, as well as cultural and religious properties, have to be restored and protected from destruction.

In this post-combat environment, often characterized by fluid governance and insecurity, the protection of the civilian population from

the consequences of conflict is of paramount importance: the protection action should contribute to prevent further violations and to build an environment that reduces the vulnerability of people at risk and preserves their lives, security, physical and moral integrity and dignity. In this respect, I am aware that the situation in Afghanistan has triggered an international debate on the application of International Humanitarian Law to post-conflict situations and I am confident that this Round Table will provide participants and legal experts with a rich and valuable contribution.

Conflicts, the Covid-19 pandemic, climate change and food insecurity have exacerbated the dire humanitarian situation worldwide, challenging an effective global response. Against this background, coherence and complementarity among humanitarian, development and peacebuilding stakeholders are fundamental in post-conflict and fragile settings.

The protection of and the assistance to civilian population, with particular attention to those in most vulnerable situations, including women, girls, children and forced displaced people, are a priority for Italy.

We have spared no efforts in advocating for a full, safe and unhindered humanitarian access and for the safety of humanitarian workers, including health workers. We commend all the humanitarian organizations, including ICRC, for their tremendous effort in defending humanitarian space and in protecting civilians and essential services during and in the aftermath of conflicts. For this reason, we support the activities of the ICRC in a variety of contexts: last year, we allocated approximately 15 million euros to the Committee, of which more than 7 million for initiatives in Afghanistan, Bangladesh, Ethiopia, Iraq, Mali, Niger and Ukraine, and 6 million euros as a core budget. This year, while confirming our support to the core budget, we have already disbursed 4 million euros for the ICRC in Ukraine and we will continue to consider it a key partner in Italy's Cooperation in other humanitarian crises.

Following the shameful Russian aggression against Ukraine, we have been assisting Ukrainian people with financial and in kind support, without forgetting other humanitarian and protracted crises in Syria, Afghanistan, Yemen, the Horn of Africa and the Sahel, where extreme natural events and conflict are jeopardizing millions of lives.

We support an inclusive and "all victims approach" in the analysis of the needs of the affected people, with a particular attention to those with specific needs and vulnerabilities. Ever since the outbreak of the Afghan crisis last year, we have been continuously underlining the need for the *de facto* authorities to respect at least basic human rights, especially those of the most vulnerable groups. It is sorrowful that this category mainly includes women and girls who are deprived of their basic right to education

and are marginalized in economic and social life. For this reason, all our humanitarian initiatives have a focus on the particular needs of Afghan women and girls.

While providing humanitarian assistance to women and girls affected by the consequences of the conflict, we also believe that women are critical agents for conflict prevention and resolution, crisis management, long-term peacebuilding as well as national reconciliation and social cohesion.

For this reason, Italy has stepped up its efforts to mainstream the participation of women in peace processes in all its relevant policies and activities. We have fully supported Security Council Resolution 1325 on Women, Peace and Security since its adoption and we devote significant efforts and resources to promoting women's participation in peace and international mediation processes. This year, we have also contributed 2 million euro to the “Women’s Peace and Humanitarian Fund”, which plays a crucial part in accelerating support for women’s participation, leadership and empowerment in humanitarian contexts.

In December 2020, Italy adopted the Fourth National Action Plan on the subject, and the Italian Parliament allocated 3 million euros for its implementation in the 2020-2023 period.

Italy is also strongly engaged in consolidating the Mediterranean Women Mediators Network, which responds to the pressing need to foster women’s participation in mediation efforts and peacebuilding in the region.

Italy is committed, through a number of initiatives, such as the Safe Schools Declaration, to protecting the rights of children in conflict and post-conflict situations. On the occasion of the 33<sup>rd</sup> International Conference of the Red Cross and Red Crescent, in December 2019, we presented an open pledge to call on all actors to undertake all the appropriate and necessary actions to reduce the impact of wars on the life of children. Since then, we are sparing no efforts in promoting our pledge and in implementing it.

We are also committed to fighting impunity for serious human rights violations and abuses and we support transitional justice in post-conflict situations: recognition to victims, trust of individuals in public institutions, respect for human rights and promotion of the rule of law can all effectively contribute to reconciliation and the prevention of new violations.

Refugees are a priority that requires, in our view, an international approach: the dire humanitarian crises all over the world have forced millions to flee their homes calling for an effective and efficient humanitarian response. We welcome the efforts of the international governmental and non-governmental humanitarian organizations to face the emergencies and we are providing financial support within the scope of our

national migration strategy. The Migration Fund of the Ministry of Foreign Affairs, established in 2017, is an important instrument to support countries of origin and transit in providing assistance and basic services to refugees. Since its creation, it has financed projects for over 390 million euros in 20 third-party countries. In 2022 alone, the Fund will finance projects for over 80 million euros.

In the current climate of protracted and violent crises, de-mining action stands out as a specialized protection activity that cuts across all spheres of humanitarian action: Italy is strongly committed to the universalization and timely implementation of the Ottawa Convention on the Prohibition of Anti-Personnel Mines and of the Oslo Convention on Cluster Munitions. During the last meeting of the States Parties of the Ottawa Convention, last November, as well as in the recent cycle of intersessional meetings, we were able to introduce valuable elements to the debate: the need for individualized approaches and disaggregated analysis of data, the expertise acquired by our country in the field of assistance to victims and risk education, the fundamental link between humanitarian demining action and socio-economic development. This year we have allocated more than 8.5 million euros for humanitarian de-mining activities.

Recent global humanitarian crises have demonstrated how crucial solidarity and cooperation among all different stakeholders are. They also shed light on existing and new legal, military and humanitarian challenges. Today's Round Table is a timely initiative in this respect and I wish you constructive work and a fruitful debate.

*Pierpaolo RIBUFFO*

Rear Admiral, Maritime Commander – North, Italian Navy

Distinguished Authorities, Ladies and Gentlemen, I have the privilege to convey the regards of the Chief of Defence, Admiral Giuseppe Cavo Dragone.

I convey his regards, in particular, to the Mayor of Sanremo, Mr Biancheri, the President of the International Institute of Humanitarian Law, Prof. Greppi and the Vice-President of the International Committee of the Red Cross, Prof. Carbonnier.

Addressing the issues on the Round Table agenda is instrumental to confront ourselves with the complex challenges characterizing a conflict, spanning from the crisis insurgence to the particularly delicate post-conflict phase, in which we aim at granting durable peace and stability.

Nowadays, we are witnessing an increasing hybridization of such conflicts, in which ill-defined activities are matching traditional warfare operations, increasingly threatening the very roots of the civilian societies of the international community. Furthermore, the spectrum of such activities is expanding constantly, spanning from disinformation campaigns within the cognitive domain, to the manipulation of international law through lawfare or the use of non-state combatants, such as the Wagner Company.

Such activities are becoming more pervasive every day, as, for example, the exploitation of cyber and space domains, together with the cognitive environment.

Coping with these challenges will require a further expansion of the “whole of a State” approach and international cooperation concepts, pursuing synergy and synchronization of all the assets at hand.

In this scenario, the Armed Forces are ready and willing to play a key role, availing their experience and adapting their preparedness and mindset to cooperate with the relevant agencies, allies and partners, so as to defend our national interests and international peace and stability.

*Edoardo GREPPI*

President, IHL

Excellencies, Ladies and Gentlemen, let me welcome you both here in Sanremo and virtually to the 45<sup>th</sup> Round Table of the International Institute of Humanitarian Law presented, as ever, in co-operation with the ICRC. The subject of this year's Round Table is "After the conflict before the peace: legal military and humanitarian issues during the transition."

This is the first Round Table since 2019 where, at least some of us, have been able to gather here in Sanremo at Villa Ormond. I confess I was unsure at first whether the time was right for a return to at least some physical presence at the Round Table and so it is a great pleasure to welcome over 100 participants and speakers to the seat of the Institute here in Sanremo. I would like to thank all of you for coming and I look forward to speaking with you over the next three days. At this point I would like to thank both the Institute's staff and the team from the ICRC in Geneva who have been working since March to make this event happen.

The transition from conflict to peace has never been straightforward and as we have seen in recent years it has become increasingly complex. History has shown how the way conflicts begin, and equally importantly, end has undergone a great change as our historical panel will tell us later today. One of the key issues for IHL today is how conflicts end and how the needs of those affected by the conflict and its conclusion are protected. Gone are the days when a conflict is concluded with a formal, legally binding peace treaty. Even when there is such an agreement, negotiators may not necessarily obtain the results they hoped for. We only need to look 1300km or so to the east for an example. The 27<sup>th</sup> anniversary of the Dayton Accords that settled the conflict in the Former Yugoslavia will be celebrated in a few weeks even though the scars of conflict still remain. Thus, the legal and humanitarian issues of conflict cessation and transition to peace, sometimes referred to as *jus post bellum* are an increasing feature of military operations. At the same time the extent to which people, not involved in military operations, are affected by them has increased. As von Clausewitz put it "The nature of war is as constant as its character is subject to change" and the character of conflict has changed markedly since he wrote this. Conflict in the 21<sup>st</sup> century involves the civilian population and the effects upon them far greater than ever before.

International Humanitarian Law (IHL) determines the force that can be used by those involved in a conflict on the one hand and guarantees protection for those not involved on the other. The challenge then for IHL

is to continue that protection when the conflict has tapered off but peace has still not been restored. The easily identifiable change from conflict to peace that historically was the result of an armistice, truce or treaty is not part of the character of most modern conflicts. Therefore, this period of transition provides challenges of a legal, humanitarian and military nature which we will consider over the next few days. In the state of flux between conflict and peace, identifying the applicable law is only part of the problem. A key issue is identifying who is responsible for applying the law and providing humanitarian support to those in need of protection in circumstances where there may be a lack of authority. This is not to suggest that there is no law, there clearly is, but identifying those responsible for applying it may not be straightforward in ungoverned or contested environments.

The displacement of people as a result of conflict leads to the vulnerable needing more protection than ever before and we have seen over the last year or so large-scale displacement and population movement. In the past such large-scale movements have involved people moving themselves but last year we saw a mass evacuation of citizens from their own State which was a new phenomenon. How to care for the displaced, whether they be internally displaced persons (IDPs), refugees or evacuees, is one of the trickiest problems of the present time and ascertaining who is responsible for that care is a theme which will be examined tomorrow when we also consider the mechanics of evacuation from legal, military and humanitarian perspectives.

Finally, we will consider the aftermath of conflict, how best to prepare for it and how to protect civilians from its continued consequences.

I will conclude my introductory remarks now so that we can move onto the first panel. Thank you once again for attending this 45<sup>th</sup> Round Table whether you be here in Sanremo or online. Much effort has gone into the preparations of the event and I believe we will have a fruitful few days of discussion here at Villa Ormond and virtually.

## Message

*Gilles CARBONNIER*

Vice-President of the International Committee of the Red Cross  
(ICRC)

Excellencies, Ladies and Gentlemen,

It is a great pleasure to join you in opening this 45<sup>th</sup> “Sanremo Round Table on current issues of international humanitarian law.”

I believe that this year’s topic is particularly timely and relevant. Indeed, we see an increasing number of instances where the boundary between war and peace is increasingly blurred. This has a direct bearing on the ICRC, which is mandated by States to act on specific issues during the transition period between the end of active hostilities, the close of military operations and beyond. Throughout its history, the ICRC has often seen that the end of combat – whether permanent or temporary – does not correlate with an end to human suffering. Our delegates, working closely with people and communities affected by armed conflict, witness first-hand not only the horrific consequences of war, but also the long-term suffering they inflict on populations once guns fall silent.

Many of the same key concerns affect communities during and after armed conflict, be it in relation to weapon contamination, the search for missing loved ones, or the profound impact on mental health. Faced with these multiple challenges, affected people need hope and opportunities to move forward in their lives.

And while emergency response remains a top priority for the ICRC, we also work to reduce the vulnerability of populations in the transition period as well as their exposure to threats.

In contexts such as the Nagorno-Karabakh conflict the ICRC continues its humanitarian work. We visit detainees in Armenia and help them restore and maintain contact with their families. In Azerbaijan, we run programmes that increase awareness of the risks of mines and other weapon contamination.

In Afghanistan, ensuring access to healthcare is among the many challenges the population faces after a protracted conflict followed by a dramatic economic crisis. To prevent the collapse of the secondary health-care system, the ICRC launched the Hospital Resilience Project, supporting 33 hospitals reaching about 26 million people.

One thing is clear: in the transition phase, traditional or administrative distinctions between humanitarian and development work are irrelevant for



affected communities. What they need are sustainable solutions to rebuild their lives irrespective of whether external assistance is labelled as humanitarian or developmental.

In the aftermath of conflicts, partnership is of the essence. Domestic authorities, international and local humanitarian and development organisations and others must join hands to support communities. They must collectively help maintain the delivery of vital services, which are often very weak during transitions.

For example, in the aftermath of the battle for Marawi in the Philippines, ICRC worked hand-in-hand with the Philippine Red Cross, the Asian Development Bank and local authorities to provide access to clean water for thousands of displaced people living in temporary sites on the outskirts of the city.

More broadly, it is crucial to adapt humanitarian operations to address evolving needs during the different phases of a conflict. Throughout such phases, the ICRC works to ensure that the relevant provisions of international humanitarian law (IHL) are respected by all parties.

IHL indeed provides a comprehensive framework to prevent or alleviate human suffering not only during armed conflicts, but also before and in their aftermath. Today, I wish to convey three key messages:

- First, human suffering in the aftermath of a conflict is not something that should be tackled only when combat stops. Measures to prevent harm must be integrated in the planning phase of a military operation to anticipate and mitigate the potential longer-term humanitarian consequences.
- Second, all warring parties – state and non-state – have obligations toward the population under their control. For example, any displaced civilian has the right to return “in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.”
- Thirdly, compliance with IHL after the end of the hostilities is fundamental to ease the suffering of communities and can be conducive to achieving sustainable peace.

Over the next three days, our Sanremo Round Table offers a perfect opportunity to discuss such fundamental questions that both humanitarians and the military face when active hostilities end.

I have no doubt that we will greatly learn from each other, and advance our thinking on the legal, military, and humanitarian issues when it comes to preparing for and responding to the aftermath of armed conflict.

I wish you all a very productive Round Table.

**I. Scene setter: military, humanitarian  
and legal challenges during transition  
from conflict to non-conflict**



## **The Kabul evacuation: first-hand chronicle of an operation driven by emergency**

*Stefano PONTECORVO*

Ambassador, the last NATO Senior Civilian Representative in Afghanistan

*The following text is based on the transcript of the recorded session. It has not been revised by Ambassador Pontecorvo and does not commit him with regard to the views expressed. The title of the contribution has been drafted by the editorial team on the basis of the content of the presentation delivered during the conference.*

Authorities, Ladies and Gentlemen, thank you to the International Institute of Humanitarian Law, to Professor Greppi, to my old friend General Giorgio Battisti, and to the ICRC for inviting me to this very timely event, which falls shortly after the first anniversary of the fall of Kabul and of the evacuation operation of August 2021, when I was the last non-American leaving the airport.

I understand that this panel is a scene setter for the discussion on the various aspects related to a number of relevant issues we ourselves were confronted with, which will be technically analyzed during the Round Table. This brief intervention will, therefore, try to give you the insider's perspective – my perspective – on what happened in Kabul and particularly in the airport during the evacuation.

At that time, the situation was rather unique, both from a political and a military viewpoint. It is important to keep in mind that the NATO Operation Resolute Support had ended before July 4<sup>th</sup>, 2021, when the Allied Military Commander, General Scott Miller, left Kabul as the last man of the military contingent to relinquish his post in the theatre. From that moment on, no NATO military personnel was present anymore on Afghan soil. The American, British, Turkish and Azerbaijani soldiers active at the airport were indeed deployed under National Command, covered by the provisions of bilateral security arrangements and not by the NATO SOFA (Status of Forces Agreement).

It is relevant to stress that NATO had operated within the Kabul airport and with its managing authorities since 2003, ensuring the continuous service that allowed to qualify it as an international hub. During the evacuation, I was present together with my staff as a NATO civilian

presence to keep the airport running and to kick-off what we thought would have been a new phase of allied engagement in Afghanistan, in support of the Islamic Republic and its Armed Forces.

Unfortunately, the Taliban thought otherwise. The poor showing of the Afghan military was mainly due to the loss of confidence and disillusionment gradually rising in the army and the public as it became clear that the US and its Allies were really leaving. Moreover, the Afghan political leadership became inexistent, culminating in the flight of President Ghani on 15<sup>th</sup> August. These factors sealed the fate of the Islamic Republic of Afghanistan and ruled out any possibility of maintaining any relationships between NATO and Afghanistan. In fact, the collapse of the public institutions following President Ghani's departure definitely gave a decisive blow to the evacuation operation going on at the airport, be it only one of the many consequences of that fateful decision.

The various contingents that had been part of the Resolute Support Mission had already evacuated in an orderly fashion all the Afghan nationals who had cooperated with them and were, therefore, at risk in a Taliban-dominated Afghanistan. Already by the end of the first week of July, nearly all of them had left the country, except for those who had chosen to stay – which were not many. In August, we were in the process of evacuating other categories of Afghan citizens, local Embassy staff, political personalities, civil servants, journalists, prominent women, civil society activists, and generally, those who had served the State or had raised their voice against the Taliban in the previous years. These people were – at least these were the intentions – to be evacuated both through commercial and military flights and through land routes within two to three months, assisted by the Embassies or international organizations that they had worked for or interacted with. Originally, we had until October/November to complete the list of departures. The dramatic turn of events that took place from mid-July on, though, with the Taliban progressively taking control of more and more territory and then of the whole country, quickly changed the parameters and the conditions under which we had to operate.

The political assumption on which the evacuation process had been planned and scheduled in the various allied capitals was that of a more or less orderly transition of government between the Islamic Republic and an entity that would have emerged from the talks between the Taliban and Republic officials. Although the bill on negotiations had failed and the progressive deterioration of the political and military landscape in the country was clearly pointing towards the Taliban, no one imagined how the transition process would have actually turned out to be. All of us thought

that the same Taliban, who were in a position of absolute dominance and could have easily taken Kabul by force, at that point, would have preferred some sort of legitimation coming from an orderly transition of power to avoid the international isolation their regime had suffered the first time around. It would have been a “fig leaf”, but it would have made a difference in the perception of the international community, in particular of the countries and regions in which the Taliban were interested the most. Instead, they entered the Afghan capital without firing a single shot, but still as conquerors and not following a political settlement.

On the night of 14<sup>th</sup>, in Doha, an agreement between the Taliban political leadership and the Afghan Republic had been reached on a last-minute political settlement that would have benefitted the insurgency, Afghanistan as a whole, and what remained of American and international interests in the country, broken by Zalmay Khalilzad. However, for reasons known only to him or, at least, unknown to us, on the following day the Afghan President, who had agreed to the political deal to save the capital from chaos and further bloodshed, decided instead to suddenly leave the city, bringing about the definitive collapse of the Afghan state institutions.

The entire picture changed for the 5 million inhabitants of Kabul and for us.

The general assumption that with a transitional government, a functional airport and a continued international presence in Kabul, we would have had certain guarantees and two to three months to evacuate those left in danger, fell.

With a transitional government in place, we would have been able to keep the flights going on the civilian side of the airport, together with a consistent number of military flights. Meanwhile, the paperwork to speed up the departure of the evacuees would have continued in a more or less orderly fashion. A change in circumstances and the collapse of the Afghan institutions and the Taliban monopoly of power, led to the cancelation of all civilian flights for the simple reason that insurance premiums skyrocketed, to the closure of the Embassies and offices of all international organizations – although the UN returned shortly after – and to growing pressure to leave the country immediately by those who felt insecure under wholly Taliban regime. We had, therefore, to compress the operation from the two months initially foreseen to a couple of weeks, namely the end of August, the date on which US President Biden had decided that the last American soldier should have left Afghanistan. Moreover, all nations could now count solely on military aircraft and, finally, we were operating in a highly unstable environment, with a situation around the airport that was chaotic, insecure and unregulated.

This being said, there is no doubt that evacuation operations were initiated late. One of the criticisms I most often hear is that we made a tremendous mistake – as an international community – by putting the evacuation off for so long, and that the international community should have started much earlier. That may well be in the light of events. However, had we done that, starting departures in May or June when the military situation on the ground was still fairly balanced and, although there were signs of growing unrest, the Republic seemed able to survive, a mass departure of internationals and Afghan nationals associated with them would have been interpreted by the population as a no-confidence vote in the Republic, leading to its implosion and ultimate fall. As it turned out, this is exactly what happened. At that time though the conditions were different and the withdrawing Alliance, together with its Member States, could not have taken the political risk of hastening the downfall of the very Republic it had fought for and supported for 20 years.

Commonly, the operational aspects – as I have mentioned, the NATO military mission had ended at the beginning of July – no NEO which was well planned was, therefore, possible. The US, who had the majority of the evacuees, and the Brits sent a national contingent in what was dubbed as a one-nation operation called “US for Aid” between the middle of July and August, in order to ensure the security of the airport and their respective Embassies. It was soon clear though that the offices located in the green zone of the town would fatally close and the remaining skeleton operations would be shifted to the airport premises, which were more secure and easier to defend.

The Taliban were not the main concern, as they were careful not to upset the evacuation operation or threaten foreign soldiers who were on their last leg out. There were, however, a few renegade Taliban leaders, together with Al Qaeda and ISIS-K operatives – which we knew about – who did pose a threat, and on 26<sup>th</sup> August a terrorist attack that killed 180 people, among which 13 Marines, demonstrated it. Moreover, the Taliban simply did not have the manpower to secure Kabul and the airport premises. With a turn of events following the rapid advance of the Taliban and the need to speed up departures, other 20 countries or so also sent smaller contingents to help evacuate the Afghan nationals of their interest. We, therefore, ended up with around 20 uncoordinated national operations which were taking place at the same time under the security umbrella ensured by the American and British contingents, who were guarding the airport and facilitating the transit of their Afghan evacuees, without provisions being made for anybody else.

NATO, the EU and other international organizations with people to evacuate were in the same situation, actually with the disadvantage of not being States. In fact, we did not have a contingent of our own and had to rely on the cooperation of Member States and Allies – in particular, US and UK but also Germans, Italians and the French – to get our people through the gates and on the planes. My target, as NATO, was 1600 Afghan nationals, including in this number those who had worked with us and their immediate families. We were finally successful and managed to embark around 2100 of our Afghan colleagues with their families to safety, taking them to allied nations that volunteered to host them. So did the EU and the UN, in bigger or smaller numbers.

In this situation of lack of coordination mechanisms among the nations present in the early days – and I am referring to 14<sup>th</sup> and 15<sup>th</sup> August – the atmosphere on the airfield was quite tense for a lack of common understanding between the national contingents and the Americans on how to take the operation forward without stepping on each other's toes, namely on how to get the necessary number of Afghan nationals in each State's interest through the gates and onto the planes. Although I had no formal role to play, I stepped in to avoid the conditions becoming untenable and I started holding coordination meetings twice a day between the officers and military commanders of all national contingents present – not an easy exercise: everyone had to renounce something starting from the US and the UK, who played it transparently. In a matter of a couple of days, we sorted out various thorny issues, plane transit and plane schedules in particular, based on proposals that I and others put forward and that the Americans, who were bearing the military and logistical weight of the whole operation, were amenable to. In the end, and before the operation folded up, we managed to evacuate nearly 125.000 people, no mean feat. That, with real coordination on the ground, and not through a pre-ordinated mechanism or anything of this kind.

Looking back on those days and writing a book that I published in June, I have consolidated the conviction that however messy the operation and unsatisfactory the outcome, given the circumstances in Kabul, we managed to conduct a successful evacuation against all odds. For one, the situation unfolding on the ground overtook the decision-making processes back in our capitals and we in Kabul were left very much to our own devices. The conditions at the airport were extreme. Whoever knows Afghanistan is aware that in August Kabul can rise up to 35 degrees centigrade, which added to the discomfort of people who had already lost everything and were leaving behind family members, relatives, and the life they had built up based on what we had led them to believe. An airport that had been built



to host around 5000 people was regularly hosting three to four times that amount, with no facilities, makeshift toilets and shelters, military rations and insufficient medical personnel, which, however, performed admirably. Managing the psychological aspect of this transition was a challenge on its own, brilliantly confronted by a force that was itself in an extreme operational environment, had the same logistical issues and slept on the ground in the open between shifts. The emotional impact of the uninterrupted flow of shattered lives got to all of us and still haunts many of those in Kabul to this day.

The intensity in this framework was such that Covid-19, for example, which was at its peak in the second wave, was not even an issue we could consider. Getting our Afghan colleagues to safety was the only concern and avoiding security risks was what we had to concentrate on. Our conduct could not take into account a number of aspects tied to a more orthodox way of conducting an evacuation operation, with full respect for all the legal, humanitarian and social norms that should have been followed. In short, no one in Kabul was in a position to play by the book.

As an example, concluding my intervention, I will stress the fundamental issue. A high number of evacuees – I believe, at least, the majority – were going to foreign countries without any sort of passport. From a legal standpoint, nations embarked and welcomed, often in transit camps in the Gulf and Europe, undocumented Afghans that were known to specific Embassies and organizations but had to be given the correct legal papers to continue the journey. Identification was and still is, in a few remaining cases, carried out in a third country, on the basis of procedures most of today's audience is familiar with.

I hope I have given you a flavor of what the Kabul evacuation was like and I thank you all for your attention.

## **Humanitarian challenges during transition from conflict to non-conflict**

*Christian CARDON DE LICHTBUER*  
Chief Protection Officer, ICRC

President Greppi, thank you.

Ambassador Pontecorvo, Brigadier General Mendelson, Excellencies, Ladies and Gentlemen.

We are here to set the scene on the military, humanitarian and legal challenges during transition from conflict to non-conflict. I will focus on some of the humanitarian concerns.

To start with, let's address the fundamental question:

### **What is the aftermath?**

When we say: "After the conflict before the peace", we are talking about the transition period. This can be a period of indeterminate duration which constitutes the prolongation of an armed conflict in which armed confrontation has ended or at least entered a period of remission. Aftermath often involves a shift in control over people and places. Victorious forces might find themselves with a new, uncontested power over a substantial population (not necessarily the whole country, but rather territory or a city at the end of an engagement), often with real or perceived affinities to the adversary. They are often eager to assert (or re-assert) authority and restore law and order, sometimes imposing new forms of government or norms of behaviour. Even when there is no clear victor in battle – as in the case of a mutual ceasefire, for example – each side is likely to take advantage of the lull to further guarantee security and consolidate their authority. The environment is likely to be tense.

When it comes to the humans involved, their needs can be overlooked or indeed they can be specifically stigmatized, discriminated against and repressed. There might be long-term consequences (including physical, mental and economic etc consequences) for civilians in the aftermath.

## **The ICRC work during the aftermath**

As a neutral, impartial humanitarian organization whose humanitarian work is carried out particularly in time of armed conflicts or internal strife, the ICRC has the mandate to act to endeavour at all times to ensure the protection of and assistance to military and civilian victims in situations of conflicts but also protection from the direct results of conflict.

Our approach focuses on the needs of the people on the ground. The direct results of armed conflict could be immediate (such as detainees, wounded and sick), but could also last a long time (such as mental health, missing, criminal repression and many more).

The humanitarian challenges that exist in the transition period also occur during armed conflicts, but they have a particular significance and differences in the aftermath. Therefore, the ICRC's work is not over when the conflict is, and we are still conducting operations to alleviate the suffering of people who are particularly vulnerable.

## **Example of challenges where the ICRC works**

Not all humanitarian challenges will be present in each location and time, but I would like to highlight some specific issues that have been identified by our colleagues in the field and where the ICRC is particularly involved both in the aftermath of battle and the aftermath of conflict.

When we talk about challenges affecting particularly vulnerable people, we can think of:

- People who have been forcibly displaced, as witnessed in Syria where more than 13 million people have fled internally and cross-border and struggle to meet essential needs and are forced to return to unsafe areas.

In situations of protracted crisis, IDPs may have been displaced multiple times, there is a clear lack of durable solutions: people have no documentation and have their freedom limited due to encampment policies. These challenges are acute for children or adults associated with armed groups designated as terrorist groups or whose identities cannot be proven, and women who are even more vulnerable to sexual violence and exploitation.

- People deprived of their liberty: the ICRC offers its services at the end of conflicts to help with the repatriation or call for release and transfer, as it did in relation to Guantanamo where people have been

behind bars for so many years with little or no clarity as to what will happen to them.

- At the end of an engagement/operation, people may frequently be detained without considering procedural safeguards. At the end of active hostilities, detainees are not released as detaining authorities continue to not make assessments as to the individual security threat each person poses. In such instances, the ICRC can offer a lifeline to families of detained people to restore family links like it did after the hostilities in Nagorno-Karabakh in 2020.
- Addressing the fate of missing people is crucial for the families and their well-being. This has an impact on individuals and extends to the collective and will influence the social cohesion within communities. The ICRC is currently following 173,800 cases of missing people – which is an increase of 75% compared with the past five years. In line with the transformation program of the Central Tracing Agency, the ICRC has been integrating an early action/preparedness element to be able to better respond to the issue from day 1 so the issue is not only dealt with once we are in the transition period. The actions that are taken during the armed conflict by the parties (keeping records and proper documentation) have a significant importance in preventing people from going missing and in restoring the family link once the conflict is over.
- At the end of an engagement, morgues are overrun, the dead are not collected and are left to lie where they are. Bodies are not properly buried. Graves are not marked nor registered. Last February, the ICRC published a guide on “The Forensic Human Identification Process: An Integrated Approach” in which time-related challenges are raised. In this regard, the ICRC expertise was requested by Argentina in 2012 to help with the identification of human remains in relation to the Falklands/Malvinas Islands conflict of 1982.
- In addition to the challenges these people are facing, there may also be associated stigma, such as discrimination and exclusion which is particularly acute for survivors of sexual violence and children who were recruited in armed groups. We witnessed such struggle this year in Colombia and in Iraq. It is of the utmost importance to create dialogue among the communities to ensure that these people are reintegrated into society – as was done in Iraq with the Kurdistan Government that created the Yazidi survivor law after the international community supported the Yazidi community.
- A study by the United States Institute of Peace in 2018 has shown that in the post-battle there is an increased risk of sexual violence.

Conflict-related gender-based violence results in a vast range of physical and psychological consequences for women, such as injuries and disabilities, increased risk of HIV infection and risk of unwanted pregnancy resulting from sexual violence. Sexual violence in armed conflict and the aftermath is rarely an isolated issue. It is usually part of a pattern of violence linked to other violations, such as torture, killings, looting, child recruitment or destruction of property. When linked to situations of conflict, it can exacerbate existing sexual and gender-based violence, such as marital rape and child marriage, which we are seeing in Afghanistan today.

There are also challenges that affect the population as a whole such as

- The damage done to the natural environment. Urgent remedies might be needed after an armed conflict – for example, clearing and cleaning waterways, mending dams, dealing with flooding, supporting arid land replanting, or marking or clearing land which might be damaged through oil spills, poison or other contamination. This issue cannot be assessed in silos. For example, in Afghanistan, it has been reported that drought is disrupting water supplies, but in addition the internal displacement caused by the ongoing and recently ended conflicts are putting additional pressure and there are fears that millions of livestock will die as a result.
- Weapons contamination is a major issue in post-conflict situations. This challenge is directly related to the respect of IHL during the conflict. When used in populated areas, explosive weapons that have wide-area effects are very likely to have indiscriminate effects. They are a major cause of harm to civilians and of disruption of services essential for their survival and continue to significantly impact the life of civilians in the aftermath of conflict. The consequences of unremoved landmines are devastating and create a sense of constant fear and insecurity. The ICRC conduct landmines removal activities in addition to dialogue with parties to urge them to respect their obligations in that sense, together with awareness-raising campaigns with National Societies.
- Damaged infrastructure occurs during and after the hostilities, this happens through the direct damages sustained by the infrastructure itself but, just as importantly, through the loss of critical personnel and material resources. Damage to the infrastructure of essential services has a critical impact on the daily life of the population such as impeding their access to clean water and education. But it can also impact the safe return of displaced civilians, such as was witnessed

in the Philippines, where in Marawi, around 100,000 peoples displaced during the conflict in 2017 are still unable to return home because of the extent of the damage to infrastructure.

These are just some examples of the extent to which armed conflicts continue to have direct and indirect effects on the civilian population and the transition toward peace long after the end of the hostilities. All these issues and vulnerabilities cannot be assessed separately since they influence each other and, therefore, create multi-layer challenges.

These consequences exist in all types of conflicts. Some might be more acute in the situation of urban warfare. In that sense, the ICRC has developed a number of public reports and recommendations for urban warfare and protracted crises which demonstrate underlying vulnerabilities of urban areas and are relevant to aftermath issues. While other consequences might be exacerbated in rural areas where the population is hard to access.

At the end of an armed conflict, humanitarian activities are still vital in addressing the vulnerabilities which have been outlined above. Sadly, as outlined in our 2015 Challenges for IHL Report, access remains a significant challenge for many humanitarian organizations.

### **The need for preparedness and planning for the aftermath**

Parties to the conflict as well as humanitarian organizations conducting activities in armed conflict should think about the aftermath before and during the conflict, not just once it has ended. They must make sure the needs of the civilian population at the end of conflict are catered for.

Before the conflict this can involve:

- Preparing for the adequate treatment of detainees, dead and missing in accordance with IHL; for example, by establishing a National Information Bureau and have standard operating procedures for dealing with detainees or the dead.
- Responding to war remnant issues, parties should prepare for correct use and destruction of weapons after a conflict – have appropriately trained staff and standard operating procedures for marking weapons and clearing and destroying them.

During the conflict,

- The parties must abide by existing principles of IHL such as conduct of hostilities rules, protection of the civilian population, war crimes investigations and prosecutions, and the protection of the natural

environment, thus enabling the population to recover better after the conflict.

At the end of the conflict,

- Parties must uphold their IHL obligations that continue to apply, by for example, repatriating detainees and releasing internees, collecting and caring for wounded and sick, ensuring that processes are in place to find and identify the missing and dead (this is also applicable during armed conflict of course).
- Parties must also make sure they share all relevant information about weapons contamination and facilitate weapon remnants removal.
- Making an assessment after the conflict on the effect of the conflict on the civilian population and the necessary steps to mitigate or remedy the effects to ensure a better preparedness in the future.
- Measures such as special compensation to civilians affected by the conflict can enable them to start getting on with their lives and help in the post-conflict building process.

These are just a few steps that can be taken, and I look forward to the discussion over the next few days on these and other related matters.

## Winning the post-conflict by seeking a better state of peace

*James HILL*

Colonel, Staff Judge Advocate,  
U.S. Army Southern European Task Force, Africa

### Introduction

Thank you for that kind introduction, and I must say that it is an honor to speak to such a distinguished audience. I also want to specify that the opinions I am about to express are solely my own and do not necessarily reflect the views of the Department of the Army or the Department of Defense.

We're here today to talk about post-conflict transition. But this raises an important question, one that must be answered to determine whether there will even be post-conflict transition. How should we define victory in armed conflict? Should we define it in terms of achieving specific military objectives? "We've reached Phase Line Gold. It's over." "We've secured OBJ SENATORS. We're done." Or is victory broader, for example, should it be defined in terms of fostering a post-conflict environment that safeguards basic human rights and promotes the rule of law in a manner that Ambassador Ferrara described a few minutes ago?

President Joe Biden's 31<sup>st</sup> August 2021 remarks on ending the war in Afghanistan illustrate the importance of these questions. In explaining his reasoning for withdrawing US troops from Afghanistan he noted: "[w]e went to Afghanistan [...] [b]ecause we were attacked by Osama bin Laden and Al Qaeda on September 11<sup>th</sup>, 2001 [...] We delivered justice to bin Laden on May 2<sup>nd</sup>, 2011—over a decade ago. Al Qaeda was decimated."<sup>1</sup> In other words, the military objective had been accomplished, a view broadly held across the American political spectrum, and US troop presence could no longer be justified. Yet, on the other hand, it is hard to suggest that the US and its partners and allies were victorious – while we may have eliminated Osama bin Laden and decimated Al Qaeda, we spent

---

<sup>1</sup> Remarks by President Biden on the End of the War in Afghanistan, 31 Aug 2021, [www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/).



20 years in Afghanistan and still failed to win peace in post conflict. The result is that the repressive Taliban regime again reigns supreme.

A lesson from Afghanistan is that transition to post conflict will likely be unsuccessful unless at the outset victory is defined by a successful post-conflict transition. In other words, only by defining victory in terms of the better state of peace sought, rather than in purely military terms, can we fortify the national and international will to get the job done.

### **Defining victory in terms of the better state of peace sought**

The distinguished military theorist, Liddell Hart, warned of the dangers of defining victory in purely military terms.<sup>2</sup> Hart saw that a focus on battles and tactics left nations exhausted and at risk of collapse. For Hart, military victory, with its focus on geography and unit statistics, was very different from achieving national policy. Armies could be destroying enemy forces and be moving to new places on maps, but they weren't necessarily achieving national interests. In Hart's view, the resources spent on battles instead of national interests led to wasted lives and wasted national resources.

Instead of focusing only on battles, Hart's solution was to define victory as a better state of peace. As Hart put it "The object in war is a better state of peace [...] hence it is essential to conduct war with constant regard to the peace you desire."<sup>3</sup>

Now that's a very broad statement. So, Hart tried to make it concrete. He recommended against using terms like "objective." As in "our objective is to seize this town" in favor of clearer terms like "the object" for national political goals. "Our object is to keep all States in the Union." He also recommended using "the military aim" for the military goals in service of those national political goals.<sup>4</sup> "Our military aim is to seize Vicksburg." His point – to define victory as a better state of peace and to focus all efforts on achieving that peace.

Now that we have defined victory as a better state of peace, we can talk about the benefits we will get by using this broader definition.

---

<sup>2</sup> Hart, Liddell B. H, *Strategy* (2d ed. New York: Frederick A. Praeger) (1967), 353.

<sup>3</sup> *Ibid.*, 338.

<sup>4</sup> *Ibid.*, 338.

## **Defining victory at the outset shapes political will to achieve it**

### **A. The Theory**

First, defining victory as a better state of peace helps build and maintain political will. William C. Martell, another renowned military theorist, argued that if leaders do not define victory, they cannot explain to the public what the State plans to do and how much it will cost.<sup>5</sup> Political support according to Martell is impossible when leaders cannot answer such basic questions.

Now Martell was a little bit different from Hart. Remember, Hart wanted to define victory as “a better state of peace.” Martell sought to define victories by their result. You might have “tactical victories,” “strategic victories,” and “grand strategic victories.”<sup>6</sup> Levels of victory are determined by the changes they make to the overall political environment. In other words, a tactical victory would bring about limited change, a strategic victory comprehensive change and a grand strategic victory would bring about transformative changes.<sup>7</sup> To boil it down – you can define a victory by the amount of change it creates.

For Martell this was really important, because levels of victory drive commitment of resources<sup>8</sup>. If you want a grand strategic victory that brings about transformative change, you will have to commit an awful lot of resources. By contrast, if you merely seek for the adversary to change his policy, a mere tactical victory this will be achieved with far less resources.

Let’s pause and summarize what we have learned about victory. We need to put Hart and Martell’s views together. Remember: for Hart, victory is defined as a better state of peace. Martell by contrast asks us to consider the cost of that “better state of peace” in determining our objective. To seek support for a grand strategic victory example, as many Western leaders sought in Afghanistan, according to Martell, those leaders must explain how the resources necessary to achieve that peace are worth the cost.

Now let’s make this concrete by talking about some of my country’s experiences, and I’ll touch on Afghanistan.

---

<sup>5</sup> Martel, William C., *Victory in war: foundations of modern strategy*. Cambridge University Press, 2011, 4.

<sup>6</sup> *Ibid.*, 9.

<sup>7</sup> *Ibid.*, 8.

<sup>8</sup> *Ibid.*, 9-10.

## **B. Applied to Afghanistan**

If we apply our theory to Afghanistan, we see that the US political establishment expected a lot of change, which tells us that it would require a lot of resources. What was the better peace the US sought? The US sought permanent regime change in Afghanistan coupled with significant development within the country. We had (at many points) ambitious goals, which required a great deal of social and political change within Afghanistan. That starts to look like a grand strategic victory that William Martel spoke of, with what would require a commensurate level of resources. In fact, looking at the amount of change we sought, it was likely that a multi-generational commitment was required. But that was never sold to the American people – I would proffer that had our political class in 2001 informed the American people that achieving victory in Afghanistan would have been a multi-generational effort, there would have been very little political support to spend the resources we eventually spent in Afghanistan.

## **C. Applied to Korea, Germany, Italy, Japan, Panama, and the Philippines**

On the other hand, maybe not. In the past, when our political class made the case that generational commitment was required to sustain transformative change, the US manifested the will to do so. Examples include Korea, Germany, Italy, Japan, Panama, and the Philippines. Now that's not to say that each effort was always carried out in the right way.<sup>9</sup> Books have been written about each case, and we will discuss those details during this conference. But it's important to note three things about these efforts: 1) they were generally successful, 2) they were transformative, and 3) they required a long-term, generational commitment. Thus, if the American people had understood in 2001 that a generational commitment was required, we might have gained this first benefit of a better definition of victory – accurately counting the cost of a conflict so we can maintain the necessary will.

---

<sup>9</sup> Conrad Crane, Phase IV operations: Where wars are really won. *Military Review* (2005) 29.

## **Defining victory leads to capabilities and authorities to achieve it**

### **A. The Theory**

Now it is time to turn to another benefit of defining victory at the outset. Defining victory fosters the political will to develop the capabilities and authorities needed to win, especially in the post-conflict phase.

A good definition of victory at the outset of an operation shapes how we prepare our military and our nation. As Dr Thomas Galvin from the Army War College has argued, a nation should focus on “preparedness,” not just the very narrow concept of “military readiness.”<sup>10</sup> What does that mean? For Galvin, the “preparedness” concept would include military readiness, but also national will. That means you can’t just focus on designing a military force. You have to consider whether the nation is ready to achieve the type of victory sought, whether it be tactical, strategic, or grand strategic. The force becomes just one element in the nation’s effort.

In other words, if we fix our definition of victory, ensuring that it is focused on achieving a better peace, we are much more likely to manifest the will to get our planning and preparation right to ensure successful post-conflict transition, if required by the victory we seek. Such a definition of victory would affect how we designed our exercises and simulations, how we structured our force, and how we designed civilian and military organizations. It would affect how we won the peace, not just the war.

### **B. Boots on the ground required**

Our new definition of victory allows us to plan to provide the capabilities we need. As Admiral Ribuffo today touched upon, there is a need for synchronization across military and civilian agencies. And while we will certainly need the right mix of civilian and military capabilities, recall what former UN Secretary-General Dag Hammerskjold once said about peacekeeping “[it] is not a job for soldiers, but only a soldier can do it.”<sup>11</sup> The same can be said for post-conflict transition.

In the past, the US made the mistake of withdrawing military forces too soon after the conflict stage. That resulted in putting civilians “in the lead” but without the planning ability or security resources they needed. A good example is Haiti in 1994. In Haiti, agencies got together and prepared for post-conflict activity, but the post-conflict activity failed because the

---

<sup>10</sup> Tom Galvin, What is the Defense Enterprise?, in Defense Management Primer, 1st ed., ed. Tom Galvin (Carlisle Barracks, PA: U.S. Army War College Press, 2018), 16.

<sup>11</sup> Conrad Crane, Phase IV operations: Where wars are really won. Military Review (2005): 35.

civilians who remained after the military left did not have what they needed to finish the job.<sup>12</sup>

### **C. The US force structure not designed for post-conflict operations**

But still today the US does not have a force designed to handle post-conflict operations – that phase of operations that can help us achieve the better peace many sought in Afghanistan. While the US military has Security Force Assistance Brigades and Civil Affairs Units that can handle many post-conflict tasks, they are too small in number and not resourced to perform extensive post-conflict operations on their own.<sup>13</sup> Commentators have suggested a few options to fill the gap.

One such option is the US could form special peacekeeping units. But this is a difficult solution. If you bulk up these units too much, you have less combat power available for the early phases of large scale combat operations.<sup>14</sup>

A second option is to restructure civilian agencies. But this is also a challenge – as previously touched upon, civilian agencies don't generally have the ability to provide their own security, and you would have to create the kind of operational planning and mission execution culture that most civilian agencies don't have at scale.<sup>15</sup>

The best way forward in my view is to combine these solutions. With an appropriate statutory framework in place, military and civilian elements could be fused together and deployed when a crisis arises to ensure a smooth post-conflict transition. But this is a big task politically – by creating such units the US would be explicitly putting itself in the nation-building business, something our political class has lacked the political will to do, which takes us full circle back to where this discussion began.

### **D. Conclusion**

To sum up our discussion, by paraphrasing Hart, “grand strategy should [...] calculate [...] moral resources, to foster the people’s willing fighting spirit is often as important as more concerted forms of power.”<sup>16</sup> We will not succeed in conflict unless we define victory as the better state of peace we seek to achieve. And only by defining that better state of peace by a

---

<sup>12</sup> Ibid., 33.

<sup>13</sup> Max Boot, *America Still Needs Counterinsurgency*, *Foreign Affairs*, 2021, [www.foreignaffairs.com/articles/afghanistan/2021-06-02/america-still-needs-counterinsurgency](http://www.foreignaffairs.com/articles/afghanistan/2021-06-02/america-still-needs-counterinsurgency).

<sup>14</sup> Crane, 34.

<sup>15</sup> Ibid, 35.

<sup>16</sup> Hart, 322.

successful post-conflict transition, can we fortify national and international will to build the right capabilities, the capabilities we need to actually make the world a better place.



## **II. Historical analysis of conflict-peace transition from Solferino to Afghanistan**





## Europe between war and peace in 1945

*Keith LOWE*

Freelance Military Historian

The transition from war to peace is a huge subject, especially when discussing the Second World War and its aftermath. Since time is limited, I want to concentrate on two things. Firstly, I want to give you a snapshot of what Europe was like in May 1945 and in the following months (and, as we will see, unfortunately there are lots of parallels today). And secondly, I want to remind us all, at the start of the day, that this is not merely an academic exercise: we are talking about the lives of real people.

So, to begin, I want to tell you the story of a man I interviewed for a book I wrote about 10 years ago. His name is Andrzej Czerniajew, and his story will give you a good snapshot of the continent after the war.

