



# ON THE EDGES OF CONFLICT

## POLICY PAPERS

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## **PROJECT OVERVIEW**

**Phase 1: Identifying Priority Areas**

**Phase 2: Conference Session Summaries**

**Phase 3: Development of Policy Papers and  
Convening of Independent Experts**

## PHASE I: IDENTIFYING PRIORITY AREAS

September 2007- March 2008

Phase I of this project involved a “fast talk” consultation of several leading experts in January 2008 to identify priority areas for research. This led to the commissioning of five research papers that were published on the project website in March 2008:

<http://www.edgesofconflict.com>. Through this initial round of research activity, a clear focus for further research emerged.

First, the proliferation of non-state actors operating in conflict and post-conflict environments is taking place on a vast scale, to an extent not envisaged when the 1949 Geneva Conventions and 1977 Additional Protocols were adopted, namely: (a) numerous humanitarian organizations operating with diverse mandates, (b) private security and military contractors hired by a wide array of clients, and (c) non-state armed groups that often deliberately violate basic norms of international humanitarian law. The interplay between these non-state actors, as well as with state armed forces, raises particularly complex challenges that concepts like “humanitarian space” and counter-insurgency doctrines have attempted to address. The co-existence of these actors in modern armed conflict environments is a central focus of this project.

Second, the growth of widespread forms of violence affecting civilians that may not fall within the definition of an “armed conflict”, as is necessary to engage international humanitarian law, has also spread (i.e. endemic urban violence and low-level insurgencies).

These developments since the end of the Cold War are particularly relevant to Canada, given increasingly significant overseas missions involving the Canadian Armed Forces in countries such as Afghanistan and Haiti, as well as the multiplicity of humanitarian organizations based in Canada that operate in conflict and post-conflict environments around the world. As a result, this project is directly relevant to building Canadian-capacity to address these challenges, while providing policy-relevant outcomes to pertinent global efforts.

## PHASE II: RESEARCHING & DEBATING ALTERNATIVE APPROACHES, INTERNATIONAL CONFERENCE

March 2009

The major undertaking of Phase II was the planning and hosting of an international conference, March 29-31, 2009 in Vancouver, British Columbia. Experts from across Canada, Switzerland, Uganda, Sierra Leone, the United States and the United Kingdom participated in this Edges of Conflict conference to share their current research and views on the project’s priority areas, identified in Phase I (see Appendix for detailed conference program and list of participants).

The *Edges of Conflict* conference was highlighted by a special panel on Afghanistan as a complex humanitarian and security environment, followed by thematic panels addressing: the proliferation of non-state armed groups and improving their compliance with international humanitarian law; issues related to the use of private military and security companies for defensive armed protection by humanitarian organizations; challenges presented by diverse approaches to the delivery of humanitarian relief, assistance and development by humanitarian organizations versus state armed forces; and approaches to enhance the protection of civilians in situations of endemic urban violence. Each panel of experts was asked to identify any gaps or challenges in the implementation and enforcement of the applicable legal regime, and recommendations to address the most pressing challenges presented by the subject area. A summary of each of these panels appears in this report to provide further information about the conference deliberations.

## PHASE III: DEVELOPMENT OF POLICY PAPERS AND CONVENING OF INDEPENDENT EXPERTS

April 2010

Following the conference in 2009, the Edges of Conflict project advisory group identified four concrete policy-relevant documents that it recommended be developed by engaging key conference participants in each area as part of the next phase of activities:

1. Statement of principles to enhance compliance of non-state armed groups with international humanitarian law;
2. Written submission and commentary on the Draft U.N. International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (dated July 2009) to the U.N. Office for High Commissioner for Human Rights, Working Group on Mercenaries;
3. Principles for the delivery of humanitarian assistance in modern armed conflicts, which involve a multiplicity of actors, to ensure maximum benefit to civilians; and,
4. International policy framework for preventing and mitigating the harmful effects of endemic urban violence.

The advisory group chose four researchers with expertise related to the proposed fields of research to independently develop policy recommendations on the basis of the projects' findings to date, notably: the lead policy papers and the conference report. **Researchers in formulating the recommendations were given academic freedom and, as such, the policy recommendations in each paper do not necessarily reflect the views or positions of the Canadian Red Cross or the Liu Institute for Global Issues.**

The following four experts were asked to respectively develop the policy recommendations:

- Prof. René Provost, Director,  
McGill Centre for Human Rights and Legal Pluralism
- Prof. Benjamin Perrin, Assistant Professor,  
Liu Institute for Global Studies
- Prof. Pablo Policzer, Dept. Political Science,  
University of Calgary
- Prof. Don Hubert, School of Public and International  
Affairs, University of Ottawa

Their findings were presented in Ottawa on April 29, 2010 in front of an invited audience consisting of selected members of

academia, key government officials and the Edges of Conflict Project's key supporters.

The Canadian Red Cross and the Liu Institute for Global Issues are looking forward to continued collaboration on this project and wish to thank the Department of Foreign Affairs and the Department of National Defence for their support.



BY

René Provost  
Professor  
Director  
McGill Centre for Human Rights and Legal Pluralism

## Statement of Principles to Enhance Compliance of Non-State Armed Groups with International Humanitarian Law

Professor René Provost

### AUTHOR'S BIOGRAPHY

Professor René Provost holds a Bachelor of Laws from the Université de Montréal, a Master of Laws from the University of California at Berkeley, and a D.Phil. from the University of Oxford. He served as law clerk to the Honourable Justice Claire L'Heureux-Dubé at the Supreme Court of Canada in 1988-1989, and taught international law at Lehigh University in Pennsylvania in 1991. He joined the Faculty of Law of McGill University in 1994, first as a Boulton Fellow (1994-1995), then as Assistant Professor (1995-2001) and Associate Professor (from 2001). He was the Associate Dean (Academic) of the Faculty of Law from 2001 to 2003. In 2005 he became the founding Director of the McGill Centre for Human Rights and Legal Pluralism. Professor Provost teaches Public International Law, International Human Rights Law, International Humanitarian Law, International Environmental Law, and Contractual Obligations. He is the author of **International Human Rights and Humanitarian Law** (Cambridge University Press, 2002) and the editor of **State Responsibility in International Law** (Ashgate-Dartmouth, 2002) and *Confronting Genocide – From Repression to Prevention* (Springer, forthcoming). He was the president of the Société québécoise de droit international from 2002 to 2006. He has been a member of the Quebec Bar since 1989.

# RENÉ PROVOST

Professor and  
Director of McGill Centre for Human Rights  
and Legal Pluralism

## Statement of Principles to Enhance Compliance of Non-State Armed Groups with International Humanitarian Law

April 15, 2010

### SUMMARY

This report is the outcome of a two-year process, the Edges of Conflict Project, organised by the Canadian Red Cross and the Liu Institute for Global Issues at the University of British Columbia, focusing on means to enhance non-state armed groups' compliance with international humanitarian law. The report first highlights the need for greater transparency in characterisation of a situation as an armed conflict of one type or another by governments and civil society organisations. The report then notes that despite the fact that insurgents can be taken to be legally bound by the laws of war from a formal perspective, the fact is that there are few if any mechanisms which can effectively 'force' rebels to comply. What's more, the existing humanitarian law regime regulating internal armed conflicts is skewed towards state interests, providing few incentives for non-state armed groups to comply. The Edges of Conflict Project leads to suggest that rebel groups must make a determination to commit to respect the laws of war on the basis of a dialogue dedicated to this goal either with other belligerents or with third parties. A component of that dialogue should aim to highlight the reciprocal interests of parties to a conflict, even if the obligations of state and non-state parties to the conflict are asymmetrical. One particularly promising vehicle to formalise the normative commitment of non-state armed groups are written undertakings similar to the Geneva Call deeds signed by a significant number of insurgents pledging to stop using anti-personnel landmines. While the model would probably benefit from a greater degree of flexibility to adapt to the specifics of a particular conflict and insurgent group, this approach appears more promising than the Security Council-mandated plans of action to end the use of child soldiers by insurgent groups. The end result is a humanitarian regime that is more fragmented but nevertheless perhaps more likely to be respected.

*"Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength."*  
- President Barack Obama,  
Remarks at the Acceptance of the Nobel Peace Prize

This paper aims to provide policy recommendations to the Government of Canada and other actors regarding approaches which may be adopted to enhance compliance with international humanitarian law by non-state armed groups. These recommendations are the outcome of a multi-stage process organized between 2008 and 2010 by the Canadian Red Cross and the Liu Institute for Global Issues at the University of British Columbia, the Edges of Conflict Project. This included the commission of a lead paper by Sophie Rondeau ("The Pragmatic Weight of Reciprocity: Promoting Respect for International Humanitarian Law and Non-State Armed Groups"), followed by three research papers by René Provost ("Asymmetrical Reciprocity and Compliance with the Laws of War"), Elisabeth Decrey Warner, Jonathan Somer and Pascal Bongard ("Armed Non-State Actors and Humanitarian Norms: Lessons on Reciprocity from the Geneva Call Experience") and Sandesh Sivakumaran ("The Ownership of International Humanitarian Law: Non-State Armed Groups and the Formation and Enforcement of the Rules"). These papers were presented and discussed at a conference in Vancouver in April 2009, bringing together participants from academia (Law, International Relations, Political Science), Government (Defence, Justice, DFAIT), civil society, media, and the private security industry. The policy recommendations presented in this paper build on the insights revealed from these several stages as well as from further research undertaken by the author.

Canada, for the very first time in its modern history, is confronted directly with the challenge of participating in an armed conflict against non-state armed groups. The compliance record of fighters linked to the Taliban and Al-Qaida in Afghanistan makes for sombre reading, revealing consistent failure to respect the basic principle of distinction between combatants and civilians, including direct targeting of civilians and civilian objects, indiscriminate attacks, failure to distinguish themselves from the civilian population, mistreatment of non-combatants and detainees, reprisals against protected persons, torture, and so on. The principle of distinction between civilians and combatants stands as the very core of international humanitarian law, meaning that the Canadian Armed Forces in Afghanistan are confronted with an enemy which fails to respect the laws of war in a basic and systematic manner, whereas

Canadian and other NATO troops do aim to carry out hostilities in full compliance with international humanitarian law. In this, the conflict in Afghanistan appears to embody the central challenge confronting those seeking to increase protection for the victims of war today, given that practically all major conflicts occurring today involve hostilities between one or more states and non-state armed groups or hostilities among non-state armed groups without the presence of any state (for instance in Somalia). Clearly, the challenge does not exclusively concern the behaviour of non-state armed groups, as in many contemporary instances the state armed forces themselves have a poor compliance record with the laws of war, including in the conflicts in Burma, Darfur, Chechnya, Colombia, Congo, etc. That being said, the focus of this paper and its policy recommendations will be primarily on the improvement of compliance by non-state armed groups rather than by states. This not only reflects the central dilemma posed to Canada by the conflict in Afghanistan, in which despite some glitches there is a general respect for international humanitarian law by NATO forces, but also the interconnection which exists between the compliance record of rebel groups and that of state armed forces. In other words, as will be developed in the next pages, some degree of reciprocity links the stance of all parties to any armed conflict, including internal armed conflicts, so that a policy which successfully triggers greater respect for international humanitarian law by non-state armed groups is likely to bring in its wake a greater degree of respect by state armed forces. As we will see, a central tool to generate better compliance by rebels is to make them share in the ownership of the laws of war through formal and informal commitments to these norms.

A perennial first stumbling block to increasing compliance with international humanitarian law by non-state armed groups is the fact that this law is applicable only in exceptional circumstances meeting the definition of an armed conflict. The problem, which stood as a backdrop to the discussion of all papers in Vancouver, is one of both normative indeterminacy and the absence of institutions competent to apply such norms. Over the last fifteen years, various international criminal tribunals like the ICTY, ICTR and SCSL have contributed to a clarification of the conditions under which a situation ought to be considered an armed conflict of one type or another. Nevertheless, the lack of definitions of armed conflicts in the Geneva Conventions and other legal instruments as well as the multiplicity of types of conflicts, each calling for the application of a distinct legal regime, leaves open a vast space for interpretation and application to a specific context. This is compounded by the fact that there is usually no institution given competence to resolve such dilemmas of interpretation and application. The intervention of an international tribunal like the ICC or the ICTY to authoritatively characterise the situation as an armed conflict of one type or another remains impossible or unlikely with regard to most situations of internal wars. Each state is thus left to proceed to its own characterisation of a situation in which it is itself deeply implicated. In a majority of contexts, the state on whose territory hostilities are occurring will resist the label of 'armed conflict', castigating non-state armed groups as bandits or

terrorists. Even when states have interests that may be seen as less directly contrary to admitting that an armed conflict is ongoing, for instance Canada in Afghanistan, Governments often maintain a *flou artistique* around the issue, preferring to be vague about the precise nature of hostilities and the specifics of international humanitarian law which are therefore applicable. Conversely, non-state armed groups are usually much more willing to characterise their actions as amounting to an armed conflict, viewing this semantic escalation as endowing greater legitimacy to their struggle. For itself, the ICRC has been on the whole very coy about publicly expressing an opinion regarding the nature of a given conflict, in the name of its neutrality and impartiality. Clearly, if one accepts that legal norms have any influence on the behaviour of belligerents during an armed conflict, then the first recommendation is to push for more clarity in the characterisation of a situation as one calling for the application of a specific set of humanitarian norms. The obligation of states not only to "respect" but also to "ensure respect" of international humanitarian law under Common Article 1 of the 1949 Geneva Conventions lead to conclude that Governments should be clearer in their own legal classification of conflicts and also actively encourage other actors, whether foreign Governments or non-state armed groups themselves, to do likewise. Clear labelling in reference to international humanitarian law by civil society and international organisations may further contribute to the solidification of a consensus as to the proper legal nature of a situation.

