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# INTERNATIONAL **REVIEW** of the Red Cross

Humanitarian debate: Law, policy, action

## The evolution of warfare



ICRC

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**INTERNATIONAL**  
**REVIEW**  
of the Red Cross

Humanitarian debate: Law, policy, action

**The evolution of warfare**

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## EDITORIAL

# TACTICS, TECHNIQUES, TRAGEDIES: A HUMANITARIAN PERSPECTIVE ON THE CHANGING FACE OF WAR

**Vincent Bernard, Editor-in-Chief**

Armed conflict has been defined as “the logical outcome of an attempt of one group to protect or increase its political, social and economic welfare at the expense of another group”. There is no need to be an expert or a prophet to predict that humanity is far from finished with it. For those who want to help limit the effects of violence, understanding and anticipating the evolution of war remains a necessity. But war has always been a “chameleon”<sup>1</sup> – it is ever-changing, adapting to new circumstances and camouflaging itself in international relations, national security and political rhetoric. Today, once again, war has transformed and escapes easy delineation. Our language itself seems incapable of conveying the reality we are facing, and we see this in several ways.

First, while some are increasingly seeking to replace their soldiers with machines – drones or automated weapon systems – that can strike beyond borders, others are making their own people into human bombs let loose amidst crowds of civilians. The contrasting figures of the drone pilot and the suicide bomber undoubtedly represent the two ends of the spectrum of contemporary violence.

Second, we are witnessing a resurgence of terrorist attacks that instantly transform vacation spots or cultural and commercial venues into scenes of war. In response, these attacks elicit the use of means and rhetoric of warfare against elusive networks, or rather, rhizomes – for, like those underground stems, they spread, emerging to strike where no one expects them.

Furthermore, the notion of heroism, traditionally associated with obedience to a warrior’s code of honour, now seems either to be absent or to have been completely perverted by those who portray cowardly murders as so many glorious victories and proudly broadcast videos of their crimes on YouTube.

Lastly, in a connected yet divided world, the front is everywhere and nowhere at the same time; war is both omnipresent and absent. Cyberspace itself has become the symbol of a new, ill-defined battlefield, with no contours or borders.

Yet while constantly changing, war also shows its old faces. The nuclear threat, to which the *Review*’s previous issue was dedicated, remains a sword of Damocles hanging over humanity. Some States are reinvesting in conventional arsenals – a navy, tanks or long-range artillery. As in the Middle Ages, cities are besieged in Syria and Yemen. The civil wars in South Sudan and the Democratic Republic of the Congo hardly involve new technology or heavy weapons, yet they are among today’s deadliest conflicts.



The confusion surrounding the metamorphosis of warfare now also seems to be affecting the progress of the effort, begun 150 years ago, to limit the effects of violence through international humanitarian law (IHL). There continue to be challenges to apply even the most basic rules, and sometimes even legal categories themselves are being challenged. We are seeing repeated attacks on civilians, humanitarian aid and health-care facilities, along with the rise of identity politics and the ebbing of solidarity movements. In this scenario, one is entitled to ask, as does Adama Dieng, special adviser to the UN Secretary-General on the prevention of genocide, whether we are witnessing an erosion of respect for the law.<sup>2</sup> Is the grand design of developing a “universal law” to contain violence failing?

On the occasion of the remembrances marking the 100th anniversary of the First World War, the *Review* asked historians, legal scholars and humanitarian practitioners to look back at this century of wars from a humanitarian point of view. In using what we know of the past to illuminate the present and the future, the *Review* decided to adopt a longer-term perspective in this issue. The contributions collected here illustrate the changing face of conflict by placing human suffering – so often relegated to the backdrop of history – front and centre. They also touch upon positive developments and innovations in the field of humanitarian action and law.

## From the French Revolution to the World Wars: The age of mass war

At the end of the eighteenth century, the typical features of war in Europe conjured up those of the ancient Greek tragedies, with their unities of action, time and place. War unfolded in well-defined places, such as battlefields in open country or towns and fortresses that came under siege. Its protagonists were mainly the soldiers and warlords themselves, in that a key element of victory was their valour in combat. Victory on the battlefield often guaranteed *absolute* victory, and war therefore had a beginning and an end. With the French Revolution, the patchwork of European countries entered a period of reconfiguration, expansion and conquest. On 23 August 1793, revolutionary France decreed mass conscription and paved the way for mobilizing all the resources of the “nation in arms”. From then on, universal conscription led to the enlistment of a much larger number of citizen-soldiers, ending the use of mercenaries in Europe. More numerous as well as more motivated, the conscripts fought in the name of popular ideals.<sup>3</sup>

1 Carl von Clausewitz, *On War* (originally published in German as *Vom Kriege*, 1832), indexed edition translated and edited by Michael Howard and Peter Paret, Princeton University Press, Princeton, NJ, 1976, p. 89.

2 Adama Dieng, “Le respect du droit humanitaire”, *Le Temps*, 1 February 2016, available at: [www.letemps.ch/culture/2016/02/01/respect-droit-humanitaire](http://www.letemps.ch/culture/2016/02/01/respect-droit-humanitaire) (all internet references were accessed in September 2016).

3 Thus, the German poet Johann Wolfgang von Goethe saw the 1792 Battle of Valmy between the French revolutionaries and the European monarchies as the start of “a new era in world history”. Indeed, what was at stake in that war was not only the conquest of territory, but an ideological clash between two political systems – the Revolution versus the Old Regime.

Europe in the nineteenth century also plunged into world conquest by colonizing peoples deemed “inferior” and engaging in cannonball diplomacy. Soon it was not only all the resources of a nation, but also those of its distant colonies, that could be mobilized for war.

Concurrently, technical “progress” in the arms field, and in particular ballistics, with the invention of the rifled barrel, automatic fire and improved explosives, increased the precision, range and destructive power of rifles and cannons. The development of the railway, the symbol of the industrial revolution, also meant that armies could be rapidly amassed. Even before the car and the airplane made their appearance, these developments upended the spatial scales of modern combat – and increased its deadliness.

The wars of the late nineteenth century foreshadowed the conflicts of the twentieth century in some respects: First, the American Civil War (1861–64) saw troop mobilizations and massive losses, an ideological cleavage on the question of slavery, the enlistment of civilians, the influence of the press and of technological and strategic innovations, etc.<sup>4</sup> Later, during the Boer War (1899–1902), the British established concentration camps for women and children to deprive combatants of their support. The mortality rate in these squalid camps augured quite badly for the fate of civilians in the wars that lay ahead.

By combining mass participation, firepower, nationalism and the hunger for conquest, the wars of the industrial age reached their climax in the two world wars of the twentieth century. In 1919, in the novel *Les croix de bois*, Roland Dorgelès gives a description of this “industrial war”. Here, he portrays the first-hand experience of the shelling of a French unit that has taken refuge in a cemetery:

What, is it from the Boche, or from the seventy-five firing short? ... The pack of fire surrounds us, tears at us. The smashed crosses riddle us with whistling splinters. ... The torpedoes, the grenades, the shells, even the tombs are bursting, everything is blown up; it is a volcano in full burst. The night in eruption will crush us all to nothingness.

Help! Help! Men are being murdered!<sup>5</sup>

The First World War played a pivotal role in the evolution of war. The division of the world that followed it had a major impact on the century’s conflicts, and its echo continues to reverberate in modern identity politics. The origin of many trends in today’s conflicts can be traced back to the First World War. At the same time, a study of the 1914–18 conflict reveals deep differences between then and now.

Although the First World War was a global conflict, it is still often associated solely with trench warfare in France and Belgium. On the occasion of the 100th anniversary of the Dardanelles Campaign for control of the straits

4 See, e.g., Donald Stoker, *The Grand Design: Strategy and the US Civil War*, Oxford University Press, Oxford, 2010.

5 Roland Dorgelès, *Les croix de bois*, Albin Michel, Paris, 1919, p. 326 (translated into English as *Wooden Crosses*, G. P. Putnam’s Sons, New York and London, 1921, and reprinted by Kessinger Publishing, Whitefish, MT, 2004).

between the Black Sea and the Aegean Sea, on the borders of Asia and Europe, Emre Öktem and Alexandre Toumarkine analyze this campaign for the first time from the standpoint of IHL. Relatively neglected in the West, the campaign, in which the belligerents' respect for the law of war drew close attention and fuelled rumours and propaganda, remains a founding event in Turkish national identity, as well as in that of Australians and New Zealanders.

From Zeppelins to Big Bertha, with a nod to “spy mania”, the article by Eric Germain in this issue of the *Review* shows that, far from having made its appearance with modern drones, “remote warfare” already existed during the First World War. Since then, we have witnessed the gradual erosion of the distinction between “the front” and “the rear”. This distinction was completely abolished during the Second World War through the “total war” strategy, of which the aerial bombardment of towns and cities was undoubtedly the most emblematic feature. Though already illegal at the time, attacks on civilians have nonetheless been perceived as justified in order to bring the enemy to his knees.

The nineteenth century also saw the awakening of a global humanitarian consciousness. Paradoxical as it may seem, America during the Civil War and Europe at the end of the nineteenth century – an imperialistic and bellicose patchwork – were also the birthplaces of modern humanitarian law and action. The first major progress was seen in the medical field. There, the humanitarian impulse was initially directed towards wounded combatants on the battlefield and later gradually extended to other categories of people and other kinds of suffering. The first editions of the *Bulletin International des Sociétés de Secours aux Militaires Blessés*, the *Review's* forerunner, attest to the extraordinary progress in war medicine that followed the founding of the International Red Cross Movement in 1863.

In industrial war, so prodigal in terms of equipment and human lives, soldiers become cannon fodder in the strict sense. Nevertheless, combatants do not stop being legitimate targets until they are *hors de combat*, and that has remained so to this day. The principle of distinction requires parties to a conflict to distinguish at all times between civilians and combatants and between civilian objects and military objectives. It is widely believed that the First World War took place between combatants on the front line and had little effect on civilians, but studies in recent decades – and, in this issue, Annette Becker's contribution – remind us that civilians were not spared in the first war that was not only worldwide but also, according to Becker, total.

In adapting to the evolution of conflict, humanitarian action also became global and acquired a mass character, although it did so gradually and in fits and starts. As the article by Elisabeth van Heyningen on the second Boer War illustrates, the end of the nineteenth century and the start of the twentieth century also saw the development of international humanitarian action before the First World War.

For the International Committee of the Red Cross (ICRC), the First World War was a crucial moment. That was when the organization began sending large numbers of delegates to the field. By undertaking a vast operation to help

prisoners of war, the ICRC became an “operational organization”. How could it reconcile this new need to negotiate with belligerents for access to victims with its duty to independently promote and defend the law in its dealings with them? Lindsey Cameron’s article on the ICRC’s response to violations of the law analyzes this evolution.

The new tension between these differing objectives soon led to a series of dilemmas from a humanitarian perspective. Drawing on the lessons of its tragic inability to confront the Holocaust, the ICRC gradually developed an ever broader and more pragmatic definition of the concept of “victims” and their needs, as well as the humanitarian principles and professional standards that would influence the budding humanitarian movement as a whole. Daniel Palmieri analyzes the development of the ICRC’s perception of war, and explains how the organization lost some of its founding fathers’ “illusions” as a result of the evolution of conflicts during its first century of existence.

## **From the Cold War to today: The age of the “war amongst the people”**

Far from being a peaceful interlude as its name might suggest, the Cold War period that followed the Second World War actually witnessed a large number of new conflicts, which arose against the backdrop of decolonization and polarization. With few exceptions, such as the Korean War (1950–53) and the Iran–Iraq War (1980–88), the dominant model of conflict was no longer that of an “industrial war” between two opposing masses of troops, planes and tanks. It became mostly internal or between local armed groups against foreign powers. It had, in the words of the British general Sir Rupert Smith, become a “war amongst the people”.<sup>6</sup>

The guerrilla tactics used by anti-colonial and revolutionary communist movements to defeat better-armed and better-equipped conventional armies were not fundamentally different from those used by contemporary armed groups against local or multinational armed forces in what are now termed “asymmetric” conflicts.

The end of the Cold War did not see the fulfilment of the old dream of a Kantian peace (the German philosopher Immanuel Kant wrote his essay “Perpetual Peace: A Philosophical Sketch” in 1795). It ushered in a new, violent period of reconfiguration along national and social lines and the reshaping of identity. But there was also the hope that the peacekeeping system which had emerged from the Second World War would finally be able to function, on the model of the coalition of States that came together to liberate Kuwait after its invasion by Iraq in 1991 (the emblematic Operation Desert Storm). In the last two decades, external “interventions” have indeed proliferated as part of multinational operations designed to end internal conflicts. However, far from being carried out systematically as part of a “new world order” or of the

6 Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Knopf, New York, 2007, p. xiii.

“responsibility to protect”, they have remained *ad hoc* actions. History has shown that these operations often run the risk of becoming quagmires, like the US intervention in Somalia in 1992. Nevertheless, if the international community – having had its fingers burned by claims of sovereignty – fails to act, this can be even more dangerous, as we saw during the genocide in Rwanda and the war in the former Yugoslavia. Since the 1990s, phases of military interventionism have alternated with phases of prudence and diplomacy on the part of States that are by turns internationalist and isolationist.

The 1990s were marked by a new impetus towards peacekeeping through multinational operations, in view of the many local conflicts that followed the end of the Cold War and that are continuing to date. The attacks of 11 September 2001, and the military and security operations carried out in response to those attacks, once again brought a spirit of polarization and unilateralism to the world and to war.

Whether carried out “for peace” or “against terror”, these “new wars”<sup>7</sup> have several characteristics in common. Three are mentioned here.

The first characteristic is the predominance of conflicts involving both non-State armed groups and intervention by foreign States or coalitions of states (in support of either party to the conflict). In his article, Tristan Ferraro addresses the question of how to classify these situations in which one or more foreign actors are intervening. Such categorization, which is often complex, is essential nowadays in order to determine the applicable law and the scope of protection afforded to victims. Claire Landais and Lea Bass discuss another important question, one raised by the recent jurisprudence of the European Court of Human Rights in several cases concerning military operations by European States abroad: what happens when IHL and European human rights law apply simultaneously, and how can they be reconciled?

Secondly, while external interventions have multiplied, Western governments have for years shown a reluctance to risk the lives of their soldiers, and their popular support, in societies that have become “post-heroic”.<sup>8</sup> The carnage of 1914–18 now seems very distant to us when we count, incredulously, the number of names inscribed on the monuments to the dead in the smallest French or German villages. Modern armies’ technology allows them to strike from a distance, whether from the air or through strong-arm actions by special forces. Nevertheless, war will still be conducted on the ground, by local combatants, in conflicts over issues that Westerners no longer understand and that often seem as if they are never going to end.

A third element that modern wars have in common is civilian suffering. Wars have not become “clean”, even with the use of so-called “surgical strikes” popularized during the first Gulf War. While we should rethink the notion that

7 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed., Stanford University Press, Stanford, CA, 2012. See also Herfried Münkler, “The Wars of the 21st Century”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003.

8 Edward Luttwak, “Toward Post-Heroic Warfare”, *Foreign Affairs*, Vol. 7, No. 43, 1995.

past wars only affected soldiers on the battlefield – as we have seen, this is how the First World War is often perceived – it may be going too far to say that 90% of those dying in current wars are civilians.<sup>9</sup> Nonetheless, it is true that conflicts have certain characteristics which affect civilians in particularly harsh ways: their length, their urban character, the availability of light weapons, and the fact that they involve armed groups operating among the population. Among the sufferings endured by the civilian population portrayed by the media, watching those of the most vulnerable is also the most distressing. The article by Heide Ferenbach and Davide Rodogno in this issue deals with the representation of children's suffering throughout the century, starting with the photograph of little Alan Kurdi's corpse on a beach in Turkey, which in 2015 became the symbol of the "migrant crisis".

## Present and future threats

The world is going through a new period of reshaping. The influence of Western States is diminishing, while other States are coming (or returning) to centre stage internationally. The system inherited from the Second World War is being called into question, and new military and economic relationships are emerging, against the backdrop of shrinking natural resources. New activists and solidarity networks are challenging the State's omnipotence. New media can be used to foster cooperation, but also conflict. The mention of human rights in multilateral forums by some evokes distrust in others, for whom it is the reflection of a new imperialism. The only element on which there seems to be international consensus today is countering terrorism.

Meanwhile, the lack of stable livelihoods and the preponderance of unresolved conflicts have forced millions of people onto the roads or into makeshift boats, while rich countries close their borders. Radicals call for isolation from the rest of the world and, at the same time, for taking the fight to the enemy. The world seems to be entering a period of selfishness, of one-sided power grabs and of rallying around "*identités meurtrières*" (murderous identities).<sup>10</sup>

Making violence into a spectacle, and spreading it through the media, has also become a remote-warfare tactic. The Taliban's media campaign around its destruction of the Buddhas of Bamiyan foreshadowed its more recent demolishing of the historical heritage of Timbuktu, Mosul and Palmyra. The perverse use of these destructive actions for terrorist purposes has made the protection of cultural property a priority (though we should not forget that other cultural and religious treasures have been destroyed or damaged by the fighting in Yemen and Syria, far from international attention). In this issue, Christiane Johannot Gradis takes another look at the protection of cultural heritage, both tangible and intangible.

9 Adam Roberts, "Lives and Statistics: Are 90% of War Victims Civilians?", *Survival*, Vol. 52, No. 3, 2010.

10 Amin Maalouf, *Les identités meurtrières*, Grasset, Paris, 1998.

Another effect of technology is to give those who possess it options for low-intensity warfare that cost far less than it would to implement real military, economic and political solutions. In the past, a “state of war” was formally declared and became the central concern of an entire nation until peace was restored. Now it is taking a new form in Western States. At once unending and unexpressed, it is brought to public attention only through sporadic attacks and ubiquitous security measures. States employ private contractors instead of conscripting citizens. Absent a desire for “perpetual peace”, are the rich and disillusioned countries resigning themselves to the idea of a “forever war”,<sup>11</sup> carried out in a routine fashion by governments which have neither the will nor the means to solve the underlying problems?

Nowadays, aerial bombardment is carried out by States that are reluctant to commit ground troops in operations overseas. States’ hesitancy to put troops in harm’s way can lead to the use of weapons and tactics, such as remote bombing or indirect fire, that imply a tacit acceptance of increased civilian casualties. However, the recurring polemics over the civilian losses that these attacks cause show that perceptions of the acceptability of civilian deaths among the general public are changing. The study of aerial bombardment throughout the century is particularly revelatory, not only of the development of military technologies but also of the evolution of mass attacks against civilian populations. When the British Parliament was debating whether to begin bombing in Syria and Iraq, the *Review* decided to interview historian Richard Overy, author of *The Bombing War*, and to lead this issue with that interview.

Several phenomena appear to us to be of particular concern for humanitarian law and action now and in the future.

Firstly, there is the problem of anticipating and regulating new military technologies. For decades, armies lived on the heritage of the Second World War, confining themselves mainly to modernizing the weapons of 1945. Developments in communications, cyber techniques, robotics and laser and nanotechnology portend not only new weapons, but also new tactics and new kinds of warfare. Some of these advances can lead to greater targeting accuracy and minimize civilian losses. Others, however, could unleash unprecedented tragedies – for example, through their indiscriminate impact. This issue of the *Review* puts new technologies in the spotlight with pieces by Eric Germain, Rain Livoja and Tim McFarland.

Secondly, even without the use of new technologies, it is disturbing to note that the most basic rules of humanitarian law are so often violated in today’s conflicts, in the Democratic Republic of the Congo, Iraq, Syria and Yemen, among others. The number of attacks against health-care workers and facilities in countries at war is a particularly striking illustration of this, coming as it does 150 years after the adoption of the First Geneva Convention, whose purpose is to protect the wounded and those who care for them in time of war. Furthermore,

11 Jack Goldsmith, “The Forever War is Entrenched”, *Lawfare*, 19 October 2015, available at: [www.lawfareblog.com/forever-war-entrenched](http://www.lawfareblog.com/forever-war-entrenched).



we continue to see inexcusable sexual violence and terrorist attacks against civilians, despite the fact that these are some of the most basic prohibitions under IHL. Another problem currently being examined by the ICRC is the use of explosives in urban areas; hence, this, among other relevant topics, will be dealt with in the next issue of the *Review* on “War in cities”.

Finally, in view of these recurring violations, the question of the political will to respect and ensure respect for humanitarian law is particularly acute today. The achievements of international law in general and humanitarian law in particular must be preserved, and emphasis must be placed on ways of implementing the existing rules. This is the purpose of the inter-State process to strengthen the mechanisms of respect for the law, facilitated by Switzerland and the ICRC. After the International Conference at the end of 2015, States committed to continuing this work. Recently, in an unprecedented joint appeal, UN Secretary-General Ban Ki-moon and Peter Maurer, president of the ICRC, called upon States to use all the means at their disposal to ensure that parties to conflicts “respect the law”.<sup>12</sup>

## Furthering humanitarian consciousness in a divided yet connected world

Are we, then, living through the worst period in world history? Contrary to the prevailing pessimism, Professor Steven Pinker asserts that violence has continuously declined throughout history.<sup>13</sup> The more violence decreases, the less tolerance we have for it, and so we persuade ourselves that we are living in the worst of times. The media play a contradictory role in this. On the one hand, they reinforce the illusion that we are living in the dark ages by focusing instantly and almost exclusively on disasters; on the other hand, they *report* on them, thereby urging us to refuse to accept the “horrors of war” as inevitable.

Indeed, we must continue to act. The *Review* asked Claudia McGoldrick to assess the state of conflicts in the world today from a humanitarian point of view, and in her article for this issue, she also looks back at a century of evolution and adaptation by humanitarian organizations. Furthermore, on the occasion of the World Humanitarian Summit, held in Istanbul in May 2016, she advocates a larger role for local humanitarian workers in the future.

The ICRC and the International Red Cross and Red Crescent Movement remain committed to transforming their field experience of the reality of modern conflicts into consciousness on the part of, and action by, the international

12 “Aide humanitaire: Un appel conjoint sans précédent de l’ONU et du CICR”, *Le Temps*, 31 October 2015, available at: [www.letemps.ch/2015/10/31/aide-humanitaire-un-appel-conjoint-precedent-onu-cicr](http://www.letemps.ch/2015/10/31/aide-humanitaire-un-appel-conjoint-precedent-onu-cicr). See also “World at a Turning Point: Heads of UN and Red Cross Issue Joint Warning”, ICRC News Release, Geneva, 31 October 2015, available at: [www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning](http://www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning).

13 Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined*, Viking Books, New York, 2011.



community. In this issue, the *Review* publishes three key documents of the 32nd International Conference of the Red Cross and Red Crescent, held in December 2015: (1) an interview with the ICRC's Balthasar Staehlin on the results of the Conference; (2) the resolutions adopted at the Conference; and (3) the fourth, and now traditional, report entitled *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, prepared by the ICRC for the Conference.

