Behemoth. A Journal on Civilisation 2009, 1 (41–46)

Violence beyond the State. The International Law Approach

Michael Bothe

Abstract

Traditionally and until today, international law upholds a fundamental difference between the organised use of force by States (war, also law enforcement involving the use of force) and organised violence by non-State actors. Even though the use of force in international relations is prohibited by international law, the conduct of war is nevertheless regulated. Violence by non-State actors is only in certain respects restrained and only as an exception regulated by international law. Persons other than the members of the armed forces are in many respects engaged in the use of organized force. These non-State actors are not a new phenomenon. International law has reacted to this phenomenon not by abandoning the difference between organized interstate violence and non-State violence but by addressing the problem in a differentiated way which, on the one hand, has maintained the privileged position of the use of armed force by State organs, but on the other hand does not simply render non-State violence lawless. It restrains and regulates the phenomenon.

Keywords: armed conflict; international humanitarian law; human rights; non-State actors; private military companies

State and non-State violence

Acts of organised violence committed by non-state actors are a phenomenon in international relations which is not at all new, but currently attracts much attention. Non-state violence, organised violence executed by non-state actors, can be observed as a matter of fact. But is there a difference as a matter of law? If yes, what is the difference? Why is a difference made as a matter of law and also as a matter of international ethics. Let us recall that there are those who deny that there is a difference. The famous phrase "*Soldaten sind Mörder*" (Soldiers are murderers) is based on the assumption that at least morally there is no difference between killing as an act of a State and killing as a private act. But as that phrase does not enjoy general acceptance, there must be a difference. Basically, it is based on the premise that the body politic, the ruler, later called the State has the right to grant a "licence to kill", mainly in times of organised violence between rulers (war) or for the execution of a death penalty.

That distinction between state and non-state violence is well reflected in the just war theories of Christian theology. One of the criteria of a just war is that it is conducted by a qualified actor, a "prince". Only a prince, to put it into the terminology just used, can grant the licence to kill. The order to conduct a war must come from a *legitima autoritas* which may be God himself or a *"princeps"*. This concept delegitimizes not only organised crime, but all kinds of private feuds or "civil" war.

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48

The distinction between a *legitima autoritas* and a command which does not qualify as such was strengthened by the establishment of what is commonly called the Westphalian system at the end of the Thirty Years War. That system provides for the next to complete distribution of all land territory on Earth between territorial sovereigns. Thus, the club of *legitimae autoritates* becomes clearly exclusive as a matter of law.

As a logical consequence of the distinction just described, a special set of rules develops for the use of violence between those having the licence to kill, i.e. a special regime for State violence, namely the law of war, *ius belli.* It becomes clearly recognized as a distinct body of international law in the early Modern Ages and is formulated and elaborated by Hugo Grotius (1583-1645). At present, it is rather styled as the "law applicable in armed conflict", or "international humanitarian law". About a century after Grotius, Rousseau, in his *Contrat social* of 1762, as well as the lawyers following him (Vattel, 1714-1767) clarify that law through a fundamental definition: "War" is a conflict between sovereigns (States) fighting by military means against the military effort of another sovereign. This is the basis of the principle of distinction between those who have the licence to kill and may therefore be killed, called "combatants", and those who do not possess such licence and may therefore not be killed, or only if they nevertheless take part in the hostilities, namely "civilians" or the "civilian population". In case of capture, combatants receive a privileged treatment (prisoner of war status). They may be detained for the duration of the conflict, but they may not be punished for the mere participation in the hostilities. This is the so-called combatant privilege. Civilians taking part in hostilities are not entitled to that status. Under the traditional law of war, which was still valid during the 2nd World War, they were liable to summary execution. Except for the summary executions, this still is positive international law as it stands today.

As far as the realities of armed conflict are concerned, the "cabinet Wars" of the 18th century largely corresponded to Rousseau's concept. However, this has never been the complete picture of organised violence. There have always been non-state actors engaged in organised violence: tribes, rebels, privateers, pirates, brigands. Some of them have simply been considered as criminal (deserving, and frequently ending at, the gallows), some as heroes (such as Robin Hood). These phenomena have continued until today, although the terminology and the sociology have changed: freedom fighters, resistance movements, terrorists, private military companies. Thus, the phenomena of non-state violence continue to constitute a challenge to international law.

Traditionally, international law left these phenomena unregulated. It was the freedom of the States to deal with them as they saw fit. As a matter of principle, international law was not concerned with the question of how States dealt with rebels or organised crime. On the other hand, non-state violence is not unlawful: international law does not, for example, forbid revolutions.

That being the principle, the international political system, and consequently international law, has in different ways reacted to the phenomenon of non-State violence, on the one hand by developing rules to restrain it, on the other hand by protecting or regulating some forms of non-State violence. In that way, it has avoided making any perpetrator of non-State violence simply an outlaw. Rules restraining and rules regulating non-State violence are complementary.