- **Policy Recommendation 1:** *Governments should be more transparent in their own characterisation of a conflict situation, whether internal or international, and encourage other Governments as well as non-state armed groups to do likewise, either through bilateral or multilateral mechanisms.*
- **Policy Recommendation 2:** *Civil society organisations present in or monitoring a conflict situation should clearly identify which type of situation obtains, with specific reference to international humanitarian law.*

Once the hurdle of determining that a situation is indeed an internal armed conflict and that international humanitarian law is indeed applicable *de jure*, the challenge shifts to making sure that all parties to the conflict comply and the laws of a war become applicable *de facto*. As explained at the outset, the focus here will be on means to secure greater compliance on the part of non-state armed groups rather than states, despite the fact that there are many internal armed conflicts in which governmental forces commit massive and systematic violations of international humanitarian law.

There is no debate that fighters belonging to a non-state armed group are legally bound by international humanitarian law, both under the Geneva Conventions and Protocols and under customary law. The explanation most commonly offered is that states have the ability to directly create rights and obligations for individuals under international law, and that they have done so through the formation of conventional and customary rules on



the conduct of war. This is reflected in the most unambiguous manner in the fact that statutes of many international criminal tribunals specifically confer jurisdiction over war crimes committed by all sides to internal armed conflicts, and indeed several rebels fighters have been convicted of war crimes by the ICTY, ICTR, and SCSL. The mere fact that these rules are deemed legally binding on non-state armed groups does not necessarily mean that they will hold significant sway and generate any kind of compliance. Indeed, there is a paradox in the fact that the rise of international criminal law in the last fifteen years has been such a magnet for attention that it has overshadowed the reality that the prosecution of war crimes before any type of tribunal remains extraordinarily rare in relation to the prevalence of violations of humanitarian law. Even beyond actual prosecutions, few jurists would actually argue that the prospect of criminal responsibility can act as a significant deterrent against war crimes. Compliance theorists have underscored the difficulty in tracing a neat line between the existence of a rule and the behaviour of any legal agent, whether in the context of domestic criminal law and individual action or in reference to public international law and state behaviour. The problem seems especially acute when considering the impact of the laws of war on non-state armed groups, because of the absence of legal institutions like courts and police forces which in other contexts will act to channel norms and impose results regardless of the perceived legitimacy of legal norms in the eyes of the actor whose behaviour we seek to modify. In the context of an armed conflict, on the contrary, norms are stripped of most institutional support and will generate compliance largely on the basis of their perceived legitimacy. The fact is that international humanitarian law typically suffers from a significant lack of legitimacy in the eyes of non-state armed groups for reasons linked to both the origins of these norms and their substance, two factors which are closely intertwined.

Turning first to the issue of the origins of applicable legal norms, we can note that an internal armed conflict will usually be regulated both by the domestic law the state on whose territory it is occurring and by international law. As for domestic law, given that the non-state armed group is attempting to defeat the government, the fact that the latter has chosen to label certain norms “law” is unlikely to endow such norms with great legitimacy. The very ideological reasons which fuel the insurgency are likely to delegitimize laws enacted by the impugned regime. The same holds true, to a certain extent, for international legal standards like the Geneva Conventions, although perhaps not entirely for the same reasons. A first reason is that as a series of international treaties, the Geneva Conventions and Protocols have been agreed upon by governments, including that of the state involved in an internal conflict. While the ideological clash may not be so immediate as with domestic law, because international norms have a pedigree linked to a multitude of states rather than a single objectionable government, nevertheless they are instruments projecting state power rather than that of other agents like non-state armed groups. A second reason, tying the issue of the origins of norms with the issue of their substance, is that international humanitarian law reflects, it is classically said,

a balancing between elementary considerations of humanity and military necessity. While it is perhaps doubtful that elementary considerations of humanity would unfold differently for rebels and for government forces during an internal armed conflict, the notion of military necessity as embodied in rules applicable to such conflicts are clearly tilted towards preserving the interests of the state. The inequality between warring parties in a civil war which is written into the core of international humanitarian law manifestly fails to reflect in a significant way the interests of non-state armed groups, starting with the fact that there is no concept of lawful combatants for rebels during an internal conflict. The simple reality that the very act of taking up arms against the established government will be considered a crime in every jurisdiction and usually punished by the most severe penalty available under domestic law means that there is little incentive, from the very start, for rebels to comply with the laws of war if it has a negative impact on their military effectiveness. If armed rebellion *per se* is punished by the death penalty, then why refrain from executing detained government soldiers or civilians which pose a risk or constitute a burden for the non-state armed group? Psychological studies of combatants commissioned by the International Committee of the Red Cross have shown that an appeal to morality stands little chance of yielding great results in the context of an armed conflict. The fact that such a killing would amount to an international crime, unlike the taking up of arms against an established government, adds the rather abstract possibility that the guilty individuals might be prosecuted by an international criminal tribunal or the courts of a third state acting under universal jurisdiction. The likelihood of such prosecutions is so remote that it would be quite fanciful to imagine that it could generate a significant degree of deterrence against violations of the laws of war. The same ICRC studies have shown that indications from commanders that humanitarian law should be obeyed are the most effective tool to increase compliance. In other words, rebel commanders have to decide that their units should respect international humanitarian law. How can that be done? There is no question of “forcing” them to adopt such a stance, as the state is already presumably using all available force to try to quell the rebellion and kill insurgent commanders. There is no alternative but to try to persuade these commanders to comply with international humanitarian law.

Persuasion speaks to dialogue, to an engagement with the other at the level of ideas. There is an apparent disconnect between on the one hand the pursuit of armed hostilities with its necessary attendant violence and inhumanity and, on the other hand, the suggestion of an intellectual exchange of ideas with a view to changing someone’s mind. There is nothing new in highlighting the ideological facets of warfare, an old idea recently translated as the “hearts-and-mind approach” or the US “Human Terrain System”, although these tend to focus more on the civilian population as a source of information and support for either party to the conflict. Psychological warfare, on the other hand, classically targets enemy combatants and their constituencies with a view to manipulate their views on the conflict, but this is not envisaged as any form of dialogue in which ideas are exchanged and debated. Beyond that, in nearly every internal

armed conflict there are debates as to whether the government should ‘talk’ to the rebels, as indeed has occurred in Afghanistan regarding whether direct negotiations should be carried out with the Taliban. There is often a degree of resistance to such an approach on the basis that it is inconsistent with the military campaign, as dialogue reinforces the legitimacy of a non-state armed group as an equal to the government. It is also not rare to object that the insurgents cannot be reasoned with, that they are irrational thugs (eg Lord’s Resistance Army) or ideological zealots (eg Sendero Luminoso) immune to reasoned discourse. Finally, there are further obstacles linked to the clandestine nature of many non-state armed groups, making it impossible or extremely dangerous to contact them. Still, many internal armed conflicts end with some sort of agreement to which rebel groups are a party, suggesting that negotiations can take place. This in turn raises questions as to the aims of a dialogue with non-state armed groups, the means whereby such a dialogue can be carried out, and the tools which it may allow to create.

The Edges of Conflict Project led by the Canadian Red Cross and the Liu Centre aims squarely at the articulation of policy recommendations towards improved compliance with international humanitarian law on the part of non-state armed groups. The aims of a dialogue with insurgents in the context of internal armed conflicts must therefore be derived from the substantive rules of humanitarian law. This makes the recommendations presented here somewhat different from a certain practice which can be gleaned from the field regarding talks with rebels: such talks have as their usual focus the arrangement of a ceasefire agreement or a full end to the war rather than negotiating the *jus in bello* applicable to the hostilities. It is understood, of course, that ending an armed conflict is by far the greatest humanitarian goal, liable to bring about a level of protection for victims of war which is irreconcilable with sustained military operations. That said, the preparatory papers and discussions in Vancouver have clearly underscored the value of a dialogue aiming not only at the termination of hostilities but also at its regulation. Indeed, one does not preclude or hinder the other. Within that framework, a dialogue with non-state armed groups on the laws of war ought to aspire to incorporate the humanitarian approach embodied in the Geneva Conventions, Protocols and customary law. Thus, a prime focus must be the protection of non-combatants, even although the state may be very keen to protect its soldiers. The use of improvised explosive devices (IEDs) in Afghanistan and Iraq, for example, has been the bane of NATO operations in these two countries, causing a high proportion of their casualties. Inasmuch as IEDs are used in a discriminate and proportionate fashion – which admittedly is not always the case – then they do not contravene any international legal standard and as such are an inappropriate focus of a dialogue aiming to securing greater humanitarian protection for the victims of war. Is it legitimate to envisage standards negotiated with non-state armed groups which are at variance with binding conventional or customary norms? The legal concept of *jus cogens* obligations, peremptory norms which the international community as a whole has identified as binding in all circumstances, can provide some parameters to

this dialogue. Beyond overenthusiastic statements of the ICTR to the effect that international humanitarian law as a whole is *jus cogens*, a more measured and defensible position would take the core norms codified in Common Article 3 of the Geneva Conventions as an inderogable minimum which could not be rolled back through negotiations between parties to an internal armed conflict. Beyond that, the rest of the Geneva Conventions, Protocols, and customary norms can provide a framework for discussions suitable to the identification of specific rules which could be agreed upon among belligerents, although formal legal standards do not necessarily limit approaches which all sides may find suitable in a given context. It should be noted that Common Article 3 itself allows for the possibility that belligerents in an internal armed conflict may enter into an agreement providing for the application à la carte of parts of the Geneva Conventions.

- **Policy Recommendation 3:** *In a conflict involving non-state armed groups, an attempt should be made to open a dialogue dedicated to the identification of humanitarian norms to be applied and respected by all sides to the conflict. This dialogue should be separate from any negotiation aiming to obtain a truce or a peace agreement.*

The ultimate aim of entering into a dialogue with non-state armed groups is to overcome their exclusion from the process which led to the creation of existing international humanitarian law. As explained earlier, the non-inclusion of this category of actors had consequences not only on the substance of norms eventually adopted but also serves to lessen the legitimacy of these norms regardless of their content. The perspective adopted here is frankly that of legal pluralism, much inspired by the writing of Lon Fuller and Robert Cover, which sees a continuum between formal legal processes leading to the adoption of rules and the gradual construction of legal meaning through every type of human interaction. For legal norms to have more than theoretical meaning, individuals and groups must commit to them, either individually or collectively, publicly or privately. This does not suggest that anyone can decide to consent or not to a specific legal standard, through some sort of veto, but rather that legal norms have no real substance if no one is willing to live by them. This is all the more so for international humanitarian law in the context of internal armed conflicts, where non-state armed groups stand largely beyond the reach of enforcement measures normally associated with the law. What interpretive commitments bring to insurgent groups is a sense of normative ownership. Non-state armed groups can consider themselves as invested in the international legal regime if they are provided with an opportunity to become involved in its creation, both for conventional and customary norms, and its application. The latter point is distinct and important, as an ability to play a role recognised as legitimate in the implementation of the laws of war supports a general sense of responsibility for respect with these standards. This is also something which governments have been particularly reluctant to acknowledge with respect to non-state armed groups. Thus, for example, few governments would ever recognise the legality of an insurgent ‘court’ convicting an individual for violating the laws of war, especially a member of

the official armed forces of the state. Such 'courts' were created by the FACR in Colombia, the LTTE in Sri Lanka, and the RUF in Sierra Leone. The usual government reaction will be to claim a monopoly over the lawful administration of justice on its territory, including convicting combatants from all sides to an armed conflict for violations of the laws of war. This is made all the easier in that insurgent 'courts' are often criticised by international NGOs like Human Rights Watch for failing to offer minimum due process guarantees to the accused. The question that this begs is whether the proper response ought to be to attempt to strengthen the capacity of non-state armed groups in this respect, so that they may indeed gradually be able to administer justice in a fairer manner. The example of insurgent 'courts' is specific to some conflicts only, but it is symptomatic of a broader ambivalence towards the possibility of recognising any degree of legal agency to insurgent groups. Compliance requires ownership of international humanitarian law, attainable through normative commitments reflective of legal agency on the part of all belligerents, including non-state armed groups.