The ever-evolving nature of conflicts also raises the question of how IHL should be interpreted in view of changing realities. The ICRC is engaged in an ambitious project to update the commentaries on the Geneva Conventions in the light of a threefold evolution: that of conflicts, of the law and of advances in humanitarian consciousness. In this issue, the *Review* is publishing an analysis by the head of the ICRC project, Jean-Marie Henckaerts, and his team, of the first part of this endeavour, the updated Commentary on Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 1949.

In view of the horrors of the past, it would no doubt be wrong to conclude that there is less respect for IHL today than before. Furthermore, international law has made impressive strides in recent years, particularly in the areas of arms regulation and international criminal justice. Paradoxically, IHL may even have emerged stronger from its challenging by those who derided it as obsolete at the start of the "war on terror", as Emmanuele Castano and Anna Di Lelio affirm in their article entitled "The Danger of 'New Norms' and the Continuing Relevance of IHL in the Post-9/11 Era".

Randolph Kent concludes this edition by identifying the causes of future conflicts, and asks: are we ready? We may need to develop more tools to anticipate future humanitarian needs. Whatever the case, never before in history have we been so well informed about the suffering of victims. Never before have we had so many ways of connecting with one another and engaging in dialogue. Though we still have much to do to put them into action, never before have there been so many technical and legal solutions for aiding and protecting victims of conflicts.



## Interview with Richard Overy

Professor at the University of Exeter\*

*Richard Overy is Professor of History at the University of Exeter and the author of more than twenty-five books on the age of the World Wars and European dictatorship, including The Bombing War: Europe 1939–1945. He is a Fellow of the British Academy.*

*Airpower has been used in armed conflicts since World War I. Aircraft have been deployed in support of the army on the ground and the navy on the surface. However, the twentieth century, with two World Wars, has also seen aerial bombardment of cities that fell outside the traditional use of airpower. During World War II, as part of the ideology of “total war”, cities were deliberately selected as targets of such attacks with the purpose of undermining the morale of the enemy’s population and “winning the war”. Nowadays, although the deliberate bombing of entire cities is prohibited, it is still believed that aerial bombardment can produce certain political dividends for belligerents. In this interview, Richard Overy provides a historical perspective on the evolution of aerial bombardment since the World Wars, and puts in context the use of airpower in contemporary armed conflicts.*

**Keywords:** the World Wars, total war, aerial bombardment, bombing of cities.

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\* This interview was conducted in London on 2 December 2015 by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*; Mariya Nikolova, Editor of the *Review*; and Markus Geisser, Senior Humanitarian Affairs and Policy Adviser, ICRC London.

***At some point between World War I (WWI) and World War II (WWII), bombing cities or bombing civilians became “acceptable”. How did bombing become an option for the parties to the conflict as a militarily rational thing to do?***

Between the wars, the general view was that bombing cities was not acceptable. However, States had in fact begun to resort to such practices already in WWI: the Germans had bombed British cities and Paris in 1917–1918; the Royal Air Force (RAF) had started to bomb German cities in 1918. The assumption was that a total war between the major powers required all the resources of society. Therefore, it was permissible to attack those members of the enemy society who were engaged in making the war possible, such as war workers, transport workers, and so on.

The other element between the wars was the decision to use aircraft for policing the empires. Aircraft were used by the French and the British. They were not only cheap, but they enabled the parties to bomb tribal villages and insurgents within the empire, who were seen as “semi-civilized” and therefore outside the law that applied to “civilized” peoples. Indeed, the RAF manual describes these as operations against semi-civilized peoples. So, at the time, it was considered that there was no need to obey international law when bombing people in the empire.

And, I think, it is interesting to note that the idea of empire policing fed back into Europe. If a State wanted to achieve a political end and to undermine the morale of the enemy, bombing was a very good way of doing it. I believe this led to the eventual idea in WWII that if you bombed the enemy cities, you would undermine the morale of the workforce and possibly bring about the enemy’s surrender – a political dividend.

***Had earlier bombings during WWI indeed undermined the morale of the population?***

At the end of WWI, those air forces that had fought primarily in support of land armies were mainly on the losing side. On the winning side, the British and the Americans in WWI came to the conclusion that the morale of the enemy’s population had been a legitimate target and that morale *had* indeed been undermined by the impact of bombing. I believe that this was a completely exaggerated claim, given the tiny amount of bombing that was used during WWI – a few hundred tonnes. Nevertheless, it became enshrined in British strategy, with the dictum that the moral impact of bombing is always ten times greater than the material impact.

The same idea ran through the 1920s and the 1930s when the British thought about the possibility of bombing in future wars; it was believed that one could undermine the war willingness of the enemies from the air, defeat them by

bombing their cities and bring them to the conference table. It was argued that, in the end, this was a more *humane* way of waging warfare than the kind of warfare that had been waged in WWI.

***Do you see any continuities in history in the way we have thought about the ultimate objective of bombing?***

Well, I think two themes run through the twentieth century. The first one is the idea of cooperation between the military services: aircraft helping armies and navies to win battles. Throughout the twentieth century, there have been prominent airmen who have thought that it is the best way one can use aircraft: in support of ground forces or in support of the navy. The other idea running through the century was that bombing civilians is unendurable, and that if you bomb them “enough”, the enemy is bound to give up.

WWII is one example, but an even better example is Vietnam. Notably, the American Air Force dropped more bombs in Vietnam than in WWII, in the belief that if they kept on dropping bombs and napalm, then somehow, this would prevent North Vietnam from taking over South Vietnam, or even bring about North Vietnam’s collapse and open the way for a “democratic” Vietnam. This did not work, and Vietnam became a communist State. I think, of all the examples of the twentieth century, this is probably the most striking one. Huge quantities of bombs were dropped on a developing society, in the expectation that it would produce some kind of political dividend. And in the end, the dividend went to the enemy.

One can see that strand of thought – the idea that the very fact of bombing will produce some kind of a political dividend – running right through the conflicts of the last thirty or forty years. And yet, time and again, the dividend does not emerge. Iraq was bombed and in the end, there have been ten years of insurgency and civil war. Libya was bombed and now there is a situation in Libya which is the exact opposite of what the West wanted. We have been bombing Islamic State Group for several months already, and the organization has not given up; it is growing in strength as the bombing goes on. Not only that, but the bombing of Syria simply fuels the desire of Islamic State Group to get back at Western countries, and this makes the possibility of terror probable, rather than possible.

These two strands have competed right across the century. The only occasion in recent years that I can think of where aircraft were used exclusively in their military role – in support of the army and the navy – was the battle for the Falklands. This was a classic and traditional use of air power. There was not a great deal of it, but it was extremely useful in terms of winning that military campaign. That seems to me to be a classic example of where aircraft can be used intelligently to achieve a military outcome. Through so much of the second half of the century, however, we have seen aircraft and aircrew being wasted, and civilians being killed, while the final consequences were not what the power carrying out the bombing wanted.

***In your work, you make a distinction between, on the one hand, the traditional or tactical use of air forces, and on the other, the expression of “total war” by bombing of civilians. Could you elaborate more on the relationship between the two scenarios?***

The distinction between tactical and strategic air power is a rather artificial one. It was made in the 1930s and 1940s, when people started thinking about how to distinguish between supporting the army on the ground and the navy at sea, and undertaking independent bombing operations. The idea was that independent bombing operations matched the image of total war much more effectively, because if it was argued that civilians were all contributing to the war effort – as workers, as transport workers, as seamen, etc. – then it was perfectly legitimate to regard them as a target.

And that was being argued by people in Britain in the 1930s; RAF officers who knew perfectly well that the deliberate targeting of civilians was contrary to international law argued for this. For them, total war was total war; it provided States with a kind of “moral tranquilizer”, through which they did not have to worry about conventional morality because the imperative of total war made bombing necessary and therefore legitimate.

One would imagine that Hitler’s Germany would share very much the same view of total war. However, the German armed forces were brought up on a different tradition. They were brought up with the argument that the whole purpose of having military services is to defeat the military services of the enemy; so on this basis, the whole purpose of an air force was to defeat the enemy’s air force. The German air force bombed with really great reluctance; it was not what they had been prepared to do and they did not regard it as strategically useful. They certainly did not regard the bombing of civilians as either legitimate or likely to be effective. For most of WWII, and with the exception of the Blitz on Britain, the German air force supported the army; very seldom the navy. And that was how they saw the role of air power.

During WWII, the British and the Americans both bombed cities knowing full well there would be high civilian casualties. The RAF bombed civilians deliberately; it was the only air force to do so. But in fact, the most successful examples of the Allied air power in WWII were in support of the army and the navy (for example, in North Africa and Italy): combined operations and amphibious operations or the invasion of Normandy and the support for ground forces all the way through to Germany.

Tactical air power became very sophisticated during WWII, and it has become even more sophisticated over the following seventy years. It does seem to me that tactical airpower is really what aircraft are for: it is in order to be able to achieve a military outcome, usually in combination with the other services. The Second Iraq War in 2003 was a classic example of the deployment of sea power, air power and land power together, to achieve a military outcome.

Throughout the century, airmen have been seduced by the notion that they can achieve an outcome that the other services cannot, that they have a strategy which is unique to the air, and that in order to demonstrate how different that strategy is, one has to find a different kind of target. These targets have almost always involved civilian casualties. And for much of the twentieth century, that was indeed the case. Civilian casualties were huge in WWII, and large in the Korean War and the Vietnam War.

### ***How did this reality change over time?***

Well, of course, today States cannot do whatever they want. Now they are very careful and anxious every time there are civilian casualties, because our sensibilities have changed – not military but public sensibilities. I think what is interesting about the contrast over the seventy years is that in WWII, the people being bombed did not think, “Oh, this is terror bombing”, or “This is illegal, why are they doing it?” They tended to think, “This is total war, this is what we expected to happen, and it is not actually quite as bad as we had thought; we can survive this.” That was the reality on both sides. In Germany, it was understood that in total war, bombing was likely to happen; some Germans even thought that they deserved the bombing, that it was in some sense a punishment for German aggression and anti-Semitism.

Yet, seventy years later we have a high degree of public consciousness about bombing. Bombing is very visible and every time there are heavy civilian casualties, there is an international outcry, protest, etc. All countries that are now in a position to undertake heavy air strikes know perfectly well that they are under the spotlight internationally and that they have to be very careful about what they do, what they hit. States are very aware of the political consequences of indiscriminate attack. And that is because now we do not think of war as total war – we do not imagine waging it now.

### ***Coming back to the bombing in WWII, do you think the air raids of the Allies on German territories differed from those conducted on friendly or occupied territories? Did the level of precision of these bombings differ?***

When it comes to the question of the accuracy of bombing in WWII, this is a relative concept. When the British were bombing German cities, accuracy meant concentrating as many bombs as possible on the city centre; the RAF was disappointed when bombs dropped in the countryside, as they often did. So “accuracy” could be a very flexible term. But when it came to bombing targets in France, in the Netherlands or in Belgium, there were different instructions for the crews: they had to use far fewer incendiaries, for example, because they did not want to create large fires. There was a great deal more low-level bombing. In fact, some of the bombing operations were carried out by Mosquito aircraft, capable of

a much greater level of precision than other aircraft. Having said that, the RAF's and the American air force's bombing of friendly targets killed huge numbers of civilians – 60,000 in France, as many as in Britain – and they regarded this as a necessity of war; if they wanted to expel the Germans from France, the French population would have to pay that price.

The sad thing is that, in many cases, the same thing could have been achieved by using tactical air power, fighter-bombers and other weapons with higher levels of precision. Or the British and Americans could simply have relied much more on ground forces. In France, probably the most outrageous examples of excessive and inaccurate bombing were the raids on Royan near Bordeaux towards the end of the war, where they dropped 4,000 tonnes of bombs on a tiny town. This raid was larger than any single attack on a British target during the Blitz. It obliterated 90% of the town. One journalist reported that not even one blade of grass remained. And all because the nearby German garrison had not surrendered. But this was completely disproportionate and was really poor judgement on the Allied side. It was a clear violation of all the restrictions they had tried to impose on themselves when it came to bombing friendly populations. The problem is, once you have the technology, once you are in a hurry to finish the war, once you have a home population that wants the war to be over, you just reach for the bomber.

***Armed conflicts still rage in cities today. We have seen it in Syria, in Yemen, in Afghanistan. Compared to the examples from WWII that you've just discussed, how would you describe the impact of bombing on cities today?***

Well, if we are talking about WWII, it is a completely different phenomenon. We are in fact talking about thousands of aircraft dropping hundreds of thousands of tonnes of bombs, high explosives and incendiaries, on cities. Nothing quite like that has happened since. Almost a million people were killed by strategic bombing in WWII. If we just think about that figure, it is a phenomenal fact.

I think in the 1930s everybody thought that if you bombed a city heavily, it would collapse, that everybody would leave the city, that there would be mass starvation, disease, and so on, and the war would be over quickly. People had a very fanciful view of the city, but in fact, the cities proved remarkably resilient. Even in cases where the bombing was heavy and persistent – the bombing of Berlin, or the bombing of Chongqing in China by the Japanese – cities tended not to collapse completely. And there were good reasons why that was the case; partly because it is, in the end, difficult to destroy an entire city. A good example is Cologne, which was bombed more than 250 times. 450,000 people lived there at the beginning of the war. By the end of the war, there were still 45,000 people living in Cologne, many of them living in cellars and basements, etc. However, productive work was still going on in the industrial zones around Cologne.

The expression that was used at the time was the question, “How do you kill a city?” The RAF in particular were interested in this idea, although they felt at the end of the war that they had not really been successful in doing that. The terrible thing about it, of course, was not just the idea of damaging the urban area, but that the idea was to kill civilians and demoralize those who remained. Civilians became a deliberate object of attack, the idea being that you would reduce the number of workers available, that factories would find that productivity would collapse because the workers would not come to work, etc. But in fact, the opposite happened. German war production continued to expand through years of bombing.

***Is this concept of “killing a city” helpful in understanding the bombing of Hiroshima and Nagasaki? Do you think that this was the objective?***

The two atomic attacks were different, because they were experimental. Two cities were chosen, which had not yet been bombed. The idea was to see what the bomb would do to them. Of course, the bomb created massive urban destruction, but it also left the cities radioactive, so that they could not function properly in the immediate aftermath of an atomic attack. The idea was that if the war had not ended in Europe, the atomic bomb would have been dropped on German cities and that would have killed those cities, of course. Whether the Americans or the British would ever have authorized that is a different question and a very hard one to judge.

Later on in the late 1950s, the British defence ministry set up a special committee called the JIGSAW Committee, which was asked to re-examine this very question: how do you kill a city? It had to work out how many nuclear bombs had to be dropped to achieve this result. Notably, the model they used was the bombing of Hamburg and the extent to which the effects of these attacks actually undermined the function of the city. Hamburg itself never collapsed, of course – it continued to produce goods, workers continued to work, and people gradually came back, despite the bombing. So the Committee had to calculate how many atomic bombs would have to be dropped on Hamburg to make sure that the city was effectively “killed”.

Presumably in the 1960s, the United States, Britain and the Soviet Union all had nuclear stockpiles large enough to be able to achieve the massive destruction of all urban areas in any of those countries. But that never happened. In the end, nuclear weapons did not change the nature of warfare. Instead, they created conditions which made it unthinkable that the United States or the Soviet Union would ever use these weapons against each other or against the enemy’s allies.

But the existence of nuclear weapons also shifted the focus onto different forms of conventional warfare. Under the shadow of the Cold War, we saw endless civil wars, insurgencies, “small” frontier conflicts, asymmetric wars of one kind or another, etc. The nature of warfare did change, but it did not change the way one might have expected. The Cold War produced a stand-off between great



powers, but small conflicts continued across the world, waged with conventional weapons, and with low risk of escalation.

***Speaking of the resilience of the populations under the bombs, could you give us some examples of how people coped with the bombings during WWII? How did they adapt to the reality of regular bomb raids and the disruption of normal life?***

If we want to explain the resilience of cities, particularly in WWII, there are two things that are worth mentioning. First, States recognized the need to provide the resources to keep cities going, so they needed to work out adequate systems of welfare, first aid, feeding, the restoration of fresh water, etc. The priority was to make sure that they could draw these resources from unbombed areas and focus efforts on the city that had been bombed. This system was most advanced in Britain and Germany, where bombing occurred across the whole war period.

Second, European citizens proved capable of a great deal of self-organization and self-discipline. It was not just the State that assumed responsibility; people themselves volunteered in huge numbers for civil defence organizations. The local population did all they could to help, so that the number of casualties might be reduced as far as possible.

So, the fact of resilience is partly to do with State initiatives, but also a great deal to do with the capacity of modern populations to help themselves. And I think this is a factor that most people underestimated a lot in the context of WWII. You can see examples of this later on in history: the regular shelling of Sarajevo, for example. This was why Sarajevo survived, despite everything.

While trying to explain the resilience of populations, one also has to mention a strong psychological pressure to somehow restore normalcy under conditions of disaster or violence. In the case of Germany and Britain, people would go back to houses that were heavily damaged so they could live in the basement or the cellar; they *wanted* to live in a place which they knew. But it varied even during WWII from area to area. In places where there was a weak sense of community, or where there were links between the rural and urban populations, that made it easy for the urban population to disappear into the countryside. It happened in Japan, where the response in the summer of 1945 was to go to the countryside: eight or nine million people left the cities and went to the countryside. It also happened in Italy: when the bombing started, people fled from the cities and went to the countryside because there were still strong rural–urban bonds. Whereas in Germany and Britain that was not really the case; these were very urbanized societies, and so people who stayed on, they saw the urban area as their place – the place they had to protect.

Finally, when we talk about resilience in terms of economic geography, it is worth pointing out that the war made much less of an impact on German cities, for example, than one would think from the level of destruction that was imposed on them. Studies of heavily bombed German cities have demonstrated that, despite

massive physical damage – perhaps the loss of 40% to 50% of the urban area – the return of the population and the re-establishment of pre-war levels of production was remarkably rapid in the 1950s and the 1960s. And that is true for other examples, too. In the German case, it was extreme because around half of the inner urban area was destroyed, and yet by the 1950s and 1960s, these are cities that are once again functioning cities with a high level of production. This too was a result of the combination of efforts of local communities to restore or renew familiar urban space and government priorities for reconstruction.

***How was the question of “killing” an entire city seen from the perspective of international law at the time?***

When we talk about international law in the 1930s in relation to bombing, most people refer to the Hague Rules of Air Warfare drawn up in 1923. These instruments were not formally ratified by the states concerned, but they were generally regarded as having the force of international law. Both in Britain and in Germany, it was generally agreed that bombing civilians from the air was a violation of the existing international law.

The problem came in WWII. With the commitment to bombing in Britain, the legal concerns were set aside. The argument was that the Germans were so terrible – they had violated so many international agreements – that international law did not count when attacking them; so if you killed German civilians in the course of bombing attacks, that would not be regarded as illegitimate. It is very interesting to note what language was used to describe the Germans on the British side – they were referred to as “barbarians”. I think that was not an accidental use of language; it was designed to foster the view that the Germans were barbarous and therefore outside the law, like the so-called “semi-civilized” peoples of empire. And that narrative was used throughout the war.

The German view was that they were bombed first, as indeed they were, by the RAF, and that their bombing – undertaken systematically from September 1940 through May 1941 – was retaliation and therefore allowed under international law. And in fact, almost all German bombing of Britain – the Blitz, the Baedeker raids, the V1, the V2 – were all couched in terms of retaliation against bombing carried out by the British.

Moral expediency, I think, came to govern the way in which one saw bombing as somehow *outside* conventional international law. Later on, during the Cold War, nuclear weapons were also seen, in some sense, to stand outside international law. The 1977 Additional Protocols [to the Geneva Conventions], designed to outlaw bombing of civilians, were only going to be ratified by the United States and Britain if nuclear weapons were excluded from the provisions. This was of course absurd, because it meant the most destructive weapon available to mankind was the one weapon you could not effectively control.

***One might say that international justice after WWII was also blind when it came to aerial bombing – the Nuremburg and Tokyo trials never addressed it. What do you think were the factors that contributed to this outcome?***

Well, at the end of WWII, the situation was interesting because both the British and the Americans thought that they would add the bombing to the indictment of the major German war criminals. However, the British Foreign Office very quickly said that it could not possibly do so, as then the Germans would have been able to argue before the tribunals that both the British and the Americans had done exactly the same. So they decided it was better not to make that part of the indictment.

There was certainly an understanding that their bombing had been outside the law. And, of course, the Geneva Conventions of 1949 and the United Nations Genocide Convention represented a recognition that much of what had happened in WWII was a clear violation of international law. But because bombing was regarded as necessary to achieve Allied victory, any moral ambiguity surrounding it was suppressed. When the moral issue was raised, the argument was always that there was no formal requirement in international law during the war that prohibited bombing non-military targets.

***WWII involved the bombing of schools, churches, hospitals and so on. Today, we still hear about bombing of civilians and civilian property in conflicts around the world. The recent bombing of the Kunduz hospital has caused a major public outcry. How have our perceptions changed of what is permissible in war over this century?***

Even in WWII, bombing of schools, churches and hospitals did tend to produce firmer protests than simply the bombing of ports or industries. However, because bombing was so inaccurate, there was no way of avoiding hitting churches, hospitals and other civilian objects. And this happened on both sides. Again, the basic rationale was the rhetoric of total war: the enemy is completely unscrupulous and has no morality. So neither side was surprised if schools or hospitals were bombed, though in reality the bombing of schools and hospitals was by chance, not by design.

Nowadays, every time a school or a hospital is hit, whether it is in Palestine or in Afghanistan or elsewhere, we are rightly outraged by what happens, first because the paradigm of total war is no longer our reference point, and second because the expectation is that current “smart weapons” have been developed precisely to avoid civilian damage. Rightly, we want to protest that military necessity does not justify high levels of civilian casualty. Over the past seventy years, popular sensibility about bombing has changed substantially.

***Looking at some of today's confrontations, do you think that some of the ideas of "total war" that were pertinent during WWII may still be present in contemporary warfare?***

I think that today, if we look at the fight against Islamic State Group, for instance, we have to look at the choice of language. One can see that again, as in the past, there is an attempt to paint these people as medieval, primitive, barbarous, somehow outside the conventions of modern combat. That may justify excessive retaliation of one kind or another. What is in common with bombing throughout the century is the effort made to create an abstract language that strips the humanity from the enemy and turns the target into a kind of metaphor – like the "Nazi system" or the "German war machine".

There was an interesting case in WWII where the British Air Ministry was producing a directive that talked about bombing industrial populations. The staff officer who read this document sent it back and said, "No, you cannot say we are bombing industrial populations; you have to say we are bombing industrial centres, because 'centres' is an abstract concept, while populations are people."

