

# Empowered Groups, Tested Laws, and Policy Options

The Challenges of Transnational  
and Non-State Armed Groups

Program on Humanitarian Policy and Conflict Research  
Harvard University

Graduate Institute of International Studies  
Geneva

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Report on an Interdisciplinary Seminar  
on Transnational and Non-State Armed Groups

*Organized by  
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and the Graduate Institute of International Studies in Geneva  
in cooperation with the Radcliffe Institute for Advanced Study  
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The document is an analytical distillation of the discussions that took place at the March 8-10, 2007 seminar on Transnational and Non-State Armed Groups convened by the Program on Humanitarian Policy and Conflict Research at Harvard University, and the Graduate Institute of International Studies in Geneva, in cooperation with the Radcliffe Institute for Advanced Study at Harvard University.

The report also builds on six original papers prepared for the seminar, which address the different facets of the questions at hand. The papers and their authors are:

- “Transnational and Non-State Actors: Issues and Challenges” by Claude Bruderlein (Harvard University), Andrew Clapham (Graduate Institute of International Studies), Keith Krause (Graduate Institute of International Studies), and Mohammad-Mahmoud Ould Mohamedou (Harvard University)
- “Al Qaeda, Armed Groups, and the Paradox of Engagement” by Pablo Policzer (University of Calgary) and Ram Manikkalingam (University of Amsterdam)
- “Transnational and Non-State Actors and the New Landscape of War” by Thomas X. Hammes (United States Marine Corps officer, ret.)
- “Non-State Actors and the Resort to Violence: Terrorism and Insurgency Strategies Compared” by Isabelle Duyvesteyn (Utrecht University)
- “Transnational Actors in Contemporary Conflicts: Hizbullah and its 2006 War with Israel” by Judith Palmer Harik (Matn University)
- “The Private Security Industry, States, and the Lack of an International Response” by Caroline Holmqvist (King’s College)

The papers are available at [www.tagsproject.org/publications](http://www.tagsproject.org/publications).

## Foreword

The bipolar distribution of power that marked the Cold War imposed a certain order on the world. While the realities on the ground were always more complex than implied by the notion of a dichotomous world of competing superpowers with conflicting ideologies, nevertheless the dizzying proliferation of sub-state conflicts since the end of the cold war has posed profound challenges to international security, to those charged with protecting it as well as those dedicated to analyzing it.

In the spring of 2007 an international group of analysts representing academia, policy-makers, the legal profession and the international development community convened at the Radcliffe Institute for Advanced Study to engage in a focused discussion of the recent changes in the nature of conflict and on the implications of these changes for the state and the international legal system. This is precisely the type of innovative, cross-disciplinary, intellectual exploration of knowledge at its outermost limits to which the Radcliffe Institute is dedicated.

Such is the metamorphosis of warfare that a great many of the world's citizens today feel more vulnerable to non-state armed groups than they ever did to even nuclear armed states. The concept of the state as the basic unit of analysis in international relations that has prevailed at least since the Treaty of Westphalia is being challenged by the profusion of transnational and sub-state groups. The state's monopoly on force has also been challenged by transnational and non-state groups. It is crucially important that policy makers and analysts respond to these developments.

The study that follows is a lucid, thoughtful, and dispassionate effort to analyze the behavior of non-state armed groups. The complex and variegated nature of these groups, as well as states, is openly acknowledged. Abjuring polemical language the report is measured, grounded, and keenly aware of the limitations of the field. The report does not confine itself to the behavior of what others might call terrorist groups, indeed, its discussion of the role of private military contractors and the challenges they pose, seems quite prescient in light of contemporary controversies on this subject. The pros and cons of various policy options for the state, such as to engage or not with the non-state adversary, are carefully laid out.

The US response to the attack of 9/11 was to declare a war on terror. This prompts the question whether the war on terror is legally an armed conflict and whether the international laws relating to armed conflict – International Humanitarian Law or the Law of Armed Conflict – rather than human rights domestic legislation and international law on co-operation in criminal matters can be applied? The report presents a range of views on this and other critical legal points.

Much of the value of this report lies in realism, its explicit recognition of the complexities involved in the issues it examines, a range of views on how to address them and the arguments for and against different approaches. It also provides for a range of suggestions on how to integrate armed groups in post-conflict situations while fully conceding the difficulties of so doing.

Rather than pretending to be the last word on these crucial issues, this reports sets out a research agenda and wisely argues for a concerted effort to acquire a keener understanding of the motives, capabilities and ideologies of non-state armed groups so that states can adapt to the ever evolving threats they face.

Louise Richardson  
Executive Dean  
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## Executive Summary

The rising importance of non-state armed groups is heightened by three post-Cold War phenomena: the increased fragmentation of states into smaller self-governing entities, the augmented privatization of warfare, and, by virtue of the expansion of global communication networks, the inflated accountability of states towards non-state actors. This context has influenced significantly the emergence of modern transnational and non-state armed groups (NSAGs) — i.e., groups that use force, flow across state boundaries, utilize global communication and transportation networks, seek international influence, and increasingly undertake military operations against dominant states.

The key markers of how contemporary conflict between states and NSAGs varies from classical state-based warfare are to be found primarily in tactical and strategic differences. The increased (quantitative) participation of NSAGs in conflict presents in and of itself a strategic challenge for states. Since the events of September 11, 2001, and their aftermath, Al Qaeda and its associated groups, for example, have decentralized and diversified their activities significantly. Almost systematically, NSAGs have proven through their military aptitude that they can innovate faster than states. It, thus, became a strategic test for states to transform and adapt their intelligence and war-fighting capabilities to face these new contests and such mutation. From the tactical perspective, one of the most important developments is the increasingly unconventional and irregular means and methods used by transnational NSAGs. This is also one of the areas that conventional military forces have struggled to respond to.

It is important in this changed context to differentiate between non-state armed groups, acknowledge their complexity and broadened goals, and register the implications of such development for states (which are themselves just as variegated as NSAGs). The ability of an NSAG such as Hezbollah to rely on local support, or at least tolerance, is another important modern-day advantage of armed groups that render conventional military tactics much less effective, if not obsolete in some cases. Such evolution underscores the fact that many an NSAG — whether as sophisticated as Hezbollah or more fluidly organized — is well suited to engaging in protracted conflicts in which no decisive military victory is required. For indeed the groups do not, by virtue of their asymmetrical stance, need necessarily to come out so far ahead of their (state) opponent to consider engagements victories.

The response of states assailed by these groups has tended to be forceful. The consequence of this dominant stance has been a reluctance to consider alternative courses of action to military response against these types of groups, and there exist — besides the groups' resort to indiscriminate use of force — many barriers to be overcome before non-military conflict resolution mechanisms can be considered. States have formed new multilateral networks — coalitions of 'the willing' — in order to combat transnational NSAGs. These *ad hoc* formations are in contrast to the formalized cooperation arrangements during the Cold War, and bring both benefits and challenges. On the one hand, states can respond reasonably quickly to developing events, the appearance of new groups, and information about emerging threats. On the other hand, there is a significant potential for confusion and miscommunication during the monitoring of the flows of people, money, goods, and information. Moreover, overlapping legal frameworks, agencies, and jurisdictions can confuse and obfuscate joint operations aimed at curtailing the activities of these groups.

More often than not, NSAGs that use terror as a tactic target civilians and non-military or political infrastructure in order to achieve political goals. These groups may want to be included in the political system or replace the existing system in their polities. Some groups may use extreme tactics, and states can respond with equally absolute measures, including targeted assassinations against group leaders and massive campaigns on their supporters. This approach on the part of the state can backfire, resulting in shifting public sympathy towards groups that use terror. Such method can also take a toll on the morale of conventional military forces that are not prepared for protracted, low-intensity conflicts that targets individuals, often with resultant civilian casualties.

It is important to consider what is new about transnational non-state armed groups and whether their importance has been overstated. While armed groups are certainly not a new phenomenon, the types, motivations, and how and why these groups fight have become far more diverse, complex, and complicated in the post-Cold War era. Any framework for understanding NSAGs must make sense of these groups in all their different formations, and consider how and whether they might be engaged per this continuum. Not all NSAGs have explicitly zero-sum goals and, when appropriate, this presents states with opportunities to modulate policies into a political rather than a violence-based process.

The rise of non-state armed groups in the post-Cold War period raises legal challenges in terms of how to deal with these entities using international humanitarian law (IHL) and international human rights law (IHRL). By and large, state responses to NSAGs are in flux and most governments around the world remain locked in attempts to determine the legal implications of the “global war on terror,” including, notably, what rights and obligations states have towards those individuals fighting for NSAGs, and the legal obligations of states on whose territory fighting occurs but where the state is not involved. IHL is not undermined by discussion of its utility. IHL should remain as a primary baseline of conduct in conflict and attempts to circumvent it or avoid applying it undermine the obligation to respect it and the further likelihood of compliance among NSAGs. An altogether novel or alternate set of laws should not be written to deal exclusively with conflict involving NSAGs. The architecture of the Geneva Conventions and Additional Protocols and customary international law would serve us well if merely clarified as regards conflicts that also involve new types of NSAGs.

The role of private military companies (PMCs) in the transformation of conflict raises issues of regulation, legitimacy, and practical operability. States have the responsibility to provide security for their population and when they are unable to do so, opportunities become available for the private military industry. When, however, PMCs are at the frontline of conflict between state interests and NSAGs, there are a number of legal and human rights issues that arise, including, most notably, who holds the PMCs responsible for their conduct. The recent expanded use of private military companies, in Iraq in particular, has raised public awareness of these problems including their perceived ability to act with impunity. The proliferation of PMCs is significant above all in its cumulative effects: the existence of individual companies may not in and of itself be a threat to the state (provided these corporations do not commit egregious crimes or use excessive force), while the gradual (unchecked) taking over of large parts of the security sector by international PMCs clearly does. Though PMCs are used primarily for political tasks, they are neither political nor politically-mandated actors. Ultimately, the involvement of PMCs is weighty but, in contradistinction to other types of NSAGs, may not necessarily have a pivotal impact on the long-term evolution of a conflict.

Whatever the inadequacies of international or domestic law, there is, generally, room for greater engagement with NSAGs in order to improve the fate of the victims of armed conflict. Groups that seek legitimacy, inter-

national support, and involvement in the political process could be rewarded for compliance with the laws of war. States exhibit a reluctance to develop negotiation channels with armed groups sharing a concern that engaging armed groups diplomatically can end up lending legitimacy to the groups and their grievances, or strengthening the groups' negotiating positions. The unwillingness to initiate channels of communication can prolong conflicts and undermine post-conflict settlements.

Rather than inquiring whether it is possible to negotiate with NSAGs, it may be best to ask under what conditions are negotiations the best strategy for the state and how does the international community maximize the likelihood that negotiations will result in sustainable agreements. Above and beyond providing an agile forum for discussion, this process can also generate a realization that non-violent strategies can be rewarded. Some armed groups develop over long periods of time, adding to their membership when their grievances go ignored and when non-violent means of protest are ignored. One perspective on this issue is that in the earliest stages of conflict in which a minority group is involved, the aspirations of these groups are quite bounded and potentially reasonable. If not taken seriously or opposed actively, and should they enjoy the ability to husband resources to organize themselves efficiently, these groups often proceed to confront governments and escalate to violence.

For the most part, armed groups are very effective at 'being' armed groups and rather poor when it comes to the process of engagement, and this is one of the most basic areas in which the international community could support peace processes. One of the most fundamental requirements to enhance the response to the challenges posed by NSAGs is the need for better information in pre- and post-conflict situations. A robust framework to assess armed groups, especially their organization and command structures, helps those involved in post-conflict reconstruction to identify leaders and groups that have the support of the community. This understanding of which leaders are legitimate must be coupled with improved comprehension of how groups define their agendas through charities and political activities.

There are neither quick fixes nor easy solutions to the issue of how to reintegrate NSAGs successfully into post-conflict societies. However, these complex issues do require close cooperation and information sharing among all of the actors involved in reconstruction processes — military and civilian. Non-state armed groups have the capabilities to respond swiftly to the loss of power due to a successful election or potential instability caused by a failed harvest or road collapse. One currently underappreciated capacity of post-conflict reconstruction agencies is the ability to monitor these changes and disseminate information among all aid agencies working in the field. A second one is the potential of developing short-term projects for armed groups to be involved in immediately after conflict has ended in order to divert them from disrupting post-conflict reconstruction efforts.