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48

Restraints on non-State violence

1. Pirates and terrorists. The oldest rules restraining non-State violence are those relating to piracy: a right and duty of all States to capture, prosecute and punish pirates regardless of their nationality or the nationality of their victims. The pirate is considered as "*hostis humani generis*". This is in a way the precedent of the modern law relating to terrorism: Under a series of different international treaties, there is today a duty for States to cooperate in the fight against terrorists, and to prosecute or extradite terrorists. A recent addition to these rules relates to drying out the financial resources of terrorists: Assets held by terrorists or by persons or entities dealing with terrorists have to be seized or frozen. The essential point of this type of restraint on non-State violence is this: measures are to be taken at the national level, mainly in the form of national criminal prosecution.

2. The friendly neighbour – cross border incursions. Another aspect of attempts to restrain non-State violence is the prohibition of State support for such violence. This is an old norm which stems from the more general rule that States must respect each other's territorial integrity. Being involved in cross border non-State violence is a violation of this rule. This is reflected in the fundamental declarations adopted by the UN General Assembly. In the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (UNGA 2625 (XXV) of 24 October 1970), the following obligations are formulated as part of the prohibition of the use of force: "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

This rule certainly prohibits a State behaviour which today is often called "harbouring terrorists". But what is the permissible reaction of the victim State? Does a violation of this rule trigger a right to take unilateral military action, i.e. a right of self-defence? The prevailing answer of international lawyers including the International Court of Justice is: Not necessarily, only if the assistance to trans-border violence amounts to an "armed attack". The basic formulation of this rule, also relied upon by the ICJ in the *Nicaragua case* (1986), is found in the Definition of Aggression adopted by the General Assembly in Resolution 3314 (XXIX) of 14 December 1974. A case of "aggression" is, *inter alia*, "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [for instance an invasion], or its substantial involvement therein."

In order to be regarded as an "armed attack" and thereby to trigger a right of self-defence, the participation of a State in cross border non-State violence originating in that State must, thus, reach a certain level of intensity. It is widely held, though not uncontroversial, that the involvement of the Taliban in the acts perpetrated by Al-Qaida on 9/11, 2001, was of such intensity and therefore triggered a right of self-defence against Afghanistan, the State of which the Taliban constituted at that time the effective government.

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48

Regulation of non-State violence and the protection of persons in connection with such violence

1. Restraint on violence in non-international armed conflicts. In the course of history, non-State violence often was of such intensity and duration that it became very similar to armed conflicts between States, i.e. to war. The laws of war had become a meaningful and salutary restraint on interstate violence. This invited the idea that international law, the *ius in bello*, could have a similar restraining effect in the case of "civil war". The history of this great humanitarian idea is long and tortuous. It really started with the American Civil War where the attitude of the Federal Government was indeed to apply the laws of war. Its attitude was interpreted as a "recognition of belligerency", and this was soon regarded as the condition which must be fulfilled in order to render the entire body of the laws of war applicable in an internal, "civil" war. That theory had a number of inconveniences and it was not applied in major civil wars of the 20th century, including in the atrocious Spanish Civil War. As a result, civil war degenerated into a butchery, and on the occasion of the revision of the Geneva Conventions in 1949, a kind of mini-convention (Art. 3 common to the four Conventions of 1949) was adopted which contains some very basic rules for the protection of the victims of non-international armed conflicts. In 1977, this was supplemented by Protocol II additional to the Geneva Conventions which contains more elaborate rules for the protection of those victims. The threshold of application of the latter Protocol is higher, i.e. it requires a more intensive type of conflict than common article 3. The level of protection it provides still is much lower than that applicable in an international armed conflict. After 1977, the rules of customary international law relating to non-international armed conflict have been approximated to those applicable in international armed conflicts. But there remains one important difference: States are still loath to accept that rebels may have a licence to kill. There is, thus, no combatant status and no combatant privilege for fighters in non-international armed conflict. Only *de facto* may States refrain from prosecuting rebel fighters during the course of the conflict, for reasons of reciprocity.

2. Protecting victims and perpetrators of non-State violence: the role of human rights. International law of human rights and the law applicable in armed conflict (international humanitarian law) are two bodies of international law which have overlapping fields of application. The exact relationship between the two still is a matter of controversy and of legal uncertainties, but it can no longer be doubted that a parallel application is possible where, on the one hand, there is an armed conflict, and, on the other hand, a person (the victim or the person to be protected) is under the jurisdiction of a State. This is so in non-international armed conflict, in the case of occupation (relation between the occupying power and the population of the occupied territory) and in that of detention (relation between the detaining power and the detainee). It is in these situations that the law of human rights has added important protections to the rules of international humanitarian law. Thus, if persons are arrested and detained for having unlawfully participated in hostilities, they may not just summarily be sentenced to death and swiftly executed. They enjoy the procedural guarantees of the law of human rights. This is so even where these persons find themselves outside the territory of the State in question. Despite the objection raised in particular by the United States and Israel, it has to be maintained the human rights apply extraterritorially wherever a State exercises jurisdiction. Jurisdiction in this sense is not only territorial jurisdiction.