One can find that in later conflicts, the nature of the military target or the nature of the aim is expressed in abstract political or military terms, but never in terms of actually killing people. RAF commanders knew what they were doing and in private were prepared to admit that killing Germans was a prime objective. But they would not say that in public; the intention was veiled by an abstract language of centres and systems. The people who did the planning of the technology, who designed the incendiary bombs, who tested bombs on models of German houses – their language was also incredibly abstract. It was just about a scientific problem, about how to solve it. There was no explicit recognition that when you bomb a residential house, it might have a person in it.

***Do air raids dehumanize the enemy (or the victims) due to the lack of face-to-face interaction in contemporary battlefields?***

In a sense, they do. One does not know who the victims are or which civilians might be hit, so one talks about "surgical" air strikes. The language, again, is very abstract.

But I think that public awareness of the cost of bombing produces regular protests across the Western world. And I think this is very important. Like the hospital recently bombed in Afghanistan, it is very important that the media are not hesitant in highlighting the human face of bombing and what it actually means. Media have to do it independently of government, of course. I remember during the bombing of Baghdad during the last Iraq War in 2003, there were journalists on the ground who wanted to report what was actually happening: the deaths of civilians and the extent of civilian damage, etc. And there was a lot of debate in Britain and the United States about whether this was permissible. This

was a serious issue: we had to unseat Saddam Hussein, and these people were not being patriotic.

It is very important that there are people on the ground who are willing to say, “Well, you know, bombing is not just surgical strikes, it is not just the report of a bombing operation; it is dead people, and here are some pictures of dead people.” It is strange how seldom you see pictures of people actually killed by bombing. Images of the bombing dead were censored for the media during WWII. Even today, when a civilian target is hit and this results in civilian casualties, it is rare to see those casualties on your television screen. It is very important to give war a human face. What can seem abstract or remote becomes real and shocking, something that might prompt protest.

***In light of our discussion so far, what do you make of the use of drones nowadays? Is the use of drones a continuation of the idea that air power in and of itself can make a unique contribution or have a unique impact? Is it a reflection of something else?***

I think drones are also part of this “fantasy” about the nature of air power, the idea that with the press of a button, you can now hit targets that are going to produce a political outcome which is favourable to you. It does not seem to me that drone warfare is going to produce such outcomes. Perhaps the old-fashioned conclusion is in fact valid in this context – that to achieve your objective, you will in the end need to have troops on the ground. The success in overturning Saddam Hussein in 2003 was due to the eventual decision to have troops on the ground to achieve that goal. The actual consequences, of course, were disastrous. But the deployment of air power in support of military operations is, first of all, legitimate in terms of international law, and secondly, much more likely to produce effective consequences in military terms because it is directed at the enemy’s armed forces in the field and not at an amorphous target such as morale or the economic network.

Yet another issue when it comes to drone warfare is that time and again, the wrong target is hit and civilians are killed. The evolution of smart weapons is a fact, but smart weapons are much smarter when they are being used against enemy armour or enemy airfields, and not in areas with large concentrations of civilians.

***In the recent counter-insurgency campaigns in Afghanistan and Iraq, it seemed for a while that the main approach was “boots on the ground” and winning the hearts and minds of local populations. Is it possible to speak of a shift today towards achieving aerial domination without necessarily involving conventional armed forces on the ground?***

The answer for the twenty-first century is that operations on the ground seem to have been, on the whole, disastrous. They have produced widespread political

protests, uncertainty about the outcome, and of course, in the case of Iraq, long-term insurgency. So there is a sense that air strikes will be more economical, that there will be less cost in terms of casualty to the powers using air power, and that if it is surgical enough, if it can be focused enough on key targets, then a campaign of air strikes will produce some kind of political dividend.

Bombing in northern Iraq and Syria today does seem like going right back to the 1920s – going back to Iraq in the 1920s, when the RAF began experimenting with bombing tribal areas where there was insurgency, using aircraft because it was cheaper and easier to organize but also in the belief that aircraft were more likely to achieve the political end required. And if we are thinking about lessons learnt from the past, there is a bizarre symmetry here between the development of early counter-insurgency bombing in the 1920s and the way in which we think about counter-insurgency bombing today.

In the case of Iraq in the 1920s, it seems to have been reasonably successful, because back then air power was a novelty and the people being bombed were terrified of the effect of the bombing. But seventy, eighty years later, Islamic State Group, for example, knows what to expect. They know how to cope with bombing, how to disperse their forces and how to camouflage what they are doing. This is an unconventional military organization, difficult to undermine by the use of air power. But that is where we are: we are back with trying to use independent air power to achieve a political aim.

***If you had to summarize, what are the big lessons we have learnt and what are some of the lessons we have not yet learnt from the history of bombing?***

One clear lesson from WWII is that deliberate bombing of civilians in the hope that it will produce political collapse, social crisis and economic decline was proved wrong. It has been proved wrong a number of times over, in subsequent major bombing campaigns. It took a long time before that message really sank in.

It is interesting to note that in the immediate post-WWII period, the RAF set up a series of research programmes to evaluate the effects of area bombing. They recognized that they had not damaged the economy as seriously as had been hoped and they had not demoralized the enemy population to the extent that had been expected – in other words, that the campaign had not really been a strategic success. Whereas the Americans, who began the war insisting on precision bombing in Europe and ended it with the firebombing of Japanese cities, decided that the latter was more effective and opted for heavy and relatively indiscriminate bombing of enemy areas. By the time we get to the Korean War, the Americans already had in place a strategy of saturation bombing, like the bombing of Japanese cities, which they carried on all the way through Vietnam and Cambodia.

The other lesson from WWII was that tactical air power had been enormously important in explaining victory for one side or the other. Multipurpose tactical aircraft proved to be the wave of the future. By the 1960s

and 1970s, that was the technology that air forces preferred and now planned for. The United States still had the heavy bomber, and it was still dropping huge quantities of bombs in Vietnam, but the multipurpose fighter-bomber, which was already emerging at the end of WWII, has become really the main form of armament for air forces since.

So, there were lessons both learnt and unlearned. The air forces we have now are what air commanders really wanted in WWII but did not have yet; at the time, they did not have the technology capable of achieving what aircraft can achieve today.

### *How do you see the future evolution of warfare?*

I believe that in recent decades, two things have gone hand in hand: the development of technologies that permit more surgical strikes, and the development of the world's public opinion, which is increasingly hostile to the idea of undertaking air strikes involving threats to civilians. These two developments reinforce each other.

But when it comes to thinking about the future, there are a number of important considerations. One is that we do not know what the power constellation will be in forty or fifty years' time. If we think about the twentieth century, power constellations changed with extraordinary rapidity. Power shifts in the future will produce political tensions or conflicts, even open military conflicts, that we cannot really predict. I also think historians are not good at predicting. The one thing we can say fairly safely is that the twenty-first century is not going to be a century of peace.

When it comes to the technology, the problem is that the high-grade technology which you need for modern air power is extremely expensive. It is subject to a constant process of development. And if we are realistic, only a very small handful of States can actually afford the cost of maintaining that technology, the United States principally. If new political players come into the picture, it is unlikely that they will be able to afford the technology or the research and development programmes which are necessary to maintain it.

So, we may well reach a point – a kind of equilibrium – where we know what the technology is and what it is capable of doing, but we are not able to move really very much beyond that. In the end, much more emphasis will be placed on trying to reach political solutions, trying to use psychological warfare (which is the fashionable thing now), trying to bring pressure to bear on potential aggressors and so on. Maintaining high-tech wars over the next forty or fifty years will just become extremely difficult to do.

Paradoxically, while there are serious problems and costs in sustaining high-technology warfare, asymmetric warfare can still be conducted with relatively primitive weaponry. Kalashnikovs and roadside bombs still work well today in contexts where low-level military power is projected to achieve rather different political ends. So I think that we will likely see an increased stalemate

for the major State actors as they sustain expensive military forces they cannot easily deploy, while at the same time an increasing resort to insurgency and terror, where the level of technology is relatively primitive.

***Where do you fit the response to terrorism in your analysis of the future evolution of warfare?***

Most terrorism has arisen as a result of civil wars or insurgencies in which the major Western States have intervened. I think if we are thinking about fifty years' time, we may be facing a situation where Western powers have adopted an increasingly hands-off position in order to reduce the risk of terrorism to their populations and allow the civil wars or the insurgencies to work their own way out.

I think the West has an extraordinary optimism about its capacity to deal with societies about which it knows very little, where it has little appreciation of profound cultural differences and assumes that somehow or other, political or military initiatives will produce a society that is acceptable to Western values. But as long as those ambitions remain, we will have the problem of international terrorism.

But I think the response of the West to Islamic State Group is quite interesting: it has not been immediately "Let's get several armoured divisions on the ground, let's wipe Islamic State Group out", which a coalition of States could have done very easily. It has been, instead, to think about public opinion, to think about the limits of what can be done, and perhaps in the end, to accept in a post-imperial age that the Middle East cannot be forced into a model which suits Western interests.





## OPINION NOTE

# How warfare has evolved – a humanitarian organization’s perception: The case of the ICRC, 1863–1960

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To understand how war is perceived and how it has evolved over time, we must first choose the right agent to study: one that is at once involved in the bellicosity, and yet keeps its distance. Such an agent will be better placed to maintain an objective and rational view of developments. The International Committee of the Red Cross (ICRC) would seem to fit the bill. As a humanitarian organization that has been working with the victims of armed conflict for more than 153 years, the ICRC has plenty of experience of war, yet it preserves its ability to interpret critically in its capacity as non-belligerent. It is therefore in a position to grasp the evolution of mankind’s oldest activity over one and a half centuries – a period during which warfare has undergone incredible and deadly transformations in conjunction with technological breakthroughs and the rise of extremist political ideologies. On top of this, the ICRC was itself, in its early days, made up of people who had experienced war in one way or another. Of the five members who decided to found the organization in February 1863, three had personally experienced armed violence

to varying degrees.<sup>1</sup> This fact also made the nascent organization uniquely entitled to voice its views on a subject of which it had empirical experience.

Unfortunately, although the word “war” is omnipresent in its publications, statements and archives, it must be admitted that for many years the ICRC does not seem to have addressed this issue other than as a theoretical and general concept. Its writings are not exactly overflowing with polemological analyses enabling us to define both the subject at hand and its changing nature. It was therefore necessary to scour hundreds of texts<sup>2</sup> to draw out, piecemeal, some overarching ideas about how the ICRC viewed belligerence. These views were often constructed around opposing terms – war/peace; military/civilian; civilization/barbarity; national/international – and it was upon those dualities that the ICRC gradually built its imaginary version of war, which we will attempt to decipher here. This intellectual exercise went on for the first fifty years of the ICRC’s existence, coinciding with the organization’s very scarce presence on the battlefield itself. Structural reasons meant that the ICRC, then a small-scale organization, was largely absent from the theatre of military operations before the cataclysm of 1914. This absence, moreover, went hand in hand with the ICRC’s long-standing hesitant apprehension of belligerence. The main reason that our article only covers the period up to the 1960s is because, from then on, the ICRC deconstructed its centennial make-believe version of war to understand it in a different way. In the conclusion to the article, we will briefly outline how the ICRC reacted to the new forms of war that appeared after the fall of the Berlin Wall.

## The age of illusions: 1863–1914

### War/peace

The ICRC and the Red Cross are not pacifist organizations. This credo opens the first issue of the *Bulletin International des Sociétés de Secours aux Militaires Blessés*, in response to the reproach levelled at the ICRC that it strove to attenuate the effects of war rather than cutting off the roots of evil.<sup>3</sup> The ICRC and the International Red Cross and Red Crescent Movement (the Movement) that it

1 In addition to Henry Dunant (1828–1910), who instigated the Red Cross project after his traumatic experience of seeing wounded soldiers after the Battle of Solferino (24 June 1859), there was General Guillaume-Henri Dufour (1787–1875), Swiss army officer and engineer, then commander-in-chief of the Swiss federal army during the Sonderbund civil war (1847); and Louis Appia (1818–1898), who was a war surgeon during several armed conflicts, including the 1859 Italian War.

2 The research for this essay focused in particular on articles published in the *Bulletin International des Sociétés de Secours aux Militaires Blessés* (which became the *Bulletin International des Sociétés de la Croix-Rouge* (BISCR) and later the *International Review of the Red Cross*), on the reports of the International Conferences of the Red Cross, and on publications by ICRC members, especially Gustave Moynier (1826–1910), second president of the ICRC from 1864 to 1910.

3 BISCR, No. 1, October 1869, p. 3.

founded set out primarily to humanize conflict.<sup>4</sup> Paradoxically, while war constituted the reason for its existence and its “business” to all intents and purposes, the ICRC quickly came to espouse a discourse which suggested that it, too, sought to fight against this scourge. In 1873, Gustave Moynier observed that the Red Cross indirectly served the efforts of the so-called peace societies (i.e., the peace movement), of which it was in fact a useful auxiliary.<sup>5</sup> The founding of the ICRC and of the Red Cross was indeed intended to curb bellicose activity. Through organized, concerted and universal assistance for the victims of war, the ambition of the rescuers who banded together under the emblem of a red cross on a white background was to bring compassion to the battlefield. The more humanized war became, the less inhumanity would occur. This would inevitably lead to the “perfectly natural desire to see the source of so much misfortune run dry”,<sup>6</sup> and finally, in the future, to the disappearance of war itself – which, since it would no longer be an expression of human brutality, would lose its purpose. As Moynier asked in 1888, was war not already seen as being the exception, deplored by all?<sup>7</sup> Tensions between people and nations would find other – peaceful – outlets, modelled on the arbitration tribunals<sup>8</sup> proven to have prevented parties from resorting to armed force. The founders of the ICRC, while far from naive, had this perception reinforced by the successes they had notched up. To their credit, they had achieved the creation of the Geneva Convention – a universal and permanent international treaty that placed limits on the hitherto absolute power of States to wage war. This first text of modern international humanitarian law (IHL) paved the way for other similar agreements, each of which restricted that kingly right a little more. But of course, on the other hand, the ICRC was also witnessing the modernization of weapons and the development of new killing machines. Here, too, this phenomenon made the violence ever more threatening and lent even more weight to the “impassioned pleas against war”.<sup>9</sup> Weapon modernization could also, paradoxically, have beneficial effects for victims. The creation of so-called “humanitarian” bullets<sup>10</sup> that penetrate tissue and bone at high speed while keeping their shape was one example of those advances, because such ammunition caused less irreversible

4 In the words of Louis Appia; “Rapport adressé au Comité international par M. le Docteur Appia sur sa mission auprès de l’Armée alliée dans le Schleswig”, *Secours aux blessés: Communication du Comité international faisant suite au compte rendu de la Conférence internationale de Genève*, Geneva, 1864, p. 144.

5 “Les dix premières années de la Croix-Rouge”, *BISCR*, No. 6, July 1873, p. 241.

6 *Ibid.*

7 “Les causes du succès de la Croix-Rouge”, *Mémorial des vingt-cinq premières années de la Croix-Rouge, 1863–1888*, Geneva, 1888, p. 13.

8 Modelled on the Alabama tribunal of arbitration, held in Geneva in 1872.

9 “Les causes du succès de la Croix-Rouge”, above note 7, p. 16.

10 The *BISCR* devoted many articles to the perfecting of handguns, which were still the most commonly used weapons in war. One of the earliest examples of “humanitarian” bullets was mentioned in *BISCR*, No. 64, October 1885, pp. 151–152. Among the members of the ICRC, Dr Ferrière was the most reluctant to adopt this terminology; see, for example, his article “Les balles humanitaires”, *BISCR*, No. 154, April 1908, pp. 89–90.

harm and killed fewer people at the end of the day.<sup>11</sup> But the overriding factor that would prevent these new technologies of war from being truly deadly was the reluctance of States themselves to use them; no State wanted to be the one to take that first uncivilized step and become an outcast. Wasn't the same true of asphyxiating gases and dum-dum bullets, which had been prohibited by the 1899 Hague Convention?

The setting in which the ICRC developed was another factor likely to reinforce these irenic tendencies. After all, the ICRC was founded in Switzerland by Swiss citizens. Since the peace treaties of Vienna and Paris of 1814–15, the Swiss Confederation had not been involved in any international conflict.<sup>12</sup> It had experienced some internal unrest, but the most serious – the so-called Sonderbund civil war of 1847 – lasted barely a month and claimed fewer than 100 lives (of some 200,000 men mobilized). What's more, the victors – led by General Guillaume-Henry Dufour, future ICRC member – behaved in a “humane” way both during and after the fighting. All these facts led the ICRC to imagine that war and violence would be gradually defeated by man's ingenuity and solidarity, in particular that born within the Movement.

The ICRC's love affair with peace reached its height at the beginning of the twentieth century, with the awards of the first Nobel Peace Prizes. The connection between peace and the Red Cross was central to the case that Henry Dunant made, with the support of certain pacifists, with a view to being awarded this recognition. He succeeded in 1901.<sup>13</sup> The ICRC wanted to try its luck too, but had less success, with no fewer than five refusals between 1900 and 1905, whether as an institution or in the name of its president, Gustave Moynier.

## Civilization/barbarity

The kind of war that underpinned the ICRC's humanitarian programme was of a particular sort, which could be classified as Napoleonic: namely conflict between States, with forces of well supervised conscripts,<sup>14</sup> and involving only a few decisive, if bloody, battles. Reinforcing this vision, the founders of the ICRC observed three recent or ongoing wars: the Crimean War (1853–56), the Italian War (1859) and the American Civil War (1861–65). The latter of these, while a civil war, nevertheless saw states fighting against each other.

11 As proven in the articles that the *BISCR* published about developments noted in army medical reports that showed a drop in mortality rates among the wounded from one war to the next; see, for example, “Quelques rapports sanitaires à propos de la guerre sud-africaine”, *BISCR*, No. 124, October 1900, pp. 269–279.

12 Switzerland was the country least likely to go to war, according to the ICRC: see “L'avenir de la Croix-Rouge”, *BISCR*, No. 50, April 1882, p. 81.

13 Henry Dunant's candidature was, however, contested by one section of the peace movement. To soothe these tensions, the very first Nobel Peace Prize was jointly awarded to Henry Dunant and the French pacifist Frédéric Passy.

14 For the ICRC, this factor also contributed to a certain degree of commiseration towards soldiers who were nationals and not mercenaries; also on this topic, see *ibid.*, p. 68; “Mémorial des vingt-cinq premières années de la Croix-Rouge”, *BISCR*, No. 76, October 1888, p. 151.

It was with this model of war in mind that the ICRC would develop and, in parallel, forge the Movement and IHL. While those conflicts were by no means angelic – thinking in particular of such bloody events as the battles of Solferino and Malakoff – they did take place between “civilized” States. War, while of course remaining humankind’s greatest self-inflicted evil and one that should be fought against and wiped out, nevertheless acquired an air of legitimacy and honour when waged between two nations that had acquired the same degree of “civilization”. Only States could minimize war’s terrible impact, especially for the victims. Civilization, therefore, also civilized armed violence. Without necessarily subscribing to Thomas Aquinas’s “just war” theory, in its early decades the ICRC, adopting a largely chivalrous view of war, acknowledged that it was necessary, while waiting for an alternative to be found. What’s more, when war was waged in the name of civilization, it even seemed to be a requirement.

The ICRC supported the West’s “civilizing” mission in the world, which was hardly surprising given that the organization was born of that same Western stock. The reason was simple: given the number of indigenous peoples who did not count as civilized because of their barbaric ways,<sup>15</sup> others had to civilize them. Hence the need for colonial expeditions and conquest which, as well as bringing “progress and enlightenment” to remote corners of the globe, would at the same time abolish their terrible warlike habits and contribute to this process of humanizing warfare. For the few non-European nations, this process of civilizing violence could take place without any external military intervention. Such was the case of Japan, held up as an example by the ICRC,<sup>16</sup> after choosing to adopt Western civilization and become a standard-bearer for the Red Cross in Asia.

The ICRC also participated in this civilizing mission by seeking to involve as many countries as possible in its humanitarian project.<sup>17</sup> Every uncivilized country that adopted the Red Cross principles and emblem – like Japan and Siam<sup>18</sup> – represented a victory for the ICRC. But there were also some defeats, such as the Ottoman Empire, which, despite rapidly becoming one of the signatories of the Geneva Convention,<sup>19</sup> was unable to cease its “savagery” towards its Christian inhabitants<sup>20</sup> and, moreover, had renounced the cross for

15 The populations of Africa was the primary target of this criticism; see, for example, “La Croix-Rouge chez les nègres”, *BISCR*, No. 41, January 1880, p. 5. Surprisingly, this stereotype of “uncivilized” peoples also applied to whites in Africa. Thus, the Boers – a population of Dutch origin whose ancestors emigrated to southern Africa in the seventeenth century – were called “semi barbarians” by the *BISCR*: see “Les insurrections dans l’Afrique austral”, *BISCR*, No. 46, April 1881, p. 53.

16 At the risk of failing to give due consideration to the violations of IHL committed by Japan against a State like China, seen as less civilized: see “La guerre sino-japonaise et le droit international”, *BISCR*, No. 107, July 1896, p. 212 in particular.

17 On the ICRC’s efforts to encourage the Japanese delegation that visited Switzerland, see “L’ambassade japonaise”, *BISCR*, No. 17, October 1873, p. 11–16. Japan ratified the Geneva Convention and founded a Red Cross Society in 1887.

18 Siam (now Thailand) ratified the Geneva Convention in 1895 and at the same time set up a fledgling Red Cross society. The Siam Red Cross was recognized by the ICRC in 1920.

19 In 1865.

20 See the many accounts of atrocities by Turkish troops recounted in the *BISCR*, particularly during the Great Eastern Crisis (1875–78).

the crescent.<sup>21</sup> And then there were cases where the ICRC was blind, such as President Gustave Moynier's fervent support<sup>22</sup> for the Congo Free State – the first African State to adopt the Geneva Convention (1888) and set up a Red Cross society (1889), but which proved to be a puppet State controlled by Leopold II and where the system of colonial exploitation led to one of the first ethnocides of the twentieth century.<sup>23</sup> Still in the name of civilization, there were aberrations like the ICRC's affirmation that it had been necessary for British troops to kill the wounded Dervishes after the Battle of Omdurman (2 September 1898).<sup>24</sup> This binary vision of civilization versus barbarity persisted at the ICRC, though in a more nuanced form, throughout the first half of the twentieth century.