Engaging in a dialogue with the other is one thing, generating the desired outcome is another. Negotiations between the government and a non-state armed group with a view to improving compliance with the laws of war are unlikely to achieve their stated goal if the exchange is limited to a recitation by the State of binding treaty and customary rules of international humanitarian law applicable to this type of conflict. Although dressed in the garb of dialogue, that would amount to an appeal similar to the common exhortations by the UN Security Council and international NGOs to parties to an armed conflict to respect applicable human rights and humanitarian law standards. The consensus is that such appeals have a very limited impact on the ground. Dialogue, if it can breed normative commitment and ownership on the part of insurgents, must provide a reasonable opportunity to advance the interests of these groups which are insufficiently reflected in the formal humanitarian law regime, as explained earlier.

The role, if any, of reciprocity as part of the architecture of an effective humanitarian regime has been the object of intense discussions among participants in the process leading up to the preparation of this report. Historically, the laws of war were wholly grounded in immediate reciprocity, the direct exchange of benefits between belligerents, usually arranged by way of ad hoc cartels agreed upon at the beginning of a campaign. The successive Geneva and Hague conventions codified many of the practices found in the earlier cartels. Although written into multilateral treaties binding states, the immediate need for reciprocity was maintained by the insertion of *si omnes* clauses which made the treaties inapplicable to any armed conflict in which one of the belligerents was not a party to the treaty. Such clauses grounded in strict and immediate reciprocity were gradually eliminated during revisions to humanitarian law treaties in the 20th century. Likewise, institutions of the laws of war which were reflection of the earlier reliance on immediate reciprocity, in particular the availability of belligerent reprisals, became more and more restricted in their scope and rare in their

application. During the last two decades, as part of a broader academic discussion regarding the relation between international human rights and humanitarian law, there has been a move afoot towards the 'humanization' of humanitarian law. Inspired by the human rights focus on individual rights, this reinterpretation of the laws of war has insisted on the absolute duty to protect the fundamental human needs of individual victims of war. This focus on individual entitlement to protection has fuelled an increasingly radical rejection of reciprocity as a factor relevant to the application of international humanitarian law, a position echoed in a number of ICTY judgments. The study of the place of reciprocity in legal regime reveals that when immediate reciprocity, the direct and synallagmatic exchange of benefits, is abandoned, it is usually replaced by systemic reciprocity, where benefits from participation in a legal regime are mediated by institutions ensuring a certain equality among participants. That shift towards systemic reciprocity is not yet occurring in international humanitarian law, however, except to the limited extent represented by the creation of international criminal tribunals. Especially in the context of internal armed conflict, it is not possible to conclude that any measure of legal equality is present amongst belligerent which would countenance the rejection of immediate reciprocity. The result is an unstable legal regime, unlikely to exert a strong compliance pull. Because of the asymmetrical nature of the vast majority of internal conflicts, it is illusory to imagine that a legal equality between belligerents could be conjured by way of an agreement to apply international humanitarian law. As a result, the invitation to enter into this type of formal bilateral agreements under Common Article 3 has in practice rarely been taken up.

One obstacle to bilateral agreement to apply the Geneva Conventions has been the presumption that symmetry between the obligations of the two sides is a prerequisite. That symmetry will often be taken by the state as suggesting an equality of the insurgents and the state, which the government will typically be keen to deny. Other factors such as the factual inability of non-state armed groups to abide by certain obligations imposed on the state under the Geneva Conventions and Protocols, for instance those that imply the existence of functioning public institutions like courts and prisons, further hinder chances of reaching this type of agreement. The problem here is a confusion between symmetry and equality, on the one hand, and reciprocity on the other. Whereas symmetry and equality are descriptions of a relative position and status, reciprocity is a type of interaction. There is no necessary alignment between the first and the second, allowing for a relationship of reciprocity to exist as between two asymmetrical or unequal participants. Master and slave are bound in a reciprocal manner despite the radical asymmetry and inequality of their status. In the legal context, Fuller wrote of the necessary reciprocity between the state and citizens in their expectation that laws will be obeyed. Turning back to the suggestion of a dialogue between state and non-state armed group to foster greater compliance with international humanitarian law, this signals that better protection for victims of war need not imply that each party to the conflict be bound in exactly the same manner, but only that these distinct obligations be undertaken in

a reciprocal fashion.

One instance of this type of approach can be found in the 'Deed of Commitment' which a number of non-state armed groups signed with Geneva Call, a Swiss NGO, providing for the prohibition of the use of anti-personnel landmines. The undertaking of an insurgent group embodied in the 'Deed of Commitment' mirrors the Ottawa Convention on Anti-Personnel Landmines, open to ratification by states only, but without any strict equivalence between the specific obligations for insurgents and states. Reciprocity can play a significant and positive role, as exemplified by the announcement by the government of Sri Lanka that it would join the Ottawa Convention if the LTTE signed the Geneva Call deed. Likewise, the Sudanese government indicated that it had ratified the Ottawa Convention in part as a reflection of the fact that the rebel SPLA/M had agreed to the Geneva Call deed. Reciprocity, even asymmetrical reciprocity, can have an impact, but is not necessarily an absolute precondition to a commitment to comply with humanitarian norms, whether by a government or a non-state armed group. Thus the majority of rebel groups which signed the Geneva Call 'Deed of Commitment' operate in countries which have yet to ratify the Ottawa Convention. Like states themselves, non-state armed groups may have motives other than reciprocity for subscribing to humanitarian standards, such as a perceived gain in international legitimacy or increased support from the local population. Nevertheless, the consensus from the studies and discussions leading up to this report support a finding that reciprocity is likely to be a significant force in moving non-state armed groups to commit to international humanitarian law. To underscore a point made earlier, that reciprocity does not necessarily imply either a synallagmatic exchange of obligations among belligerents or a position of equality as between the parties to a conflict. On the contrary, asymmetries are to be expected even as part of a reciprocal process to create and apply the laws of war. It bears mentioning that such an asymmetry should mirror the distinct interests and capacities of belligerents. As such, the example of the Protocol to the Convention on the Rights of the Child which actually imposes stricter restrictions on non-state armed groups than on the state regarding the recruitment and use of child soldiers seems hardly the type of asymmetrical reciprocity liable to bring about increased compliance with humanitarian law.

- **Policy Recommendation 4:** *While negotiations with non-state armed groups should underscore the interrelatedness of humanitarian obligations of all parties to a conflict, it should be expected and accepted that the duties of insurgents will not necessarily be identical to those of the state.*

It was noted earlier that one of the reasons regularly invoked against the possibility of opening a dialogue with non-state armed groups is that it is either impossible to locate an interlocutor or extremely dangerous to attempt to do so. This brings up the important issue of the tools with which an insurgent group may make the type of normative commitment to international humanitarian law which has been described as necessary to bring about greater compliance. From what precedes, it emerges that

the tools in question must be dialogic, that is they must involve some kind of collaborative construction involving all parties whose behaviour we seek to regulate. This may involve direct negotiations between state and non-state belligerents in an armed conflict, or indirect dialogue through the good offices of a third party. Direct negotiations between parties to an internal armed conflict leading to an agreement regarding the application of international humanitarian law are a rare phenomenon. Among the few examples in practice are: the 1990 San José Agreement between El Salvador and the FMLN to comply with Common Article 3, Protocol II and some human rights standards; a 1992 agreement by the warring parties in Bosnia-Herzegovina to apply Common Article 3; and a 1998 agreement signed by the Philippines and an insurgent group to respect human rights and humanitarian law. Such formal bilateral instruments are unusual due to states' common reluctance to legitimize rebels by entering into an agreement on an equal footing.

More often, a normative commitment will be obtained from a non-state armed group following indirect dialogue between belligerents through the intervention of a third party. Like anyone, rebel groups will be reluctant to initiate any kind of dialogue in a constructive spirit unless they perceive their interlocutor to be legitimate and trustworthy. Legitimacy speaks to the neutrality and impartiality of the intervener, who cannot be associated with the state against whom the rebels are fighting and preferably not with states in general. A non-governmental organisation like Geneva Call or the ICRC will in all likelihood be preferable to an intergovernmental organisation like the United Nations or the OSCE. Trustworthiness refers to both an organisation and individual delegates having an established reputation in the field. Thus, governments and civil society organisations seeking to encourage normative commitments by non-state armed groups to respect the laws of war should offer support to a limited number of NGOs building a significant practice in this field. The approach adopted by Geneva Call has been evoked already, involving a dialogue with rebel groups with a view to persuade them to sign a 'Deed of Commitment' which mirrors the provisions of the Ottawa Convention on Landmines. The deed includes monitoring and compliance clauses, as well as a general statement that the undertaking to stop using landmines is one part of a broader commitment to respect international humanitarian law. Such deeds are formally signed in the room in Geneva where the initial Geneva Convention was adopted in 1864. They are signed by Geneva Call, the non-state armed group and (perhaps slightly oddly) by the regional government for the Canton of Geneva. Impressively, to date, 39 different armed groups have signed the Geneva Call 'Deed of Commitment' in Africa and Asia, leading to the destruction of about 20,000 landmines. The organisation is currently developing programmes which would tackle the use of child soldiers and the protection of women and girls, still by way of deeds of commitment signed by non-state armed groups. The work done by Geneva Call is extremely interesting, and the results impressive. That said, it should be noted that is not the only organisation involved in dialogue with armed rebel groups, and that its approach is not necessarily the blueprint to adopt systematically for such an

exercise. In particular, Geneva Call seems to conceive itself as engaged in an exercise which parallels the Ottawa landmines process, perhaps a natural reflection of the fact that it was created by the same coalition which supported the Ottawa process. Its deed of commitment is thus said to be a standard and universal instrument, presented to non-state armed groups for ratification in the same manner as any state may choose to ratify the Ottawa Convention on Landmines. Given the heterogeneity of armed groups, which will vary according to their aims, ideology, structure, independence, popular support, etc, the dialogic process described up to now would suggest that there should be more flexibility in determining the substance and scope of any undertaking relating to the laws of war. Perhaps there are sufficient commonalities around the use of landmines so that a static text may be used in that context, but an attempt to generate a broader commitment to respect international humanitarian law would seem to call for a more *ad hoc* approach.

- **Policy Recommendation 5:** *Governments should acknowledge the high value of the contribution of NGOs working to incite normative commitments on the part of non-state armed groups, and support such efforts financially and diplomatically.*

Besides the contribution of NGOs like Geneva Call, the establishment of a mechanism by the UN Security Council to monitor the use of child soldier was noted as an interesting new approach. Following a series of reports by the Secretary-General on this issue, the Security Council decided to require certain non-state armed groups in Africa and Asia to provide plans of action aiming to curtail recruitment and use of child soldiers. Monitoring of the drafting and implementing of such plans was tasked to a working group of the Council. If a targeted group fails to deliver a satisfactory plan of action or to live up to its commitment, then the Security Council's sanctions committee can take measures against the group or its leaders. Inasmuch as such a process can elicit genuine commitments from non-state armed groups to respect elements of international humanitarian law, then it surely ought to be considered a positive development. Some legitimate doubts can be entertained as to whether there can be a true dialogue between the UN Security Council and an armed rebel group, given the bureaucratic nature of the UN and the distance separating the interlocutors. What's more, the approach has proven far from insulated from political interference by states. In one concrete illustration, a report by the Secretary-General under this process regarding the conflict in Chechnya was 'corrected' after its initial release to re-label "insurgency groups" as "illegal armed groups" and to add a mention which specifically denied that any armed conflict warranting the application of humanitarian law was occurring in the region. Clearly, this type of interference significantly threatens the usefulness of such a process in generating normative commitments that sustain better compliance with the laws of war.

The net result of the policy recommendations presented in this report is to move away from a rigidly unitary and universal international humanitarian law regime in favour of a fragmented one that will vary according to the particulars of a given conflict

and its parties. This may be distressing to some lawyers, for whom the very idea of law is tied to an aspiration of coherence and equality. What emerges from the papers and discussions is that the existing one-size-fits-all regime regulating non-state armed groups is too disconnected from the realities and interests of these groups to succeed in guiding their behaviour. A series of *ad hoc* commitments by insurgent groups may be a messier regime but one which sticks more closely to the daily reality of those called to live by it.