At the end of the war, Andrzej was just 9 years old. He had been kidnapped from Warsaw with his mother, and made to work as a slave labourer on a farm near Dresden. Come the end of the war, he and his mother were set free, but they did not know where to go. They did not want to head back to Poland, because they were afraid of the Soviets. So instead, they took to the road and headed westwards. They had no idea where they were going – they were just going somewhere, anywhere, to get away from the life they had been forced into.

They walked for a month through the Sudetenland, trying to reach the American zone of Germany. Andrzej's description of that journey is a stream of striking images. The first thing he remembers is the sheer number of people on the roads. The Sudetenland seemed to be a complete ant's nest of Poles, Russians, Frenchmen, Italians – people of virtually every nationality, all heading in a thousand different directions.

Nobody had any food. If things had been tough when they were slave labourers, they were even tougher now that they were free. The only way they could get any food was by begging for it, or stealing – or foraging for food in the fields and the forests. The hunger he felt now, according to Andrzej was much worse than anything he'd felt during the war. He said he had a recurring dream about mashed potatoes with bacon on top – that was the highest of the high. He could not think of anything better – a heap of golden, steaming mashed potatoes! Instead, he was forced to live on whatever scraps he and his mother could find.

At every crossroads there were trees or lampposts covered in pieces of paper. People would write little messages to their friends and loved ones and pin them to the trees, in the desperate hope that by some coincidence a member of their family might come past this way, see the note, and discover which way they were heading.

There were also some more gruesome sights. On one occasion, he remembers coming across a German field hospital in the woods. According to Andrzej the smell of this place was absolutely disgusting – it was as if the people there were decaying alive. There were Germans there with wire cages supporting broken arms and legs. Some of them were bandaged from head to foot. They could not move. They were helpless, because the whole hospital crew had run away. They were just sitting here, waiting to die.

Another time, when they came out of the forest, they came across a wide valley that was completely filled with German soldiers who had been captured by the Allies. All these soldiers were sitting quietly, with a few bonfires dotted around – but they were being guarded by only a handful of Allied soldiers. Andrzej and his mother passed by as quickly and as quietly as they could.

Andrzej and his mother walked for about 70 or 80 miles before they finally reached a Displaced Person's camp run by the United Nations in Bavaria. And they knew they were safe at last.

What struck me when Andrzej was telling this story was the complete lack of any institutions he met along the way. The reason that he had to walk was because the train lines had been bombed to pieces. There was no transport. There was no food distribution. There were no shops or businesses. There was no government, no policemen, no doctors. According to Andrzej, he did not see anyone with any authority during that month. No Germans, nor Russians, nor Americans – it was a complete vacuum.

Only when they came across the United Nations was anyone at all willing to take responsibility for them. It was the UN that first gave them food, that registered them, that deloused them, that tried to find them somewhere to stay. Nobody else was either willing or capable of doing this.

Andrzej's story is just one of millions. According to UN estimates, there were about 8 million Displaced Persons, or DPs, in Germany at the beginning of 1945. On top of this there were about 4.8 million Germans who were displaced internally: these were people who had left the cities in order to escape the bombs and the fighting. Then there were about 4 million German people from other parts of Europe – the *Volksdeutsche*. (Before the war there were German communities all over Europe – in Czechoslovakia, Poland, Hungary etc. These people fled before the Russian advance, and

many more would come later.) If you add up all these numbers, it gives you a total of 17 million refugees of one sort or another just in Germany alone. Some estimates put the total number of people displaced in Europe as a whole, at one point or another during the war, at about 40 million.

All of these people experienced the same things that Andrzej did: hunger, homelessness, disorientation, trauma. This is what war always does. It destroys lives and families. It destroys homes and businesses. It destroys institutions, and entire economies. But worst of all, it displaces and traumatizes people.

The question we're discussing here is how to rebuild these lives, families, institutions, economies. In 1945 the Allies were reasonably good at this: after all, they already had 2 years of experience. When they first arrived in Italy in summer 1943, they made all kinds of mistakes. They massively underestimated the cost of setting up Allied Military Government (AMG). They massively underestimated the cost of supplying the population with food. They installed Mafia leaders in positions of power – so that many towns, especially in Sicily – were being run by gangsters. They forgot to prosecute the Fascists for their crimes.

But by the time they got to Berlin they had learned some of these lessons. They became more efficient at setting up government, and distributing food. They set up legal processes like the Nuremberg trials. Most importantly they set up a new international institution to deal with refugees and to distribute economic and humanitarian aid: it was called UNRRA – the United Nations Relief and Rehabilitation Administration.

UNRRA is a really interesting institution. It was set up in November 1943 – so although it was a United Nations organization, it actually existed before the United Nations was formally established. Its primary function was to deal with refugees – people like Andrzej – but it was also supposed to help with rebuilding and rehabilitating Europe. It is no good just keeping people alive: you also have to give them the opportunity to be rehabilitated, so that eventually they can look after themselves.

So UNRRA not only set up refugee camps, they also provided schools and medical centres. They donated new trains and locomotives to European countries. They provided new fishing boats, and new farming equipment... and so on. By the standards of the time, they had a huge budget. Each participating nation pledged to donate 1% of their national income to UNRRA: this meant that in 1945 they had a budget of around \$2 billion.

Now all of this sounds very impressive, but actually \$2 billion was a drop in the ocean compared to the trillions of dollars' worth of damage in Europe. And besides, money isn't everything. In 1945 there were all kinds of things that money could not solve.

For example, it was all very well bringing well-meaning Brits and Americans as part of UNRRA, but what Europe really needed was local people with local expertise. The problem with local people, however, was that so many of them were tainted by association with the old regime. In Italy, for example, you needed police chiefs and judges to organize the capture and trial of collaborators – but anyone with any experience was by definition a Fascist. Do you bring in new people with no experience at all? Do you bring in outsiders with no understanding of local laws and customs? Or do you just leave it to former Fascists to judge their fellow travelers? This was a problem that the Allies grappled with for years, and never found a satisfactory answer.

Then there was the problem of continuing violence. It is nice to think that the war came to a clean ending in 1945, but actually the violence continued everywhere: political violence, ethnic violence, revenge killings – and so on. The Greek Civil War, for example, started in 1944, and carried on until 1949. Just because the Allies and the Germans had finished killing one another, that did not mean the violence was over.

Weapons were everywhere. When Andrzej was living in a refugee camp in 1945 and 1946, he and his friends used to go into the woods and find guns and grenades and ammunition, just lying about. He told me one story about how he and a bunch of other 10-year-olds had great fun firing a Panzerfaust across the valley. If children can get hold of weapons so easily, then so can criminals and gangsters and people with vengeance on their mind.

The last thing I want to say is that there were political problems for people like Andrzej and his mother that were also unsolvable. Perhaps the biggest task facing the Allies in May 1945 was to send DPs like Andrzej back to their countries of origin. This was a massive logistical task, that was made infinitely more complicated by the fact that many of these DPs – Andrzej included – did not want to go.

Some – like Latvians, Lithuanians and Estonians – no longer had a country to go back to: it had been swallowed up by the Soviet Union. Others did not want to go back because they knew they would be persecuted by the Communists.

So what do you do? Do you force them to go back against their will? The British did this to Yugoslavs and Cossacks, with disastrous results. Or do you find them a new home? This is a better option, but it is not so easy, because the nations of the world were very choosy about which refugees they would accept – just as they still are today. Andrzej and his mother applied for citizenship in the USA, Canada, Australia and the UK – but

nobody wanted them. They remained in refugee camps until 1955 – ten years after the war was supposed to be over.

These are just a handful of the problems that plagued Europe in 1945. No doubt we will cover many more in the next hour or so. To me as a historian, they are fascinating concepts, but I just want to be mindful of the fact that, for individuals like Andrzej Czerniajew, they are much more than that. We are talking about people's lives here: the Second World War and its chaotic aftermath had a dramatic effect on the lives of millions of people across the continent, and indeed continues to have an effect on the lives of their children and grandchildren today.

## **Humanitarianism, law and the post-war era: the case of the International Committee of the Red Cross**

*Daniel PALMIERI*

Historical Research Officer, ICRC

For humanitarian organizations, such as the International Committee of the Red Cross (ICRC)<sup>1</sup>, wars rarely end with armistices or the signing of peace treaties. On the contrary, because of the heavy humanitarian consequences wars have on societies, their effects often last many years after the official end of the fighting, obliging such organizations to continue their work to relieve suffering. Similarly, in international humanitarian law, post-war periods are times of intense reflection to develop new legal norms and improve existing treaties.

This article aims to illustrate two fundamental post-war trends – the continuation, or even revival, of humanitarian activities and the development of humanitarian law – by drawing on examples from the history of the ICRC. To do so, it will focus on two post-war periods that were as important as the conflicts that gave rise to them: namely the post-First World War and the post-Second World War.

It will begin by highlighting the essential characteristic of the post-war periods. Those periods are grey areas, oscillating between a return to peace, with all the benefits that this implies, and the persistence of violence in various forms, with all the problems that this causes. This in-between situation means that the ICRC is operating on very shaky ground, both in the humanitarian and legal fields. Indeed, humanitarian activities carried out in post-war periods can be criticized because of the populations they target. As for the law, although it is generally considered necessary to reflect on how to drive it forward because the existing legal architecture proved deficient during the conflict, there is a high risk of opposition if the ambition is to go too fast and too far in this area. It is, therefore, necessary to anticipate the post-war period to prepare it well.

---

<sup>1</sup> The ICRC was founded on 17 February 1863. It is the oldest humanitarian organization still in operation.

## Post-war preparedness

At the ICRC, the post-war periods were thought about and prepared in advance. Thus, during the final weeks of the Great War, the ICRC began to reflect on its role in the post-war period, as it knew that the end of hostilities would certainly not coincide with the end of the need for humanitarian involvement. So, right after the armistice of November 11, 1918, the ICRC sent a circular to the National Red Cross Societies and to the former belligerents to make them aware of the humanitarian needs of the post-war period.<sup>2</sup> In this document, the ICRC emphasized the question of aid for the disabled and invalids of war, the fight against diseases – particularly tuberculosis – and the problem of assistance for war widows and orphans. And it declared itself ready to act in these different fields of activities.

This same process of anticipation began during the Second World War, with the difference that it started during the hostilities when the ICRC set up a “post-war commission”. The first meeting of this body took place in December 1944. Its objective was to deal with “problems arising from the aftermath of the war in countries devastated by it”.<sup>3</sup> For the ICRC, the essential issues were: the organization of aid to prisoners of war and civilian internees and their repatriation, the question of dispersed families, and all matters relating to pharmaceutical and medical assistance. Later, it added to this list the question of relieving the civilian population affected by the conflict and the destruction it caused.

## Helping the defeated

The second characteristic of the ICRC's humanitarian intervention is that it often focuses primarily on the defeated. Indeed, it is to the abandoned populations that the ICRC gives priority in its aid once the war is over. For example, in 1919-1921, the ICRC organized the repatriation of Russian prisoners of war from Germany and Austria-Hungary and prisoners of war from the Central Powers from Russia, two categories of prisoners not covered by the peace treaties. More than 500,000 of them were repatriated under the auspices of the ICRC. The institution was also

---

<sup>2</sup> *La mission du Comité international de la Croix-Rouge pendant et après la guerre, 174<sup>e</sup> circulaire, Genève, 27 novembre 1918, in Actes du Comité international de la Croix-Rouge pendant la guerre 1914-1918, Genève, 1918, p. 89-91.*

<sup>3</sup> ACICR, B G 86 PV, *Commission d'après-guerre, lundi 11 décembre 1944, p. 2.*



involved in helping White Russian civilian refugees and Armenian survivors, two other categories of defeated people. The ICRC also provided food aid to populations threatened by famine, particularly in Austria and in Germany.

After 1945, one of the ICRC's most important activities was to relieve civilians in Germany, regardless of the occupation zones. Germany was not initially included in the Marshall Plan, despite the catastrophic health and food situation of the country. The ICRC once again took care of refugees. A significant relief and protection operation was carried out for *Volkdeutsche*, ethnic German civilians expelled from Czechoslovakia, Poland, and Yugoslavia. The ICRC also assisted refugees of other nationalities – for instance from failed "States" such as Croatia or Slovakia – whose needs were not covered by specialized organizations such as the IRO (International Refugee Organization), precisely because they were considered "bad refugees."

Of course, such activities did not take place without provoking controversy. The ICRC's benevolence towards those considered enemies was sometimes poorly understood by public opinion, particularly those who had suffered directly from military occupations. The French and Belgians reproached the ICRC for its concern for the Austro-Germans after 1918, while its action in favour of the White Russians fleeing Bolshevism was badly perceived by Moscow. After 1945, the countries of the communist bloc were highly critical of the activities carried out for populations considered to be fascist, whether they were Croatian refugees in Italy or German ethnic groups expelled from Eastern European territories. After D-Day and in the years that followed, in France, the numerous activities of the ICRC on behalf of German prisoners of war sometimes provoked hostility.

### **The continuation of violence**

Moreover, the end of wars does not always mean the end of violence. The post-war period can give rise to new conflicts or other forms of belligerence that are a continuation of the world wars or are their direct consequences. Thus, immediately after the armistice of November 11, the ICRC was caught up in a cycle of violence in Eastern Europe and the Middle East. Among the conflicts in which the institution intervened were the Hungarian revolution of 1919, the Polish-Russian war (1919-1921), the civil war in Upper Silesia (1921), the Greco-Turkish war (1919-1922), and the civil war in Ireland (1922-1923). The outbreak of these armed conflicts led to an increased presence of the ICRC in the various war zones.

The same phenomenon can be seen in the immediate post-Second World War period, when the ICRC had to deal with the persistence of war violence in Greece, China and the Middle East; all three contexts being marked by civil wars. The institution was also confronted with a new form of conflict, the wars of decolonization, which first affected the Asian continent with the struggle for independence in Indonesia (1945-1949) and the war in Indochina (1946-1954).

These new humanitarian operations were often combined with the continuation of traditional activities such as visits to prisoners of war camps, which were often amplified by the cessation of hostilities. For example, one third of all camp visits related to the First World War took place after the armistice of November 1918.<sup>4</sup> This is even more remarkable during the Second World War. Indeed, it can be estimated that about 50% of the 11,000 camp visits were made after May 8, 1945, i.e., after the end of the war in Europe.<sup>5</sup> The camp inspections carried out during the first half of 1947 even exceeded those carried out during the whole of 1942,<sup>6</sup> a year that was nevertheless a peak in terms of the extension of the conflict.

So, the end of wars did not coincide with the end of humanitarian activities.

### **Advancing international humanitarian Law**

In terms of international humanitarian law, the post-war periods were also fruitful. For the ICRC, they coincided with the reflection on new legal issues and/or the drafting of new treaties. This reflection began just after the Franco-Prussian War of 1870-71. Although the conflict was not on the scale of the world wars, it had a powerful impact on the European continent. It was also the first war that took place under the auspices of the Geneva Convention of 1864<sup>7</sup> for each of the belligerents. At the end of the hostilities, the ICRC found itself in an uncomfortable position. On the one hand, it claimed to be the defender of the Geneva Convention, which, in its view, had indeed rendered immense services by limiting the number of

---

<sup>4</sup> 524 visits to prisoners of war camps were made between 1915 and 1919.

<sup>5</sup> See Report of the International Committee of the Red Cross on its activities during the Second World War (September 1, 1939 – June 30, 1947), Volume 1, General Activities, Geneva, May 1948, p. 83.

<sup>6</sup> 1,100 visits in the first half of 1947 versus 1,000 visits in 1942.

<sup>7</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva, 22 August 1864.

military victims left untreated. On the other, the ICRC could not deny that non-compliance with the Convention had given rise to numerous cases of abuse, mainly because the belligerent nations that had ratified it did not actually know what the Convention entailed. Therefore, in April 1872,<sup>8</sup> to remedy these shortcomings and provide effective sanction to the regulations of the Geneva Convention, the President of the ICRC, Gustave Moynier (1826-1910), proposed the creation of an international judicial institution composed partly of neutral arbitrators and partly of arbitrators chosen by the belligerents, an institution which had the power to rule on complaints concerning violations of the Geneva Convention. In case of guilt, this judicial institution would impose penalties in accordance with international criminal law. Obviously, this innovative idea was not well received by the major European powers, which were reluctant to sit on the bench of this tribunal. And the project did not proceed. The idea of such an international tribunal to examine the violations of the Geneva Convention would re-emerge after the First World War with the proposal to set up a commission of delegates from the European Red Cross-National Societies, which had remained neutral during the war.<sup>9</sup> Here, too, this project failed. It was not until the creation of the International Criminal Court in 1998 that the proposals made by Moynier more than a century earlier came to reality. Nevertheless, one of the lessons learned from the Franco-Prussian war was that war no longer only involves victors and vanquished but also potential perpetrators under the law.

### **New categories of victims**

The obsolescence of existing humanitarian law – the Geneva Conventions or the Hague Conventions - in the light of developments of total war – led the ICRC, in June 1918, before the end of hostilities, to undertake work to draw up a “prisoners of war code.”<sup>10</sup> The drafting of this code was entrusted to three members of the International Committee,

---

<sup>8</sup> Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève, par M. Gustave Moynier, in *Bulletin international des Sociétés de secours aux militaires blessés*, n° 11, avril 1872, p. 122-131.

<sup>9</sup> Résolution IV. Commission pour l’examen des violations de la Convention de Genève, in *Dixième Conférence internationale de la Croix-Rouge tenue à Genève du 30 mars au 7 avril 1921. Compte Rendu*, Genève, 1921, p. 213-214.

<sup>10</sup> Résolution XV. Code des prisonniers de guerre, déportés, évacués et réfugiés, in *Dixième Conférence... op. cit.*, p. 218-221.

including one woman, Renée-Marguerite Cramer (1887-1963). In doing so, the ICRC highlighted the extent to which the First World War had established a new category of victims, namely: military captives. A new code for prisoners of war was adopted in July 1929.<sup>11</sup> It should be remembered that this code was originally intended to include deportees, evacuees and refugees. Alongside military victims, the Great War also highlighted the sufferings of civilian victims, especially those in territories occupied by the enemy. After it was decided to differentiate between civilian and military victims, the ICRC again entrusted Renée-Marguerite Cramer with the task of drawing up a treaty on international humanitarian law to protect the specific category of civilians who had fallen victim to the enemy. Unfortunately, this draft treaty<sup>12</sup> could not be discussed at a diplomatic conference before the outbreak of the Second World War, with the tragic consequences that we know.

It should also be noted that in the immediate post-First World War period, the ICRC was as concerned with *jus ad bellum* as it was with *jus in bello*. Thus, at the first General Assembly of the League of Nations in November 1920, the ICRC proposed that the means of combat used during the world war, such as poison gas, aerial bombardment of undefended localities or the mass deportation of civilian populations, be prohibited and that these prohibitions be included as additional protocols to the Hague Conventions on the law and customs of war.<sup>13</sup> Only the first of these demands found real concretization with the adoption in June 1925 of the Geneva Protocol prohibiting asphyxiating, poisonous or similar gases and bacteriological weapons as means of warfare.<sup>14</sup> Here too, the issue of civilians in armed conflict was left unresolved.

However, the Second World War was a turning point in the way belligerence was understood, as there were more civilian casualties than military ones. Thus, the legal reflection interrupted by the conflict regained strength, as it was now a matter of trying to protect all civilian populations from the harmful effects of violence. With the deportations to the Nazi death camps or the massacres organized by their own authorities, the war

---

<sup>11</sup> Convention relative to the Treatment of Prisoners of War, signed at Geneva, 27 July 1929.

<sup>12</sup> *Résolution XXXIX. Projet de Convention concernant le sort des civils de nationalité ennemie*, in *Quinzième Conférence internationale de la Croix-Rouge tenue à Tokyo du 20 au 29 octobre 1934. Compte Rendu*, Tokyo, [1934], p. 262-268.

<sup>13</sup> *Limitation de la guerre. Lettre du Comité international de la Croix-Rouge à l'Assemblée de la Société des Nations*, in *Revue internationale de la Croix-Rouge*, n°24, 15 décembre 1920, p. 1348-1349.

<sup>14</sup> Protocol for the Prohibition of the Use in War of asphyxiating, poisonous or other Gases, and of bacteriological Methods of Warfare, signed at Geneva, 17 June 1925.

showed that it is not only the enemy who can be a threat to civilians. As we know, the discussion, which began in 1945, led to the adoption of a brand-new treaty on international humanitarian law, the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.<sup>15</sup> With this treaty, all populations likely to be confronted with armed conflict are now protected by international humanitarian law.

### **Humanitarian action vs. international humanitarian law**

The adoption of the Fourth Geneva Convention gives me the opportunity to make a general remark concerning the gap between humanitarian action and international humanitarian law. The entire history (and even the “prehistory” of the ICRC) shows that humanitarian action has always preceded reflection on the adoption of legal standards. Thus, long before 1949, the ICRC was already providing concrete assistance to civilian populations in war, even before they were legally protected by an international treaty. And if we go back to the origins of modern international humanitarian law, it was because Henry Dunant (1828-1910) was involved in helping wounded soldiers after the battle of Solferino (24 June 1859) that he came up with the idea of an international pact to protect this category of war victims,<sup>16</sup> an idea that was given concrete form in the Geneva Convention of 22 August 1864. This difference between humanitarian action and humanitarian law is explained by their very different approaches to problems. Humanitarian intervention aims to respond to the needs of as many people as possible, whereas humanitarian law is segmented, with problems being studied separately, sometimes according to the current situation of the conflict. For example, it is symptomatic that the adoption in 1868 of additional articles to extend the benefits of the Geneva Convention to naval military forces took place immediately after the Battle of Lissa (20 July 1866), one of the last major sea battles of the 19th century.<sup>17</sup>

---

<sup>15</sup> Convention (IV) relative to the Protection of civilian Persons in Time of War, signed at Geneva, 12 August 1949.

<sup>16</sup> This idea appeared in the founding book of the Red Cross, “A Memory of Solferino” (1862). This book was written by Henry Dunant.

<sup>17</sup> Additional Articles relating to the Condition of Wounded in War, signed at Geneva, 20 October 1868. These Additional Articles failed, however, to secure any ratifications and never entered into force.

## **Conclusion**

In conclusion, the post-war periods were times of intense activity for the ICRC, both in the field of legal rulemaking and in assistance directly to victims. However, the main problem and challenge of post-conflict situations, as they are now called, is their ever-increasing duration, which can sometimes reach several decades. Such a parameter commits humanitarian organizations to be involved for the long term, even the very long term. For instance, the ICRC has been present in Israel and the Occupied Territories almost permanently since 1967. The irony of this situation is that the war that gave rise to the ICRC's half-century-long involvement in the Middle East lasted... only six days!

## Two examples of evacuations organized and managed by the military

*Oreste FOPPIANI*

Visiting Fellow, European University Institute



Thank you for the kind introduction. Thank you very much for the invitation to the 45<sup>th</sup> Round Table of the International Institute of Humanitarian Law.

First, let me explain why I chose the two examples of evacuation in North Indochina in 1954 and South Vietnam in 1975 (the famous Operation FREQUENT WIND). Although they share common elements, one should compare the different kinds of evacuation in these specific case studies.

The cases of North Indochina and Vietnam were built respectively on the Geneva Talks and the Treaty (or Accords) in 1954 and then the Paris Conference in 1973.

### **The North Indochina Evacuation**

As one can see from the map, in this area, one can understand that on the eve of the Geneva Accords, the Dien Bien Phu fighting was extensive in the territory. It is essential to highlight that, despite being a military battle, the battle was more a psychological defeat than a strategic one for the French troops, and that the evacuation of the Franco-Vietnamese civilians from the North to the South took at least two years. This was because the French Forces between 1954 and 1956 had to evacuate the French nationals and the Catholic Vietnamese.

The difficulty of this evacuation was mainly caused by the difficulties in implementing an evacuation by land. That is why the US Navy, which supported the French in the operations, led the evacuation through the coastal routes and by sea (from one side of Northern Vietnam to the other, above the 17th parallel, as shown by the map). The military evacuation in the first year, from 1954 to 1955, had to decrease from around 170,000 troops and around 5,000 civilian personnel down to 75,000 troops, while on the eve of the supposed elections of July 1956, the French Expeditionary Force in the Far East had to go down to 40,000.

In those two years, the French military of this expeditionary corps oversaw the evacuation of civilians and the French military and the Vietnamese forces, which were siding with France during the Indochina War, which lasted 9-10 years between 1945-1946 and 1954.

What is also interesting to outline is that, during the evacuation procedures, the responsible military forces had to kick off a series of public works to improve the infrastructure and make the evacuation possible. The roads were not sufficiently resistant to the weight of heavy military trucks, or even light tanks, that had to move from one part of the North to the South and then further down to South Vietnam.

In the case of this evacuation, which was concluded with a parade in Saigon in 1956, it is moreover relevant to see how Americans played a leading role, if not for the technical support provided by the US Navy (that the French Government did not want to admit) for the funding: 80% of this Indochina War was financed by the US Government. Therefore, the Americans were already financially present during the Indochina War, and



it is certainly possible to identify the beginning of the entanglement of the Americans in Vietnam already in this period.

When reading the papers of the Geneva Accords of July 20-21, 1954, one can easily see that the forces involved in the war – the North Vietnamese forces, the French Union forces, the South Vietnamese forces and, also, the revolutionary government forces in the South – were four components that created a sort of confused framework, which gave the input for the American involvement already under President Dwight D. Eisenhower in the late 1950s. This means that it is not true that the military advisors, the thousands of military advisors present in 1963-1964 in Vietnam, were an original idea of President John F. Kennedy. Kennedy continued a policy already in place in the late 1950s–early 1960s.

One must state that the evacuation of troops, material, and civilians in Indochina was organized as best as possible. However, evacuating mobile infrastructure, such as Bailey bridges or power generators, resulted in protests amid the population.

After all, the retreat of French troops and material was made in a very hostile climate but without major clashes, mainly because the new authorities had already indoctrinated the local population. This hostility is often triggered by the welcome of refugees from the Tonkin Region, who often escape from the villages *en masse* to join the French Zone before being transferred to South Vietnam. Article 14 of the Geneva Accords allows civilians to choose freely the Zone where they want to live. Day by day, this exodus of civilians, mainly Catholic worshippers, became refugees needing help, housing and food before transferring them to the South. In Hanoi, before the evacuation, the French created a mixed Transport Bureau managed by the Expeditionary Corps. On its side, the South Vietnamese Government organized a central evacuation committee in charge of the census and reunification of the families who applied to go South, then redirected them to Haiphong, where a Transport Bureau had been opened. Between October 1954 and May 1955, these bodies kept working on the bridgehead of Haiphong. This voluntary migration was unexpected and created huge problems. The French military was obliged to evacuate them only by air or sea because the Vietminh prohibited the use of land routes.

Two refugee waves can be traced as the first one, which started on the short ceasefire in Hanoi, of about 330,000 persons. As the French Expeditionary Corps assured the transport by air of 117,000 Vietnamese versus 103,000 by sea, the U.S. Navy transferred another 110,000. Eventually, the insufficient logistic asset of the French required the help of the Americans and the British. However, the US Navy evacuated one-third

of the people concerned. The second wave started in October 1954 and went up to May 1955. The total number of Vietnamese refugees was between 800,000 and one million.

The evacuation of the Northern Vietnamese citizens to South Vietnam became a tragedy. The Vietminh used all means to retain the refugees via propaganda, roadblocks and the militarization of the coast. This behavior resulted in friction with the fleeing population and insurrections.

Following the evacuation from the Tonkin Region, the French Expeditionary Corps left North Vietnam for good. They prepared the settlement of the refugees and the military from North Vietnam to South Vietnam. However, this operation was increasingly complex because educated and Catholic Tonkin people were not well received by South Vietnamese, but primarily Buddhist and the poorly educated.

Because of this alarming situation, the Vietnamese authorities asked for French help. This arrived only thanks to the French economic aid program and the American funds dedicated to the anti-communist fight, which allowed the purchase of lands, houses and agricultural equipment. All these efforts by the French Expeditionary Corps improved the situation. They helped redistribute the masses of refugees who were living around Saigon at the very beginning of this evacuation. In 1955, thanks to Western investments, the North Vietnamese from the Tonkin Region were well integrated into South Vietnam and became the new bourgeoisie of South Vietnam, opening new businesses or rice farms.

### **The Vietnam Evacuation**

This takes our considerations to January 27, 1973, with the Paris Conference and Treaty, which started the planning, organization and implementation of the evacuation that later became famous in 1975 under the name of Operation FREQUENT WIND (April 29-30, 1975) also through the pictures we are used to seeing in history books, which are unfortunately often wrongly described. What we see in the famous picture of the helicopter freeing the personnel during those hectic days is an Air America helicopter on the top of an apartment building, which was the CIA station, or better, a CIA safe house, in Saigon and not the US Embassy. The US Embassy had different evacuation plans, and the almost 7,000 persons (American personnel, South Vietnamese citizens, and third-country nationals) evacuated in those few days mainly followed these latter ones. In the end, the evacuation was indeed made possible by these widespread flights of helicopters, which were able to save not all the Vietnamese

population asking to flee nor all the Americans present in Saigon but most of them. Notably, 450 personnel remained in the Embassy and were captured by the Vietnamese communist forces.

In late April 1975, North Vietnamese forces pushed into Saigon, rolling over South Vietnamese Army resistance, and pushing US forces out of Vietnam for good. For many, the evacuation that followed was the sign that the bitter conflict was finally ending.

The situation on land was dire. A declassified CIA situation report, written on April 28, 1975, detailed the grave state of the fighting:

“Some Marines are still reported holding on at the Long Binh logistics complex, but they are surrounded and do not stand much of a chance to hold out for long.”

Militarily speaking, Operation FREQUENT WIND was successful in most aspects. Nevertheless, those who participated in it would tell you they wished they could have done more.

The CIA’s covert fleet of transport planes and helicopters, known as “Air America,” was also involved in Operation FREQUENT WIND along with the US Marines Corps Aviation, the US Air Force, and some South Vietnamese aircraft. However, these multiple flights from Saigon to the ships moored in the Vietnamese territorial waters could not save all the people they would have liked to have saved.

On the offshore ships, such as the USS *Kirk*, a bigger problem was quickly developing: South Vietnamese aircraft was bringing a constant flow of refugees to ships. However, once the helicopters landed, the pilots often refused to take off again. Many helicopters were pushed off the ships into the ocean to clear decks.

Operation FREQUENT WIND is still considered the largest evacuation ever conducted by the US military. During the last week of April 1975, approximately 70,000 South Vietnamese were evacuated, most by boat. In one day, 81 helicopters carried more than 1,000 Americans and almost 6,000 Vietnamese to US naval units ready to pick up as many refugees from the water as possible.

Many refugees who reached US ships remember the sailors who took them in fondly. During the terrifying experience of fleeing their homes and a brutal war, most of the refugees were met with compassion and understanding by the crews, who knew that the families were risking their lives to avoid living under a communist regime, the refugees reported.

Operation FREQUENT WIND concluded more than two decades of US involvement in Vietnam. Although the evacuation of South Vietnam had ended, the USAF still had to transport thousands of tons of cargo to refugee camps and move refugees from the Philippines to Guam. By the middle of

May 1975, Guam harbored more than 50,000 Southeast Asian evacuees. The evacuation concluded with Operations NEW LIFE and NEW ARRIVALS, which brought approximately 130,000 refugees to the United States. The aerial evacuation of South Vietnam was the largest such operation in history, with more than 50,000 evacuees transported mainly on US Air Force aircraft.

## **Some lessons on accountability for war crimes and other international crimes: from Bosnia and Herzegovina to Ukraine**

*Iva VUKUŠIĆ*

Assistant Professor in International History at Utrecht University;  
Visiting Research Fellow at the Department of War Studies,  
King's College London

### **Introduction**

Since the full-scale invasion of Ukraine by the Russian Federation on 24<sup>th</sup> February 2022, it has become clear that war crimes, crimes against humanity and possibly even genocide are being perpetrated against the Ukrainian population. There have been attacks on Ukrainian territory since 2014 – when Crimea was annexed – but the February escalation brought the war closer to millions of people who are now suffering the consequences. Russian forces attacked across vast territories and many civilians have been arbitrarily detained, tortured, raped, maimed, and killed.<sup>1</sup>

The confirmed number of civilians who died, as reported by the Office of the High Commissioner for Human Rights, is over six thousand, including dozens of children. Importantly, “the OHCHR believes that the actual figures are considerably higher”, but communication difficulties and access to areas where intense fighting is ongoing create challenges for verifying information.<sup>2</sup> While not all civilian casualties are necessarily victims of war crimes, there have been numerous credible reports of them being targeted on the streets by Russian Forces, as in Bucha,<sup>3</sup> or attacked as

---

<sup>1</sup> Masha Gessen, “The Prosecution of Russian War Crimes in Ukraine”, *The New Yorker*, August 1, 2022, [www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine](http://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine).

<sup>2</sup> “Ukraine: Civilian Casualty Update 7 November 2022”, OHCHR, accessed December 8, 2022, [www.ohchr.org/en/news/2022/11/ukraine-civilian-casualty-update-7-november-2022](http://www.ohchr.org/en/news/2022/11/ukraine-civilian-casualty-update-7-november-2022).

<sup>3</sup> Lorenzo Tondo, “Dozens of Bucha Civilians Were Killed by Metal Darts from Russian Artillery,” *The Guardian*, April 24, 2022, sec. World news, [www.theguardian.com/world/2022/apr/24/dozens-bucha-civilians-killed-flechettes-metal-darts-russian-artillery](http://www.theguardian.com/world/2022/apr/24/dozens-bucha-civilians-killed-flechettes-metal-darts-russian-artillery).

they were sheltering, as in the case of the theatre in Mariupol.<sup>4</sup> These are merely the names of places that now everyone knows. There are many others that were destroyed.

This brazen February invasion and the civilian suffering it has produced has “re-vitalized the idea of international criminal justice” and reinvigorated global discussions about accountability which had become quieter since the atrocities of the war in Syria failed to result in a robust international response aimed at punishing perpetrators.<sup>5</sup> The present article will take stock of some of the developments concerning accountability in Ukraine, and will approach the subject from an international perspective – as seen from The Hague. Furthermore, it will investigate lessons that can be learned from Bosnia and Herzegovina (hereinafter BiH, or Bosnia) which itself had been devastated by a brutal war in the early 1990s, much like Ukraine today. The focus of this brief intervention will be individual criminal responsibility and will leave proceedings between, and against States, aside.

While there are obviously significant differences between Bosnia and Ukraine, there are also important similarities which make the former’s experiences instructive when it comes to accountability for crimes in the latter. The most important similarity, and one that makes the comparison between the two countries meaningful, is that both are overwhelmed by the extent of the violations that were perpetrated against civilians on their territory, or in the case of Ukraine, are *still* being perpetrated. Another important fact is that the judiciaries of both countries seem to have comparable weaknesses.

Ukrainian domestic judicial authorities have “documented 34,000 alleged cases of war crimes since Russia invaded the country in February” according to the country’s Prosecutor General Andriy Kostin (as of September 2022).<sup>6</sup> In December, that number exceeded 50,000.<sup>7</sup>

---

<sup>4</sup> “AP Evidence Points to 600 Dead in Mariupol Theater Airstrike,” AP NEWS, May 4, 2022, <https://apnews.com/article/Russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1>.

<sup>5</sup> Julia Geneuss and Florian Jeßberger, “Russian Aggression and the War in Ukraine: An Introduction,” *Journal of International Criminal Justice*, November 24, 2022, mqac055, <https://doi.org/10.1093/jicj/mqac055>.

<sup>6</sup> Madeline Halpert, “Ukraine Investigating Over 30,000 War Crimes Since Russian Invasion Began, Top Prosecutor Says”, *Forbes*, accessed December 8, 2022, [www.forbes.com/sites/madelinehalpert/2022/09/18/ukraine-investigating-over-30000-war-crimes-since-russian-invasion-began-top-prosecutor-says/](https://www.forbes.com/sites/madelinehalpert/2022/09/18/ukraine-investigating-over-30000-war-crimes-since-russian-invasion-began-top-prosecutor-says/).

<sup>7</sup> Tim Mak, “There Have Been 50,000 Alleged War Crimes in Ukraine. We Worked to Solve One”, *NPR*, December 10, 2022, sec. Investigations, [www.npr.org/2022/12/10/1138710652/russian-war-crimes-ukraine-investigation](https://www.npr.org/2022/12/10/1138710652/russian-war-crimes-ukraine-investigation).

Remarkably – given all the challenges the country is facing – domestic war crimes trials concerning recent violations have already started. These trials are taking place across Ukraine and garnering much media attention.<sup>8</sup> These proceedings build on years of activity that followed violent attacks of 2014 in the eastern provinces and in Crimea, when the capacity of Ukraine to respond to challenges in fighting impunity began to be built and strengthened, with significant assistance from friendly States, donors, and civil society organizations.<sup>9</sup> In this vital struggle for justice, there are crucial lessons to learn from previous experiences in obtaining a measure of satisfaction for victims in the aftermath of mass atrocity.

### **Snapshot of the current situation**

The full-scale invasion of Ukraine has produced an unprecedented mobilization and deployment of resources beyond the Ukrainian State authorities in an effort to document and preserve potential evidence for future prosecutions.<sup>10</sup> Numerous Ukrainian NGOs – many of them active since 2014 – were joined by non-governmental organizations from abroad. The Prosecutor of the International Criminal Court (ICC) has also become involved in investigating the recent attacks, just days after they began.<sup>11</sup> As the discussion that follows will show, other actors have been participating too, e.g., a number of European States, such as Poland, Germany, and Lithuania.

Ukrainian authorities, the Prosecutor of the ICC, domestic law enforcement from different States (many of them European neighbors to Ukraine) are all active, and Eurojust – the European Union’s Agency for Criminal Justice Cooperation (with its headquarters in The Hague) – has established a Joint Investigation Team trying to coordinate the different actors involved.<sup>12</sup> However, the number of those doing work in this space

---

<sup>8</sup> “Map of War Crimes Trials in Ukraine”, JusticeInfo.Net (blog), December 6, 2022, [www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html](http://www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html).

<sup>9</sup> “ICL and IHL Reform in Ukraine”, Global Rights Compliance, accessed December 8, 2022, <https://globalrightscpliance.com/project/positive-complementarity-in-ukraine/>.

<sup>10</sup> Geneuss and Jeßberger, “Russian Aggression and the War in Ukraine”, p. 1.

<sup>11</sup> “Ukraine”, International Criminal Court, accessed December 8, 2022, [www.icc-cpi.int/ukraine](http://www.icc-cpi.int/ukraine).

<sup>12</sup> “Eurojust and the War in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation”, accessed December 10, 2022, [www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine](http://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine).

presents massive issues of coordination and potential overlap, posing challenges for effective deployment of the considerable resources.<sup>13</sup>

Most of this documentation and investigation work concerns potential cases of war crimes, crimes against humanity, and genocide, i.e., the numerous instances where credible reports seem to suggest that civilians, prisoners of war and civilian infrastructure have been attacked unlawfully. Crucially, the actual launching of the full-scale invasion – the act of aggression – is separate from investigations done by Ukrainian authorities, the ICC and other States and will be treated in this article only briefly, as it remains beyond the scope of this piece.<sup>14</sup>

Ukraine has been conducting a number of proceedings since the start of the full-scale invasion.<sup>15</sup> It has the primary responsibility for events happening on its territory and, experts suggest, it is that State which will have to deal with “95 percent of what has happened.”<sup>16</sup> So far, all the accused prosecuted in the domestic system have been lower-level direct perpetrators and some have even been tried *in absentia* as the defendants are not in custody of Ukrainian authorities.<sup>17</sup>

The permanent Hague-based ICC has also been actively involved. Neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, but the former has accepted ICC jurisdiction for crimes committed on its territory from 21<sup>st</sup> November 2013 onwards. For the purpose of this discussion, details of the years-long preliminary examination are not crucial and will be left aside. However, one key development demands attention. On 1<sup>st</sup> March 2022, Lithuania referred the Ukraine situation to the ICC Prosecutor, as the Statute allows.<sup>18</sup> Since then, 42 States Parties joined Lithuania.<sup>19</sup> The bulk of the States are European, with New Zealand,

---

<sup>13</sup> “As Ukraine War Crimes Probes Grow in Scope, Fears about Bureaucratic Struggles Rise”, NBC News, accessed December 10, 2022, [www.nbcnews.com/news/world/coordination-struggles-hamper-ukraine-war-crimes-investigations-rcna27100](http://www.nbcnews.com/news/world/coordination-struggles-hamper-ukraine-war-crimes-investigations-rcna27100).

<sup>14</sup> The crime of aggression did not feature in the proceedings relating to Bosnia and Herzegovina, so it falls outside the scope of this article.

<sup>15</sup> Iryna Marchuk, “Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine”, *Journal of International Criminal Justice*, November 24, 2022, <https://doi.org/10.1093/jicj/mqac051>.

<sup>16</sup> “Maastricht Blog On Transitional Justice”, November 18, 2022, <https://transitionaljustice.net/ukraine-series-interview-with-wayne-jordash/>.

<sup>17</sup> “First Sentence for Sexual Violence in the Ukraine War”, *JusticeInfo.Net* (blog), November 10, 2022, [www.justiceinfo.net/en/108703-first-sentence-sexual-violence-ukraine-war.html](http://www.justiceinfo.net/en/108703-first-sentence-sexual-violence-ukraine-war.html).

<sup>18</sup> ICC, *Lithuania Referral of Ukraine Situation to the Prosecutor of the ICC*, March 1, 2022, [www.icc-cpi.int/sites/default/files/2022-04/1041.pdf](http://www.icc-cpi.int/sites/default/files/2022-04/1041.pdf).

<sup>19</sup> “Ukraine”.



Australia, Colombia, also supporting the move. However, there are notable absences from this referral, and some parts of the world have decided to stay silent on the matter.

Finally, in the context of the fight against impunity for crimes in Ukraine, there is the crime of aggression for which there is a “huge accountability gap.”<sup>20</sup> The International Criminal Court has no jurisdiction on aggression in this case, and critics point out that the jurisdictional regime for this crime has been made too restrictive.<sup>21</sup> There is currently no way to pursue judicial accountability for the crime of aggression internationally, and any domestic effort would face obstacles of immunities for high-level suspects and issues of (perceived or real) independence and legitimacy. There are lively debates and several options on the table for the possible establishment of a special tribunal for the crime of aggression, which would bypass the United Nations Security Council where Russia sits as a permanent member and would make sure any such effort is blocked.<sup>22</sup>

### **Some similarities and differences between BiH and Ukraine**

Due to the limitations of space, this short article cannot provide an in-depth analysis of the similarities and differences between the realities of the war, the victimization, the state of the legal system and the ways in which they resemble, and differ, between these two countries. Here, it is sufficient to note a few major characteristics, relevant in this context of justice and accountability, which make the experience of twenty plus years of investigations and trials concerning crimes in BiH relevant for Ukraine.

The similarities between what these two States and their populations experienced, and in the case of Ukraine, still experience on a daily basis, are the massive victimization of civilians. In both countries, cities were besieged, people taken away and shot, arbitrarily arrested, tortured, raped, beaten, and killed. The brutality that was unleashed in Bosnia and Herzegovina between 1992 and 1995 left over 100,000 people dead and missing. It also left the country with over 10,000 potential suspects to

---

<sup>20</sup> Geneuss and Jeßberger, “Russian Aggression and the War in Ukraine”, p. 2.

<sup>21</sup> “The Need to Reexamine the Crime of Aggression’s Jurisdictional Regime”, Just Security, April 4, 2022, [www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/](http://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/).

<sup>22</sup> Patrick Wintour, “Russian War Crimes Draft Resolution Being Circulated at the UN”, The Guardian, December 4, 2022, [www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy](http://www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy).

investigate for credible allegations of perpetrating genocide, crimes against humanity and war crimes.<sup>23</sup> If the war in Ukraine continues with similar brutality for a while longer, it is likely the number of suspects there will be comparable.

As already stated, both judicial systems were (and are) overwhelmed by the thousands of potential international crimes that need to be investigated. That is no wonder, and bigger and wealthier States would struggle too, as no country can easily investigate and prosecute thousands of cases, while respecting international fair trial standards. That work would require resources and the technical, specialized expertise few States, if any, can provide.

In 2017, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation (OSCE) issued an Opinion assessing the judiciary in Ukraine, and identified challenges, such as corruption.<sup>24</sup> Bosnia and Herzegovina has had similar problems, and even thirty years after the start of the war, challenges remain, as will be shown later. Significant resources have been invested in building the needed capacity in Ukraine, and that process continues.<sup>25</sup> One area of expertise where support has been provided is the investigation and prosecution of cases of sexual violence.<sup>26</sup>

As with similarities, only a few key differences can be highlighted here. The most important one is that, while Bosnia was also struggling under the weight of numerous crimes being committed on its territory, it – unlike Ukraine – had an international tribunal working on some of them. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, as the war in Bosnia was ongoing, by the UN Security Council. It was the first post-Cold War international tribunal and when it closed, in 2017, it left a complicated legacy behind.<sup>27</sup> It has, however,

---

<sup>23</sup> “Time Is Running out for War Crimes Prosecution in Bosnia,” *JusticeInfo.Net* (blog), November 14, 2022, [www.justiceinfo.net/en/108796-time-running-out-war-crimes-prosecution-bosnia.html](http://www.justiceinfo.net/en/108796-time-running-out-war-crimes-prosecution-bosnia.html).

<sup>24</sup> OSCE, Opinion on the Law of Ukraine on the Judiciary and the Status of Judges, 30 June 2017, Warsaw, [www.osce.org/files/f/documents/8/1/335406.pdf](http://www.osce.org/files/f/documents/8/1/335406.pdf), p. 4.

<sup>25</sup> “EU supports ICC investigation Russian war crimes in Ukraine,” European Commission - European Commission, accessed December 10, 2022, [https://ec.europa.eu/commission/presscorner/detail/es/ip\\_22\\_3543](https://ec.europa.eu/commission/presscorner/detail/es/ip_22_3543).

<sup>26</sup> Anthony Deutsch and Anna Voitenko, “Exclusive: International Legal Experts Assist Ukraine in Sexual Violence Investigation,” *Reuters*, December 12, 2022, sec. World, [www.reuters.com/world/international-legal-experts-assist-ukraine-sexual-violence-investigation-2022-12-11/](http://www.reuters.com/world/international-legal-experts-assist-ukraine-sexual-violence-investigation-2022-12-11/).