## International/national

The ICRC's plan was to start by tackling the tip of the iceberg – international conflicts, which were the most visible and publicized and the biggest threat to global stability.<sup>25</sup> The ICRC therefore addressed States to suggest that they set up civilian societies for relief to wounded soldiers and ratify, from 1864, an international pact recognizing those societies and protecting their members and the victims they would care for. From the start, the ICRC did not forget that there was also the submerged part of the iceberg, made up of internal wars that took various forms – but it left the task of humanizing them for later.<sup>26</sup> From the time of the Third Carlist War (1872–76), however, the ICRC's interest in civil wars rose, because the Spanish example had shown that there could be fighting within a single nation that still followed the ideal model which the ICRC had envisaged for international conflicts (organized armed forces respecting a certain code of chivalry and ready to reach agreements, especially when it came to helping the wounded).<sup>27</sup> The idea that the Red Cross had a role to play in fratricidal conflicts therefore took hold,<sup>28</sup> and national relief societies would be involved in several such conflicts, especially in their colonies. It goes without saying that, in this context, the relief was primarily, if not exclusively,

21 This change took place during the Russo-Turkish war of 1877–78.

22 Gustave Moynier was, moreover, Congo's consul-general in Switzerland from 1890 to 1904.

23 It is estimated that several million Africans died in Leopold's Congo as a consequence of colonial exploitation of the territory between 1888 and 1908; for figures, see: <http://necrometrics.com/20c5m.htm> (all internet references were accessed in December 2015).

24 "Les blessés de la bataille d'Omdurman", *BISCR*, No. 117, January 1899, pp. 40–41. While continuing to plead "attenuating circumstances", the ICRC nevertheless gave a British war correspondent in Sudan an opportunity to speak out against what had happened: see "Les blessés de la bataille d'Omdurman", *BISCR*, No. 118, April 1899, pp. 109–113.

25 "We are restricting ourselves to addressing only the issue of the great struggles for power in Europe": see Jean-François Pitteloud (ed.), *Procès-verbaux des séances du Comité international de la Croix-Rouge*, 17 février 1863–28 août 1914, Geneva, 1999, p. 20.

26 *Ibid.*

27 See "Les blessés espagnols", *BISCR*, No. 19, April 1874, pp. 145–148; and "Les blessés espagnols", *BISCR*, No. 20, July 1874, pp. 194–197.

28 "It is to be hoped that, in internal conflicts, the parties will draw on the charitable principles that have governed our work, and that they will at least agree on one shared idea: respect and care for the wounded": "Les dix premières années de la Croix-Rouge", *BISCR*, No. 16, July 1873, p. 235.

administered to the occupying troops. It is also worth noting that when disturbances broke out in the Ottoman Empire, the ICRC’s sympathy lay instantly with the victims on the insurgents’ side, who were often Christians like the ICRC’s members.<sup>29</sup>

## Military progress/humanitarian progress

Lastly, to round up this ICRC origins story in relation to war, the organization seemed very interested in technological advances – not only, as we have seen, in terms of “humane” weapons, but also and above all in terms of the potential improvements in care for the wounded soldiers who, prior to 1914, were the ICRC’s main concern. The organization ran competitions to perfect the design of its stretchers and to improve the set-up of a field hospital. It canvassed the national relief societies and regularly published their proposals in the *Bulletin International des Sociétés de la Croix-Rouge (BISCR)*, complete with illustrations. The ICRC also advocated the use of electricity on the battlefield in order to collect the wounded at night.<sup>30</sup> As for the combatants, the ICRC stressed, for example, the extent to which improvements in transportation, and in particular the use of the railways, had changed the face of war, giving it the appearance of both speed and mass, made possible by the swift transfer of troops from one side of the European continent to the other. The issue of future wars, in relation to the continued and innovative efforts being made to find ever more disastrous ways to kill one’s fellow man, was clearly addressed at the Fifth International Conference of the Red Cross (International Conference) in 1892. The International Conference put this issue to the National Societies, and called upon the ICRC to gather their views and to report to the next Conference.<sup>31</sup> Thus, in 1897, at the Sixth International Conference, the ICRC submitted a list of nineteen measures aimed more at preparing the National Societies for traditional mass warfare than for a conflict using new scientific discoveries.<sup>32</sup> This was hardly surprising, since the Movement overlooked certain key advances and did not, for example, anticipate the effects of military use of civilian technology. In 1911, therefore, although it reported on the bombardments by Italian aircraft during the Italo-Turkish War (air strikes that also hit some protected sites), the ICRC did not pick up on the fact that this was the first time that bombs had been dropped from planes, and that war would henceforth be fought in the skies.

29 See, for example, the articles “L’insurrection macédonienne”, *BISCR*, No. 136, October 1903, pp. 205–206; and “Le Comité de Constantinople et les massacres arméniens”, *BISCR*, No. 159, July 1909, pp. 191–192.

30 Resolution M of the Third International Conference, Geneva, 1884. The same Conference expressed the wish that antiseptic dressings be the norm in the medical services of all armies operating in the field, as well in National Red Cross Societies.

31 Fifth International Conference, Rome, 1892.

32 Sixth International Conference, Vienna, 1897.



## Disillusion: 1914–18

The First World War marked a twofold turning point for the ICRC in terms of its perception of how war was evolving. Its work for the victims, mainly prisoners of war, was on an unprecedented scale. The ICRC became a truly operational organization, epitomized by its International Prisoners of War Agency, which at the height of the conflict had more than 1,200 staff, and the material and financial means to match. This time the ICRC was directly involved, sending representatives (known as delegates) to inspect prison camps in the belligerent countries. It was therefore in direct contact with the reality of war, which became a tangible subject for study. Paradoxically, it was at this time that a dichotomy emerged between the ICRC in Geneva and the ICRC in the field – a split that would have repercussions for how armed violence was perceived by those facing it directly and those far removed from it and only able to understand it through the eyes of those on the ground.

The ICRC's direct involvement in the war enabled it to observe more closely how things were evolving, and in particular the new methods of waging war. Underwater warfare and the torpedoing of ships (including hospital ships), reprisals against prisoners of war and the use of poison gas were all issues of concern to the ICRC. Throughout the conflict, the organization issued protests and appeals to the belligerents to limit or ban the use of new weapons.<sup>33</sup> However, these efforts were often in vain or only acted upon well after the end of the war, as in the case of poison gas.<sup>34</sup>

The lack of reaction to its initiatives opened the ICRC's eyes to a new reality: war was no longer chivalrous – even though it was still largely waged by “civilized” societies – and overstepped all the limits imposed by international law. The violence was becoming as barbaric as it was among the “barbarians”. Stemming from this observation, the ICRC realized the ineffectiveness and inadequacy of that same law which was supposed to govern armed violence. These two phenomena led the ICRC, even before the end of the conflict, to consider drafting a code for prisoners of war that would be adapted to the new face of war.<sup>35</sup> This work would first come to fruition in 1929 with the adoption of the Convention relative to the Treatment of Prisoners of War.

Another major upheaval in the ICRC's perception of war concerned the victims. The invasions of Belgium, Serbia and northern France, the deportations of civilians, the hostages taken among occupied populations, and finally the tragic extermination of Armenians and Assyrian-Chaldeans in the Ottoman Empire

33 First published in the *BISCR*, these appeals and protests were collected and published in a book at the end of the conflict: *Actes du Comité international de la Croix-Rouge pendant la guerre 1914–1918*, Geneva, 1918.

34 The efforts begun by the ICRC on this issue came to fruition with the adoption, in 1925, of the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

35 Daniel Palmieri (ed.), *Les procès-verbaux de l'Agence internationale des prisonniers de guerre, 21 août 1914–11 novembre 1918*, ICRC, Geneva, 2014, p. 235, available in French at: [www.icrc.org/fre/resources/documents/publication/p4220.htm](http://www.icrc.org/fre/resources/documents/publication/p4220.htm).

brought home to the ICRC that war no longer just affected soldiers. The First World War highlighted that civilians were and had always been victims of armed conflict. For further proof that this was a long-standing phenomenon, the ICRC had only to recall the images that emerged during the Balkan Wars revealing the suffering of communities forced out of former Turkish territories in Europe. This realization prompted the ICRC to devote part of its humanitarian work to civilian victims, setting up a section especially dedicated to them within the International Prisoners of War Agency. In the field, when they had the opportunity and authorization, ICRC delegates also visited civilians detained because of their enemy nationality.<sup>36</sup> Further, the ICRC publicly denounced injustices committed against civilians, including the Armenian massacre of 1915.<sup>37</sup> But it was on the ICRC’s post-war activities that this new focus on civilian victims really had an impact.

## After the First World War: 1920–30

The interwar period saw the ICRC renounce the distinction between international conflicts, where it had a legal mandate to intervene, and internal conflicts, which lay outside its mandate. Called upon to help with the process of repatriating former prisoners from Russia and the former Central Powers, the ICRC set up its first permanent delegations abroad, either in transit countries or in the countries of origin of those former prisoners. At that time, Eastern Europe, where the ICRC was now present – whether in Berlin, Prague, Budapest or Warsaw – was experiencing major political instability, giving rise to unrest, revolutions and wars. The ICRC was inevitably drawn into several of these events, as epitomized by its delegate in Hungary, who was present at the time of the Bolshevik revolution of March 1919, followed by the “White” counter-revolution in August. The ICRC delegate, faced with people’s suffering and humanitarian opportunities, got involved in an internal crisis, which would normally lie outside the ICRC’s mandate. By acting in this way, the delegate unwittingly paved the way for the ICRC’s future involvement in non-international armed conflicts; he also opened up the ICRC’s work to other victims (in this case, political prisoners<sup>38</sup>) and to new activities (direct distributions of aid and medical supplies to civilians).

Much of the ICRC’s work in the 1920s was therefore focused on non-combatants, for whom decisions made in wartime were still taking their toll (e.g., the economic blockade of Germany and its allies, leading to food shortages in

36 The reports of the delegates’ visits during the First World War were published in *Documents publiés à l’occasion de la Guerre*, 24 series, Geneva, ICRC, March 1915–January 1920.

37 “An Armenian committee has appealed to us concerning the Armenian populations massacred by the Turks, with the undissimulated purpose of extermination”: *BISCR*, No. 184, October 1915, p. 438.

38 “La protection des étrangers à Budapest”, *BISCR*, No. 202, 15 June 1919, p. 705. Another category of new victims was refugees, particularly from Russia: “Appel du Comité international en faveur des réfugiées russes nécessiteux”, *BISCR*, No. 220, 15 December 1920.

those countries<sup>39</sup>) or having direct consequences, with the redrawing of the map of Europe and the resulting clashes between nationalities. The Hungarian precedent and other internal disturbances (such as in Silesia and Ireland) ended up making the ICRC's role in civil wars official, putting an end to the dichotomy between international and national. Surprisingly, this new area of humanitarian action continued to be overlooked by the law of war, as all efforts to revise the treaties continued to focus on international war; the Geneva Conventions of 1929 were a perfect example of this.

The other major shift in the ICRC's perception was the realization that there was little chance of an end to war one day. Contrary to pacifist hopes, expressed in particular by the victorious States, the First World War had its successors. Thanks to its delegations in Eastern Europe, the ICRC was well placed to observe that the guns had not fallen silent after 11 November 1918. New international conflicts broke out between Poland and the fledgling Soviet Russia, between Hungary and its neighbours, and between Greece and Turkey, perpetuating the carnage of 1914–18. Exhortations to “combat the warlike spirit that still hangs over the world”, as the 1921 International Conference put it,<sup>40</sup> or the stronger idea of preventing war, expressed during the 1934 International Conference in Tokyo,<sup>41</sup> sounded a lot like pious hopes.

Hope for universal peace was also dampened by the inability to achieve respect for the law – Hague and Geneva alike – both during the First World War and after. As for the plan to set up an international criminal court to try violations of the Geneva Convention, as the ICRC proposed in 1921, it was a dead letter.<sup>42</sup> That was why the ICRC's efforts would now focus on striving to strengthen existing IHL. The first step was to have specific protection for certain categories of victims who had paid the highest price in the First World War – i.e., prisoners of war and inhabitants of territories under military occupation. While the ICRC was successful for the first group, with the adoption in 1929 of a specific convention for prisoners of war, its draft for a new international treaty containing thirty-three articles protecting civilians of enemy nationality – which had been endorsed by the Fifteenth International Conference in 1934<sup>43</sup> – stalled in the face of the reticence of some States. The ICRC also pushed for the protection of civilians against the dangers of airborne chemical warfare agents; it was entrusted with a mandate by the 12th International Conference to this end.<sup>44</sup> It convened three international expert committees between 1928 and 1931 and set up a document centre on airborne chemical warfare to collect all the information about the subject and make it available to the National Societies and

39 Maurice Gehri, “La vie chère en Autriche”, *International Review of the Red Cross*, No. 22, 15 October 1920.

40 Resolution V of the Tenth International Conference, Geneva, 1921.

41 Resolution XXIV of the Fifteenth International Conference, Tokyo, 1934.

42 Resolution IV of the Sixth International Conference, Vienna, 1897. Fifty years earlier, the ICRC had already proposed that an international criminal body be set up with the same purpose, also to no avail; see “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève, par M. Gustave Moynier”, *BISCR*, No. 11, April 1872, pp. 122–131.

43 Resolution 39 of the Fifteenth International Conference, Tokyo, 1934.

44 Resolution V of the Twelfth International Conference, Geneva, 1925.

the public. However, the ICRC ran out of financial resources and stopped this work in early 1938.

Many of the armed conflicts of the 1930s were characterized by the presence of an authoritarian political ideology that lay at the origin of the violence. The examples of the Spanish Civil War, the Sino-Japanese wars and Italy's territorial conquests demonstrated that it was no longer just about defeating the enemy, but rather about destroying the enemy. It seems that the ICRC did not realize, or ignored, the totalitarian nature of the regimes involved in these confrontations, and that it continued to classify these "new" conflicts according to its usual system (international wars or civil wars). The delegates on the ground, on the other hand, while not classifying the violence, noted that the conflicts were special. Thus, when protected Red Cross sites were bombed and mustard gas used by the Italian army in Ethiopia, and when prisoners were executed by Francoist and Republican forces in Spain, the ICRC delegates on the ground communicated their concerns about violations of the law and this new heightened kind of fighting to Geneva. But ICRC Headquarters did not really take much heed of complaints from the field.

## The end of illusions: 1939–45

For the ICRC, the Second World War brought with it a sense of déjà vu. The organization was faced with the same issues as during the previous world war, although this time the humanitarian needs and efforts would be on a scale never reached during the 1914–18 conflict. In terms of the law, the situation was mixed: although the ICRC had the satisfaction of seeing that its work for the abolition of poison gas had paid off – this weapon was not used on a mass scale during the war – on the other hand the protection of civilian populations against air raids, something for which the ICRC and the Red Cross had campaigned,<sup>45</sup> proved unattainable from the Poland Campaign onwards. In March 1940 the ICRC issued a long appeal against the use of aviation as a method of warfare,<sup>46</sup> but to no avail. Meanwhile, the question of prisoners of war, protected since 1929, exposed the ambivalence arising when an international norm clashed with totalitarian ideologies. Whether it was the Soviet Union's treatment of the prisoners it took, Japan's treatment of the captives who fell into its hands in the countries it occupied, or Germany's treatment of Soviet prisoners – all these situations remained outside of humanitarian law and action, despite the ICRC's efforts.

But it was the experiences of civilians in occupied territories that would really expose the limits of the ICRC's perception of war. At the start of the conflict, the ICRC suggested that the belligerents adopt the 1934 Tokyo draft convention, just for the

45 See in particular the appeal for protection of civilians against bombing from the air, made in Resolution IX of the Sixteenth International Conference: *Sixteenth International Red Cross Conference, London, June, 1938: Report*, Geneva, 1938, p. 103.

46 "Appel concernant la protection de la population civile contre les bombardements aériens", *BISCR*, No. 452, April 1940, pp. 321–327.

duration of the hostilities. Only Germany was willing to discuss this, provided it was reciprocal, which was not the case. This lack of protection had catastrophic consequences for civilians deported in the territory of the Third Reich. Throughout the war, the ICRC did its utmost to intervene in order to help these victims in various ways, which were modelled on its activities for prisoners of war: gathering information about the deportees, exchanging correspondence with their families, delivering food and medical supplies to concentration camps, and trying to carry out visits in the camps at the same time. Most of these initiatives were rejected by the German authorities. While the ICRC cannot be reproached for doing nothing for civilian deportees, what should be highlighted is its inability to break free of a mindset that lumped them in with “traditional” victims of armed conflict, no different from soldiers. The organization failed to grasp that the deportees were different, especially the “racial” deportees, and completely misjudged a key factor: time. The deportees were being condemned by their jailers to certain death, unlike prisoners of war, who could hope to be released one day. In this regard, traditional humanitarian step-by-step efforts were useless for these civilian victims whose days were numbered. The ICRC, like many others, was unable to break free of its usual approach, which it sought to apply to a situation that was decidedly unusual.

Unlike in the First World War, the issue of new technologies of warfare was not on the ICRC’s radar during the conflict, but it returned with a vengeance in August 1945 with the two atomic bombings of Japan. The fear aroused by this new weapon of mass destruction revived a pacifist discourse within the Movement that had fallen into disuse. It gave rise to two resolutions adopted at the first post-war International Conference<sup>47</sup> and became a primary focus of the Movement for the Cold War decades to come.

## The age of reason: 1945–60

The period immediately after the Second World War saw the ICRC re-examine the last of the dualities underpinning its make-believe vision of war: that of civilization versus barbarity. Up to then, the term “barbarity” had been used to describe the various colonized peoples. Most of the colonial conflicts that had taken place in the first half of the twentieth century had served to reinforce the ICRC’s vision of a fight between civilization and savagery. True, the Italo-Ethiopian war of 1935–36 had shaken this world view, showing that a civilized nation could be crueller than the “barbarians”. But the final blow came when the extermination camps were set up – the work of a nation that was also the birthplace of *Kultur*. From that time on, the ICRC made a radical about-turn and started to look more closely at those who were supposedly still in the shadow of civilization. This

47 Resolution XXIV (“Non-directed Weapons”) earnestly requested States to undertake to prohibit absolutely all recourse to atomic weapons in the event of war; Resolution LXIV (“The Red Cross and Peace”) reaffirmed the Red Cross’s determination to work for enduring peace among nations. See *Seventeenth International Red Cross Conference, Stockholm, August 1948: Report*, Stockholm, 1952, pp. 94 and 102–103 respectively.

change of attitude was helped along by the emergence of the wars of decolonization from 1945, which would gradually spell the dismantling of the Dutch, French, British, Belgian and Portuguese empires. During these conflicts – classified in legal terms as civil wars or internal disturbances – the ICRC largely came to the aid of the colonized, whether combatants or civilians. The dissymmetry of the forces involved meant that for the most part, the toll was heaviest among the indigenous populations. That brought the ICRC up against reason of State – which could have been a major obstacle for its efforts to exercise its humanitarian mandate. While the French government was quick to grant the ICRC permission to visit enemy combatants and civilians captured during the conflict in Algeria, the organization struggled to obtain the same permission from the British during the quashing of the Mau Mau uprising in Kenya, where it was only briefly able to act at the very end of the events. When working in the field, ICRC delegates noted that, while the action of the colonizers was legitimate, that did not exclude ill treatment of the colonized peoples who had rebelled and been captured. Cases of torture during the Algerian War were the most striking example of this. Although the other side was not absolved of all crimes – far from it – the distinction between “civilized” whites and the other “barbarians” nevertheless disappeared from the ICRC’s discourse, even if racism could still be detected in the odd report or letter. But after 1945, the ICRC only approached war – regardless of where it was taking place – in terms of combatants and victims, and of its duty to protect them as best it could.

## **Conclusion: A new perception of warfare?**

It had therefore taken several decades for the ICRC’s perception of armed conflict to align with reality, and for it to adapt to, if not understand, how warfare was evolving. The fact that the organization had not been physically present on the battlefield for the first fifty years of its existence partly explains this time-lag. It had lived on imported images of conflict, drawing on the imaginations of its members, who had grown up in a country that had long been spared the scourge of war and revelled in that fact. The ICRC had also yielded to a Western, Christian view of the world, which prevented it from correctly judging armed violence, especially when it came to colonial conflicts. This peculiar mindset formed the starting point for the organization and, initially, for modern international humanitarian law.<sup>48</sup> Founded to “humanize war” (in the words of one of its founders, Louis Appia) and not to fight it, the ICRC nevertheless let itself get carried away by the pacifist message of the late nineteenth century, perhaps more out of ambition than conviction.

This idealistic vision evaporated with the outbreak of the First World War. The ICRC realized that war, far from becoming more humanized, was increasingly inhumane, owing in particular to technology (tanks, submarines, aircraft, gas, etc.).

<sup>48</sup> We could also ask whether the ICRC founders’ erroneous belief that the scope of the 1864 Geneva Convention was based on reciprocity had been the start of their skewed perception of war.

And the representatives that the ICRC sent to help the victims of the war (military prisoners and civilian internees) only confirmed this sorry realization. In Geneva itself, the ICRC came into contact with the suffering caused by the conflict, witnessing the arrival of thousands of French civilians driven from occupied territories. Although the ICRC did respond to these dreadful developments by denouncing the violations committed against people or in the conduct of hostilities, sometimes it took a while to react, as though it needed to prove to itself that all of this was really happening. The case of poison gas, used from 1915 and only denounced by the ICRC in 1918, is a telling example of this. Unable to count on mankind's goodwill, the ICRC turned to the law – imperfect, admittedly, but the last guarantor of civilization. The organization supported many initiatives by the belligerents aiming to establish a “humanitarian” framework for war, then it began thinking itself about revising the existing law, but once again only in a reactive way, drawing on past experience rather than trying to anticipate how war would develop in the future.

Following the First World War and in particular from the 1950s, the ICRC therefore went from having a theoretical interest in armed conflict to being a steadily growing presence in war zones. From that time, and for roughly the next four decades, the organization evolved in a relatively clear-cut conflictual environment. Things deteriorated again after the fall of the Berlin Wall and the collapse of the bipolar world, with the emergence of new forms of violence: ethnic, nationalist and unstructured conflicts, then the “war on terror”, and finally other situations of violence not amounting to armed conflict (such as the Arab Spring) that make up so many of the contexts in which the ICRC is working. It seems a little premature to analyze whether and how the ICRC has changed its perception of armed conflict since the beginning of the 1990s. It can nevertheless be supposed that, in light of some of the civil wars in West Africa and the Caucasus in particular, a concept like “barbarity” may have regained currency at the ICRC, especially when the organization has itself been a direct victim of violence in these settings. It also seems obvious that the “war on terror” has blurred the distinction between peacetime and wartime that had hitherto reigned. That said, and unlike in its early days, the ICRC has directly experienced these new forms of violence. This has brought it into contact with new victims and new needs, and has above all forced it to overhaul its understanding of war. This “knowing by doing”, which began in the First World War and continues to this day, is also undoubtedly one of the reasons for the ICRC's longevity. Its existence as a humanitarian organization has depended on it adapting continually to its working environment. Today, the ICRC is once again facing a turning point in the evolution of warfare as a result of major technological challenges in the form of cybernetics and possibly of robotics, which have the potential to fundamentally change how wars will be fought in the future. While the ICRC may try to prohibit them or, failing that, restrict their deadly impact through the law, it would be hard pressed to anticipate the humanitarian needs that would result from any military use of these methods. And that is an abiding characteristic of war: its effects can only really be perceived once they have happened, and only then can we really talk about the evolution of warfare.