In considering how to move forward with research agendas and practical engagement with NSAGs, it is important to consider how to clarify and refine existing thinking that informs modern armed conflict, and how to relate those categories to novel and changing elements. It is also important to consider whether the lexicon and classifications used to analyze and comprehend NSAGs contain assumptions that limit options for dealing with them efficiently and legitimately.

# Introduction

On March 8-10, 2007, the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) and the Graduate Institute of International Studies in Geneva (HEI), in collaboration with the Radcliffe Institute for Advanced Study at Harvard University, convened an international interdisciplinary seminar on “Transnational and Non-State Armed Groups”.

Participants to the seminar were invited to organize their thoughts and to engage in privileged intellectual exchanges on non-state armed groups and the contemporary landscape of war and law around three discrete strands of inquiry as follows:

- the metamorphosis of war,
- the limitations of the current laws of war, and
- existing and potential strategic responses.

The aim of the seminar was to examine the recent and consequential rise of transnational and non-state armed groups (NSAGs) with a view to understanding the place and role of these actors in the new context of conflict, and identifying options in relation to the legal and policy implications of these transformations.

In disaggregating the problem into these three different facets, the intent of the seminar was to map out the key components and actors of the new scene and enable an innovative reconstruction. Through presentations and discussions among an international group

of senior scholars, the aim, too, was to develop and articulate novel thinking into how the increasingly prominent role played by transnational and NSAGs is at once altering the landscape of armed conflict and challenging traditional understandings of the laws of war.

Articulated around these lead strands, panels were devoted to the metamorphosis of war; the challenges to international humanitarian law; existing and potential responses for compliance and international security; non-state actors’ resort to terrorism; the role, place, and status of private military contractors; the involvement of non-state actors in post-conflict situations; and the examination of cases of recent wars where non-state actors featured prominently such as those of Iraq, Afghanistan, and Lebanon.

Early in the discussion, it became clear that it was important to consider the contextual background from which NSAGs emerged. Until recently the challenges of non-state actors, such as civil society organizations, to states was welcomed by scholars as part of an implicit belief that such actors would contribute to the national and global welfare by including the views and values of a wider spectrum of the populations. Non-state actors became the focus of international attention because of their part in bringing increased pressure on states in the post-Cold War era to move toward democratization and respect for human rights. This largely positive perspective, however, did not extend to NSAGs, whose use of force has been considered destructive and disruptive on post-Cold War states.

The rising importance of NSAGs is compounded by three post-Cold War trends.<sup>1</sup> First, the increased fragmentation of states into smaller self-governing entities, which has occurred for the most part not peacefully and smoothly, but only following the resort to violence by non-state actors. This includes newly independent states such as East Timor, and states formed from the ashes of larger Cold War entities such as the former Yugoslavia. A second important trend is the augmented privatization of warfare and the introduction of many new private security and military actors into an increasingly complex international political environment. As a result, NSAGs have presented a major challenge to the states' monopoly of the use of force in their own territories. Furthermore, in some areas of the world, such as Sierra Leone, private entities have acquired the ability to shift the balance of power inside a state, remodeling the state's political spectrum to fit their group interests. Third, by virtue of the expansion of global communication networks, states have become more accountable for their acts towards non-state actors. This trend towards global transparency has brought increased scrutiny to the states' domestic political and security agendas.

This context has very much influenced the emergence of modern transnational NSAGs — i.e., groups that use force, flow across state boundaries, utilize global communication and transportation networks, seek global influence and to communicate with a wider audience, and increasingly undertake military operations against dominant states.

In order to understand the impact of NSAGs on states and the international community, it is important to begin with some definitions. Recognizing that definitions can be fraught with controversy, the approach here is to avoid politicized and polarizing terms, and attempt to establish scientific terminology about armed groups that benefits scholars and practitioners in their endeavors.

Accordingly, in the seminar, the phrase “non-state armed groups” was used generically to describe armed groups — both transnational and national — that are not under direct control of the state. Although they can play a significant role in terms of international relations, these groups are not formal members of the international society. The international society is regulated by international law — a corpus of norms made by sovereign states. Some of these norms are applicable to NSAGs through the national jurisdiction of the concerned state. Yet many of these groups appear indifferent to international norms and are therefore not as likely, unless they aspire to become states, to abide by the norms and forms of order associated with the “anarchical society.”<sup>2</sup> As such, NSAGs may be less likely than states to be deterred, influenced by sanctions, or persuaded by the traditional incentives of negotiation attempts. NSAGs also lack the accountability associated with states. While they may control large segments of populations and territory, or may even be recognized as legitimate entities by the local population or a foreign government, and in possession of a form of public authority, they lack institutionalized means to enforce international

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<sup>1</sup> This section builds on discussion from Claude Bruderlein (Harvard University), Thomas Biersteker (Brown University), Pablo Policzer (University of Calgary), and Barry R. Posen (Massachusetts Institute of Technology).

<sup>2</sup> Hedley Bull, *The Anarchical Society — A Study of Order in World Politics*, New York: Columbia University Press, 1977. See, in particular, the section on “War and International Order,” pp. 178-194.

norms. Moreover, while NSAGs engaged in armed conflict may share many attributes, not all NSAGs operate in the same manner and some preliminary distinctions should be kept in mind.

Firstly, it is important in this context to *differentiate between non-state armed groups* that could be described as proto-states or states-in-formation based on political and/or ethnic movements (such as national liberation movements) that desire statehood or sovereign recognition as states and those that are based on transcendent ideologies or millenarian movements. Groups such as the Liberation Tigers of Tamil Eelam (LTTE) and the Kosovo Liberation Army (KLA, *Ushtria Çlirimtare e Kosovës* or *UÇK*) have goals that entail the creation of new states. Moreover, such groups increasingly function and operate like a state in the territories they control. Generally, these kinds of groups are more likely to be deterred, engaged positively in negotiations, and respond to incentives and sanctions, than ideological or religious movements with both broader and vaguer goals and agendas.

It is also important to note, however, that in contrast to a dominant trend during the Cold War period, some post-Cold War NSAGs have eschewed the organization and goals of national liberation movements. Instead they are organized around ideological principles, recruit and seek influence in territories that far exceed their original places of origin. As such, they display, to varying degrees, transnational features.

Secondly, the *complexity of NSAGs* must be acknowledged and grasped. While many of these groups,

such as the Palestinian Movement Hamas, the Lebanese Party Hezbollah, and the Irish Republican Army (IRA) have engaged in armed violence against civilians, they cannot be simply classified in undifferentiated ways as “terrorist organizations.” However morally reprehensible these acts may appear, they should not obscure the social complexity of these organizations and their relationship with their community through the provision of social welfare and periodic engagement in competitive party politics and elections. Such complexity may reveal conditions under which NSAGs may be moved away (or come to move themselves) from the further commitment of acts of terrorism by facilitating or at least not preventing their participation in competitive politics.

Thirdly, it is also key to consider the *broadened goals of NSAGs* and the implications of such development for states. While some NSAGs are content with limited self-autonomy, others aim to usurp the role of states in a region, while others seek yet again to create a wider regional or even international sphere of influence and control. Groups that pursue the strategic transformation of regional and international affairs along ideological lines challenge the existence and utility of states.

Finally, *just as NSAGs are complex and variegated, so too are states*; the political map of the world is profoundly misleading and gives the appearance that all the states contained within the clearly-identified boundaries are essentially similar. This is hardly the case. States are exceptional with regard to their possession of a monopoly on the legitimate use of force.<sup>3</sup>

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<sup>3</sup> As defined in the work of Max Weber, *Politik als Beruf* (Politics as a Vocation), Munich: Duncker & Humblodt, 1919, available in *From Max Weber – Essays in Sociology*, edited by H.H. Gerth and C. Wright Mills. New York: Oxford University Press, 1946. Weber writes of the monopoly of the legitimate use of force as a necessary condition of statehood. He also argues that such monopoly could be delegated or derivative, provided the ultimate source of legitimacy remains with the state. These notions of ‘centralization’ and ‘authorization’ to use force are particularly consequential as regards the normative challenges of non-state actors.

The inability of some states to provide for security within a given territorial space and their shortcomings in projecting power over their territories in what are often called ‘failed’ or ‘failing’ states gives NSAGs much room for maneuver. In this discussion of armed groups therefore, in addition to differentiating among NSAGs, it is also important to consider the role of the state and its response to the challenges posed by NSAGs.

The present report opens with a discussion of how non-state armed groups have changed warfare and its impact on the state. Next, it considers the legal dimensions of the rise of NSAGs, including the limitations of the current laws of war. Strategic responses are then discussed — the range of policy options available to states, and to the international community to respond to the challenges presented by transnational and national NSAGs to the integrity of international law and of its mission, in particular as it refers to the protection of civilians in times of conflict. Finally, the concluding section discusses the overarching themes that have arisen from this discussion of NSAGs.

## Armed Conflict and Change

The first analytical lens of this discussion focuses on the metamorphosis of war, in particular, the characteristics of recent asymmetric conflict and how violent conflict between states and transnational NSAGs differs from more traditional state-based warfare. Other important issues to consider include the impact of such conflict on the laws of war, and how traditional notions of legal warfare, such as fighting according to the principles of distinction and proportionality and limits on the targeting of civilians, may be breaking down.

In considering NSAGs it is important to first understand that they can range in size and capability from quite limited to very sophisticated.<sup>4</sup> Some NSAGs display limited means and objectives, while others have complex military and political wings. Some of these groups come from weak, corrupt, or failing states, affecting their ability to operate. NSAGs can also derive their identity and power from the manipulation of powerful ethnic, ethno-national, religious, and communal differences by competing elites. Some NSAGs, in this context, are essentially opportunistic and use internal and transnational violence as the means for obtaining state resources and power, secession, or group autonomy. Other groups are ideological with global factors such as radical ideology inspiring their activities and aims.

Other important characteristics of armed groups are their ability to operate through clandestine organi-

zations, their dependence on intelligence and counterintelligence capabilities, and their masking of operations through denial and deception. In particular, transnational NSAGs can attack within and across state boundaries, even globally, based on sophisticated networks of communication and information, empowered by globalization and information-age technologies. Such clandestine and IT-based operations can bypass superior military power of nation-states to attack political, economic, and other high-value targets.

In order to understand these groups it is also important to discern whether the group can be recognized as a national entity that essentially seeks security and political objectives in a particular state, or whether it has transnational security and political objectives. Interestingly, while NSAGs may have distinct national or transnational objectives, they may both rest upon the creation of transnational networks to mobilize their resources and gather intelligence. As far as the seminar was concerned, NSAGs were understood as national or transnational based on their capability to operate across borders, regardless of their actual objectives in crossing these borders. A definition that resonated with the participants in the seminar in regards to whether a group is transnational was “the ability to move tangible or intangible items or resources across state boundaries when at least one actor is not an agent of a government or an intergovernmental organization.”

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<sup>4</sup>This discussion draws on ideas discussed by Mohammad-Mahmoud Ould Mohamedou (Harvard University), Thomas X. Hammes (Independent Security Consultant), Richard Shultz (The Fletcher School at Tufts University), and Christopher Coker (London School of Economics and Political Science).

In the case of transnational groups with local objectives, some of the group's leadership may reside (temporarily) abroad and the group may make (extensive) use of diasporas to gather funds and to raise international awareness of their cause. Hezbollah, for example, fits this pattern of a non-state armed group that has both military and political objectives and capabilities, and has built extensive networks of supporters outside of its main base in Lebanon. That group's important relations with at least two states (Iran and Syria), beyond the borders of its own (Lebanon), are added transnational elements, including of clientelism and patronage, raising issues of transitivity of legitimacy.