This has, in particular, consequences for the regimes of detention. In international armed conflict, combatants are entitled to prisoner of war status. But if persons are not enti-

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48

tled to such status, because they are not members of the armed forces, because they may have forfeited the status by not distinguishing themselves properly from the civilian population, because they are fighters in a rebel army, they are nevertheless in all these cases entitled to the safeguards prescribed by the law of human rights: detention is only admissible where prescribed by law, the reasons of detention are subject to judicial scrutiny, the treatment during detention has to respect the human dignity of the detainees.

Even the right to life remains applicable in times when organised violence reigns. The right to life is not an absolute right. The question is its limitation. The right to life does not prohibit the use of deadly force in all circumstances, for instance not where it constitutes a lawful act of war. In warfare, the use of deadly force is lawful if it is directed against combatants, or against civilians while they are directly taking part in hostilities. This is essential for the question of the so-called "targeted killings": a combatant may be killed, i.e. specifically and individually targeted at any time. A civilian may only be individually targeted while actually taking part in hostilities. Once he or she ceases to do so, returns to his or her peaceful occupation, he or she may no longer be so targeted. This rule, it must be said, is often violated, but it is still a valid rule of positive law, it has not fallen into desuetude.

That being so, there are (shall we say, of course?) legal constructions to create a free fire zone to the detriment of individuals considered to be undesirable. This is the purpose of the notion of "unlawful combatant" as it is currently used by certain States. This notion was applied by the U.S. Supreme Court in a case (*ex parte Quirin*) where the use of the term was indeed appropriate. Members of the German Wehrmacht (who for that reason were indeed combatants) landed in the United States for the purpose of committing acts of sabotage. After their arrival, they threw away the minimal outside distinctive signs they still wore during landing. Thus, as they failed to distinguish themselves from the civilian population while engaging in acts of war, they forfeited their right to being treated as combatants and consequently as prisoners of war. They had become "unlawful combatants". But nowadays, this notion is designed to create a legal black hole. The person may be individually targeted at any time because he or she is considered as a "combatant". But he or she is not entitled to prisoner of war status and combatant privilege because he or she is an "unlawful" combatant. A civilian, however, becomes a combatant, i.e. targetable at any time, only by joining the armed forces of a State, not just by participating in hostilities. The concept of "unlawful combatant", as used today, is fundamentally flawed.

Outsourcing or privatizing State violence: private military companies and similar phenomena?

There is still another phenomenon which tends to blur the line between State and non-State use of force, and this is the use of private personnel in situations which are closely related to the conduct of hostilities. In particular, private personnel when used in securing the safety of valuable assets or of endangered persons. Furthermore, they may provide the necessary know-how for using high-tech weaponry, and may thus be closely associated with its use.

International humanitarian law is based on the assumption that the military effort of the State is a function of the "armed forces" as part of the State apparatus and cannot be the task of private enterprise which may only be controlled by the State. In the field of human rights, it is well recognized that a State cannot evade the duty to fulfil its human

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48

rights obligations by simply handing over certain tasks to private entities. Thus, it is unlawful under the law applicable in armed conflict to entrust certain key responsibilities to persons which are not part of the military organisation of a State, e.g. command responsibility over prisoner of war camps. In addition, it is that the State exercises such degree of control over private military companies to ensure that the obligations normally incumbent upon them are indeed respected. A number of States have recently adopted guidelines to that effect, the "Montreux Document" which is not legally binding, but carries a certain weights as a formulation of principles.

State military action and non-State violence: still a meaningful distinction under international law?

Persons other than the members of the armed forces are in many respects engaged in the use of organized force. These non-State actors are not a new phenomenon. International law has reacted to this phenomenon not by abandoning the difference between organized interstate violence and non-State violence. It has addressed the problem in a differentiated way which, on the one hand, has maintained the privileged position of the use of armed force by State organs, but on the other hand does not simply render non-State violence lawless. It restrains and regulates the phenomenon.

Michael Bothe, Prof. em., Dr. iur. (Heidelberg). Professor of Public Law, in particular International Law at the Universities of Heidelberg, Hannover and Frankfurt 1977-2003; Visiting professor/lecturer at different universities in Europe, the United States and Australia, and director and coordinator of a number of major international research projects. Currently Chair, Commission for International Humanitarian Law, German Red Cross, and President, International Humanitarian Fact-Finding Commission.
E-Mail: bothe-bensheim@t-online.de

© 2009 Akademie Verlag
ISSN 1866-2447 DOI 10.1524/behe.2009.0004
Unangemeldet | 85.178.2.112
Heruntergeladen am | 25.10.13 07:48