# The South African War as humanitarian crisis

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## Abstract

*Although the South African War was a colonial war, it aroused great interest abroad as a test of international morality. Both the Boer republics were signatories to the Geneva Convention of 1864, as was Britain, but the resources of these small countries were limited, for their populations were small and, before the discovery of gold in 1884, government revenues were trifling. It was some time before they could put even the most rudimentary organization in place. In Europe, public support from pro-Boers enabled National Red Cross Societies from such countries as the Netherlands, France, Germany, Russia and Belgium to send ambulances and medical aid to the Boers. The British military spurned such aid, but the tide of public opinion and the hospitals that the aid provided laid the foundations for similar voluntary aid in the First World War. Until the fall of Pretoria in June 1900, the war had taken the conventional course of pitched battles and sieges. Although the capitals of both the Boer republics had fallen to the British by June 1900, the Boer leaders decided to continue the conflict. The Boer military system, based on locally recruited, compulsory commando service, was ideally suited to guerrilla warfare, and it was another two years before the Boers finally surrendered. During this period of conflict, about 30,000 farms were burnt and the country was reduced to a wasteland. Women and children, black and white, were installed in camps which were initially ill-conceived and badly managed, giving rise to high mortality, especially of the children. As the scandal of the camps became known, European humanitarian aid shifted to the provision of comforts for women and children. While the more formal aid organizations, initiated by men, preferred to raise funds for post-war reconstruction, charitable relief for the camps was often*



*provided by informal women's organizations. These ranged from church groups to personal friends of the Boers, to women who wished to be associated with the work of their menfolk.*

**Keywords:** South African War, Anglo-Boer War, Red Cross, humanitarian aid, concentration camps.

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## Introduction

Although the South African War<sup>1</sup> could be described as a “small” war, involving a limited number of combatants in a fairly remote colonial outpost, it raised questions about the conduct of war and the treatment of combatants and civilians that were to recur in the era of total war that followed in 1914 with the First World War. Many elements of the South African conflict had already emerged in the course of the nineteenth century. In the Crimean War (1853–56), journalists, using the telegraph, enabled the public to follow events closely in cheaper mass-produced newspapers. As a result, public opinion became a more important factor in responses to war, especially in democracies like Great Britain. The American Civil War (1861–65) saw terrible devastation of the land during Sherman’s march to Atlanta, and the dreadful suffering of soldiers in such prisoner-of-war camps as Andersonville, foreshadowing the misery of twentieth-century “total” war. The swift victory of the Germans in the Franco-Prussian War of 1870 did much to transform European military bureaucracy, including that of Britain, contributing to a harsher military culture in which warfare against civilians sometimes became part of military strategy. The American academic Isabel Hull describes this as “institutional extremism”, when “necessary-seeming routines” led the military to gravitate towards final or total solutions. Similarly, Jonathan Hyslop has pointed to the importance of the emergence of the professional army, with “instrumental rationality as a core value”.<sup>2</sup> Two examples in colonial conflict were the Spanish–American war of 1896 (the Cuban War of Independence), when General Weyler cleared the countryside of civilians so ruthlessly that well over 150,000 women and children died, and the Philippine–American War in 1899, where the concentration of civilians in camps led to an even greater number of deaths.<sup>3</sup>

Many of these features coalesced in the South African War and were to be still more fully realized in the strategies of total war in the twentieth century. The South African experience of British officers like General Lord Kitchener and General Sir John Maxwell, with their “scorched earth” policies that deliberately

1 This is the preferred term for those who see the war as embracing the larger population of South Africa.

2 Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany*, Ithaca, NY, Cornell University Press, 2005, p. 1; Jonathan Hyslop, “The Invention of the Concentration Camp: Cuba, Southern Africa and the Philippines, 1896–1907”, *South African Historical Journal*, Vol. 63, No. 2, 2011.

3 John L. Tone, *War and Genocide in Cuba, 1895–1898*, Chapel Hill, NC, University of North Carolina Press, 2006.

destroyed the land and cleared it of civilians, did nothing to mitigate the ruthlessness with which they conducted war in 1914–18.<sup>4</sup> Conversely, according to his most distinguished biographer, the South African Boer guerrilla leader Jan Christiaan Smuts, who was a member of the British War Cabinet in the First World War, was influenced by the suffering of his own country in the South African War. In the First World War he favoured the negotiated surrender of Germany and, at the Paris Peace Conference of 1919, he worked for reconciliation with Germany and limited reparations. His desire for cooperation between nations to prevent further war also influenced him as a major contributor to the framing of the Covenant of the League of Nations.<sup>5</sup>

The South African War occurred at a time when the European political left was already uneasy about imperial conquest and sympathy for the Boers was widespread, informed by the number of journalists following the conflict. The term “pro-Boer” embraced a disparate range of people, from British liberals and Irish nationalists to a surprisingly broad section of the Russian public.<sup>6</sup> While their governments were never willing to give military aid to the Boer republics, pro-Boers found an outlet for their sympathies either by volunteering to fight or by supporting their National Red Cross Societies and other charitable organizations, many of which sent ambulances, medical staff and equipment to the medically under-resourced Boer republics. The experience that these organizations gained almost certainly expanded their understanding of working in unfamiliar and difficult terrain, with limited support from the governments engaged in conflict.

The British experience was somewhat different. While there was certainly a considerable opposition to the war and its conduct, there was also vigorous public support for the war. At first the British Army was reluctant to accept civilian intervention in the conduct of war in any form. For some time this included professional nurses or humanitarian aid through Britain’s own National Red Cross Society, or any other charitable organization. It was only after the scandal of a serious typhoid epidemic gave rise to public inquiries about the medical welfare of the troops that the military moderated its stance. The Central British Red Cross Committee (CBRCC), formed in 1899, was able to trade on public sympathy and thereby raise considerable sums to establish hospitals for the troops and to coordinate relief efforts in South Africa.<sup>7</sup>

4 In the First World War Kitchener was secretary of State for war, contributing to the decisions that led to the massacre of trench warfare, while Maxwell gained notoriety for ordering the execution of the Irish rebels in the Easter Rising in 1916.

5 Smuts had been attorney-general of the Transvaal and became a formidable commando leader. Later he was to be prime minister of South Africa, a member of the British War Cabinet in both the First and Second World Wars, and one of the founders of the League of Nations. W. Keith Hancock, *Smuts*, Vol. 1: *The Sanguine Years*, Cambridge, Cambridge University Press, 1962, p. 128.

6 Arthur Maidens Davey, *The British Pro-Boers, 1871–1902*, Cape Town, Tafelberg, 1978, pp. 130–144; Donal P. McCracken, *The Irish Pro-Boers, 1877–1902*, Johannesburg, Perskor, 1989; Apollon Davidson and Irina Filatova, *The Russians and the Anglo-Boer War*, Cape Town, Human & Rousseau, 1998; Elisabeth Kandyba-Foxcroft, *Russia and the Anglo-Boer War, 1899–1902*, Roodepoort, Cum Books, 1981.

7 Central British Red Cross Committee, *Report by the Central British Red Cross Committee on Voluntary Organisations in Aid of the Sick and Wounded during the South African War*, London, HMSO, 1902;

After June 1900, combat shifted from conventional warfare, with sieges and set battles, to a guerrilla phase. Most of the foreign volunteers returned home, along with their National Societies. The need for humanitarian aid shifted from the troops to civilians – above all to the Boer women and children who were being “concentrated” in internment camps that had been established in haste, poorly conceptualized and badly administered, contributing to considerable mortality. Although there was a great need for such comforts as clothing, the British rejected outside assistance as far as they could. From June 1901, when more information about the camps became available, a public outcry from pro-Boers in Britain and abroad forced the British government to accept some aid, mainly in the form of clothing, Bibles and other comforts. A handful of Quaker and Dutch aid workers were also allowed to enter the camps.<sup>8</sup>

Assistance did not reach everyone. Although the South African War has been described as a “white man’s war”, this was far from being the case. Black people formed the majority of the population. The impact of white settlement had forced many to adapt to new conditions, and a considerable, if unrecorded, number of black people lived and farmed in the areas of white occupation. Although both sides often denied it, British and Boers used black men in combat and, very widely, for labour. Black families were swept off the land along with the Boers. However, far less provision was made for them, and their fate in the early months of the British invasion is largely unknown until June 1901, when a Native Refugee Department was established and more information was recorded. These families received virtually no humanitarian aid, partly because the plight of black women and children aroused no interest abroad. In this sense, the South African War remained a colonial war in which the plight of the indigenous inhabitants aroused little interest or concern in the imperial nations.<sup>9</sup>

## The South African War: A brief history<sup>10</sup>

The South African War (also referred to as the Anglo-Boer War) of 1899–1902 was both a conventional war, with set-piece battles and sieges, and a colonial war in

Good Hope Society, *Report of the Good Hope Society for Aid to Sick and Wounded in War: South African War, 1899–1902*, Cape Town, W. A. Richards, 1902; Shula Marks, “British Nursing and the South African War”, in Greg Cuthbertson *et al.* (eds), *Writing a Wider War: Rethinking Gender, Race, and Identity in the South African War, 1899–1902*, Athens and Cape Town, Ohio University Press and David Philip, 2005; Jaquez Charl de Villiers, *Healers, Helpers and Hospitals: A History of Military Medicine in the Anglo-Boer War*, Vol. 1, Pretoria, Protea Book House, 2008, pp. 33–38.

8 Elizabeth van Heyningen, *The Concentration Camps of the Anglo-Boer War: A Social History*, Auckland Park, Jacana, 2013.

9 Peter Warwick, *Black People and the South African War, 1899–1902*, Cambridge, Cambridge University Press, 1983; Stowell V. Kessler, *The Black Concentration Camps of the Anglo-Boer War, 1899–1902*, Bloemfontein, War Museum of the Boer Republics, 2012; E. van Heyningen, above note 8, pp. 150–178.

10 Earlier histories of the South African War concentrated on conventional combat and were primarily British. See, for instance, Arthur Conan Doyle, *The Great Boer War*, London, Smith Elder, 1902; L. S. Amery (ed.), *The Times History of the War in South Africa, 1899–1902*, 6 vols, London, Sampson

SOUTH AFRICA AT THE OUTBREAK OF THE WAR



Fig. 1 - B/W online, B/W in print

Figure 1. Map of South Africa at the outbreak of the war. B. Nasson, above note 10, p. 34.

Low, Marston and Co., 1909. The most popular history of the war is Thomas Pakenham, *The Boer War*, Cape Town, Jonathan Ball, 1979. A witty and erudite version is Bill Nasson, *The War for South Africa The Anglo-Boer War, 1899–1902*, Cape Town, Tafelberg, 2010. For a modern Afrikaner perspective see Fransjohan Pretorius, *The Anglo-Boer War, 1899–1902*, 2nd ed., Cape Town, Don Nelson, 2013.

which there was a vast discrepancy between the resources of the metropolitan power and those of the colonial insurgents. From 1795, when it had first captured the Cape from the Dutch during the Napoleonic Wars, Britain had dominated the subcontinent. Many of the Dutch settlers, widely known at this stage as Boers (farmers) and later as Afrikaners, rejected this hegemony, trekking further north to escape British rule and establishing the two independent States of the South African Republic<sup>11</sup> and the Orange Free State (Free State). Between 1834 and 1899 Britain repeatedly tried to reassert its control, only to withdraw after expensive and inconclusive conflict. The last such occasion had occurred when Britain was humiliatingly defeated at the Battle of Majuba on 27 February 1881. The peace that followed gave the Transvaal self-government under British suzerainty, with British control over foreign relations.

The burghers of the Boer republics considered themselves to be members of civilized independent States, not a colonized African peasantry. However, their countries were fragile, with small white populations, little money and somewhat inefficient political structures. Their history, particularly that of the Transvaal, was marked by constant conflict with the black societies on whose lands they had encroached – and with one another, for their independent spirits did not make for easy cooperation.

## Origins of the war

Since the impoverished Boer republics had little to offer the Empire before the 1880s, conflict with Britain was the product of local circumstances rather than an imperial desire to expand in southern Africa. By this time the Free State was beginning to establish a relatively competent government, making it the “model republic”, but the South African Republic continued to be inefficient. All this changed in 1884 with the discovery of rich gold deposits on the Witwatersrand (modern-day Johannesburg, in Gauteng). Britons poured into the country to work the mines, considerably altering the demographic distribution of the Transvaal and, over time, giving rise to demands for political rights. These demands ultimately became the official *casus belli*, as the Transvaal president, Paul Kruger, and his government resisted an extension of the franchise to the new arrivals. Underlying these political demands was control of the gold, for this was a world on the gold standard and Britain’s place as the foremost financial power now rested on its access to this rich source.

In the face of these changes, President Kruger remained a wily but ill-educated farmer who was resistant to modernization. However, more sophisticated men were entering government. Amongst them was the young Cambridge-educated attorney-general, Jan Christiaan Smuts, and a coterie of Dutch, who were often disliked by the locals but brought much-needed skills. The most outstanding of these was Willem Johannes Leyds, who was recruited

11 Various known also as the Zuid-Afrikaansche Republiek, the Suid-Afrikaanse Republiek or the Transvaal.

initially as legal adviser but who played a critical role in foreign affairs after he became State secretary. The Transvaal State geologist, Gustav Adolf Frederik Molengraaff, was another man whose influence gave the South African Republic credibility abroad. This tendency of the Transvaal government to bring in advisers from the Netherlands, and the building of the Netherlands South Africa Railway Company line to Portuguese-owned Delagoa Bay, led Britain to view the foreign relations of the Boer republic with alarm, particularly since this new wealth would enable the Transvaal to dominate the subcontinent.<sup>12</sup>

Debates about the origins of the war continue but, broadly, this was a war for the control of a vital asset, exacerbated by the aggressive imperialism of men like Cecil John Rhodes, prime minister of the Cape Colony and owner of the world's largest diamond mines. He entered the fray at the end of 1895 by instigating the Jameson Raid, an ill-advised and badly managed incursion into the Transvaal to overthrow the Kruger regime. The fallout from the Raid was considerable. From this point the Free State, which had no quarrel with Britain, supported its compatriot to the north. The Cape Afrikaners, too, were turned from their long-standing loyalty to the empire, with many of them embracing the Transvaal cause. The German Kaiser's telegram to President Kruger, congratulating him on the capture of the Raiders, contributed to the growing animosity between Britain and the European powers. The South African War, then, was both a local conflict and the product of global tensions, giving it an international significance on a scale that set it apart from most colonial wars.

When war broke out on 12 October 1899, therefore, it engaged not only the Boers from the two republics but Afrikaners from the Cape and Natal as well. Yet, although the Boers were able to rally substantial forces in the beginning, by no means all their men were hotly committed to this fight for freedom. As the war continued, many returned home to bring in the crops and care for their families.

Black people were in a particularly invidious position. In seventy years of conflict with the Boers, tribal societies had been reduced in numbers and territory. Still, many retained an ethnic identity and some independence. Although they were drawn into the conflict on occasion, this was not their war. The situation was very different for those who were in the white-dominated areas. Many black people lived and worked on Boer farms, while some farmed independently, profiting from the new markets on the Witwatersrand. When war broke out a number of black men rode to war with their Boer masters as *agterryers* (military orderlies), leaving their families behind.<sup>13</sup> Of those who remained, some disappeared quietly, while others stayed to help with the farm work. The British Army, for its part, wanted black men as labour and, initially, drew largely on men from the Cape. Later on, it used mine labour since the mines had closed down. This was, therefore, far from a "white man's war".<sup>14</sup>

12 Keith Wilson (ed.), *The International Impact of the Boer War*, London, Acumen, 2001, p. 1.

13 There were probably about 9,000 to 11,000 black men on commando. Fransjohan Pretorius, *The A to Z of the Anglo-Boer War*, Lanham, The Scarecrow Press, 2010, p. 5.

14 P. Warwick, above note 9.



Despite its experience of twenty years before, Britain expected an easy victory, while the Boers, also influenced by the Majuba triumph, and hoping for international support, believed that Britain would come to terms fairly readily. The Boers had been able to import sufficient arms to make them formidable enemies, while the British had failed to make provision for more than a minor colonial war. The result was a series of defeats for Britain, especially during “Black Week” on 10–17 December 1899, when the British lost the battles of Stormberg (in the Eastern Cape), Magersfontein (in the Cape) and Colenso (in Natal). The Boers, however, failed to capitalize on their victories. They tied up their forces in the sieges of Ladysmith, Kimberley and Mafeking, and they did not break through to the Natal coast. Once Britain had thrown in more resources and removed its less efficient generals, the Boers were defeated in the field. The turning point came with the prolonged battle of Paardeberg on 18–27 December 1899, opening the way for the fall of the Orange Free State capital of Bloemfontein in March 1900 and the Transvaal capital, Pretoria, in June 1900. The Boer republics were annexed as the British colonies of the Transvaal and the Orange River Colony. New governments were installed in the erstwhile Boer republics.

### British treatment of the Boers

At first the British dealt relatively leniently with the defeated Boer men. Provided that they returned home, handed in their weapons and took an oath of neutrality, they were promised protection. The great majority of them returned to their farms. The Boer leadership, however, now shorn of its older and more incompetent generals, took the decision to continue the war. Their reasons for doing so are not entirely clear, for men like Jan Christiaan Smuts and President Marthinus Theunis Steyn of the Orange Free State had studied law in Britain and understood the might of the British Empire. The stubborn desire for independence and the hope of foreign intervention (which never materialized), fuelled by the number of foreign volunteers who had been fighting for them (about 2,000), perhaps drove the decision, despite the fact that European governments had shown no inclination to rally to the Boer cause, for diplomatic considerations dominated their alliances. No country wanted to alienate Britain too much, and many were engaged in their own colonial conflicts.<sup>15</sup> Nevertheless, the hope of such backing encouraged the Boer leaders to continue the war after the fall of Pretoria in June 1900. But the decision was divisive, for by no means all Boer men wanted to fight on – probably at least 20,000 resisted the new call to arms.<sup>16</sup> In making this choice, the Boers also recognized that their women and

15 K. Wilson, above note 12, pp. 2, 6. On the Dutch, see Vincent Kuitenbrouwer, *War of Words: Dutch Pro-Boer Propaganda and the South African War (1899–1902)*, Amsterdam, Amsterdam University Press, 2012; for the French, see Jean-Guy Pelletier, “L’opinion Française et la Guerre des Boers (1899–1902)”, PhD thesis, Université de Paris-X Nanterre, 1972.

16 This is a subject which has been avoided until recently. Albert M. Grundlingh, *The Dynamics of Treason: Boer Collaboration in the South African War of 1899–1902*, Pretoria, Protea Boekhuis, 2006.

children must be sacrificed, although they were ignorant of what that sacrifice would be.<sup>17</sup> As President Steyn of the Free State explained later:

We must not think of our wives and children anymore, but must fight for our independence. It is but a short time that our women and children will suffer, but that is preferable to ourselves and our children and our children's children becoming slaves [*knechten*] of the enemy.<sup>18</sup>

## British tactics against civilians

It took the British another two years to defeat the Boers. The Boer military system, the commando, was an ethnic institution. Dating back to the eighteenth century in the Cape, it had been developed and refined in the Boer republics, particularly in conflicts with black people. In law it was obligatory for every man between the ages of 16 and 60 to perform commando service when required, bringing to the commando a horse, a saddle and a gun. The commando unit was drawn from the local district and, for young Boer men, commando duty was a rite of passage. Burghers could buy themselves out of commando service, however, and it proved to be a somewhat inefficient institution for conventional warfare, depending on loyalty rather than bureaucracy and coercion. On the other hand, the commando proved remarkably flexible and effective for guerrilla warfare.<sup>19</sup> In December 1900, General Lord Kitchener was appointed as commander-in-chief of the British forces. He had a reputation for conducting pitiless colonial warfare in India and the Sudan, but the Boers had not anticipated such ruthlessness, for they had never anticipated that the methods of colonial warfare would be directed against them, and they had never encountered such a determined attempt at conquest. Kitchener's "scorched earth" policy aimed to clear the land of anything that might provide the commandos with support.<sup>20</sup> Some 30,000 farms were burnt, crops and orchards were destroyed, and livestock was captured or killed. There remained the problem of the farm residents, both black and white; in the end, British officers decided to bring them into the towns and to place white civilians in camps.

## The concentration camps

The reasons for the decision to round up the families and install them in camps are complex.<sup>21</sup> Although it is rarely mentioned, it seems likely that underlying the

17 E. van Heyningen, above note 8, p. 48.

18 Stephanus Burridge Spies, *Methods of Barbarism? Roberts and Kitchener and Civilians in the Boer Republics, January 1900–May 1902*, Cape Town, Human & Rousseau, 1977, p. 138.

19 On the meaning of the commando, see Sandra Swart, "'A Boer and His Gun and His Wife are Three Things Always Together': Republican Masculinity and the 1914 Rebellion", *Journal of Southern African Studies*, Vol. 24, No. 4, 1998; for a history of the commando in the South African War, see Fransjohan Pretorius, *Life on Commando during the Anglo-Boer War, 1899–1902*, Cape Town, Human & Rousseau, 1999.

20 S. B. Spies, above note 18.

21 *Ibid.*



decision was the fear that white women would be left vulnerable to marauding black men. European pro-Boer literature was already depicting this war as a black onslaught against women and children. Such racist fears had little grounding in reality, but they were certainly widespread amongst the Boer women, and “black panics” were a regular feature of white psychology in South Africa in times of crisis.<sup>22</sup>

The policy of sending civilians to camps was ill-considered and ill-managed, for Kitchener had no interest in non-combatants. Until the end of 1901, when reforms were set in place, conditions in the camps were dismal, with worn tents as accommodation and inadequate rations. Ultimately about forty-five white camps and sixty-four black camps were established by the British Army, holding at least 150,000 whites and probably a higher number in the black camps.