Since the September 11, 2001 attacks on the United States, however, transnational NSAGs with local infrastructure and both local and transnational objectives have increasingly attracted the attention of states. Al Qaeda is certainly the most comprehensive of these types of groups.<sup>5</sup> It has used a local infrastructure — training camps and weapons caches mostly in Afghanistan but at times elsewhere, in places such as the Sudan and Pakistan — to plan and carry out attacks conducted in the Middle East, Europe, Africa, and the United States. Smaller groups, included those inspired by Al Qaeda, also exploit the weaknesses of states, their ungoverned territories, and porous borders (e.g., the Sahel) in order to prepare attacks carried out in other states.

As discussed below, the response of states assailed by these kinds of groups has tended to be forceful. Since most transnational NSAGs strike military and civilian targets alike, their attacks across borders tend to en-

ergize both the state and the local populations against them. Most states have felt justified in using harsh measures against these groups. The consequence of this dominant stance has been a reluctance to consider alternative courses of action to military response against these types of groups. This is not to reject at this early stage in the discussion any prospects for negotiation or political solutions to conflicts involving NSAGs and states. However, there exist — besides the groups' resort to indiscriminate use of force — many barriers to be overcome, including the tendencies of states to band together in military coalitions against transnational NSAGs, before such conflict resolution mechanisms can be considered.

Next, it is important to consider what is new about transnational non-state armed groups and whether their importance has been overstated or whether their lasting implications are not yet fully grasped both operationally and in terms of policy implications. While armed groups are certainly not a new phenomenon — there is a long history of wars inside states and civil wars — the types, motivations, and how and why these groups fight have become far more diverse, complex, and complicated in the post-Cold War era. Thus, while there are some types of groups that are recognizable from the post-World War II struggles for power and resources, there are a plethora of other groups not easily recognized and which are, consequently, not dealt with easily and straightforwardly.

Moreover, the transitioning of groups to criminal activities, the prevalence of transnational networks as preferred domains of action, and the use of the Inter-

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<sup>5</sup> See John Gray, *Al Qaeda and What It Means to Be Modern*, London: 2003, in particular Chapter Six, "The Metamorphosis of War," pp. 71-84; Jason Burke, *Al Qaeda — Casting a Shadow of Terror*, London: IB Tauris; Abdel Bari Atwan, *The Secret History of Al Qaeda*, London: Saqi Books, 2006; and Lawrence Wright, *The Looming Tower — Al Qaeda and the Road to 9/11*, New York: Knopf, 2006.

net, particularly by Al Qaeda and associated movements, for information sharing, operations, and to develop manuals and doctrine for fighting are most consequential new developments to which states have been slow to adapt. In the post-September 11 context, the proliferation of NSAGs motivated by extremist ideology and united by the World Wide Web is also a striking development that sets the current generation of NSAGs apart from the revolutionary movements of the post-World War II era.

Non-state armed groups have demonstrated a formidable ability to change and adapt their structures in response to the reaction by states. In the case of Al Qaeda, for example, the original group appears to have evolved from a loose coalition, to a tightly knit core group of ideologically motivated members inspiring an invisible, cell-based network of apparently autonomous entities. Al Qaeda has survived, in particular, by decentralizing its operations, and some scholars argue that this has made the center of Al Qaeda less relevant politically in considering how to deal with this particular NSAG. Thus, it has become even more important to develop a clearer understanding of the different types of NSAGs, their motivations and activities, in order to consider whether and how the numerous groups at the periphery of Al Qaeda may present opportunities for states to deal with the threat from a globalized radical movement.

The groups at the periphery differ according to ideology — some are profoundly religious, others are deeply political, and yet again some are motivated by ethnic rather than ideological loyalties. A faction of these groups may have the potential to develop

into political entities that challenge a state's political legitimacy, while other groups draw their power from their ability to resort to force and distribute the spoils of conflict. Thus, any framework for understanding NSAGs, must make sense of these groups in all their different formations, and consider how and whether they might be engaged per this continuum.

### **The challenge to states**

The key markers of how violent conflict between states and NSAGs varies from classical state-based warfare are to be found primarily in tactical and strategic differences, and in the nature of the pre- and post-conflict environments. The increased (quantitative) participation of non-state armed groups in conflict presents in and of itself a strategic challenge for states.<sup>6</sup> Almost systematically and certainly regularly, NSAGs have proven through their military aptitude that they can innovate tactically and strategically faster than states. Since the events of September 11, 2001, and their aftermath, Al Qaeda and its associated groups, for example, have decentralized and diversified their activities significantly. It, thus, became a strategic test for states to transform and adapt their intelligence and war-fighting capabilities to face these new contests and such transformation.

In particular, the intelligence communities of states have struggled to understand the motivations, interests, and ethno-national, religious, and resource-based grievances of new groups. Intelligence networks have also struggled with how to gain internal access to these groups in order to monitor their plans and activities from within the organization, particu-

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<sup>6</sup> For an empirical counterweight to the new war thesis, see Erik Melander, Magnus Öberg, and Jonathan Hall, "The 'New Wars' Debate Revisited: An Empirical Evaluation of the Atrocity of 'New Wars,'" Uppsala Peace Research Papers No. 9, Department of Peace and Conflict Research, 2006, Uppsala University, Sweden.

larly when group identity is centered on religious or ethno-national loyalties.

The transnational nature of these groups also makes it difficult for states to monitor them externally; albeit this presents both opportunities and challenges for states to cooperate bilaterally and multilaterally in order to be able to handle the challenges raised by armed groups. Some states have responded by participating in international, anti-money laundering initiatives. There are, however, limits to the willingness of states to cooperate, and these restraints are bounded by the degree to which states consider the threat from NSAGs a menace to their own sovereignty and territorial integrity.

The state response to the rise of conflict with transnational NSAGs has also changed in other ways. States have formed new multilateral networks — coalitions of ‘the willing’ — in order to combat transnational NSAGs. These *ad hoc* formations are in contrast to the formalized cooperation arrangements during the Cold War, and bring both benefits and challenges. On the one hand, states can respond reasonably quickly to developing events, the appearance of new groups, and information about emerging threats. This flexibility is a considerable advantage in a world where states seem to be two steps behind the ever-evolving NSAGs. On the other hand, there is a significant potential for confusion and miscommunication during the monitoring of the flows of people, money, goods, and information that support the activities of transnational NSAGs. Moreover, each state approaches NSAGs from a different perspective and overlapping legal frameworks, agencies, and jurisdictions can confuse and obfuscate joint operations aimed at curtailing the activities of these groups.

International organizations have faced similar challenges in terms of how to deal with the threat from armed groups. For example, international lawyers are considering whether the United Nations — an organization of states — can legally use targeted sanctions against transnational NSAGs. The role of the United Nations in brokering peace agreements between states and NSAGs and in monitoring cease-fire agreements is also under discussion as the number of conflicts involving one or more NSAGs rises.

In addition, although the existence of transnational NSAGs may not lead to an increased likelihood of great power war, these groups challenge the basis of international authority and legitimacy on several fronts. Most obviously, these groups impugn the state’s ability to provide security and its monopoly on violence. NSAGs often develop in states in which there is a power vacuum or in which states already fail to provide economic and physical security for some portion of the population. In that sense, NSAGs are not merely involved in conflict with states, for some of them can offer alternate social services and goods as a means to establish client-patronage relationships with the general population. These alternate lines of dependency can bolster their own popularity and support and serve to emphasize the inability of the state government to deliver these services for their own citizens.

NSAGs can also challenge the social contract of a state — the agreement between a state and its citizens that the government of the state is responsible for its foreign policy. In the United Kingdom (UK) for example, the British government’s involvement in the war in Iraq has been used by extremist British Muslim groups to justify attacks on British citizens. In addition, the use of the Internet to construct vir-

tual communities of likeminded extremists — which some have called a ‘cyber-caliphate’ — which allows people to be uninvolved in the society in which they live further undermines the interaction between the state and its citizens. This raises longer-term and complex questions about whether states still enjoy the full political capital to secure legitimacy with citizens of different socioeconomic and cultural hues, and how they can organize themselves to face the new security threats from transnational armed groups (which also challenge such legitimacy).<sup>7</sup>

Transnational NSAGs present a deterrence challenge to states for a number of reasons.<sup>8</sup> First, NSAGs are less likely to be hindered because they lack the reciprocal accountability of states to other states in the international system. The groups may also be unaccountable to their own support base, particularly if they have messianic or ideological motivations. Moreover, NSAGs have fundamentally different perspectives from states on the issues of victory and defeat, which presents the state with unique challenges especially in terms of how to deter NSAGs.

The war between the state of Israel and the Lebanese non-state armed group Hezbollah in July-August 2006 demonstrates the increased strategic sophistication of NSAGs, and how difficult it has now become for states to win such conflicts. During the thirty-three day war, Hezbollah used cutting-edge weapons technology, including unmanned aerial vehicles or drones, to extend its ability to attack far into Israeli territory. Israel, in return, used its airpower capabili-

ties to attack roads leading to Syria in the north of Lebanon in an attempt to cut off Hezbollah’s transnational supply lines. However, Hezbollah fighters in the south had large stockpiles of missiles, and the continued shelling by Israel only served to strengthen the group’s support in the Lebanese population. Hezbollah adapted their tactics to fit the local geography and used bunkers, arms caches, and protected supply lines to great effect. The ability of an NSAG such as Hezbollah to rely on local support, or at least tolerance, is another important modern-day tactical advantage of armed groups that render conventional military tactics much less effective, if not obsolete in some cases.

Such evolution underscores the fact that many an NSAG — whether as sophisticated as Hezbollah or more fluidly organized — is well suited to engaging in protracted conflicts in which no decisive military victory is required. For indeed the groups do not, by virtue of their asymmetrical stance, need necessarily to come out so far ahead of their (state) opponent to consider the engagement a victory — an assessment they can sometimes make persuasively, as in the case of Hezbollah’s 2006 war with Israel.<sup>9</sup> In these conflicts, states often need to defeat an armed group on several (simultaneous) fronts — militarily, ideologically, and politically — and this asymmetry of goals makes combating armed groups particularly challenging for states.

From the perspective of practitioners and scholars that work on NSAGs, it is important to emphasize

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<sup>7</sup> On this issue, see Audrey Kurth Cronin, “Cyber-Mobilization: The New *Levée en Masse*,” *Parameters*, Summer 2006, pp. 77-87.

<sup>8</sup> This section draws on comments from Louise Richardson (Radcliffe Institute), Isabelle Duyvesteyn (Utrecht University), and Judith Palmer Harik (Matn University).

<sup>9</sup> See Alastair Crooke and Mark Perry, “How Hezbollah Defeated Israel,” *Asia Times*; Part One: “Winning the Intelligence War”; Part Two: “Winning the Ground War”; and Part Three: “The Political War,” October 12, 13, and 14, 2006, available at [www.atimes.com/atimes/Middle\\_East/HJ14Ak01.html](http://www.atimes.com/atimes/Middle_East/HJ14Ak01.html).

that not all states and NSAGs are always engaged in zero-sum games, and not all NSAGs want to ‘become’ or ‘take over’ the state (or the full panoply of its functions). Indeed, such groups may not seek the monopoly on power, but rather, aim at transforming the state. As discussed below, groups that are involved in self-determination campaigns are arguably the most approachable in terms of establishing conduits of communications between NSAGs and states, and may be the most amenable to a negotiated settlement of their grievances.

### **Erosion of the constraints on warfare**

From the tactical perspective, one of the most important developments that scholars and practitioners have emphasized is the increasingly unconventional and irregular means and methods used by transnational NSAGs. This is also one of the areas that conventional military forces have struggled to respond to. Unconventional and irregular tactics include the targeting of ‘soft’ assets such as civilians and civilian infrastructure instead of, or sometimes in addition to, targeting political or security assets. The groups resort to suicide bombings and improvised explosive devices (IEDs) instead of, or sometimes in addition to, conventional weapons and ordnance. Moreover, in protracted conflicts between states and NSAGs, such as the Russian-Chechen conflict, constraints on tactics and targeting have eroded with the result that the civilian population has borne the brunt of increasingly bloody attacks from both sides.