<sup>27</sup> Diane Orentlicher, *Some Kind of Justice: The ICTY’s Impact in Bosnia and Serbia* (New York: Oxford University Press, 2018, <https://doi.org/10.1093/oso/9780190882273.001.0001>).

indicted 161 individuals for genocide, war crimes and crimes against humanity, and convicted many of them for crimes in Bosnia and Herzegovina.<sup>28</sup> Among them were guards who beat and tortured civilians in camps in Western Bosnia, army officers in charge of constant sniper and mortar attacks on besieged Sarajevo, and executioners who massacred people after the fall of Srebrenica.

A UN *ad hoc* tribunal like the ICTY dealing with genocide, crimes against humanity and war crimes, is not a realistic option for Ukraine due to the Russian Security Council veto. A similar inability to form an *ad hoc* at the Security Council followed the mass violence in Syria, nearly a decade ago now. Therefore, alternative routes are currently being considered and passionately debated.

In 2005, the ICTY supported the establishment of an important body namely, the State Court of BiH and the Prosecutor's Office, both of which had dedicated staff specializing in international crimes. The State Court was supposed to deal with the bulk of the cases locally – those not taken by the ICTY – and those not falling within the jurisdiction of local courts across the country (that were meant to process the low-level perpetrators).<sup>29</sup> Importantly, the State Court and Prosecutor's Office had a period of hybridization lasting several years, when they received assistance in resources, training and support from donor States, and when international staff worked alongside Bosnian professionals. For the moment, as regular courts deal with the crimes in Ukraine, there is no such participation and formal inclusion of foreign staff to work as judges and prosecutors with their domestic counterparts.

Two final points need to be stressed regarding differences. One is access to potential suspects. Ukraine will, barring massive political changes in Russia and the collapse of the Putin regime, face serious issues in trying to arrest suspects. If, upon the commission of the crime(s), the suspects return to Russia, there is little opportunity for Ukraine (or any other State for that matter) to make arrests. As long as they stay in Russia, and Putin remains in power, it will be difficult to make any arrests.

The people who have committed the 50,000 alleged crimes are not going to stay in Ukraine, nor will they be tried in Russia or transferred for trial somewhere else. Bosnia and Herzegovina has, and continues to have,

---

<sup>28</sup> “Key Figures of the Cases | International Criminal Tribunal for the Former Yugoslavia,” accessed December 11, 2022, [www.icty.org/en/cases/key-figures-cases](http://www.icty.org/en/cases/key-figures-cases).

<sup>29</sup> Claire Garbett, “Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina Recent Development”, *Human Rights Law Review* 10, no. 3 (2010): 558-68.

problems with access to some suspects (many of whom remain in Serbia, and Croatia, for example), but overall, this problem was not as pronounced as it could be in Ukraine. After all, many of the suspects were Bosnian citizens who remained in Bosnia after the war.

Finally, technological advancements and, in particular, the sheer amount of social media content which may be of relevance as potential evidence is another major point of difference. The incredible volume of video material coming from the conflict and being shared online was already a massive challenge for those trying to collect and analyze evidence for future judicial proceedings for crimes in Syria.<sup>30</sup> Arguably, in Ukraine the massive amount of digital evidence will be greater than ever before and will present challenges that will require both strategic decision-making on priorities and the assistance of artificial intelligence.<sup>31</sup>

### **Experiences from BiH and lessons to learn**

Designing policies and approaches for transitional justice in post-war settings is anything but simple.<sup>32</sup> The needs of victims and the broader society are immense, and there is a competition for resources: to house returning refugees, fix infrastructure, and provide healthcare, to name only a few. Fighting impunity is just one of the competing goals in a country that is, or has been, engulfed by violence and brutal attacks on civilians. Bosnia and Herzegovina has been somewhat of a laboratory for post-war justice and after thirty years, it has much to teach us.

As it was already stressed, a key aspect of war crimes prosecution in both countries is the issue of overwhelming numbers of cases to deal with. That requires careful planning, assessment of available resources, coordination between different actors (state authorities and civil society, domestic and international) and a plan based on on-the-ground needs. For successful prosecutions going forward, what is needed is a realistic strategy. Bosnia's experience is instructive here, as it struggled for years in

---

<sup>30</sup> "40 Years' Worth of Footage from Syria Alone: Global Documentation Requires Commensurate Global Justice", *Opinio Juris* (blog), May 26, 2021, <http://opiniojuris.org/2021/05/26/40-years-worth-of-footage-from-syria-alone-global-documentation-requires-commensurate-global-justice/>.

<sup>31</sup> Alexa Koenig, "From 'Capture to Courtroom': Collaboration and the Digital Documentation of International Crimes in Ukraine", *Journal of International Criminal Justice*, November 8, 2022, <https://doi.org/10.1093/jicj/mqac046>.

<sup>32</sup> Hakeem O. Yusuf and Hugo van der Merwe, eds., *Theories, Mechanisms and Debates* (London: Routledge, 2021, <https://doi.org/10.4324/9781315760568>).

drafting and adopting two different war crimes strategies. Both, in many ways, remain merely aspirational as the country is failing to reach its stated goals which were, it now seems clear, unrealistic to begin with.<sup>33</sup>

These overwhelming numbers of cases to investigate and make decisions about, i.e., if they are solid enough to indict and take to court, force any authority to make difficult choices about which cases to prioritize and which to set aside. That case selection requires a clear set of criteria to guide prosecutors in making these decisions and defining these criteria will be complicated for Ukraine as well, as there will be clashing priorities and difficult choices to make. What is vital is that the criteria is made in consultation with victim representatives and that it attempts to secure their buy-in.

Of course, not all victims will have the same opinions or the same priorities, and many will be left disappointed as their own victimization will not be prioritized for investigation and prosecution. However, this step is key and there is no way to avoid it: create a set of clear criteria for case selection, ask victim communities about feedback and input, and communicate clearly about choices that need to be made in achieving at least a measure of justice for the crimes that were perpetrated. Without getting into the details of how the strategy was drafted and how criteria were defined in Bosnia, those working on Ukraine now would benefit from familiarizing themselves with that process.

What is abundantly clear when analyzing the Bosnian experiences, and that is echoed across other contexts where mass violence took place, is that all perpetrators will never be prosecuted. In fact, most perpetrators will not be prosecuted, at least not within the confines of a traditional courtroom, as no State has the capacity – the resources, expertise, funding – to conduct proceedings in thousands and thousands of cases.<sup>34</sup> Ukraine will be no different. Even with the assistance it has been receiving, and its competent and driven staff, there are limits to what a judicial system can offer. There is simply no way to prosecute everyone so pretending that there is becomes counterproductive and deeply damaging to survivors.

---

<sup>33</sup> “Bosnia Adopts Long-Delayed National War Crimes Strategy”, Balkan Insight (blog), September 24, 2020, <https://balkaninsight.com/2020/09/24/bosnian-adopts-long-delayed-national-war-crimes-strategy/>.

<sup>34</sup> There are examples of proceedings against great number of suspects, as in the case of the Gacaca in Rwanda, but those were conducted outside of the frameworks of the conventional courtroom and legal frameworks that are most commonly applied internationally. That is an example of community-driven justice, inspired by traditional conflict-resolution traditions.

That is why it becomes even more important to address prioritization and case selection, and making clear where the focus will be for investigations. Here, a useful lesson from BiH (and the broader region) is that it tends to be easier to prosecute lower-level perpetrators, with no political power and where evidence places a suspect at the crime scene. What is more difficult is investigating and prosecuting people up the chain of command. Those cases in particular are risky and require political support.

At the moment, over 4,000 suspects, and nearly 500 war crimes cases, remain before the prosecutor's offices in BiH. The OSCE, which has been supporting and monitoring war crimes prosecutions for two decades, states that "with each passing day, the likelihood of achieving justice for the remaining victims of the atrocities committed during the war diminishes."<sup>35</sup> The lesson for Ukraine, from Bosnia and Herzegovina, is to be aware that attention, funding and support wanes, and that ultimately, they will be left (mostly) on their own with this gigantic challenge. It is worth remembering that even if the ICC, for example, ends up prosecuting some cases from Ukraine, it is unlikely that those will be more than a handful and they will probably be suspects who had higher positions in military or civilian structures.

Another important lesson concerns the ICTY, and the effective way it dealt with ensuring the last fugitives – mainly Radovan Karadžić and Ratko Mladić – were arrested.<sup>36</sup> These two high-level accused were fugitives for almost fifteen years and their cases are an important example of the importance of having a long-term perspective in all the planning when it comes to accountability. Support (domestic and international) for prosecutions must be sustained over decades if major results are to be expected. The prosecution of War crimes prosecution is a long-term commitment.

This issue of time and how long investigations and prosecutions take, especially in complex cases with high-level people accused, is a constant point of critique of international mechanisms in particular. Investigations are slow because the number of cases are overwhelming; access to evidence is sometimes difficult due to security challenges; interviewing witnesses; seizing and then working through thousands of pages of documents; and

---

<sup>35</sup> "A RACE AGAINST TIME - Successes and Challenges in the Implementation of the National War Crimes Processing Strategy of Bosnia and Herzegovina," accessed December 10, 2022, [www.osce.org/mission-to-bosnia-and-herzegovina/521149](http://www.osce.org/mission-to-bosnia-and-herzegovina/521149).

<sup>36</sup> Julian Borger, *The Butcher's Trail How the Search for Balkan War Criminals Became the World's Most Successful Manhunt* (London, Penguin Random House, 2017).

analyzing crime scenes, or conducting DNA analysis of human remains, are all time-consuming tasks. But this delay is not always a problem to overcome, and can in fact have positive consequences on the trials of those most responsible for the perpetration of international crimes.<sup>37</sup>

A constant concern throughout the year-long process of investigations and prosecutions must be outreach and communication with survivors, the affected communities, as well as, and maybe in particular, with communities from which the perpetrators come. In past experiences, outreach has been a challenge, and there is much Ukraine can learn from past experience.<sup>38</sup> If the communities from which the perpetrators come are completely neglected, without creative and genuine efforts to reach them, any outcome of these proceedings will be minimized. Then, as in some other contexts, we will have communities who see courts and trials as enemies, and dismiss any findings as lies, conspiracies and attacks from abroad. Those attitudes are not conducive to peace, security, and stability in post-conflict situations.

One key element which can be used in communication with the public, but also more broadly, in presenting facts about what happened, are the archives – the documents collected and created, through the judicial process. These can be military and police reports, intelligence briefings, witness statements (and witnesses can be survivors, or observers, or “insiders”, i.e., those working on the same “side” as the accused), images, ballistic reports, forensic reports, death certificates, etc. Documents are presented in trial as evidence, and documents are created during the process, in the form of, for example, transcripts of courtroom testimony. All of that, to the extent possible, needs to be made accessible to the public and to researchers in particular. Another point is language: as much material as possible should be made available in the languages the affected communities speak. Ideally, it would also be made available in English, to enable broader engagement with the materials and research. All that can be done while respecting fair trial rights and while not compromising the judicial process. Therefore, the archives of future war crimes trials should

---

<sup>37</sup> Iva Vukušić, “Later Rather Than Sooner: Time and Its Effects on the Karadžić and Mladić Trials”, *International Criminal Law Review* 22, no. 1–2 (January 22, 2022): 189–208, <https://doi.org/10.1163/15718123-bja10086>.

<sup>38</sup> Janine Natalya Clark, “International War Crimes Tribunals and the Challenge of Outreach”, *International Criminal Law Review* 9, no. 1 (January 1, 2009): 99–116, <https://doi.org/10.1163/157181209X398835>.

not be an afterthought. They should be a central part of the accountability efforts from the start.<sup>39</sup>

What all these efforts, even if successful, cannot guarantee, is reconciliation. While that was an admirable goal in the early efforts to fight impunity, at the beginning of the work of the ICTY and ICTR, by now the admirable goal has been understood as too ambitious for one mechanism – trials – to attempt to reach. Reconciliation is not always possible in ways that foreign observers expect it to be, and from the experience of the ICTY we know that it was too much to ask.<sup>40</sup> For any social repair to happen, what is needed are complementary mechanisms – measures to implement alongside any trials. These can and should include truth-finding, reparations, acknowledgment of harm, memorialization, finding and identifying missing persons, and psycho-social support for survivors, etc. Only a comprehensive approach based on needs and existing opportunities to maximize effect can assist in providing a measure of justice and a measure of hope in a society so deeply ravaged by war and violence. We know that much from Bosnia.

## Conclusion

Ukraine now stands before a massive challenge: to bring some justice to the thousands of civilians whose lives have been ruined by this invasion. Spouses, siblings, family, friends, pets, property – some people lost everything, and many survivors will never fully recover from the trauma. Much about how pathways to justice will look and what they can hope to achieve remains unknown. Outcomes will depend on which measures are ultimately implemented, and how. They will also depend on the outcome of the war and closely related to that – the future of the Putin regime. It will also be affected by the long-term commitment of the vaguely-named “international community” to the cause of justice. As any other country

---

<sup>39</sup> Iva Vukušić, “Why We Should Open Archives from War Crimes Trials to the Public”, accessed December 11, 2022, [www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials](http://www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials).

<sup>40</sup> Jennifer Trahan and Iva Vukušić, “The Legacy of the ICTY: The Three-Tiered Approach to Justice in Bosnia-Herzegovina and Benchmarks for Measuring Success”, in *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach*, ed. Carsten Stahn et al. (Oxford University Press, 2020), <https://doi.org/10.1093/oso/9780198862956.003.0025>.



would be in this set of circumstances, Ukraine needs help, and whoever is providing it must listen to the Ukrainians and recognize their leadership.

This effort, to achieve a measure of justice, will take years – decades – and it requires a serious discussion about goals and the strategies to achieve them. More than anything, those in charge of the effort must be transparent about their capacity to achieve these goals and manage expectations of survivors. Ideally, there would be a set of explicit, measurable goals that survivors, the broader public and outside observers can return to, in 2030, to see what has been done. For now, there is no clear notion about what would constitute success in the fight against impunity for crimes in Ukraine. That must change. Finally, complementary mechanisms need to be devised and adequately funded by Ukrainian partners and donors.

Ultimately, even if the fight against impunity “works” and punishes some perpetrators for some crimes, and provides a measure of justice to some survivors, what it can do on its own is relatively modest. The needs of a society that is being, or has been brutalized, like Ukraine and Bosnia, are simply too great. It is from this humility that all efforts to provide justice should begin.

### **III. Humanitarian issues in transition: who is responsible and what for?**



## Responsibilities of armed groups and *de facto* authorities controlling territory

Sara GAMHA

Head of Region-Sahel, Geneva Call

Geneva Call is one of the world's leading organizations in the field of humanitarian engagement with armed groups. Geneva Call is active in 16 contexts worldwide, with offices in all of them, and has developed a humanitarian engagement with more than 170 armed groups since 2000. In situations of armed conflict, Geneva Call, as a neutral, impartial, and independent international humanitarian organization, endeavors to strengthen the respect of humanitarian norms and principles by armed groups and *de facto* authorities (AGDA), to improve the protection of civilians.



Geneva Call's mission

Geneva Call is a neutral, impartial and independent humanitarian organisation.

**Its mission is to improve the protection of civilians** in armed conflict through **humanitarian engagement** of armed group and *de facto* authorities (AGDAs) on their respect for international humanitarian norms

Covers broad variety of AGDAs

- Insurgents
- *De facto* entities
- Government affiliated militias etc.
- Designated terrorist groups



I am here today to discuss the responsibilities of armed groups and *de facto* authorities who exercise control over a territory. But first, it is necessary to underline a recent change in the terminology used by Geneva Call.

**Armed Non state actors (ANSA)**

Vs.

**Armed groups and *de-facto* authorities (AGDA)**

The term "**Armed Non-State Actor**" (ANSA) posed increasing legal challenges for Geneva Call's field operations.

Consultations with stakeholders revealed that, in practice, a vast number of armed groups operate as hybrids, maintaining or claiming some form of relationship with state structures.

The term ANSA is replaced by '**Armed Groups and *de facto* authorities**' (AGDA) in the public communication of Geneva Call.

Photo: IHL workshop for the brigades of Back-Up and Support forces and Security Belt, Aden, Yemen. Geneva Call ©

The term “ANSA” (armed non-state actor) has been commonly used by Geneva Call throughout the years. However, it raised more and more operational, security and conceptual difficulties. Consultations with stakeholders revealed that in practice a vast number of armed groups operate as hybrids, maintaining or claiming some form of relationship with state structures. Therefore, using the term “ANSA” to describe the groups that Geneva Call engages can be misleading. It is also seen by many armed groups as a breach of neutrality by Geneva Call, as the term ANSA implicitly qualifies them. Consequently, Geneva Call’s board approved the change from ‘ANSA’ to 'Armed Groups and *de facto* authorities' (AGDA) in the public communications of the organization (website, Facebook, annual report etc.)

The term “armed groups and *de facto* authorities” is neutral, does not imply a judgment on the status of the armed actor in question by Geneva Call, and in case of questioning by armed groups or *de facto* authorities, allows us to explain that as a neutral humanitarian organization, we do not take a position on whether an actor or authority is state or non-state, or exercises state authority.

Two examples from countries where we work illustrate the diverse nature of armed groups Geneva Call engages:

In Yemen, armed groups themselves object to the use of the term ‘ANSA’. They perceive it as negative and do not want to be associated with non-state armed groups. They informed Geneva Call that they consider that this term takes away their legitimacy or recognition as a governing

authority. This is especially the case for the Houthis and the Southern Transition Council.

In Syria, the term ‘ANSA’ does not reflect the reality on the ground: all armed groups are affiliated with different government entities, except for a few groups with no influence. The use of the term ‘ANSA’ is perceived as a lack of understanding of the context and is thus counterproductive.

**Geneva Call**  
Forum de Genève

### What we mean by « territory control »?

with State forces presence	Rebel governance
<p>A law enforcement role.</p> <p>State-like capacities and services.</p>	<p>3 aspects:</p> <ul style="list-style-type: none"> <li>- Rebel encouragement of civilian participation</li> <li>- Provision of civilian administration</li> <li>- Organization of civilians for significant material gain.</li> </ul> <p>The presence of any aspect of one of these three types of activities is sufficient to indicate governance.</p>
<p><b>State forces are no longer present</b></p> <p>Government-like functions</p> <p>Provision of certain services (health care, education, etc).</p> <p>imposed restrictions, mimicking those imposed by States (movement restrictions, etc)</p>	
	<p>Who exercises preponderant control?</p> <p><u>Capacity to govern</u>: is the degree of territorial control sufficient to permit rebel leaders to organize structures in which civilians actually participate?</p> <p>How safe do civilians feel in obeying insurgent orders or using services provided by rebels?</p>

genevacall.org

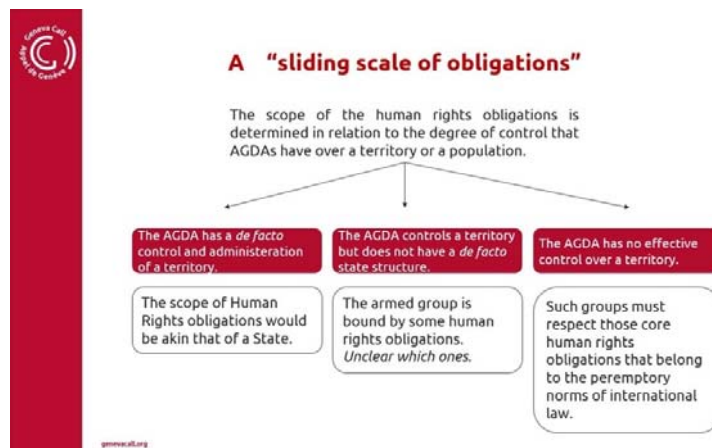
The CMA is political and military coalition from Mali and is one of the signatories of the Algiers Peace Accords signed in June 2015. It is composed of the *Mouvement national pour la libération de l’Azawad* (MNLA), the *Haut conseil pour l’unité de l’Azawad* (HCUA), and part of the *Mouvement arabe de l’Azawad* (MAA-CMA). The coalition is highly organized with a political branch and a military branch, and a clear hierarchical structure.

With the CMA officially taking control of northern areas in Mali, this could cumulate in the *de facto* independence of the northern area, which would likely lead to new conflicts between already fractured separatist movements, pushing the region once again into a state of turmoil.

In areas under their control, AGDAs have a major role to play regarding access to healthcare. However, AGDAs exercising territorial control in Mali have neither the means to meet the health needs of the population, nor the knowledge to meet their obligations in terms of protecting the medical mission. This represents a significant risk of lack of access to care, as the mesh of state health services has been affected. For example, during the COVID-19 crisis, the CMA told Geneva Call that they were likely to object

to healthcare being provided by state structures without prior involvement of their officials.

Once it has been established that an armed group or *de facto* authority has control over a territory, how do we determine the scope of its responsibilities? It is dependent on the degree of control exercised by the group.



International humanitarian law of non-international armed conflicts could, in some situations, become increasingly similar to international humanitarian law applicable during international armed conflicts. However, this is unrealistic for most armed groups. Either because it is an unrealistic requirement they cannot comply with considering their degree of organization and control, or because it could limit the obligations of governmental forces to minimal obligations.

In these cases, we could talk about “a sliding-scale of obligations” for armed groups:

- Their obligations will increase according to the intensity of violence and the degree of organization.
- The better organized an armed group is and the more stable the control over territory it has, the more similar the rules applicable would be to the full IHL of international armed conflicts.

**Disarmament, Demobilization, Reintegration (DDR) / Security Sector Reform (SSR)**

**Territory controlled by AGDAs :**

- ☐ Not necessarily exclusive
- ☐ Parallel security and justice structures
  - ☐ Example of Iraq
  - ☐ Contested areas, including Sinjar
  - ☐ Clashes
  - ☐ Impact on social cohesion – instrumentalization of local communities

→ **AGDAs and Covid-19**

genevacall.org

Disarmament, Demobilization, Reintegration (DDR) and Security Sector Reform (SSR) are integral parts of transitions from war to peace. While of course the disarmament, demobilization and reintegration of armed groups is an integral part of DDR, relatively little attention is paid to how AGDA's can be integrated in SSR. Integrating AGDA's, in particular those that control territory and populations and have set up their own, either exclusive or parallel security structures, can and should be involved in such processes.

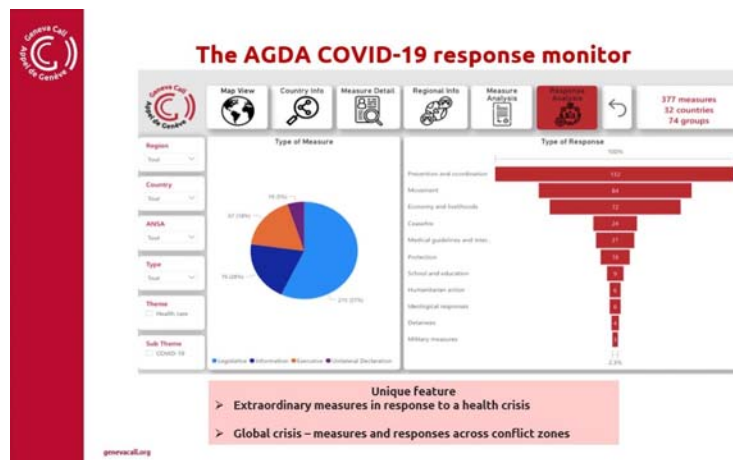
### **Why or when should we involve AGDAs?**

The example of Iraqi Kurdistan can help us better answer this question. Iraqi Kurdistan is an autonomous region with its own government, but also still has internally contested areas (i.e., an internal border dispute, to some extent fostered by the conflict. The Sinjar agreement was signed between the Government of Iraq and the Kurdistan Regional Government, but it failed to solve this issue). In these kinds of situations, where parallel security and justice sectors exist, there can be clashes between those parallel forces, which creates insecurity. It also has an impact on social cohesion - in Iraq, it is necessary to have links with the various security actors, so we often see families where every member belongs to a different security force.



There are numerous challenges to this involvement: first, fragmentation. For instance, in Iraq, many of the parallel Yazid or Christian forces have formally joined the Peshmerga, but still operate independently.

Secondly, there can be different obstacles to engaging all armed actors: In Iraq, you can be exposed to sanctions (e.g. Iranian-supported groups are often excluded under donor contracts), which makes it difficult to work with all actors. Likewise, in other contexts, counter-terrorism laws can prevent working with all actors. Another obstacle is the political dimension of this activity.



In 2019, Geneva Call launched its first AGDA Covid-19 Monitor, a new and innovative tool to monitor AGDAs’ responses to the COVID-19 outbreak, which has been providing the international community with a clearer picture of the situation in AGDAs’ controlled areas. With almost 400 different types of AGDA’s responses linked to the COVID-19, the Response Monitor has proven to maintain its relevance throughout 2020-21.

The monitor lists over 260 measures and policies taken and implemented by over 60 AGDAs in more than 25 countries. For the first time, a broad variety of armed groups were responding to a public health crisis all over the world in very different contexts. We have seen many AGDAs taking very general preventive measures, for example by disseminating information on the COVID virus and how to prevent its spread, encouraging populations to stay at home, and so on.

In many cases in addition to the measures taken, armed groups have called for humanitarian and medical assistance to address the pandemic and pledged to guarantee the safety of humanitarians and medics. In the DRC, the leadership of the APCL (*Alliance pour la libération du peuple congolais*) issued public communication to its troops requesting all units to adopt the barrier gestures recommended by WHO. It also called for increased awareness-raising campaigns.

Other armed groups have, however, instrumentalised the pandemic. By spreading disinformation and using Covid-19 as an instrument of propaganda as did Boko Haram in Nigeria.

To conclude this part, the types of measures we have seen taken by AGDAs in response to the Covid-19 pandemic is remarkably similar to the types of measures taken by States across the entire spectrum of possible measures in response.

## ***Jus post bellum* as a parameter for involving local constituencies in the transition processes**

*Barbara SCOLART*

Major, Italian Army; IIHL Member

As has emerged and will emerge several times during this Round Table, one of the preliminary questions to be resolved, assuming we can, is the temporal parametrizing of transition as well as the identification of the type of conflict in which transition raises the greatest problems. Is it possible to know exactly when a conflict ends and when peace begins? Does this uncertainty, if any, play out differently in internal versus international conflicts? Is there a specific law of transition, a post-conflict law or, in other terms, a *jus post bellum*? Is there a complete and self-sufficient branch of law as *jus ad bellum* and *jus in bello*? If it exists, what is its purpose?

Let us say at the outset that *jus post bellum* as a defined set of norms with a clear scope and “self-sufficient” content does not exist. This does not mean, however, that transition is not governed by any area of law. On the contrary, many of the issues that require to be addressed in the transition phase receive accomplished regulation by other segments of international law but “these provisions must be interpreted and adapted in their application to the specific transitional context.”<sup>1</sup>

Borrowing from Rojas-Orozco and without being able to go into further detail here, we can say that *jus post bellum* can be seen as a “normative framework ordering norms, discourses, and practices to allow the contextualized interpretation and application of relevant international law to the transition from armed conflict to sustainable peace.”<sup>2</sup>

---

<sup>1</sup> Rojas-Orozco C., “International Law and Transition to Peace in Colombia. Assessing *Jus Post Bellum* in Practice”, 2021, p. 2, <https://hdl.loc.gov/loc.gdc/gdcebookspublic.2021014018>. Interpretation and adaptation must also face the possibility of overlaps between legal regimes, since «it may turn out impossible to always find a *lex specialis* that would block the application of other relevant bodies of law» (Paulus A., “The Use of Force in Occupied Territory: the Applicable Legal Framework”. Background document, in T. Ferraro (ed.), “Occupation and Other Forms of Administration of Foreign Territory”. Report of the Expert meeting, ICRC, 2012, p. 131, [www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf](http://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf)).

<sup>2</sup> Rojas-Orozco, C., *op. cit.*, p.30. That the achievement of a sustainable peace is the purpose of *jus post bellum* is also evidenced by other authors. Without any claim to exhaustiveness, see, for example: Chetail V., “Introduction: Post-Conflict Peacebuilding-Ambiguity and Identity”, in V. Chetail (ed.), “Post-Conflict Peacebuilding: A Lexicon”,

As a matter of fact, the UN General Assembly noted that true peace is to be understood as a sustainable peace because “While the cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes sustainable development, rule of law and governance, and respect for human rights, making the recurrence of violent conflict less likely.”<sup>3</sup>

Today there is a growing awareness that the end of hostilities requires not only measures to permanently end the conflict, but also concrete actions to build peace in order to prevent protracted instability from giving rise to the outbreak of a new conflict.

Indeed, very often, at the end of a conflict, there is no longer a central power, a functioning legal system, good governance, democracy. Nor are human rights protected. In many cases, the majority of the population lives in poverty, and endemic poverty is aggravated by war. Hatred between groups, exacerbated by the violence and abuses committed during the war, often increases the risk of a return to war. This is especially true in the case of NIACs for whom statistics show a high risk of renewed outbreak of conflict within 10 years of the formal end of hostilities.<sup>4</sup>

The initial prerequisite, then, is to gain negative peace, i.e., the absence of war or of the threat of massive political violence: the first thing to be

---

Oxford University Press, 2009, p. 17; Iverson J., “Contrasting the Normative and Historical Foundations of Transitional Justice and *Jus Post Bellum*. Outlining the Matrix of Definitions in Comparative Perspective” in C. Stahn, J. S. Easterday, J. Iverson (eds.), “*Jus Post Bellum*. Mapping the Normative Foundations”, Oxford University Press, 2014, according to whom «The term “*jus post bellum*” does not seek to displace *jus ad bellum* or *jus in bello*, but rather to complement them. It does not seek to supplant the separate frameworks of humanitarian law, human rights law, or international criminal law, and indeed to challenge the entire notion of public international law as traditionally understood, but simply to integrate the law applicable to a particular phenomenon, the transition to a sustainable peace, into a more coherent whole» (p. 84). C. Stahn further notes that, while being structurally different, *jus post bellum* and responsibility to protect «share certain elements of convergence. [...] They coincide in their postulate to constrain violence and secure conditions for sustainable peace» (“R2P and *Jus Post Bellum*. Towards a Polycentric Approach”, in C. Stahn, J. S. Easterday, J. Iverson (eds.), “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 103).

<sup>3</sup> United Nations General Assembly, “Nuremberg Declaration on Peace and Justice”, para. II.1 – “Definitions”, doc. A/62/885, 2008.

<sup>4</sup> Jarland J.; Nygård H.M.; Gates S., Hermansen E., Bergstad Larsen V., “How Should We Understand Patterns of Recurring Conflict?”, *Conflict Trends*, 3/2020, Oslo, PRIO [www.prio.org/publications/12303](http://www.prio.org/publications/12303).

achieved, together with access to water, food and medical care, is the restoration and maintenance of public safety.

We will focus here essentially on the issue of security and thus the ability of local institutions to ensure it, which in turn is linked to the involvement of all local communities in the process and to a long-lasting commitment from the international community.

In this respect, we can say that post-conflict law, the *jus post bellum*, consists of the enforcement of the provisions of international law dictating standards for transitional justice, democratization and elections, compensation regimes, mechanisms for property claims and mechanisms for the protection and promotion of human rights.

Some of these rules may require adaptations in relation to the specificity of the situation or society involved. So, for example, is the case with standards of democratic governance when interim governments are allowed to exercise governing authority without being formally legitimized by a prior electoral process or when, in the administration of justice, prosecutions are focused on the prosecution of the “most serious crimes” (the so-called “targeted accountability”).<sup>5</sup>

It is worth emphasizing the emerging link between the prohibition of the use of force – and the UN mechanism of collective security – and the management of the post-conflict phase and, in particular, the link between the responsibility to protect and the “responsibility to rebuild” according to the well-chosen expression of the International Commission on Intervention and State Sovereignty.<sup>6</sup> The idea that military interventions cannot end with the cessation of military activities, but require enduring efforts to prevent the resurgence of conflict also inspires the mandate of the Peacebuilding Commission, which was created to help countries “emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development.”<sup>7</sup>

---

<sup>5</sup> Stahn C., “‘*Jus ad bellum*’, ‘*jus in bello*’ . . . ‘*jus post bellum*’? – Rethinking the Conception of the Law of Armed Force”, in *The European Journal of International Law*, Vol. 17 no.5, 2006, p. 924 *in nota*.

<sup>6</sup> On this issue see Stahn C., “R2P and *Jus Post Bellum*. Towards a Polycentric Approach”, *cit.* The responsibility to rebuild is dealt with in the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, where it is stated (para 5.3) that “[m]ilitary intervention is one instrument in a broader spectrum of tools designed to prevent conflicts and humanitarian emergencies from arising, intensifying, spreading, persisting or recurring. The objective of such a strategy must be to help ensure that the conditions that prompted the military intervention do not repeat themselves or simply resurface.”

<sup>7</sup> United Nations General Assembly, A/RES/60/1, “2005 World Summit Outcome”, 16 September 2005, para. 97.

The need to deal with the organization of society in a post-war environment is particularly evident in the case of NIACs and here we can see also a nexus with *jus ad bellum* in all those cases where a regime change is invoked as a just cause of a conflict.<sup>8</sup> Also, since the purpose of *jus post bellum* is to pave the way for a just and stable peace after a conflict, it is hard to say that this purpose is compatible with the promotion of non-democratic values (e.g., violation of human rights, discrimination on ethnic-religious grounds, ...). It follows that democracy, human rights, and the rule of law constitute key elements of *jus post bellum*. And this explains also why rule of law programs have become a central component of UN peace operations over the past two decades, with the ambitious goal of simultaneously promoting security, democracy, development and human rights in States emerging from conflict.

It is a fact that institutional changes are a frequent phenomenon when wars end and are often a precondition for a lasting peace. It, therefore, happens that preservation of the legislative and institutional status quo can be counterproductive to national conciliation and yet local governments may not be able to effectively implement reforms without active international assistance<sup>9</sup>. It is, therefore, necessary to obtain the consent of local actors to a transformation of their legal system, always keeping in mind the respect for national sovereignty, the pillar of international relations after World War II.

This is all the more true since many societies are unable to absorb “hard” democratization, especially in the post-conflict phase,<sup>10</sup> and it happens that attempts to do so result, in turn, in a source of instability, particularly when democratization processes are externally-driven and overly ambitious. A typical thorn in many of these experiences is their failure to take sufficient account of the starting conditions in the country, such as when institutions and infrastructures have been destroyed, judges and other legal professionals have been killed or have fled the country, and society is divided.

Therefore, lasting, sustainable peace necessarily requires, in addition to the support and commitment of the international community, a “substantive local ownership” that is the principle according to which key local actors

---

<sup>8</sup> Österdahl I., “The Gentle Modernizer of the Law of Armed Conflict?” in “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 208.

<sup>9</sup> Fleck D., “*Jus Post Bellum* as a Partly Independent Legal Framework” in “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 45.

<sup>10</sup> Boon K.E., “*Jus Post Bellum* in Non-International Armed Conflicts” in “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 265.

and constituencies within the post conflict state play a leading role in the design, management and implementation of peacebuilding processes thus making their own path towards a sustainable peace.<sup>11</sup>

Another issue is to answer the question as to whether it is possible to clearly establish when the transition phase occurs, when it starts and when it ends.

As a matter of fact, the transition from conflict to peace is a process with no clear starting and ending points. Looking at the definition of armed conflict – for which we can rely on the well-known ICTY ruling in the Tadić case,<sup>12</sup> which also refers to the confrontation between multiple organized armed groups within a State – one sees that the factual datum is the resort to armed force or protracted armed violence, from which it can be inferred that the cessation of the use of armed force can be considered the initial moment of the transition to peace. But when can we say that the use of force really ceases? When are we faced with a cessation of active hostilities (which is normally achieved by a ceasefire agreement) or when do we come to the general close of hostilities, for which, however, a peace treaty is required and which leads us to wonder how to ascertain it in the case of NIACs, in which no peace treaties are negotiated?

The Tadić ruling mentions, in the latter regard, the achievement of a peaceful settlement, but many scholars believe that this is too high a standard for NIACs<sup>13</sup> and suggest to simply ascertain whether there is a decreasing intensity of the confrontation.

Moreover, the end of a conflict does not imply the automatic cessation of the application of humanitarian provisions and some issues keep being regulated by IHL even after the end of the conflict – common examples are

---

<sup>11</sup> Donais, T. (2009), “Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes”. *Peace & Change*, 34: 3-26. <https://doi.org/10.1111/j.1468-0130.2009.00531.x>. The Author notes that “the case for substantive local ownership rests on the argument that the challenge of re-constituting state institutions, re-establishing social contracts between state and society, and re-building social relations in the aftermath of war is simply too immense to achieve in the face of either inertia or outright opposition on the part of those being reformed.”

<sup>12</sup> International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Tadić a/k/a “Dule”, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (Oct. 2, 1995), paragraph 70: “we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” See also the *Draft articles on the effects of armed conflicts on treaties*, adopted by the International Law Commission in 2011, art. 2, lett. b.

<sup>13</sup> Bartels R., “From *Jus In Bello* to *Jus Post Bellum*” in “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 301.

the questions of landmines, displaced persons, or missing people. Given the nature itself of *jus post bellum*, it is not necessary to wait until *jus in bello* ceases to apply to start enforcing it, and thus both regimes can apply simultaneously.

Perhaps it is more interesting to ask when the end of the applicability of *jus post bellum* occurs. Since it is the law of transition from armed conflict to a sustainable peace, the conclusion could be that it ceases to apply when there is a sustainable peace, that is, the impossibility – *rectius*, improbability – of a new resort to violence. For some of the components of *jus post bellum* – such as criminal proceedings, reparations to victims, disarmament and demobilization, return of internally displaced persons – it is certainly possible to identify their end but, first, these processes do not happen nor end simultaneously and, second, we still do not know whether we can speak of a positive peace.<sup>14</sup> In this regard, the idea, that I personally share, is that “approximate compliance with human rights signals one of the closing stages of *jus post bellum* merging into the state of normalcy”<sup>15</sup> may be misleading.

The full enjoyment of human rights, unfortunately, may not be a sufficient indicator of peace: just think of the still numerous situations in which individuals are deprived of even a significant number of basic rights and freedoms and yet cannot be said to be at war: think, for example, of political experiences in which discrimination, compression of freedoms, etc., are applied.

In any case, the question of the temporal scope of *jus post bellum* is particularly relevant if we consider it as an independent legal regime, while if we look at it as an ordering system there is no need to discuss its temporal applicability.<sup>16</sup>

In conclusion, the international community is called to engage in making the transition processes more and more inclusive. If *jus post bellum* is a normative framework that guides the interpretation and application of international law for the transition to peace, and if its goals are addressing the root causes of armed conflict and observing international standards on human rights, democracy, and the rule of law, then its actors are all the subjects invoking, interpreting, or applying legal norms, discourses, and

---

<sup>14</sup> Rojas-Orozco C., “International Law and Transition to Peace in Colombia. Assessing *Jus Post Bellum* in Practice” *cit.*, p. 37.

<sup>15</sup> Wählisch M., “Conflict Termination from a Human Rights Perspective” in “*Jus Post Bellum*. Mapping the Normative Foundations” *cit.*, p. 321.

<sup>16</sup> Rojas-Orozco C., *op. cit.*, p. 38.



comparative practices with a view to achieving a sustainable transition from armed conflict to peace<sup>17</sup>.

This means that, besides the “necessary” actors – i.e. the parties directly involved in the conflict (the governmental authorities and the leaders of non-state groups) and the international community (States, international and regional organizations) – actors of the process are also others. The victims, women, other identity groups, ethnic communities: they are all affected by the conflict, they all risk being forgotten after the war and they all can offer an understanding on international law principles, thus contributing to addressing structural discriminatory factors in the concerned societies.

---

<sup>17</sup> Rojas-Orozco C., *op. cit.*, *passim*.

## **Who is responsible and what for? A humanitarian perspective on healthcare in the aftermath**

*Kelisiana THYNNE*

Senior Legal Advisor, ICRC

Conflict imposes huge burdens on States and their populations. At the end of a conflict, rebuilding, offering services to civilians, supporting the finding of missing persons or their fates, and providing an adequate security and justice regime to support justice and reconciliation are challenging in a country devastated by war. And yet they are essential for the country to get out of conflict, and to get back to peace.

In my particular work on the aftermath of conflict, with the ICRC, I have identified 14 main areas where there are humanitarian needs or practical work to be done.<sup>1</sup> For all of these vulnerabilities there are existing IHL or other legal obligations during armed conflict, such as human rights obligations. In some cases, assigning responsibility to the parties to the conflict is clear. Whether they accept this responsibility or have the resources to fulfil the responsibility is another matter. In this session, we are talking about responsibility – who is responsible and for what?

There are a range of actors who are present in the aftermath of conflict: parties to the conflict, including non-state armed groups, state armed forces, foreign forces supporting one or more parties to the conflict, multinational forces, emerging governments, or existing governments, humanitarian actors, donors, development actors, third state governments. Who has responsibility, and when and for how long in the aftermath of conflict?

In the interests of time, I will focus on one issue which is indeed central to the first notions of IHL and protection of persons in armed conflict: healthcare. I will explain what responsibilities and obligations are entailed at the end of conflict, and how they continue into the aftermath, and make some proposals as to who has responsibility and if they don't or can't step

---

<sup>1</sup> Many of these are mentioned in Kelisiana Thynne, Christian Cardon and Thomas de Saint Maurice, "Aftermath of battles and conflict: from challenges to solutions" ICRC Humanitarian Law and Policy Blog (13 September 2022): <https://blogs.icrc.org/law-and-policy/2022/09/13/aftermath-battles-conflict-challenges-solutions/>.

up, how can humanitarian organizations, as one of many actors in the field, assist?

Here are some examples of the problem. As of February 2022, in Afghanistan, after the conflict with the US and NATO ended, there are now overcrowded hospitals, as some shut down. As a result, the remaining hospitals are not able to cope with malnourishment, weapon wounds, or endemic diseases.<sup>2</sup> In Yemen this year, more than 20.1 million people out of a total population of 30.5 million currently lack access to basic healthcare in the aftermath of successive engagements. Only 51% of health facilities still function across the country.<sup>3</sup> Violence further complicates the ability of patients to reach lifesaving healthcare.

Protection of healthcare was central to the very first Geneva Convention and is now enshrined in GCI, GCIV, the 1977 APs and customary IHL. But it is not only in conflict that the IHL obligations apply – they continue on after conflict.

To facilitate healthcare services is the primary responsibility of the government. When it comes to medical care, this is a long-term goal in the aftermath of conflict. The obligation extends well after the end of active hostilities until the end of the need for such healthcare (i.e. the recovery of the patient). The ICRC Commentary on Common Article 3 to the GCs notes “The obligation to collect the wounded and sick is a continuous obligation, i.e., it applies for the duration of the non-international armed conflict. ... a good faith application of common Article 3 requires search, collection and evacuation activities after every engagement.”<sup>4</sup> While in relation to collection and evacuation it is suggested it should occur after each engagement, the requirement to treat the on-going sickness or wound would suggest that it should continue after the end of active hostilities.

I am not suggesting, however, that parties to a conflict, who have disbanded or left in the aftermath, whether partnered foreign forces or the non-state armed groups involved, have long-term obligations under IHL to provide health care. If an intervening foreign force has caused a lasting health condition, like a complicated wound in one of their engagements that would require medical care for the rest of the wounded fighter’s or

---

<sup>2</sup> ICRC, “Time is running out to save millions of lives in Afghanistan” (25 February 2022): [www.icrc.org/en/document/time-running-out-save-millions-lives-afghanistan](http://www.icrc.org/en/document/time-running-out-save-millions-lives-afghanistan).

<sup>3</sup> ICRC “Health crisis in Yemen” (9 August 2022): [www.icrc.org/en/where-we-work/middle-east/yemen/health-crisis-yemen](http://www.icrc.org/en/where-we-work/middle-east/yemen/health-crisis-yemen).

<sup>4</sup> 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, para 752: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

civilian's life, do we then imply that the State has to cover medical expenses for that person for the rest of their lives? We cannot stretch the continuous character of an obligation to provide medical care that far – we need to be reasonable and practical. So, for example, the obligation would extend until the health condition of the person has sufficiently stabilized.

This would then imply that the ongoing medical care in the long-term would be taken over by the national health system. Notably the obligation to ensure non-discriminatory access to health services would arise under international human rights law and fall upon the State under whose jurisdiction a person with ongoing health needs would be located.

Parties to conflict have residual IHL obligations to ensure access to care for the wounded and sick, but generally, it is in the hands of the government, that may rule at the end of conflict, to facilitate healthcare under IHRL, individually and through international assistance and cooperation,<sup>5</sup> which will include support from others, be it from other States or humanitarian organizations. Government institutions should strengthen the resilience of essential services to ensure inclusive and equitable access for civilians<sup>6</sup> and be able to structure and enable health systems that deliver care<sup>7</sup> such as physical and mental health care, as well as provide essential drugs, while respecting the principles of non-discrimination and equitable access to vulnerable populations.<sup>8</sup>

But in many cases, governments cannot cope with the long-term economic effects of a conflict and the challenges this poses on top of the other challenges of damaged infrastructure, brain drain and an already weakened, sick and injured population. Others may have to step in, to substitute or support the existing structures until the government can fulfil its obligations itself. The government or in some cases the community should be first responder, but impartial humanitarian organizations and third governments need to see how they can assist and support as an added value in aftermath. Basically, others can step in to prevent the “implosion

---

<sup>5</sup> Art. 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>6</sup> Peter Maurer, “Wars in cities: protection of civilians in urban settings” (Speech given by Mr Peter Maurer, President of the International Committee of the Red Cross. UN Security Council Open Debate. 25 January 2022 via video link): [www.icrc.org/en/document/wars-cities-protection-civilians-urban-settings](http://www.icrc.org/en/document/wars-cities-protection-civilians-urban-settings).

<sup>7</sup> ICRC, “Time is running out to save millions of lives in Afghanistan” (25 February 2022): [www.icrc.org/en/document/time-running-out-save-millions-lives-afghanistan](http://www.icrc.org/en/document/time-running-out-save-millions-lives-afghanistan).

<sup>8</sup> Article 12 of the ICESCR and General Comment No. 14 of the United Nations Economic and Social Council.

of basic social services systems”<sup>9</sup> not only in relation to healthcare but also in relation of other humanitarian consequences of armed conflict.