By June 1901, mortality was rising rapidly; it reached a peak in November 1901 in the white camps and December 1901 in the black camps. The official figure for whites is 27,927, of which 22,074 were children – half of the camps’ child population. In total, some 10% of the Boer population died in the camps.<sup>23</sup> The numbers of black people who died will never be fully known, since records were not kept for many months, although it has been estimated that at least 20,000 civilians fell victim to the war.<sup>24</sup> In total, civilian deaths must have amounted to about 50,000, the great majority being children. Ultimately, female and juvenile civilians suffered far more than male combatants. Some 6,189 Boer combatants died, and about 21,000 British soldiers lost their lives, over 13,000 from disease – primarily typhoid, since this was the last of the so-called “typhoid wars”. Up to this point, disease had almost always been a greater killer in warfare than wounds suffered in battle. The First World War was to be the first major conflict in which disease played a smaller part in mortality than fighting.<sup>25</sup>

For months little was known of the camps, for Kitchener was innately secretive and he failed to report on the camps to the War Office. Rumours reached Cape Afrikaners and spread abroad. Their worst fears were confirmed in June 1901 when Emily Hobhouse, a pro-Boer English philanthropist who had spent about five months in the Free State camps, published a report on behalf of

22 Tim Keegan, “Gender, Degeneration and Sexual Danger: Imagining Race and Class in South Africa, ca. 1912”, *Journal of Southern African Studies*, Vol. 27, No. 3, 2001; Gareth Cornwell, “George Webb Hardy’s *The Black Peril* and the Social Meaning of ‘Black Peril’ in Early Twentieth-Century South Africa”, *Journal of Southern African Studies*, Vol. 22, No. 3, 1996; E. van Heyningen, above note 8, pp. 111–114. In their propaganda, the French also placed particular emphasis on this aspect of the danger to women, although they also included the threat of wild animals – a somewhat more exotic perspective. J.-G. Pelletier, above note 15, p. 23. For a rare example of a Boer male usage of this form of demonization (clearly used for propaganda purposes, since the letter was written to W. T. Stead, the editor of the *Review of Reviews* and an ardent British pro-Boer), see W. Keith Hancock and Jean van der Poel (eds), *Selections from the Smuts Papers*, Vol. 1, Cambridge, Cambridge University Press, 1966, p. 465.

23 E. van Heyningen, above note 8, pp. 96, 121, 141; Elizabeth van Heyningen, “‘Lies, Damned Lies and Statistics’: Statistics and the British Concentration Camps Database”, in R. J. Constantine (ed.), *New Perspectives on the Anglo-Boer War*, Bloemfontein, War Museum of the Boer Republics, 2013.

24 P. Warwick, above note 9, p. 151; S. V. Kessler, above note 9, pp. 213–254.

25 Philip D. Curtin, *Disease and Empire: The Health of European Troops in the Conquest of Africa*, Cambridge, Cambridge University Press, 1998, Chapter 8.

the South African Women and Children Distress Fund.<sup>26</sup> She had grasped clearly the failures of the military. Worn, overcrowded tented accommodation and an inadequate ration scale coincided with a measles epidemic that had decimated the children. For the British government, the conduct of this war by “methods of barbarism” was an embarrassment. The War Office recruited a group of women to investigate conditions,<sup>27</sup> and full management of the camps passed from the War Office to the Colonial Office. Major reforms were set in place, including the expansion of medical care and improved ration scales, and mortality declined abruptly.

### Black South Africans in camps

The position of families in the black camps has been far less well documented. The destruction of records and the tendency of whites at the time to ignore any black presence means that we have only fragmentary knowledge of black civilian suffering in the war, even though black people were an integral part of republican society. It is clear that until June 1901, almost no provision was made for black people. Before that date, camps were eventually set up for them in the Orange River Colony, but nothing is known of the fate of black farmers in the Transvaal during this earlier period. The little information that is available for the Orange River Colony suggests that nutrition and accommodation were very inadequate and mortality must have been high.

In June 1901, the gold mines began to reopen and the British Army lost an important source of labour. To deal with the problem, a Native Refugee Department was established. The refugee women and children were moved into farm camps, where they were expected to grow their own food, while their men were employed by the British Army. Although this provided some income for the families, the parsimonious management of these camps ensured that conditions were harsh and mortality soared, as the scant surviving records indicate. Medical care was minimal; some doctors were provided, but there is no record of any nursing.<sup>28</sup>

Emily Hobhouse claimed that she did not have the resources to investigate the black camps and accused the Ladies Committee of neglect in failing to visit them. However, this was not part of the Committee’s brief and correspondence indicates that, when they were able, some of the women did visit black camps. They found nothing to complain about, as Lucy Deane, one of the Committee members, explained. She thought that Klerksdorp black camp was “beautifully run” and “cost practically nothing at all”. She added: “Everything is beautifully clean and sanitary, the people so amiable and cheerful, all of which is a sad contrast to the Boer Camps with their terrific cost and appalling difficulties, discontent and

26 Emily Hobhouse, *Report of a Visit to the Camps of Women and Children in the Cape and Orange River Colonies*, London, Friars Printing Association, 1901.

27 *Report on the Concentration Camps in South Africa by the Committee of Ladies*, Cd 893, London, HMSO, 1901.

28 *Ibid.*, pp. 150–178; S. V. Kessler, above note 9.

worry!”<sup>29</sup> In the end, it was missionaries or local ministers who protested most against the miserable conditions. The Reverend R. Matteson, the Wesleyan minister in Heilbron, was outraged by the treatment of local black people. “Their treatment is a great contrast to the generous way in which Boer needs or professions of needs, are met,” he pointed out. “I cannot believe until officially informed that this is the intention of the administration. It outrages British ideas of humanity and justice, and were all the facts known, would arouse strong indignation.”<sup>30</sup> But that did not happen, and it was only in the 1980s that historians first began to explore the plight of the black camps. For black people this remains a forgotten history, blotted out by the suffering of the twentieth century.

## Outside perspectives on the war

In South Africa the war was fought, in the early stages at least, in the full glare of modern publicity; as Donal Lowry has observed, this made it the most publicized war outside Europe between the American Civil War and the First World War.<sup>31</sup> This intense scrutiny was not simply the product of modern journalism. The war also became a touchstone for international morality, attracting military support and philanthropic aid, and this set it apart from most colonial wars.

The reality was that many Europeans found it easy to relate to the struggle for independence of small white republics against a powerful imperial nation, for the conflict resonated with many European struggles of this era.<sup>32</sup> In contrast, the Aceh (Indonesian) fight for freedom against the Dutch, for instance, had no such echoes. The history of the foreign volunteers who fought for the Boers – from Ireland, France, Scandinavia and Russia, among others – has been well documented.<sup>33</sup> Less has been written about humanitarian aid, although the contribution of Russia, in particular, has attracted attention both because a Russian émigré to South Africa has written on the subject and because, after the fall of the Soviet Union, several Russian historians with access to new sources have explored the subject.<sup>34</sup> However, help came in the form not only of advice and ambulances but of personnel as well, ensuring that there were an unusual number of foreign witnesses to the war, at least until about June 1900 and the fall of Pretoria.

Most foreign participants withdrew from South Africa after June 1900, although six nurses, sent by the Netherlands government, went to work in the concentration camps. The scandal of camp mortality was exposed a year later by

29 Letter from Lucy Deane to her sister, 4 October 1901, London School of Economics, Streatfield Collection, LSE 2/11.

30 Letter from the Rev. R. Matteson to Chief Superintendent of Refugee Camps, Bloemfontein, 12 July 1901, Free State Archives Repository, SRC 9, RC3226.

31 Donal Lowry, “The Boers were the Beginning of the End? The Wider Impact of the South African War”, in Donal Lowry (ed.), *The South African War Reappraised*, Manchester, Manchester University Press, 2000, p. 203.

32 Ireland and Russia are examples. See below.

33 F. Pretorius, above note 13, pp. 480–481. Most histories of the war mention these volunteers.

34 A. Davidson and I. Filatova, above note 6; E. Kandyba-Foxcroft, above note 6.

Emily Hobhouse in her report on the Free State camps.<sup>35</sup> Questions were asked in the British House of Commons and reforms were put in place.<sup>36</sup> In Europe, a fresh effort was made to help the camp inmates, usually in the form of “comforts” as Britain refused any other assistance. Women played a prominent role in this work, since the earlier, male-dominated aid organizations preferred to dedicate their funds to post-war reconstruction. Mortality declined, and better nutrition, accommodation and administration greatly improved the lot of the Boer civilians in 1902.

## The end of the war

The war ended on 31 May 1902 with the signing of the Treaty of Vereeniging. By this time the majority of Boer combatants were prisoners of war in exile, in India, Ceylon (Sri Lanka), St Helena and Bermuda. About 17,000 remained in the field, but there were now also about 5,500 Boers who had joined the British forces.<sup>37</sup> The terms of surrender were not unreasonable, although the Boers had to take an oath of allegiance to the British sovereign. The “rebels” from the British colonies of the Cape and Natal were disenfranchised for five years. £3 million was provided for reconstruction. Repatriation from the camps was slow since the families could not be left unprovided for on their ruined farms, but by early 1903 all the camps had closed. Repatriation from the black camps was more strictly controlled, for the British now intended that every black man should have a white “master” rather than farming independently. Many black people were reluctant to return to their old employers and the coercive labour conditions they had sometimes endured before. While Britain did not wish to force them to return to farms where they had been ill-treated, under a share-cropping system that it regarded as inefficient, at the same time it was determined to assert a modern waged labour system rather than the more casual relations that had existed before. Although the process has been little studied, it would seem that black people lost significant independence as a result of the war.

For Afrikaners, however, relative political freedom was soon acquired. By 1907 both the Transvaal and the Orange River Colony had received self-government, with the Afrikaner parties winning the elections that followed, and in 1910 all four colonies joined together to create the Union of South Africa.<sup>38</sup> The real losers of the war were the black population, for the new colonies retained the racist legislation of the Boer republics rather than adopting the more enlightened race-free franchise of the Cape, and this discrimination was incorporated into the Act of Union.

35 E. Hobhouse, above note 26.

36 E. van Heyningen, above note 8, pp. 181–283.

37 B. Nasson, above note 10, p. 235.

38 The Union of South Africa left the British Commonwealth in 1961 to become the Republic of South Africa. In 1994, after a new constitution was introduced, granting the vote to all adult South Africans, the country returned to the Commonwealth but retained the name of Republic of South Africa.

## Humanitarian aid in the South African Republic

Neither republic was well prepared for war as far as medical services were concerned, as weak administration and a pre-industrial medical culture had inhibited investment in efficient institutions. Both the Free State and the South African Republic had adopted the Cape practice of district surgeons, government employees who provided some basic medical services such as post mortems or vaccinations and who were to form the backbone of wartime medical services, particularly in the Free State. In the South African Republic, medical practitioners were registered; in 1898 there were 271 doctors listed in the *Staats Almanak*.<sup>39</sup> No less than 106 of these gave no place of residence, but they were probably on the Witwatersrand since British doctors had immigrated to the goldfields in significant numbers, leaving abruptly when war broke out. Of the remaining doctors, there were seventy-one in Johannesburg and twenty in Pretoria. The rest were scattered thinly across the country.<sup>40</sup> Poverty meant that few doctors could make a viable living in the rural areas, where a single consultation could mean a day's journey over treacherous terrain – and the likelihood of no payment at the end. Medical institutions were equally sparse. There were only twelve hospitals in the Transvaal in 1899 and fewer in the Free State, and most hardly deserved the name.<sup>41</sup>

The consequence of this meagre medical provision was that most republican Boers had little experience of modern scientific medicine. The medical knowledge that they took north had its origins in Galenic thought, combined with European folk remedies. To this had been added some knowledge learnt from South Africa's indigenous people. Patent medicines in the form of the Huis Apotheek – a box of simple remedies that, by 1899, were manufactured in South Africa – enhanced their pharmacopoeia.<sup>42</sup> Boer men were more likely to embrace the masculine values associated with Paul Kruger, who, when his hand was hurt by a rhinoceros as a young man, had cut away parts of the rotting flesh himself with a penknife.<sup>43</sup> In this spirit, General Piet Joubert rejected the aid of a Russian ambulance on the eve of the war. Joubert was a “kindly, well-meaning old man” but unfit for the burden of modern warfare, the young Deneys Reitz felt. As an example, just before the war started, Joubert showed Reitz a telegram he had received from “a Russian society” offering to equip an ambulance should war break out. To Reitz's dismay, he had refused the gift. “He said, ‘You see, my boy, we Boers don't hold with these new-fangled ideas; our herbal remedies [*bossie-middels*] are good enough.’”<sup>44</sup>

39 Edmund H. Burrows, *A History of Medicine in South Africa up to the End of the Nineteenth Century*, Cape Town, Balkema, 1958, pp. 284–285.

40 Elizabeth van Heyningen, “Medical History and Afrikaner Society in the Boer Republics at the End of the Nineteenth Century”, *Kleio*, Vol. 37, 2005.

41 F. Pretorius, above note 13, p. 275.

42 Elizabeth van Heyningen, “Women and Disease: The Clash of Medical Cultures in the Concentration Camps of the South African War”, in G. Cuthbertson et al. (eds), above note 7; E. van Heyningen, above note 40.

43 Daniel Wilhelmus Kruger, *Paul Kruger*, Vol. 1, Johannesburg, Dagbreek-Boekhandel, 1961, pp. 32–33.

44 Deneys Reitz, *Commando: A Boer Journal of the Boer War*, London, Faber & Faber, 1929, p. 17. Deneys Reitz was the son of Francis William Reitz, the fifth president of the Orange Free State and, at the outbreak

## Het Transvaalsche Roode Kruis

This was rough terrain in which to establish a viable medical service in wartime, and it is to the credit of a handful of Dutch doctors, who realized the need for better care for the commandos, that such a feat was achieved. They turned to the International Committee of the Red Cross (ICRC) for advice and assistance. In the wake of the Jameson Raid, the Volksraad (the South African Republic parliament) approved the establishment of the Pretoria Ambulance Corps early in 1896. Shortly after, on 30 September 1896, the South African Republic became a signatory of the Geneva Convention of 1864, with British permission in terms of the London Convention of 1884.<sup>45</sup> The Pretoria Ambulance Corps was renamed and expanded to become Het Transvaalsche Roode Kruis (TRK), and it was formally recognized as the National Red Cross Society of the South African Republic. Two of the doctors who had driven the movement, Goswijn Willem Sanne Lingbeek and Johan Balthazar Knobel, formed part of the new executive, the Hoofdbestuur, but men like the State geologist Gustav Adolf Frederik Molengraaff were also drawn in. Intensely aware of their position as members of a modern State, these men were alert to the demands of the Geneva Convention, realizing the need to maintain impartiality and neutrality; however, as de Villiers observes, the TRK moved perilously close to government when President Paul Kruger, General Piet Joubert and Willem Johannes Leyds were appointed as honorary office bearers, increasing the organization's dependence on government and weakening its ability to maintain impartiality.<sup>46</sup>

The objectives of the newly established TRK were ambitious. Not only did it want to establish a section of the Red Cross in every town in the Transvaal, but it also intended to form an ambulance service, organize a temporary hospital system and enrol staff to care for the sick and wounded in the event of war. Without much financial support and without an adequate medical structure in the country, the TRK had considerable difficulty in setting up these bodies. Although there was an enthusiastic response when the TRK advertised for volunteer workers in 1899, many who applied had neither the skill nor the knowledge required. The best were probably women like Mrs Cassie O'Reilly, the wife of the Heidelberg doctor. Under the guidance of her husband, she worked enthusiastically in the hospital that was hastily established when it became clear that the only facility in town for caring for the wounded was the local jail, as she explained in a letter to her family:

One night about this time Dr. was called up out of bed to attend a man who had fallen off a train. He was a young Burgher who was on his way to the front. He had fallen asleep on top of a truck & about midnight the accident happened.

of war, State secretary of the South African Republic. *Commando* is considered a classic account of the South African War.

45 Available at: [www.icrc.org/ihl/INTRO/120?OpenDocument](http://www.icrc.org/ihl/INTRO/120?OpenDocument) (all internet references were accessed in December 2015); J. C. de Villiers, above note 7, p. 46.

46 *Ibid.*, p. 47.

There was no hospital in Heidelberg, so the poor fellow was carried to the gaol hospital, being the only place available at the moment for Dr. to operate in. ... We had great difficulty in getting anyone to nurse this man as there was no trained nurse in Heidelberg & we had to depend on volunteers. Naturally the gaol was not a nice place for any woman to be in. This accident shewed the public that a hospital of some kind was absolutely necessary.<sup>47</sup>

But this short-lived enthusiasm was no replacement for the needs of a sophisticated modern organization. Red Cross sections started only in the larger towns, and there was always a deficiency of ambulances and staff. Worse still, the Hoofdbestuur was distinguished by indecision and disorganization. It was unable to direct and guide the foreign ambulances, the medical staff were mismanaged, and relations with government were poor. De Villiers considers that the main reason for the failure of the TRK, leading ultimately to its closure, was the lack of financial support from government. Although the TRK was, in essence, expected to provide the primary medical service for the South African Republic military forces, it received no more than £4,100 from the government between 1896 and 1900, in dribs and drabs.<sup>48</sup> Instead, the TRK turned to the public and overseas donors for support. Of the latter, the Nederlandsch-Afrikaansch Bijstandsfonds was the most important, but it was never enough. Indecision and inefficiency also marked the work of the TRK, leading inevitably to strife within the organization and a breakdown in relations with the government. This incompetence was not unique to the TRK, for it was a feature of much administration in the Transvaal. The provision of relief during the war was so corrupt that the historian Bill Nasson has commented: "it seems that only bibles for commandos were entirely exempt from requisitioning deals".<sup>49</sup>

More important, perhaps, was the fact that the TRK was attempting to establish a relatively sophisticated medical organization within a society which lacked a modern medical infrastructure and had little understanding of the value of scientific medicine. Red Cross workers were regarded with suspicion, as shirkers from military duty – but what made the TRK even more suspect was the belief of ordinary Boers, suspicious of anything new and strange, that the TRK was a foreign structure, even an *Uitlander* or English organization. This hostility was exacerbated as people like O'Reilly, British-born naturalized citizens, sought to give service through such work rather than by joining the commandos.

Despite these difficulties, all over the Transvaal local people sprang to the aid of their commandos. While men, often local English-speaking businessmen anxious to prove their loyalty, formed the Red Cross committees, women provided most of the care. Doctors gave lectures in basic nursing and awarded Red Cross certificates. Some sections were relatively clear about their obligations under the Geneva Convention, but others were less certain. In Johannesburg there was a fairly well-funded structure working in association with the St John

47 Letter from Mrs Cassie O'Reilly, 3 May 1901, National Archives of South Africa (NASA), A432.

48 J. C. de Villiers, above note 7, pp. 48–49.

49 B. Nasson, above note 10, p. 61.



Ambulance Association, but such alliances were often tense since the organizations' relations with the inefficient TRK could be conflicted and the loyalty of the organizers was suspect.<sup>50</sup>

The battle of Elandslaagte on 21 October 1899 was the first major Boer defeat, a bloody slaughter in which the Boer forces were devastated by a vicious cavalry advance. The battle demonstrated only too clearly the need for effective care on the battlefield. The Boer general, Johannes Kock, was mortally wounded and taken into Ladysmith to die.<sup>51</sup> Annie Rothmann, a TRK nurse, was allowed into the besieged town to nurse him.<sup>52</sup> It is not clear how many Boer ambulances were present, but a Johannesburg ambulance was certainly there. However, its resources were very limited, consisting of three medical men, six dressers and a wagon, as well as a stock of drugs. An Indian store was used as a hospital. There was also an ambulance of the German Corps which was fighting with the Boers. Although the German ambulance was fairly well supplied, after the battle it was ordered to join another commando unit. In the end, most of the Boer wounded were left to the care of the British medical services. The situation at Elandslaagte was not unique. Medical care for the Boers on the Natal front deteriorated so badly that in most cases, it did not exist at all.<sup>53</sup> The western front was somewhat better served, as the Netherlands South Africa Railway Company had provided three well-equipped ambulance trains; two of these ran from Bloemfontein and Kroonstad to Pretoria, while the third ran from the Natal front, all carrying Boer wounded to the capital.<sup>54</sup>

By early 1900, the TRK had collapsed. On 8 January 1900, the Hoofdbestuur wrote despairingly to the South African Republic government begging for improved cooperation. Above all, it needed the right to act independently, and to order the medicines and equipment that it required. The letter was, de Villiers observes, "an indictment of the ZAR Government for its miserly attitude and lack of insight and understanding".<sup>55</sup> But it is also a comment on the need for a social context that is favourable for a modern institution like the Red Cross to function. In response to the TRK letter, the Volksraad created a new structure, the Medische Commissie, to act on behalf of government and to create ambulances for the commandos. The Medische Commissie was a government organization, not part of the Red Cross, although it had to work with foreign Red Cross ambulances. The reality, however, was that the Boers were already losing the war; they had few resources, and it was difficult for any medical bureaucracy to operate. Medical help for fighting Boers was now *ad hoc*, and came largely from European ambulances of which only some were from National Red Cross Societies.

50 J. C. de Villiers, above note 7, pp. 62–73.

51 B. Nasson, above note 10, pp. 105–106.

52 Annie Rothmann, diary, 1899–1900, NASA, A321.

53 J. C. de Villiers, above note 7, pp. 54, 561–564.

54 F. Pretorius, above note 13, p. 275.

55 J. C. de Villiers, above note 7, p. 55.



## A successful initiative: The Orange Free State and the Identiteits Buro

The Orange Free State signed the Geneva Convention of 1864 shortly after the Transvaal, on 28 September 1897.<sup>56</sup> Unlike the South African Republic, however, the Free State did not immediately establish any Red Cross organization. It was only when it became clear that war was imminent, in September 1899, that an Ambulance Commission was set up by Dr Alfred Ernest William Ramsbottom, who became head of the Orange Free State Red Cross Ambulance, to which some £2,000 was devoted by the government. The resources of the little Free State were small, but it already had a more efficient medical service than the Transvaal. Working through district surgeons, Ramsbottom was able to set up a structure which served the commandos relatively effectively. Ever conscious of the need to function as part of the “civilized” world, Ramsbottom went to some lengths to ensure that the local Free State Red Cross ambulance crews that were established in 1899 were properly informed about the demands of the Geneva Convention. They were supplied with copies of the Geneva Convention and encouraged to maintain a non-combatant and neutral status. The result was a service, de Villiers suggests, that “can be regarded as a model of how a small country with limited resources could accomplish such a huge task”.<sup>57</sup>

The bleak story of the TRK had one bright spot: this was the work of the Identiteits Buro, formed after the Battle of Elandslaagte on 21 October 1899. The confusion that followed this skirmish about who had died or been wounded, who had been taken prisoner and who had survived, created panic amongst the families. Since the Boer commando system was more than usually dependent on community support, the republics could not afford to alienate distressed citizens. The State geologist, Molengraaff, rapidly grasped the need for reliable information, and he proposed and organized an office which could collect information on the whereabouts of combatants and distribute it to families. This need was particularly acute because many families were almost illiterate and there was no effective postal system; sometimes months could pass before families would discover the fates of their menfolk. Operating under the aegis of the TRK, the Identiteits Buro registered all the men who had been called up for commando duty and issued them with identity cards which they were expected to carry at all times (Figure 2). The Free State was soon brought on board as well. What made the system particularly effective was that Molengraaff was able to persuade the British military to cooperate. By November 1899 a process was set in place whereby each side provided information weekly on the dead, the wounded and prisoners of war.