These erosions of constraints on the part of NSAGs can be mirrored by the state’s willingness to put

aside the constraints and limitations of the laws of armed warfare. As a result, states fighting armed groups may themselves be increasingly willing to use force indiscriminately against civilian populations suspected of harboring these groups. These states may also refuse to offer combatants the legal protections required under the law. States battling NSAGs may also be increasingly willing to ignore the Geneva Conventions’ prohibition of torture and of the use of certain weaponry. Ultimately, both states and NSAGs use the willingness of the other side to flout the laws and conventions of war as part of the battle for the moral high ground and to bolster support for their positions.

Several NSAGs have used sophisticated media and communication strategies to bring attention to the failure of particular states to uphold international legal standards, even while they continue themselves to target civilians. Other media-relayed strategies include, for instance, Hezbollah’s offering to rebuild and invest in neighborhoods in Southern Lebanon and in Beirut that were destroyed by Israeli missiles during the summer 2006 war. Israel accused the international news media of helping to exacerbate this effect by their reports focusing on Lebanese women and children injured in these attacks. Amid the destitution resulting from the conflict, the measures adopted by Hezbollah and the speedy and efficient assistance to the victims added to the group’s levels of support among many sectors of the Lebanese population.<sup>10</sup>

The September 11, 2001 attacks on the United States by Al Qaeda and the US-led “War on Terror” have

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<sup>10</sup> Such support remained significant a year after the conflict. See Alistair Lyon, “Support for Hezbollah Still High in Southern Lebanon,” *Reuters*, July 10, 2007, [www.alertnet.org/thenews/newsdesk/L10889369.htm](http://www.alertnet.org/thenews/newsdesk/L10889369.htm).

also raised important issues about the relationship between NSAGs and terrorism. This is an issue that is particularly fraught with political tensions because of the multiple definitions of terrorism and rhetorical use of the word “terrorist” as regards the actions of particular NSAGs.

Though the practice of terrorism traces further back in history, the term “terrorism” was coined with the 1789 French Revolution (i.e., the Jacobins’ *La Terreur*) and, since then, gradually acquired a negative connotation over time. Those connotations became predominant in the post-World War II setting, and subsequently with waves of terrorist activity in the 1960s (often in tandem with decolonization struggles) and the 1970s (with transnational patterns emerging). Pre-September 11, 2001, a variety of NSAGs themselves often protested strongly the use of the word terrorism ascribed to their actions. In contradistinction, several post-September 11 NSAGs are unconcerned with such accusations, and some, like Al Qaeda, have questioned the judgments underscoring the “terrorism” labeling, imparting that it is they who are reacting to the terrorism of particular states. This vocabulary stalemate does not necessarily limit the ability of states to use the term “terrorism” as a shaming device and as part of their counter-terrorism strategies.

More often than not, NSAGs that use terror as a tactic target civilians and non-military or political infrastructure in order to achieve political goals. These groups may want to be included in the political system, or, in some cases, to replace the exist-

ing system in their polities. Some groups may use increasingly extreme tactics, and states can respond with equally absolute tactics including targeted assassinations against group leaders and massive campaigns on their supporters. This approach on the part of the state can, however, backfire resulting in shifting public sympathy towards groups that use terror. Such method can also take a toll on the morale of conventional military forces that are not prepared for protracted, low-intensity conflicts often with resultant civilian casualties.

In such a context, questions arise as to how systematically NSAGs are incorporating terror tactics into their repertoires and why NSAGs are using these tactics. The answer to these interrogations lies partly in the effectiveness of this tactic for exacting vengeance, for gaining public attention and notoriety, and for increasing public support for the actions. Groups that obtain these rewards seem far more likely to resort to terrorism and to escalate their use of terror tactics than in the past. This is not to say, however, that such evolution is developing into a “new terrorism.”<sup>11</sup>

Per se, the hybridization of religion, violence, and politics,<sup>12</sup> is not novel, nor is the targeting of civilian assets and the use of improvised explosive devices. It is important to consider, however, that when groups using terror tactics have political goals, a military-only response will not resolve the conflict. Not all NSAGs have explicitly zero-sum goals and, when appropriate, this presents states with opportunities to negotiate with them in order to bring the groups into a political rather than a violence-based process.

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<sup>11</sup> Such novel terrorism is defined as “more networked, *ad hoc*, lethal, and dangerous.” See David Tucker, “What is New about the New Terrorism and How Dangerous Is it?” *Terrorism and Political Violence* 13, Autumn 2001, pp. 1-14. Also see, generally, Bruce Hoffman, *Inside Terrorism*, New York: Columbia University Press, 2006.

<sup>12</sup> On these issues, see the work of Stathis Kalyvas, *The Logic of Violence in Civil War*, New York: Cambridge University Press, 2006.

This discussion about the origins and impact of NSAGs on the metamorphosis of war raises several important points.

- First, that post-Cold War and twenty-first century conflict will remain characterized by continuing challenges to state legitimacy and authority by non-state armed groups. These self-empowering actors exploit the inability of states to control their territories and challenge the state's traditional monopoly on violence.
- Second, that there has been a proliferation of armed groups motivated by national, transnational, or religious principles, but that these groups can also be motivated by a range of ethnic identities, economic protests, and political grievances. Non-state armed groups can, in that context, find themselves involved both in internal wars with global dimensions, and in transnational conflicts using local capabilities and resources. Consequently, the issues raised play differently on these respective fronts.
- It is important to remember, thirdly, that technology plays a key role in the function and evolution of the new armed groups, but political and social factors continue to affect significantly how these actors develop and how effective they ultimately are.
- Fourth, we must take into consideration that these groups use force in increasingly irregular and unconventional ways, including the targeting of non-military assets, and there is danger in not grasping the consequences of the changes, particularly for conventional militaries who are tasked with fighting them.
- Finally, the importance of studying these groups and understanding their motivations and capabilities lies in their impact on states and security. In developing a framework for understanding these groups, it is therefore important to ask questions about their motives and outlooks, and to reexamine long-held assumptions about their goals, organization, and culture.

## Laws of War and New Actors

The rise of non-state armed groups in the post-Cold War period raises legal challenges in terms of how to deal with these entities using international humanitarian law (IHL) and international human rights law (IHRL).<sup>13</sup> Currently, NSAGs constitute a challenge to international law in several respects. Foremost amongst these is the fact that states are the building blocks of the international system and, as such, remain in control of international law and policy-making. The equality of member states and their commitment to the principles of the United Nations Charter in terms of peaceful coexistence and respect for human rights represent core values of the international system. Supra-state entities, such as the United Nations, or sub-state private entities, such as the International Committee of the Red Cross (ICRC), are recognized in such a context solely by virtue of being granted a mandate by those sovereign states.

By and large, state responses to NSAGs are in flux and most governments around the world remain locked in attempts to determine the legal implications of the post-September 11 US-led “global war on terror,” including, notably, what rights and obligations states have towards those individuals fighting for NSAGs, and the legal obligations of states on whose territory fighting occurs but where the state is not involved.

Considering this background, the second analytical lens of this discussion focuses on the limitations of

the current legal regulations of armed conflict, the impact of asymmetrical conflicts on the laws of war, and what means exist presently under the laws of war for regulating new conflicts. A related issue is how relevant the legal definition of ‘armed conflict’ as delineated under international humanitarian law is to the monitoring and regulation of conflicts involving transnational and national armed groups. Finally, it is also important to consider under what circumstances transnational and NSAGs heed the limitations on the means and methods of warfare established in the legal regulation of armed conflict.<sup>14</sup>

### **International humanitarian law and non-state armed groups**

Since the September 11, 2001 attacks by Al Qaeda on US soil, the terms “armed groups” and “war on terror” have become part of the common lexicon. However, the legal meaning of these two terms and their implications for the legal regulation of armed conflict has not been delineated with precision and consensus. In a divided context, where indeed war has become “a fact and an argument,”<sup>15</sup> one of the most immediate issues is the extent to which the “war on terror” is legally an armed conflict and whether the international laws relating to armed conflict — International Humanitarian Law (IHL) or Law of Armed Conflict (LOAC) — rather than human rights domestic legislation and international

<sup>13</sup> See Paul Gilbert, *New Terror, New Wars*, Washington, DC: Georgetown University Press, 2003; David Wippman and Matthew Evangelista, eds., *New Wars, New Laws? – Applying the Laws of War in 21<sup>st</sup> Century Conflicts*, Ardsley, New York: Transnational Publishers, 2005; and Howard M. Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, London: Ashgate Publishing, 2005.

<sup>14</sup>This section draws on presentations by Andrew Clapham (Graduate Institute of International Studies), Marco Sassòli (University of Geneva), Jann Kleffner (University of Amsterdam), and William Lietzau (US European Command).

<sup>15</sup> David Kennedy, *Of War and Law*, Princeton, New Jersey: Princeton University Press, 2006, p. 5.

law on cooperation in criminal matters, can be applied. This section delves into the applicability of IHL to conflicts involving NSAGs, and whether such conflicts are considered to be international conflicts or non-international conflicts.

“IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony’s militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities, and the near or total collapse of some states.”<sup>16</sup> One perspective on these issues is that international humanitarian law is currently inadequate to cover conflicts that involve powerful non-state armed groups when such groups are acting under their own direction (and not on behalf of another state) and conducting operations transnationally.<sup>17</sup> International humanitarian law is mostly codified in treaties, of which the four 1949 Geneva Conventions and the two 1977 Additional Protocols are the most pertinent to this discussion.<sup>18</sup> The Geneva Conventions and Additional Protocols apply to the conduct of armed conflict and establish a strict distinction between international and non-international armed conflicts.

Article 2 Common to the four Conventions states that the Geneva Conventions “shall apply to all cases

of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,”<sup>19</sup> while Article 3 applies to other armed conflicts between a High Contracting Party and other (or among) parties within the territory of that state. This raises the issues of what other legal frameworks may be applicable for conflict involving non-state armed groups, the status of these fighters (not recognized as belligerents or combatants), and which sets of rules best apply by analogy and what may be the compelling policy reasons for preferring one set over another.

Conflicts that involve NSAGs that are acting on behalf of or as agent of a state, whether this is explicitly acknowledged or *de facto*, however, do fall under the auspices of activities covered by the Geneva Conventions and Protocols. Thus, as many have argued, IHL applicable to international armed conflicts applied to the situation in Afghanistan in 2001-02 because the Taliban group represented the *de facto* authority functioning as government at the national level. Once the Taliban were displaced from power, the continued hostilities between the Afghan government and the international forces on one hand, and the Taliban insurgents on the other became covered by the rules of IHL applicable to non-international armed conflict.<sup>20</sup>

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<sup>16</sup> Luc Reydam, “*À la Guerre Comme à la Guerre: Patterns of Armed Conflict, Humanitarian Law Responses, and New Challenges*,” *International Review of the Red Cross*, 88, 864, December 2006, p. 755.

<sup>17</sup> See, for instance, Dan Belz, “Is International Humanitarian Law lapsing into Irrelevance in the War on Terror?” *Theoretical Inquiries in Law* 7, 1 (2005), pp. 97-129.

<sup>18</sup> Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31-83; Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85-133; Convention [No. III] relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135-285; Convention [No. IV] relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287-417).

<sup>19</sup> Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 – 434; Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609-699.

<sup>20</sup> On this issue, see Program on Humanitarian Policy and Conflict Research at Harvard University, “Extraterritorial Scope of Enforcement and Compliance with International Humanitarian Law,” Cambridge, MA: HPCR, 2006.

This, in turn, raises the question of whether Al Qaeda fighting in Afghanistan in 2001-2002 should be considered a party to an international armed conflict and therefore covered by the Geneva Conventions.<sup>21</sup> It could be argued, for example, that Al Qaeda was an armed group fighting on behalf of the Taliban and, therefore, that IHL also applied to them. The legal implications of this for the United States, if this argument is followed to its logical conclusion, are that Al Qaeda fighters captured in Afghanistan should be classified as prisoners of war and protected by the Third Geneva Convention because they were duly parties to an international conflict. On the other hand, however, the United States could argue that captured Al Qaeda operatives can be denied prisoner of war status because Al Qaeda did not comply with the conditions which such a militia must fulfill under the Third Convention, in particular a proper command structure, a distinctive sign, and the respect of the laws and customs of war.<sup>22</sup>

If conflicts involving states and NSAGs are not considered to be international conflicts, however, the question arises as to whether such conflicts can be considered non-international conflicts. Although Protocol II excludes isolated acts of violence or riots (below a certain threshold) from that assessment, (i) the intensity of the conflict on the territory of a particular state, (ii) the number of active participants and victims, and (iii) the duration and protracted character of the use of force are indicators of whether violence involving armed groups can legally amount to (non-international) armed conflict.