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## Policy Working Paper: A Canadian Perspective on the 2009 Draft U.N. International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies

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Professor Perrin's first book, **Invisible Chains: Canada's Underground World of Human Trafficking**, will be published by Penguin Group (Canada) in October 2010. He is currently working on a second book to appear as an edited volume, entitled **Edges of Conflict: Non-State Actors, Contemporary Armed Conflict and International Humanitarian Law** with a chapter on the use of private security companies by humanitarian organizations.

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## POLICY WORKING PAPER<sup>1</sup>

### A Canadian Perspective on the 2009 Draft **U.N. International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies**

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#### ABSTRACT

The Edges of Conflict project, a joint initiative of the University of British Columbia's Liu Institute for Global Issues and the Canadian Red Cross, aims to provide policy-relevant insights into contemporary issues of international humanitarian law, including the proliferation of private military and security companies. This policy working paper offers a brief, but focussed, analysis of the United Nations Draft *International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies* (dated July 13, 2009).

This paper describes the significance of the Draft Convention and then describes the approach taken in the proposed treaty to the regulation of this controversial topic. Several problematic issues are identified in the Draft Convention, including the identification of proscribed private military and security company activities, State responsibility for conduct of private military and security companies and the International Criminal Court referral mechanism for violations. Finally, specific policy recommendations are made for the Government of Canada as a Home State and Contracting State of private military and security services, irrespective of the progress of negotiations on the Draft Convention.

## INTRODUCTION: THE SIGNIFICANCE OF A DRAFT CONVENTION

On July 13, 2009, a United Nations Draft *International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies* ("Draft Convention")<sup>2</sup> was approved for distribution and comment by the cumbersome-titled U.N. Office of the High Commissioner for Human Rights, Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination ("U.N. Working Group").<sup>3</sup>

The existence of the Draft Convention itself appears to effectively render moot the perennial scholarly debate about whether private military and security contractors are presumptively mercenaries, and thus, illegal as such under international law. Indeed, the emphasis in recent years has shifted in both academic and policy circles to the question of how the international community and affected States should adapt to the reality of private military and security activity so as to ensure that risks associated with their conduct are managed, that oversight and accountability for wrongdoing is strengthened, and that greater transparency is brought to the industry and its regulation.

Just a few years ago, the preparation of a Draft Convention would have been dismissed as hopelessly naive by many observers. While the ultimate adoption of an international treaty addressing this controversial phenomenon remains a distant prospect, the Draft Convention has refocused attention on the legal response to the exponential growth of private military and security activity in the last decade, implicitly rejecting the sufficiency of industry self-regulation models and reliance on general provisions in domestic and international law. While some States have adopted specific laws and regulations dealing with this matter, there are vast differences among these practices and their effectiveness as well as the approaches that are taken by so-called Contracting States, Territorial States and Home States.<sup>4</sup>

<sup>1</sup> This draft is for discussion purposes only and may not be cited without prior written approval from the author. The author is pleased to acknowledge the support of the Canadian Red Cross, Liu Institute for Global Issues, Department of Foreign Affairs and International Trade (Canada) and Department of National Defence (Canada). This policy working paper does not necessarily represent the views of any of these organizations. Email: [perrin@law.ubc.ca](mailto:perrin@law.ubc.ca)

<sup>2</sup> United Nations Office of the High Commissioner for Human Rights (UNHCR), Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (final draft for distribution, 13 July 2009) ("Draft Convention").

<sup>3</sup> For a brief history of the Working Group's efforts leading to the Draft Convention, see J. Chris Haile, "New U.N. Draft International Convention On The Regulation, Oversight And Monitoring Of Private Military And Security Companies" (2009) 6:9 International Government Contractor 70.

<sup>4</sup> These terms are defined in art. 2(n)-(p) of the Draft Convention.

The creation of the Draft Convention also attests to persistent concerns about the scope of activities engaged in by private military and security companies in Iraq, Afghanistan and elsewhere, including several high-profile allegations of indiscriminate killing of civilians and use of contractors during problematic interrogations of detainees.<sup>5</sup> However, at the same time, national governments and their armed forces, international organizations, private companies, non-governmental organizations and even some individuals continue to hire private military and security companies, viewing their services as indispensable to operating in complex security environments where State security is either absent or deemed insufficient for a variety of reasons. In rare instances, States have even required companies to hire their own private security contractors as a condition of operating in their territory. In short, because private military and security companies appear to be here to stay, the international community had best learn to more effectively deal with them.

The ambitious goal set by the U.N. Working Group is reportedly to consult with U.N. Member States as well as researchers, interested non-governmental groups, and individuals to prepare an official draft treaty that would be tabled at the U.N. Human Rights Council as early as September 2010. This policy working paper aims to contribute to the constructive debate surrounding the substantive content of the Draft Convention itself, building on the *Edges of Conflict* policy-relevant research initiative of the University of British Columbia's Liu Institute for Global Issues and the Canadian Red Cross.

Part 1 briefly summarizes the major elements of the Draft Convention on a thematic basis. Part 2 critically evaluates the Draft Convention and exposes potentially significant concerns about the consistency of the current version with general principles of international law. Finally, Part 3 makes policy recommendations for the Government of Canada in light of the Draft Convention, given that Canada is a Home State, Contracting State and, less significantly, a Territorial State. These recommendations are made irrespective of progress made towards the negotiation and adoption of the Draft Convention.

## I. OVERVIEW OF DRAFT CONVENTION

The stated purpose of the Draft Convention is to “reaffirm and strengthen the principle of State responsibility” in relation to the conduct of private military and security companies, which it defines as follows:

(a) A **Private Military and/or Security Company (PMSC)** is a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities.

<sup>5</sup> See Benjamin Perrin, “Promoting Compliance of Private Security and Military Companies with International Humanitarian Law” (2006) 88 *International Review of the Red Cross* 613 at note 5.

(b) **Military services** refer to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, military training and logistics, and material and technical support to armed forces, and other related activities.

(c) **Security services** refer to armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities[.]

The Draft Convention proposes a hybrid approach to address the activities that may be engaged in by private military and security companies. First, the Draft Convention takes the position that certain activities can never be carried out by private military and security companies and their personnel. Secondly, the Draft Convention sets out a regulatory framework to oversee and monitor permissible private military and security services. After first outlining the prohibited categories of conduct, the Draft Convention's regulatory regime is described.

The Draft Convention is, at least in part, similar to “suppression conventions” that oblige States to criminalize certain conduct under their domestic law, recognizing the possibility of extraterritorial jurisdiction, and committing themselves to cooperate with one another in the enforcement of such offences through provisions dealing with extradition and mutual legal assistance.<sup>6</sup>

Conduct that private military and security companies are *prohibited* from engaging in, as specified in the Draft Convention, includes:

- “Fundamental State functions”:<sup>7</sup>
  - waging war and/or combat operations,
  - taking prisoners,
  - law-making,
  - espionage,
  - intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.
- “transfer of the [State's] right to use force and/or to carry out special operations”<sup>8</sup> and any other “illegal or arbitrary use of force” by private military and security companies;<sup>9</sup>

<sup>6</sup> See Draft Convention, arts. 22-23 (jurisdiction), 24 (extradition), 25 (mutual legal assistance).

<sup>7</sup> Draft Convention, art. 2(k) (definitional provision); see also art. 31(5). The term “intrinsic governmental” is alternatively used in art. 8 of the Draft Convention: “States parties shall define and limit the scope of activities of private military and/or security companies and specifically prohibit functions which are intrinsically governmental, including waging war and /or combat operations, taking prisoners, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.” This inconsistent use of language should be remedied.

<sup>8</sup> Draft Convention, art. 4(6).

<sup>9</sup> Draft Convention, art. 1(2).



- “directly participating in armed conflicts, military actions or terrorist acts, whether international or non-international in character, in the territory of any State”;<sup>10</sup>
- A wide range of conduct related to nuclear weapons, chemical weapons, bacteriological (biological) and toxin weapons, delivery systems, components or equipment as well as weapons likely to adversely affect the environment, including depleted uranium;<sup>11</sup>
- “using firearms, ammunition and equipment as well as methods of conducting fighting and special operations of such character as will cause excessive damage or unnecessary suffering or which are non-selective in their application, or otherwise violate international humanitarian law”;<sup>12</sup>
- Trafficking in firearms, their parts, components or ammunition;<sup>13</sup>
- “actions inconsistent with the principle not to interfere with the domestic affairs of the receiving country, not to intervene in the political process or in the conflicts in its territory, as well as to take all necessary measures to avoid harm to the citizens and damage to the environmental and industrial infrastructure, and objects of historical and cultural importance”;<sup>14</sup>
- Committing any of the listed offences (“Offences”):<sup>15</sup>
  - War crimes,
  - Crimes against humanity
  - Genocide
  - Violations of the *International Covenant on Civil and Political Rights*, in particular violations of articles 6 (right to life), 7 (prohibition of torture), 9 (security of person, prohibition of disappearances, arbitrary detention, etc.), 12 (prohibition of forced expulsion and displacement);
  - Violations of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
  - Violations of the International Convention for the Protection of All Persons from Enforced Disappearance;
  - Grave breaches of the Geneva Conventions of 1949 and Additional Protocols of 1977;
  - Reckless endangerment of civilian life, right to privacy and property;
  - Damage to or destruction of cultural heritage;
  - Serious harm to the environment; and
  - Other serious offenses under international human rights law.

As mentioned above, apart from these prohibited activities, the Draft Convention proposes that a multi-part regulatory

10 Draft Convention, art. 10.  
 11 Draft Convention, art. 11(1)-(2).  
 12 Draft Convention, art. 11(3).  
 13 Draft Convention, art. 12(1).  
 14 Draft Convention, art. 18(4).  
 15 Draft Convention, arts. 22, 28.

framework apply to the permissible private military and security services as well as to the investigation of alleged prohibited activities or failures to comply with regulatory standards set out in the Draft Convention. The Draft Convention’s regulatory framework requires that State Parties to the Draft Convention implement a domestic licensing regime both when “exporting” such services (i.e. the “Home State” or State Party where the company is registered or incorporated),<sup>16</sup> and when “importing” services (i.e. the “Territorial State” where the services are delivered).<sup>17</sup> Additionally, “Contracting States” have obligations under the Draft Convention. There is some inconsistency in the use of terminology in referring to this typology of States in the Draft Convention that should be remedied.

Under the Draft Convention, private military and security companies and their personnel would be subject to several regulatory requirements imposed by States Parties, such as:

- Obtaining a licence in both their Home State and each Territorial State in which they deliver services;<sup>18</sup>
- Professional training, examination and vetting “according to the applicable international standards for military and security services and for the use of specific equipment and firearms”;<sup>19</sup>
- Abiding by rules on the use of force;<sup>20</sup>
- Respecting the sovereignty and laws of the country in which they are providing services;<sup>21</sup>
- Observing international humanitarian law as well as “norms and standards set out in the core international human rights instruments”.<sup>22</sup>

In terms of enforcing the prohibition on certain private military and security services as well as promoting compliance with the regulatory standards established under the Draft Convention, a broad obligation on States Parties would require them to “take such measures as are necessary to investigate, prosecute and punish violations of the present Convention, and to ensure effective remedies to victims.”<sup>23</sup>

More specifically, the Draft Convention provides for the possibility of concurrent sanctions for wrongdoing by the personnel of private military and security companies as well as the corporate entities themselves. Individual personnel are subject to individual criminal responsibility for the Offences listed earlier as well as for “arbitrary or abusive use of force”,<sup>24</sup> while the company’s liability extends to civil, criminal and/or

16 See Draft Convention, arts. 2(h), 2(p).  
 17 See Draft Convention, arts. 2(i), 2(o).  
 18 Draft Convention, art. 17(1),(3).  
 19 Draft Convention, art. 18(3).  
 20 Draft Convention, art. 19(1).  
 21 Draft Convention, art. 18(4).  
 22 Draft Convention, art. 18(5).  
 23 Draft Convention, art. 21(2).  
 24 Draft Convention, art. 20(2).

administrative sanctions not only for the Offences listed above but also for “human rights violations or criminal incidents”, including having their corporate licences revoked.<sup>25</sup> The Draft Convention also provides that “States [P]arties may refer cases to the International Criminal Court” (“ICC”).<sup>26</sup>

Beyond creating a domestic regulatory network to oversee and monitor private military companies that frequently operate transnationally, the Draft Convention proposes a new international Committee be established to investigate and report on allegations of misconduct by these companies. The Committee on the Regulation, Oversight and Monitoring of Private Military and Security Companies (“International Committee”) is comprised of independent experts nominated and selected by States Parties in a detailed regime set out in Part VI of the Draft Convention. The U.N. Working Group drew its inspiration for the functioning of the International Committee from a committee established under the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

## II. CRITICAL COMMENTARY ON THE DRAFT CONVENTION

Alongside the development of the Draft Convention, the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (“Montreux Document”), dated September 17, 2008, is a non-legally binding document developed with the participation of 17 governments including Home States, Territorial States, Contracting States and others.<sup>27</sup> While the Draft Convention is arguably too bold and expansive (for the reasons described below) the Montreux Document is arguable too modest and restrictive (as it is merely a declaration of existing international law and good practices). Consequently, the U.N. Working Group would be well advised to use the Montreux Document’s statement on existing international legal obligations as a foundation and then build on those obligations based on the views of the States most likely to be affected by the Draft Convention. In this way, the Draft Convention would do what all treaties endeavour to achieve: first, to codify the existing state of customary international law and, secondly, to progressively develop international law through a binding legal instrument.