Since both the work and the commitment to neutrality demanded by the TRK were unfamiliar to Identiteits Buro workers, Molengraaff issued very precise instructions for work on the battlefields. These were intended to ensure that the

<sup>56</sup> Available at: [www.icrc.org/ihl/INTRO/120](http://www.icrc.org/ihl/INTRO/120).

<sup>57</sup> J. C. de Villiers, above note 7, p. 58.

Fig. 2 - B/W online, B/W in print

*Informatie-Bureau van het Roode Kruis, Pretoria.*  
(IDENTITY DEPARTMENT OF THE TRANSVAAL BRANCH OF THE GENÈVE RED CROSS SOCIETY, PRETORIA)

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**BEWIJS VAN IDENTITEIT.**  
Proof of Identity. **No 8424**

Naam *Adriaan Johannes Schenker*  
Name  
Ouderdom *37 (veel en derig)*  
Age  
Woonplaats *Potchefstroom*  
adres familie  
Residence  
Commando *Pharm N.C. Duthwaite*

The Identity Department of the Red Cross Society will forward to English authorities information about wounded English soldiers who might be made prisoners.

Telegraphic and Postal Address: **Molengraaff, Pretoria.**

In geval van dood of verwonding van houder dezes wordt men dringend verzocht deze kaart ingevuld op te zenden aan bovenstaand adres.

In case of bearer of this being killed or wounded, you are requested to send this card through the nearest Commanding Officer, or Responsible Official, to the Identity Department above mentioned.

Geslacht	Plaats
Killed	Locality
	Datum
	Day
	Welke Verwonding
	Nature of Wound
	Plaats
	Locality
	Datum
	Day

Figure 2. An example of an ID card carried by Boer combatants. J. C. de Villiers, above note 7, p. v.

Identiteits Buro workers confined themselves strictly to Red Cross work, were unarmed and were clearly identified as part of the Red Cross.<sup>58</sup> Like the TRK, the Identiteits Buro was poorly funded, and it survived only because of foreign donations, mainly that of the Nederlandsch-Afrikaansch Bystandsfonds. Despite difficulties, the Identiteits Buro functioned well in the first months of the war. Once the guerrilla phase started, from about September 1901, conditions changed completely. For one thing, the two republics were formally annexed by Britain, thus ending their independent Red Cross organizations. In addition, after General Lord Kitchener arrived as commander-in-chief in December 1900, cooperation with the British ceased. Although the Identiteits Buro struggled on, in 1902 Kitchener forbade any information to be given to the Buro, and from this point families received little information about their men on commando; indeed, it was often months before they even knew if the men were held as prisoners of war.

### The involvement of foreign National Red Cross Societies

The weaknesses of the TRK, including its lack of funding and its maladministration, meant that foreign contributions were critical to the care of the Boer wounded in the first months of the war. In de Villiers' view, "this injection of medical foreign aid saved the Boer medical service from disaster".<sup>59</sup> Fortunately the sympathy for the Boers that the war aroused ensured that substantial contributions were forthcoming. In all, fourteen well-equipped ambulances from European and American National Red Cross Societies reached the Transvaal between November 1899 and June 1900, along with over 200 doctors, nurses and assistants.<sup>60</sup>

<sup>58</sup> *Ibid.*, pp. 84–85.

<sup>59</sup> *Ibid.*, p. 405.

<sup>60</sup> *Ibid.*, p. 401; F. Pretorius, above note 13, p. 275.



Figure 3. Staff of the Russian Red Cross Hospital. J. C. de Villiers, above note 7, p. xxxix.

In other contemporary colonial wars, like those of Cuba and the Philippines, there was little humanitarian aid of this kind, and the explanation for assistance on this scale must be found partly in Europe. For one thing, Europeans could identify more easily with the Boers as white and apparently Western in their culture than they could with the Cuban or Filipino peasantry. But there were other reasons as well. For Ireland, this war had a particular resonance because the plight of the Boers seemed to bear close parallels to their own struggle for independence from British rule.<sup>61</sup> Russia was equally engaged (Figure 3). In faraway Kiev, the young Konstantin Paustovsky recorded the excitement that the war had generated amongst his contemporaries:

We children were tremendously excited by the war. We were sorry for the Boers fighting for their independence, and we hated the English. We knew every detail of the battles being fought at the other end of the world. ... We were not alone in this. The whole civilised world was tensely watching the unequal struggle in the plains between the Vaal and the Orange River, and even the organ grinders in Kiev ... now had a new song: "Transvaal, Transvaal, my country burning in flames".<sup>62</sup>

61 A. M. Davey, above note 6, pp. 130–144; D. P. McCracken, above note 6. The American contribution was also largely influenced by Irish politics.

62 Konstantin Paustovsky, *Story of a Life: Childhood and Schooldays*, London, Harvill Press, 1964, p. 47.

Fig. 4 - B/W online, B/W in print



Figure 4. The second German ambulance in the veld. J. C. de Villiers, above note 7, p. xxxviii.

Indeed, support for the Boers in Russia was so widespread that it has been described as “Boer mania”. “Russian society was seldom as united as it was in its sympathy for the Boers”, Apollon Davidson and Irina Filatova observe, for support came from both the left and the right.<sup>63</sup> The pacifist Leo Tolstoy, who followed the events of the war closely, apparently saw this war as a special case, overriding his convictions about non-violence.<sup>64</sup> In the United States, Theodore Roosevelt saw the Boers as ethnic cousins, sharing a Dutch, Huguenot, Scots and Irish heritage, worth supporting against the British empire.<sup>65</sup>

Even before the war started, the Netherlands Red Cross had provided advice and financial support to the two republics. When it became clear that war was imminent, the ICRC also called upon local societies for aid, and the Germans and Dutch responded promptly (Figure 4). The French Société de Secours aux Blessés donated two auxiliary field hospitals and a substantial quantity of supplies to the TRK. The Russians were particularly generous, and their contribution has been very fully explored.<sup>66</sup> In the United States, the Holland Transvaal Association was formed in Detroit, and an American Committee to Aid Red Cross Work in the South Africa War was also established, both to raise funds to assist the Boers. By no means all of these organizations operated under the aegis of the Red Cross; the town of Alençon in Normandy donated small horse-drawn carts bearing the words “Homages au peuple Boer”, and this appears to have been an independent initiative (Figure 5).<sup>67</sup>

The disorganization existing in the TRK often made it difficult for the foreign ambulances to operate efficiently. The Dutch and German Red Cross ambulances coped best, as these organizations had planned more adequately for

63 A. Davidson and I. Filatova, above note 6.

64 *Ibid.*, pp. 180–181.

65 D. Lowry, above note 31, pp. 208–209. One should not forget that the USA was engaged in conflicts at this time which were, in reality, imperial wars, especially against Spain in the Philippines.

66 E. Kandyba-Foxcroft, above note 6; A. Davidson and I. Filatova, above note 6.

67 J. C. de Villiers, above note 7, p. 401. The caption to the illustration suggests that the donation was from the Carcassonne.



Figure 5. One of the horse-drawn carts donated by the people of Alençon. J. C. de Villiers, above note 7, p. xxxviii.

South African conditions (Figure 6) and the Dutch had the advice both of Dr W. J. Leyds, who, during the war, was appointed as ambassador extraordinary and minister plenipotentiary for the South African Republic in Europe, and of the Netherlands South Africa Railway Company. De Villiers, who has examined their activities most fully, devotes considerable space to the foreign ambulances. With two exceptions, their crews were careful to function within the terms of the Geneva Convention.

One of these exceptions was the Chicago Irish-American Ambulance, most of whose crew members, apart from the doctors, discarded their Red Cross insignia as soon as they arrived in Pretoria, and joined the local Irish Brigade instead.<sup>68</sup> The second, more problematic exception was the actions of the members of the Belgian section of the Belgian-German ambulance. Pro-Boer sentiment ran particularly high in Belgium, leading to substantial donations for the Boer cause. The organization that was thus established, the *Volontaires Internationaux de la Croix-Rouge*, was unauthorized, partly because the participants were linked to the Antwerp branch of the *Alldeutscher Verband*, the ultra-nationalist Pan-German League. The German Red Cross operated entirely separately, and the Belgian Red Cross

68 *Ibid.*, p. 402.



Fig. 6 - Colour online, Colour in print

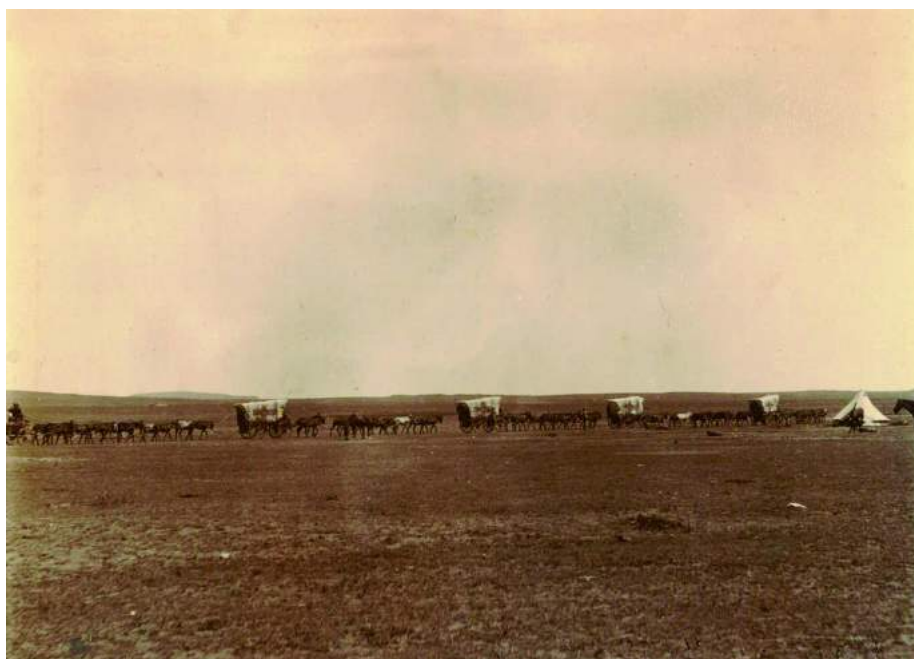


Figure 6. Red Cross ambulance wagons. J. C. de Villiers, above note 7, p. xxiii.

disowned it. For this reason the Belgian-German ambulance could not operate under the flag of the country of origin, and it failed to fulfil the demands of the Geneva Convention in other respects too. Over time, a host of other difficulties emerged. The ambulance that went to South Africa continued to operate under the Red Cross insignia without authorization from either the Belgian or the German National Societies. The behaviour of some of the personnel was questionable. Men were quarrelsome, while some of the women were accused of “flirting” and other improper behaviour. Whatever the truth of the rumours that swirled around its members, it was clear that this group was ill-managed. The self-interested account of one of the nurses, Alice Bron, gives some indication of their failure to inculcate a proper understanding of their role as neutral non-combatants. The actions of both the Chicago and Belgian groups were sufficiently disturbing for the ICRC to discuss their behaviour at the Seventh International Congress of the Red Cross at St. Petersburg in 1902.<sup>69</sup> Both for the ICRC and for the National Societies, there was probably more to be learnt from these minor failures than from the impeccable conduct of most of the foreign ambulances. Above all, they learnt the need for adequate preparation beforehand and some knowledge of local conditions.

69 *Ibid.*, pp. 523–536; Alice Bron, *Diary of a Nurse in South Africa*, London, Chapman & Hall, 1901.

## The British Red Cross

On the British side, the war was fought on an imperial stage. Contingents of Australians, Canadians and New Zealanders joined the British forces. Pro-imperialist propaganda, which attempted to portray the war as a fight for human rights, attracted this loyal support. While the claim was largely unconvincing, many anti-imperialists were reluctant to oppose the war with any vigour. The socialist Fabian Society considered the war unjust but necessary, and the Quakers were equally cautious in their opposition. They compromised by sending a Quaker member of parliament, Joshua Rowntree, out to South Africa to investigate the rumours about the high mortality in the women's camps. But he visited only a few camps, and his report failed to make any mark.<sup>70</sup> This pusillanimous attitude affected the medical care of ordinary soldiers as well, since it was only after the scandal of the typhoid epidemic that action was taken to employ more female nurses and to improve sanitation.

Despite the well-publicized work of reformers like Florence Nightingale in the 1850s, the British military remained hostile to any structure that was peripheral to the work of fighting. The officer-doctors of the Royal Army Medical Corps were notoriously despised by other officers. The Royal Army Medical Corps, in turn, resisted the introduction of female nurses, and as late as the end of 1898, there were less than 200 nurses in the Army Nursing Service and the Army Nursing Reserve Service. There was no intention of employing them at the front in any capacity. The appalling sanitary conditions which made the South African War the "last of the typhoid wars" were one product of the British military's arrogant neglect of its soldiers.<sup>71</sup>

Britain's attitude to the Geneva Convention of 1864 and the Red Cross should be seen partly against this background. Although Britain became a signatory to the Geneva Convention on 18 February 1865,<sup>72</sup> it was slow to form a National Red Cross Society and it was only in response to the Franco-Prussian War in 1870 that the British National Society for Aid to the Sick and Wounded in War was created. But the view of Lord Wantage, the chairman, that Red Cross assistance was unnecessary in Britain's colonial wars hindered any effective development in the national movement. Others did not share Wantage's view, and the result, in Britain, was a proliferation of humanitarian organizations, of which the most prominent was the St John Ambulance Association.<sup>73</sup>

When war broke out in 1899, then, Britain was ill-prepared to provide the medical support it needed for its troops, and nobody anticipated a long and bloody conflict. It was largely the warning of Surgeon-Major W. Macpherson of the Royal

70 D. Lowry, above note 31, pp. 205–206; A. M. Davey, above note 6, pp. 126, 153–156; Hope Hay Hewison, *Hedge of Wild Almond: South Africa, the "Pro-Boers" and the Quaker Conscience, 1890–1910*, Portsmouth, Heinemann, 1989.

71 S. Marks, above note 7, pp. 159–85; P. D. Curtin, above note 25, pp. 119–120.

72 Available at: [www.icrc.org/ihl/INTRO/120](http://www.icrc.org/ihl/INTRO/120).

73 Central British Red Cross Committee, above note 7; J. C. de Villiers, above note 7, pp. 33–38.

Army Medical Corps<sup>74</sup> that, in the event of war, Britain was likely to be swamped by ill-managed voluntary aid that encouraged the establishment of another Red Cross organization to serve in colonial wars. This was the Central British Red Cross Committee, formed specifically to “serve the British Empire and its dependencies”, and it brought together the National Society, the St John Ambulance Association, the Army Nursing Reserve and the War Office.<sup>75</sup>

Neither the Cape nor Natal had Red Cross organizations at the outbreak of the war. In Cape Town the Good Hope Society managed much of the voluntary aid, along with various civilian relief structures, including the Mansion House Fund and the Absent-Minded Beggar Fund, the latter named after a poem by Rudyard Kipling and particularly well publicized.<sup>76</sup> In January 1900 a Central Good Hope Red Cross Committee was formed as a branch of the CBRCC, to coordinate humanitarian assistance work in South Africa. The heightened emotions of the war, particularly after such episodes as the relief of Mafeking, led to an outpouring of support from the British public and, as a result, British humanitarian aid was well funded. There was enough money to establish two hospital ships and two hospital trains, as well as to send gifts and comforts for the troops. These must have come as a great relief as the troops were often poorly fed while they were on the march, sometimes for weeks at a time, in a difficult climate. National Societies were formed in many of the small towns in the Cape Colony, and these were coordinated from Cape Town.

Despite popular enthusiasm for the British cause, neither the military authorities nor the Royal Army Medical Corps were enthusiastic about Red Cross assistance. Nor were they willing to accept assistance from abroad. As De Villiers observes, “[t]he Red Cross agent was effectively reduced to the level of a commercial traveller calling at military establishments to ask whether anything was needed but eliciting no response”.<sup>77</sup> Even at the height of the typhoid crisis, the military hindered Red Cross aid. Medical aid for the troops was so poor that a scandal erupted, leading to a government enquiry.<sup>78</sup> Ultimately the failures of the British Red Cross in this war had more to do with military arrogance and intransigence than with incompetence and lack of enthusiasm on the part of the British Red Cross Society.

But Britain’s empire consisted of far more than the white settlement colonies. It is likely that many indigenous colonists were alert to the opportunities of the war.

74 Although a military medical service had existed since the seventeenth century in Britain, it had always been unsatisfactory and disregarded by the military establishment. The Royal Army Medical Corps was only formally established in 1898; see: [www.ams-museum.org.uk/museum/history/ramc-history/](http://www.ams-museum.org.uk/museum/history/ramc-history/) [https://en.wikipedia.org/wiki/Royal\\_Army\\_Medical\\_Corps#History](https://en.wikipedia.org/wiki/Royal_Army_Medical_Corps#History).

75 Central British Red Cross Committee, above note 7, p. 63.

76 This is a poorly developed aspect of the history of the war. See Elizabeth van Heyningen, “Refugees and Relief in Cape Town, 1899–1902”, *Studies in the History of Cape Town*, Vol. 3, 1980; Vivian Bickford-Smith, Elizabeth van Heyningen and Nigel Worden, *Cape Town in the Twentieth Century*, Cape Town, David Philip, 1999, pp. 12–16.

77 J. C. de Villiers, above note 7, p. 39.

78 *Report of the Royal Commission on the Care and Treatment of the Sick and Wounded during the South African Campaign 1901*, Cd 453, London, HMSO, 1902.



Almost certainly many men saw the war as an occasion to display their manhood in fighting and, in laying down their lives, their loyalty to the British civilizing mission. While Africans beyond the borders of South Africa had no prospect of participating, Indians did, usually in support positions. In South Africa itself, officially black men did not bear arms but in practice they were widely used in combat on both sides.<sup>79</sup>

### The role of women: The transition from aid to the troops to aid for civilian victims of war

Although women had begun to contribute formally to aid in war at least as far back as the 1850s, by 1899 nurses were far better trained and many more had entered the profession. In 1899 by no means every woman was demanding the vote or desired to nurse troops, but women were moved by the issues of the war. Many women also hoped that an active support for the war might strengthen their claims to participate more fully in the political life of the nation. As Antoinette Burton has argued, British feminists claimed that women acted as “moral agents” in the life of the nation. Their engagement in this war was predicated on this argument that they brought compassion and humanity to the conflict.<sup>80</sup> While this sense that women acted as a moral force was probably most strongly developed amongst British feminists, the war also stirred Afrikaner women who had been politically passive up to now. The pro-Boer movements in Europe, too, attracted considerable female support.

The plight of the women and children in concentration camps aroused international concern as well, but the nature of the aid was partly determined by gender. Organizations like the *Nederlandsch Zuid-Afrikaansche Vereeniging* were dominated by men and tended to favour medical aid to combatants (often through the Red Cross) rather than civilians. As the war continued, these Dutch

79 This includes people of mixed birth, the so-called “coloured” people, but also those of Khoekhoe origin like the Nama. P. Warwick, above note 9; Bill Nasson, *Abraham Esau's War: A Black South African War in the Cape, 1899–1902*, Cambridge, Cambridge University Press, 1991. The presence of Mohandas Karamchand Gandhi added an unusual dimension to the participation of black people in the war. Gandhi had arrived in South Africa in 1893 on the invitation of the Natal Indians, to combat the increasingly hostile legislation of racist South Africans. At this stage of his life, Gandhi was still loyal to the British imperial cause, despite his personal sympathy for the Boers. Even before the war Gandhi's desire for service had led him to volunteer as a nurse and dispenser at St. Aidan's Mission Hospital, so he was not without medical experience.<sup>79</sup> Both he and other Indian traders saw the war as a moment to demonstrate that they were fully British subjects.<sup>79</sup> He offered to the Natal government the services of an Indian stretcher bearer corps. Eventually two such corps were established. They functioned for a brief time only, between 15 December 1899 and 14 February 1900, despite their obvious value to the overstretched Royal Army Medical Corps. While Gandhi's corps were not affiliated with the Red Cross, as medical personnel they had its protection, he believed, for he stated in his autobiography: “Though our work was outside the firing line, and though we had the protection of the Red Cross, we were asked at a critical moment to serve within the firing line.” J. C. de Villiers, above note 7, pp. 318–319; Mohandas Karamchand Gandhi, *An Autobiography: The Story of my Experiments with Truth*, London, Jonathan Cape, 1972, pp. 169, 179, 180.

80 Antoinette Burton, *Burdens of History: British Feminists, Indian Women and Imperial Culture, 1865–1915*, Chapel Hill, NC, University of North Carolina Press, 1994, p. 1.

aid organizations preferred to see their money going towards reconstruction in the erstwhile Boer republics, rather than to charity in the concentration camps.<sup>81</sup> As a result, the collection of clothing and other comforts tended to fall to the less formal organizations of women. Nonetheless, the Nederlands Bystands Fonds probably made the most substantial contribution, sending Bibles, hymn books and food as well as clothing. The work of the German Buren Hilfsbund was also considerable, as a female correspondent told Mrs Tibbie Steyn, wife of the Free State president:

A shipping agent was here from Hamburg the other day and he told us his sheds were just full of cases of things sent mostly to private people & he could not get them off, but of course that was before the British government had promised the German government that the things would be allowed thro'. I do hope you will be able to find out what has been received by the Bloemfontein camp. We of course have been using all the little influences we have on its behalf and our friends here will be anxious to know what has reached there. They are so pleased to know their labours have not been in vain & that their efforts have really been a help to the Boers.<sup>82</sup>

One of the most useful contributions from the Dutch government was a group of eight qualified nurses. They did "the work of angels", the inmates affirmed.<sup>83</sup>

From the point of view of the British authorities, these gifts were undesirable, but they had no desire to fuel pro-Boer fever by banning them. For some time the supplies were blocked, but eventually they were allowed through, albeit reluctantly.<sup>84</sup> The medical officers complained that the clothing was "old rubbish" and even that some was "inflammatory", like a consignment from Germany which included handkerchiefs depicting Boer leaders. Eventually a compromise was reached whereby the cases were opened in the presence of the camp superintendents and the Germans undertook only to send new goods.<sup>85</sup> Probably the greatest value of the donations was to remind the camp people that they were not forgotten, as the Reverend E. Dommissie affirmed: "I was present when the clothes and other goods arrived from Cape Town; with what grateful hearts people received those gifts!"<sup>86</sup>

British pro-Boers also contributed substantially. Apart from the major role played by Emily Hobhouse, whose report had initiated major reforms in the camps, and her South African Women and Children Distress Fund,<sup>87</sup> the Quakers also sent

81 V. Kuitenbrouwer, above note 15, pp. 146–148, 169–176.

82 Elbie Truter, *Tibbie: Rachel Isabella Steyn, 1865–1955: Haar Lewe was Haar Boodskap*, Cape Town, Human & Rousseau, 1997, p. 53.