Moreover, the organization and discipline of the parties, a group's control over territory and population, and its capacity to respect IHL also contribute to this judgment. Thus, even when states and NSAGs are involved in a conflict that may be 'transnational' in nature and in which fighting occurs across different states, under IHL, this can still be considered merely a non-international conflict.

However, states have been reluctant to apply this standard to violence involving NSAGs. This, in turn, raises the issue of when and under what circumstances terrorist groups can be classified as parties to a non-international conflict and why states would seek to exclude NSAGs from this classification.

The answer to the first question hinges on whether an NSAG exercises such control in a state as to "carry out sustained and concerted military operations" in that state.<sup>23</sup> While it is possible to imagine non-state armed groups that fulfill this criterion in weak or failing states, such threshold may arguably be too high for transnational groups organized along the lines of Al Qaeda's looser networks and certainly the activities of derivative groups inspired by Al Qaeda which only carry out sporadic, isolated attacks and which do not meet these criteria.

The answer to the second question of why states would seek to deny NSAGs legal character under IHL rests partly in governmental policy. Although the United States and Al Qaeda may subjectively consider themselves to be engaged in a "war," the

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<sup>21</sup> See Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror,'" *The Fletcher Forum of World Affairs* 27, 2, Summer/Fall 2003, pp. 55-74.

<sup>22</sup> Article 4(A)(2) of Convention III; and, for a detailed discussion, Luisa Vierucci, "Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled," *Journal of International Criminal Justice* 1, (2003), pp. 392-95.

<sup>23</sup> Article I of Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949.

objective legal question remains as to whether they are involved in an “armed conflict” according to IHL. For the most part, the answer to this latter query is that they are not, although, some analysts argue, it is not possible to answer definitively such question under current IHL. The United States is fighting Al Qaeda operatives and Qaeda-inspired operatives in multiple locations and under varied conditions, and this affects the differing application of IHL to these situations. The United States, for example, has classified Al Qaeda operatives captured in Afghanistan as “unlawful combatants,” stripped of prisoner of war (POW) status and of the protection pertaining to the status of civilians, because doing so fits particular policy choices.

Given the challenges that NSAGs pose for states it may be expedient for the United States to argue that members of NSAGs who are captured during combat hold none of the benefits of the Geneva Conventions. Since these individuals (i) do not belong to a state, (ii) do not distinguish themselves from the civilian population, and (iii) do not comply with the laws of war, the state may argue that they are not privileged combatants. This allows the state to attack members of transnational NSAGs as combatants, rather than as civilians participating in the hostilities, and detain them without the privileges of prisoners of war. An alternative perspective is that, under IHL, Al Qaeda fighters should revert to civilian status upon capture, and thus be afforded the same protections as civilians.<sup>24</sup> However, the United States has not supported this assessment.

Considering, thus, the extent to which IHL encompasses NSAGs, scholars offer a range of opinions.

- First, the majority view is that national jurisdiction is paramount and that these groups are bound by the rules of the states on whose territories they operate. To the extent that these states are High Contracting Parties to the Geneva Conventions and Additional Protocols, the activities of NSAGs operating within these sovereign territories are similarly regulated by the laws of war. (The lack of consent and/or impossibility of ratifying the Conventions and Protocols by NSAGs renders, for some, this argument incomplete and has inspired several initiatives to secure compliance on the part of NSAGs.<sup>25</sup>)
- Second, it can be argued that NSAGs are beholden to IHL because the individuals involved in these conflicts are themselves, regardless, bound by the laws of war. However, and although such individual responsibility comes into play directly as regards the punishment of individuals for war crimes, IHL distinguishes clearly between different kinds of collective entities such as states, armed groups, and civilians.
- A third argument is that when NSAGs exercise *de facto* control over territory and populations (sometimes government functions), they should be treated as independent actors and

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<sup>24</sup> See Marco Sassòli, “Transnational Armed Groups and International Humanitarian Law,” Occasional Paper No.6, Program on Humanitarian Policy and Conflict Research, Harvard University, Winter 2006.

<sup>25</sup> On this issue, see Marco Sassòli, “Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law,” paper presented at the Armed Groups Conference, Vancouver, November 13-15, 2003, [www.armedgroups.org/images/stories/pdfs/sassoli\\_paper.pdf](http://www.armedgroups.org/images/stories/pdfs/sassoli_paper.pdf).

thus subject to IHL. The weakness of this argument, however, is that, even when they display important military capabilities, not all NSAGs come to exercise such control over state territory and population, and cannot therefore fall systematically into this category.

- Fourth, it can be argued that NSAGs are involved in non-international conflict, even when they behave as transnational groups fighting simultaneously in multiple locations. In this case, NSAGs are bound by customary international law and general principles of IHL.
- Finally, it could also be argued that NSAGs have consented implicitly to being bound by the laws of armed conflict — ratified by all 194 countries — by the very fact that they are involved in conflict.

The first two arguments understand *non*-state armed groups as being inherently defined in relation to the Westphalian normative system. The latter three take note of the consequential empowerment of the groups and of the strength of universal jurisdiction.

Next, it is important to consider whether the law, international or domestic, is adequate to deal with the issues of NSAGs. Participants to the seminar refuted the notion that IHL was undermined merely by discussion of its utility, arguing instead that such very debate demonstrated that IHL was both important and relevant to contemporary issues of armed conflict. What is more, this debate is already taking place in multiple fora. Consequently, the test of the validity of the law lies ultimately in its functioning ability to regulate the behavior of the parties to armed conflict and to protect civilians. In order, therefore,

for IHL to remain relevant, it needs to make sure it is adapted and applied to current wars. Based on this line of reasoning, IHL should therefore remain as a primary baseline of conduct in conflict and attempts to circumvent IHL or avoid applying it undermine the obligation to respect it and the further likelihood of compliance among NSAGs.

Focusing solely on whether a conflict involving NSAGs is international or non-international in nature can, too, obscure other flexible approaches to the application of law to the issue. As noted, if NSAGs are treated as independent groups and not as part of a state, there emerges a range of scenarios in which IHL can still retain regulatory force. Moreover, sometimes IHL provides better options than the domestic law of the state in which the conflict is being fought, particularly if the rule of law is weak or central authority in a state of decay.

Overall, and while noting the mutation of recent conflicts, participants refuted the idea that an altogether novel or alternate set of laws should be written to deal exclusively with conflict involving NSAGs, arguing instead that the architecture of the Geneva Conventions and Additional Protocols and customary international law was designed for situations in which states were party to a conflict, and that the laws of war would serve us well if merely clarified as regards conflicts that also involve new types of NSAGs.

On the question of whether the law is adequate for dealing with NSAGs and whether conflicts involving these groups are governed by law enforcement or humanitarian law, participants argued that there was murkiness to the issue confounded by a tendency to conflate policy arguments with legal arguments. This

was identified as particularly prevalent in the United States, and less so in Europe and other parts of the world. In recent years, such a geographical dimension has gone to the heart of the differences between, in particular, US and European perspectives. If the United States uses its armed forces during a conflict, policy-makers tend to consider them to be engaged in war. In Europe, however, it is not nearly as clear-cut a separation and it is often understood that military forces can become involved in law enforcement operations that do not necessarily amount to war. Some argue that this may be more of a policy issue than an aspect to be resolved by agreements over international law.

Yet such variance in perspectives is material and can be carried over to the way transnational groups, such as Al Qaeda, are conceived of. In particular, it can be argued that if the responses of states and conventional militaries to irregular and unconventional armed groups are arguably always two steps behind, the law, of its part, is always three steps behind, especially when fast-paced changes are taking place. Thus, it is possible from one perspective to argue that IHL is not adequate as it stands and it is necessary to provide for more regulation of conflict involving armed groups in order to update the law to fit modern circumstances including the challenge from NSAGs. Yet, on the other hand, it is equally possible to argue that since, by definition, the law always lags behind real-world events, it is important not to create law in haste. Rather, sufficient law exists and the challenge is how to apply current law to new situations.

One central theme of the debate on the adequacy of the law concerns the question of whether IHL is really inadequate or whether the issue lies in the desire of some actors to stretch the applicability of IHL

to situations for which it was not designed. In that respect, it would be useful to have greater clarity of aims from those arguing that IHL is inadequate and must be updated. Some participants felt that those calling for such reexamination should come forward with precise indications as to what they would want to see altered and whether such a development could be undertaken without lowering the current standards of protection afforded by existing law.

It can also be argued, moreover, that the application of treaties and conventions can itself also be interpreted, and that, consequently, specific applications can shift *de facto* over time. Of more consequence to a country like the United States, currently engaged in a conflict with an armed group, is whether there is a shift in the perception that the state has flouted the laws of war. If it has, or if this perception takes root, then the unintended consequences for the United States may include the loss of protection for its military and the loss of moral high ground in future conflicts with states and NSAGs alike.

Whatever the inadequacies of international or domestic law, however, there is, generally, room for greater engagement with NSAGs in order to improve the fate of the victims of armed conflict. Several different approaches were discussed at the seminar including the use of existing IHL to address the issue. For example, since Article 3 Common to the Geneva Conventions already encourages NSAGs to conclude arrangements with states, this could form a renewed basis for practices that encourage NSAGs to use declarations of intentions (which would require monitoring) and perhaps even negotiated codes of conduct between the parties to a conflict. Such voluntary codes could create a sense of ownership over the law and the parts of the negotiation process

can come to form the constituency of this law. The extent to which NSAGs are willing to participate in this process is both unclear and key to the effectiveness of this approach. Groups that seek legitimacy, international support, and involvement in the political process could be rewarded for compliance with the laws of war.

### **The legal regulation of private military companies**

Conventional militaries have, so far, struggled to adapt to challenges raised by NSAGs, including increasingly violent tactics and long-term threats to state security. In that context, the role of private military companies (PMCs) in the transformation of conflict is important to consider, as it has also raised issues of regulation, legitimacy, and practical operability.<sup>26</sup> States have the responsibility to provide security for their population and when they are unable to do so, opportunities become available for the private military industry. When, however, PMCs are at the frontline of conflict between state interests and NSAGs, there are a number of legal and human rights issues that arise, including, most notably, who holds the PMCs responsible for their conduct.

In recent years, the discussion about PMCs has been dominated by polarized moral and ethical issues raised by their use.<sup>27</sup> What has been largely overlooked is the increasing need for legal regulation of these actors. This issue is further complicated both by confusing typology and terminology and by the lack of transparency in the industry about its activi-

ties. Such phenomena are exacerbated by the tiered subcontracting used by PMCs to outsource activities like convoy protection or food catering to sub-contractors. One estimate in 2007 puts the numbers of non-military contractors operating internationally as high as one hundred thousand; whereas the number of private armed-protection individuals may range between five and seventy thousand.

One of the most difficult issues in the regulation of private military companies, particularly when they operate in areas where transnational NSAGs are also present is the weakness of the local state authority and its failing or failed legitimacy. This has several important repercussions for the use and regulation of PMCs. When PMCs are used in weak states, they can further undermine the authority of the state and become alternate sources of power and patronage. Moreover, when PMCs are used in states in which the legitimacy of state authority is weak or questioned, this exacerbates the difficulty of establishing to whom PMCs are responsible, which laws are applicable to PMCs, and who enforces these rules. This further undermines the authority of the state and makes the issue of how to regulate PMCs even more urgent.

Such states of affairs also raise the issue of whether PMCs under some circumstances should be considered NSAGs in the same manner that other transnational NSAGs, such as Al Qaeda and its associated movements, are identified. The answer to this question lies both in the objective company's existence as a reflection of the fact that the state is not the sole

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<sup>26</sup> This section draws on ideas from Naz Modirzadeh (Harvard University), Mariana Caparini (Geneva Centre for Democratic Control of Armed Forces), Andrew Clapham (Graduate Institute of International Studies), and Caroline Holmqvist (King's College, London).