I am now going to focus on the role of humanitarian organizations in the aftermath of conflict, noting that we, as humanitarian organizations, are not obligated to do so but merely have the right to offer our services to support States in fulfilling their obligations.

Common Article 3 of the Geneva Conventions provides that a humanitarian organization can offer its services in conflict. According to the Commentary to GCI “When an offer of services is made, it may be regarded neither as an unfriendly act nor as an unlawful interference in a State’s domestic affairs in general or in the conflict in particular. Nor may it be regarded as recognition of or support to a Party to the conflict. Therefore, an offer of services and its implementation may not be prohibited or criminalized, by virtue of legislative or other regulatory acts. Nothing precludes a Party to the non-international armed conflict from inviting the ICRC or other impartial humanitarian organizations to undertake certain humanitarian activities. However, as a matter of international law, these organizations are not obliged to accept such a request; it is at their discretion to decide whether or not to respond positively in any particular context.”<sup>10</sup> Therefore, while consent must be sought and obtained, it should not be unreasonably denied. Therefore, there is a responsibility on the State to accept assistance.

The services offered would encompass “all types of humanitarian activities required to meet the needs of all persons affected by the armed conflict,”<sup>11</sup> that is, protection or relief/assistance activities and prevention activities, including medical care.<sup>12</sup> The beneficiaries include all persons affected by the conflict (including civilians, those *hors de combat*, detainees, and people with a variety of health conditions, be they physical or mental).<sup>13</sup>

If we are talking about an aftermath situation where the conflict has genuinely ended, this does not stop humanitarian action on the direct results

---

<sup>9</sup> Peter Maurer, “Wars in cities: protection of civilians in urban settings” (Speech given by Mr Peter Maurer, President of the International Committee of the Red Cross. UN Security Council Open Debate. 25 January 2022 via video link): [www.icrc.org/en/document/wars-cities-protection-civilians-urban-settings](https://www.icrc.org/en/document/wars-cities-protection-civilians-urban-settings).

<sup>10</sup> 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, para 804: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

<sup>11</sup> *Ibid.*, para 809.

<sup>12</sup> *Ibid.*, para 823.

<sup>13</sup> *Ibid.*, paras 822-824.

of conflict such as on-going healthcare. The longevity, depth or type of humanitarian action is not limited so long as it is impartial making no distinction among people needing healthcare except on medical grounds, and is neutral, i.e. gives no advantage to one or other party to the conflict. Instead, IHL understands a very wide spectrum of activities as innately humanitarian and sets no limits on the quality or longevity of these action.<sup>14</sup> ICRC action in direct results of armed conflict would encompass all such humanitarian work.

If there is some dispute about the relevance of humanitarian organizations working in a context of transition, the Commentary to Article 3 notes that special agreements can be concluded under Article 3 (and ICRC can facilitate them)<sup>15</sup> for peace and ceasefires which might encompass the range of humanitarian activities “or lessen the negative effects of the conflict on the population, among other things.”<sup>16</sup> The Commentary goes on “in some circumstances it may be a vital means of respecting existing obligations under humanitarian law such as enabling the wounded and sick to be collected and cared for.”<sup>17</sup>

Therefore, there is a range of responsibilities and obligations for States, complemented by the rights of humanitarian organizations to assist them in discharging these obligations in the aftermath, which would facilitate humanitarian relief, including provision of healthcare in the aftermath and dealing with the long-term consequences of the conflict on physical and mental health.

I note here again that for third States, there may be different obligations depending on the level of support they have given or the extent of their involvement in the conflict. They may also have a role as donors to support humanitarian action, for example, third States should provide funding to humanitarian organizations/or the State affected directly with limited or no restrictions on how and where the funding can be used, but this is a topic for further and future discussion.

In conclusion, even in relation to the protection of healthcare and persons in need of healthcare in the aftermath of conflict, where the

---

<sup>14</sup> ICRC, *Protracted conflict and humanitarian action: some recent ICRC experiences*, Geneva, 2016, [www.icrc.org/en/publication/4265-protracted-conflict-and-humanitarian-action-some-recent-icrc-experiences](http://www.icrc.org/en/publication/4265-protracted-conflict-and-humanitarian-action-some-recent-icrc-experiences), p. 12.

<sup>15</sup> 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, para 804: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>, para 859.

<sup>16</sup> *Ibid.*, para 849.

<sup>17</sup> *Ibid.*, para 859.

obligations are rather clear, assigning responsibility and ensuring action remains challenging. Some recommendations would be that IHL be fully implemented before a conflict – planning and preparedness for the conflict and its aftermath remains key – and that appropriate measures be put in place to ensure a functioning health system. If this is not possible, while State authorities maintain the obligation to facilitate healthcare access and protection, if necessary, measures can be applied by giving access to humanitarian organizations or others to provide support as far as necessary for long term healthcare and recovery and rebuilding, to ensure that essential mental and physical health services are provided to all in the aftermath.

## **Transition from hostilities to non-hostilities: legal and practical aspects**

*Nadav MINKOVSKY*

Lieutenant Colonel, Head of the Strategic Affairs Branch,  
International Law Department, IDF

The transition from armed conflict to peace is never instantaneous. It usually has an intermediate period of non-hostilities. The non-hostilities period can be referred to with various names: Hiatus; Ceasefire; Armistice; etc. It is a transitional period in which hostilities between the parties have already subsided but restoration and normalization of relations between the parties have yet to be achieved. This period can be relatively short but can also last for decades. It could lead to normalization and peace but it could also result in the renewal of hostilities between the parties.

In a post-conflict period, when tensions between the parties are still high, the distrust between them is evident and any spark might reignite the exchange of fire, it is crucial to produce a sustainable framework for non-hostilities, which in time, can set the stage for transition towards restoration of peace between them.

What does sustainable non-hostilities framework include?

When transitioning towards full restoration of normalization and peaceful relations between the parties, it is customary to discuss Confidence Building Measures (CBMs) aimed at rebuilding trust between the parties.

Similarly, when transitioning from armed conflict to non-hostilities, measures must be taken to prevent the tension and distrust between the parties from causing them to revert back to hostilities. For the purpose of this presentation, we will refer to such measures as Tension Defusing Measures (TDMs).

When trying to establish a sustainable non-hostilities framework, several issues must be addressed, in order to determine which TDMs are required to ensure sustainability of the non-hostilities.

Prominent examples for such TDMs could be:

- *Creating separation between the rivaling Armed Forces* - Delimiting and marking ceasefire lines and possibly areas of separation (demilitarized zones) to physically distance the rivaling Armed Forces from one another. This helps in preventing local frictions and incidents which might escalate unintentionally to full resumption of hostilities.



- *Introduction of a neutral Third Party* – such as UN Peacekeeping Forces, Multinational Forces, etc. – to monitor the adherence of the parties to the cessation of hostilities and possibly to be positioned physically between the Armed Forces to provide additional separation between them.
- *Possible withdrawal from the other party's territories, overtaken during the conflict* – The actual conduct of such withdrawal, whether gradual and conditioned or unilateral and immediate, could also determine the level of tension defusing with the withdrawing party and with the reclaiming party.
- *Establishing direct and immediate lines of communication* – whether bilateral or via the Third Party – in order to reduce misunderstandings in interpretation of either party's actions and intentions.
- *Exchanging of POWs and casualties in the custody of the other party* – which can create political pressure on leaders from both sides, as long as the question remains unresolved, and thus can lead to re-escalation.
- *Facilitating the removal of remnants of war (land mines, duds, etc.) left by either party in the territory of the other party* – civilian casualties caused by the detonation of such remnants in the post conflict might easily re-ignite tensions between the parties.

Additionally, determining the legal framework in which the TDMs are outlined is a pivotal element for sustainable non-hostilities. Whether in a Bilateral Agreement, Exchange of Letters, Adoption of UNSC Resolution or a Third-Party Declaration – the feasibility and enforceability of the legal architecture could be crucial in establishing and maintaining the TDMs.

Many of these TDMs have standards and guidelines set in Customary International Law and in State Practice, so the parties' framework usually sets not necessarily the “What” but rather the “How.”

Armed conflicts between Israel and its neighboring States, over the past decades, present relatively comprehensive case studies for the application and implementation of such TDMs, with a myriad of different legal frameworks and variations of the aforementioned TDMs.

Examples for such TDMs and the way they were implemented can be found in post-conflict agreements and arrangements between Israel and its neighboring States. Such agreements and arrangements helped to facilitate a sustainable non-hostilities framework which enabled the parties, in some cases, to eventually engage in peace negotiations, resulting in peace treaties (with Egypt and Jordan), and in some cases enabled to maintain a *de facto* ceasefire for a period of several decades (with Syria).

#### **IV. Legal and military challenges in non-combatant evacuation operations (NEOs)**



## **Legal challenges in non-combatant evacuation operations: the practitioner's perspective**

*Chris ADAIR*

Lieutenant Colonel, UK Army Legal Services

While other contributors may address the inherent military difficulty of conducting a non-combatant evacuation operation (NEO) and the strategic legal considerations such an operation presents, the article below is focused on the operational to tactical level challenges a legal advisor may face when supporting any future NEO. As with the complex and unpredictable logistical, technological and security issues commanders will face, legal advice on a NEO may also be multifaceted and required at high speed. While events and the inexorably closing timeframes under which NEOs are ordinarily conducted may not permit deep philosophical thought or lengthy legal contemplation, the demand for legal advice will pervade, and a wide range of actions and actors must be considered and consulted. Additionally, often the advice sought must be provided from within an environment which is high risk and dangerous.

The NEO, therefore, presents complex planning considerations for military and cross-government partners, but what specific legal issues might they raise? What is the role of the legal advisor on such an operation? Be that a uniformed lawyer, as preferred in the UK, or a civilian / government lawyer, as preferred by some of the many nations who support the work of the Institute.

The first challenge which must be addressed, often very quickly, is the legal basis for conducting a NEO which is an issue many readers will be familiar with, and one which has prompted considerable academic debate. Central in that debate is the, at best, highly controversial doctrine of 'protection of nationals abroad.'

That is not a debate with which this short article will engage in any great depth. The author has been fortunate that both NEOs with which he has been involved – on a small scale in Ukraine in early 2022, and on a much larger scale in Afghanistan in 2021 – have been conducted with host nation consent. That was, however, one of the few common factors between the two operations.

While academics may long argue as to when the consent of President Ashraf Ghani's Afghan Government became worthless – as the Taliban had *de facto* control of Kabul from 15<sup>th</sup> Aug 2021, prior to mass evacuations –

the UK position, initially at least, was that although Kabul had fallen, the non-international armed conflict, the NIAC, continued and President Ghani's permissions remained extant. Certainly, anti-Taliban forces were fighting quite hard in the Panjshir valley until well into September.

In any event, while there may not have been any formal agreements with the Taliban in the hectic days of mid-August 2021, it was clear as early as the 15<sup>th</sup> itself, and certainly at Hamid Karzai International Airport on the 16<sup>th</sup>, that the Taliban did not seem set on interfering with evacuations. While the Taliban Leadership were equally clear that the evacuation had to be complete by the end of the month, they provided tacit consent to continued international military presence to complete the NEO.

This legal basis of an operation may be very interesting for academics: Indeed, you may think it a strategic question, a question for Attorney Generals, and Chief Ministry lawyers. But, what value is this identified legal basis to the embedded, uniformed legal advisor advising the Task Force Commander *in situ*? That legal advisor will have their orders and must advise their Commander within the envelope of those orders, a Commander whose HQ might straddle the operational and tactical levels.

Despite any reservations one may have as to the relevance of the international legal basis for an operation at the tactical / operational interface, any lawyer who has advised at that level would emphasise that the nature of the legal basis of an operation is fundamental. It is certainly fundamental in the British military and should be important to all practitioners of IHL. It is among the very first things our commanders and our soldiers want to know. It sets the tone for the operation. It will dictate the rules of engagement. It is a critical ingredient in a commander's risk calculus. And, it is of vital importance to the troops on the ground. Those troops naturally want to know what protections are in place should they be captured or arrested. Who will exercise jurisdiction over them?

In Ukraine, it gave great confidence to soldiers to be able to have a copy of the note-verbal covering the limited evacuation the UK conducted in their pockets and in their vehicles. They had it in those pockets, along with important elements of the NATO SOFA (Ukraine being, of course, a member of NATO's Partnership For Peace).

There were a lot of nervous people in both Afghanistan and Ukraine, and the ability of our service personnel to speak with authority on their status in the country, their entitlement, their legal basis for being there, provided them much assurance. British servicemen and women are not oblivious to the risks they face on operations, or the potential implications of their very presence in a particular location.

That represents the first legal challenge; understand the legal framework under which a NEO is to be conducted (or is likely to be conducted). The latter is important because the legal advisor may not know themselves what the legal basis for an operation is until they are on their way to an aircraft or ship, because NEOs are invariably conducted at short notice. They are also conducted with allies, so you may also need to know the legal permissions under which partners are working. Certainly, as with any operation, the legal advisor should understand the nature of those allies' permissions and, importantly on a NEO, identify who has authority to evacuate whom.

Having identified the legal basis behind an operation, a legal advisor's capacity can then switch to the substantive legal challenges involved in the conduct of the NEO itself.

The first thing to consider here is that, as military lawyers, one cannot afford to assume the next NEO will be the same as the last. While similar themes may resonate over time, Ukraine was nothing like Afghanistan. Afghanistan, in turn, was nothing like the NEO the UK and her allies conducted in Libya in 2011, which was nothing like the one conducted in Lebanon in 2006.

Each operation was unique: Afghanistan was, surprisingly perhaps, a permissive environment. But there was no host nation support. Each Operation had different challenges: Ukraine was an uncertain environment with a real fear in some quarters of irregular action, armed or unarmed, organised or otherwise. There was also the uncertainty posed by the significant Russian airborne and air-assault capability. And, unsurprisingly, the Ukrainian Government at the time was focussed on issues other than the safety of foreign nationals. The reason this is of fundamental importance is because the next NEO the UK or any other nation conducts, will be different again. Just as the commander must be flexible in his planning, the legal advisor must be prepared to face different and unpredictable challenges.

It may be that significant and early, political and legal engagement is required to identify and secure consent for the establishment of 'Place of Safety' in a third party country. The negotiation of such permission is something on which only little will be added here, but it is something of fundamental importance. The basis on which a third party country permits its territory to be used may have a direct implication on how a NEO is conducted on the far-bank, and on what route eligible evacuees and any belongings are evacuated.

Another key practical challenge which will likely face any legal advisor supporting a NEO is the challenge of making themselves, of making their

legal advice, heard. While this is not specifically a legal challenge, it is an important challenge which must be overcome if legal advice is to be understood throughout the chain of command and appropriate action taken. This requires that in a world of rapidly evolving geopolitical developments requiring flexible, pragmatic and timely legal advice at the point of need, the lawyer must be in the room. For a legal advisor to be of value in rapidly changing situations – they must be involved. That is the challenge.

By way of example, in Kabul last year, the UK and allies went from being in conflict with the Taliban, and flying aircraft into Afghan Government controlled airspace on the 15<sup>th</sup> of August, to an airfield overrun by civilians on the 16<sup>th</sup>, to operating cheek-to-jowl with the Taliban on the 17<sup>th</sup>. While, in the recent past, legal advice might have been provided remotely, ‘at reach’, in the 21<sup>st</sup> Century battlespace, in a world which demands speed of decision making, and a world in which communications can readily be denied by our adversaries, legal advice must be available to the front-line commander at the right time and in the right place. And that might mean the lawyer needs to be deployable so that they can travel to, and advise in, hostile environments.

The lawyer needs to be with the staff, with the Commander.

Building on that requirement to be available is the challenge of earning a Commander’s trust. A known and trusted lawyer is less likely to be sidelined during a crisis, and is more likely to be involved throughout the planning process than an advisor only temporarily attached to a unit or task-force. In the UK, we endeavour to develop relationships with Commanders prior to operations, and a number of training sessions had been conducted prior to operations in both Ukraine and Afghanistan. The lawyer was known to the staff, had trained with them, and was trusted by them. This was vital because as we all know, or should know; you can’t force relationships.

Another challenge for the lawyer on operations is the challenge to remain relevant. The UK is lucky in that it has some great doctrine on NEOs and it also has a dedicated headquarters looking ahead at where future crises may develop, and where NEOs may be required. But, as legal advisors we are required to advise across the spectrum of legal issues; conventional warfare and national resilience operations, as well as NEOs. We might be engaged on other matters prior to any requirement to support a NEO. And, as a crisis can develop so quickly, there may not be time for any substantial pre-deployment training. The challenge is to have enough core knowledge to be able to support a NEO, at short notice, at reach. This may be without access to online materials or legal reference documents.

The challenge is to plan for your role in crisis. Stay as relevant as possible. Train, train and train some more.

Then, when a crisis does appear, provide input to, and then assimilate and fully understand the Rules of Engagement. The lawyer should understand these better than anyone else on the NEO and must ensure orders and briefings adequately convey permissions to the troops who are most likely to use them. It is those young men and women, far removed from universities, Defence Ministries, or even Operation Rooms who are the ones most likely to face decisions on the use of force, those most likely to face a developing threat, those standing, perhaps with a finger on a safety-catch, watching a situation develop. The challenge for the legal advisor in those circumstances is to ensure the entire team, those young people directly behind the riot-control shields, fully understand their operating parameters, and when the use of force is permitted, is legal, and is appropriate.

To ensure that they have this understanding, legal advice must be delivered in a way which understands that operating parameters faced by troops in a NEO will be complex and evolving. In Afghanistan, it was the lawyers' understanding of everything from firing warning-shots to utilising riot-control equipment that enabled the provision of legally based, but practically focused, solutions to problems as they arose. Solutions and advice which calmed nerves and provided reassurance that we were on the right side of the law.

This is perhaps the key challenge for future legal teams; to help a task force identify legally compliant solutions to complex, or even wicked problems. Conflict has and continues to evolve. Our legal advice must reflect this.

Before concluding, it is appropriate to briefly mention some of the many other challenges that may arise on NEOs; issues of a legal flavour on which the deployed legal advisor can be expected to find the answer:

- What to do with unaccompanied children? How should heavily pregnant women be dealt with (if there is no evacuation option other than air-transport)?
- What detention options are available? This may be particularly relevant if, as occurred in Afghanistan, the approved detention pathway has collapsed.
- What to do if there is an air-safety incident? Evacuees may have no right to remain in the Place of Safety.
- How should one handle non-compliant media personnel?



- How might one explain or address the nuances or the extent to which lethal force might be used in response to a suicide IED, or another life-threatening situation?

While time and space prohibit a detailed consideration of those issues here, they provide a feeling of some of the intricacies which may arise during a NEO.

There is, however, one final challenge and one area the legal advisor can add real value, an area it would be remiss to ignore here. The challenge is unique to the operational lawyer – something removed from the corridors of universities and other institutions such as these.

Alluded to above, is the challenge to find a way to lawful mission accomplishment. Not unique to NEOs, but an ever-present challenge to a lawyer embedded in a task force. The entire task force will be focussed on its duty – working to a common goal. It can be difficult in those circumstances for a legal advisor to say ‘no’. To tell a commander, or their team, that they cannot do something they have been planning. This is pressure all deployed legal advisors should have felt at some stage. Something all lawyers think they can contend with, but not something that Armed Forces, and their lawyers, always get correct. The challenge for legal advisors is to remember that their primary duty is to act for their respective countries, and the rule of law in the wider sense. Theirs is not a duty owed solely to the deployed task force. Because, important as it is to be involved in conversations, to be trusted, to be in the room, the longer and deeper a lawyer’s relationship with an organisation, and the more difficult it is to advise impartially.

The challenge might be to give advice which stops a force acting in the way it wishes to do. But legal advisors must provide professional advice without fear or favour. Be prepared to offer unpalatable and challenging advice. What may seem to offer short-term tactical advantage in the face of real humanitarian catastrophe, may cause significant strategic and legal problems in the longer term.

The deployed legal advisor on a NEO, or any operation, may advise on alternative routes to success by all means, but they must also be prepared to be unpopular, and advise against activity if the situation, if the law, demands it.

## **Legal and operational considerations for humanitarians engaging in evacuation of civilians during armed conflict**

*Itay EPSHTAIN*

Special Advisor, Norwegian Refugee Council

Evacuations are one of the most delicate operations in a crisis environment. While an evacuation can provide an immediate, lifesaving intervention in the face of an imminent threat, evacuations also carry substantial risks, and the normative questions they evoke can be significant, demanding an iterative process of legal and operational reflection.

A number of considerations come from the experience of the Norwegian Refugee Council (NRC),<sup>1</sup> an independent humanitarian organization, working in both new and protracted crises across 35 countries. In some of those situations, considerable legal dilemmas arose while planning for, and during, an evacuation of civilians.

NRC would be typically engaged in a number of different stages of an evacuation:

- Assisting the besieged population before an evacuation and negotiating the terms of their relocation;
- Ensuring the safety, dignity, and well-being of evacuees during the evacuation itself, through the provision of assistance and protection by presence;
- Providing follow-up support and care at the destination location, including facilitating returns where possible;
- Supporting protection and assistance for those persons who stayed behind.

The normative framework for NRC's engagement is set out in Customary IHL Rule 24,<sup>2</sup> requiring, to the extent feasible, the removal of

---

<sup>1</sup> Considerations for planning mass evacuations of civilians in conflict settings, NRC. Available at: [www.nrc.no/resources/reports/planning-mass-evacuations-in-conflict-settings/](http://www.nrc.no/resources/reports/planning-mass-evacuations-in-conflict-settings/) (Accessed: November 14, 2022).

<sup>2</sup> Customary IHL - Rule 24. Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives.

civilian persons and objects from the vicinity of military objectives, as an application of the principle of distinction.

In international armed conflicts (IACs), the duty of parties to the conflict flows from Article 58(a) of Additional Protocol I:<sup>3</sup> “Without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.” While in non-international armed conflicts (NIACs), Additional Protocol II Article 13(1)<sup>4</sup> stipulates that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”

We would also consider the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kupreškić*<sup>5</sup> to contain further evidence of the customary nature of the duty of each party to the conflict, to the extent feasible, to remove civilian persons and objects under its control from the vicinity of military objectives in both international and non-international armed conflicts:

Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. [...] Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

The obligation of parties to the conflict to remove civilian persons and objects from the vicinity of military objectives is gauged against the prohibition on the forcible transfer of a civilian population, unless its security demands that it be evacuated.

Article 58(a) provides that evacuations would be taken without prejudice to Article 49 Fourth Geneva Convention, granting occupying powers with limited latitude in connection with imperative military reasons, security of the population, proper accommodation to receive the persons concerned, and satisfactory conditions of transfer.

---

<sup>3</sup> Additional Protocol (I) to the Geneva Conventions, 1977 - 58 - precautions against the effects of attacks.

<sup>4</sup> Additional Protocol (II) to the Geneva Conventions, 1977 - 13 - protection of the civilian population.

<sup>5</sup> *Kupreškić et al.* (IT-95-16) (1998), International Criminal Tribunal for the former Yugoslavia. Available at: [www.icty.org/en/case/kupreskic](http://www.icty.org/en/case/kupreskic) (Accessed: November 14, 2022).

In the case of NIACs, we draw from Article 4 of Additional Protocol II<sup>6</sup> which provides for measures to be taken to temporarily relocate children to safer areas within the territorial State, with the consent and accompaniment of their parents or guardians.

Once the legal basis for NRC engagement has been clarified, we will consider the following factual and operational questions. First, is there an imminent threat of violence to the affected persons?

An immediate threat of attack against civilians and civilian objects is, in our experience, the most common reason for an evacuation. This can be either a deliberate and targeted attack on the civilian population, or an evolving situation where a besieged population is trapped in an area where hostilities take place.

While we would always prefer a carefully assessed – legally and operationally – orderly evacuation, humanitarians should be prepared to expedite evacuation support should prevailing circumstances deem it necessary.

Second, the threat of violence is gauged against a possible long-term suspension of access to protection and the obstruction of humanitarian relief.

Our humanitarian operations in the Middle East, and more recently in Ukraine, have repeatedly shown parties to conflict lay siege to civilian areas – effectively preventing populations from accessing essential services and meaningful protection.

Parties deliberately cut off access to essential items and services – water, food, energy, and medicaments – and refrain from negotiating the resumption of these services, or the admission of relief consignments. The sustained lack of access to essential services in a besieged area is, at times, indicative of a prospective attack, where an evacuation would be urgently considered.

Third, do the affected persons want to evacuate, and do they have enough information to make an informed choice? To the greatest extent possible, the will of affected persons should always be respected.

Humanitarians should ensure that the affected persons have enough information to enable them to make an informed choice about their futures, which should include, at a minimum, information about the process of evacuating risks and support en route; information about the destination; risks to people, property, and goods left behind; the likelihood of future

---

<sup>6</sup> Additional Protocol (II) to the Geneva Conventions, 1977, Article 4 - Fundamental guarantees.

sequential evacuations, and the potential for assisted returns after an evacuation, including whether there are official policies on return.

We would also consider the fact that communities are rarely homogenous, and individuals will often have different preferences about whether to evacuate or remain. Humanitarians should also be aware of the potential for members of the community to try to influence or coerce others into making a decision, one way or another.

The question of free and informed choice to evacuate becomes all the more apparent when the affected population refuses to evacuate, even when the humanitarian community feels an evacuation is imperative nonetheless. In these instances, it is essential to clearly articulate to the affected persons why humanitarians are suggesting an evacuation, and particularly to explain the protective limitations of humanitarians, peacekeepers, or other perceived sources of protection to ensure that they have enough information to make an informed decision.

If, after receiving all the information, the affected persons still do not want to evacuate, humanitarians should respect this decision and support them with alternative protection methods wherever possible.

Finally, have all other potential alternatives for improving protection and access to lifesaving assistance been exhausted? Regardless of whether the motivation for an evacuation is an imminent threat of attack or obstructed access to relief, given the inherent risks in evacuations, it would be important to pursue all other options first.

These could include negotiations with the parties to allow for an opening of humanitarian space and a decreased threat to the besieged population through increased services and humanitarian relief, or the establishment of humanitarian corridors that allow for regular delivery of goods, and extractions of the most critical cases.

For example, at different times in Iraq, NRC had called on the government to ensure that those fleeing conflict and violence could access safety; and advocated with coalition partners to use their influence to ensure that warring parties respected the rights of evacuated or demobilized civilians when they reached relative safety.

That included deploying an adequately resourced UN monitoring team to support the Government of Iraq in its efforts to protect civilians; and ensuring UN monitoring teams work closely with Iraqi civil society and INGOs.

Even with these questions satisfactorily answered, and even with the best planning and procedures in place, humanitarians may encounter situations that pose considerable legal dilemmas while planning for, and during, an evacuation.

For one, is the evacuation a deliberate attempt by the parties to depopulate a particular group or segment of the population from a given area? For NRC, supporting the relocation of individuals in a context where they are being intentionally driven from means that it is much less likely that they will be able to repatriate or return, and as such, the risks and impact of the evacuation are more significant and need to be weighed carefully.

In those instances, alongside any movement to evacuate those in imminent danger, there must also be a strategy to alert humanitarian and political leaders of these concerns.

In another example, Israel has designated nearly 18 percent of the occupied West Bank as “live-fire zones,” where at least 38 Palestinian communities reside. The Israeli promulgation of a live-fire zone for generalized military training needs is in itself inadmissible under the law of armed conflict. Recently, we have witnessed the evacuation of the civilian population of Massafer Yatte in the southern West Bank for the benefit of generalized training, with the purpose of these evacuations to irreversibly and forcibly transfer the said communities, beyond the temporary evacuation during training.

In this instance we consider appropriate private and public humanitarian diplomacy. In other instances, we may encounter a party to conflict, which objects to an evacuation. It could be that the party is genuinely concerned about people being forcibly transferred or losing access and status in an area, or that it fears that an evacuation could be perceived as a sign of political or military defeat and the inability to protect its own.

At times, preventing evacuations comes from a desire to use the population’s suffering to gather public sympathy and garner political support. At its worst, a party plans to attack the besieged population and wants to keep affected persons in a contained area where they can be more easily targeted. Should this appear to be the rationale for blocking the evacuation, we would want to move as quickly as possible to relocate the affected persons.

In Ukraine, we have seen people trapped amid hostilities with no access to humanitarian assistance since February, witnessing the destruction of their property and critical infrastructure needed for survival. We continue to call for a meaningful political agreement for the protection of every civilian trapped in high-risk areas anywhere in Ukraine, including safe and voluntary passage to people who want to leave, humanitarian access, and protection.

While there will inevitably be high risks during the evacuation itself, if well planned, these are likely to be less grave than the potential, deliberate

and direct attack that could occur. If, after repeated attempts to address the underlying opposition to the evacuation, or renegotiate the terms, humanitarians are still told that the evacuation cannot proceed, then the next step is to assess the risk of proceeding without consent, which raises a number of legal and operational questions.

As a general rule, the requirement of consent appears in Article 70 of Additional Protocol I<sup>7</sup> and in Article 18(2) of Additional Protocol II.<sup>8</sup>

The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict provides that there are two situations in which States have no latitude to withhold consent to humanitarian relief operations: first, in situations of belligerent occupation; and second, where the United Nations Security Council has adopted a binding decision.<sup>9</sup>

In any event, consent must not be arbitrarily withheld, and States and non-state armed groups do not have absolute and unlimited freedom to refuse their agreement to relief actions. A State refusing consent has to do so for “valid reasons,” not for “arbitrary or capricious ones.”

While the starting position is that humanitarian relief operations, including evacuations, without that State’s consent, violate the latter’s sovereignty and territorial integrity, the wrongfulness of such humanitarian relief operations may be precluded in situations of belligerent occupation, or where the Security Council imposes such operations by a binding decision under the UN Charter.

The question of consent will also arise if the evacuees’ preferred location is across an international border. First and foremost, a conversation should be had with the government of the neighbouring country to inform them of this preference and seek their input, needs and concerns and hopefully consent and endorsement.

Given the imperative to respect the authority and sovereignty of a State, if the neighbouring government is wholly opposed to receiving the refugees, alternative options should be pursued. We would encourage upholding commitments under the 1951 Refugee Convention.

---

<sup>7</sup> Additional Protocol (I) to the Geneva Conventions, 1977, Article 70 - Relief actions.

<sup>8</sup> Additional Protocol (II) to the Geneva Conventions, 1977, Article 18 - Relief societies and relief actions.

<sup>9</sup> Oxford guidance on the Law Relating to humanitarian relief operations in situations of armed conflict (no date) Faculty of Law. Available at: [www.law.ox.ac.uk/content/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict](http://www.law.ox.ac.uk/content/oxford-guidance-law-relating-humanitarian-relief-operations-situations-armed-conflict) (Accessed: November 14, 2022).

Ultimately, the decision about where to place the evacuees has to be determined based on what is in their best interest. If a neighbouring State or local population does not want the evacuees and could foreseeably deny them access to rights and services, this may ultimately not be the best option.

Finally, we would want to believe that evacuations would never be seen as a substitute for a political solution to a crisis. It is clear that it neither offers the same benefit as an actual resolution but if a political solution seems far off, an evacuation might be a necessary intermediary step, provided that it is accompanied by proactive humanitarian diplomacy pushing for better compliance with IHL, and a more sustainable long-term solution.



## **Evacuation of the Italian Embassy: situation report, Kabul 14-27 August 2021**

*Ettore MARTANO*

Captain, Commander, First Section of the Training Wing,  
First Regiment Carabinieri Paratrooper “Tuscania”, Italy

Thank you, Ambassador. After a brief introduction on the characteristics of the *Arma dei Carabinieri*, both as a police force and as an armed force, I will shift the focus to the unstable security situation in Kabul last year, eventually describing the events that led to the notorious evacuation. More precisely, I would like to better outline the chronology of the most salient facts of the last year, concluding my presentation by stressing a few lessons learnt by the Carabinieri that were there in Kabul, Afghanistan, during the evacuation.

The Carabinieri Corps is a “police force with military status in permanent public security service.” Integrated into the Italian Ministry of Defence alongside the Army, Navy and Air Force, it performs the function of Defence, Security Police, Judicial Police, and Civil Protection. As a police force, the Carabinieri Corps is engaged in carrying out all public order activities, from territorial control to the protection of public health and security. As an armed force, on the other hand, it performs multiple tasks, ranging from helping to defend the country’s borders, to joining international missions to maintain and/or restore peace and security, to the surveillance of all the Italian diplomatic and consular offices abroad. Finally, a further task of the Carabinieri is its unconditional commitment in the event of disasters, helping to provide prompt response and relief to the population in need.

### **Situation report: Kabul, Afghanistan**

As the situation reports from the same day delineate, the “Resolute Support” mission ended on August 14<sup>th</sup>, 2021, resulting in the retreat and repatriation of all the coalition troops apart from a few US and British units, which were scheduled to complete the withdrawal in the month of September. At the time, the international base established inside the HKIA military airport was entirely managed by the Turkish Army, which guaranteed safe access and security in collaboration with a small American

contingent responsible for guaranteeing Role 2.<sup>1</sup> Role 1<sup>2</sup> inside the South compound, located in the green zone between the Italian and American Embassies in Kabul, and Role 2 inside N-HKIA remained available to the diplomatic community. Considering the closure of the Bagram Hospital covering Role 3<sup>3</sup>, an aircraft for emergency STRATEVAC (strategic evacuation) was also available.

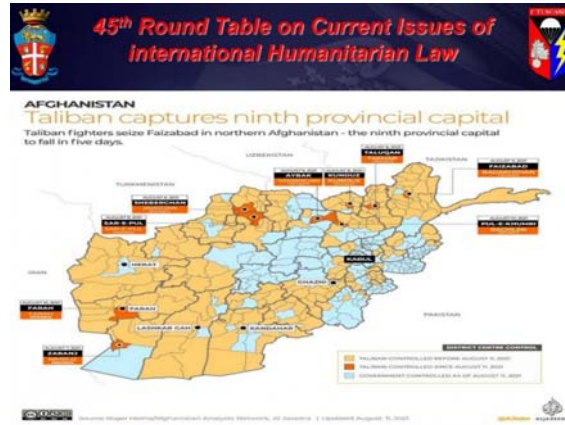
On the same day, the CJOC (Combined Joint Operations Center, former Resolute Support headquarters) was led by the US Army and managed any type of emergency that might have occurred to a unit in service in any part of the city and within the diplomatic headquarters. The Quick Reaction Force (QRF) was provided exclusively by Afghan personnel, supported by a small QRF of the US Army able to intervene only within the Green Zone. For those who are not familiar with the city situation, the Green Zone is a well-protected zone in Kabul, where all the Embassies and political institutions are located.

---

<sup>1</sup> See NATO Logistics Handbook, Third edition: 1997, Chapter 16. Paragraph 1610 reads: "The term "Role" [...] is used to describe the stratification of the four tiers in which medical support is organised, on a progressive basis, to conduct treatment, evacuation, resupply, and functions essential to the maintenance of the health of the force. [...] "Role" is defined on the basis of capabilities and resources and is not specific to particular medical unit types. [...]". On Role 2, Paragraph 1612 reads: "Role 2 support is normally provided at larger unit level, usually of Brigade or larger size, though it may be provided farther forward, depending upon the operational requirements. In general, it will be prepared to provide evacuation from Role/Echelon 1 facilities, triage and resuscitation, treatment and holding of patients until they can be returned to duty or evacuated, and emergency dental treatment. Though normally this level will not include surgical capabilities, certain operations may require their augmentation with the capabilities to perform emergency surgery and essential post-operative management [...]".

<sup>2</sup> Idem. On Role 1 Paragraph 1611 reads "Role/Echelon 1 medical support is that which is integral or allocated to a small unit, and will include the capabilities for providing first aid, immediate lifesaving measures, and triage. Additionally, it will contribute to the health and well-being of the unit through provision of guidance in the prevention of disease, non-battle injuries, and operational stress. Normally, routine sick call and the management of minor sick and injured personnel for immediate return to duty are a function of this level of care".

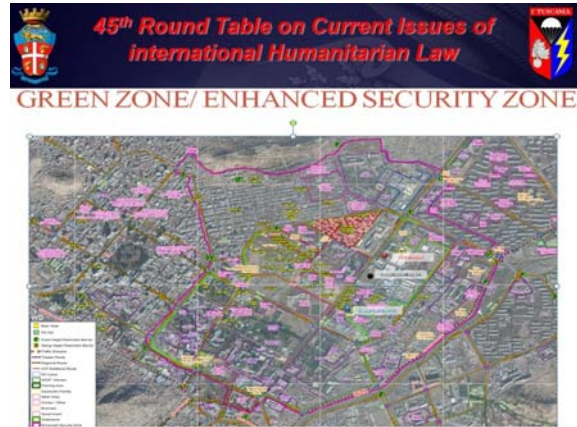
<sup>3</sup> Idem. Paragraph 1613 reads on Role 3: "[...] It includes additional capabilities, including specialist diagnostic resources, specialist surgical and medical capabilities, preventive medicine, food inspection, dentistry, and operational stress management teams when not provided at level 2. The holding capacity of a level 3 facility will be sufficient to allow diagnosis, treatment, and holding of those patients who can receive total treatment and be returned to duty within the evacuation policy laid down by the Force Surgeon for the theatre. Classically, this support will be provided by field hospitals of various types [...]".



On August 14<sup>th</sup>, the Taliban Forces had arrived near the city, already taking up positions on the outskirts. As shown in the map, on that date the Taliban fighters also seized Faizabad, in the North-East part of Afghanistan, which represented the ninth district capital to fall under the fighters' control in five days.



This slide is updated to August 13<sup>th</sup>, 2021. The red line represents the Taliban Forces surrounding Kabul on that date. This map was drawn by the Carabinieri Forces from inside the Embassy merging all the information received from all the parties involved in the operations.



This is then the Green Zone in Kabul. On the morning of August 15<sup>th</sup>, in the Afghan capital the roads were congested as a consequence of the first sporadic firefights between the Taliban and the local forces. It is important to highlight that, normally, the airport is reachable by car from the Green Zone while, on that day, the staff of the Italian Diplomatic Office and other diplomatic delegations were evacuated with the use of US helicopters and disembarked within the perimeter of the N-HKIA. On the same day, around 6 pm, while the Tuscania Carabinieri Paratroopers unit was escorting an Italian diplomat through a Gate of the airport and some local collaborators were successfully accessing the area of the airport, the same gate was targeted by direct fire and subject to the explosion of an Improvised Explosion Device (IED, cell phone-controlled bomb). As a result, two western citizens remained injured. On the contrary, the Italian diplomat remained unscathed thanks to the prompt reaction of the escort unit, composed of three Carabinieri Paratroopers. Due to the unsafe and chaotic context, the recovery operation of Afghan personnel conducted by the Carabinieri Paratroopers was also moved to a different gate.

During the early afternoon of the following day, 16<sup>th</sup> August at 2 pm, an Italian aircraft finally took off carrying onboard the Italian Head of Mission, while the Carabinieri Paratroopers remained in Kabul with an Italian diplomat. In the morning, at around 10 am, thousands of Afghan citizens had indeed broken through the gate of the civil airport of HKIA occupying the only operational runway for military flights. These actions were actually repeated several times during the same day, resulting in about twenty casualties among the crowd and clashes with the security forces. Furthermore, due to these events, no further emergency evacuations to Italy were allowed for the Italian staff throughout the day.

On the morning of August 17<sup>th</sup>, the evacuation of Afghan civilian collaborators to Italy resumed. In this framework, additional attempts were made to retrieve Italian nationals, local contractors and their family members using a gate to the north. Despite the obvious risks resulting from “plunging” into the crowd to physically recover specific people, the evacuation procedures continued even by physically lifting people above the defensive barriers of the airport, clearly exposing both the subjects and the security forces to potential hostile acts. From 18<sup>th</sup> to 21<sup>st</sup> August 2021, the recovery operations of civilians from different airport gates thus continued, mainly depending on the variable security conditions of the different gates. On Saturday, August 21<sup>st</sup>, some UK military officers on duty at an airport gate identified and extracted five deceased persons, who died because of the crowd in the previous hours.

Between August 22<sup>nd</sup> and August 25<sup>th</sup> an official warning for possible hostile actions by ISIS-K against Western troops employed at the airport was launched. From that moment on, the recovery operations started to take place from inside the perimeter sewer channel, in very unsafe and unhygienic conditions.

Because of the persistent warning concerning potential hostile actions at the gates of the airport, on August 26<sup>th</sup> all the recovery operations were suspended. At around 6.20 pm local time a body-borne IED attack on the Abbey Gate sewer channel caused about 200 deaths, 13 of which were US personnel, as well as hundreds of injured. From the moment of the explosion on, the Carabinieri Paratroopers were ordered to remain in a safe area to protect the Italian diplomats left in Kabul.

During the afternoon of the following day, at around 5 pm, an Italian military aircraft boarded all the remaining Italian personnel in the Kabul airport and departed for the military airport of Pratica di Mare, Rome.

### **Lessons learnt, acquired knowledge and takeaways**

Let me now remark on a few lessons learnt by the Carabinieri Paratroopers during the above-mentioned operations last year in Kabul.

The first element is the importance of an effective interpretation of the events and the anticipation of their evolution. How so? The production of frequent risk assessments during the single days proved to be very helpful in the fourteen days.

What was also certainly key to addressing the crisis was the preliminary training programme, the so-called “Hostile Environment Awareness Training Courses” performed in Italy by the Carabinieri Paratroopers unit

and addressed to the diplomatic personnel, journalists and other people involved in these very dangerous environments. Such courses were, moreover, complemented and integrated by the useful training directly developed in the Embassy. In fact, during our permanence in the Embassies, particularly the “high-risk” ones, as security officers, the Carabinieri carried out further training for the civilian personnel, with the main objective of preparing the staff for these kinds of emergency events.

A further interesting tool to support the lessons learnt assessment is the report “Police in conflict: lessons from the U.S. experiences in Afghanistan” published by the Special Inspector General for Afghanistan Reconstruction (SIGAR). The report explores the reasons for the failed reform of the Afghan Police despite the huge investments (\$20 billion) made by the US Government and the international community in terms of Police Assistance, over 20 years of NATO presence in Afghanistan. The Afghan Police indeed proved unable to carry out its duties in support of the Afghan communities, collapsing together with the Armed Forces just four months after the announcement of the coalition withdrawal, in many cases without even attempting to oppose the Taliban forces. The document particularly identifies 11 observations, among which it notes: “[...] the excessive militarization of the police, oriented towards counter-guerrilla activities rather than the protection of the population and the fight of the crimes.” On this basis, the analysis then moved to the discussion on the use of gendarmerie force, as the Carabinieri are, in light of the observations of the previous point. The SIGAR identified 10 lessons, including “the deficit found in the international community of a capacity to intervene in crisis areas to provide technical assistance and training to the local police, a capacity recognized in countries with gendarmerie forces.”

The SIGAR text finally highlights the contributions of the NATO Stability Policing Centre of Excellence in Vicenza (Italy), mentioning the two *pro tempore* Directors, General Paris and Colonel De Magistris, and the deployment in Afghanistan, in 2019, of Lieutenant Colonel Ellero. CoESPU and EUROGENDFOR are also mentioned for their contribution.

Thank you very much for your attention.



## **V. Legal status of evacuees from NEOs and legal responsibility for them**





# The international legal framework

*Gabriella VENTURINI*

Professor Emerita, University of Milan; Council Member, IIHL

## 1. Looking at definitions

The international legal framework governing Non-combatant Evacuation Operations (NEOs) is multi-layered and includes both International Humanitarian Law (IHL) and International Human Rights Law, as well as soft law principles and guidelines. It is important to keep in mind that at least two kinds of military operations are currently labelled as NEOs. An initial specific meaning refers to situations where foreign militaries are deployed (with or without consent of the receiving State) in order to remove their own nationals from a threatened area. This is nothing more than a renamed version of the traditional doctrine of “protection of nationals abroad.”<sup>1</sup> But there exists a much broader definition according to which NEOs consist of “operations whereby non-combatant evacuees are evacuated from a threatened area abroad, which includes areas facing actual or potential danger from natural or manmade disasters, civil unrest, imminent or actual terrorist activities, hostilities, and similar circumstances [...] A NEO can be a concurrent mission with other operations across the spectrum of conflict in a particular foreign country.”<sup>2</sup>

The general title of this Round Table suggests taking up this second version since the practice of evacuating non-combatants in times of transition between armed conflict and peace is manifold and cannot be categorised in narrow terms. One element, however, is always present: the non-combatant character of the individuals affected. It is interesting to remark that the term “non-combatant” is not specifically defined in IHL. It only appears in Article 15 sub-paragraph a) GC IV on the establishment of neutralized zones for the wounded and sick “combatants or non-combatants” and in Article 37, sub-paragraph c) AP I where “the feigning of civilian, non-combatant status” is listed among the examples of perfidy.

According to the Commentary of 1958 to GC IV “[t]here can be no doubt that the words “wounded and sick, combatant or non-combatant”

---

<sup>1</sup> See Thomson A.W.R. (2012) Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation, 11 Wash. U. Global Stud. L. Rev. 627–668, pp. 654-655.

<sup>2</sup> United States Operational Law Handbook 2022, p. 317.

mean wounded and sick members of the armed forces and civilian wounded and sick.”<sup>3</sup> The notion of “non-combatant” is thus deemed to be equivalent to that of “civilian.” The US Operational Law Handbook, however, states that the term “can refer to various categories of military personnel protected from attack, such as military medical personnel and chaplains, plus those out of combat like prisoners of war and the wounded, sick, and shipwrecked, as well as to civilians.”<sup>4</sup> This definition of “non-combatant” is broader than that of “civilian” as a person who is not a member of the armed forces<sup>5</sup> and intrinsically different from that of “protected person” which according to Article 4 GC IV refers to “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

To summarise, the category of “non-combatants” may include, according to the circumstances,

- “ordinary” civilians
- protected persons
- military medical personnel
- ministers of different religions
- prisoners of war
- wounded, sick, and shipwrecked of the armed forces.

In order to preserve the “non-combatant” character of a NEO, all those needing to be evacuated must at least be required to be unarmed. In a situation of emergency, however, it may be very difficult to determine the individuals’ level of involvement in the conflict and, therefore, some uncertainty often remains about the non-combatant quality.<sup>6</sup>

## 2. The key players

While non-combatants are the passive subjects of NEOs, States and humanitarian organizations are the key active players of NEOs. A State

---

<sup>3</sup> See the Commentary of 1958 to the Geneva Convention IV, p. 531.