From a structural perspective, the Draft Convention’s hybrid approach of defining prohibited conduct by private military and security companies, coupled with a regulatory framework relying on domestic and international oversight is, in itself, an acceptable

model. While there are numerous issues that are raised with the Draft Convention, I will focus on three significant threshold issues that should be addressed in a revised Draft Convention:

- Activities prohibited by private military and security companies;
- State responsibility for conduct of private military and security companies; and
- International Criminal Court referral mechanism for violations.

### THE NEED FOR CLARIFICATION OF PROHIBITED ACTIVITIES

The Draft Convention is to be commended for attempting to enumerate the categories of activities that private military and security companies are forbidden from undertaking. However, the current list of prohibited activities is ill-defined, vast and requires greater precision. To illustrate some of the complexity involved, three issues are highlighted here: detention, directly participating in armed conflicts, and use of force.

#### DETENTION:

A notable distinction between the Draft Convention and the Montreux Document relates to the extent in which private military and security companies may be involved in matters dealing with prisoners or detainees. While the Draft Convention expressly prohibits contractors from taking prisoners and exercising powers of arrest or detention, including the interrogation of detainees, the Montreux Document adopts a much narrower view. To begin with, the Montreux Document includes “prisoner detention” in its list of services that private military and security companies may perform,<sup>28</sup> but later clarifies that such private contractors are not permitted to “exercis[e] the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions”.

#### DIRECT PARTICIPATION IN HOSTILITIES:

Under international humanitarian law, the protected status of a civilian subsists “unless and for such time as they take a direct part in hostilities”.<sup>29</sup> A significant consequence of the suspension or loss of protected status is that the individual may legally be subject to attack as well as prosecuted under domestic law for criminal acts that do not necessarily violate international humanitarian law.

As mentioned above, the Draft Convention prohibits private military and security companies from “directly participating in armed conflicts, military actions or terrorist acts, whether international or non-international in character, in the territory of any State”.<sup>30</sup> While this language is very similar to the “direct

25 Draft Convention, arts. 2(q), 13.

26 Draft Convention, art. 26(2).

27 Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America. See Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, U.N. General Assembly Doc. A/63/467–S/2008/636, 6 October 2008.

28 Montreux Document, pgs. 6-7.

29 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 51(3).

30 Draft Convention, art. 10.

participation in hostilities” concept in international humanitarian law, the Draft Convention is not clear in importing this standard. Recently, the International Committee of the Red Cross provided greater clarity on what constitutes “direct participation in hostilities”.<sup>31</sup> As will be seen below, the concept of “direct participation in hostilities” is a helpful one to use as the bright line between permissible self-defence and improper use of force as well.

#### USE OF FORCE:

An element of inconsistency in the Draft Convention sees the recognition of “police powers” as a “fundamental State function”<sup>32</sup> that private military and security companies are prohibited from engaging in, while States Parties must nevertheless “establish rules on the use of force and firearms by the personnel of private military and security companies” that are consistent with the U.N. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990).<sup>33</sup> While it is tempting to refer to the rules on use of force in policing as an analogy to the private military and security context, there are significant limitations to this approach. Self-defence, defence of others under your charge, and defence of property are appropriate concepts that the Draft Convention references to evaluate the propriety of the use of force by private security and military companies (such concepts are familiar to domestic criminal law across major legal systems of the word and typically include requirements of restraint and proportionality – they are not unique to a law enforcement context). However, beyond these appropriate basic principles on the use of force by civilians (i.e. those not directly taking part in hostilities), the Draft Convention would permit private military and security personnel to engage in armed intervention to “prevent or put a stop to the commission of a serious crime that would involve or involves a grave threat to life or of serious bodily injury”.<sup>34</sup> While it is easy to foresee circumstances where such intervention could have a positive outcome, it is a very slippery slope to recognize this form of non-state policing activity that the Draft Convention itself has arguably prohibited elsewhere.

Under international humanitarian law, civilians have a right to defend themselves (using necessary, proportionate and reasonable force) against criminality, banditry and even an imminent unlawful attack by a party to the armed conflict.<sup>35</sup> Consequently,

private security and military companies and their personnel should be prohibited from “directly participating in hostilities” as defined under international humanitarian law applicable during international and non-international armed conflict. This concept already includes notions of allowable forms of self-defence and use of force by civilians. During periods of armed conflict, this model is arguably more appropriate than making reference to policing standards. Absent the existence of an armed conflict to trigger the applicability of international humanitarian law however, it is appropriate for the Draft Convention to recognize analogous rights to use force in defence of person and property, so long as the force used is necessary, proportionate and reasonable in the circumstances.

#### VAGUENESS & OVER-EXTENSION OF STATE RESPONSIBILITY

The Draft Convention frames the myriad of issues raised by private military and security companies in terms of State responsibility. While this is not surprising given that the document is a proposed international treaty, the emphasis placed on State responsibility does not represent a mere codification of existing customary international law rules or principles dealing generally with State responsibility for internationally wrongful acts – despite reference in the preamble of the Draft Convention to the International Law Commission’s Articles on State Responsibility. Rather, the Draft Convention would extend State responsibility for the conduct of private military and security companies in a significant and extremely broader manner.

The Draft Convention states: “Each State [*P*]arty bears responsibility for the military and security activities of private entities registered or operating in their jurisdiction, whether or not these entities are contracted by the State.”<sup>36</sup> This is a vast extension of the attribution of State responsibility, going well beyond existing customary international law rules and principles in a manner that is vague and undefined. This flows from the apparent conceptual approach of the drafters that the focal point of pressure to address concerns about private military and security contractors are States. As a result, it is highly unlikely that major Home States, Territorial States or Contracting States will be willing to accept the Draft Convention in its current form.

In contrast to the Draft Convention, the Montreux Document’s focus on State responsibility is explicitly an exercise in recalling “certain existing international legal obligations of States regarding private military and security companies”.<sup>37</sup> It is far more specific and prudent in ascribing obligations to Contracting States, Territorial States and Home States than the Draft Convention and is a preferable starting point for expanding on obligations that may be specific to private military and security company activity.

31 “Reports and Documents: Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009” (2008) 90:872 *International Review of the Red Cross* 991.

32 Draft Convention, art. 2(k) (definitional provision); see also art. 31(5). The term “inherently governmental” is alternatively used in art. 8 of the Draft Convention: “States parties shall define and limit the scope of activities of private military and/or security companies and specifically prohibit functions which are inherently governmental, including waging war and /or combat operations, taking prisoners, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.” This inconsistent use of language should be remedied.

33 See Draft Convention, pg. 18, note 4.

34 Draft Convention, Art. 19(4)(d).

35 See Benjamin Perrin, “Private Security Companies and Humanitarian Organizations: Implications for International Humanitarian Law”, *Edges of Conflict Policy Working Paper* (February 2009).

36 Draft Convention, art. 4(2) (emphasis added).

37 Montreux Document, pg. 7.

In my view, expanding State responsibility in the vast and ill-defined manner proposed in the Draft Convention is not likely to gain traction nor is it desirable. Instead, the Draft Convention should first codify existing rules governing State responsibility for Home States, Territorial States and Contracting States, drawing inspiration from the Montreux Document. The bulk of the Draft Convention then is directed towards securing the commitment of States Parties to enact effective domestic legislation and regulatory regimes to license, investigate and sanction private military and security companies and their personnel that run afoul of the agreed criminal and regulatory standards, as well as to cooperate with other States Parties in ensuring there is no gap in the regulatory network.

## PROBLEMATIC INTERNATIONAL CRIMINAL COURT REFERRAL MECHANISM

As noted above, the Draft Convention provides that “States [P]arties may refer cases to the International Criminal Court” (“ICC”).<sup>38</sup> This seemingly innocuous provision presents three significant problems that make it untenable in its present form: the first is largely political, while the second and third are legal problems. First, the provision itself would not be supported by the United States (one of the most significant, if not the most significant, Home State and Contracting State for private military and security companies), unless there is a radical change in the foreign policy of the U.S. Government towards the ICC. While the U.S. has agreed to the U.N. Security Council referral of the Darfur situation in Sudan to the ICC, this was an exceptional case. The U.S. has consistently opposed the jurisdiction of the ICC over U.S. nationals and its efforts to secure bi-lateral legal agreements with States Parties to the Rome Statute of the ICC have been well documented.

Secondly, the Draft Convention ICC referral provision is even more problematic in the manner that it interfaces with the Rome Statute of the ICC. After much debate about when the ICC may exercise jurisdiction over a situation, the Rome Statute itself limits the initiation of investigations by the ICC Prosecutor to situations referred by either a State Party, the U.N. Security Council or *proprio motu* (on the Prosecutor’s own initiative) – all subject to review by the ICC Pre-Trial Chamber. The Draft Convention contemplates the referral of “cases” (i.e. presumably a single serious incident or more systematic misconduct committed by private military and security company personnel), but the Rome Conference rejected such a possibility, in part, due to concerns about politicized prosecutions, targeted prosecutions of individuals and shielding of perpetrators who are associated with the referring State.<sup>39</sup> Thus, instead of the above, “situations” are referred to the ICC Prosecutor (i.e. geographic areas where crimes within the jurisdiction of the ICC have allegedly taken

place on a large scale, with the authority to investigate and prosecute not only non-State actors, but military leaders and senior government officials as well). Additionally, the Draft Convention’s list of Offences goes far beyond those that the ICC has jurisdiction over (i.e. genocide, war crimes and crimes against humanity). Further, the ICC does not have jurisdiction over corporate entities, but only natural persons, so it would be unavailable as a judicial body to prosecute corporate entities themselves.

Thirdly, there is an issue with the very existence of an ICC referral mechanism appearing in a treaty separate from the Rome Statute itself. At best, the Draft Convention ICC referral provision is redundant in cases where a State is both party to the Draft Convention and the Rome Statute – in which case the legal authority for the ICC Prosecutor to receive a referral of a matter is already covered in the Rome Statute. At worst, where a State is party to the Draft Convention but not to the Rome Statute, the Draft Convention’s ICC referral provision would improperly purport to grant a privilege to such a State under a treaty that it is not party to. This is problematic at a minimum as it detracts from the legitimacy of the ICC’s jurisdiction by allowing non-State Parties to use the ICC as a vehicle to prosecute others, all while shielding their own territory and nationals to at least a large extent from the jurisdiction of the ICC. Indeed, this has been a concern expressed over the U.N. Security Council’s referral of the Darfur case. However, the Draft Convention raises the additional problem that while the Rome Statute at least expressly provides for the use of a U.N. Security Council referral, it does not expressly recognize the right of non-State Parties to make such a referral. Undoubtedly part of the rationale for this is that States wishing to unilaterally refer matters to the ICC Prosecutor should also bear the burden of adopting the Rome Statute as a whole. The Rome Statute itself recognizes that, apart from a U.N. Security Council referral, a non-State Party must declare that it accepts the jurisdiction of the ICC in order for the tribunal to exercise jurisdiction over the alleged crimes that were neither committed in the territory of a State Party to the Rome Statute or by nationals of a State Party to the Rome Statute.<sup>40</sup> Owing to these objections, the U.N. Working Group would be well advised to remove the ICC referral provision from the Draft Convention and leave the matter of ICC jurisdiction in the four-corners of the Rome Statute where it has been agreed to by State Parties to that treaty.

## III. POLICY RECOMMENDATIONS FOR GOVERNMENT OF CANADA

While it is nowhere near as significant as the United States in its relation to private military and security company activities, Canada is nevertheless a Territorial State, Home State and Contracting State for private military and security services. The federal Criminal Code addresses self-defence, defence of

<sup>38</sup> Draft Convention, art. 26(2).