<sup>27</sup> See Ken Silverstein, *Private Warriors*, London: Verso, 2001; Peter Warren Singer, *Corporate Warriors – The Rise of the Privatized Military Industry*, Ithaca, New York: Cornell University Press, 2004; and Thomas Jäger and Gerhard Kümmel, eds., *Private Military and Security Companies – Chances, Problems, Pitfalls, and Prospects*, Wiesbaden, Germany: VS Verlag, 2007.

user of force on its territory and in the subjective intent of that PMC to involve itself in the activities of these groups — deliberately usurping or undermining the political power of a state or its resources. The proliferation of PMCs is significant above all in its cumulative effects: the existence of individual companies may not in and of itself be a threat to the state (provided these corporations do not commit egregious crimes or use excessive force), while the gradual (unchecked) taking over of large parts of the security sector by international PMCs clearly does.

The recent expanded use of private military companies, in Iraq in particular, has raised public awareness of these problems, including their perceived ability to act with impunity. Although many of the largest PMCs are based in the United States or the United Kingdom, they are deployed worldwide in a variety of administrative, support, humanitarian, and protection missions. PMCs work for national governments and their various departments and agencies; international and regional agencies such as the United Nations, the African Union, and the European Union; and for private companies.

One of the most important issues in considering how to regulate PMCs is how to hold private military contractors responsible for their actions when they work abroad and are involved in the deaths of civilians or other criminal activities. Thus, the debate about legal regulation focused on (i) the adequacy of international and national law for regulating the private military industry, (ii) the issue of jurisdiction, and (iii) the question of what kind of law should be used to regulate the industry. However, it is to be noted

that, generally, other motivations for regulating the industry exist, including misplaced attempts to regulate the politics of a given armed conflict through the regulation of the private contractors involved. Though PMCs are used primarily for political tasks, they are neither political nor politically-mandated actors. Consequently, the involvement of PMCs is weighty but, in contradistinction to other types of NSAGs, may not necessarily have a pivotal impact on the (long-term) evolution of the conflict.

As regards the applicability of international law to the regulation of the activities of PMCs, the options remain fairly limited. The literature is generally in agreement that there is inadequate codification, and although there are different efforts underway to remedy the gap, overarching and effective regulation mechanisms are absent. In particular, the problem of jurisdiction is not dealt with easily, even when there exists clear evidence linking private military contractors to human rights abuses.

International humanitarian law, for example, relates to the activities of states or individuals, but it is difficult to argue for its application to private entities and more difficult still to enforce regulations. Under IHL, hence, it is rather complicated to prosecute a contracting firm on the issue of torture, for instance, because it is necessary to prove that the contractors were working closely with a given state.<sup>28</sup> Moreover, if prosecutors are able to demonstrate convincingly such connection to a state, then this may become a political issue. Still the issues are complex and if many agree that more regulation is needed, there is no absolute sense that there exists a legal “black hole”

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<sup>28</sup> In July 2004, lawyers representing five abused Iraqi prisoners filed suit in US federal court against employees of CACI International and TITAN Corporation, the two US PMCs employed at the Abu Ghraib prison in Iraq. In September 2007, a deadly shooting in a central Baghdad square involving the Blackwater USA private security firm led to a US Department of State internal review of private security contractors’ operations.

as concerns PMCs; a prominent view is that existing rules merely need to be expounded and developed more clearly to cover these groups.

Some states are taking the lead in regulating the PMCs whose services they employ in conflict situations. In Iraq, for example, the actions of private military contractors employed by the United States government would fall normally under the jurisdiction of US law such as the War Crimes Act of 1996. The reality, however, is that there have been no prosecutions of private military contractors for any actions in Iraq. Indeed Coalition Provisional Authority Order No. 17 granted contractors immunity from the Iraqi legal system. The Military Extra-territorial Jurisdiction Act, published in 2004, extends US military law — the Uniform Code of Military Justice (UCMJ) — to civilians supporting US military operations abroad if prosecutors can prove that contractors were employed directly by the US government. However, the multiple layers of sub-contractors used routinely by PMCs make it difficult to bring about a successful prosecution. Despite these limitations, however, the US framework is still arguably the most robust existing for the regulation of PMCs.

Scholars have rejected attempts to consider the regulation of the industry on the basis of ‘offensive’ or ‘defensive’ functions. This, they argue, misunderstands the complexity and organization of the industry, and such regulations would be impossible to enforce. There is consensus, however, that the industry needs regulating, and one solution to the issue of how to hold PMCs accountable for the actions of their employees is to resort to contract or business law. Since the goal of the private industry is, admittedly, to make a profit and to the extent that PMCs are ultimately responsible to their investors or share-

holders, one suggestion is to use business licenses issued in the country in which they are incorporated to introduce punitive fiscal consequences. The difficulty of using this approach, however, is that companies may choose to move their headquarters to countries that do not impose this kind of regulation.

Moreover, since PMCs often sub-contract their work to multiple other contractors, it may also prove quite complicated to establish which PMC should be held responsible for the actions of private military contractors. A similar approach is being tried already in Iraq. Employees of PMCs must be willing to comply with human rights of all Iraqi citizens and they must pay a minimum refundable bond. Any abuse can result in withholding that bond. At the moment, the bond is of a small amount, but it could be possible to raise that cost for individuals and use those funds to compensate victims.

A third, more practical alternative to attempts to apply international law, or state law, to the regulation of PMCs is to support a voluntary, sector-wide arrangement. Ultimately, companies that ignore human rights principles or allow egregious acts of violence to go unpunished are marginalizing themselves from the norms of most states in the international system, and this may affect the profitability of all PMCs. Thus, it may be possible to encourage and support the industry itself in developing its own self-regulating regime that benefits the industry by maintaining the reputation of the larger PMCs and holds to the principles of IHL. To be practical, such a regime would need not only a code of conduct, but also a monitoring body to ensure compliance. This may not be the optimal or even the fastest solution to the issue, but it can be a sustainable and pragmatic approach to the problem.

# Strategic Responses and International Security

The final section of this report considers what challenges violent conflict involving transnational and national non-state actors pose to the international community, and what diplomatic, military, and legal responses might be the most effective in coping with these challenges. In particular, it is critical to consider what options exist for increasing compliance by NSAGs with the laws of armed conflict and human rights principles. Finally, it is also important to examine the implications and strategies for non-military engagement of NSAGs in a diverse range of conflict contexts.

Against this background, prime issues are whether it is possible to negotiate with NSAGs<sup>29</sup> and the role of NSAGs in post-conflict settings.<sup>30</sup> As regards the latter two questions, states, in large part, exhibit a reluctance to develop negotiation channels with armed groups. States (and other agencies) around the world share a concern that engaging armed groups diplomatically can end up lending legitimacy to the groups and their grievances, or strengthening the groups' negotiating positions. The unwillingness to initiate channels of communication can prolong conflicts and undermine post-conflict settlements if states do not address the long-term grievances that fueled the conflict as well as such consequences of conflict as the loss of life and property.

The question of whether and how to negotiate with non-state armed groups may be controversial from

a political perspective. From the humanitarian perspective, however — and though the issue is certainly problematic — there are several important reasons for involving non-state actors in a conflict resolution process, although it is not clear whether ideologically-motivated NSAGs can be included in the same manner that politically-motivated ones are.

## Engagement incentives and disincentives

As noted, it is very difficult for a state to achieve decisive victory against NSAGs that are willing to fight using irregular and unconventional tactics. When states are faced with NSAGs that are motivated by their exclusion from a state or which seek to displace that state's role, then the use of force itself may not provide any opportunity to bring members of disaffected groups into the social contract of that state.

One possible 'incentive mechanism' for states interacting with NSAGs is for them to offer the opportunity for NSAGs to become involved in the political economy of a state, sharing in the larger governance. However, to do so it is necessary to overcome a set of implicit assumptions about armed groups. In asking whether it is possible to negotiate with NSAGs, we need to be aware of the oft-intoned arguments that 'there is nothing to negotiate about' and that, in any event, 'the endeavor is pointless'. We should also realize that we may be assuming that NSAGs will not negotiate in good faith — whereas there are no

<sup>29</sup> Ideas from this section are drawn from discussion by Andrea Bartoli (Columbia University), Eileen Babbitt (The Fletcher School, Tufts University), Andy Carl (Conciliation Resources), and Balthasar Staehelin (International Committee of the Red Cross).

<sup>30</sup> This section draws from discussion and ideas from Keith Krause (Graduate Institute of International Studies), William Murphy (Northwestern University), and Karin Von Hippel (Center for Strategic and International Studies, Washington, DC).

indications of such disposition with many a violence-prone armed group — and that they are using the negotiations to stall for time, re-supply, or gain a tactical advantage before they revert to more violent actions. A third common assumption, widespread in policy-making circles, is that it is not possible to get an agreement with such groups because ‘they only understand force’, or, fourth, that NSAGs are inherently untrustworthy and, contrary to states who enjoy institutional continuity and sovereignty, cannot be counted on to keep their part of the deal.

Problems can be found with these assumptions. To begin with, the presumptions imply that all NSAGs will act in the same manner, share similar goals, and will respond to negotiations in the same way. This is demonstrably untrue. Moreover, such postulates also connote an unchanging understanding that it is solely the resort to force by NSAGs (rather than, additionally, problems with particular state behavior) that is systematically the source of the problem at the heart of a given conflict. Some scholars and practitioners argue that in order to begin the process of negotiating with NSAGs we must first acknowledge that some of these groups may not be so different from state actors in terms of motivations and needs.

Thus, rather than inquiring whether it is possible to negotiate with NSAGs, some scholars and practitioners argue that it may be best to reframe the question to ask under what conditions are negotiations the best strategy for the state and how does the international community maximize the likelihood that negotiations will result in sustainable agreements.<sup>31</sup> The first step in such a process is to identify what

kind of armed groups one is attempting to negotiate with, and doing so by differentiating the groups’ (avowed and unstated) motivations from their structure or resources. For example, there may be a dramatic difference in aims and goals between groups with radical religious ideologies and organizations struggling for self-determination. Generally, it may be easier to negotiate with the latter, because they are looking for cultural, economic, and political rights within the existing state configuration.

Importantly, there is, as well, a ‘commitment’ problem in the sense that negotiating with NSAGs often involves uncertainty as to whether these actors can abide by their commitments (sometimes perceived as compromises), and whether or not concessions can constitute meaningful triggers for subsequent rounds of negotiations.

Timing constitutes a third key issue in deciding whether and how to negotiate with NSAGs. Some armed groups develop over long periods of time, adding to their membership when their grievances go ignored and when non-violent means of protest are ignored. One perspective on this issue is that in the earliest stages of conflict in which a minority group is involved, the aspirations of these groups are quite bounded and potentially reasonable. If not taken seriously or opposed actively, and should they enjoy the ability to husband resources to organize themselves efficiently, these groups often proceed to confront governments and escalate to violence. In that sense, armed groups involved in self-determination conflicts may be the most appropriate groups for non-military engagement. It is important to emphasize,

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<sup>31</sup> The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has produced a manual with practical guidance on humanitarian negotiations with NSAGs. See Gerard McHugh and Manuel Bessler, “Humanitarian Negotiations with Armed Groups – A Manual for Practitioners,” OCHA, New York, 2006.

however, that the inception of a negotiation process does not of necessity spell accepting the demands of these groups, though it does require acknowledging that the groups may conceivably have some legitimate motivations and interests.

In addition to timing, timeliness is also a consequential aspect of the negotiation sequence with armed groups. Although a responsive government could possibly address motivations early on in the process, assuming that the NSAG has reasonable interests that can be met by a state, governments might not yet be motivated to engage because they believe they can stifle opposition easily. Thus, this is the juncture at which ‘track two’ engagement using unofficial back channels such as outside non-governmental organizations (NGOs) may sometimes help bring NSAGs and state governments to the negotiating table. At this point it is important to pay attention to intangible elements of conflicts — identity, respect, fairness, justice, and pride — that often matter substantially to these actors and can come to make a key difference. One of the advantages of using outside NGOs in such negotiations and mediation is that they can help the parties to a conflict renounce what can constitute or be perceived as dehumanized views of each other, and address issues of marginalization.