<sup>4</sup> Ibid. p. 63.

<sup>5</sup> See Article 50 of Additional Protocol I and the ICRC Study on CIHL, Rule 5. Definition of Civilians, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule5](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5).

<sup>6</sup> See Gade E.K., (2010) Defining the Non-Combatant: How do we Determine Who is Worthy of Protection in Violent Conflict? *Journal of Military Ethics*, Vol. 9, No. 3, 219–242, p. 229.

launching a NEO needs to make many organizational steps including the adoption of clear selection criteria and the setting of rules on the applicable law. Therefore, the decision will be taken at the highest political level especially if it involves exercising military force in the territory of a foreign State without its consent. Managing evacuations in a NIAC provides non-state entities with even more challenges, which have been extensively discussed on previous panels.

International humanitarian actors also play a crucial role in NEOs where they complement, and sometimes substitute, State protection, particularly when the State concerned is unable or even unwilling to protect the affected people.<sup>7</sup> Humanitarian organizations are called upon to assess the needs of the civilian population and to impartially provide assistance subject to State consent, which according to the content and current interpretations of the relevant international instruments must not be arbitrarily withheld.<sup>8</sup> However, international and non-governmental organizations have a policy of not carrying out or participating in forced evacuations “unless an imminent and serious threat to the lives, physical integrity or health of the evacuees cannot be averted without the involvement of the organizations concerned” and as a measure of last resort when it proves impossible to protect civilians “*in situ*.”<sup>9</sup>

International humanitarian organizations are supposed to model their conduct on the principle of impartiality and not to discriminate on the basis of race, national or ethnic origin, language or gender.<sup>10</sup> In this perspective, any action should be based on an assessment of whether the individuals or groups involved face a life-threatening situation, the first priority being to save lives.<sup>11</sup> Accordingly, humanitarian organizations have developed principles and guidelines such as the UNHCR Handbook for the Protection of Internally Displaced Persons and Guiding Principles on Internal Displacement, or the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters of the Inter-Agency Standing Committee. These constitute a substantial corpus of soft law to ensure that evacuations

---

<sup>7</sup> Handbook for the Protection of Internally Displaced Persons, Global Protection Cluster, Working Group, p. 207.

<sup>8</sup> IASC (2013) Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys, p. 8.

<sup>9</sup> IASC (2011) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, The Brookings – Bern Project on Internal Displacement January 2011, pp. 15-19; Handbook for the Protection of IDPs, cit., p. 151.

<sup>10</sup> ICRC (2001) Strengthening Protection in War. A Search for Professional Standards, ed by. Giossi Caverzasio S., pp. 10 and 67.

<sup>11</sup> Ibid., pp. 70-71.

are carried out in a manner that respects the rights of those affected and does not discriminate against anyone. Nevertheless, in planning evacuations, transfers and relocations, selection criteria depend not only on the organization's mandate but also on donors' directions.<sup>12</sup> Moreover, in armed conflict situations, the entities involved in a NEO have to deal with the rules laid down by the parties to the conflict.

### 3. Priorities in evacuations: the “women-and-children” factor

Selection criteria for evacuations also require establishing priorities to the advantage of certain individuals and groups. Generally recognized and accepted in evacuations are criteria based on age and gender, specifically considering children and women.<sup>13</sup>

The practice of rescuing children in times of emergency outside the context of their family through evacuation has historical precedents.<sup>14</sup> There is, however, tension between the need of removing children from danger area and that of preserving family unit. While any decision should be taken only “in the best interests of the child” there may indeed be different ways to assess the “best interests of the child”.<sup>15</sup>

GC IV is focused on the physical safety of the child hence Article 17 encourages the parties to the conflict to conclude local agreements to remove children from besieged and encircled areas. Article 24 GC IV is meant to ensure the evacuation of children under 15 and those orphaned or separated from their families to a neutral country, with the consent of the Protecting Power, provided that their maintenance, the exercise of their religion are facilitated and their education is entrusted to persons of a similar cultural tradition; but there may be doubts as to whether the persistence of the individual child's education in the culture of origin is always in his or her “best interests”.<sup>16</sup> AP I at Article 78 places further

---

<sup>12</sup> Ibid., p. 66.

<sup>13</sup> Jones A. (2002) *Genocide and Humanitarian Intervention: Incorporating the Gender Variable*, Journal of Humanitarian Assistance, p. 16.

<sup>14</sup> A controversial case was the so called “Operation Babylift” carried out in 1975 from Viet-Nam by the US administration. See Bergquist K.J.S. (2009) *Operation Babylift or Babyabduction? Implications of the Hague Convention on the humanitarian evacuation and ‘rescue’ of children*, 52 International Social Work 5, 621-633, pp. 624-625.

<sup>15</sup> Handbook for the protection of IDPs, cit., p. 205.

<sup>16</sup> van Bueren G. (1994) *The International Legal Protection of Children in Armed Conflicts*, International and Comparative Law Quarterly, 809–826, p. 821; Hamilton C. and

weight on the consequences of the separation of children from their families without giving priority to the “best interests of the child.” Accordingly, it sets out strict conditions for evacuation of children but does not significantly extend the protection afforded to all children.<sup>17</sup>

Women – without any further specification – are usually paired with children when discussing priorities in evacuation. However, if it is true that among war-affected civilians those most at risk of rape and sexual violence are women, there is evidence that summary executions mainly target adult civilian men. For this reason, some scholars deem that rescuing with priority women just because they are women would amount to a kind of “sex-selective behaviour.”<sup>18</sup> They also point out the impacts that the gendered cultural lens has had on humanitarian evacuation policy and criticise the lack of attention given to that issue by policy-makers.<sup>19</sup> Accordingly, it has been submitted that “Actors in international society are still influenced by older formulations that defined entire categories of the population as presumptive combatants or presumptive non-combatants on the basis of sex and age rather than their role as agents” and that in the absence of gender rules prioritizing women, civilian adult men and women without children should be accorded the same priority for evacuation in armed conflict scenarios.<sup>20</sup>

#### 4. The status of non-combatant evacuees

The purpose of any NEO is the transfer of individuals or groups from one area or location to another in order to ensure their security and safety. If evacuation is ordered and/or enforced by authorities we speak in terms of forced evacuation. In both cases the consequence of evacuation is displacement, forced displacement in case of forced evacuation and deportation if the evacuees are unwillingly transferred beyond a national border.<sup>21</sup>

---

El-Haj T.A. (1997) *Armed Conflict: the Protection of Children under International Law*, 5 *Int'l J. Child.* 1–46, pp. 15-17.

<sup>17</sup> See Hamilton & El-Haj 1997, cit., p. 26.

<sup>18</sup> Carpenter R.C. (2003). “Women and Children First”: Gender, Norms, and Humanitarian Evacuation in the Balkans 1991-95. *International Organization*, 57(4), 661–694, pp. 663-664 and 667-668.

<sup>19</sup> See Jones 2002, cit., p. 13; Carpenter 2003 pp. 661-663; Gade 2010 p. 236.

<sup>20</sup> See Carpenter 2003, cit., pp. 671-673 and 682-683.

<sup>21</sup> Handbook for the Protection of IDPs, cit., p. 503.

Generally, besides citizens of the State managing the evacuations, citizens of the host country and even nationals of other nations are evacuated as well, but they face a different future. While citizens rescued by means of a classical “protection of nationals” operation will regain their places of habitual residence, those who have been evacuated from their homes as a result of an international or non-international armed conflict, unrests or natural disasters will often find themselves either in another area of their own State (in which case they are referred to as internally displaced persons–IDPs)<sup>22</sup> or in the territory of another State, in which case they are called currently refugees, in a wider meaning of the term and not in the technical sense.<sup>23</sup>

Both forced displacement and deportation of civilians are prohibited by IHL. Article 49(1) GC IV states that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from the occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” As to non-international armed conflicts, Article 17 AP II declares that the displacement of the civilian population must not be ordered for reasons related to the conflict and they must not be compelled to leave their own territory for reasons connected with the conflict. Article 51.7 AP I prohibiting the forced movement of civilians in order to shield military objectives or military operations from attacks is also relevant.

There are, however, situations where the ban does not apply. In international armed conflicts it is limited to occupation and IDPs are not explicitly protected against arbitrary treatment and other unlawful practices committed by their own country.<sup>24</sup> Forcible transfers are considered to be lawful if the security of the population – the “civilians involved” according to Article 17 AP II – or imperative military reasons so demand. Even deportation from the occupied territory is allowed when for “material reasons” it is “impossible to avoid” the displacement of protected persons outside the boundaries of the occupied territory (Article 49.1 GC IV). These exceptions are inherent in the general rule prohibiting forced

---

<sup>22</sup> IASC Operational Guidelines 2011, cit., p. 12

<sup>23</sup> Piotrowicz R. (2007) Displacement and Displaced Persons. In: Wilmshurst E. & Breau S. (Eds.) Perspectives on the ICRC Study on Customary International Humanitarian Law, 337–353, p. 337.

<sup>24</sup> According to the ICRC’s interpretation the own nationals of a Party to the conflict are entitled to the protection of Article 75 AP I. See the Commentary of 1987 to the Additional Protocol I, para. 2912 at p. 838. See also Jacques M. (2012) Armed Conflict and Displacement. The Protection of Refugees and Displaced Persons under International Humanitarian Law, Cambridge University Press, Cambridge, pp. 40 and 254.

displacement of civilians.<sup>25</sup> Last, but not least, Article 58 AP I states that belligerents should remove the civilian population under their control from the vicinity of military objectives. It is argued that in accordance with the principle of distinction between civilians and combatants, a party to a NIAC also has the right to evacuate civilians under its control from the area close to a military objective.”<sup>26</sup>

IHRL, which continues to apply even in times of armed conflict, complements IHL and the relevant rules of each system must be applied cumulatively in order to provide the greatest protection to internally displaced civilians and refugees.<sup>27</sup> While a specific prohibition of arbitrary displacement cannot be found in human rights treaties, it indirectly derives from the freedom of movement and residence and it is implied in a number of provisions prohibiting expulsion of nationals across the national border, expulsion of refugees, or massive expulsion of certain groups and minorities.<sup>28</sup> Freedom of movement, however, is not an absolute right, therefore, forced evacuations or relocations are lawful in emergencies.

One crucial aspect is the status of children orphaned or separated from their families evacuated to a neutral country. International human rights instruments such as the 1986 UN Declaration on the Social and Legal Principles Relating to the Protection and the Welfare of Children, the 1989 UN Convention on the Rights of the Child, as well as the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, establish rights and guarantees for children providing useful guidance in times of transition. Generally speaking, inter-country adoption is currently only considered as a last resort option, if a suitable solution is not possible in the child’s country of origin.<sup>29</sup>

Other sensitive issues about the status of particular categories of evacuees involve:

- the status of undocumented evacuees, which (as was pointed out yesterday on the first panel) must be established as soon as possible in order to give them the appropriate protection;

---

<sup>25</sup> Guiding Principles on Internal Displacement (1998) 2<sup>nd</sup> ed. UNHCR 2004, Principle 6.2.b; ICRC Study on Customary International Humanitarian Law, Rule 129. The Act of Displacement, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule129](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule129); IASC Operational Guidelines 2011, cit., p. 56; Handbook for the Protection of IDPs, cit., p. 30. See Piotrowicz 2007, cit., pp. 342 and 352; Jacques 2012, cit., pp. 29-32

<sup>26</sup> See Jacques 2012, cit., p. 52.

<sup>27</sup> See Jacques 2012, cit., p. 225.

<sup>28</sup> See Stavropoulou 1994 pp. 724-725; Jacques 2012, cit., p. 21.

<sup>29</sup> See van Bueren 1994, cit., p. 821; Bergquist 2009, cit., p. 626.



- the status of persons deprived of liberty (convicts or temporary detainees or persons who pose a security threat) who find themselves among the evacuees. Non-binding instruments such as the 1990 Basic Principles for the Treatment of Prisoners<sup>30</sup> or, as the case may be, the Geneva Convention Relative to the Treatment of Prisoners of War can provide guidance on how to appropriately keep in custody the persons concerned until their legal status is determined by a competent authority;
- the situation of foreign nationals wishing to seek asylum while being evacuated or relocated. Governments are not inclined to grant asylum during a NEO, however, the persons concerned must be granted every possible protection; they should be provided with information on the option of asylum, and displacement ensuing from evacuation should not unduly hinder their claim.<sup>31</sup>

## 5. Legal responsibility & jurisdiction

IHL establishes positive obligations concerning the treatment of the displaced civilian population. In IACs it gives special responsibilities to the Occupying Power in order to ensure, ‘to the greatest practicable extent’, that proper accommodation is provided to the evacuees and that the removals are effected “in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.”<sup>32</sup> Similarly, Principle 18 of the Guiding Principles on Internal Displacement requires that competent authorities must provide internally displaced persons with safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation.

According to IHRL, States have the obligation to respect, protect and fulfil the human rights of their citizens and other persons under their jurisdiction. Therefore, governmental actors (i.e. the government organizing a NEO, the host nation and, if it is the case, the country receiving the evacuees) have the primary responsibility to provide protection and assistance to the affected persons either in an IAC, a NIAC

---

<sup>30</sup> UNGA Res. 45/111 of 14 December 1990.

<sup>31</sup> Handbook for the Protection of IDPs, cit., p. 439. See Day S.F. (1992) Legal Considerations in Noncombatant Evacuation Operations, 40 Naval L. Rev. 45–64, p. 58.

<sup>32</sup> Geneva Convention IV Article 49.3; Handbook for the Protection of IDPs, cit., p. 213. See Jacques 2012, cit., pp. 33–36.

or in an emergency situation such as a disaster. In a situation of non-international armed conflict this responsibility is incumbent on any authority which has the power to effectively manage an evacuation of persons who do not take part in hostilities. In principle, this also applies when an evacuation is managed under the direct command and control of an intergovernmental organization, for example, in a peacekeeping operation.

To conclude, evacuating non-combatants in times of armed conflict or transition between armed conflict and peace is itself an emergency. The practice is manifold and it gives rise to the most challenging issues, first of all, that of preserving the “non-combatant” character of the operation. Governmental actors, humanitarian organizations and non-state entities are called upon to manage NEOs and their interplay adds complexity to the task. It is important to recognize that both IHL and IHRL remain applicable and complement each other, while soft law provides comprehensive guidelines to ensure that the affected persons are given the best possible protection in all circumstances.

## **Evacuation of IDPs, asylum-seekers and refugees: the coordination role of UNHCR**

*Aurvasi PATEL*

Deputy Director (Protection), Regional Bureau for Asia-Pacific,  
UNHCR

*The title of the contribution has been drafted by the editorial team on the basis of the content of the presentation delivered during the conference.*

I would like to thank the organizers for this opportunity to speak at this 45<sup>th</sup> Round Table and to share my operational experience in evacuations.

In my intervention, I will deal with two different scenarios: the first one is related to the case in which UNHCR is involved in country evacuations of individuals within the country, who do not cross an international border; the second refers to the evacuation of refugees and asylum-seekers from the country of asylum to another country.

Overall, in the framework of the United Nations Refugee Agency, humanitarian evacuations mostly refer to large-scale relocations of civilians, sometimes including refugees and asylum-seekers. All the previous speakers have already spoken about the issues experienced by anyone who faces an immediate threat to life in a conflict setting and moves to locations within their own country, where they can be more effectively protected. For this reason, I thought I would use this time slot to talk about my personal experience in the field with evacuations.

When I was deployed in the Balkans in Zenica (Bosnia and Herzegovina), in the early '90s, following the fall of Srebrenica and after the safe areas of Žepa had also fallen, the Sarajevo Government asked the United Nations to provide security to the thousands of Muslims planned to be expelled from this safe area. In the process, both military and civilians were part of the dialogue and were dispatched to Žepa to monitor the situation and liaise with both the government and the Bosnian-Serb forces on the ground. UNHCR was asked to support the evacuation and I was the convoy leader in partnership with the local municipal authorities in Zenica. We arrived in Zepa with empty buses and left Zepa with the buses full of the Bosniak population of Zepa.

The convoy left Zepa late at night, in extremely bad weather conditions along the mountainous roads of Bosnia. We managed to achieve the objective of relocating these people into a camp in Zenica with the support

of agencies like the Norwegian Refugee Council and other non-governmental organizations.

It is important to stress that in-country evacuation is always to be considered a temporary, last resort measure and, in the case of my example, there was an imminent and clear threat to the security of these people. The individuals in the camp were given tents for shelter as nobody expected that these people would live in the camp permanently. The evacuation and relocation was agreed with the local authorities concerned. Of course, there was a whole range of other actors, from the UN Secretary-General in New York, his Special Advisor, NATO, Member States, the ICRC, too many to name but just to say that a lot of discussions and coordination efforts were made for this exercise.

Let me stress that we work in many situations where agreements are made and then broken and, in this situation, it would have been a real tragedy if the Bosnian Serbs did not allow the evacuation. Furthermore, preserving the civilian character of humanitarian evacuations is essential and I think that this is one of the main elements why UNHCR was asked to support this operation. Of course, to perform all these tasks, the respect and application of the fundamental principles of international law are key.

I will not go too much into detail on the current example of Ukraine, but just to say that the example of Bosnia fits very well with what many of the Ukrainians under siege are currently living, having been relocated to other parts of the country. In this case, all the international humanitarian law, human rights law and refugee law principles that have been outlined in the earlier sessions apply.

The second type of evacuation is the evacuation of refugees and asylum-seekers from a country of asylum. It certainly represents an exceptional circumstance, and UNHCR has supported the evacuation of refugees and asylum-seekers at risk from countries of asylum to another country. Also in this case, it is a tool of last resort and, therefore, reserved for some unique and individual cases falling under broad risk categories.

In recalling my experience as the Global Resettlement Coordinator in Geneva, part of my responsibilities was to manage the Emergency Transit Mechanisms (ETM). At that time, we had an ETM in Manila, and one in Romania. The best way to illustrate this point is by giving an example such as Libya where there is a conflict and those seeking protection in Libya are risking their lives because of the conflict. UNHCR, in agreement with the authorities in Libya and other Member States, transferred refugees and asylum seekers out of Libya and relocated them to the ETM so that UNHCR could continue processing their case with the objective of

resettling them to a third country (country of Resettlement) that could offer these individuals permanent protection once the procedure was concluded.

In a recent example in November 2017, UNHCR, for the first time, established an Emergency Evacuation Transit Mechanism (ETM) for the evacuation of vulnerable refugees from detention in Libya to Niger. The programme was established to facilitate the processing of refugees trapped in detention, in order to enable access to protection and durable solutions. UNHCR and the Government of Niger signed a Memorandum of Understanding in December 2017, temporarily expanding the Niger asylum space to these refugees.

The last example on this issue I would like to provide is the time when I was in Kosovo. Following the NATO airstrikes in Serbia a massive movement of Kosovars into Macedonia was generated. At the time, I was a camp manager of “Stankovic One” and there was an agreement among Member States to relocate some of these refugees out of the camp and implement what was called a “humanitarian evacuation programme”. This meant that representatives of all the Member States interested in supporting the programme arrived at the camp and UNHCR staff set up small temporary “offices” for each Member State where the respective Government officials processed the Kosovars’ applications. Those accepted on the programme were air lifted out of the camp to a third country. This example illustrates a specific request made to UNHCR to address a specific refugee crisis.

Thank you.

## No woman left behind: legal and military challenges in NEOs

*CHAN Kristy Tin Wing*

Author of the winning essay of the 2022 “Sanremo New Voices in International Humanitarian Law Essay Competition”

“There was little, or no planning done for how to support and extract those left behind.” – a former UK General, commenting on the 2021 UK evacuation from Afghanistan.<sup>1</sup>

“No man left behind” is a military motto deeply ingrained in the public conscience. For example, a group of British soldiers won a legal battle to ‘bring their Afghan interpreter to the UK’<sup>2</sup> after the UK’s Non-Combatant Evacuation Operation (NEO). However, this essay argues that a gendered IHL analysis of NEOs is necessary to reveal how NEOs fail to protect women who have served in equally worthy capacities. Moreover, IHL places a positive obligation on States to respect the specific protection and needs of women affected by armed conflict.<sup>3</sup> Taken with Common Article 1 of the Geneva Conventions, States must ensure that (1) NEOs do not indirectly discriminate against women; (2) military planners take account of women’s special needs during evacuation; and (3) diligence is undertaken to protect women against IHL violations. The overarching point is that an IHL framework can enable NEOs to move away from predominantly diplomatic or military considerations to a more humanitarian approach. Finally, I argue that a gendered-IHL framework to NEOs fortifies the applicability of *jus post bellum* and, potentially, remedial IHL obligations directly owed to individuals.

---

<sup>1</sup> House of Commons Foreign Affairs Committee, 2022. Missing in action: UK leadership and the withdrawal from Afghanistan. London: Parliamentary Copyright House of Commons, p. 27.

<sup>2</sup> Ball J., “Soldiers Win Legal Battle to Rescue Afghan Interpreter” *BBC* (June 5, 2022), [www.bbc.com/news/uk-england-nottinghamshire-61696271](http://www.bbc.com/news/uk-england-nottinghamshire-61696271).

<sup>3</sup> ICRC, Customary IHL Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule134](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule134) (2022).

## Applicability of IHL to NEOs

Though States clearly recognize that IHL is, in theory, applicable to NEOs,<sup>4</sup> it is unclear what legal framework, if any, underpins these military operations in practice. State practice demonstrates that NEO eligibility criteria are predicated on the individual's connection to the evacuating State. Legal considerations are passed over, downplayed, or shunted to the back: the UK military manual on NEOs leaves 'legal considerations' to Annex 3B; the bulk of the 98-page document covers military and diplomatic aspects of NEOs.

In academia, key debates lie in the doctrine of protection of nationals abroad,<sup>5</sup> permissibility of the use of force, and self-defence.<sup>6</sup> Some scholars have even explicitly rejected the applicability of international law to talk of "obligations" in NEO discourse. In Professor Mégret's view,<sup>7</sup> IHL cannot act as a suitable framework for NEOs and evacuation of these "categories of privileged persons for the purposes of post-war relocation" as IHL "is focused on duties towards former enemies, not former allies" broadly rejecting an international law analysis. However, I argue that IHL *is* about the protection of the vulnerable and hence an appropriate framework for NEOs. Further, it is clear that IHL obligations persist even when hostilities cease.<sup>8</sup> Given that NEOs often take place in hostile environments where eligible persons and the evacuating force may be directly targeted, IHL can still apply.

Though Mégret suggests that transnational frameworks are more appropriate (relying on national parliaments to pass legislation),<sup>9</sup> given that NEOs are already bilateral processes with relatively little multinational cooperation, an underlying IHL framework can serve to standardize NEO approaches. Eligibility criteria would not be based on one's contribution to the evacuating State *per se* but based on every State party's obligations

---

<sup>4</sup> UK Ministry of Defence, Joint Doctrine Publication 3-51, Non-Combatant Evacuation Operations, para. 1.4.

<sup>5</sup> Ruys T, "The Protection of Nationals Abroad Doctrine Revisited" [2008] *Journal of Conflict and Security Law*.

<sup>6</sup> Thomson A, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 *Washington University Global Studies Law Review* 627 (2012).

<sup>7</sup> Mégret F, "Intermediate Solidarities: The Case of the Afghan Interpreters" <https://verfassungsblog.de/os1-intermediate-solidarities/>.

<sup>8</sup> Mahnad R and Thynne K, "Silenced Guns Do Not Mend Lives: What Does the Law Say about Human Suffering at the End of Conflict?", <https://blogs.icrc.org/law-and-policy/2022/07/21/silenced-guns-lives-law-end-of-conflict/>.

<sup>9</sup> Mégret, n. 7.

under international law. This could make evacuation procedures less arbitrary – for example, some individuals could not reach the airport for evacuation on time due to the UK’s failure to provide a shuttle bus, in comparison to the US and German Governments who picked up passengers from around Kabul and drove them directly to safety.<sup>10</sup> Under an IHL analysis, a potential evacuee’s route to safety is not dependent on the varying goodwill of individual States; it is closer to a right, not a privilege. Specifically, the focus of this essay is to demonstrate that States owe an obligation not to discriminate, and potentially *positively* discriminate, in favour of particularly vulnerable groups, namely women.

## **A gendered IHL framework**

### **(1) Indirect discrimination**

According to Common Article 3 of the 1949 Geneva Conventions, “Persons taking no active part in the hostilities... shall in all circumstances be treated humanely, without any adverse distinction founded on ... sex...”. This treaty and customary rule bans both direct and indirect discrimination.<sup>11</sup> States must account for the fact that women are, for physical and societal reasons, often unable to perform the same work as men.

Basing eligibility on military-linked service leaves a gaping hole in the network of protection for women who did *not* serve, or were unable to serve, in a position favourable to the evacuating power’s interests. For example, Special Immigration Visas (SIV) required the interpreter to have worked with the US military for at least 12 years. Similarly, UK eligibility criteria required “contribution to UK objectives; vulnerability; and... [rarely] sensitive information or knowledge that individuals held”.<sup>12</sup> However, the wife and children of a man whose SIV was approved a month before his death were almost unable to flee to the US because the wife herself did not fulfill the SIV criteria.<sup>13</sup> It is difficult for women to find

---

<sup>10</sup> Townsend M, “‘I Can’t Risk My Children’s Lives’: the Families Left behind at Mercy of Taliban”, *The Guardian* (2021), [www.theguardian.com/world/2021/aug/28/families-left-behind-kabul-taliban-afghans-entitled-britain](http://www.theguardian.com/world/2021/aug/28/families-left-behind-kabul-taliban-afghans-entitled-britain).

<sup>11</sup> ICRC, Customary IHL Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule134](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule134) (2022).

<sup>12</sup> House of Commons Foreign Affairs Committee, n1, p.25.

<sup>13</sup> Trovall E., “After 10-Year Wait, Family of Slain Afghan U.S. Military Interpreter Arrives In Houston” *Houston Public Media* (2021) [www.houstonpublicmedia.org/articles/news/politics/immigration/2021/06/14/400530/after-10-year-wait-family-of-slain-afghan-u-s-military-interpreter-mohammed-arrives-to-houston](http://www.houstonpublicmedia.org/articles/news/politics/immigration/2021/06/14/400530/after-10-year-wait-family-of-slain-afghan-u-s-military-interpreter-mohammed-arrives-to-houston) accessed 2022.



work at all, let alone work with foreign forces. In Afghanistan, 80% of Afghan women are out of the workforce.<sup>14</sup> Societal stigmas surrounding working women, let alone one in a military-related position, run rife. Given that 91% of Afghan women only have a primary education or less, it is also unlikely that they will be able to work in positions that demand literacy, such as an Embassy. The most vulnerable – for example, young girls or mothers who bear the brunt of child-rearing responsibilities – are unlikely to be working at all. Women who sit at the intersection of the elderly, sick, and disabled are also disproportionately sidelined by NEO eligibility. 80% of Afghan adults live with some form of disability,<sup>15</sup> but severe disabilities are also more prevalent amongst women. Consequently, they may be unable to serve in roles that require active movement and struggle with even greater social stigmas. To prioritize a specific kind of role is to indirectly lock women out of life-saving evacuations, a form of IHL non-compliant discrimination.

NEO eligibility also adversely affects women because gendered data gaps render women and girls “invisible.” Data collection methods that fail to account for stereotypes, social norms, and other factors can introduce bias.<sup>16</sup> For example, female births may be less likely to be registered,<sup>17</sup> or women may have restricted access to identification cards. In 2018, Afghanistan had the widest gender gap between men and women having IDs in the world. 94% of Afghan men possessed IDs compared to only 48% of women.<sup>18</sup> This informational gender bias skews military commanders’ understanding of the civilian population. In turn, this has knock-on effects on decision-making, especially in complex, fast-paced NEO operations, and may indirectly discriminate against women.

---

<sup>14</sup> “What Happens to Afghanistan’s Left-behind Women as the Taliban Rises?” The Guardian (2019), [www.theguardian.com/global-development/2019/nov/14/what-happens-to-afghanistans-left-behind-women-as-the-taliban-rises](http://www.theguardian.com/global-development/2019/nov/14/what-happens-to-afghanistans-left-behind-women-as-the-taliban-rises).

<sup>15</sup> Fitzgerald C., Humanitarian Crisis and Neglect in Afghanistan Puts People with Disabilities at Risk, The OWP (2022) <https://theowp.org/reports/humanitarian-crisis-and-neglect-in-afghanistan-puts-people-with-disabilities-at-risk/>.

<sup>16</sup> Durham H. et al., “Gendered Impacts of Armed Conflict and Implications for the Application of IHL” <https://blogs.icrc.org/law-and-policy/2022/06/30/gendered-impacts-of-armed-conflict-and-implications-for-the-application-of-ihl/>.

<sup>17</sup> “Birth Registration: A Passport to the Future” (UNICEF Afghanistan 2017) [www.unicef.org/afghanistan/stories/birth-registration-passport-future](http://www.unicef.org/afghanistan/stories/birth-registration-passport-future).

<sup>18</sup> Cone D., “Afghan Women and Girls Under Immediate Threat: The Responsibility to Protect” (Refugees International 2021) [www.refugeesinternational.org/reports/2021/10/5/afghan-women-and-girls-under-immediate-threat-the-responsibility-to-protect-and-assist-is-just-beginning](http://www.refugeesinternational.org/reports/2021/10/5/afghan-women-and-girls-under-immediate-threat-the-responsibility-to-protect-and-assist-is-just-beginning).

### *Application to NEOs*

Therefore, in a NEO context, women must, as far as possible, be included in States' primary visa programmes for evacuees. Women who worked for NGOs funded by US and NATO grants should be included in SIV or P-1 programmes. Further, States may consider lowering the requirement of the number of years worked, given that many women in conflict-torn countries bear greater responsibilities, such as household and child-rearing duties, affording them less time in the workforce.

In terms of military planning, a gendered IHL analysis should also be applied to ensure that the actual physical evacuation adequately protects women. Reports from Kabul in August 2021 suggested that evacuees "escaped by walking on dead people."<sup>19</sup> Due to "the crowds, the checkpoints, the sheer physicality and danger involved... if you were carrying small children, forget it."<sup>20</sup> For women who bear the brunt of child-rearing responsibilities, even if they are eligible for evacuation, the process is in practice weighed heavily against them, violating the principle of non-discrimination.

### **(2) Positive action**

More broadly, because all States are under an obligation to "respect and ensure respect" for IHL pursuant to Common Article 1 of the four Geneva Conventions, this strengthens the basis of a claim that States must ensure that NEOs protect vulnerable groups most at risk of reprisal/IHL violations. In the Afghanistan NEO context, States should, therefore, have taken into account the greater risk of sexual violence, unequal access to medical care, targeting of women in the workplace such as policewomen, judges, and prosecutors, or educators.

This is not merely aspirational; in its 2016 Commentary, the ICRC explains that Common Article 1 requires that States act positively to "prevent violations when there is a foreseeable risk that they will be committed and... prevent further violations in case they have already occurred."<sup>21</sup> States must ensure compliance with IHL not only by their own forces, but also by *other* parties to a conflict. That leaves the door open to the potential for requiring other States to "pick up the tab" and assist even indirectly-linked local citizens.

---

<sup>19</sup> Townsend M., "I Can't Risk My Children's Lives': the Families Left behind at Mercy of Taliban", *The Guardian* (2021) [www.theguardian.com/world/2021/aug/28/families-left-behind-kabul-taliban-afghans-entitled-britain](http://www.theguardian.com/world/2021/aug/28/families-left-behind-kabul-taliban-afghans-entitled-britain).

<sup>20</sup> *Ibid.*

<sup>21</sup> ICRC, *Commentary on the First Geneva Convention*, 2016, para. 164.

This essay does not go that far. Instead, it submits that creating viable pathways for women to escape via NEO could enable States to fulfil a diligence obligation to ensure respect for IHL. This could take the form of a special visa set up for women and girls at risk.<sup>22</sup> Many States' programmes are only effective for women who have managed to leave Afghanistan, failing to protect those who were never eligible in the first place. Similar resolutions have been put forward by non-profits,<sup>23</sup> arguing that the US should have established a P-2 programme specifically for Afghan women and girls who credibly fear Taliban reprisals. By doing so, Afghan women and girls who are in immediate danger would be less likely to be subject to the same administratively burdensome requirements necessary to process P-1 or P-3 cases. This would render NEOs more IHL-compliant.

## Wider implications

### (1) Obligations and rights

The above analysis recognizes that States owe IHL obligations with respect to particularly vulnerable groups based on fundamental principles of IHL, especially the principle of non-discrimination, requiring positive discrimination and action in favour of those groups. But to *whom* is that obligation owed? Shifting the focus of NEOs to the protection of civilians squares with recent scholarship which suggests that IHL grants individual rights, including substantive rights to be treated in accordance with the law<sup>24</sup> and even a right to reparation for breaches directly to individual victims. This is important in NEOs because the host State is often collapsing, experiencing a breakdown in law and order, or may be hostile itself. It would be impossible for them to exercise diplomatic protection over the individual to bring a claim on their behalf. Instead, the corollary "right" to the evacuating State's obligation should be vested in the individual herself.

Moreover, to explicitly frame NEO operations in IHL terms is to support the "very *raison d'être*" of IHL by protecting and empowering

---

<sup>22</sup> MEPs Call for Special Visa Programme for Afghan Women Seeking Protection" [www.europarl.europa.eu/news/en/press-room/20210910IPR11906/meps-call-for-special-visa-programme-for-afghan-women-seeking-protection](http://www.europarl.europa.eu/news/en/press-room/20210910IPR11906/meps-call-for-special-visa-programme-for-afghan-women-seeking-protection).

<sup>23</sup> Cone n. 18.

<sup>24</sup> Lawrence Hill-Cawthorne, Rights under International Humanitarian Law, *European Journal of International Law*, Volume 28, Issue 4, November 2017, p.1187-1215, <https://ezproxy-prd.bodleian.ox.ac.uk:2102/10.1093/ejil/chx073>.

individual victims. In *Jurisdictional Immunities of the State* [2012], Greece stated that “it cannot be argued with any seriousness that IHL – law *par excellence* aimed at protecting the individual and his rights – does not confer direct rights on individuals which are opposable to States. That notion is implicitly accepted in a series of IHL provisions and explicitly accepted in [IHL] philosophy.”<sup>25</sup> Given that NEOs are often the last chance for vulnerable civilians to flee a hostile host State, recognizing the potential for an IHL right to equal treatment in NEOs accords with IHL’s “very *raison d’être*.”<sup>26</sup>

## (2) Remedial obligations

If this is true, what scope is there for remedial obligations even after the NEO is complete? In New Zealand, an attempt to secure the transfer of the extended family of Afghan interpreters on the grounds that the State failed on IHL grounds was, for instance, unsuccessful. The judge stated that “New Zealand might be thought to have a form of moral responsibility for the citizens of Afghanistan who assisted them in the years while they were there, but the suggestion there is an international obligation to the wider family of those persons after hostilities had ceased stretches the argument on international humanitarian law obligations too far.”<sup>27</sup> However, the “causal link” therein could be sufficiently close for women who (indirectly) worked for foreign forces. Failure to evacuate them, and a corresponding remedial obligation, could be invoked by individuals directly in domestic courts as a violation of the individual’s right under IHL.

Regardless, an IHL analysis may help to make NEOs more humanitarian-oriented. States view NEOs as predominantly diplomatic or military exercises: “NEOs, first and foremost, are diplomatic operations that are supported by military assets.”<sup>28</sup> Such a conception of NEOs is inherently part of the problem – NEOs are not *humanitarian* but *diplomatic* initiatives. States are concerned with, first and foremost, protecting their own. Though such bilateral evacuation operations are important, more multilateral efforts that focus on humanitarian issues are needed.<sup>29</sup> For

---

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154, at [33].

<sup>28</sup> Blanchard, C. “Noncombatant Evacuation Operations,” *Marine Corps Gazette* (March 1997) p. 56.

<sup>29</sup> “UNHCR Warns That Humanitarian Needs in Afghanistan Cannot Be Forgotten” [www.unhcr.org/news/briefing/2021/8/611f61824/unhcr-warns-humanitarian-needs-afghanistan-forgotten.html](http://www.unhcr.org/news/briefing/2021/8/611f61824/unhcr-warns-humanitarian-needs-afghanistan-forgotten.html).

example, wider use of humanitarian corridors may allow larger numbers to flee voluntarily or, more controversially, States may choose to undertake a greater responsibility to protect. Before that happens, applying an IHL analysis to NEOs – symbols of transition, limbo, and change – may go some way to bridging this gap and protecting at least some more women left behind.

## Preparing for post-conflict: a disability-responsive perspective

*Victoria RIELLO*

Author of the second-place essay of the 2022 “Sanremo New Voices in International Humanitarian Law Essay Competition”;

Associate at the ICRC Legal Division in Geneva

*This article does not necessarily reflect the views of the ICRC*

While all civilians face challenges in the aftermath of conflict, certain groups encounter specific risks and barriers. That is the case of persons with disabilities, a group that constitutes at least 15% of any given population – often more in contexts of protracted conflict,<sup>1</sup> making them the largest minority group in the world.<sup>2</sup> Although there have been incremental efforts towards addressing the situation of civilians with disabilities in armed conflict – such as the adoption of a UN Security Council resolution dedicated to this topic and of the Charter on Inclusion of Persons with Disabilities in Humanitarian Action by Stakeholders from States, international organisations and civil society –<sup>3</sup> humanitarian and military actors continue to struggle in responding to the specific risks and challenges this group faces during and after hostilities.

This essay proposes that international humanitarian law (IHL) be operationalised in a disability-responsive manner to address the specific challenges persons with disabilities encounter in the transition from conflict to peace. First, it explains the extent to which the legal framework applicable in armed conflict provides an inclusive protection to civilians with disabilities, underscoring the obligations of the parties to a conflict.

---

<sup>1</sup> World Health Organization, World Report on Disability, 2011, p. 29, [www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability](http://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability); UN General Assembly (UNGA), Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/76/146, 19 July 2021, para. 31.

<sup>2</sup> A. Priddy, Academy Briefing No. 14: Disability and Armed Conflict, Geneva Academy, April 2019, p. 19, [www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactif.pdf](http://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactif.pdf).

<sup>3</sup> UN Security Council Resolution 2475, Protection of Civilians in Armed Conflict, S/RES/2475, 20 June 2019; Humanitarian Disability Charter, About <http://humanitariandisabilitycharter.org/>. As of 12 November 2022, the Charter had been endorsed by 260 stakeholders.

Second, it highlights three challenges prevalent in the aftermath of armed conflicts and how they have differentiated impacts on persons with disabilities. Finally, it draws conclusions on the underlying causes of their invisibility in the aftermath and how the relevant actors can work in a more inclusive manner.

## I. Legal framework

From a historical perspective, the concern for the situation of persons with disabilities in conflict was already present in the making of the Geneva Conventions.<sup>4</sup> However, as a product of their time, their language reflects an outdated understanding of disability. The Fourth Geneva Convention (GC IV) provides for the particular protection of and respect for “the wounded and sick, as well as the infirm”<sup>5</sup> which was then understood to encompass people that acquired disabilities as a result of the conflict, as well as those with pre-existing disabilities. The language chosen by the drafters, particularly the term “infirm”, was said to reflect the fact that these persons were “in a state of weakness which demand[ed] special consideration.”<sup>6</sup> Therefore, this term evidenced a medical model, by which persons with disabilities were seen as in need of cure, reinforcing negative stereotypes and a discriminatory attitude, ultimately denying them agency and often even legal capacity.<sup>7</sup> Thus, while a merely textual interpretation of this provision proves anachronistic, the provision’s *raison d’être* sustains a theological interpretation that persons with disabilities are owed special protection and respect. This, in turn, supports a disability-responsive application of IHL.

Moreover, the interpretation of legal norms evolves over time in light of social developments. The adoption in 2006 of the Convention on the Rights of Persons with Disabilities (CRPD) was the result of decades of work to change attitudes and approaches to persons with disabilities, moving from the medical model to a social one, which recognises disability as an

---

<sup>4</sup> A. Breitegger, Persons with Disabilities in Armed Conflicts, ICRC Humanitarian Law & Policy Blog, 13 December 2017 <https://blogs.icrc.org/law-and-policy/2017/12/13/persons-with-disabilities-in-armed-conflicts/>.

<sup>5</sup> Art. 16, GC IV. The Cambridge Dictionary defines ‘infirm’ as ‘physically or mentally weak, especially because of old age or illness’.

<sup>6</sup> J. Pictet (ed.), Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva (1958), p. 134.

<sup>7</sup> Priddy, n. 2, p. 13.

evolving concept and that disability results from “the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”<sup>8</sup> This recognition thus places the individual as a subject of rights and an agent rather than the object of charity or medical treatment, highlighting that the problem lies in the barriers the individual may encounter. In this respect, armed conflict and its effects exacerbate barriers and, therefore, require specific measures to ensure an inclusive protection of persons with disabilities. To this end, the CRPD explicitly obliges its 185 States Parties to take all necessary measures to that effect in situations of risk such as armed conflict, in accordance with their obligations under international law, including IHL and international human rights law (IHRL).<sup>9</sup>

Therefore, taking Article 11 CRPD and the fact that IHRL remains applicable in times of armed conflict<sup>10</sup> into account, the rights of persons with disabilities and the principles enshrined in the CRPD must inform the application of IHL. By prescribing the humane treatment of all civilians and prohibiting *adverse* distinction, IHL also recognises that differentiated treatment may be required in accordance with an individual’s inherent status, capacities and needs.<sup>11</sup> In this regard, the CRPD’s general principles of respect for persons with disabilities’ agency, non-discrimination, full and effective participation in society, human diversity and accessibility, among others,<sup>12</sup> must inform the practical application of IHL. As explained by the UN Special Rapporteur on the Rights of Persons with Disabilities (UNSRD) Mr Gerard Quinn, “[p]ersonhood – not vulnerability – is now the main touchstone.”<sup>13</sup>

In the aftermath, placing personhood at the forefront also entails understanding protection broadly “beyond mere bodily protection.”<sup>14</sup> Rules such as access to humanitarian relief and accountability for serious

---

<sup>8</sup> Preamble (e), CRPD.

<sup>9</sup> Art. 11, CRPD.

<sup>10</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106.

<sup>11</sup> J.M. Henckaerts (ed.), *Commentary to the Third Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva (2020), paras. 587, 611-612.

<sup>12</sup> Art. 3, CRPD.

<sup>13</sup> UNGA, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/77/203, 20 July 2022, para. 15.

<sup>14</sup> *Ibid.*, para. 18.



violations,<sup>15</sup> which gain particular relevance in the transition to peace, are thus prime examples of how the protection afforded by IHL encompasses not just physical safety, but also addresses mental health and access to justice, for example. Likewise, the rights to reasonable accommodation and to accessibility,<sup>16</sup> coupled with IHL's prohibition of adverse distinction, provide guidance in operationalising IHL protections: they provide a legal basis to according priority to persons with disabilities in the distribution of humanitarian aid and adapting shelters to be accessible to persons with different disabilities.<sup>17</sup>

Finally, it is noteworthy that recourse to the CRPD is not without its difficulties. First, despite widespread ratification, the CRPD is not universal and is thus not applicable to all States. Second, the application of IHRL to non-state armed groups (NSAGs) remains controversial.<sup>18</sup> Nevertheless, it should be acknowledged that IHL itself already provides certain tools for a disability-responsive protection of civilians, even where certain human rights obligations do not apply. Consequently, IHL obliges both States and NSAGs to protect persons with disabilities, including by provisions that continue to apply after the conflict.<sup>19</sup>

## II. Challenges in the aftermath

Persons with disabilities face myriad challenges in armed conflict, which reflect physical, communicational, attitudinal, and institutional barriers in their surroundings. For parties to apply IHL in a disability-responsive manner, they must recognise such barriers and work to mitigate them. Further, parties must take the protection of persons with disabilities into consideration throughout the entire peace-conflict continuum.<sup>20</sup> Thus, this section highlights three challenges civilians with disabilities encounter

---

<sup>15</sup> See Arts. 23, 59, 146 et seq., GC IV; Arts. 11(4), 54(I), 70, 85 et seq., Additional Protocol (AP) I; Arts. 14, 18(2) AP II; Customary IHL Rules 55, 56, 149 et seq.

<sup>16</sup> Arts. 5(3) and 9, CRPD.

<sup>17</sup> ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, 13 December 2017, p. 4 [www.icrc.org/en/download/file/62399/how\\_law\\_protects\\_persons\\_with\\_disabilities\\_in\\_war.pdf](http://www.icrc.org/en/download/file/62399/how_law_protects_persons_with_disabilities_in_war.pdf).

<sup>18</sup> For discussions, see J.M. Henckaerts & C. Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice', in E. Heffes, M.D. Kotlik & M.J. Ventura (eds.), *International Humanitarian Law and Non-State Actors: Debate, Law and Practice*, The Hague (2020).

<sup>19</sup> It is beyond the scope of this paper to analyse the differences of rules applicable in international and non-international armed conflict.

<sup>20</sup> See A/76/146, n. 1.

in the aftermath: the destruction of essential services, access to humanitarian aid, and accountability for violations. Although these circumstances severely impact all civilians, persons with disabilities face specific, compounded challenges which relate not only to intrinsic characteristics such as disability, gender and age, but also to “accumulated disadvantages” imposed by external factors such as pre-existing marginalisation, institutionalisation or a lack of inclusion in social processes.<sup>21</sup>

### *II.1 Destruction of essential services*

In the aftermath of conflict, essential services such as transportation, electricity and healthcare may become inaccessible to persons with disabilities due to damage to its infrastructure or outright destruction. The lack of electricity can render assistive devices inoperable, and physical access to certain facilities may become impossible for persons with mobility impairments.<sup>22</sup> Women and girls with disabilities, who are at increased risk of conflict-related sexual violence (CRSV), face specific adverse impacts due to healthcare and rehabilitation services potentially becoming unavailable.<sup>23</sup> Additionally, persons with disabilities may need specialised services, which are often disrupted to the point of collapse.<sup>24</sup>

Furthermore, economic crises arising from conflict, while impacting the whole population, have driven persons with disabilities further into poverty.<sup>25</sup> In Yemen, for instance, the inflated price of medication led to

---

<sup>21</sup> A/77/203, n. 13, para. 16.