<sup>39</sup> See Rod Rastan, “The Power of the Prosecutor in Initiating Prosecutions”, A paper prepared for the Symposium on the International Criminal Court (February 3 – 4, 2007; Beijing, China) at 4, online: International Centre for Criminal Law Reform and Criminal Justice Policy <<http://www.icclr.law.ubc.ca/Site%20Map/ICC/PoweroftheProsecutor.pdf>> (accessed April 6, 2010).

<sup>40</sup> See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 12(3).

others and defence of property within the ambit of Canadian criminal jurisdiction,<sup>41</sup> the *Firearms Act* regulates the possession of firearms,<sup>42</sup> while provincial legislation requires private security companies to be licensed.<sup>43</sup> However, the Government of Canada has yet to adopt legislation to address its role as an exporter of private military and security services or contractor of such services abroad. A lack of sufficient oversight of private military and security companies was identified by several participants in the Edges of Conflict project as a cause for concern. The circulation of the Draft Convention and Canada's participation in the preparation of the Montreux Document provides a timely impetus for domestic policy development on this topic.

The Department of Foreign Affairs and Department of National Defence have both employed private military and security companies in Afghanistan and elsewhere. Activities performed by such companies under contract by federal departments overseas include: training of members of the Canadian Armed Forces (performed by Blackwater Worldwide, now Xe Services LLC), the provision of armed perimeter security for Canadian diplomatic posts in multiple countries, and even armed close protection services for senior Canadian officials visiting Afghanistan, including Prime Minister Stephen Harper. In addition, there have been high profile incidents involving private military and security companies incorporated or having their head offices in Canada. For example, Garda International made headlines when several of its private military and security personnel were abducted in Iraq. Unfortunately, most of this information has only been publicly disclosed due to media reports and requests under the *Access to Information Act*. Consequently, there has been a significant lack of transparency surround the practices of the federal government in contracting private military and security services.<sup>44</sup>

The following preliminary recommendations are made for the Government of Canada:

1. The Department of Foreign Affairs should promote further diplomatic efforts to gain the support of other States for the principles set out in the Montreux Document while advancing that document's principles as a more credible starting-point for a reformulated Draft Convention.
2. The Government of Canada, in consultation with the Department of National Defence, Department of Foreign Affairs and Canadian International Development Agency, should adopt a transparent and clear policy on the use of private military and security companies contracted by federal departments and agencies or paid through contracts using federal public funds. Such a policy should, at a minimum:

- a) Specify which activities are prohibited from being engaged in by private military and security companies;
  - b) Require that private military and security companies and their personnel be vetted for criminal records, prior contractual violations or misconduct;
  - c) Ensure that private military and security personnel have the same minimum level of training in international humanitarian law and international human rights law as members of the Canadian Armed Forces;
  - d) Ensure that when private military and security personnel are armed, they comply with international standards on the carrying and use of firearms and local laws as well as any more stringent rules agreed to by contract;
  - e) Ensure that private military and security personnel will be subject to local jurisdiction in the country they are operating and subject to extraterritorial jurisdiction under the *War Crimes and Crimes Against Humanities Act*;
  - f) Fully investigate any allegations of misconduct by private military and security contractors and fully cooperate with local investigations;
  - g) Ensure contractual clauses are in place to suspend/remove individual contractors from duty and terminate contract (with penalties to the contractor) for improper conduct; and
  - h) Disclose basic contractual details about all private military and security companies retained by the Government of Canada in the annual reports to Parliament by the applicable government department or agency (i.e. name of firm, duration of contract, geographic scope of contract, dollar amount of contract, number of personnel employed, terms of reference of activities engaged in by the private military and security company).
3. Parliament should adopt legislation to regulate companies incorporated or registered in Canada that export private military and security services abroad. As a starting point, the Montreux Document's standards for Home States should be considered – both Part I on pertinent legal obligations as well as Part II on good practices of Home States, including:
    - a) Ensuring respect of international humanitarian law and international human rights law;

41 Criminal Code, R.S.C. 1985, c. C-46, ss. 34-43.

42 Firearms Act, S.C. 1995, c. 39.

43 See, e.g., Security Services Act, S.B.C. 2007, c. 30.

44 These concerns have been raised before, including in the wake of a serious incident involving Blackwater in Iraq in 2007: see Benjamin Perrin, "Tightening the leash on the 'dogs of war'", *Globe and Mail*, 10 October 2007, A13.

- b) Investigation and prosecution under the *War Crimes and Crimes Against Humanities Act* of serious international crimes committed by private military and security companies and their personnel;
- c) Clearly identifying the categories of services that may or may not be lawfully exported;
- d) Establishing a licensing system with clear criteria for granting, suspending and revoking such licences;
- e) Authorizing the Governor General in Council to promulgate a list of entities and individuals that private military and security companies licensed in Canada are prohibited from providing services to (similar to U.S. law); and
- f) Establishing a monitoring and compliance regime with criminal and civil liability.

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## Shrinking Humanitarian Space? Trends and Prospects on Security and Access

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## Shrinking Humanitarian Space? Trends and Prospects on Security and Access

The Edges of Conflict project, launched in 2007 by the Canadian Red Cross and the Centre for International Relations at the University of British Columbia, seeks to assess the contemporary challenges of armed conflict and to develop new conceptual approaches and policy recommendations to address the challenges of contemporary armed conflict on international humanitarian law. From its outset, the project has highlighted the proliferation of non-state actors operating in contemporary conflict and post-conflict environments as one of the principal barriers to respect for humanitarian law and effective humanitarian operations. Specifically, the project noted that the notion of shrinking “humanitarian space” has become a commonly accepted characterization for the challenges of providing effective relief in such complex environments.

The concept of humanitarian space is used to describe the situation where the changing nature of armed conflict and the geopolitical shifts, particularly since 9/11, have combined to limit or restrict the capacity of humanitarian organizations to safely and effectively provide material relief to populations suffering the ravages of war. In addition to the proliferation of non-state actors, humanitarian organizations have pointed to the growth of asymmetrical warfare and an increase in the targeting of civilian populations, deliberate attacks on humanitarian workers, the cooptation of humanitarian response within counter-insurgency operations, the push for coherence within integrated UN missions and the ever-increasing overlap with longer-term development programming.

This report begins with an examination of the meaning of the phrase “humanitarian space” and the evidence for the claim that this space is shrinking due to decreasing respect for humanitarian law, increases in attacks on humanitarian works and declining access to populations at risk. The following section analyses the blurring of boundaries between humanitarian organizations and other actors and agendas including: militaries and the delivery of assistance, counter-insurgency strategies and integrated UN missions. A third section assesses the possible measures humanitarian organizations can undertake to maximize humanitarian space including the reassertion of traditional humanitarian principles, pragmatic steps that humanitarian organizations can take to improve security and access, and the value of adopting a more beneficiary-centered approach to humanitarian action.

## Defining “Humanitarian Space”

There is no common definition for the term ‘humanitarian space.’ Sylvain Beauchamp, in the lead paper on the topic for the Edges of Conflict project observes that “With time and the multiplication of actors involved in the delivery of international aid, as well as their working methods, the notion of humanitarian space has increasingly been used in different manners and for different purposes.”<sup>1</sup>

The phrase humanitarian space was first used to describe the limitations imposed on the “operating environment” of humanitarian agencies operating in highly politicized context of Cold War conflicts in Central America.<sup>2</sup> Its broader usage by humanitarian organizations seems to have begun in the 1990s when former President of Médecins sans frontières (MSF), Rony Brauman, used the phrase *‘espace humanitaire’* to refer to an environment in which humanitarian agencies could operate independent of external political agendas. By the late 1990s the term was in widespread use by the International Committee of the Red Cross and other humanitarian organizations. While there are some common elements in the use of the term across the range of humanitarian organizations, there are also important differences of emphasis.

The International Committee of the Red Cross (ICRC) has been vocal over the last two decades in deploring the erosion of humanitarian space and the resulting difficulty in delivering humanitarian assistance. For the ICRC, the concept of humanitarian space is rooted in International Humanitarian Law (IHL). The mandate of the ICRC requires adherence to the principles of impartiality, neutrality and independence which enable the organization to “remain active and assist victims of conflict throughout the world.”<sup>3</sup> In the ICRC’s view, states have the responsibility to facilitate humanitarian action. They further acknowledge that the “humanitarian space” involves a range of actors many of whom are not bound by humanitarian principles. Ultimately, the creation and maintenance of humanitarian space requires proactive efforts by humanitarian actors themselves.<sup>4</sup>

MSF calls for a ‘space for humanitarian action’ in which aid agencies are ‘free to evaluate needs, free to monitor the delivery and use of assistance, free to have a dialogue with the people.’<sup>5</sup> In their view, political actors are responsible for creating and maintaining the humanitarian space in which humanitarian organizations undertake relief activities in accordance with humanitarian principles. The emphasis on independence from political agendas and the impartial in the provision of assistance is consistent with the ICRC. But as Von Pilar, former Executive Director of MSF Germany, makes clear, their notion of humanitarian space should focus on the suffering and needs of people in danger and MSF therefore rejects an absolutist vision of neutrality.<sup>6</sup>

Oxfam’s use of the concept of humanitarian space places greater emphasis on the rights of beneficiary populations. For Oxfam International, humanitarian space refers to “an operating



environment in which the right of populations to receive protection and assistance is upheld, and aid agencies can carry out effective humanitarian action by responding to their needs in an impartial and independent way.”<sup>77</sup> The organization adds that such space “allows humanitarian agencies to work independently and impartially to assist populations in need, without fear of attack or obstruction by political or physical barriers to their work. For this to be the case, humanitarian agencies need to be free to make their own choices, based solely on the criteria of need.”<sup>78</sup>

The United Nations adopts a more instrumental view. The UN Office of the Coordination of Humanitarian Affairs (OCHA), refers to humanitarian space as an ‘operating environment’ for relief organizations and recognizes that the “perception of adherence to the key operating principles of neutrality and impartiality [...] represents the critical means by which the prime objective of ensuring that suffering must be met wherever it is found, can be achieved.”<sup>79</sup> They claim that “maintaining a clear distinction between the role and function of humanitarian actors and that of the military is the determining factor in creating an operating environment in which humanitarian organisations can discharge their responsibilities both effectively and safely.”<sup>80</sup> But as a state-based organization pursuing multiple objectives, the United Nations’ definition explicitly omits the principle of independence as a condition for maintaining humanitarian space.

From these and other uses of the term, it is possible to identify three distinct variations. First, humanitarian space can be understood as synonymous with respect for IHL.<sup>81</sup> The notion of humanitarian space is not explicitly specified in the Geneva Conventions. But states party to the Geneva Conventions, when involved in conflict, are obligated to provide for the basic needs of civilian populations affected by conflict or to allow and facilitate relief action that is ‘humanitarian and impartial in nature’.

A second variation focuses on the existence of a practical, even physical, space within which humanitarian action - saving lives by providing relief to victims of armed conflicts - can be undertaken. This can be conceived narrowly in opposition to ‘military’ or ‘political’ space with a focus on humanitarian corridors, refugee camps, demilitarized zones and ‘safe areas.’ More commonly, however, it is synonymous with acceptance of the role and activities of humanitarian actors by both the parties to a conflict and by beneficiaries.<sup>82</sup>

Third, there are times when humanitarian space seems synonymous with humanitarian action *writ large*. In analyzing the situation in Somalia, for example, one humanitarian organization lists the following phenomenon as limiting humanitarian space: “general insecurity, administrative delays, restrictions or delays in movement of goods, targeting of humanitarian workers and assets including the looting of aid and car-jackings, piracy, negative perception of humanitarian workers, targeting civil society and media, localised disputes/competition over resources, lack of will and/or ability by authorities to address security incidents within their control”.<sup>83</sup>

Assessments of the existence of humanitarian space differ substantially based on the perspective of particular organizations and the specific criteria they chose to adopt. It is not at all clear therefore that “humanitarian needs can be put in focus and practically addressed through a clearer understanding of ‘humanitarian space’.”<sup>84</sup> It may in fact be the case that such needs can be put in focus and practically addressed most effectively by avoiding the loose notion of humanitarian space and considering the constituent elements of the concept independently.

## Is Humanitarian Space Shrinking?

The review above of definitions of humanitarian space identifies three criteria against which to assess the claim that humanitarian space is shrinking: respect for the provisions of IHL, the relative safety of humanitarian workers and the degree of access to populations at risk.