Above and beyond providing an agile forum for discussion, this process can also generate a realization that non-violent strategies can be rewarded. Mediators can also introduce norms into the negotiation and persuade all parties to a conflict that complying with these norms will benefit everyone involved. This can help educate NSAGs as to the limits to what they can expect through the engagement process. For example, it may become clear during negotiations that, while full independence may not be acceptable

to the international community, autonomy might be and the international community could be willing to play a role in supporting this goal if an NSAG continues to pursue non-violent means.

While these approaches may be valid for NSAGs with limited self-determination goals, it remains difficult, however, to conceptualize a negotiation strategy to deal with groups that follow a transcendent ideology. One approach may be to consider the extent to which these groups are motivated by feelings of marginalization and humiliation. In a negotiating setting, this would suggest the need for a renegotiation of the social contract either state by state or regionally that is more inclusive and tolerant. The challenge with this approach, however, is that particular values (e.g., women’s rights) may appear to be mutually exclusive (at least initially). Some practitioners have argued that it is indeed possible for groups with different values from states to be brought into a negotiation process, but this process can take a long time and there are no guaranteed results.

This, in turn, raises the issue of what is at risk when states negotiate with NSAGs. Already mentioned is the risk that entering into negotiations confers legitimacy on NSAGs, when states would prefer to undermine such potential legitimacy and reduce whatever ‘credibility support’ they can provide indirectly. There is, moreover, also the risk that negotiations might fail, leading to prolonged conflict during which opportunities for engagement might be squandered, in the sense that pro-compromise moderates and intermediaries may die during the conflict or be marginalized by the failure of the negotiations. Such evolution could lead to the splintering and further radicalization of armed groups. These considerations render the peaceful resolution of the conflict ever

more difficult and distant. At the same time, the conflict may become more violent and bloody if NSAGs use the discussion phase as an opportunity to rearm and if their experience during the negotiations confirms their opinion that they will not have their interests met through engagement.

Another perspective to consider in addressing the question of whether and how to negotiate with NSAGs is that of international organizations such as the International Committee of the Red Cross. In the case of the ICRC, it is essential to engage with NSAGs in order to fulfill the organization's humanitarian mission and to maintain its credibility as concerns the principles of neutrality, independence, and humanity.<sup>32</sup> Since the ICRC routinely 'talks to' NSAGs, its perspective on whether talking to them involves legitimizing their position is important, as it moves the discussion from abstract to concrete considerations. In this case, it can be argued that negotiating with NSAGs does not undermine the authority of the state, because if it did, states would be much more reluctant to talk with the ICRC, which remains a trusted partner of states.

There is much to be learned from the best practices of the ICRC in dealing with armed groups. As regards the type of dialogue necessary for a purely humanitarian, non-political purpose, it is, for instance, important to research both the dimensions of conflict and the motivations of the NSAGs involved. In the course of engagement with NSAGs, the aim of the ICRC is to explain its own impetus, which often includes negotiating safe access to victims, to medical structures, and to detainees during a conflict. The

growing number of NSAGs, their fragmentations, and their evolving tactics make it difficult to keep track of the membership, organization, and aims of these groups. This renders negotiation even more complex in conflict areas where there is considerable difficulty in building networks of trust through personal contacts.

Moreover, it can be challenging to counteract — efficiently — the perception that, by its very nature, IHL favors states, and that violating it may be, for NSAGs, the only way to wage war. The ICRC is, hence, also engaged in promoting adherence to IHL that involves disseminating information about these rules to NSAGs via, *inter alia*, interventions at the periphery of conflicts, discussions of the legitimacy of the rules, the promotion of IHL through training and manuals, and carrying messages between parties to a conflict to help establish channels of communication. The ICRC asserts that an additional dividend of this dialogue is to understand the conflict and the motivations and goals of the actors with a view to help them anticipate conflict and implement adequate responses to humanitarian needs.

The ICRC is able to enjoy such 'maneuvering room' and the trust it often yields primarily because it does not pursue a political agenda. The organization emphasizes that it must be clear to parties that, throughout the engagement, it will remain apolitical. In negotiating with NSAGs, the ICRC emphasizes that establishing trust through consistent behavior and leaving no gap between discourse and acts are important keys to success.

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<sup>32</sup>These principles are among the Fundamental Principles of the Red Cross and Red Crescent Movement. They were proclaimed by the Twentieth International Conference of the Red Cross, a conference that, every four years, brings together the High Contracting Parties to the Geneva Conventions and the components of the Movement.

## Planning the post-conflict setting

One of the most fundamental requirements to enhance the response to the challenges posed by NSAGs is the need for better information in pre- and post-conflict situations. Practitioners and scholars alike emphasized that there is still a large information gap about many of the places and groups involved in irregular and unconventional conflicts. This reality can be a reflection of the lack of experience amongst government agencies — civilian and military — about these groups and places. Equally, it may be that the number of people involved in these missions often increases from small numbers of regional specialists to larger numbers of development specialists who are sometimes deployed without background knowledge of particular places and people. This difficulty becomes particularly acute in regard to the new types of armed and non-state actors in conflict zones.

An example of this type of problem is the degree to which the United States government was taken aback when, in May-December 2006, the Islamic Courts Union (*Ittihad al Mahakim al Islamiyya*, ICU) took over Somalia. Although this was not per se a new group and had previously been driven from power in the 1990s, the group returned in 2006 based on its ability to provide law and order and social services to Somalis. Since 1993, the United States had maintained a minimal presence in the area and had relied on local sources of information (which tended to present a skewed interpretation of events based on their own grievances). Accordingly, the reaction of the aid and development communities to the situation in Somalia was complicated by a lack of knowledge about these groups — e.g., the Union was initially considered to be a monolithic fundamentalist group, whereas in fact it was akin to an umbrella or-

ganization of nineteen ‘courts,’ including some that might have been able to offer stability and meaningful development opportunities in Somalia.

Though hostilities continue there, the same situation may also be compounded in Iraq and Afghanistan where post-conflict reconstruction specialists need more information and a framework for understanding which of the many armed groups are transactional, and where they derive their support and goals from local actors (and indeed when the two options combine). Without such information and the ability to share their findings, the various development and reconstruction communities run the risk of sending mixed signals to armed groups about how to behave and what to expect in return for certain actions. The post-conflict situation in Afghanistan is a case in point in which the short-term goals of supporting various regional warlords helped defeat the Taliban in 2001, but may have also significantly undermined the long-term goal of democratization. Warlords have used aid money to secure their own client-patronage networks and have thus strengthened their own standing in local communities, arguably undermining the authority of the central government. This raises a larger theoretical question with practical implications — namely, how to integrate traditional patrimonial systems with democratic structures; are they incompatible or complementary?

Similarly, in planning the post-conflict setting, it is key to identify who is a legitimate leader in a community and who wields power solely because they have the weapons. A more robust framework to assess armed groups, especially their organization and command structures could help those involved in post-conflict reconstruction to identify leaders and groups that have the support of the community. This understanding of

which leaders are legitimate must be coupled with improved comprehension of how groups define their agendas through charities and political activities.

This also raises the issue of how to plan for the post-conflict setting when NSAGs have been involved in the conflict, or may take advantage of continued instability to carve out power and patronage for their constituents. One of the first steps, practitioners argued, is to improve the flow of information among practitioners in the field about the armed groups, and their agendas, organization, and motivations. This can include an ongoing assessment of how post-conflict reconstruction and stability efforts shift the balance of power and the perception of authority and legitimacy in a state. Non-state armed groups have the capabilities to respond swiftly to the loss of power due to a successful election or potential instability caused by a failed harvest or road collapse. One currently underappreciated capacity of post-conflict reconstruction agencies is the ability to monitor these changes and disseminate information among all aid agencies working in the field.

A second point is the importance of developing short term projects for armed groups to be involved in immediately after conflict has ended in order to divert them from disrupting post-conflict reconstruction efforts. This should be a priority in the planning phase and clearly understood among practitioners in the field. The aim is to help avoid situations such as the one following the US and UK take-over of Iraq in the spring of 2003, when cashiered Iraqi military rank-and-file returned home to unemployment and joined local militias and armed groups.

In the long term, moving armed groups from violence to inclusion in a sustainable political process requires investment in the economy and governance structures in post-conflict societies. Some of the most pressing questions in the field of governance are whether to include armed groups in post-conflict political systems and determining whom to include. On the one hand, including armed groups gives their leaders the opportunity to prove their democratic credentials and transition from armed conflict to peaceful participation in society. On the other, this raises the question of how to determine which armed groups should be engaged in this way and how to deal with criminals when prisons, judges, and police services are not yet working.<sup>33</sup>

Finally, in examining the place of NSAGs in post-conflict societies, it is also important to consider the security of the civilian population. In the case of Iraq, for example, local neighborhood militias may make the argument that they are providing what the state cannot — security and stability. In such cases, outside actors, including the post-conflict reconstruction communities, should understand what needs the armed groups may be fulfilling and ask whose security is most important in the long- and short-term. At the same time, it is important to consider capacity building programs that help shift responsibility for an end to violent struggle onto the parties themselves — states and armed groups.

A fundamental question in this regard is how much access NSAGs and non-violent groups have in order to participate and inform these peace processes. One way to look at this issue is to consider that, for the

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<sup>33</sup> On these issues, see the experience and current practice of the United Nations Integrated Disarmament, Demobilization, and Reintegration Standards (IDDRS). That framework of security and stability in post-conflict environments is presented here: [www.unndr.org/iddrs/framework.php](http://www.unndr.org/iddrs/framework.php)

most part, armed groups are very effective at 'being' armed groups and rather poor when it comes to the process of engagement, and this is one of the most basic areas in which the international community could support peace processes. Although states such as the United Kingdom have started to develop a pool of conflict resolution and post-conflict reconstruction specialists to help in these situations, there are few initiatives worldwide to develop the capacity to respond to ongoing crises. Even at the United Nations level, the mediation support unit is considered under-resourced and under-scaled for what it needs to do. Thus, one of the first areas to address in considering how negotiation techniques and capacity can help resolve conflicts involving NSAGs is the development of capacity at the NSAG, state, regional, and international levels.

Moreover, it is also necessary to question the emphasis placed on replacing traditional client-patron systems of governance with democratic systems that require years of institution and capacity building in order to succeed. The issue of patronage can be vital for solving the problem of how to integrate armed groups in post-conflict societies. Certainly, ignoring the importance of patronage in countries such as Afghanistan weakens the development agenda, since strengthening the warlords can undermine central control. Yet, equally, undermining the warlords and not replacing them with suitably powerful distributors of patronage from the central government detracts from, rather than enhances, security. The solution in places like Afghanistan may involve controversial plans such as issuing amnesty for warlords in order to sustain a level of peace and stability in outlying areas. This type of steps may not fit with international development and aid agendas, however, since armed groups sometimes develop in

response to a power vacuum in a community. The post-conflict development communities may have to work with the client-patronage systems in the short run in order to at least prevent other security gaps developing and conflict starting anew. This raises a larger question, not yet resolved — namely the need to engineer a form of patronage that meets peoples' needs in a way that contributes not to dependency but to social independence. To avoid manufacturing dependency, must law or ethics accept benign and efficient forms of patronage as a type of governance, even temporary governance?

Clearly, there are neither quick fixes nor easy solutions to the issue of how to reintegrate NSAGs successfully into post-conflict societies. However, these complex issues do require close cooperation and information sharing among all of the actors involved in post-conflict reconstruction process — military and civilian. As noted, one of the most pressing problems with the regulation of transnational armed groups is that their activities are not confined to the territory of one state. To the degree that there is consent from the territorial state to their presence and activities, then international humanitarian law provides some options for dealing with these groups. In such cases, organized NSAGs are bound by the rules of war because the states in which they operate have agreed to these principles.