<sup>22</sup> Human Rights Watch (HRW), Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities Regarding Persons with Disabilities in the Context of Armed Conflict, 8 June 2021, pp. 3-4 [www.hrw.org/sites/default/files/media\\_2021/06/Protection%20of%20Persons%20with%20Disabilities%20in%20Armed%20Conflict.pdf](http://www.hrw.org/sites/default/files/media_2021/06/Protection%20of%20Persons%20with%20Disabilities%20in%20Armed%20Conflict.pdf).

<sup>23</sup> Humanity & Inclusion et al., Joint Submission on Promoting and Protecting the Human Rights of Women and Girls in Conflict and Post-Conflict Situations on the Occasion of the Twentieth Anniversary of Security Council Resolution 1325, 2 April 2021, p. 4 [www.womensrefugeecommission.org/wp-content/uploads/2021/04/Joint-OHCHR-Submission-04022021.pdf](http://www.womensrefugeecommission.org/wp-content/uploads/2021/04/Joint-OHCHR-Submission-04022021.pdf).

<sup>24</sup> Humanity & Inclusion, Unshielded, Unseen: The Implementation of UNSC Resolution 2475 on the Protection of Persons with Disabilities in Armed Conflict in Yemen, May 2022, p. 9, [www.hi.org/sn\\_uploads/document/HI-Case-study-Resolution-2475-YEMEN-2022\\_1.pdf](http://www.hi.org/sn_uploads/document/HI-Case-study-Resolution-2475-YEMEN-2022_1.pdf).

<sup>25</sup> Families with persons with disabilities are often among the poorest segment of the population. UNICEF, Children with Disabilities in Situations of Armed Conflict, November 2018, p. 8 [www.unicef.org/disabilities/files/Children\\_with\\_Disabilities\\_in\\_Situations\\_of\\_Armed\\_Conflict-Discussion\\_Paper.pdf](http://www.unicef.org/disabilities/files/Children_with_Disabilities_in_Situations_of_Armed_Conflict-Discussion_Paper.pdf).

persons with disabilities who require treatment no longer being able to afford it.<sup>26</sup> This is felt especially in contexts of protracted conflict, where institutional capacity is decimated not only by hostilities, but also by possible sanctions and countermeasures' regimes.<sup>27</sup> In this respect, sanctions can disproportionately affect persons with disabilities living in areas controlled by NSAGs designated as terrorists for example by hindering imports of assistive devices and technology.<sup>28</sup>

## *II.2 Access to humanitarian aid*

Persons with disabilities encounter both physical and institutional barriers in accessing aid. Persons with disabilities interviewed in IDP camps in the Central African Republic related that food distribution sites were inaccessible, and that by the time they reached the sites, distribution was already finished.<sup>29</sup> Additionally, persons with disabilities have underscored that aid distribution is often disorganised,<sup>30</sup> which points to the lack of preparedness by aid delivery actors. While aid organisations may lack sufficient resources, their programming should nevertheless identify the barriers faced by persons with disabilities and find ways to address them, mainstreaming the protection of persons with disabilities into their work.

Moreover, humanitarian relief rarely reaches persons with disabilities living outside of camps. Since they are often left behind by their families while fleeing or decide not to leave, they are left without any assistance to access food, water or medication, as described by persons with disabilities in South Sudan.<sup>31</sup>

---

<sup>26</sup> HRW, *Leave No One Behind: Persons with Disabilities in Humanitarian Emergencies*, 19 May 2016, [www.hrw.org/news/2016/05/19/leave-no-one-behind](http://www.hrw.org/news/2016/05/19/leave-no-one-behind).

<sup>27</sup> J. Strother, *North Koreans with Disabilities Threatened by International Sanctions, Aid Groups Say*, VOA News, 14 December 2019 [www.voanews.com/a/east-asia-pacific-north-koreans-disabilities-threatened-international-sanctions-aid-groups-say/6181070.html](http://www.voanews.com/a/east-asia-pacific-north-koreans-disabilities-threatened-international-sanctions-aid-groups-say/6181070.html); UN News, *Unilateral sanctions particularly harmful to women, children, other vulnerable groups*, 8 December 2021, <https://news.un.org/en/story/2021/12/1107492>.

<sup>28</sup> See *Humanity & Inclusion, Issue Brief – Syria: Humanitarian Access, Continuity of Services, and Protection of Humanitarian Workers*, March 2022, p. 3 [www.hi.org/sn\\_uploads/document/IB-1-continuity-finale-2022.pdf](http://www.hi.org/sn_uploads/document/IB-1-continuity-finale-2022.pdf).

<sup>29</sup> HRW, n. 26.

<sup>30</sup> Islamic Relief Worldwide, *Tigray Refugees with Disabilities in Eastern Sudan Camps*, October 2021, pp. 20-22 [www.internationaldisabilityalliance.org/sites/default/files/tigray\\_refugees\\_report\\_final.pdf](http://www.internationaldisabilityalliance.org/sites/default/files/tigray_refugees_report_final.pdf).

<sup>31</sup> HRW, *South Sudan: People with Disabilities, Older People Face Danger*, 31 May 2017, [www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger](http://www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger).

### *II.3 Accountability for violations*

Despite persons with disabilities being subjected to serious violations of IHL, there is little prospect of accountability. In some instances, persons with disabilities were specifically targeted, particularly those with intellectual disabilities since they may not fully understand the dangers of certain circumstances or be in a position to resist. Persons with intellectual disabilities were reportedly targeted in cases of “false positives” in Colombia, whereby members of the armed forces conducted extrajudicial executions of civilians and disguised them as NSAG fighters, but very few cases have been prosecuted and only one specifically mentioned the victim’s disability.<sup>32</sup> With regard to CRSV, the Colombian Constitutional Court has recognised that women and girls with psychosocial and intellectual impairments are more vulnerable to this form of violence, not least due to the lack of reporting avenues and authorities often according little credibility to their testimonies.<sup>33</sup>

### **III. Conclusion: A way forward**

Persons with disabilities are undoubtedly in a vulnerable position during the transition from conflict to peace. As the above-mentioned challenges demonstrate, there is a lack of preparedness among the relevant actors to address the specific needs of persons with disabilities. In this respect, the lack of context-specific, disaggregated data on persons with disabilities and a general lack of awareness or sensitivity to the specific risks and challenges they face permeate any discussion on planning and preparedness for post-conflict. Furthermore, one cannot overlook the fact that the lack of data and awareness are also challenging for the armed forces and humanitarian organisations, for which further training and resources are needed.

That notwithstanding, examples of good practice have emerged at different levels. Denmark has incorporated the protection of persons with disabilities in its military manual,<sup>34</sup> while Greece’s Air Force training

---

<sup>32</sup> Priddy, n. 2, p. 90, referring to data from 2017; La Información, Militares Colombianos Culpables por Matar Discapacitado en Falso Positivo, 31 March 2012 [www.lainformacion.com/espana/militares-colombianos-culpables-por-matar-discapacitado-en-falso-positivo\\_MaRkhcQjASBhxZw7o1Wwq3/](http://www.lainformacion.com/espana/militares-colombianos-culpables-por-matar-discapacitado-en-falso-positivo_MaRkhcQjASBhxZw7o1Wwq3/).

<sup>33</sup> Colombian Constitutional Court, Auto 173 de 2014, pp. 16-17.

<sup>34</sup> See A. Priddy, Military Briefing: Persons with Disabilities and Armed Conflict, Geneva Academy, March 2021, p. 5 [www.geneva-academy.ch/joomlatools-files/docman-](http://www.geneva-academy.ch/joomlatools-files/docman-)

covers the CRPD and specific protection to persons with disabilities under IHL.<sup>35</sup> Among humanitarian organisations, the Inter-Agency Standing Committee (IASC) has issued Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action and the ICRC has committed to more disability-inclusive humanitarian programming.<sup>36</sup> Some fighters have also individually intervened to protect persons with disabilities.<sup>37</sup> Although scattered, these practices show there are concrete avenues to operationalise a more disability-responsive application of IHL if used more consistently. Likewise, consultations with organisations of persons with disabilities (OPDs) and militaries, convened by the UNSRD and the ICRC in 2022, underscored several recommendations to this end, such as revising military manuals and standard operating procedures to mainstream the protection of persons with disabilities into the general chapters on protection of civilians, and cooperating with OPDs to train and educate the armed forces on disability.

Above all, persons with disabilities and their organisations must be included in all processes affecting them, as specialists in their own situation. Thus, they must be closely consulted and actively involved in devising disability-responsive policies in the aftermath. Testimony from OPDs highlights the pivotal importance of establishing communication lines between persons with disabilities, humanitarian, and military actors, which can be done through the establishment of civil-military coordination bodies and the inclusion of persons with disabilities in national IHL committees. Only by effectively communicating and coordinating with all members of the affected population, can we build lasting peace.

---

files/working-papers/Military%20Briefing%20Persons%20with%20Disabilities%20and%20Armed%20Conflict.%20.pdf.

<sup>35</sup> A/77/203, n. 13, para. 58.

<sup>36</sup> IASC, Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action, July 2019 [https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Guidelines%20on%20the%20Inclusion%20of%20Persons%20with%20Disabilities%20in%20Humanitarian%20Action%2C%202019\\_0.pdf](https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Guidelines%20on%20the%20Inclusion%20of%20Persons%20with%20Disabilities%20in%20Humanitarian%20Action%2C%202019_0.pdf); ICRC, Vision 2030 on Disability, 6 August 2020 <https://shop.icrc.org/the-icrc-s-vision-2030-on-disability-pdf-en.html>.

<sup>37</sup> See HRW, n. 26.

## **VI. Responsibility for refugees and IDPs in the transition**



## Discussion panel

*Claudio DELFABRO*

Director, Department of International Refugee Law  
and Migration Law, IIHL

*Mathilde DE RIEDMATTEN*

Global IDPs Advisor, ICRC

*Aurvasi PATEL*

Deputy Director (Protection), Regional Bureau Asia-Pacific,  
UNHCR

*Joanna DARMANIN*

Head of the Humanitarian Aid Thematic Policies Unit,  
European Civil Protection and Humanitarian Aid Operations (ECHO)

*Claudio Delfabro*

Good morning to the last day of this Round Table. My name is Claudio Delfabro and I have the honour to lead the Department of International Refugee Law and Migration Law here at the IIHL. We have some familiar faces on the panel: Aurvasi Patel, from the UNHCR, Head of Protection Service Regional Bureau for Asia-Pacific. Those of you who were here yesterday heard a great deal about her vast experience in the field. As my mother used to say when I used to work for the UNHCR for over 20 years “*How come they never send you to places with postcards?*” I think that Aurvasi is a very good example of what UNHCR does. At the same time, I want to welcome Mathilde. Mathilde is the Global Advisor of the ICRC on internal displacement. We also have online our colleague from ECHO, Ms Joanna Darmanin, Head of the Unit responsible for Humanitarian Aid on different Thematic Policies of European Civil Protection and Humanitarian Aid Operations (ECHO), who is going to explain what ECHO stands for and which is its role.

So let me start by sharing with you a short description of what this session is going to be about. In the framework of the transition from armed conflict to post-conflict scenarios, the basic needs and fundamental rights of the civilian population must be set as a priority by all the players involved. This session analyses the different scenarios and possible solutions to ensure the protection and inclusion of refugees and internally displaced persons who find themselves in transitional contexts. This includes roles and responsibilities of the authorities, governments, *de facto*



authorities, international agencies, and donor countries, in the evacuation of civilians both to other regions of the same country and across international borders. Throughout the session, I am going to ask our panellists to make a short description of their organization and its respective role in relation to the topic, then we have a set of questions prepared for them. At the same time, I very much encourage the audience here and online participants to ask as many questions as you/they wish.

Mathilde, as we were saying, you are the Global Advisor for internal displacement of the ICRC, based in Geneva but with a global function. Now that the pandemic is allowing it, you are expected to continue travelling to the field and advising your ICRC colleagues on how to integrate policies and standards related to the protection of IDPs deep in the field. At the same time, you are involved in the policies at the global level and high-level discussions both in Geneva and other capitals. With this, I would like to ask you who are IDPs and what is the role of the ICRC *vis-à-vis* IDPs. I think it is important to start this session with basic comments and clarify some basic concepts: why are we not talking about internal refugees? Why is it wrong to use this expression in the legal framework?



What is Protection?

"All activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e., human rights law, humanitarian law and refugee law)"

IASC  
Inter-Agency Standing Committee

Before giving the floor to Mathilde, maybe I can explain this slide with a short anecdote. When I was deployed to Kosovska Mitrovica, the Serbian part of Kosovo, during the Kosovo war – and I can see some of you smiling saying “*I have been there, and it does not have postcards*”– I met the local authorities on the Serbian side with my head of office from UNHCR. He introduced me as a “Protection Officer”, which the interpreter translated as: “*This is my bodyguard*”. I then found myself in a position in which I had to

explain what “Protection” meant – in Serbian, of all languages – and to explain to them that I was not a bodyguard. Fortunately, we had the Inter-Agency Standing Committee, who came up with a decision. The Inter-Agency Standing Committee is one of the most relevant international agencies and NGOs dealing with humanitarian aspects. This [as per the slide] is the definition of “Protection”: it is not limited to physical protection, and that is why it is important to clarify that in the humanitarian world, protection are all the activities aimed at ensuring full respect for the rights of the individual – in this case, we are talking about the displaced – in accordance with the letter and the spirit of the relevant bodies of law. The definition specifically includes three branches of law that are very relevant to this Round Table: Human Rights Law, Humanitarian Law and Refugee Law. With this, Mathilde, you can help us with this definition and the role of ICRC.



*Mathilde De Riedmatten*

Thank you very much. Good morning to everyone. Indeed, I was going to start with the definition of what is an internally displaced person. I know the term was already evoked yesterday, in the previous presentations on evacuation, but I do not know if it has been defined as such, so I thought we can start with that.

**WHO IS AN IDP ?**

*Persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border”*

(1998 UN Guiding Principles on Internal Displacement)




The ICRC uses the definition that has been set out in the Guiding Principles of the UN on Internal Displacement. It talks about persons or groups of persons who have been forced or obliged to flee or leave their

homes/places of habitual residence, in particular as the result of armed conflicts or situations of generalized violence, human rights violations or human-made disasters, who have not crossed an international border. From this definition, the two key elements are the fact that people have been forced or obliged to flee, so there is the element of coercion, although people have an agency, they decide when to flee to some extent, of course the aspect of being forced to leave their homes of habitual place of residence is key. The second one is that they have not crossed an internationally recognised border, and this is the big difference between internally displaced persons and refugees. Another important distinction is that, unlike refugees, the definition of IDPs is not a legal status, it is more of a factual situation: unlike refugees who do have specific rights, IDPs are usually citizens of a country, so they benefit from the laws of a country as citizens or as residents of that country if they are foreigners or migrants. In any case, of course, International Human Rights Law applies to them as well. That was the general definition of an IDP, people who live in a country, so I think it is important to stress in this conversation that we are not only talking about citizens, but we also include migrants who have been living there for a long time or other foreign nationals who have been living in a country and are forced to leave their habitual places of residence. The second point was on ICRC's role in working with internally displaced persons, and here I think it is twofold: one is as a promoter and guardian of international humanitarian law and, secondly, as an operational agency that responds to the needs of IDPs.

## ICRC'S APPROACH TO INTERNAL DISPLACEMENT

- Mandate: to ensure **protection and assistance** for everyone affected by **armed conflict** and **other situations of violence (OSV)**
- Internal displacement as a **key factor of vulnerability**
- The ICRC's approach to internal displacement:
  - Holistic**
  - Needs-based**
  - Situational**
  - All phases**
- Distinction and complementary in the ICRC's approach to migration



Of course, responding and providing support to IDPs falls into ICRC's mandate, which is to protect and assist persons who have been affected by armed conflict and other situations of violence. We do look specifically at IDPs because we do see internal displacement as a key factor of vulnerability. So, the fact of having been forced to leave one's home or habitual place of residence obviously adds a significant layer of vulnerability to an individual, to a family or to a society, and, therefore, this warrants a specific analysis and, in many situations, a specific response as well. The approach is really needs-based, so we look at the needs of the most vulnerable within the population group, and it is situational in the sense that we look at everyone within the displacement cycle.

We obviously look at those who have been forced to flee, but also at those who stayed behind and who were not able to flee for various reasons, either because they could not physically leave, because they were too vulnerable or because they chose not to leave for one reason or another, and, of course, the host population, who are often the first responders in providing assistance to IDPs when they first enter a new village or a city. Just to touch base on the displacement cycle, we do also work in the first stages, so in the pre-displacement, which is very much again about promoting international humanitarian law and understanding why people flee. Are they fleeing due to direct attacks on civilians or civilian infrastructures or are they leaving due to the consequences of the destruction of critical infrastructures? For example, oftentimes people do not leave because they are directly attacked, but they leave because there are no services, no healthcare, no education and, therefore, they are *de facto* obliged to flee. We look at all these elements and we see how we can support people to not be forced to flee if they choose not to, but of course this does not mean that we try to contain them in any way. *De facto*, displacing is a very important coping mechanism that we facilitate and support if that is the choice of people. Then there is the acute displacement phase, where we often provide emergency assistance to protracted displacement, which tends to last years and oftentimes decades – but we will come back to this later when we talk about the aftermath of conflicts. Eventually, durable solutions are either return to the place of origin, resettlement elsewhere in the country or, indeed, local integration where people are displaced – and, again, this is often for numerous years. Finally, we really do try to approach the issue of internal displacement through a multidisciplinary approach, looking from a protection point of view, from a policy one and, obviously, very much from an operational perspective.

*Claudio Delfabro*

Thank you so much Mathilde for bringing us up to speed on the concept of IDPs and the role of ICRC. I think you also managed to encapsulate the concept of the displacement cycle: it is not a static picture of displacement, but it is a dynamic phenomenon. Thank you so much for that.

Aurvasi, let us talk about refugees, in the name of your organisation, the UN Refugee Agency. Can you help us with the legal definition of who is a refugee? That's why we do not speak about political refugees, economic refugees and so on, but we speak about refugees and how this comes in an international and regional legal framework. Then, of course, the role of UNHCR, maybe a bit about the origins, because in the sessions yesterday we also spoke about World War II, and the UNHCR is a great example of how everything has evolved.

*Aurvasi Patel*

Thank you very much and good morning, everyone. Just to build on Claudio's story of what a Protection Officer is: when I was in the field, most people thought I was a Security Officer – different from a bodyguard, but still a Security Officer. Until one day, when I explained my mandate and somebody said: “*You mean a legal officer, with protection when it comes to legal issues*”.

Very quickly on the UNHCR background: we were created after the Second World War, after the destruction and the population movements following the Second World War. Our job was to help millions of Europeans who had fled or lost their homes – I clearly said Europeans – and with a three-year mandate at first, which was then extended to a five-year mandate and unfortunately, our mandate keeps continuing, and 70 years after we are still a big organisation. When I started to work for UNHCR, we had approximately two thousand staff members, while now there are nineteen thousand staff members in the organisation. It is a growing trend; organisations getting bigger because the world is getting more complex. There are more wars and displacements, and refugee situations are growing rather than stopping. UNHCR was created in 1950 to address the refugee crisis that resulted from the Second World War. The 1951 Refugee Convention established the scope and legal framework of the agency's work which was initially focused on Europeans fleeing the war. The 1967 Protocol – Relating to the Status of Refugees was ratified to remove the geographical and temporal restrictions. Under the 1951 Convention UNHCR was mandated to resettle many of these people to a third country, but in 1967 those decisions and the issues affecting the world were not limited to Europe. For this reason, our mandate was extended to

the rest of the world, which is why we have both the 1951 Convention and 1967 Protocol, which basically define UNHCR's work.

As Mathilde also underscored, who is a refugee, as opposed to an IDP? Refugees are people who have fled war, violence, conflict, and persecution from their State and have crossed an international border. It is very important to understand that a refugee has to cross an international border, while an internally displaced person remains within her/his own country, seeking protection within this same country. The UNHCR works with refugees and, over the years, our mandate has also included IDPs. We started working with conflict-related IDPs – the Balkan situation is a very good example – in Bosnia where we started working with IDPs and it was the first time that the UNHCR staff was in a country or a region of war: before this case the agency usually was in a neighbouring country where people would flee crossing an international border and UNHCR received them and supported them. It was during the Balkan crisis that we started helping internally displaced persons. UNHCR's mandate then evolved during the Sri Lankan situation following the tsunami and our mandate also included assisting IDPs affected by natural disasters. So, the 1951 Refugee Convention is a key legal document and defines a refugee as someone who is unable or unwilling to return to her/his country of origin and has a well-founded fear of being persecuted for one of five reasons: their race; their religion; nationality; membership of a specific social group or political opinion. When you break this down, a protection officer assesses the claim of a person by interviewing them: why would you leave your country? If they say *"I am a Catholic and following my conversion the State does not recognize it. Because of my conversion they denied my fundamental rights as a person and it has impacted my life. I ended in arbitrary detention"* this is the kind of claim we process. In terms of the current situation, as I mentioned at the beginning, the world has gotten worse in terms of numbers of persons affected: we have around 27 million refugees across the world today, and over 21 million are under UNHCR's mandate. There are 6 million refugees who are under the United Nations Relief and Works Agency for Palestine Refugees. So that is another specialized UN agency that looks after the Palestinian situation. When a Palestinian leaves the Middle East, UNHCR assesses the claim. Approximately half of the refugees we work with are under 18 years of age; 74% of the refugees are hosted in low and middle-income countries; 72% originate from five countries: Syria, Venezuela, Ukraine, Afghanistan, and South Sudan. In terms of UNHCR mandate *vis-à-vis* refugees, our job is to safeguard the rights and wellbeing of those who have been forced to flee, and together with partners like ICRC, IOM, and other non-governmental organisations,

we work to ensure that everyone has the right to seek asylum and find safe refuge in another country. Again, the important element here is that they must have fled by crossing an international border. We also strive to find lasting solutions. Yesterday we mentioned some of them, including resettlement. We also work to ensure access to territory and access to asylum. If I look at my experience currently in the job I am doing, I must admit that we have struggled quite a lot, for example in ensuring access to territory and access to asylum following the recent Afghan situation last year in August. We also provide specialised support to the host governments. If you look, for instance, at countries like Pakistan and Iran, there is a huge number of refugees that these countries have been hosting for over 40 years until they can go back to their homes or, otherwise, integrate. UNHCR provides support to those host governments.

Some key areas of UNHCR's work also include preventing *refoulement*. *Refoulement* is a legal term, which is also known as "deportation". A refugee should not be returned to a country where s/he may face serious threats to her/his life or freedom. It gets a bit complicated here where some States have signed the 1951 Convention, and some States have not. Pakistan, for example, has not signed the 1951 Convention, although for 40 years it has been hosting millions of Afghan refugees. There is indeed a lot of discussion around the rights and duties of States who have signed the Convention and those who have not. Moreover, *non-refoulement* has now become Customary International Law, so even if a country has not signed the Convention, that State cannot *refoule* a refugee. I say they cannot, but they do, and I will give a concrete example. In Tajikistan today – I used to work there following 9/11 attacks and my job at the time, as a Protection Officer, was to help the State who had signed the Convention in implementing it. We trained immigration officers in how to conduct refugee status determination; we helped monitoring their implementation and we taught them about the 1951 Convention and the 1967 Protocol. Regrettably today, following the August 15<sup>th</sup> events last year, about 130 refugees have been refouled from Tajikistan back to Afghanistan, among whom many women and children. Our High Commissioner has visited Tajikistan in recent months, as did my director, and I will actually visit next week in Geneva to meet the permanent representative of Tajikistan to try to make a stronger impact on them and to stop this negative trend of refouling refugees. What does this situation mean? It means that these people are now back in Afghanistan, where our Afghan operation tries to locate them and provide them with assistance. Many of these people have been recognized as refugees by the State of Tajikistan and suddenly overnight expelled to Afghanistan, where they have not lived for many, many years.

You can imagine the vulnerabilities they are facing, which makes it very difficult for them to manage their situation. What our teams in the field are trying to do is to reunite those families and get the Tajik Government to let them go back to Tajikistan. Also, we advocate to support host countries. If we look at Bangladesh today, the country hosts 1 million refugees from Myanmar, so we are working closely to help the government in managing these refugees. For example, UNHCR ensures access to fair and efficient status determination procedures: sometimes officials may not be able to make the right determination of an asylum seeker, so we guide them. We have a supervisory function enshrined in the 1951 Convention to see how the States are implementing this. Together with partners, we deal with education, shelter, livelihoods and economic exclusion. UNHCR works in coordination, particularly through cluster systems, looking at people as individuals but also at the classification process of categories like women, children, disabled and youth by assessing their needs. For instance, yesterday I briefly dealt with resettlement as a durable solution and I still recall my work in Hong Kong, when the comprehensive plan of action was developed after the fall of Saigon and a lot of Vietnamese left the country spreading into many parts of the Asian continent. The UNHCR was processing a lot of these cases at the time, to determine whether these people were leaving for “Convention reasons”<sup>1</sup> or for other reasons, such as economic ones. Of course, those who left for Convention reasons were to be declared refugees and would have been helped to resettle (principally to the US at that time). On the contrary, as a field assistant in the Whitehead Detention Centre my job then was to counsel those individuals who were not declared refugees, explaining to them why they could not be declared refugees and that they really needed to go back to their home, avoiding staying in a camp with barbed wire and 24-hour armed security. As part of that counselling, my job was also to help them understand that the best durable solution for them was returning home.

This is the job UNHCR still does, even today in Afghanistan. There are many Afghans in Pakistan and Iran who, despite the situation including a *de facto* Taliban Government, seek to return. What we do is to counsel

---

<sup>1</sup> The reasons mentioned by Article 1 of the 1951 *Convention relating to the Status of Refugees*, namely “any person who: [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”



them, we make sure that they are fully aware of the situation in Afghanistan, and we confirm their willingness to return. If the answer is positive, we provide them with a voluntary repatriation grant and include them in our other programmes. UNHCR indeed implements area-based programming to ensure access to basic infrastructure, education, and livelihoods not only for returnees but also for IDPs.

*Claudio Delfabro*

If you allow me, I would like to introduce now Ms Joanna Darmanin. Hello Joanna, thank you for joining us online. Joanna joined the European Commission in 2004 and worked in the field of maritime affairs and later in consumer policy, public health and food safety. She has also worked in the field of migration, in particular in the field of asylum, as the Head of Operations in the European Asylum Support in Malta. Joanna is a diplomat by training, having served in the Maltese Ministry of Foreign Affairs in various roles, including as the First Secretary of Malta's mission to the United Nations in New York, between 1994 and 1998. In April 2021, Joanna joined ECHO, as the Head of Unit responsible for Humanitarian Aid and Thematic Policies.

Joanna, we would like to know more about ECHO, what it stands for. For those of us who are involved in the humanitarian protection field, we know very well the tremendous work and support that ECHO provides to humanitarians and to those involved in the field during the transition to peace. So please, share with us what ECHO stands for and what is the work that you do in regard to displacement, evacuations and transitions. Thank you.

*Joanna Darmanin*

Thank you very much and indeed, a big regret on my part is that I am not there with you in Sanremo, but rather in rainy Brussels. Thank you in particular for the opportunity to explain the mandate of DG ECHO when it comes to the issues concerning protection. Indeed, the main task of DG ECHO is to deliver this protection to the people suffering the most around the globe. Our main mission is to preserve life, prevent and alleviate human suffering, and safeguard the dignity and integrity of populations affected by natural disasters and man-made crises.

How do we do this? We do this by supporting assistance in third countries, essentially through contracts with partners, for example, the ICRC, UNHCR and IOM. Such assistance is always needs-based, and I note that this is a common thread emerging from all speakers. What this means in practice is that our assistance has to be channelled to affected

populations in an impartial manner, regardless of their race, ethnic group, religion, gender, age, nationality or political affiliation. In doing so, we pay particular attention to the needs of specific groups, such as children and persons with disabilities and, furthermore, we advocate for the respect and adherence to international humanitarian law on a global scale.

This year, DG ECHO celebrated its 30<sup>th</sup> anniversary. Since 1992, DG ECHO has helped to alleviate the suffering of millions of people in more than 110 countries worldwide. I would like to highlight that the EU together with its Member States are leading donors of humanitarian aid at the global level, not only in terms of the overall amount of financial assistance but also in terms of humanitarian policy engagement and action. One of the previous speakers mentioned, for example, issues related to coordination: EU is a leader not only in the coordination amongst the partners working on the ground in particular operational contexts, but also in terms of setting overall policy frameworks for the assistance that we deliver, particularly to ensure the “do no harm” principle – namely that, whatever we do, our work does not lead to any harm to the beneficiaries of our assistance.

Much of DG ECHO’s response indeed goes toward refugees and internally displaced populations: these are the focus of the main actions that we deliver on the ground. A few moments ago, we also mentioned two key elements that I would like to raise once more, as it was mentioned by previous speakers. Not only do we have the conflict-driven refugees and IDPs, which is an extremely worrying phenomenon that the invasion of Ukraine, with the immediate displacement of population, has made even more central, but also, we have the issue of climate displacement, which has become more and more impactful and needs a clearer and stronger response.

*Claudio Delfabro*

Thank you very much Joanna and thank you for joining us from Brussels. I will just pick up on one thing that you just mentioned, the issue of climate-induced displacement, as we call it. Indeed, this is something that, despite it being there for centuries, has nowadays become an even more acute problem. As a matter of fact, here at the Institute, we are going to have a dedicated Thematic Course on Climate Change and Forced Displacement as an addition to the regular courses that we do on refugee law, displacement and migration. The point is to show not just that displacement happens because of a drought or the rising sea levels, but also climate change can be one of the factors that contributes to conflict and

displacement, therefore, impacting the transition to peace. So, it should not be seen as an isolated element.

Thank you very much Joanna for raising this. I have prepared a list of questions, but I can see that there are already many questions coming in from the audience. One of these questions relates to the issue of coordination you mentioned, Joanna, just now. The importance of coordinating. I think that since last century we have been talking about the humanitarian space shrinking. Now, I would like to pose this question to the panellists: is it that the humanitarian space is shrinking, or is it becoming more crowded? What is your take on that, especially in the context of addressing the issue of displacement and how can this lead to the transition?

*Mathilde De Riedmatten*

Thank you for the questions. Indeed, I guess that in terms of humanitarian space we are talking both about humanitarian actors having access to persons in need and persons affected by conflict and, also, for those people having access to services and assistance, which may be provided not only by humanitarian actors but also by the State. Preventing these people from experiencing an overlapping is also a solution I see to gain humanitarian space.

Again, I agree that the humanitarian community has grown a lot over the years and that there are definitely several actors and, therefore, a need for coordination. I also think that to a large extent different organisations have very specific mandates, and it is important to understand who should be intervening and at what stages. This is because there are humanitarian actors who are in the field especially in times of armed conflict and violence to respond to immediate needs, to urgent needs, while an increasing number of humanitarian organisations, including ICRC, are looking more at the medium and long-term needs of populations. This is something that, at least for ICRC, we do sometimes autonomously but, more often, in partnership with other institutions, such as national societies and, when possible, also with the development actors, who are always key in terms of sustainable transition to a more stable environment. Thinking about infrastructural programmes that we have for example in Goma and Maiduguri, namely projects that require a larger investment but take place in unstable situations, you do need a partnership with both humanitarian and development actors.

Looking more at the conflict dimension, I think that space in conflict is becoming more and more crowded. Within a conflict, you currently have armed forces, special forces, proxies, sometimes private companies, etc., so

here, as well, the space is hard to define and suddenly the chain of command is diluted in terms of security considerations. In this framework, it gets very difficult for humanitarian organisations to make sure that they are talking to the right people at the right time, and that the messages or the guarantees that they are getting in return actually encompass all the actors who are on the ground at a given time. Not to mention the issue of the complicated access to the actors as well, especially in volatile situations. Finally, I think that, unfortunately, and we have experienced this, certain States and armed groups also politicise humanitarian aid a lot. This is something that we are very aware of, and there is definitely a call for States who have signed the 1949 Geneva Conventions and the other international legal tools to uphold these standards, not using either the civilian population or humanitarian assistance for political means, especially in the event of conflicts.

*Claudio Delfabro*

Thank you. So that is not an easy job. Joanna, can I ask you: how can such a large and influential donor as ECHO, which helps breach these two concepts of humanitarian aid and development, contribute to better coordination among the different actors? And I guess an additional question would be: does this coordination also engage non-state actors or, as we were hearing yesterday during a presentation from Geneva, also *de facto* authorities?

*Joanna Darmanin*

Thank you. Indeed, not easy issues. Let's start from the beginning. As I tried to explain DG ECHO is a principled donor. What this means in practice is that our humanitarian principles of neutrality, humanity, impartiality and independence are key and this is how we have to act on the ground. We are also a key advocate for the respect of international humanitarian law. What this means in practice is that we have to engage within the real context of conflict and displacement. This means, for example, that we and our humanitarian partners have to engage both with state and non-state armed groups and, as the ICRC officer said, this is absolutely key in the humanitarian context in which we have to ensure that there actually is access to the beneficiaries that we are trying to target and that nobody is left behind. Not only do we have to act in a manner that is impartial, neutral and independent, but we also have to be seen to be acting in such a manner if we want to retain the space. You mentioned shrinking space, and that is always something that we are trying to address.

Now I come back to the “how?” because this is, I think, the sense of the question. Clearly, humanitarian needs are growing, humanitarian resources are shrinking, and basically, we have to do something to make our work more effective and more efficient and for me, there are a number of issues that come up. First of all, for example, localisation: we need to have a more strategic approach to local actors, they are the actors on the ground, they know the real needs, and they know how to tailor a response in a short time. This is what we saw with Covid-19: when the Covid-19 pandemic exploded a lot of the international community retracted, but the local actors stayed there. So, let’s engage them in a better partnership. The second issue was also mentioned by you, Claudio, and the ICRC representative: the *nexus*. In a situation where you have exploding needs and shrinking resources, we have to combine our actions together with development actors. We need to work in tandem, to address the short term, but also the medium and longer term, and within the European Commission we are making a great effort. We started by looking at how to implement this on the ground in six pilot countries, and now we are moving beyond that stage. It is not an easy task, particularly because each context is of course different, but it certainly is a necessary step to address the humanitarian crises and, more in general, the situation today. Thank you.

*Claudio Delfabro*

Thank you very much, Joanna, I think that this is one of the big questions of our work, not just the nexus but also the bridge between the two spheres of the transition: on the one hand humanitarian aid, the emergency assistance, the evacuation, and on the other, how to make sure that the transition actually becomes peace. And for this, we need, of course, development. Needless to say, I will now welcome any questions here in the room and online.

*Question from the audience*

A lot has been said about Afghanistan, how dynamic the situation was and how many people were moving in a very short amount of time. I was in Ramstein, Germany, at the same time and we were dealing with a lot of people in a short amount of time. At that time our offices come up with a phrase for how to deal with these people. They wanted to call them refugees, because they had status, others wanted to call them displaced persons, but finally they called them travellers and I thought it was a very interesting thing to do. How would you have called them, and do you think there are other terminologies out there that could better define the legal status of these persons?

*Aurvasi Patel*

Thank you for your question, a very interesting one. Those who arrived in Germany arrived with the consent of the German Government and evacuated by the German Government, so I think the term there would be evacuees. They do not fall within the UNHCR mandate.

*Claudio Delfabro*

Thank you. I see that Mathilde also agrees with this. Let us try to go through the cycle that you presented at the beginning and to link it to some of the questions that we have from colleagues online. A question that I think is best for you to address is: how do you identify the needs of persons who are being evacuated beyond physical safety?

*Mathilde De Riedmatten*

Sure. Probably I should have said that in the beginning. Of course people's needs change over time, and IDPs are the same, not one big homogeneous group.

The first important thing is to understand who is part of this population and what are the specific characteristics of the individuals in that certain displacement phase. So, for instance, whether it is emergency or protracted displacement, considering how of course the needs would change over time and people in the very beginning may not be the same as they would be a couple of months later. Beyond physical needs, you definitely have a whole string of needs and protection issues that are usually related to stigmatisation. As I was mentioning, the host populations usually are the first responders to internally displaced persons, but as time goes on and as resources become scarcer, often we do see tensions rising between the host population and the internally displaced persons, which could lead to stigmatisation and, eventually, to acts of violence. This could thus lead to a whole string of protection issues. I think that another important element to highlight is the fact that the majority of the world's IDPs are now displacing or have been displaced to urban centres. So, even if it is true that we still have this idea of IDPs in camps, back from the 1990s and 2000s, the world is now moving towards urbanisation and, equally, so is internal displacement. There are a lot of issues that are faced by persons in urban settings such as security of tenure, people who do not have the financial means to pay rent or, even when they have a rental agreement, are highly exposed to abuse and exploitation by a lot of people, either by fellow citizens or sometimes companies, and other actors. And then, without going into details, there are the issues experienced by people who flee and do not have documentation, and what this means to their access to health services,

education, etc. I think these would be some of the other protection needs that are unfortunately very common in displacement situations.

*Claudio Delfabro*

Indeed, thank you Mathilde for raising this issue of displacement into urban settings because definitely this makes life more complicated for the humanitarians. It is much easier to provide assistance and security for that matter in the context of a camp: you have different sectors, it is easier to know who is there, it is easier to identify individual needs, it is easier to talk to them because you know where they are. Now, over 60% and 80% of all refugees and IDPs – respectively – for that matter are in large urban centres and they are not in downtown urban centres, they are in the large cities, in the poorest neighbourhoods, in the most dangerous neighbourhoods, and sometimes, as happens in Central America, they are in places where not even the police or the military can enter, there are places that are totally under the control of the organised crime, for example. So, this is one of the challenges. You also mentioned the issues of the support of the host community to start with. For this, Aurvasi, I know that the UNHCR also works not only in assisting the evacuation of those in need, but also in inserting them in the host communities so that the “do no harm” principle is respected. In these cases, how do you make sure that the two communities can coexist?

*Aurvasi Patel*

Just building on what has been said, on the “do no harm” principle particularly, it is important to stress that the host communities usually are in an IDP setting too and have also suffered greatly. They have got probably the same problems as the rest of the population, they just did not leave. So when you have an IDP that returns back, there is competition for resources. What we try to do, as mentioned, through a coordination mechanism in IDP settings is an area-based and community-based programming. We make sure we support the community that has remained, and the IDPs who have returned from another place, back to their place of origin. Here UNHCR tries to make sure that the humanitarian-development nexus is in place, trying to ensure that the infrastructures are built up and accessible to both returned IDPs and the very vulnerable host community. In other words we make sure that these categories of people have access to schools, education, and livelihoods in a sustainable situation, so as to avoid further displacement.

*Claudio Delfabro*

Thank you. I would like to invite Joanna to join on this point as well. I remember twenty years or even thirty years ago, donors were very eager to

have the humanitarian agencies or NGOs allocating their funds exclusively to those who were displaced. What this created were animosity between the two communities. I remember, for example, having donors giving funds to the UN to build schools in the camps where the displaced persons were, but this idea has now changed in the attempt to enhance the capacity of the host community to absorb the displaced but also to have these infrastructures left behind for them. Joanna, can you share with us some views on this point from the development sector?

*Joanna Darmanin*

Indeed, if you are looking at the principle of “do no harm” and if you are trying to prevent what the previous speaker mentioned, this idea of the risk of falling into a cyclical type of displacement, then certainly interacting with the host community and addressing the needs of the host community are going to be a key element to consider. We look at it from the idea of ensuring the dignity of affected populations when they are displaced but also host communities. To do so, we must consider that we are talking about returns and resettlements, and what we strive to do is to ensure, before any of this happens, obviously in a way that is voluntary, dignified, etc., not only a physical space ready to welcome these people but also to ensure that such context is ready in terms of electricity supply, living conditions, provisions of services such as health and education. For example, DG ECHO guarantees that at least 10% of all its funding goes to education in emergencies. These are all the issues that we look at, but we also have to look at involving the displaced and the host communities in the design of the programme, again making sure that even the “invisible” is being tackled. It is not just a question of physical space, but it is key, in fact, to also deal with the trauma that these people are experiencing, both the IDPs and the host communities. More specifically it is crucial to deal with the psycho-social needs of these people and their mental health, and, increasingly, both the UNHCR and other agencies are becoming more and more engaged in this. Thus, what we need is a holistic approach to ensure that we deal with the problem from its core to avoid any harm.

*Claudio Delfabro*

Thank you very much. Aurvasi. Something came to my mind seeing so many men and women in uniform here and that is cooperation between the military, CIMIC operations, for example, and the humanitarians on the ground. I remember, for instance, that for evacuations we were relying very much on the military either to help us evacuate people or relocate them to safer areas. At the same time, I remember having this very begging-type of



conversations with military commanders, asking them to please use their trucks to move humanitarian aid into camps located in areas that the 4X4 vehicles of the UN could not reach. We needed those big trucks. Has this changed from those good old days when the UN was bringing non-food items, buckets, tents, from the big warehouses in Dubai? How is the humanitarian assistance to the displaced people done now?

*Aurvasi Patel*

It is interesting to reflect on the past and the support that we used to get from the military. Of course, it is always difficult because the military is not a humanitarian actor and, therefore, there is a question of mandates that get blurred potentially jeopardising the element of security of the humanitarian delivery. In the Balkans, for example, we worked very closely with all the battalions and, for example, if it were not for the Turkish battalion at that time following the fall of Srebrenica, we would never have been able to build that camp at the speed and efficiency we did, because of the emergency needs. Having said that, over the years, we are now migrating into less delivery of humanitarian assistance of core relief items ” the bucket, the blanket, the plastic sheet – and what we are evolving into recognising is that individuals who need support sometimes prefer cash. This is working well and UNHCR coordinates a cash-assistance programme in many operations we work with, with our partners and funded by donors, because somebody might not need a second bucket but a blanket instead, or more blankets. So, with the cash component of assistance, people can choose how to address their needs as opposed to being given something that they do not need, ending up either bartering it or being cold only because what they really needed was a blanket and not a second bucket. This is the reason why over the last few years we have really moved into cash-based programming, where and when possible. Of course, there are concerns about these programmes, a lot of monitoring needs to be done and we must make sure that the money is being used for the right reasons. So, again, with the ‘do no harm’ approach, we try to manage that.

*Claudio Delfabro*

Mathilde, we have a question about the actual process of evacuation. In the midst of an evacuation, which is a very complex process, one of the things for which the ICRC is famous is family tracing. Which are the challenges of family tracing in that context and how do you do it?

*Mathilde De Riedmatten*

Thank you for the question. Indeed, I was thinking that this was something that I did not mention earlier, the importance of maintaining links among family members. It is true that evacuations are often very messy, very complex, so I think that, when the ICRC is involved as a neutral intermediary for very specific evacuations, a lot has to do with the preparedness, not only from a logistic point of view or from the ICRC's one but also from the side of the population that will be evacuated. To have information that is well delivered, well clarified and that the population understands: how are they going to be evacuated and how will it happen? This is never an ideal situation, but to the extent possible having all the information prior to the evacuation certainly allows the reduction of the risk for family separation. In terms of evacuations, but also as I was saying before in the pre-displacement phase, even when people are still living in their homes or villages, we do a lot of community-based work with the population, sometimes precisely to prepare them in case of a possible displacement. Especially in areas – I am thinking of DRC, for example – where people are unfortunately displaced numerous times, there is sort of a pendular movement. They know that in certain seasons there is a very high risk of being attacked by some of the armed groups who come in to pillage the villages, forcing people to displace for a few days in the bushes and then return to their homes. Some of the work that we have done with these communities, for example, is to discuss this displacement in the bush with the population, so that people, especially children, know where to go. There are for example common meeting points in certain areas established for parents and children to be reunited in case they lose each other during displacement. Apart from these few strategies, the vast majority of the work that we do in family tracing takes place, unfortunately, after family separation. In these cases, we primarily take information directly from the family members, who say “I am looking for my father, my son, my daughter”. We were previously talking about localisation, the ICRC operates as part of the Red Cross and Red Crescent Movement for family tracing, very closely with the National Societies that are key. In Congo, for example, there is a huge network of Red Cross volunteers from the Congolese Red Cross who are active in the field to help us find people in very remote places, where there is no internet connection or where access is very difficult. Finally, for people who do have access to the internet, we also developed a website called “*Trace the face: reuniting families*” where people can look for family members or, *vice versa*, register themselves declaring “I am this person, this is my picture and I am looking for my son/daughter” in the hope that their relative would do the same.

*Claudio Delfabro*

Thank you. Family tracing is actually something that is very much linked to security as well. If I look at my time in the jungle in Colombia, surrounded by non-state actors, I can assure you that when family tracing is not effective and you end up having children who are unaccompanied or separated, they are at the mercy of forced recruitment. It definitely becomes a security issue then, not only a human rights issue *vis-à-vis* the child, for the armed forces, because child soldiers are usually used in an active way, forced to plant bombs or attack thus becoming targets. This is one of many examples of why there is a link between the security aspects and the work of the humanitarians in operations. This is important to remember.

We have now a question related to refugees: are refugees entitled to be evacuated as nationals if they are in a third country affected by an armed conflict?

*Aurvasi Patel*

This touches on the points that I made yesterday. If it is a lifesaving need, then UNHCR would certainly explore evacuation as an opportunity. We would also explore the possibility of relocating these refugees to other parts of the country and, if that were not possible, to evacuate them.

*Claudio Delfabro*

Let us say you have nationals and non-nationals and possibly refugees in a country where a conflict starts. They have to cross the border with a country that has to define who is a refugee and who is not. What happens if you do not have just a few persons crossing the border in a very orderly manner but, instead, you basically have thousands of people crossing the border at once? How do you deal with that?

*Aurvasi Patel*

In this situation, the *prima facie* refugee status is granted. Let's look at the current situation in Ukraine, the best example. When the Ukraine situation erupted, mass movements of individuals went across the borders to countries neighbouring Ukraine. UNHCR, as the mandated agency for refugees, could not possibly interview every single person asking "did you leave Ukraine because of the generalised violence?" We just assumed from the facts, the environment and the operational situation in Ukraine, and we basically provide these people with what we call *prima facie* refugee status, namely stating that they left on mass because of a refugee-like situation. This is the most recent example, and we are very grateful to the Member States in Europe for granting access to their territory and allowing UNHCR and other

partners to support the provision of necessary assistance. This certainly is a good practice, but unfortunately not followed everywhere. With regard to the Afghan situation for example, as I mentioned earlier, neighbouring States are not giving access to territory or access to asylum for the many Afghans that may have sought protection if the borders had been kept open.