### Respect for IHL

For at least three decades, it has been commonplace to lament a declining respect for IHL.<sup>85</sup> This conclusion fits neatly with the commonly held view that the number of armed conflicts is increasing and that the vast majority of the victims of contemporary conflicts are civilians. Conventional wisdom however can be misleading. We know that the total number of armed conflicts has declined over the past two decades and that there is no evidence to support the claim that civilians account for the vast majority of the casualties in contemporary wars.<sup>86</sup>

Specific conflicts where IHL is violated with impunity can always be found, but this does not necessarily demonstrate a broader trend. As the number of conflicts declines, so too does the number of theatres in which violations of IHL could occur. Furthermore, there is reason to believe that respect for IHL by government forces has improved in recent decades. The ICRC study on customary humanitarian law, based on a review of state practice, concluded that the vast majority of the rules agreed for international armed conflicts now apply to internal armed conflicts as well suggesting that governments have accepted a broader reach for IHL.<sup>87</sup>

Claims about the declining respect for IHL commonly focus on the proliferation of non-state armed groups. But it is not clear that non-state armed groups are proliferating. The majority of armed conflicts since the Second World War have been internal conflicts in which at least one of the warring factions was a non-state armed group.<sup>88</sup> One analyst claims that there were more than 200 non-state armed groups involved in 40 conflicts in Africa between 1955 and 2005, demonstrating that there is nothing new about non-state armed groups.<sup>89</sup> He goes on to argue that, “respect by African non-state actors for IHL and the ICRC’s work was greater between 1956 and 1989, when most of the fighting was by recognized liberation movements and the majority of them had observer status and the support of the OAU.”<sup>90</sup>

A lack of respect for IHL is attributable, therefore, only to specific non-state armed groups. In assessing the prospects for future respect for IHL, the motivations of armed groups seem to be important – those that seek to acquire statehood may be more willing to place constraints on their behavior. Organizational coherence and internal discipline are also relevant – fragmentation of non-state armed groups makes it difficult to negotiate access and to distinguish the targeting of aid workers from banditry.

## Safety of Humanitarian Workers

According to the UN's Interagency Standing Committee, one of the most prominent manifestations of shrinking humanitarian space is the insecurity of humanitarian staff.<sup>21</sup> It is commonly acknowledged that efforts to more consistently respond to humanitarian crises have led to aid workers operating in more dangerous situations. International humanitarian workers did not operate in many of the greatest crises of the Cold War. In contrast, few of today's conflicts are entirely off limits to humanitarian actors. Insecurity for aid workers was indisputably high in Iraq following the US-led invasion, but it is worth noting that there were no substantial humanitarian operations at all during the Iran Iraq war in the 1980s, the deadliest conflict in the world during that decade.

The risks to contemporary humanitarian workers are substantial. The Overseas Development Institute reports that “260 humanitarian aid workers were killed, kidnapped or seriously injured in violent attacks” in 2008, the highest total in the 12 years for which these incidents have been tracked.<sup>22</sup> The report goes on to note however that, “there is a concentration of incidents in a few high violence contexts. Three-quarters of all aid worker attacks over the past three years took place in just six countries.”<sup>23</sup> And “the spike over the past three years was driven by violence in just three contexts: Sudan (Darfur), Afghanistan and Somalia.”<sup>24</sup> Reviewing the same data, one analyst concludes that, excluding Afghanistan, Sudan and Somalia, major attacks on aid workers are decreasing.<sup>25</sup>

Furthermore, it is important to understand the reasons for these attacks before necessarily attributing them to declining humanitarian space due to militarization or politicization of humanitarian action. For more than half of the security incidents tallied in the ODI report, the motives behind the attacks remain unknown. And among the attacks that can be categorized, only half during 2007-08 were attributable to armed opposition groups. For the riskiest environment, Sudan/Darfur, the bulk of the attacks was attributed to “common banditry” while “in Afghanistan and Somalia criminality has colluded with political forces pursuing national (and in the case of al-Qaeda, global) aims.”<sup>26</sup>

With the evidence indicating that perhaps only one in four security incidents are committed by the warring factions, something else must account for the increases in security incidents. For instance, the former head of the ICRC office in

Bagdad concludes bluntly that “More often than not, the security incidents suffered by aid agencies are due to foolish mistakes by ill-prepared individuals, and to faulty appraisals of local conditions.”<sup>27</sup> He goes on to point out that “Most agencies admit that they have insufficient knowledge of the contexts in which they operate, that they lack local networks and information sources and that most of their international staff are not familiar with local customs, language and culture.”<sup>28</sup>

## Humanitarian Access

Not surprisingly, there is a direct correlation between the findings noted above on the security of humanitarian workers and the ability of those workers to access populations at risk. “Of the 380 incidents in the AWSD (Aid Worker Security Database) for 2006–2008, 82 resulted in suspension, withdrawal or relocation, in 15 countries.”<sup>29</sup> Again there is compelling evidence that access has been severely restricted in high profile conflicts including Afghanistan, Iraq and Somalia.

Although difficult to measure, sweeping claims about limitations on humanitarian access seem inconsistent with a decline in the number of civil wars and a continued expansion of humanitarian operations. Budgets for humanitarian operations continue to increase over time: \$800 million in 1989, \$4.4 billion in 1999, \$10 billion in 2004 and \$11.2 billion in 2008.<sup>30</sup> And so too have the numbers of personnel employed in these operations: “Global estimates of the number of field-based aid workers employed by UN humanitarian agencies, the ICRC and international NGOs indicate an increase from 136,204 to 241,654 (77 percent) over the period 1997 to 2005.”<sup>31</sup> These figures translate into a 54 percent increase for the UN, a 74 percent increase for the ICRC and a 91 percent increase for international NGOs.<sup>32</sup>

What then do we make of the claim that humanitarian space is declining? Across all three empirical measures of humanitarian space – respect for IHL, safety of aid workers and access to populations at risk – the data is incomplete. Careful analysts draw differing conclusions about what the trends really are. But outside of three or four specific conflicts, there is no conclusive evidence that “humanitarian space” is shrinking.

## Blurring Boundaries

Turning from trends to causes, the root of nearly all claims about the shrinking of humanitarian space is that lines between humanitarian action and the roles and responsibilities of other actors on the battlefield are increasingly blurred. This section examines the claims surrounding a series of blurred lines linked to declining humanitarian space: the role of the military in the delivery of humanitarian assistance, the incorporation of humanitarian operations into counter-insurgency strategies, and the integration of humanitarian action within multi-mandated UN missions.

## The Military and the Delivery of Aid

Most humanitarians admit that the military has a role to play in creating humanitarian space and even to deliver assistance themselves as a last resort. The challenge, as the Edges of Conflict Report points out, is that “on one hand, state armed forces are obliged to provide such aid, but on the other, there is a need for non-discriminatory delivery of assistance and providing humanitarian access for aid that is neutral, independent and impartial.”<sup>33</sup> Similarly, the Steering Committee for Humanitarian Response concedes, whether “the given situation is one of armed conflict and whether the armed force in question is party to the conflict and under what mandate should reasonably be determining factors in defining the extent and nature of humanitarian-military relations.”<sup>34</sup>

In the fifteen years since these concerns were first seriously acknowledged, the need to maintain a clear distinction between humanitarian and military actors has become widely accepted. The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) first released Guidelines on the Use of Military and Civil Defence Assets (MCDA) in relief operations in 1995. Updated in 2007, the document reasserts the importance of this distinction: “As a matter of principle, the military and civil defence assets of forces that may be perceived as belligerents or of units that find themselves actively engaged in combat in the affected country or region shall not be used to support UN humanitarian activities.”<sup>35</sup>

In addition, throughout the last decade, most humanitarian organizations and leading donor governments have developed their own guidelines, policies and protocols. Humanitarians have sought to mitigate the unintended negative consequences of associations between humanitarians and military forces by promoting dialogue and coordination while maintaining a clear distinction between the two. UNHCR was among the first, publishing their ‘Handbook for the Military on Humanitarian Operations’ in 1995. Other examples include the ICRC’s 2001 Guidelines for Civil-Military Relations, InterAction’s 2007 ‘Guidelines for Relations between U.S. Armed Forces and Non-Governmental Organizations in Hostile or Potentially Hostile Environments’ and CARE International’s 2009 ‘Policy Framework for CARE International’s Relations with Military Forces.’

Examples of government guidance that clearly articulates the importance of maintaining a distinction between humanitarian and military operations include the ‘Guide to a Constructive Engagement with Non-Governmental Organisations and the Aid Community’ recently published by the United Kingdom Ministry of Defence and the 2003 Canadian ‘Guidelines on Humanitarian Action and Civil-Military Cooperation’. The importance of the distinction is however less apparent for other organizations and countries including the 2003 NATO CIMIC doctrine (AJP-9), the 2001 U.S. joint doctrine for Civil-Military Operations (JP-357), and the 2005 French ‘Concept et doctrine inter armées de la coopération civilo-militaire’ (PIA 09.100).

Elaborating guidelines for the interaction between humanitarian and military actors is one thing, applying them in practice is another. Given experiences in Kosovo, Afghanistan and Iraq, we should anticipate that military actors, particularly in non-UN missions, will undertake activities inconsistent with the various guidelines in the future. The challenge then will be to promote adherence and application on a case-by-case basis.

## Humanitarianism and Counter-Insurgency

Where major humanitarian donors have implemented counter-insurgency campaigns – particularly Iraq and Afghanistan – the threat to the independence of humanitarian action has been most pronounced. In such circumstances, the delivery of assistance is seen as one component of the larger effort to ‘win hearts and minds’ with humanitarian organizations seen as “force multipliers.”

Counter-insurgency strategies employed in Afghanistan have posed a range of specific challenges to the maintenance of humanitarian space. It has been alleged that psychological warfare operatives have masqueraded as civilians undertaking a humanitarian assessment mission.<sup>36</sup> Some have argued that aid in the midst of counter-insurgency, “becomes ‘threat-based’ rather than ‘needs-based’ – that is, it is deployed according to military objectives not impartial assessments of humanitarian needs.”<sup>37</sup> Others have expressed apprehensions over humanitarian agencies being used as sources of intelligence – a US counter-insurgency guide for example identifies humanitarian organizations as “an independent and often credible source of ‘ground truth’ about the areas in which they work.”<sup>38</sup> Statements such as Colin Powell’s in 2001 that “NGOs are such a force multiplier for us, such an important part of our combat team,” imply collaboration whether or not it actually exists.<sup>39</sup>

Even unwarranted perceptions can have profound effects. As ICRC’s Vice-President Jacques Forster states: “the main risk I see for humanitarian action in general is its integration – willing or otherwise – into a political and military strategy to defeat the enemy. (...) The danger is real if insurgents, or parts of the population, perceive the humanitarian agencies as instruments of a foreign agenda.”<sup>40</sup>

According to one analyst, “no amount of guidelines and cultural understanding can alleviate the biggest threat to humanitarian space in existence today – the emergence of American military doctrine in the post 9-11 world that specifically includes humanitarian activities as mission-essential tasks in winning hearts and minds and stealing the loyalty of the population from insurgents and extremists.”<sup>41</sup> But how can the biggest threat to humanitarian space come from the doctrine of a country, even the United States, fighting in only two of the more than thirty contemporary civil wars? Although undeniably problematic for humanitarian action, the long-term impact of counter-insurgency doctrine on humanitarian space will depend on the number and scale of future US/NATO-led military interventions.

## *Integrated UN Missions*

Throughout the 1990s, a common refrain from humanitarian organizations was that humanitarian action was being employed by the international community as a substitute for the political action necessary to bring an end to the violence and lay the foundations for a sustainable peace.<sup>42</sup> Ten years later, the model has changed. For the UN at least, the watchword is integration – subsuming all actors and approaches within an overall political-strategic crisis management framework.<sup>43</sup> Following the Secretary-General's decision N° 2008/24, the principle of integration now applies to “all conflict and post-conflict situations where the UN has a Country Team and a multi-dimensional peacekeeping operation or political mission/office, whether or not these presences are structurally integrated.”