The issue remains, however, of how to deal with other NSAGs whose activities are not covered (fully) by international law. Several options have been proposed, including the application of national laws mixed with human rights law. The problem with such an approach is that states may be reluctant to prosecute NSAGs or lack the law enforcement capacity to do so. An alternate approach is to create ad-

ditional dispositions to cover 'extra-state hostilities.' This, however, might legitimize NSAGs under the concept of the equality of belligerents, and, as such, constitute a major stumbling block for states hoping in the first place to undermine and delegitimize NSAGs, particularly those demanding autonomy or independence.

However desirable or acceptable (or problematic or counter-productive), the development of new law on these issues ultimately raises the question of who should enforce it and how NSAGs can be bound efficiently and obliged to abide by this law. One solution might be to introduce *ad hoc* declarations of intention or deeds of commitment by NSAGs that could be monitored by an independent body, allowing for the discussion of conflicts that cannot be discussed at other international fora. The negotiation of codes of conduct has the advantage of creating a sense of ownership and constituency amongst the groups, as well as establishing norms and rewards for compliance. This may be attractive to NSAGs that are trying to engineer political legitimacy and gain support from the international community for their goals. This may be less attractive to states, which may seek to avoid further legitimizing NSAGs and resent the usurpation of domestic authority by an international organization.

## Conclusions

The aim of the international seminar was to examine the recent and consequential rise of transnational and non-state armed groups with a view to understanding analytically the place and role of these actors in the new context of conflict, and identifying strategic options in relation to the legal and policy implications of these transformations. The goals were also to use an interdisciplinary approach to achieve a fuller understanding of the multifaceted patterns of NSAGs — their functions and methods — as well as state and international responses to them.

Six general themes developed out of the discussions: (i) transnationality as a condition and method, (ii) the role of culture in contemporary armed conflict, (iii) the place, prerogatives, and responses of the state, (iv) the changing face of modern warfare, (v) the relevance of legal rules to armed conflict and the status of that current international corpus of norms, and, (vi) issues relating to engagement with NSAGs. These themes are discussed below.

### **The condition of transnationality**

The issue of how to define and understand transnationality in the twenty-first century is in its early stages. All the same, it is a question vested with both urgency and importance. In particular, the mechanics of transnationality as an enabling condition (particularly for agile non-state actors) and a novel context of warfare constitute a complex set of issues in need of further understanding as regards the modern transformation of conflict and related instability. Some states and non-state actors draw their legitima-

cy, authority, and sources of support from a broader transnational constituency. Other groups seek to redefine borders and reorder regional balance of power. In the twenty-first century information age, data, money, ideas, expertise, and ideologies flow freely via the World Wide Web, and can also provide a sense of identity and belonging that supersedes geography and nationality.

Transnational NSAGs create complex problems for an international system based on the sanctity of state sovereignty and national borders. When transnational NSAGs are located (initially, temporarily, or intermittently) in one state and attack another, this raises multiple issues of how to apply consistent and clearly delineated IHL. Some NSAGs also stand at the nexus of transnational issues such as the trafficking of people, drugs, and weapons. These criminal connections further complicate the issues of what laws can be used to regulate armed conflict and emphasize the need for states to cooperate with each other in order to reduce the threat transnational armed groups pose to international and state security.

### **The place of culture**

In recent years, and much to the resistance of scholars and practitioners who emphasize a universal outlook on matters of armed conflict, the importance of culture and religion for understanding the motivations of armed groups and the international security context, has been gaining ground. Indeed the issue is even shaping parts of the debate on the legal frameworks that regulate conflicts involving NSAGs whose

values and norms are referenced in relation to both *ius in bello* and *ius ad bellum*.

One of the first steps for better understanding the role of culture is to develop a richer and more nuanced typology of armed groups based on an improved understanding of cultural norms. In this report, the phrase ‘non-state armed groups’ was used to describe armed groups — both transnational and national — that are not under direct control of the state. It is also important, however, to acknowledge the complexity of NSAGs and, particularly, to avoid applying the catch-all term “terrorist” to groups that have variegated, complex, and evolving social, political, ideological, and tactical goals. Thus, in acknowledging that culture might indeed matter, we also need to ask fundamental questions about where NSAGs come from, what their concept of warfare is, how they behave (currently) in armed conflict, who their leaders are, and how their legitimacy is established or pursued. Similarly, under what circumstances groups will fight and for what reasons they will negotiate a settlement are central queries warranting further study.

### **The role of the state**

This discussion examined the notion of the state and its role in conflict. In some debates, however unrealistic, alternatives to the Westphalian nation-state, such as the calls on the part of some Islamist groups for the reestablishment of the Caliphate, were important for understanding the motivation and goals of particular NSAGs. In other exchanges, the limitation of states in providing security and how such shortcomings contribute to their lack of legitimacy and authority is also considered. The role of information technology in providing alternate identities

and loyalties, norms and organizing principles is an important contemporary marker of these elements.

What choices states and international organizations have made in the face of the qualitative and quantitative transformations ushered by the participation of NSAGs in recent wars, and the associated policy implications of these changes, are germane to the assessment of these options. One theme that emerged from the discussion was the importance of understanding the current wave of NSAGs in their historical context. Previous generations of armed groups have challenged the authority of colonial powers, or political ideologies. Some of the current NSAGs are challenging the boundaries of states, and this notion of the fixity of borders in the international systems is undeniably coming under attack. NSAGs are also testing notions about the role and function of states, including the latter’s success or lack thereof (particularly in the case of ‘failed states’) in providing stability and security in conflict. Thus, in addition to developing a clear typology about NSAGs, we should also consider clarifying and updating the modern typology for states and the contemporary evolution of their functions.

This is particularly consequential as regards the self-empowering ability of the new armed groups in potentially raising the risk of great power war by threatening continuously international security on a wider scale. Yet several scholars and practitioners refute this notion, arguing instead that the proliferation of NSAGs has, in effect, provided greater incentive for great powers to cooperate in order to maintain their own stability and security. The tendency, then, has been for great power states to render the actions of armed groups illegitimate. This is especially true in the case of transnational groups with transnational

objectives — the only options for these groups to conceivably engage with great powers is to give up the means of violence in order to become legitimate enough to participate in negotiations. However, this approach rests at the same time on the unchanging impulse of great states to crush the transnational groups and their global structures and operations whenever possible.

Notwithstanding, states are also cooperating, directly or indirectly, with non-state actors to enhance their own security. Some states provide information and intelligence gathering capabilities to NSAGs that help these groups project power far beyond their own limited means. For example, Syria and Iran were believed to have used their respective national intelligence apparatuses to support Hezbollah's operations in Lebanon during the Israeli-Hezbollah conflict in 2006. Other states have supported different groups in a similar fashion. The implications for state and regional security of these actions by states render such 'sub-contracting' dynamics a problematic and controversial notion. Moreover, states have also provided sanctuary and supply of weaponry as well as funding for NSAGs, which muddies the waters as regards accountability and heightens security concerns in various regions. Our understanding of the complex calculations in terms of gains and risks that states consider when they support non-state armed groups remains rudimentary and this, too, appears a fertile area for further practical and scholarly research.

### **The changing face of warfare**

This discussion on the challenges NSAGs pose for states and for the international system hinges on the impact of conflict involving these groups on state

and international security. As discussed in the first section of this report, it is particularly important to reexamine the reasons for which NSAGs fight, the circumstances under which they will wage war, and the methods and strategies they use. While during the immediate post-World War II phase most armed groups fought to drive out colonial powers, and a second generation fought in the 1970s and 1980s to determine which political systems held sway, the current generation of non-state armed groups is engaged in a host of multifaceted ideological, political, ethnic, and resource-based struggles.

Such complexity translates primarily in the means and methods adopted by these new groups fighting asymmetrical, transnational, and open-ended wars. The duration and bitterness of these conflicts also focuses our attention on the weaponization of civilians, the proliferation of small arms, and the widespread erosion of the constraints on warfare, including the targeting of civilians.

### **The rule of law**

The emergence of a new generation of NSAGs in the post-Cold War setting has raised many questions about the applicability of international humanitarian and human rights laws for regulating these conflicts. It is important, therefore, to consider whether there is satisfaction with the state of the law, if the current body of conventions, protocols, and customary international law is adequate in the face of new challenges. When is there actually an armed conflict? What is the distinction between international armed conflict and non-international armed conflict? Is this distinction still important and where do the legal bases of obligations for non-state actors come from?

Participants generally rejected the idea that a new or alternate set of laws is warranted to address conflict involving NSAGs, arguing instead that the Geneva Conventions and Additional Protocols were written for situations in which states were involved in armed conflict, and that these laws already explicitly cover situations in which non-state actors are party to a conflict. Customary law, resulting from the practice of states, also reinforces that system.<sup>34</sup> The laws of war would serve us well if we clarify them for dealing with conflicts that also involve NSAGs.

Yet rather than focusing solely on whether conflict involving NSAGs is international or non-international, participants reflected on different approaches to the application of law to the issue. If NSAGs are treated as independent groups and not as part of a state, there are a range of scenarios in which IHL can be considered with added acuity. Moreover, IHL can, at times, provide fuller protection options than the domestic law of the state in which the conflict is being fought, particularly if the rule of law in that country is weak or its central authority in a state of decay.

Returning to the issue of whether the law is adequate for dealing with NSAGs and whether conflicts involving NSAGs are governed by law enforcement or humanitarian law, participants argued that there was indeed murkiness to the issue confounded by a tendency to conflate policy arguments with legal arguments. In that sense, it is indeed possible to argue that the (IHL) law is always reactive, especially when rapid changes take place. Thus, one can maintain that IHL is not adequate as it stands, and it is necessary to provide for more regulation of conflict involv-

ing armed groups in order to update the law to fit modern circumstances, including the challenge from transnational NSAGs. Similarly, it is possible to argue that since the law always lags behind real-world events, it is important not to create law in haste, and that, rather, sufficient law exists. The challenge, then, is merely how to apply current law to new situations. Those that hold the latter view maintain, additionally, that precise indications as to what in the law should be changed (and how) must be advanced clearly, warning that such a development could hardly take place without lowering the current standards of protection afforded by existing law.

### **The value of negotiations**

Finally, it is also important to consider how states and the international community can engage with NSAGs, regardless of their legal status. One question that recurred in different forms was whether it is morally and ethically acceptable to negotiate with NSAGs. Practitioners emphasized that this is not an abstract issue and that negotiations happen in practice on a regular basis. In and of itself, negotiation is necessary, viable, and even essential in order to resolve conflicts and protect the victims of violence. States, however, still protest that negotiating with NSAGs confers legitimacy and strengthens these actors' position, which makes the issue fraught with difficulties.

Working with NSAGs in post-conflict setting, practitioners argued, requires engagement on how to improve the flow of information among actors in the field about the armed groups, agendas, organization,

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<sup>34</sup> See the three-volume ICRC study on customary IHL: Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, Cambridge University Press, 2005. Also see, Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, 2007.

and motivations. These practical dimensions come to include an ongoing assessment of how post-conflict reconstruction and stability efforts shift the balance of power and the perception of authority and legitimacy in a state. Non-state armed groups have the capabilities to respond very quickly to the loss of power due to a successful election or potential instability caused by a failed harvest or road collapse. One currently underappreciated capacity of post-conflict reconstruction agencies is the ability to monitor these changes and disseminate information among all aid agencies working in the field.

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The international interdisciplinary seminar on the legal and policy challenges raised by contemporary armed transnational and non-state actors emphasized the complexity of the defiance these empowered groups pose to states and the international system. In considering how to move forward with research agendas and practical engagement with NSAGs in the future, it is particularly important to consider how to clarify and refine existing classifications that inform modern armed conflict, and how to relate those categories to novel and changing elements. It is also important to consider whether the lexicon used to analyze and comprehend NSAGs contains assumptions that limit options for dealing with them efficiently and legitimately.

The variety of actors discussed — some familiar, others hybrid, and a number novel — exhibited a spectrum of different motivations and evolved from varied circumstances, including the failure of states and ethnic conflicts. In considering how states and the international community can evolve to meet the challenge from these groups, it is also important to consider the timing of policies, the role of third parties in conflicts, and the importance of improved coordination between agencies involved in post-conflict setting in which non-state actors are present.

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## Participants

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