*Question from the audience*

My question is about information sharing and coordination with other entities. I know that ICRC and UNHCR work in many places where there are also Peace Operations in place, and you have access to relevant information speaking with people. Do you share this information with such missions and what are your internal policies on sharing this information that could be relevant for ongoing operations?

*Mathilde De Riedmatten*

Thank you for the question. So, for ICRC the principle of confidentiality is very important, especially because we work very much in situations of armed conflict and violence where we do end up both in governmental and non-governmental controlled areas. In order to ensure that we continue to have access and be perceived as a neutral and independent organisation we are very careful with the type of information that we share or do not share. We are very happy to talk about our activities and about the needs of the people we see, especially when these are urgent, but we are also very careful not to go into details or to provide information that could be perceived as being of a military nature or of a strategic nature, potentially impacting military operations one way or the other.

*Question from the audience*

I can understand during an armed conflict, but when there is a peace operation ongoing the situation is quite different, don't you think?

*Mathilde De Riedmatten*

I think that the answer would remain the same. I think that it would be more a question of why this information should be shared, so what is the purpose and how does it benefit those who are affected, without putting anyone at risk, whether beneficiaries, our own colleagues or volunteers from the Movement.

*Aurvasi Patel*

Thank you for the question. No, in terms of personal data, the UNHCR has access to personal data to interview and we cannot share that. However,

we do have data-sharing agreements with governments in which we outline what we can share and what we cannot share. But generally, if it is an operational environmental issue, we are very open to sharing as much information as possible, because we understand that the more information sharing there is, the less duplication of efforts, and the more teamwork in the delivery of humanitarian assistance in protection. In general, in any setting, the principle is to share as much as you can without infringing on the rights of the individual and the protection of the individual.

*Question from the audience*

How to deal with criminality in IDP camps and refugee camps, especially when it is a contested area, and non-state actors are controlling the surrounding environment. How do you deal with, stop and prevent and investigate crimes?

*Mathilde De Riedmatten*

Well, I do not think it is the role of humanitarian actors to deal with criminality, this could fall under the responsibility of the State and I think it would be more of a question for either the police or possibly the armed forces if they were there to maintain the stability and security of persons in the IDP site. But maybe going a little further and talking about the humanitarian character of sites, whether they are for IDPs or refugees, I would like to mention that we wrote a joint *aide memoire* with UNHCR addressed to humanitarian actors that looks at the complexities of maintaining the humanitarian character of sites. The issue is very much related to how we can work with States or institutions, usually the police or the army, in terms of setting up the standard-operating procedures for the screening process, information and awareness raising for the community to know the risks of having either armed elements or persons participating in the hostilities hiding within the camp, and how this is actually putting the camp and its entire population at risk. Also, it looks at how the screening process does take place and what happens not only to the people within the camp but also to the people who are screened out: what happens if they are detained and if so, on what legal basis are they transferred elsewhere, under what conditions, etc.? Of course, there is no ideal solution, but it gives the different elements of analysis and possible responses. There are also very practical guidelines, such as ensuring that IDP camps or refugee camps are far from border areas or are far from military installations, etc. Looking at the issue of recruitment within the camp, we sensitize the population on the risks of being recruited and on the possible presence of active elements in the surrounding area who might use the camp as a recruiting point. I think

that to have an impact it is important to work on all sides, with the States, with armed actors and certainly with the population itself.

*Question from the audience*

It is quite a complicated issue. I am interested in Ms Patel's view on this because it is a fundamental aspect of safety and protection to ensure that the people in the camp are safe, and safe from themselves because there is the risk of sexual violence, exploitation, human slavery, trafficking, you name it. What do you do with these people and how do you enforce security directly in the camp, especially when you cannot rely on external actors, essentially, because it is on your watch?

*Aurvasi Patel*

Just building on what Mathilde said, of course, what we want is a proper process. The State is responsible for IDP protection, and it is supported by humanitarian actors. On this basis what we do is make sure that if there is a situation, a criminal act or a violent accident, the authorities of the State are following through with the investigation. While we want to protect refugees and IDPs we of course understand that individuals in IDP or refugee settings should not violate the laws of the country – you are probably familiar with the Cox's Bazar situation in Bangladesh where there is a lot of gang violence, a lot of trafficking, drug-related crimes. If refugees are involved there should be a due process in terms of investigation and if they are found guilty or involved in illegal activities, they should be prosecuted. They do not take absolute protection from agencies like ours just because they are IDPs or refugees, they are subject to the laws of the State.

*Claudio Delfabro*

Joanna, there is a very interesting question from the audience online, which states that it would be unfair to expect the neighbouring countries to deal with a huge number of refugees, especially when we talk about poor neighbouring countries. The question is: is it fair and what can development actors and large donors such as ECHO do about it?

*Joanna Darmanin*

The issue of fairness is not certainly for me to address, but certainly it is a known fact that most displacements happen either within or in the areas of the Global South, which is clearly a huge issue. Of course, the humanitarian actors who are on the field are there to address basic needs and perform lifesaving actions, but the aim should always be to try to hand

over the situation to the development and peace actors, who should be able to better invest in the stabilisation of the area. In a best-case scenario then, we should not forget the issue of the return to the country of origin too as long as this is feasible and possible and happens in a voluntary, safe and dignified manner. For this reason, the European Commission works very hard on tailoring its programmes at the very best based on the individual context. Let us take a particular case, which could be, for example, the current one of Ukraine. At the moment, the Commission has allocated millions of euros to meet the basic needs of the displaced population, but, nonetheless, it has already engaged in conversations with the development actors to reflect on how to link these humanitarian needs with the social protection system of the State, so that in the longer term such needs could be handed over to the State with the help and support of the same development actors. As I know that we are getting short of time, I would like to stress another key challenge that will come up more and more frequently in the next months and years, namely disaster displacement. There has already been an increase of nearly 40% in displacement related to natural disasters and, in 2021 alone, 24 million people were internally displaced due to disasters. It is, therefore, relevant to mention that the Commission has just adopted a staff working document on disaster displacement that tries to look exactly at this phenomenon. The objective of the document is to assess how each of us, the peace actors, climate, environment, development and the humanitarians can join forces in order to try to prevent, where, when and if possible, disasters. Considering how prevention obviously constitutes an ideal scenario not always applicable, the study also aims at preparing all the actors involved, so that they can respond in a coordinated and quick way when a situation develops.

*Question from the audience*

Going back to the Niger-kind of agreement, which is of course a very valuable agreement able to move people away from Libya, where they face terrible dangers, I see a risk and the UNHCR is certainly considering the creation of a new and permanent situation to manage the resettlement of all these people: How do you see this problem?

*Aurvasi Patel*

In our negotiations, UNHCR would ensure that the people who are being transferred from Libya to Niger have a durable solution, by negotiating with other member States for a durable solution, e.g. resettlement of these individuals. Similarly, from the emergency transit centre that I have mentioned in my previous intervention, we already know

that the transfer of those persons to a third country is based on the pre-condition that such Member State has agreed to host them, in this way avoiding the risk of leaving them, in this particular case, in the neighbouring country which is Niger.

*Claudio Delfabro*

As we are reaching the end of the session, I have just one final question for each of our speakers. From your experience, from your role now, what would be one key recommendation for all of us to put in place in order to make sure that the way we address displacement actually leads to a successful transition, meaning that the transition will actually lead to peace? I think it was made clear enough on this panel, as well as in other sessions before it, that displacement is one of the key components of the transition. How do you recommend we address displacement in a way in which the transition can actually lead to peace?

*Mathilde De Riedmatten*

One key recommendation would be to keep people at the centre, making sure that all decisions are taken in consultation and coordination with the displaced persons themselves – again, to make sure that the displaced persons' choice of whether they want to remain in a certain place or want to return or want to be resettled elsewhere is taken into consideration and respected.

*Joanna Darmanin*

I was going to say to keep the people at the centre, so I am very happy with what has just been said. I have one additional specific recommendation though. We have discussed a lot about the link between humanitarian and development, both referring to instruments and actors, in order to find more durable solutions. Where I think we need to make greater progress is in the relationship with the peace actors. Here we still have some way to go to reach more durable solutions.

*Aurvasi Patel*

I will not repeat what my colleagues have said, but I think that the most important thing is to make sure that we all have a role to play, so coordination amongst all the players involved in the whole operational sphere is critical. We really need to work with development actors. UNHCR, for instance, is increasingly working with the World Bank, the International Monetary Fund, the Asian Development Bank, as well as many other financial institutions, including the private sector, with which we haven't worked so closely for a long time.





**VII. Planning for post-conflict from the military  
and humanitarian perspectives:  
necessary interactions between actors**



# **The dilemma of determining the dividing line between the war of arms and war of ideas: legal and humanitarian consequences**

*Godard BUSINGYE*

Brigadier General, Chief of Legal Services, Uganda People's Defence Force, Ministry of Defence and Veteran Affairs

## **Introduction**

The question of what happens after the conflict and before peace, is one that calls for debate by the political elite, the military, the economists, humanitarian agencies and organizations and of course the legal minds, and any other stakeholder. It cannot have a definite answer, each case must be judged according to its own unique circumstances. It has always been and will remain a period not clearly defined both theoretically and in practical terms. What is clear, however, is that it is a transitional period between a conflict and peace. My view is that it is a transitional period that automatically sets in starting immediately after the war of arms, in case of an armed conflict, but before the war of ideas achieves its ultimate objective. It is my view that, unlike the actual armed conflict that can be planned for, this period cannot succinctly be planned for before the outbreak of an armed conflict, and even during the tenure of an armed conflict. Moreover, the duration of an armed conflict can also not be predetermined before. It equally depends on how the situation unfolds in real times. In addition, the legal and humanitarian interventions during that transitional period cannot be predetermined before the armed conflict, much as international humanitarian law, human rights law and generally international law impose identifiable obligations on parties to an armed conflict. What comes to my mind is that as the world enjoys peace, there are those who plan to spoil enjoyment of that peace. These are many but they include the political elite, the economic opportunists, and of course the militaries who serve the interest of these groups. This understanding enables me to distinguish between the periods of peace, which precede conflict, armed conflict, and then peace after the conflict, the latter; translating into the *status quo ante*. With background, I will only be able to demonstrate what is expected to be done, immediately after the conflict, but before returning to a peace environment. I will, in order to succinctly delineate these scenarios, wriggle out of the general term "conflict" and

narrow the discussion to the armed conflict scenario. So colleagues, move with me in this unprecedented journey of bringing out contemporary issues regarding legal and humanitarian issues during the transitional period between an armed conflict and peace.

In the real world situation, there will be scenarios where armed conflict shall end, and yet stable peace will not be realized.<sup>1</sup> Such scenarios complicate the discussion of what happens after the conflict, before there is peace, for, in those cases, no peace is ever realized after the war of arms. Indeed, after the war of arms, the war of ideas, what ought to be the situation on the ground, who should do what, and who is responsible for what dominates discussions such as is the case for today's Round Table.<sup>2</sup> To illustrate my discussion of this question, I refer to what President Santos said at the signing ceremony of the historic peace deal between FARC Rebels and the Government of Colombia:

What we have signed today, (...) goes beyond a simple agreement between a government and a guerrilla to put an end to a conflict". "What we have signed today is a declaration by the Colombian people in front of the world to say that we are tired of war and that we do not accept any more violence as a means to defend ideas and that we say loud and clear NO MORE WAR...<sup>3</sup>

It is a matter of fact that during an armed conflict, there is no peace in the State, or environment where the armed conflict takes place. Based on the example of the ongoing armed conflict between the Russian Federation and Ukraine, it is correct to state that there is generally no peace in the whole world, when an armed conflict is taking place in any part of the world.<sup>4</sup> It is anticipated that immediately the guns go silent, the situation

---

<sup>1</sup> Michal Smetana & Jan Ludvík, "Between war and peace: a dynamic reconceptualization of Bfrozen conflicts", *Asia Europe Journal*, Springer-Verlag GmbH Germany, part of Springer Nature 2018 (2019) 17:1–14, <https://doi.org/10.1007/s10308-018-0521-x>.

<sup>2</sup> The war with arms is over, now begins the debate of ideas", the Commander of the FARC Ivan Marquez, after signing the 2016 Agreement between the Colombia Govt and the FARC rebels.

<sup>3</sup> Euronews, Colombians call for "no more war" as historic peace deal is signed between Farc rebels and the government, available at: [www.euronews.com/2016/09/27/colombians-call-for-no-more-war-as-historic-peace-deal-is-signed-between-farc](http://www.euronews.com/2016/09/27/colombians-call-for-no-more-war-as-historic-peace-deal-is-signed-between-farc), updated on 27/09/2016, accessed on 7 October, 2022.

<sup>4</sup> Charter of the United Nations, 1945, Article 1 provides : "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

will permit an inflow of humanitarian assistance to the victims of the armed conflict. Based on the example of Colombia, already referred to, that transitional period to peace will also allow former parties to the armed conflict to fulfil their legal obligations under international humanitarian law, human rights law and generally international law regarding cleaning up the wraths of the armed conflict. Humanitarian agencies and organizations, including the ICRC, will help to, among others, re-unite families separated by the armed conflict, feed the hungry populations, largely those displaced by the armed conflict, work with national governments, non-governmental organizations to clean up the environment contaminated by remnants of war – unexploded remnants of war, and residuals of exploded war materials.

What then is the problem at hand? My view is that during peace time, the political elite, economic opportunists and their militaries plan for war, how to fight the war and how to withdraw from the battlefield unharmed, or with the least injuries inflicted upon them by their adversaries. When this objective is realized, the political elite amass political capital and may be rewarded by the electorates by being retained or re-elected in the political offices they hold. The economic opportunist who supported the war reaps by being awarded contracts for the reconstruction of the war-torn areas, while military commanders earn promotions and may, in addition, be rewarded in monetary terms. Sadly, those planning for the armed conflict do not involve their civilian populations, who eventually become the victims of that conflict. Moreover, what preoccupies the planning process for the armed conflict is not return to peace thereafter, but what benefits are achieved during and after the conflict. Failure to involve the civilian population in the planning process by governments translates into a serious problem when an armed conflict breaks up – civilians will be taken unawares and become the unsuspecting victims of the armed conflict. Worst of all, the civilian population is rarely, if at all, involved in the planning for peace, after the conflict, they, as during the period of the armed conflict, remain at the receiving end of those who plan for their fate, whether during peace time, before the armed conflict, during the tenure of the armed conflict and, of course, after the armed conflict period, before peace returns. My view in this regard is that until the political elite, the economic opportunists, and their militaries bring on board the civilian populations, planning for the period after the armed conflict, peace shall remain elusive to all of them.

What is needed, hence, is that in planning for the aftermath of the armed conflict, before peace sets in, all stakeholders, including the victims, should focus on a number of activities, including, but not limited to, discussing,

and where possible, negotiating peace treaties, where the following issues are key: discussions on the granting of amnesties in excepted circumstances; prosecutions for the gross violations of the rules of IHL, human rights and generally international law; demobilization of the former fighters; reintegration of some of the former fighters in the national armies; reconstruction of the damaged environment and facilities; and assigning responsibilities to who should do what and how. At this stage, the following parties should be involved: parties to the armed conflict, national governments where the armed conflict took place, United Nations Organs, and agencies, especially the Security Council and the United Nations Commissioner for Refugees, international humanitarian organizations such as the International Committee of the Red Cross, faith-based organizations, the international community, international and national civil society organizations, and any other interested parties such as Geneva Call and regional or bloc organizations, and the victims of the recently ended armed conflict.

It is, indeed, the responsibility of governments where the armed conflict took place, either on their own, but largely with the help of humanitarian agencies and organizations, to resettle those internally displaced or those who fled their homes and remain displaced up to that time. Return to the original homesteads, however, must be assured after the environment has been cleaned of unexploded remnants and residuals of war, and there is no threat of a reoccurrence of armed conflict, which is difficult to guarantee as is illustrated by cases of frozen conflicts – where return to peace remains in abeyance. In my view, it is when these activities have taken place that we are able to talk of peace returning to the hitherto armed conflict environment. To the victims of the armed conflict, however, peace does not come immediately. It may take a much longer time, depending on the extent the armed conflict has devastated the area, and also whether or not resources are available to them to resettle, resume activities such as children returning to schools, hospitals opening up for all, and government and other employers reabsorbing their former employees. There is of course need for psycho-social support, in addition to the economic rehabilitation of the victims of the armed conflict, before it can be said that peace has returned to those affected communities. At this juncture, permit me to assign responsibilities, if I may, to the key stakeholders in the planning process for the after the armed conflict period before peace.

On their part, the political elite, and for their own selfish reasons, constitute armies, train and equip them, but do not disclose to them why, eventually they may be deployed to attack their former friendly forces. The militaries, aware of their fundamental obligations towards the political elite,

plan for any eventuality, guided by the political doctrines of their governments.

The economic opportunists invest hefty sums of money to support the political elite, who in turn reward the former with government contracts, before the armed conflict, during the armed conflict and even after the armed conflict, but before peace periods. Their sole motivation is profit making, which has nothing to do with the rights and obligations of States and their civilian population.

For the military, unlike other role players in the war of arms, planning is a must for the “before the armed conflict, during armed conflict” and with less precision, for the “after the conflict, before peace” and also for the long after the armed conflict peace periods. The military planning cycle is, however, adjusted to suit the prevailing conditions at any one time; it is largely conditioned to what unfolds during any of these periods. During peacetime, before the armed conflict, the military engage in rigorous training, informed by the ideology and doctrine of their sovereign States. They acquire arms, ammunitions and munitions and train on how to utilize them during the armed conflict phase. The training they get must, however, be guided by the tenets of international humanitarian law, human rights law, and generally the whole body of international law. Militaries raised and trained to ensure that planning is part and parcel of their lifestyle, rarely get to know the ideological reasons as to why they shall fight, even when they are rigorously training. The main preoccupation of the militaries is to plan for how to subdue their enemies and get out of the battlefield with least injuries and harm inflicted upon their own by the opposing forces. After the armed conflict, they execute the planned for exit strategy, but also continue planning for the next war, in case they are attacked, or ordered by the political elite to attack their opponents. In their contingency planning cycle, and in accordance with the law governing the conduct of hostilities, they also attempt to clean up the fields where they fought, or identify to the humanitarian agencies and organizations the areas where they left unexploded war material. Humanitarian organizations and the United Nations agencies use such information to clean up areas so contaminated and make them safe for human habitation again.

On their part, humanitarian organizations, such as the ICRC, and the United Nations agencies, depending on their mandate, plan for how to participate in, and render assistance to the civilian population, when an armed conflict breaks up, and also how, after the armed conflict, before peace is handled, to alleviate the suffering of the victim civilian population. During the transitional period after the armed conflict, before peace, which is the most critical period for the ICRC and the United Nation agencies,



they mobilize and put aside resources that are deployed to facilitate the return of peace to the war-torn areas. They work with governments, international and local non-governmental organizations, and the civilian population to render the most needed help to the victims of the armed conflict. Their actions gradually usher in the much yearned for peace time, especially for the civilian population.

It is important, however, to note that the uncertainties, especially in the opposing militaries, even during ceasefires, or long-term suspension of fighting, do not facilitate the much yearned for peace after an armed conflict. I will illustrate this last point with a few examples, where, in the words of Smetana and Ludvík, conflicts are merely frozen, without signifying return to peace.<sup>5</sup> In the case of Libya, the situation deteriorated after the 2011 internal revolt against Muammar al-Qaddafi's regime. The Libyan internal revolt was later reinforced by a United Nations Security Council mandated international intervention forces that saw the fall of the Qaddafi regime. Shortly after the international forces withdrew from the country, Libyans enjoyed a lull of peace. It, however, did not take long before Libyans started fighting amongst themselves to claim political leadership of the country. Peace has remained elusive in Libya up to date. In the case of Afghanistan, immediately after the departure of a United States of American led international coalition force against the Taliban fighters, and the latter taking control of the State authority, there has been no peace in the country to date.

In conclusion, I reiterate that the period conceived as “after the conflict, before peace” is undeterminable through prior political and military planning, because peace does not fall from heaven as soon as an armed conflict ends. Peace after an armed conflict is essentially a factual period, when there is no armed conflict, whether after a short spell of fighting, or even after a very long period as I illustrated with the examples of Colombia, Libya and Afghanistan, in my discussion. The end of an armed conflict, which is the war with arms, automatically triggers off the war of ideas – what must be done by different stakeholders in the immediate period after the armed conflict. Each stakeholder in the peace process becomes critical during the transitional period before peace returns to an armed conflict torn area. During this transitional period, there will be enjoyment of temporary peace, at least in the short, or even medium term.

---

<sup>5</sup> Michal Smetana & Jan Ludvík, “Between war and peace: a dynamic reconceptualization of Bfrozen conflicts”, *Asia Europe Journal*, Springer-Verlag GmbH Germany, part of Springer Nature 2018 (2019) 17:1–14, <https://doi.org/10.1007/s10308-018-0521-x>.

The civilian population, which fell victim of the actions of the political elite, the economic opportunists and the militaries struggle to regain their peace taken away by the armed conflict. It is my recommendation that humanitarian organizations, largely the ICRC, which has for decades maintained neutrality at all times be supported to execute their mandates so that they facilitate the moving from the transitional period after the armed conflict to a period of lasting peace, if this is ideal, for all humanity.

## **The legal and military aspects of the management of secessionist conflicts after the war and before the peace: with and without international peacekeeping**

*Sossi TATIKYAN*

Consultant on Foreign and Security Policy, Armenia

Since de-colonisation, the collapse of the Soviet Union and Former Yugoslavia, various secessionist movements and conflicts have emerged. Self-determination through granting independence was mainly applied for de-colonization, as well as for independence of the former Soviet Republics and most of the entities within the former Socialist Federal Republic of Yugoslavia. At the same time, it was not applied for other entities in the Soviet Union, Balkans and other parts of the world, and led to long-lasting and severe armed conflicts involving attempts of ethnic cleansing and human rights violations toward civilian populations and certain ethnic groups.

In spite of similarities, different conflicts have evolved in different ways, and the international community adopted different approaches towards them, which have in its turn affected their further dynamics. Some of them led to a full or partially recognized or earned sovereignty based on remedial secession while others remained *de facto* States that are mostly unsupported by the international community. Many of them turned into long-lasting and severe armed conflicts involving attempts of ethnic cleansing and abuse toward civilians and certain ethnic groups, violations of international law, including IHL, international customary law and human rights law.

### **Factors affecting the dynamics of secessionist conflicts and approaches towards them**

The application of divergent approaches to secessionist inter-ethnic conflicts involving *de facto* States has created an impression that the international community applies double standards to them out of geopolitical considerations, which is leading to the collapse of international order. While the application of double standards is a common public perception, the approaches by key international organizations and major powers are multi-layered.

There are various factors that have affected the dynamics of conflicts, as well as international engagement and approaches towards them, which have in turn affected their further dynamics:

- Legal and normative framework, application of various principles of international law prioritizing them over conflicting principles;
- Geopolitical implications, i.e. as possession of oil and gas, other natural resources;
- Foreign policy alliances and aspirations;
- Adopted system of values (respect for human rights and IHL);
- Governance systems (autocracy vs. democracy);
- Strategic narratives of the conflict parties and stakeholders.

### **Prioritization of different principles of the international normative framework**

The first factor shaping them is related to the contradiction between principles of the international normative framework, i.e. self-determination vs. territorial integrity, and humanitarian intervention vs. sovereignty. Self-determination is one of the fundamental principles of the UN Charter, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe. The 2000 United Nations Millennium Declaration mentions “the right to self-determination of peoples which remain under colonial domination and foreign occupation.” However, it clashes with other fundamental principles in international law, such as territorial integrity, also reflected in the UN Charter and Helsinki Final Act.

Even if territorial integrity is often prioritized, the notion of territorial integrity does not give a green light to any State to oppress an ethnic group under its jurisdiction. In accordance with the UN General Assembly Resolution 2625 (XXV) adopted in 1970, “every State has the duty to refrain from any forcible action which deprives peoples [...] of their right to self-determination and freedom and independence [...] The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.” Subsequently, the notion of Responsibility to Protect was endorsed as a global political commitment by UN Member States at the 2005 World Summit in order to address its four key concerns to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. Further demonstration of this

determination was reflected in the 2009 UNSC Resolution 1894 on Protection of Civilians in Armed Conflict.

### **Granting secession in international relations theory and policy**

The application of secession has often been based on geopolitical factors and double standards. The realist theory of international relations has claimed that, when there is a contradiction between the principles of self-determination and territorial integrity, the latter takes precedence. Allen Buchanan has supported territorial integrity as a moral and legal aspect of constitutional democracy. At the same time, he has claimed that an ethnic group has “a general right to secede if it has suffered certain injustices, for which secession is the appropriate remedy of last resort.” Thus, remedial secession is a value-based liberalist approach based on a set of conditions that might justify the secession of a subgroup from the State as a “remedy of last resort.”

The existence of the threat of ethnic cleansing often determined whether the international community made a humanitarian intervention or not, and whether it granted the given entity remedial rights, including secession / sovereignty or not. At the same time, the approaches of the international community have varied dependent on the context, and have evolved over time. Finally, the liberalism of 1990s and 2000s has currently changed to realpolitik in light of complicated geopolitical factors.

### **Various approaches to various conflicts**

- a. One approach has focused on the violation of human rights and the threat of ethnic cleansing in Kosovo, Timor-Leste and South Sudan, deploying large international peacekeeping missions to protect the civilian population and to assist with institution-building, eventually granting them remedial secession, phased and earned sovereignty. Remedial rights were asserted by stopping the annexation of Timor-Leste by Indonesia and recognition of its sovereignty that it declared upon decolonization from Portugal after three decades. NATO’s military humanitarian intervention in Kosovo was aimed at stopping the massacre of Kosovar Albanians by the armed forces of the former Yugoslavia, and the remedial secession of Kosovo from former Yugoslavia. In South Sudan, recognition of sovereignty and deployment of a large UN international peacekeeping mission were

- carried out to assist with state-building and stopping the civil war. Timor-Leste and South Sudan are fully – and Kosovo partially – recognized States. The UN peacekeeping mission withdrew from Timor-Leste in 2021 after it gained sovereignty, finalized its institution-building and was not facing an external threat. In Kosovo, the NATO-led peacekeeping Kosovo Force (KFOR) still defends Kosovo's borders and assists in strengthening the Kosovo Security Force as Serbia does not recognize Kosovo's independence. There are also European Union Rule of Law and UN political missions in Kosovo given the unresolved internal and external issues. In 2021-2022, there were tensions in the Serbian-majority Northern Kosovo, causing concerns for the relapse into conflict. In South Sudan, the UN peacekeeping mission extended its mandate to prevent the country from relapsing into civil war inside the newly sovereign country and due to the fragility of the 2018 peace agreement.
- b. In Bosnia and Herzegovina, the UN, NATO and the EU deployed consecutive international peacekeeping missions and negotiated an agreement leading to the creation of a federation of two political entities (the Federation of Bosnia and Herzegovina, which in its turn consists of ten cantons, and Republika Srpska, as well as Brčko District) for three ethnicities (Bosniaks, Serbs and Croats). Despite criticism of such an arrangement and related political tensions, the country hasn't experienced a major military escalation since the first few years after the war.
  - c. Yet another approach has unsuccessfully attempted to resolve the Israeli-Palestinian conflict through a two-state solution and the conflict in Cyprus through a "bi-zonal, bi-communal federation with political equality." Due to the opposition of Turkey to such an arrangement and its demand for a two-state solution, the UN has been operating a peacekeeping mission that patrols the UN Buffer Zone in Cyprus, maintains its military status quo, and works toward a diplomatic solution of the conflict. In Palestine, the UN has been providing support for Palestinian refugees through the UN Relief and Works Agency for Palestine Refugees in the Near East and provides a platform for Palestinian political claims through other UN bodies. Palestine has a status of non-member observer State in the United Nations.
  - d. Another approach has focused on the violation of the territorial integrity of Moldova (Transnistria), Georgia (Abkhazia and South Ossetia) and Ukraine (Crimea and Donbass) by Russia. The degree to which the human rights of ethnic groups in those territories were

violated by the State to which jurisdiction they legally belong differed. Allegedly, however, none reached the threshold of ethnic cleansing. In order to contribute to the peace process, cease-fire monitoring, and to address human rights issues, there has been a limited international presence through peacekeeping missions by the UN and Commonwealth of Independent States (CIS) and monitoring missions by the Organization for Security and Cooperation in Europe (OSCE) or European Union Common Security and Defence Policy (CSDP) in or around those territories at different times. However, the unresolved nature of these conflicts led to the Russian-Georgian war in 2008, annexation of Crimea in 2014, the armed conflict in Donbass in 2014-2015, the ongoing disastrous Russian-Ukrainian war, and a fragile situation in Moldova prone to escalation. It has resulted in the Russian unilateral military presence in those areas, which in turn ruled out any multilateral international presence.

- e. With regards to Nagorno-Karabakh – an Armenian enclave incorporated into Azerbaijan during the Soviet period – the OSCE Minsk Group – the official mediating body of the conflict – was trying to accommodate irreconcilable principles of territorial integrity and self-determination. The Co-chairs of the group – US, Russia and France, offered several solutions to resolve the conflict throughout 26 years between the first and second Nagorno-Karabakh wars, including deploying international peacekeepers to ensure the security of civilians, granting an interim status and anticipating a referendum for the final status. The failure to reach a negotiated resolution eventually led to the 2020 war, which resulted in a change in the status quo in favour of Azerbaijan, the deployment of Russian peacekeepers without an international mandate, the territory's unresolved status, lack of guarantees for security and human rights for its Armenian population. There has not been any international presence in Nagorno Karabakh, except for ICRC and Halo Trust Fund, it has not received international security, humanitarian, development or institution-building assistance, and its isolation has deepened since the Russian-mediated ceasefire arrangement in 2020 that has not addressed those issues.

Those cases demonstrate that no contemporary inter-ethnic conflict with high intensity, armed clashes, threat of ethnic cleansing and military aggression has been de-escalated or resolved without international guarantees for security and human rights. Multinational peacekeeping forces have been operating for decades and are still maintained in Kosovo

and Cyprus, and were withdrawn in Bosnia and Herzegovina and East Timor when they were not needed anymore.

### **International peacekeeping as a tool for humanitarian intervention**

As demonstrated above, international peacekeeping has served as a tool for humanitarian intervention to protect civilians in secessionist conflicts. UN peacekeeping missions have helped countries make the difficult transition from conflict to peace, and regional organizations such as the African Union, European Union, NATO and the OSCE have taken up their share of responsibilities to ensure peace, security and rights.

International peacekeeping missions gain their legitimacy through the mandate by an international organization, primarily from the UN, but also from regional organizations such as the AU, EU, NATO and the OSCE. Their strategic and operational concepts adhere to international humanitarian, human rights, and customary law. They are accountable for the implementation of their mandate and report to the UN Security Council or governing bodies of regional organizations. They may consist of military, civilian and police components dependent on the need in the given context. During the force generation process, the parties to the conflict should agree on the composition of contributing countries. International peacekeeping missions are multinational, therefore, are not dependent on the interests or commitment of one State.

International peace operations are not static and rigid but evolve over time dependent on the situation and take different composition, size, and formats. Peace enforcement is a subset of peace operations, in which military force is used as a tool of coercive diplomacy to terminate an ongoing conflict, implement a ceasefire, or create a secure environment. They create conditions for classic peacekeeping operations that assist with stabilization and transition to peace. Finally, peacekeeping missions are succeeded by political missions that continue to help with political dialogue and peacebuilding. Examples of dynamic missions include: a) the peace operation in Kosovo that started with a NATO intervention in Kosovo in 1999, after which KFOR remained as a defence force while a large UN peacekeeping mission followed, including the OSCE as its institution-building and the EU as economic rehabilitation pillars, later replaced by the UN political mission and the EU Rule of Law Mission; b) In the Central African Republic, a unilateral Sangaris operation was deployed by France to stop sectarian violence and civil war, followed by the AU and EU forces,



and later on – by a large UN peacekeeping mission and the EU military advisory mission.

International peacekeeping is challenging and has also been criticized for its failures. It has not prevented the genocide in Rwanda and the massacre in Srebrenica due to the lack of instructions from the headquarters to use force to protect civilians. To avoid the reoccurrence of such failures, the UN has modified its rules of engagement authorizing the use of force not only for self-defence of peacekeepers, but also to defend the mandate of the mission and, first of all, to protect civilians. However, force generation for launching a peacekeeping mission may take months, therefore, it may not be able to respond to a sudden crisis. Peacekeeping missions have had problems related to the violations of ethics and code of conduct, such as sexual exploitation and trafficking of local population. Their multinational nature may result in interoperability issues and varying levels of awareness of international humanitarian and human rights law. Some missions may lack exit strategy and stay for an indefinite period in light of the continuing threat for relapse into the conflict, or their withdrawal is followed by the relapse into the conflict.

Finally, the deployment of an international peacekeeping mission depends on the consent of the parties, especially the agreement of the State in the internationally recognized territory of which it is to be deployed, and if the State oppresses a minority group, it may not be interested in agreeing on the presence of an international peacekeeping mission unless coerced or pressured. Alternatively, a peacekeeping operation can be deployed without the request and consent of the host country or a conflict party upon the decision of the UN Security Council under Chapter VII on the Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. However, adoption of such a decision depends on geopolitical interests of the members of the Security Council, especially those of its permanent members who may veto it. Therefore, it has not been able to intervene to protect civilians in Syria, the Rohingya minority in Myanmar, Yezidis by ISIS or to stop the armed conflict in Nagorno Karabakh.

### **Unilateral peacekeeping: the case of Nagorno-Karabakh**

The Nagorno-Karabakh conflict has seen two large-scale wars, in 1988-1994 and 2020, and a smaller war in 2016, to impose a military solution to the conflict. Russia mediated the ceasefire and its peacekeeping contingent was deployed as a peace enforcement operation to stop the 2020 war as the only security guarantee of Armenians in Nagorno-Karabakh. However,

since then there have been three major rounds of the violations of ceasefire resulting in the capture of new villages, mountains and roads, depopulation of Armenians from those areas in 2020-2022, and deprivation of gas and thus weaponizing cold temperature in March 2022. There is no transparency and clarity in the rules of engagement of Russian peacekeepers, and there are no international reporting and monitoring mechanisms for their activities.

Russian peacekeepers have no international mandate, their presence is based on the 2020 tripartite ceasefire statement between the Heads of State of Russia, Armenia and Azerbaijan. While Armenia has signed a Memorandum of Understanding on Russia's peacekeeping role, Azerbaijan has refused to do so. Besides, Russian peacekeeping mission consists of only a military contingent, and contains neither police nor civilian components. It has also been preventing the access of international NGOs and media to Nagorno-Karabakh since February 2021, which deepens the isolation of the territory.

The authorities, experts and civil society of Armenia, and even some groups in Nagorno-Karabakh have criticized the lack of action and failures by Russian peacekeepers to prevent violations of ceasefire and further territorial and human losses by the Azerbaijani Armed Forces but they do not have any other deterrent to prevent further large-scale armed conflict in the absence of an international peacekeeping force. This makes the security of Nagorno-Karabakh civilians fully dependent solely on one country, and its changing geopolitical interests, international reputation and capabilities. Azerbaijani authorities imply that the presence of Russian peacekeepers is temporary, making the extension of their mandate to 2025 unlikely, and public figures aim to delegitimize them, especially in light of the Ukrainian crisis. At the same time, Azerbaijan is not willing to accept an international peacekeeping force whether with the UN, OSCE, EU or other mandate, claiming that Azerbaijan doesn't want any foreign military presence on its soil.

The current peacekeeping architecture in Nagorno-Karabakh should evolve, based on the international norms of peacekeeping. Even if it looks challenging in the current geopolitical environment, options for a multinational peacekeeping operation under a mandate from an international organization should be established in order to prevent a relapse into an armed conflict, and to provide security and human rights guarantees to Armenians there. It may be a mission either under the UN, OSCE or the EU Common Security and Defence Policy (CSDP) framework. It should be a civil-military mission to provide security in line with the "Responsibility to Protect" principle, as well as with political,

governance, human rights, protection, humanitarian and development issues in line with the UN “Leave No One Behind” principle.

Consequences of a new armed conflict will be costly geopolitically and reputationally for the international order enshrined in the UN Charter, the OSCE that has provided a formal mediation framework for the resolution of Nagorno-Karabakh conflict, and the EU that has facilitated meetings between Armenia and Azerbaijan since 2021 due to the crisis in the OSCE Minsk Group in light of the polarized geopolitical environment.

## **Conclusions**

After a long and heavy history of armed conflict, the transition to peace is difficult without international peacekeeping. The commitment of the international community to peacekeeping in conflict zones is key. Preferably, peacekeeping should be multi-national, under the mandate of an international organization, and consist of military, police and civilian components, as well as integrate humanitarian and development components to ensure a holistic intervention.

Currently, there is a feeling that the international order is collapsing, and multiple standards are applied to different conflicts. While understanding geopolitical interests, all conflicts deserve attention, and parties deserve treatment based on the human rights approach, in consideration of human security and human development issues. The international community should not allow military coercion to be normalized as a tool to achieve unilateral solutions in conflict resolution. It should also find ways to exercise leverage to persuade parties to the conflict to accept the deployment of international peace operations.

Peace should be positive, comprehensive and sustainable, be based on the resolution addressing the root causes of conflicts, provide long-term solutions for its key aspects and build confidence towards genuine reconciliation.

## The Complexities of Planning

*Mark DAKERS*

Colonel, UK Army; Director of the Military Department,  
International Institute of Humanitarian Law

*The views expressed here are the personal ones of the author and do not represent the position of the UK, UK Ministry of Defence or the British Army*

I have always found that plans are useless, but that planning is indispensable.<sup>1</sup>  
Dwight D. Eisenhower

In a previous session of the Round Table the historian Keith Lowe was asked what he would recommend for any transition period from conflict to post-conflict. His response was that in his view the key was to have a plan. This may seem common sense but having a plan in and of itself will not solve the problem.

Eisenhower's views on the value of having a plan are well known and appear in works on project management, computer programming, information technology and even how to be a successful lawyer but they bear closer examination. Eisenhower planned along with his staff, at Southwick Park a country house in Hampshire UK, the most complex joint operation in the history of warfare Operation Overlord. What did Eisenhower mean by this seemingly self-contradictory remark? Eisenhower made the remark in the context of preparing for battle but it applies equally to preparing for transition. In considering them it is also worth bearing in mind the now famous words of General David Petraeus in 2003 when he was Commander of the 101<sup>st</sup> Airborne division preparing for the invasion of Iraq. He said to a journalist, Rick Atkinson, as he was doing that preparation "Tell me how this ends."<sup>2</sup> This is the crux of the issue. Where does it all lead and what is the position to be reached – what the military refer to as the end-state.

---

<sup>1</sup> Letter to: Hamilton Fish Armstrong, Date: December 31, 1950, The Papers of Dwight David Eisenhower, Volume XI: Columbia University, Editor Louis Galambos et al., 1984.

<sup>2</sup> Said to Rick Atkinson, Washington Post, March 2003. Rick Atkinson "In the Company of Soldiers" Henry Holt and Co. New York 2005.

It is submitted that what Eisenhower meant is that it is not the plan which is critical but the analysis that drives the plan. One of the great military clichés is that “no plan survives first contact with the enemy.”<sup>3</sup> What that means is that one must be prepared for the unpredictable because it will happen, it is just not clear what will happen. Thus, the analysis which lies behind the planning, the military intellectual thinking which is essential to the creation of the plan is that which is important as it is that which will allow the operation to adapt. To return to Operation Overlord, the plan was that at the end of day one, British forces would have taken Caen some nine miles inland from the beaches and a key objective. This did not happen, and it took until 20<sup>th</sup> July some six weeks after D-Day before Caen was secured. However, this did not derail the plan despite it being a key objective it just meant that it had to be adapted.

Achieving military objectives rarely goes smoothly and arguably achieving military objectives is the easy bit. Planning to achieve developmental, governmental, etc. goals is far more complex. There are certain key elements in transitions which can be planned. As an example, if a force which will leave during transition is holding detainees it can plan for the handover of those detainees, which should be straightforward. Provided the force knows how many detainees it has, where they all are and to whom they should be handed over. The first two of those requirements should be simply fulfilled but the question of to whom detainees (who are not prisoners of war) should be handed over may not be. Similarly, a force can plan for doing decontamination of bases, of the area surrounding those, and for getting rid of the explosive remnants of war in its area of operations. The first two are tasks which should be achievable before departure but the latter may be more complex as it relies on detailed knowledge of the position of explosive remnants of war. The key problem with explosive remnants of war is often that some actors in the conflict have not recorded where they may be. If they have been recorded explosive remnants such as land mines are prone to move especially in wet environments. Moreover, the clearance of explosive remnants takes a long time and is labour intensive. As an example, following the conflict between the UK and Argentina in 1982 it took 38 years before the last mines were cleared.

---

<sup>3</sup> The origins of the cliché are not universally agreed but the first written expression of the view is often given as Von Moltke in an 1871 essay reflecting on the 1870 Franco-Prussian War.

So, there are things which can be planned for with some certainty, but other things are more difficult to plan for precisely. This is because when planning from a military perspective there are objectives to be achieved which can be quite clearly defined. Transition planning is more complex because it is suggested that the ends to be achieved are more difficult to define and more importantly the ways and the means to achieve them are more difficult to clearly identify. It is very difficult to plan if there is no clear picture of what the plan is meant to achieve. Herein lies one of what the author suggests are two key problems. The first is: identifying a clearly defined and realistically achievable aim is central as that allows the analytical process to be done. This will allow the plan to be adapted as circumstances require but the overall aim has to remain consistent.

The most important remark on transition and post-conflict during this Round Table was that of Ambassador Pontecorvo, as part of his very piercing address on day one. When referring to nation-building and transition, he said “it takes time.” This is the second of the key problems: time. It takes time and during that time it will take resources and the planning analysis will identify those required resources. A successful transition does not happen overnight nor can it be achieved by only military means. In terms of time taken the example of the conflict in the Balkans from 1991 to 1995 is appropriate. The Dayton accord agreed on 21<sup>st</sup> November and signed on 15<sup>th</sup> December 1995 was meant to bring an end to that conflict. The transition involved the large-scale deployment of forces and a tour in the Balkans for many in Western militaries at the time became a common occurrence. Twenty-seven years after Dayton has there been a full transition? It is difficult to conclude, given the ongoing political tensions and the nature of the political rhetoric in Bosnia-Herzegovina that there has been a successful transition.

Planning successful transition is a long-term issue as Ambassador Pontecorvo said and that sort of planning is not best left purely to the military. There are legal obligations that must be fulfilled, obviously, particularly in a post-conflict situation, as there are obligations in occupation which could be considered an initial form of post-conflict. Those States which have been involved in occupation in recent history, such as Iraq, have found it enormously difficult, particularly because the existing legal obligations are heavy. Fulfilling those legal obligations is very heavy on people and resources. This needs to be considered in advance and the appropriate resources set aside in order for there to be the possibility of success. Moreover, the resources are not purely or even primarily military ones but will need to be comprehensive in nature, and address the complex problems which occupation and post-conflict bring.

The understanding, that time is key and transition is not short, is critical. As the last British Brigade Commander in Iraq, Brig (later Lt Gen) Tom Beckett said to his troops, before being deployed, “Pack light, plan long.”<sup>4</sup> The thinking, analysis and planning has to be long term, and has to be cross-government, multidisciplinary, etc., not just involving state organisations, but also international organisations, and humanitarian organisations. It is a complex undertaking with large, short-term, medium-term and long-term consequences and needs to be approached as such. It is also inevitable that if a military operation is planned there will come a point where transition becomes an issue which is better managed by other actors. It can only be an effectively managed transition if there is engagement with the multiplicity of other actors who are operating on the field. It used to be simpler because there were fewer actors, even if the problems were equally as complex, but the number and disparity of actors now involved add a further layer of complexity.

It is only right to acknowledge that there can be difficulties with this engagement between the military and civilian actors and between civilian actors of a governmental and non-governmental character. This can be for a variety of reasons. There is not always complete trust and understanding between military organisations and humanitarian organisations or between government organisations and non-governmental ones whether they be international organisations or NGOs. Differing actors will have differing approaches and, while all will be seeking to assist those in need, they may have different end states. Aurvasi Patel in her presentation to the Round Table referred to the exchange of information and how central that could be to success. The exchange of views and trying to cooperate, perhaps even less than cooperate, just rub along and understanding what each actor is seeking to achieve and not act at cross purposes, is a key step. Simply put, given the plethora of actors with different philosophical start points, there is never going to be a strategic objective on which everyone agrees. For the military working at the operational and tactical level what can be achieved is a positive effect on which all can agree and to which all can contribute through understanding and mutual respect at those levels. This involves a mindset of understanding on all involved and a willingness to put aside differences in order to achieve the desired effect which is some sort of positive result that is going to benefit the population who are affected by

---

<sup>4</sup> Author’s recollection of 20 Armoured Brigade pre-deployment briefing Sennelager Training Camp, Germany, October 2008.

the conflict and because the responsible, law-abiding military does not want to affect that population any more than is necessary.

In conclusion, a reflection on what one of the fellow panellists observed previously. Ms Tatikvan referred to the situations in Timor-Leste, Kosovo and South Sudan and the post-conflict transitions in those places as if they were the lucky ones. While not disputing that observation, it is worth noting that all those situations involved long-term, large-scale military deployments of peacekeeping forces alongside enormous work by civilian actors. The argument could be made that, historically, transition has only once been done properly and that was in post 1945 through the Marshall Plan in Europe. Even then for political reasons the Plan was not applied across the European Theatre of operations. This was a comprehensive effort aimed at stabilising a continent after a second major conflict in 30 years and was undertaken at huge expense. It is one example of transition being done very well but, even so, it took until 1955 for certain countries to be receiving aid to be given their constitutional rights again, while it took till 1990 for others who did not receive the full, or in some cases, any benefit from the plan. And while the plan was a success and between 1948 and 1951 created the conditions for successful transition in Western Europe it was arguably a unique product of the circumstances. Many have argued that when the Marshall Plan model has been applied subsequently in different circumstances it has failed.<sup>5</sup> Successful transition will involve adapting any given plan to the prevailing circumstances, while involving co-operation between actors with differing perspectives and, most of all, will take time.