Humanitarian assistance – designed to respond to the symptoms of armed conflict – cannot operate in isolation. But the integration of security, political and developmental agendas with humanitarian ones again blurs boundaries. Oxfam International concludes that despite its evident advantages, integration “creates its own risks, including that of associating humanitarian workers with one side of a conflict, and the consequent risks of attacks on humanitarian workers and the people they are assisting.”<sup>44</sup> While formal integration applies only to UN agencies it has also had a profound effect on UN-NGO relations. “With UN agencies acting as cluster leads, or with direct access to CERF funding restricted to UN agencies, the UN wields significant influence over NGOs through the reforms – in stark contrast to the majority of aid capacity and activity, which is provided by field-based NGOs.”<sup>45</sup>

With the UN committed to integrated missions, lines between humanitarian and other actors will be less distinct. But as the Vice-President of the ICRC has stated, humanitarian agencies should accept that the integrated approach is here to stay. “Pertinent integration and good coordination are key elements in achieving the best results for the populations in need of protection and assistance.”<sup>46</sup> Accepting integrated missions does not mean that there cannot be improvements to the existing model. One factor commonly identified is the multiple roles expected from the Deputy SRSG. An MSF study of integrated missions concluded: “In an integrated mission setting, the reforms’ reinforcement of the HC position simply strengthens the role of the many-hatted HC/RC/DSRSG, negotiating between global UN objectives (peacekeeping, state-building, development) and the imperative of humanitarian action.”<sup>47</sup> There may well be scope in other areas to adopt a more nuanced approach to integration without necessarily seeking to ensure “that all actors, including NGOs, are moving in lockstep toward a particular political outcome.”<sup>48</sup>

The challenges of coherence and effectiveness that affect the UN as a multi-mandate organization have parallels within the humanitarian community as well. For many organizations that refer to themselves as ‘humanitarian agencies’ also function as ‘development’ agencies. ECHO concludes that being engaged in reconstruction and rehabilitation activities will “inhibit

NGOs’ ability to adhere to humanitarian principles.”<sup>49</sup> The main issue here seems to be the tension between the principle of neutrality and the close working relationship that often exists between development agencies and host governments. MSF has gone so far as to suggest, that “in war zones multi-mandate organizations should make a choice between relief and development assistance”.<sup>50</sup> But others suggest that multi-mandate organizations engaged in both activities are one way to facilitate the necessary transition between relief and development.<sup>51</sup>

## Principles and Pragmatism

The notion of humanitarian space associates attacks on aid workers and restrictions on humanitarian space with the militarization and politicization of humanitarian action. The corresponding policy response then seems obvious: “Maintaining distinction has long been understood as a vital factor that enables the preservation of ‘humanitarian space’.”<sup>52</sup> But where militarization and politicization are not the source of the problem – a considerable proportion of cases, according to the analysis above – an emphasis on humanitarian principles may be misplaced. More important, perhaps, is to refine the strategies and protocols for operating in the inherently dangerous situations that humanitarians have encountered in the past and will undoubtedly encounter in the future.

## Humanitarian Principles

In the face of claims about the shrinking of humanitarian space, the overwhelming response by humanitarian practitioners is to call for a renewed adherence to the traditional humanitarian principles of impartiality, neutrality and independence. Analysts however tend to be skeptical, with some believing that “the principles and tactics that have worked well in the past for humanitarians dealing with interstate wars are undoubtedly of limited utility in many of today’s civil wars.”<sup>53</sup> There are two separate questions here that need to be addressed: is full adherence to humanitarian principles possible for the full range of humanitarian actors, and will renewed adherence actually expand humanitarian space?

The ICRC recognizes that the principles do not apply in a strict sense to all humanitarian organizations. Of the four – humanity, impartiality, neutrality and independence – only the first two seem absolute. Humanitarian organizations, by definition, ought to act in all cases on the basis of human need and provide assistance without discrimination. Neutrality is more complex. While it is clear that humanitarian organizations should not favour one warring faction over another, taking sides with populations at risk facing armed attacks can be perceived to be taking sides in the conflict itself. Independence is a serious issue for all humanitarian organizations. Whatever the claims to the contrary, humanitarian action has been and remains largely a western enterprise. Even organizations that prioritize funding independent fundraising receive the vast majority of their support from Western/NATO governments. Multi-mandate organizations facilitate the transition to longer-term development

but must also have closer relations with host governments.

Ultimately, it is the practical utility of these principles that matters. Even for the ICRC, traditional principles are a means to an end, not ends in themselves. “It is the longstanding adherence to humanitarian principles that allowed the ICRC to remain active and assist victims of conflict throughout the world”<sup>54</sup> And the evidence, even from high-risk situations such as Afghanistan, seems to support this claim. Even if achievable, it is clear that adherence to principles will not solve the problems of security and access for the humanitarian community. A practitioner with considerable experience in Afghanistan concludes that “While humanitarians would like to think that more rigorous respect of humanitarian principles acts as their best protective shield, this remains true more in the negative than in the positive in the sense that non-respect of principles increases staff insecurity.”<sup>55</sup>

### Practical Adaptation

If renewed adherence to principles can be expected to deliver less security and access than is often presumed, greater attention ought to be given to practical measures that can be employed to function effectively in high risk environments. The starting point for most humanitarian organization is the ‘security triangle’ paradigm of acceptance, protection and deterrence.<sup>56</sup> Acceptance is simply the formalization of the long-standing humanitarian emphasis on maintaining good relations with project recipients, local social groups and authorities.

Where acceptance is not enough to ensure a basic minimum of security, diverging protection strategies have been employed. Some organizations have adopted ‘low/no profile’ approaches by removing all identity markers from facilities, staff, and vehicles and engaging in what might be called ‘clandestine’ programming. Others have opted for a high-profile approach of using armoured vehicles, fortifying offices and hiring armed security. Both strategies have been accompanied by increased attention to staff training in incident and crisis management and to the further development of security protocols.<sup>57</sup> There is general agreement however that practical implementation continues to lag.

Where there is no alternative but to withdraw, remote management can be a viable alternative. Much attention has been given to the ethical implications of transferring risk to national staff and to the challenges of remaining accountable to beneficiaries. This “long-arm” programming is commonly labeled *ad hoc*, but it was first used by Oxfam in India more than 50 years ago and has been employed in a series of crises since including Afghanistan, Biafra, Chechnya and Burma. Crises that may require remote delivery are unlikely to arise without warning, giving time for careful preparation. And the emphasis that remote delivery places on the roles of local NGOs can assist in an appropriate rebalancing of attention from international to national actors.<sup>58</sup>

### A Beneficiary-Centred Humanitarianism

A prominent critique of the notion of humanitarian space is that it focuses too heavily on the perspectives of third parties in contrast to the populations that they seek to assist. This idea is alluded to in the report of the Edges of Conflict Conference which speculates that “a sharper focus on civilians as the beneficiaries of humanitarian aid and protected status from attack will provide an alternative paradigm to consider the challenges of delivering such aid in the midst of a complex environment.” Whatever the prospects for an alternative paradigm, an emphasis on beneficiaries is an important corrective to much of the discussion on humanitarian space.

There is broad agreement that no general right of humanitarian assistance exists in positive international law (Dinstein 2000) and it is unlikely that further legal developments in this area should be a short-term priority. More important is the shift in emphasis that comes from reflecting on what it would mean to have a right not to provide humanitarian assistance but to receive it. According to Jean-Francois Vidal of Action Contre la Faim, “the problem with the traditional idea of humanitarianism is that it demands access for [NGO] workers to reach victims who then become the object of “our” compassion. What I support is the victims’ access to their rights – that is, a construction that makes them subjects, not objects.”<sup>59</sup>

Much has been written about the need for accountability to beneficiaries. Principle 9 of the Red Cross Code states that “We hold ourselves accountable to both those we seek to assist and those from whom we accept resources” while the Sphere Humanitarian Charter states that “We acknowledge that our fundamental accountability must be to those we seek to assist.” There are many ways in which accountability to beneficiaries can be pursued. One starting point is clear – accountability means nothing in the absence of knowledge about the perceptions and priorities of the beneficiaries themselves. More than a decade ago, the ICRC broke new ground with the publication of *People on War*. And there have been some important parallel efforts to seek out the views of populations at risk.<sup>60</sup> But it remains the case that “governments, international agencies and local organizations have generally recognized the importance of consulting with beneficiaries, but often fail to carry through with consultations in practice.”<sup>61</sup>

Putting the principle of beneficiary-centred humanitarianism into place will not be easy.<sup>62</sup> But it would be an indication of progress if in the years the volume of words spoken and written on that subject came anywhere close to those currently devoted to the problem of shrinking humanitarian space. Focusing in the first instance on the perspective and possibilities of populations at risk does not solve the inter-related problems of security and access. It may however help to identify strategies through which the traditional ends of humanitarian action – the survival and dignity of populations at risk – can be secured through new means.

## Conclusions

The notion of humanitarian space embodies a series of assumptions that together imply an inexorable decline in the ability to provide material assistance to populations affected by armed conflict. Disaggregating the concept demonstrates that although most of these assumptions contain an element of truth, they are highly context specific. On the basis of the analysis above, the following conclusions can be drawn:

1. There is no conclusive evidence that humanitarian space is declining over time.

By almost any measure – size of budgets, number of personnel – there continues to be decade upon decade growth in humanitarian operations. Access to vulnerable populations, with some notable exceptions, is better now than in previous periods. Violations of IHL are widespread but macro-trends suggest that there are probably fewer violations today than in the past. The recent increase in attacks on humanitarian workers is confined to a few high risk conflicts; only one-quarter of attacks can be attributed to “political targeting.”

2. Sometimes less ‘humanitarian space’ is more.

Recent emphasis on the notion of humanitarian space implies that this objective should be privileged over others. The provision of life-saving relief to populations suffering the ravages of war must remain a priority. But it is better to have integrated UN missions with strong political mandates, accepting the challenges they entail, than to revert to a situation where humanitarian action is a substitute for political action.

3. When donors are occupiers and combatants, security & access will be compromised.

Evidence for the shrinking of humanitarian space is easily found in cases like Iraq and Afghanistan. In both situations the major humanitarian donors were also occupying forces engaged in high-intensity combat operations. Counter-insurgency operations *do* militarize and politicize humanitarian operations, and security and access will be reduced. Whether this is part of a longer term trend however will depend on the likelihood of future US/NATO combat interventions.

4. Adherence to traditional humanitarian principles will not guarantee space.

There is some scope for aligning field practices with humanitarian principles – particularly responding to human need without discrimination. Neutrality and independence are more difficult: the former can be compromised by taking

the side of populations at risk, the latter by dependence on a small number of donors and the unavoidable association that multi-mandate organizations have with host governments.

5. Only specific non-state armed groups threaten security and access.

Non-state armed groups are not new, nor are they proliferating. Some have been more respectful of humanitarian law (e.g. some national liberation movements) and others less. Motivations of armed groups are important – those that seek to acquire statehood may be more willing to place constraints on their behavior. Organizational coherence and discipline are also important – fragmentation of non-state armed groups makes it difficult to negotiate access and to distinguish the targeting of aid workers from banditry.

6. Humanitarian organizations have scope to expand space and retain access.

Guidelines on the role of the military in the delivery of assistance are well-established. There is only limited scope for negotiating clearer boundaries during counter-insurgency operations. Further refinements are possible to the integrated UN mission model. Field protection strategies can be further elaborated. As situations of unacceptable risk have occurred in the past and will occur in the future, strategies for remote delivery should be formalized.

7. Focus not on humanitarian space but on civilian populations at risk.

When pressed, all humanitarians would concede that humanitarian space is not an end in itself, but a means to ensure the survival and dignity of vulnerable populations. The consolidation of a broad range of disparate challenges under the banner of ‘humanitarian space’ reinforces the already existing tendency of outsiders to view crises from their own perspective. Emphasis on the perspectives and priorities of beneficiaries can help to correct this imbalance.

8. Abandon the term humanitarian space.

There are times when adopting concepts that consolidate disparate trends into an overarching framework can be useful, but this is not one of them. By conflating a range of largely disconnected phenomenon under this single heading, humanitarian organizations have generated an unnecessarily gloomy outlook on the prospects for effective humanitarian operations. This conflation is a barrier to analyzing and responding to the very real challenges of security and access facing humanitarian organizations. The alternative is to focus on constituent elements, carefully examine the context specific nature of the challenges, and then seek to address them issue-by-issue.

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Founded in 1998 by Professor Ivan Head and opened in 2000, the Institute acts as a hub for global research and emerging issues at the University of British Columbia (UBC).

A hallmark of the Institute is to provide innovative learning and research opportunities for UBC graduate students, postdoctoral fellows, faculty, and community members that help to bridge the gap between academics and practitioners.

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### Canadian Red Cross

The Canadian Red Cross Society (CRC) is a non-profit, humanitarian organization dedicated to improving the situation of the most vulnerable in Canada and throughout the world. The Canadian Red Cross is a national society and member of the International Red Cross and Red Crescent Movement – this includes the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (Federation) and the 185 National Red Cross and Red Crescent Societies. In 1909, the Federal Government passed the Canadian Red Cross Society Act, which legally established the Red Cross as the corporate body responsible for providing volunteer aid in accordance with the Geneva Conventions.

CRC's mission is to improve the lives of vulnerable people by mobilizing the power of humanity in Canada and around the world. A wide range of assistance is provided to millions of people in Canada through a national Disaster Services program and injury prevention services (such as Water Safety and First Aid) and through community outreach programs. CRC is also dedicated to helping the world's most vulnerable populations - victims of armed conflicts and communities destroyed by devastating disasters - through its international programs.

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