---

<sup>5</sup> Doug Bandow “A look behind the Marshall Plan Mythology” Cato Institute 1997 [www.cato.org/commentary/look-behind-marshall-plan-mythology](http://www.cato.org/commentary/look-behind-marshall-plan-mythology). Accessed 01 Dec 2022.





## **VIII. Infrastructure and remnants of war**



## **The rehabilitation and reconstruction of water infrastructure**

*Mara TIGNINO*

Reader, Faculty of Law, University of Geneva; Lead Legal Specialist of the Platform for International Water Law, Geneva Water Hub

I would like to thank the International Institute of Humanitarian Law for the kind invitation to join this important Round Table. In my presentation, I will focus on access to essential water, sanitation and hygiene services in the time between the end of hostilities and before peace is reached.

International humanitarian law (IHL) deals especially with water as indispensable to the survival of the civilian population and only marginally as a natural resource. Water is also protected under one of the most ancient rules of IHL, i.e. the prohibition of the use of poison and poisoned weapons. This includes, for example, the prohibition of poisoning water wells. Under IHL, in addition to the general protection as a civilian object, the natural environment, or part of it, is specifically protected against attacks which may cause or are expected to cause long-term, severe and widespread effects.

To enhance the protection of the environment, including water resources, the ICRC published the Guidelines on the Protection of the Natural Environment in Armed Conflict in 2020. The ICRC Guidelines contain specific recommendations to States and parties to armed conflicts to provide instruction in IHL, including the rules protecting the environment, to their armed forces. The International Law Commission also adopted draft principles on the protection of the environment in relation to armed conflict in 2022. This document follows a temporal approach, including measures that should be taken by States and other actors before, during and after armed conflicts to ensure better protection of the environment.

My presentation will focus on two aspects. First, I will give some examples on how international law may help to ensure the rehabilitation and the reconstruction of water infrastructure in that period of time between the end of hostilities and before peace is reached. Second, I will focus on the role of transboundary water cooperation mechanisms in the rehabilitation and reconstruction of water infrastructure.

## 1. Reconstruction and rehabilitation of water infrastructure

Regarding the first point, let me start by defining what I mean by “water infrastructure.” Water infrastructure covers small facilities like water wells but also wastewater treatment plants and large installations like dams and dykes. This term also includes infrastructure such as power grids which are essential for the functioning of water installations as such.

At the end of hostilities and before a peace process starts, the rehabilitation and reconstruction of critical infrastructure providing essential services such as water and electricity may be unduly delayed, despite their vital character. In the aftermath of armed conflicts, access to water is necessary to alleviate the suffering of the civilian population, mitigate humanitarian consequences, strengthen the resilience of essential services, and more broadly, prevent the reversal of development efforts.

In his report on peacebuilding of 2009, the former UN Secretary-General Ban Ki-moon noted that providing basic water and sanitation services is one of the critical measures that should be prioritised in the immediate aftermath of conflict. The same year, the US Congress passed an Act on Northern Uganda authorizing funds for humanitarian relief and reconstruction. One of the objectives of the Act was expressly to prioritize access to clean water in return sites.

At the end of hostilities, negotiations towards humanitarian ceasefires should expressly include ensuring safe access to humanitarian relief personnel, such as water engineers, to repair water infrastructure. Moreover, it is also essential that water engineers have the necessary equipment to repair and rehabilitate electrical and water infrastructure.

In order to be effective and ensure the rehabilitation of water infrastructure, ceasefire should last a certain period of time. This is particularly important since the negotiations between the parties to the conflict and humanitarian organizations, such as ICRC or other humanitarian organizations, can be lengthy and burdensome. If negotiations are required every time a relief activity is undertaken, the provision of water services to the population can be unduly delayed. For example, ICRC, in its report on *Bled dry: How war in the Middle East is bringing the region's water supplies to a breaking point* of 2015, has reported that the rehabilitation of water services can often be done in a short period of time, but they need to ensure the safety of the personnel. In order to ensure this safety, ICRC water engineers need to negotiate with the parties to the conflict, which may require extended time. An ICRC water engineer, Michael Talhami, noted in the report *Bled dry* and I quote: “to do an emergency response it is less about the technical side and the ability of the

contractors to perform the work, and more about the politics and negotiations that are necessary to ensure that you have safe access.”

Long-term ceasefire agreements can facilitate the work of humanitarian organizations and consequently alleviate the suffering of the civilian population. The UN Security Council has already called for temporary ceasefires on humanitarian grounds, for instance, under Resolution 2401 of 28 February 2018 on Syria. Such resolutions do not often expressly include water. That is why the Global High-Level Panel on Water and Peace, co-convened by 15 countries, recommended that the UN Security Council should encourage “water supply ceasefires” and should expressly refer to the rehabilitation of water infrastructure in its resolutions. A basis for this position can be found in some resolutions of the UN General Assembly. For example, Resolution 49/10 of 1994 expressly called the parties to “facilitate the unhindered flow of humanitarian assistance, including the provision of water, electricity, fuel and communication, in particular to the ‘safe areas’ in Bosnia and Herzegovina.”

There are also other examples. In 2016, the UN Resident and Humanitarian Coordinator for Syria called for an urgent ceasefire to repair water systems and electricity networks that drive water pumping stations in Aleppo. There were also several ceasefire agreements in Eastern Ukraine between parties to the conflict, which enabled repairing damaged water pipelines and infrastructure. In Kosovo, the interim agreement, the Rambouillet Accords of 2009, provided that the rapid improvement of living conditions for the population of Kosovo could only be done through the reconstruction and rehabilitation of local infrastructure and the accords explicitly included water and energy infrastructure.

Let me highlight the final point regarding the reconstruction of water infrastructure. During armed conflicts, a party that has built and has been operating an infrastructure providing water may lose its control over the infrastructure to the opposing party. Particularly in these cases, to facilitate the operation, maintenance, assessment, repair and rehabilitation of water infrastructure, the technical personnel of the two parties to the conflict need to collaborate. This collaboration is necessary to share the technical information and expertise at the hands of the party that was operating the installation. This sharing of technical information may not only be helpful but in some cases indispensable for the general functioning of the water infrastructure. Collaboration is crucial for the continuation of basic services that benefit the civilian population and ensure human dignity.

Let me now move to the second point of my presentation.

## **2. The role of transboundary water resources as a tool for peace**

When peace is reached, the process of rehabilitation and reconstruction of water infrastructure is enhanced. Joint institutional mechanisms on transboundary water resources such as river basin organizations, may help to support joint efforts by hostile parties in the recovery process. While water is often viewed as a possible cause or trigger of conflicts, there are more examples in which water has been used as an entry point for peace. For example, the agreement on the Sava River in the Balkan region was the first agreement signed at the end of the conflict in former Yugoslavia in 2002. There are other examples, such as the Indus River between India and Pakistan or the Senegal River between Senegal and Mauritania where joint institutional mechanisms on shared water resources have been a channel of communication between hostile parties.

At the end of an armed conflict, States could use shared waters mechanisms, as a tool for starting direct contacts. An example is the Picnic Table Talks concerning the Jordan river between Israel and Jordan which were concluded with the signature of the peace treaty. This treaty includes specific provisions on water.

At the end of hostilities, hostile parties may also designate, by agreement or other instruments, areas of environmental importance as protected zones in the event of an armed conflict. This can include areas around international rivers.

It is also essential that organizations dealing with peacebuilding include water in their actions to support peace. For example, the Martti Ahtisaari Foundation was able to bring in the same table representatives from Turkey, Syria, Iran, Iraq and Jordan to discuss water issues. Moreover, the Center for Humanitarian Dialogue has built up a network of more than 2,000 agro-pastoral mediators across border communities in Burkina Faso, Chad, Mali, Mauritania and Niger who work to prevent and resolve conflicts over natural resources, including water. Many disputes and conflicts in the Sahel region can be resolved with a wider knowledge of local customs and greater use of traditional mediation methods.

### **Conclusion**

To conclude, let me emphasize some of the challenges that the Geneva Water Hub face in promoting the use of water as an instrument for peace.

First, as speakers of this Round Table have already noted, most of the armed conflicts take place in cities. In cities, critical infrastructure and

installations are interconnected. The targeting of critical infrastructure may have incidental impacts on the access to water. For this reason, it is important to consider the direct, indirect, and reverberating impacts of targeting critical infrastructure on the provision of water.

Second, in situations of protracted armed conflicts, an alliance between humanitarian, development and peace institutions should be built around water. This is necessary to prevent and resolve water conflicts that can be aggravated by an armed conflict.

Finally, at the end of hostilities and before peace starts, there is an interplay between different areas of international law. In this context, it is particularly important to consider the instruments of international environmental law and international water law such as agreements on transboundary freshwater resources which can promote peacebuilding.

Many thanks for your kind attention and I look forward to the discussion.



## **The impact of unexploded ordnance contamination on critical infrastructure and essential services**

*Nibras Fakhir Matrood AL TAMEEMI*

Director, RMAC-S (Regional Mine Action Centre –South),  
Sangaris operation

In many parts of the world, explosive remnants of war (ERW) litter landscapes that are no longer battlefields and continue to kill and maim thousands of civilians during and long after active hostilities have ended. A large proportion of victims are children. With armed conflict increasingly taking place in urban areas, including cities of millions of inhabitants, weapon contamination of urban terrain has become commonplace.

So, what are ERW? ERW are explosive munitions that have not fulfilled their purpose, either because they failed to explode as intended due to malfunction or other reasons (“unexploded ordnance” or “UXO”), or because they were left behind by a party to the conflict before actually being used (“abandoned explosive ordnance” or “AXO”). While the latter undoubtedly also have a detrimental impact, I will focus my presentation on the former.

Explosive munitions of every kind have a failure rate that can vary greatly, depending on diverse factors such as their age, conditions of preservation and use, the quality of design and production, the type of material or soil at the point of impact, atmospheric conditions, and the competence of the user.

In the following I will address the broader patterns of harm caused by unexploded ordnance, focusing on their impact, in humanitarian terms, on critical infrastructure that enables the delivery of vital services such as water, electricity, sanitation and healthcare. I will then briefly outline the applicable legal framework and conclude with some practical recommendations on preventing and mitigating the impact of UXO on individuals and communities.

### **Impact on critical infrastructure**

We often think of their long-term humanitarian impact, but the presence of unexploded ordnance aggravates civilian suffering already during armed

conflict. In addition to injuring and killing civilians going about their daily activities (such as fetching water or returning from school), and hindering the delivery of life-saving humanitarian assistance, UXO have a threefold impact on infrastructure and the delivery of essential services.

To begin with, UXO block access to infrastructure and facilities such as roads, hospitals or schools, depriving civilians of medical treatment and education and preventing their evacuation when roads or land through which evacuees must pass are contaminated. This puts at grave risk both those who decide to flee (and are exposed to the lurking threat of weapon contamination), as well as those who opt to stay behind for fear of stepping on a UXO (and are exposed to the dangers of hostilities).

Furthermore, UXO pose an obstacle to the operation and/or maintenance of critical infrastructure. Think of unexploded munitions found in the control room of a power plant, or maintenance/operation staff unable to access a facility due to the threat an unexploded ordnance poses, or of consumables unable to reach the infrastructure due to contamination of roads by UXO.

This can have significant reverberating effects on other interconnected essential services. For instance, in the previous example, if the functionality of the power plant is impaired, this could potentially affect water purification or distribution, and the operation of a nearby hospital, with dire consequences on the life and health of civilians. Urban areas are particularly vulnerable, because of the complex, interconnected and interdependent nature of urban essential service networks and the high dependency of civilians on them.

This impact persists long after hostilities have ended. UXO pose a daily threat to civilians and hamper agriculture and trade. They can significantly delay reconstruction efforts and prevent the return of displaced persons to their places or residence. Ultimately, UXO impede socio-economic development and pose a long-term obstacle to the achievement of the Sustainable Development Goals. The International Committee of the Red Cross (ICRC) continues to witness the high human cost of unexploded ordnance in its day-to-day operations in armed conflicts and in post-conflict situations.

### **Additional challenges in urban environments**

The difficulty of clearing UXO is much greater in urban areas than elsewhere for several reasons. Let me flag two:

First, locating UXO in the midst of rubble and picking them out from among a wide array of everyday objects, many of which are made of similar material (e.g., metal), is an onerous, dangerous, and often extremely time-consuming task.

And second, UXO can hinder the recovery of human remains, which in turn poses risks for public health and aggravates the problem of missing persons. At the same time, clearance operations must ensure that human remains are handled and recovered in a dignified manner and in a way that will facilitate their identification, which can further slow down the pace of clearance.

### **Legal framework**

Under international humanitarian law, parties to an armed conflict have an obligation to take measures to minimize the risks and effects of UXO both during as well as after the end of hostilities, notably to protect the civilian population. These obligations stem from the principle of precaution, and are detailed in Protocol V to the Convention on Certain Conventional Weapons.<sup>1</sup>

The principle of precaution requires that a party that uses explosive munitions that may become UXO take constant care in the conduct of military operations to spare civilians, as well as all feasible precautions to avoid, and in any event to minimize, incidental civilian harm from their attack, including the resulting UXO.

It further requires that a party that controls an area affected by UXO take all feasible precautions to protect civilians from the effects of UXO.

These general obligations do not indicate precisely the practical measures that parties must take to limit the risks and effects of unexploded ordnance. The provisions of CCW Protocol V can provide useful guidance in this respect.

What is clear is that parties must factor in the risk of the munition not exploding upon impact, and the reverberating effects of weapon contamination on the life and health of civilians, when assessing the proportionality of an attack.

Protocol V, in force since 2006, was the first multilateral treaty to deal comprehensively with the problems caused by explosive remnants of war. The Protocol applies in situations of international as well as non-

---

<sup>1</sup> Protocol V to the CCW (2003) on Explosive Remnants of War.

international armed conflict and in their aftermath, and binds not only States but also non-state armed groups party to an armed conflict involving a State party to the Protocol. Although some of the Protocol's requirements apply during armed conflict, most obligations are activated after the end of active hostilities.

Under the Protocol, the party that uses or abandons explosive munitions that may become explosive remnants of war has three main obligations:

First, "to the maximum extent possible and as far as practicable" they must record information on the munitions employed or abandoned by its armed forces (including the types, numbers and location of targeted areas, identification measures and methods of safe disposal). This obligation presupposes having in place a system for the recording and retention of such information.

Second, "without delay after the cessation of active hostilities and as far as practicable, subject to their legitimate security interests" they must share such information with the party in control of the territory where the ERW are located and/or with any organization that will be undertaking clearance or risk education activities. In 2013, the ICRC organized an expert meeting to identify and address challenges to the implementation of these obligations, which recommended a number of best practices in this respect.<sup>2</sup>

And third, after the end of active hostilities, they must provide, where feasible, assistance (technical, financial, material or other) to the party in control of the affected territory, to facilitate the marking and clearance, removal or destruction of ERW.

States and non-state armed groups that are in control of a territory affected by ERW, whether or not such ERW was a result of their operations, have two important additional obligations:

First, to take all feasible precautions to protect civilians from the risks and effects of ERW, including warnings, risk education, and marking, fencing, and monitoring affected areas.

And second, after the end of active hostilities, as soon as feasible, to mark and clear, remove, or destroy the explosive remnants of war.

Protocol V contains a detailed technical annex that identifies a number of voluntary preventive and other measures that States are encouraged to take in order to minimize the occurrence of ERW, including in terms of production, storage and transportation of munitions.

---

<sup>2</sup> ICRC, Identifying and Addressing Challenges to Implementation of Article 4 of Protocol V to the CCW, Expert Meeting, ICRC, Geneva, October 2013.

## **UXO and the use of heavy explosive weapons in populated areas**

Unexploded ordnance is largely the result of the use of heavy explosive weapons in populated areas. Recent and ongoing conflicts, be it in Ukraine or the Middle East, are clear examples. UXO as the result of attacks using heavy explosive weapons in cities, towns and villages plague civilians and humanitarian operations, causing direct and indirect harm.

Given the difficulties posed by urban contamination and clearance, prevention is key. The ICRC continues to call on States and all parties to armed conflict to avoid the use of explosive weapons with a wide impact area in populated areas.<sup>3</sup> The recent Political Declaration on explosive weapons in populated areas<sup>4</sup> committing States to restrict or refrain from the use of explosive weapons in populated areas, where such use may be expected to cause civilian harm, which has already been endorsed by 82 States, is a very encouraging step in this respect.

### **Recommendations**

I would like to share with you a few recommendations on preventing and reducing the risk posed by UXO and the harm they cause, These are “umbrella” recommendations, each requiring many practical measures to be implemented.

1. Ensure effective maintenance and adequate storage of explosive weapons and munitions, and do not deploy poorly maintained or stored weapons or munitions, especially in operations in populated areas.
2. Incorporate in military doctrine (instructions, operating procedures, training manuals, as well as exercises) best practices for recording, retaining and transmitting information on the use of explosive ordnance, as recommended by the ICRC in its 2014 report.<sup>5</sup>
3. Adopt an avoidance policy with regard to the use of explosive weapons with a wide impact area in populated areas. The ICRC’s milestone report on EWIPA published in January 2022 provides detailed practical recommendations on which types of weapons to

---

<sup>3</sup> ICRC, *Explosive Weapons With Wide Area Effects: A Deadly Choice in Populated Areas*, ICRC, Geneva, January 2022.

<sup>4</sup> [www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/](http://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/).

<sup>5</sup> Above n. 2.

avoid using in populated areas, and on appropriate mitigation measures.<sup>6</sup>

4. Make the export of explosive weapons with a wide impact area conditional on recipients putting in place limits on their use in populated areas.
5. When providing support to partner forces and/or parties to an armed conflict, in the form of explosive weapons with a wide impact area, ensure that training is provided to recipients so that they know and understand the effects of such weapons in populated areas, and implement restrictions and limitations on their use.
6. Ensure that good practices and lessons learnt in relation to the use of explosive weapons with a wide impact area in populated areas are shared with partner forces and/or supported parties.
7. In the operational planning process, ensure that critical civilian infrastructure and, to the extent possible, the essential service systems they enable or serve, are identified and mapped and that such findings are communicated to the operational military decision-makers. To this end, actively seek information on the nature, location, condition and interconnectedness of critical civilian infrastructure.
8. Ensure where feasible the participation of engineers with relevant expertise, as well as urban planners, in the decision-making process for targeting.
9. Support the development of resilient essential services, to ensure that civilians have access at minimum to essential services of a quality necessary to preserve their lives, security, physical and moral integrity, and dignity.

Explosive munitions constitute the main bulk of military arsenals and are used in mass numbers in today's armed conflicts. With these weapons, contamination is fast, and clearance very slow and extremely costly. Every year, the ICRC, National Red Cross and Red Crescent Societies and other organizations continue to treat thousands of new victims of these weapons that keep on killing. The ICRC undertakes specific initiatives to prevent and address the effects of explosive remnants of war, including awareness-raising, physical rehabilitation and support for the social and economic inclusion of survivors. Protocol V explicitly establishes the collective responsibility of States to provide assistance to the victims of ERW. All stakeholders must do more to protect civilians and their communities from the grave and persistent harm caused by these weapons.

---

<sup>6</sup> Above n. 3.

## Geneva Call's humanitarian engagement on landmines and ERWs (before, during and after)

*Mariam ISMAIL*

Regional Operation Coordinator, Geneva Call

Excellency, distinguished Guests, Ladies and Gentlemen, good afternoon, everyone.

On behalf of Geneva Call, I would like to thank the International Institute for Humanitarian Law and ICRC for their warm welcome and outstanding organization and management of this Round Table discussion.

Today, I will be talking about Geneva Call's humanitarian engagement with armed groups and *de facto* authorities (AGDAs) during armed conflict, including transitional periods to peace. I will share with you concrete examples on how this engagement is illustrated in landmines and explosive remnants of war issues in the work of Geneva Call and how it has evolved with time.

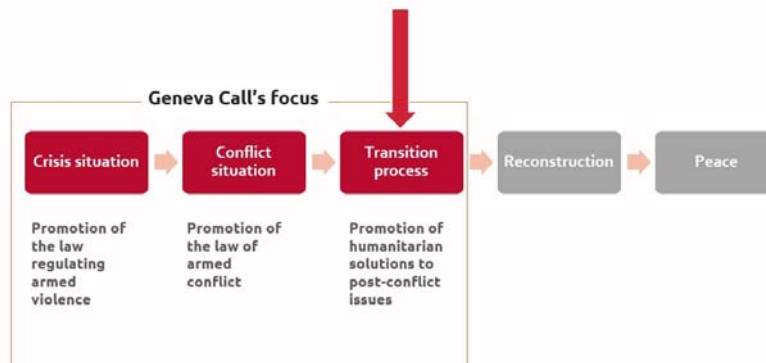
Geneva Call is a Geneva-based international non-governmental organization. We work in conflict zones to prevent abuses against civilian populations. We do it by strengthening the respect for the rules of war (law of armed conflict) by AGDAs and by raising awareness of the civilian population of their rights. The year was 1997, the Ottawa Treaty, had just been signed. Several members of the International Campaign to Ban Landmines (ICBL) from conflict zones at opposite ends of the world were struggling with the fact that even if all the world's States were to join the treaty, there would still be many other users of mines that were outside the Treaty process: e.g., armed groups which we call AGDAs.<sup>1</sup>

Out of this desire to find a solution to the problem of how to bring AGDAs into the mine ban movement, Geneva Call was born in 2000. The organization was set up with the sole focus of engaging AGDAs not only towards an anti-personnel mine ban but also towards adherence to international humanitarian norms more broadly. Geneva Call swiftly developed a unique tool to facilitate engagement: a declaration that ANSAs could sign which mirrors the obligations that States have under the APMBC; the Deed of Commitment under Geneva Call for Adherence to a

---

<sup>1</sup>Armed Groups and de facto Authorities (AGDA): Geneva Call adapts its engagement terminology: [www.genevacall.org/armed-groups-and-de-facto-authorities-agda-geneva-call-adapts-its-engagement-terminology/](http://www.genevacall.org/armed-groups-and-de-facto-authorities-agda-geneva-call-adapts-its-engagement-terminology/).

Total Ban on Anti-personnel Mines and for Cooperation in Mine Action. The Deed of Commitment is co-signed by the ANSA itself, by Geneva Call as a witness, which supports and monitors implementation of the Deeds, and by the Government of the Republic and Canton of Geneva, which acts as custodian of the signed Deeds.



### Why we focus on AGDAs

- Nobody else is doing it: many organizations have a dialogue with armed groups but focus on their own access and security, not on the protection of civilians.
- The nature of contemporary conflicts has changed: increasingly, we see more and more emergence and involvement of armed groups in contemporary wars. The significant increase in the number of armed conflicts and the parallel increase in the number of armed groups and *de facto* authorities over the last ten years makes humanitarian engagement with such actors more relevant than ever. In 2022, the ICRC reported that about 100 situations of armed violence legally qualified as an armed conflict,<sup>2</sup> more than double the number from 2011.<sup>3</sup> The number of armed groups has risen even more dramatically from 170 armed groups active in conflict settings in

<sup>2</sup> These numbers come from the ICRC 2022 Appeals: [www.icrc.org/en/document/icrc-appeals-operations-2022](http://www.icrc.org/en/document/icrc-appeals-operations-2022).

<sup>3</sup> In 2011, the ICRC reported that there were 48 non-international armed conflicts, see here [www.icrc.org/es/doc/resources/international-review/review-882-armed-groups/review-882-all.pdf](http://www.icrc.org/es/doc/resources/international-review/review-882-armed-groups/review-882-all.pdf), p. 261.



2011<sup>4</sup> to more than 600 such armed groups in 2022,<sup>5</sup> including 296 AGDAs located in Africa.<sup>6</sup>

- Lack of knowledge and ownership of the law of armed conflict by armed groups: members of armed groups are often former civilians from their communities and do not have previous knowledge nor training on the law of armed conflict and the protection of civilians: long engagement and dialogue, trust building, contextualized interventions.
- Nature of the international legal system: even if armed groups have obligations under international humanitarian law, the state-centric nature of the international legal system poses challenges for regulating their behavior.

**Geneva Call focuses on 8 thematic topics depending on the context, namely child protection, cultural heritage, displacement, famine, gender, humanitarian norms, landmine ban and medical care. Contextualized trainings and interventions go with it**

- Deeds of Commitments: 5 DoCs, implementation plans, revision of internal code of conducts, monitoring IHL violations and compliance to the signed commitment.



---

<sup>4</sup> Ibid., 261.

<sup>5</sup> Though not all of these armed groups qualify as being parties to a conflict from a legal sense.

<sup>6</sup> These numbers come from the ICRC 2022 Appeals: [www.icrc.org/en/document/icrc-appeals-operations-2022](http://www.icrc.org/en/document/icrc-appeals-operations-2022).

## **When does Geneva Call intervene?**

As it was stated at the beginning of this three-day conference, the reality of contemporary conflicts is no longer just between States. Increasingly, we see more and more emergence and involvement of armed non-state actors. According to “The War Report” 2014, 12 of 14 armed conflicts (excluding military occupations) are situations of non-international armed conflict in which at least one ANSA is a party. However, this number went way up in 2017 reporting that out of 55 armed conflicts, 39 involved armed non-state actors in different States and territories. Therefore, having them involved in the aftermath of the conflict to the path to peace is not only a must but a natural situation. As Geneva Call, we found ourselves working not only in contexts of conflict but also in contexts heading towards peace, such as in Colombia, the Philippines, Somalia, Western Sahara, etc.

## **A deed of commitment for adherence to a total ban on anti-personnel mines and for cooperation in mine action. Engaging AGDAs on APLMs and ERWs**

Since the launch of Geneva Call in 2000, significant progress has been made in engaging non-state armed actors in the landmine ban. To date, 68 armed groups have signed *at least* one DoC; 54 DoC on banning anti-personnel mines were signed by different armed groups in Myanmar, the Philippines, Somalia, Sudan, Syria, Yemen and Western Sahara. They have by large complied with its terms, refraining from using AP mines and cooperating in mine action. In addition, some armed groups have even gone beyond and committed to facilitate the launch of new mine action programmes by specialized organizations, as well as the accession of their respective States to the Mine Ban Treaty, thus further universalizing the mine ban norm.

Beyond the landmine issue, Geneva Call’s engagement work with armed groups and *de facto* authorities has contributed to peace by building confidence among parties to a conflict in several countries. It has also served as an entry point for dialogue on wider humanitarian and human rights issues. Such dialogue is actually envisaged in the Deed of Commitment and could provide a basis for engaging NSAs to adhere to other norms.



**DEED OF COMMITMENT UNDER GENEVA CALL  
FOR ADHERENCE TO A TOTAL BAN ON ANTI-PERSONNEL MINES AND FOR  
COOPERATION IN MINE ACTION**

WE, the (NAME OF THE NON-STATE ACTOR), through our duly authorized representative(s),

*Acknowledging the global scourge of anti-personnel mines which indiscriminately and inhumanely kill and maim combatants and civilians, mostly innocent and defenceless people, especially women and children, even after the armed conflict is over;*

*Affirming that the limited military utility of anti-personnel mines is far outweighed by their appalling humanitarian, socio-economic, and environmental consequences, including an post-conflict rehabilitation and reconstruction;*

*Rejecting the notion that revolutionary ends or just causes justify inhumane means and methods of warfare of a nature to cause unnecessary suffering;*

*Reaffirming our determination to protect the civilian population from the effects or dangers of military actions, and to respect their rights to life, to human dignity, and to development;*

*Resolved to play our role not only as actors in armed conflicts but also as participants in the practice and development of legal and normative standards for such conflicts, starting with a contribution to the overall humanitarian effort to solve the global landmine problem for the sake of its victims;*

*Accepting that international humanitarian law and human rights apply to and oblige all parties to armed conflicts;*

*Acknowledging the norm of a total ban on anti-personnel mines established by the 1997 Ottawa Treaty, which is an important step toward the total eradication of landmines;*

**NOW, THEREFORE, hereby solemnly commit ourselves to the following terms:**

What is Geneva Call's Role in all of this? It continues to play a role in promoting adherence to the Deed. Where possible Geneva Call will:

- Based on needs and gaps: provide technical expertise.
- Assist in organizing trainings, dissemination, workshops.
- Link with specialized agencies who might be able to undertake mine action activities.
- Monitor to ensure compliance with the commitment.

Levels of monitoring include:

- Compliance reports
- Third-party monitoring
- Field missions
- Verification missions

As of 2022, Geneva Call has been engaged with over 160 conflicts in 26 countries. In the following section, I will be presenting and sharing our engagements in different contexts with different AGDAs in the past years.

## **1. SPLM/SPLA (SUDAN)**

Geneva Call's engagement with the group goes back to as early as 2001. While it was involved in armed opposition against the Government of Sudan, the Sudan People's Liberation Movement and Sudan People's Liberation Army (SPLM/SPLA) committed to a total ban on anti-personnel mines, by signing the Deed of Commitment in 2001.

The results of the group's signing such a commitment with Geneva Call were the following:

- The signing of the Deed of Commitment facilitated the launch of much-needed humanitarian mine action programs by specialized organizations. According to mine action operators, the signing of the DoC by the SPLM/A also facilitated the release of funds as many donors gave their support conditional on an anti- personnel mine ban.
- Engagement with ANSAs may also positively influence state policies. According to Martin Barber, at the time Director of the United Nations Mine Action Service (UNMAS) "Sudan would not have felt able to ratify the Treaty if the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control."



## **2. Polisario Front**

In partnership with the Sahrawi Campaign to Ban Landmines, Geneva Call began engaging the Polisario Front in the ban of anti-personnel mines in 2000.

Since 1999, Polisario officials have stated that they would sign the Mine Ban Treaty if permitted to do so. Unable to do so, the Polisario Front

signed the Deed of Commitment banning anti-personnel mines in 2005 instead.

Shortly after the signature of the Deed of Commitment, several mine action organizations started their operations in accordance with the survey and clearance project. This included ICRC subsequently setting up a physical rehabilitation centre in the Saharawi refugee camps.

Moreover, in compliance with the Deed of Commitment, the Polisario Front completed in January 2019 the destruction of all its stockpiled anti-personnel mines, which amounted to 20,493 in total.

The International Campaign to Ban Landmines repeatedly welcomed the Polisario Front's efforts to recognize and record the destruction of anti-personnel mines. Geneva Call has monitored each destruction since 2006.

Geneva Call has always considered the group signing of the DoC as a step that paved the way for much needed humanitarian mine action programs by specialized entities. The Polisario Front destroyed its landmines. Each destruction since 2006 has been monitored by Geneva Call. Moreover, the experience with the Polisario Front shows how Geneva Call can successfully engage with an internationally recognized national liberation movement.

Signing the DoC with its reporting obligations served the Polisario Front to record instances of compliance, i.e. the destruction of anti-personnel mines stockpiles. It also paved the way to highlight the much needed international assistance for the destruction of anti-personnel mines and unsafe ordnances.

In conclusion, Geneva Call's continuous and consistent direct engagement with different AGDAs in different contexts and on different levels led to the creation of a solid trustworthy relationship, ultimately paving the way for the adoption and compliance to humanitarian standards that could contribute to peace during transitional justice, as well as political stability.

## **Concluding session**



## Closing remarks

*Edoardo GREPPI*

President, IIHL

Excellencies, Ladies and Gentlemen, I would like to make some closing remarks as we come to the end of this 45<sup>th</sup> Round Table on the topic “After the conflict before the peace: legal military and humanitarian issues during the transition.”

“Legal, military and humanitarian issues” have been addressed at this Round Table. We decided to refer to the framework of our picture as “after the conflict before the peace.” As a matter of fact, we have reflected on the traditional categories of war and peace, but enlarged the scope to concepts and notions such as armed conflict, use of force, *ius ad bellum*, *ius in bello*, *ius post bellum*. The issues of victory and defeat, non-combatant evacuation operations, transitions, infrastructures, remnants of war have also been addressed.

When I started my academic career – ages ago! – I had to look at the classical treatise of the late Professor Lassa Oppenheim, International Law. This important text was published in several editions and in two volumes: volume I, Peace, volume 2, Disputes, War and Neutrality. More or less all manuals, in all countries and legal cultures, distinguished the two parts: peace and war. All authors had clear in their mind the model of traditional wars, which were inter-state. They started with a declaration and ended with a peace treaty.

Nowadays, armed conflicts are much more complex and complicated entities. States are parties in conflicts, but the so-called non-state actors, under various forms, are also involved.

It is not always easy to understand if and when a conflict has ended. The space between a conflict and peace is frequently an unknown area, in which we find threats and challenges to international humanitarian law. At this Round Table we have reflected and discussed this area, with military officers, humanitarian actors, academics, diplomats, international officials.

Over the last two and a half days, we have heard telling contributions and insights from across the spectrum of actors involved in conflict transition, and also academic perspectives. The tone was very much set by Ambassador Pontecorvo on the first panel and the need to consider the various aspects of transition in depth could not have been made clearer. The complex matter of effectively managing transition and protecting the



vulnerable was brought across in discussions both in the auditorium, and in conversations outside during the breaks.

This Round Table has drawn together diverse actors active in this area and has enabled them to take part in the discussion in the Spirit of Sanremo. This is the fundamental purpose of the Institute's annual Round Table, and I think it has fulfilled such purpose.

As you all know, this is the first Round Table the Institute has organized on site here at Villa Ormond since the pandemic, and my thoughts are that it has proved to be a success. The event has also truly represented and addressed the areas of the law of armed conflict and refugee law which are the Institute's key fields of interest, and has been as broad in scope as possible. The continuing work of the Institute in disseminating IHL has been advanced and will benefit from the outcome of these few days. In due course the proceedings will be collated and published as has always been the case.

Having the event here in Sanremo has fostered fruitful discussion and exchange of views. Although this is also possible in a virtual format it is not quite so fulfilling as being on site.

This event could not have been possible without a lot of work and support. In particular, I would like to thank the Municipality of Sanremo, and the Italian Ministry of Foreign Affairs and International Co-operation for the ongoing and invaluable support they give to the Institute. In addition, the Institute very much appreciates the financial support from the Swiss Federal Government, the British Red Cross, the Monegasque Red Cross, Vittoria Assicurazioni and the RI Group, enabling us to bring speakers from all over the world to share their knowledge. The diversity of participants is key to the event.

Most importantly, I would like to express my sincere thanks to the ICRC, a constant and precious co-organizer of the Round Table. Once again working with the team in Geneva was as constructive as ever, and ensured a very successful event. In this regard, I would like to thank Kelisiana Thynne especially, who was the principle point of contact in Geneva for the Sanremo team. Through her assistance we had regular meetings as of April leading up to the event.

I would like to thank all the presenters and chairpersons whose contributions have made this Round Table the interesting and valuable event it has been. The time taken to prepare your remarks and, in many cases, travel to Sanremo is much appreciated.

I would also like to thank the Ruffini Aicardi High School and the students who have assisted in the smooth running of the event over the last few days with their administrative support.

Finally, I would like to thank the team here at the Institute who have worked tirelessly since March when the decision was adopted to have the Round Table at least partially on site. The staff have all contributed to what has been very much a team effort, assisted and guided by the Council of the Institute.

I will conclude my closing remarks now and wish you all a safe journey back home. I hope to see you again here at the Institute in the near future.

*Eva SVOBODA*

Deputy Director, International Law,  
Policy and Humanitarian Diplomacy, ICRC

Excellencies, Ladies and Gentlemen.

I am delighted to see that after two years of convening online, the Sanremo Round Table is held once again in person as well as online. The hybrid format course means that so many more people are able to attend and present online which is not only good for the environment but also good for those with other commitments at this busy time.

The last two and a half days have shown that even in the midst of a terrible war, some thought must be had to the aftermath of conflict. Human suffering will continue in the aftermath and somehow must be addressed before the end of the conflict to ensure less humanitarian suffering at that point. This is not something to be dealt with only when combat stops, but must be integrated in the planning phase of the military operation. Many, if not most, of the humanitarian consequences that will be generated from combat can be anticipated and mitigated by enhanced respect for IHL, and with appropriate preparation.

Some highlights from the discussions that I have noted include the following:

The key message from the first session is that this is an important topic to be addressing at this time. Of course, with a number of armed conflicts going on around the world, it is hard to focus on aftermath of conflict. But we have realized that the needs of the civilian population at the end of conflict must be factored into the planning *for* conflict and how States intervene *in* conflict. The boundaries between war and peace are blurred, as ICRC's Vice-President, Gilles Carbonnier, said in the introduction.

We heard about the practical challenges that have faced individuals, militaries and governments and the humanitarian community over the last year, particularly arising out of political decisions made in and around Afghanistan. It was noted that "war will not end when the last bullet is fired" – there are many robust humanitarian responses that are needed over the long term. Parties to a conflict must be better prepared for post-conflict transition periods so they can reach a "better state of peace."

In the second session, taking a historical perspective demonstrated that we have sadly seen all this before – starting from Solferino and Henry Dunant's lessons in the aftermath of that, through WWI and WWII, we are constantly learning from history of responses to aftermath. But caution was also drawn by one of the learned historians that while history can teach us

something and we can draw parallels, no situation plays out in exactly the same way. Nonetheless, lessons can be learned from history to develop new approaches, new laws and to learn from mistakes. For example, the lessons from war crimes prosecutions in the Balkans can translate into and should be taken on by investigators and prosecutors in future and as well as lessons from current conflicts.

In the third session, we heard about the roles of different actors in the aftermath. Non-state armed groups have a range of obligations, for example, depending on the control they have over territory in the aftermath. We heard of how to possibly create sustainable peace by taking a long-term approach. This is often applicable when we think about how healthcare obligations might continue after the end of conflict and the need for States to take responsibility – either to facilitate the healthcare themselves or through others. We have also heard about tension defusing measures to establish sustainable peace or ceasefire frameworks in the aftermath of hostilities. The key word of this session was “inclusivity” – speak to all actors, try to work out who does what and ensure some level of dialogue.

The fourth session was the first on non-combatant evacuations, a theme which ran through the Round Table, including challenges that governments have faced in the aftermath of recent and on-going conflicts. Evacuation of non-combatants presents a significant number of humanitarian and practical problems which were explored, including political challenges, the availability of hardware, the presence of people to assist on the ground, challenges in registration and tracing and security of personnel. Preparation for everyone – humanitarian and military alike – is once again key.

In the second session on non-combatant evacuees the focus shifted from the practical challenges of the operations to the legal status of evacuees and legal responsibility for them. International human rights law and refugee law apply alongside IHL in post-conflict and apply to non-combatant evacuations.

We heard from the winner of our essay competition, Chan Kristy Tin Wing, about gendered roles and expectations in non-combatant evacuations and the idea to frame the problem in IHL terms to empower victims, in this case women, in need of evacuation.

The sixth session focused on the responsibility for refugees and IDPs in the aftermath or transition – we got a great overview of some of the organizations that are already helping, but also how challenges remain, including those related to climate change, and the need to engage in partnerships.

In the seventh session we moved away from the thematic approach, back to overall challenges and opportunities in the aftermath. We focussed

on how different actors should plan for the aftermath. Planning is important, even if plans change. We heard about challenges for Uganda in relation to interactions across-government over the last 40 years. We also heard about the challenges of planning for peacekeeping comparing Kosovo and Nagorno-Karabakh. Such peacekeeping missions must include a range of actors, be well planned and must have the support of the international community.

Last, but not least, we heard about infrastructure damage during and after armed conflict and recovery of water supplies, the need for demining and mine awareness, and the need for IHL to be properly applied during conflict to be able to build back better after conflict.

To conclude, over recent years we have witnessed conflicts start, going through peaks and troughs of violence, die down or flare up again. The discussions here at the Sanremo Round Table have shown a light on the challenges, but also explored options. Let us now move forward so that there is better preparedness for the aftermath and thus a reduction in human suffering.

And I thank you all for these discussions.

## Acronyms

AGDA	Armed Groups and <i>de facto</i> Authorities
AMG	Allied Military Government
ANSA	Armed Non-State Actor
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
APCL	Alliance pour la libération du peuple congolais
APLM	Anti-Personnel Landmine
APMBC	Anti-Personnel Mine Ban Convention
APs	Protocols Additional to The Geneva Conventions Of 12 August 1949
AU	Africa Union
AXO	Abandoned Explosive Ordnance
BiH	Bosnia and Herzegovina
CBMs	Confidence Building Measures
CCW	Convention on the Use of Certain Conventional Weapons
CIA	Central Intelligence Agency
CIMIC	Civil-Military Co-operation
CIS	Commonwealth of Independent States
CJOC	Combined Joint Operations Center (former Resolute Support headquarters)
CMA	Coalition des Mouvements de l'Azawad
CoESPU	Center of Excellence for Stability Police Units
CRPD	Convention on the Rights of Persons with Disabilities
CRSV	Conflict-related Sexual Violence
CSDP	EU Common Security and Defence Policy
DDR	Disarmament, Demobilization and Reintegration
DG ECHO/ ECHO	Directorate-General for European Civil Protection and Humanitarian Aid Operations
DNA	Deoxyribonucleic Acid
DoC	Deed of Commitment
DRC	Democratic Republic of the Congo

ERW	Explosive Remnants of War
ETM	Emergency Transit Mechanisms
EU	European Union
EURGENDFOR	European Gendarmerie Force
EWIPA	Explosive Weapons in Populated Areas
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
GCs	Geneva Conventions of 12 August 1949
HCUA	Haut conseil pour l'unité de l'Azawad
HIV	Human Immunodeficiency Virus
HKIA	Hamid Karzai International Airport (Kabul International Airport)
IAC	International Armed Conflict
IASC	Inter-Agency Standing Committee
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IDs	Identification documents
IED	Improvised Explosive Devices
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIHL	International Institute of Humanitarian Law
INGO	International Non-Governmental Organisation
IOM	International Organization for Migration
IRO	International Refugee Organization
ISIS	Islamic State in Iraq and Syria
ISIS-K	Islamic State – Khorasan Province
KFOR	Kosovo Force
Lt Gen	Lieutenant General
MAA-CMA	Mouvement arabe de l'Azawad
MNLA	Mouvement national pour la libération de l'Azawad
N-HKIA	North Gate - Hamid Karzai International Airport (Kabul International Airport)

NATO	North Atlantic Treaty Organization
NEO	Noncombatant Evacuation Operation
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
NRC	Norwegian Refugee Council
NSAG	Non-State Armed Group
OBJ	Objective
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPD	Organisations of Persons with Disabilities
OSCE	Organization for Security and Co-operation in Europe
POW	Prisoner of War
QRF	Quick Reaction Force
SIGAR	Special Inspector General for Afghanistan Reconstruction
SIV	Special Immigration Visas
SOFA	Status of Forces Agreement
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SSR	Security Sector Reform
STRATEVAC	Strategic Evacuation
TDMs	Tension Defusing Measures
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMAS	United Nations Mine Action Service
UNRRA	United Nations Relief and Rehabilitation Administration
UNSC	United Nations Security Council
UNSRD	UN Special Rapporteur on the Rights of Persons with Disabilities
US/USA	United States/United States of America
UXO	Unexploded Ordnance
WWI	World War I
WWII	World War II





## **Acknowledgements**

L'Istituto Internazionale di Diritto Umanitario ringrazia vivamente i Governi e gli Enti che hanno concesso un contributo finanziario o il patrocinio per la Tavola Rotonda.

The International Institute of Humanitarian Law warmly thanks those Governments and Organisations that have given either a financial contribution or their patronage on the occasion of this Round Table.

L'Institut International de Droit Humanitaire tient à remercier les gouvernements et les organisations qui ont accordé leur appui financier ou leur patronage à l'organisation de cette Table Ronde.

BRITISH RED CROSS

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

COMUNE DI SANREMO

CROIX-ROUGE MONÉGASQUE

DÉPARTEMENT FÉDÉRAL DES AFFAIRES ÉTRANGÈRES, SUISSE

R.I. GROUP

VITTORIA ASSICURAZIONI



## FrancoAngeli

### a strong international commitment

Our rich catalogue of publications includes hundreds of English-language monographs, as well as many journals that are published, partially or in whole, in English.

The **FrancoAngeli**, **FrancoAngeli Journals** and **FrancoAngeli Series** websites now offer a completely dual language interface, in Italian and English.

Since 2006, we have been making our content available in digital format, as one of the first partners and contributors to the **Torrossa** platform for the distribution of digital content to Italian and foreign academic institutions. **Torrossa** is a pan-European platform which currently provides access to nearly 400,000 e-books and more than 1,000 e-journals in many languages from academic publishers in Italy and Spain, and, more recently, French, German, Swiss, Belgian, Dutch, and English publishers. It regularly serves more than 3,000 libraries worldwide.

*Ensuring international visibility and discoverability for our authors is of crucial importance to us.*

**FrancoAngeli**

 **torrossa**  
Online Digital Library

Questo   
LIBRO

 ti è piaciuto?

---

**Comunicaci il tuo giudizio su:**  
[www.francoangeli.it/opinione](http://www.francoangeli.it/opinione)



VUOI RICEVERE GLI AGGIORNAMENTI  
SULLE NOSTRE NOVITÀ  
NELLE AREE CHE TI INTERESSANO?



ISCRIVITI ALLE NOSTRE NEWSLETTER

SEGUICI SU:



---

FrancoAngeli

La passione per le conoscenze

## After the Conflict Before the Peace: Legal, Military and Humanitarian Issues during the Transition

This collection of contributions made by renowned international experts and practitioners at the Sanremo Round Table addresses the most crucial issues affecting the application of IHL in post-conflict situations, by examining the lessons learned from recent operations, as well as the legal, military and humanitarian issues experienced during post-conflict transitions.

The 45<sup>th</sup> Round Table on current issues of international humanitarian law investigated the legal challenges of such processes, with particular regard to the role played by regular armed forces, armed non-state actors, humanitarian actors and civilian population.

Starting from the historical analysis of the transition from conflict to non-conflict, in the present volume experts try to shed light on the different key areas of concern of this multi-layered phenomenon, among which the planning and implementation of non-combatant evacuation operations (NEOs), the disarmament process and the dismissal of remnants of war, the transitional justice and accountability procedures for crimes against civilians and civilian objects, the position of armed groups exercising control over specific territories in the aftermath of conflicts, and the legal framework of detention policies.

The Round Table also constituted an important forum to discuss the interplay between different stakeholders and parties, as well as the establishment of most essential long-term cooperation between military and non-military law enforcement bodies, public institutions, civil society organisations, private entities (e.g. financial and economic stakeholders), NGOs and humanitarian actors.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organisation founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of international humanitarian law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close cooperation with the most important international organisations.