83 Emily Hobhouse, *The Brunt of the War and Where it Fell*, London, Methuen, 1902, p. 254.

84 Baron Gericke, Chargé d'Affaires, Netherlands, to the Foreign Office, 25 June 1901, and related comments, NASA, FK 525, CO 417/331 IV 222025/01.

85 Sir Henry McCallum, Governor of Natal, to the High Commissioner, 27 May 1902, Pietermaritzburg Archives Repository, GH 1331/182/02.

86 Letter from Rev. E. Dommissie to *De Kerkbode*, Vol. 5, No. 6, 1914, pp. 116–117.

87 E. Hobhouse, above note 26 and above note 83; Jennifer Hobhouse Balme, *To Love One's Enemies: The Work and Life of Emily Hobhouse Compiled from Letters and Writings, Newspaper Cuttings and Official Documents*, Cobble Hill, Hobhouse Trust, 1994; R. van Reenen (ed.), *Emily Hobhouse: Boer-War Letters*, Cape Town, Human & Rousseau, 1984.



Figure 7. A group of pro-Boer Bloemfontein women who provided aid to the concentration camp inmates. Free State Archives Repository, VA 385.

out volunteer nurses, for humanitarian aid sat more comfortably with them than the political controversy that would have arisen if they had been more critical of the policy of establishing concentration camps for civilians. A South African War Victims' Committee was established at the end of 1899 and, after a Women's Relief Committee was also set up on 1 November 1900, two women, Frances Taylor and Anna Hogg, were recruited to work in the camps. They were accompanied by an unofficial representative, Helen Harris. None was medically trained, so their primary task was to distribute clothing and check on the welfare of the families. Harris did not remain for long, but all three were popular; they travelled widely through the country distributing cases of goods. Frances Taylor eventually ran the Belfast camp orphanage.<sup>88</sup>

The plight of the camp inmates also galvanized Boer women who had, until now, played a very restricted role in public life. In almost every town and village near a camp, women's organizations were formed to provide support for the hapless inmates (Figure 7). Probably the best known are the group of six Pretoria women who worked as volunteers in Irene camp.<sup>89</sup> In Bloemfontein the president's wife, Mrs Steyn, was a catalyst for the formation of an active group that included the pro-Boer Jewish families of the Leviseurs and the Baumanns.<sup>90</sup> Further away, in Cape Town, Mrs Marie Koopmans de Wet and her associates collected clothing and funds for the relief of upcountry families. While all these groups are well

<sup>88</sup> H. H. Hewison, above note 70, p. 218, 205–224.

<sup>89</sup> E. van Heyningen, above note 8, p. 276.

<sup>90</sup> Karel Schoeman, *Bloemfontein: Die Ontstaan van 'n Stad, 1846–1946*, Cape Town, Human & Rousseau, 1980, p. 176.

known, they were only the tip of the iceberg, for similar groups operated all through the Boland and even in such strongly British centres as Pietermaritzburg and Durban, although their work has been little recorded.<sup>91</sup>

The Dutch Reformed churches also played an active role in coordinating relief efforts, but the camp authorities were often suspicious of their initiatives.<sup>92</sup> In the Transvaal the camps tried to control local philanthropy by establishing a Burgher Relief Fund which collected small sums of money. Notices of money over £1, collected by “reliable” people locally, were published in the *Government Gazette*, with sums under £1 acknowledged “in bulk”.<sup>93</sup> In time the camp authorities tightened their control over the distribution of relief, employing camp nurses for the work rather than relying on the inmates.<sup>94</sup> For Afrikaners themselves these initiatives were probably most important in laying the foundations of the “welfare feminism” that characterized post-war Afrikaner women’s activities, for political feminism was often discouraged in their patriarchal world.<sup>95</sup>

## Conclusion: A white man’s war

In so many ways, this war was a precursor to the greater war that was to follow. Perhaps its greatest significance was the extent to which it drew attention to civilian suffering in war. Of course, Europeans were well aware of this, but the suffering of civilians in the South African War was the direct result of military strategy, rather than the broader distress that is always incidental to war. However, the fact that this was regarded as a “white man’s war” meant that the implications of colonial warfare for indigenous people were disregarded. The war that followed shortly after in German South West Africa was more vicious than Cuba, South Africa or the Philippines, with the Herero hunted down like animals and the Nama incarcerated under atrocious conditions.<sup>96</sup>

Since the 1980s, when some historians began to incorporate black history more fully into their understanding of the South African past, scholars have looked at the experience of black people in this war. It is clear that they played a much larger part than was previously thought, but gaps remain. We know almost nothing about the treatment of black men on the battlefield and only a little more about their fate in the camps.<sup>97</sup> On the contrary, in the aftermath of the war the

91 Annette Wohlberg, “The Merebank Concentration Camp in Durban, 1901–1902”, MA thesis, University of the Orange Free State, 2000, pp. 202–203.

92 Johannesburg camp report, May 1902, NASA, DBC 12.

93 Circular No. 33, 24 April 1901, NASA, DBC 59; Circular No. 19, 26 March 1901, NASA, DBC 46.

94 General Superintendent of Burgher Camps, Transvaal, to Military Governor of Pretoria, 1–2 July 1901, 30 July 1901 and 17 August 1901, and related correspondence, NASA, MGP 121.

95 Marijke du Toit, “Women, Welfare and the Nurturing of Afrikaner Nationalism: A Social History of the Afrikaanse Christelike Vroue Vereniging, C.1870–1939”, PhD thesis, University of Cape Town, 1996.

96 I. V. Hull, above note 2, pp. 5–90.

97 There is no reference to aid to black men in J. C. de Villiers, above note 7; or in Pieter Labuschagne, *Ghostriders of the Anglo-Boer War (1899–1902): The Role and Contribution of Agterryers*, Pretoria, University of South Africa, 1999.

independence of black people was further reduced. In the new colonies, the British retained the racist legislation of the Boer republics which denied black people the franchise and restricted their rights to own property or live where they chose. After the Union of South Africa was established in 1910, such discrimination was further entrenched and reinforced through the twentieth century.

For the British, the war had direct consequences. The value of female military nurses was established, as Shula Marks explains:

[T]his was the first war in which large numbers of female nurses were employed and actually nursed in the field hospital close to the battle front, and the deficiencies revealed in South Africa led directly to the transformation of British military nursing services evident in World War I.<sup>98</sup>

The importance of the Red Cross in managing aid to the wounded had also been demonstrated. For Europeans, too, the South African War gave fresh experience in the management of Red Cross work in a complex and messy situation, while their doctors gained new surgical skills.<sup>99</sup>

For South Africans, the consequences were rather different. The war left bitter division between English- and Afrikaans-speakers, which grew deeper in the years that followed. The creation of the Union of South Africa in 1910, and the prominent role of General Jan Smuts, prime minister of South Africa, in the formation of the League of Nations, gave South Africa a place on the international stage which confirmed the country as part of the international world order.

98 S. Marks, above note 7, p. 159.

99 Jaquez Charl de Villiers, *Healers, Helpers and Hospitals: A History of Military Medicine in the Anglo-Boer War*, Vol. 2, Pretoria, Protea Book House, 2008; A. Davidson and I. Filatova, above note 6, pp. 157–161.

# The Great War: World war, total war

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## Abstract

*The Great War was globalized and totalized<sup>1</sup> by the inclusion of colonial and newly independent people from all over the world and of civilians, old people, women and children. The European war became a laboratory for all the suffering of the century, from the extermination of the Armenians to the refugee crisis, the internments, and the unending modernization of warfare.*

**Keywords:** Great War, First World War, total war, occupied territories, prisoners of war, civilians, refugees, civilian internment.

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*Cartoon of two men camouflaging cannon:*

- “You were a decorator before you joined up. What’re you doing nowadays?”
- “Scenery for a tragedy.”

The Great War was a total, global tragedy: its setting, the entire world; its duration, 1914–18; its main feature, mass violence. From the very beginning, the British, French, German and Belgian governments made the war global by pulling the inhabitants and resources of their empires into it. This took place long before the United States entered the war in 1917. Countries, whether neutral or not, helped maintain the epic scale of the violence through industrialized production of munitions, food and other supplies, while also seeking to uphold as much of the law of war as they could. Although the war officially ended in 1918, in some ways it continued into the 1920s and lasted right up to the Second World War.



For the first time in history, the whole world waged war – a war that devoured men, resources and energy; that split loyalties, reignited old fervours and generated new horrors. What began in Europe, and might have been only the “Third Balkan War”, was turned into a global catastrophe upon the whim of the great imperial powers. Four of them – Germany, Austria-Hungary, the Ottoman Empire and Russia – were destroyed by it, but the war would also leave a vivid scar on the collective memory of all involved. The world would come to mourn the deaths of hundreds of thousands of civilians and ten million combatants, and the loss of an innocence never to be regained.

In 1918, Maurice Busset produced a large painting entitled *Bombardement de Ludwigshafen* (Figure 1). He was so proud of his work – in both senses of the word – that he signed it “aviator”, a member of the new cavalry of the sky. His own plane can be seen above a factory in flames – bombs falling in a colourful, almost joyful setting in which Busset, a very patriotic man, depicts the destruction of a German factory, perhaps one of those that had produced the asphyxiating gases used on all the battlefields since 1915. What did civilian lives matter – the lives of the workers and residents of the area – when what counted was winning the war? The painting shows that in that conflict, civilians on the



Figure 1. Maurice Busset, *Bombardement de Ludwigshafen*, 1918. Army Museum, Paris.

1 See Jay Winter (ed.), *The Cambridge History of the First World War*, Cambridge University Press, Cambridge, 2014.



other side were simply the enemy (although Buset did not actually include any civilians in the image, as if they simply did not exist). In this way, it exemplifies the terrible novelty of total war. There was now more than one kind of front: sprawling military fronts mostly made up of men in uniform, and home fronts, where civilians came to be seen as targets, but their suffering went largely unnoticed and was often forgotten.

In 1917, the poet Apollinaire, a soldier in the war, was already asking himself:

What should this war be called? In the beginning, people called it 'the war of 1914', then as the war carried on into 1915 it became 'the European war'; when the Americans got involved it became the 'World War' or 'Universal War'. ... The 'Great War' has its backers too. The 'War of Nations' could garner some votes. The 'War of the Races' might also be defensible. And the 'War of the Alliances' or the 'War of the Peoples'. But the 'War of the Fronts' would perhaps express best the character of this gigantic struggle.<sup>2</sup>

For 100 years, the military fronts – land, sea and air – and those who fought on them have quite rightly received the most attention in discussions of conflict. But it is time to study everyone else's war. Civilians were also caught up in the fight – through their tremendous work to keep the supplies moving to the fronts where they were needed – and they suffered and grieved their losses. The military fronts cannot be understood without looking at those fighting on the home fronts, who also were completely mobilized for the war effort. Every man, woman and child contributed in his or her own way in factories, fields and schools.

The military fronts and the home fronts formed an immense, complex war machine: there were fronts on land, sea and air; there were sites of invasion and shelter, of Herculean labour, of military and civilian imprisonment, of tireless battles against wounds and disease, and of mourning and remembrance. This sowed the seeds of later catastrophes. In some areas, civilians were at the heart of the war; invaded, occupied, looted and bombed, they had become everyday targets in a total war. In these areas, outside the four walls of their laboratory, the authorities tested their ideas of how to repress large groups, displace entire populations, even attempt, in the words of the International Committee of the Red Cross (ICRC) at the time, the "systematic extermination" of the Armenians of the Ottoman Empire.

In his essay, "Wars of the Twentieth Century and the Twentieth Century as War", the Czech philosopher Jan Patočka fully grasped the paroxysmal nature of the conflict:

The First World War is the decisive event in the history of the twentieth century. It determined its entire character. It was this war that demonstrated that the transformation of the world into a laboratory for releasing reserves

2 Guillaume Apollinaire, *Mercur de France*, 16 November 1917, in *Œuvres complètes*, T 3, La Pléiade, Gallimard, p. 514.

of energy accumulated over billions of years can be achieved only by means of wars.<sup>3</sup>

Emmanuel Levinas, a Lithuanian philosopher exiled from his country for the first time as a child in 1914, spoke of the importance that the two world wars had had on his life:

The war of 1914 never ended; the revolution and the unrest afterwards, the civil war, all of that comes together in the war of 1914. ... The unrest started in August 1914 and never stopped, as if the order of things had been forever disturbed.<sup>4</sup>

Both thinkers point the way to how we should explore this laboratory of violence, the “unrest”, the “disturbances” and the extremely difficult task of perceiving, conceptualizing and remembering what happened.

The Great War was, whether deliberately or unconsciously, a laboratory for the twentieth century: a field experiment or test site where violence could be carried out and the effectiveness of military materials to kill men measured and improved. As weapons became increasingly sophisticated, the white-coated technicians were sometimes located right at the front. When poison gas was deployed on a massive scale for the first time, Fritz Haber, a German chemist, was on the battlefield at Ypres to observe the consequences of his research at first hand. Psychologists set up laboratories as close as possible to the action to use war as an extended experiment, with men serving as lab rats. Experts like these became proselytizers of total war, a way of waging war ever more effectively in the service of their countries. The goal of the laboratory war was not universal knowledge but national victory. On the military fronts, that meant many more captured, wounded or dead. Total war meant globalization and industrialization; modernization and regression; atavism, anomie and cultural appropriation across regions, countries and continents. Facts and statistics are needed on an enormous scale to assess the Great War – but geography and statistics do not bleed. We will endeavour, therefore, to understand the blood and the tears by looking at this new face of war on both the military and the home fronts.

## The military front

Generals Hindenburg and Ludendorff coined the term “battle of materials” (*Materialschlacht*) to describe the battle of the Somme. Their soldiers, however, described it as *Verwüstungsschlacht*: devastation or butchery. Officers of the General Staff and soldiers in the field were both right. Between 1914 and 1918, the various armies were engaged in battles of materials and battles of utter

3 Jan Patocka, *Heretical Essays in the History of Philosophy*, Carus, Chicago, IL, 1996 (first published 1975), p. 134.

4 François Poirié, *Emmanuel Levinas, qui êtes-vous?*, La Manufacture, Lyon, 1987, pp. 63–65.

Fig. 2 - B/W online, B/W in print



Figure 2. Tom Aitken, “Photo of a Soldier Surrounded by Shell Casings”. National Library of Scotland.

carnage. The more than 70 million soldiers fighting the war were trapped in a new kind of deadly violence. Even if they came out of the war in one piece, over half of those that survived developed psychological disorders, minor and major.

From 1914, the battlefield became a place that was radically different and more terrifying than anything that had gone before. War had been transformed. Where previously soldiers had fought shoulder to shoulder, they were now isolated, spread out across the terrain, hiding wherever a shell had made a crater. While all battlefields had been frightening in the past, nothing had come close to the total dehumanization of this war. The difference between the means of protecting oneself and killing others was massive: machine guns, artillery, flamethrowers and poison gas turned the terrain into killing fields. Men were not even safe in their bunkers underground.

The intense fighting lasted, on and off, for weeks, then months. But after the outbreak of hostilities in 1914, the initial period of battles that were brutal but brief was over. Battles on the Western Front, on the Eastern Front and in the Middle East would last for months. They became a series of sieges that laid waste to everything around them – without, however, preventing in the least the besieged from bringing in new supplies and reinforcements, or rebuilding their defences. Rear lines of trenches extended so far, sometimes dozens of kilometres, that defending forces could repel almost all the enemy’s attempts to break through. But how many

were killed or wounded? How many were made prisoners of war? How many were declared missing or used as human shields?

As a result, what is most remembered about the war is the mass slaughter of combatants: over 10 million dead in four and a half years. Unlike in previous wars, very few died of disease; almost all were killed in the fighting. The survivors did not fare much better. Nearly 50% of all those who fought were wounded, whether seriously or not, and often more than once. Shells were the main cause; poison gas, though a new terror, caused far fewer casualties.

The new violence got under the skin and into the flesh of those who were both agents and patients. However, few would later be able to say “I survived, and I killed” – like Blaise Cendrars, the Swiss writer who volunteered to fight in the French army:

All at once everything breaks, cracks, booms. General commotion. A thousand blasts. Infernos, fires, explosions. It's an avalanche of cannon. The thunder rolls. Barricades. The firing pin. In light of the looming departure, oblique, ambiguous men, the index of a signboard, a crazy horse. The batting of an eyelid. The flash of magnesium. A quick snapshot. Everything disappears.<sup>5</sup>

“Everything”, it seems, including bodies:

[H]e was blown up by a shell and I saw, with my own eyes I saw, this handsome legionary sucked up into the air, violated, crumpled, blasted in mid-air by an invisible ghoul in a yellow cloud, and his blood-stained trousers fall to the ground *empty*, while the frightful scream of pain emitted by the murdered man rang out louder than the explosion of the shell itself, and I heard it ringing still for a long moment after the [vaporized] body had ceased to exist.<sup>6</sup>

It was because there was so often no identifiable trace of killed men that governments started to commemorate the Unknown Soldier.

Innovations in general medicine in the nineteenth century led to improvements in military medicine. Therapeutic practices had seen progress too – paradoxically because of new kinds of wounds and injuries. Wounded soldiers were now commonly evacuated to field hospitals, where operations would be carried out with antiseptic agents and anaesthetics, reducing the risk of gangrene and amputation. Bullets and shrapnel were located using X-rays. Doctors performed reconstructive facial surgery. The first blood transfusions took place and new vaccines were developed. But the intensity of the fighting caused extreme emotional and psychological trauma, and left some irreversibly damaged. Psychiatric science was not sufficiently developed to treat stress and trauma of this kind. While German had the scientific-sounding *Kriegsneurosen*, the far less sophisticated-seeming “shell shock” of the British and *obusite* of the French (*obus*

5 Blaise Cendrars, “J’ai tué”, in *La Main coupée et autres récits de guerre*, Denoël, Paris, 2013, translated as “I Killed” by Rainer J. Hanshe in *Hyperion – On the Future of Aesthetics*, Vol. 9, No. 1, 2015, Contra Mundum Press, New York, p. 22.

6 Blaise Cendrars, *The Astonished Man*, Peter Owen, London, 2004, pp. 18–19.

Fig. 3 - B/W online, B/W in print



Figure 3. “Wounded German Prisoners of War”, 1916. Archives of the ICRC, Geneva.

means “shell”) left considerable room for unhelpful interpretation; in an atmosphere of feverish patriotism, combatants were frequently suspected of dissimulation. Nevertheless, little by little the experts had to accept the evidence before their eyes: not only did war mutilate men, it drove them mad. Even officers whose sense of honour and duty were beyond question could crack. For the philosopher Walter Benjamin, the generation of 1914–18 “had to experience one of the most monstrous events in the history of the world”.<sup>7</sup> He insisted on the insignificance of human beings in this radically new kind of war:

A generation that had gone to school in horse-drawn streetcars now stood in the open air, amid a landscape in which nothing was the same except the clouds

<sup>7</sup> Walter Benjamin, “Experience and Poverty”, translated by Rodney Livingstone in *Selected Writings*, Vol. 2: 1927–1933, ed. Michael W. Jennings *et al.*, Harvard University Press, Cambridge, MA, 2005, p. 731.

and, at its centre, in a force field of destructive torrents and explosions, the tiny, fragile, human body.<sup>8</sup>

What he hadn't understood, however, was that civilians had had their own fair share of frenzy.

## The home front

In occupied areas, the usual dichotomy between front and rear did not exist. In "normal" wars, wives and daughters "stayed at home" while the husbands and grown-up sons went off to fight at the front. But in war, men – *franc-tireurs*, or maverick soldiers – would invade houses and women's bodies, venting their frustration on defenceless civilians. Hence the general fury against the Germans because of their atrocities in Belgium and France, against the Austro-Hungarians in Serbia, against the Russians in eastern Prussia.

A consequence of making war total was that immense numbers of people were now forced to flee their village or town – to live, or die, elsewhere. At both the start and the end of the Great War, there was an exodus of people by road and rail – people on foot and horseback, people crammed in carts, cars and trains. Though displacements were as old as war itself, the Great War made them commonplace, and ushered in the century of the refugee.



Figure 4. "Serbian Refugees". Archives of the ICRC, Geneva.

8 *Ibid.*, p. 732.



In the beginning, people were fleeing at the approach of invading armies, holding onto the more or less reasonable hope of returning soon, depending on the country and the way the war was going. They knew, or hoped, they would be coming back, just as soon as the war was over. But when would that be? Louis Malvy, the French interior minister, gave this tortuous description of the situation of masses of people on the fringes of the war, who had lost their houses, jobs and resources:

There is obviously no uncertainty concerning the inhabitants of places in areas occupied by the enemy (whether they have withdrawn thereto or been repatriated thereto from Germany); nor is there any with regard to communes that, although located in an uninvaded or recovered area, have been evacuated by decision of the military or administrative authorities. The same cannot be said for inhabitants of communes that, unoccupied by the enemy and unevacuated, are located in an area that has to a greater or lesser extent been subjected to bombardment. ... There may be individual cases that require examination; that is to say that inhabitants, having left their place of residence, found themselves in a situation that, whilst justifying their departure, thereby too provides the grounds for their transfer elsewhere. ... These cases cannot be settled a priori by myself, and will therefore require referral to the prefects in the area of the military operations concerned for their assessment, who have hitherto always provided the most well-founded and equitable response to questions of this order. Should there be any doubts with regard to the situation of the interested party, the decision taken should be that which is the most generous and humane.<sup>9</sup>

These were men who were old or who had not been called up, and women and children. They were neither at the front nor at the rear, but somewhere else, in a new situation that paradoxically pushed them to the margins of the war simply because they had been, from the very first days and months, right in the eye of the storm. Many continued to be pushed from place to place; the evacuations and expulsions continued for the duration of the war, and these journeys were as diverse as they were painful. Those being displaced knew when they left that their houses would be occupied by soldiers. They hoped that these would be people from their own side in the rear lines, but what if they were enemy soldiers from the front? The enemy were barbarians, capable of anything – or so they thought, because that, after all, was why they were running away.

These men, women and children, when they did find refuge, attracted various reactions – the best and worst of societies during wars. The care and concern of the first months, bolstered by patriotic declarations of solidarity, soon gave way to rejection as the war dragged on. Refugees became a burden; they were useless, poor, extra mouths to feed – in short, foreign. Refugees did not

9 Archives Nationales, France, F/23/3, Réfugiés et rapatriés, 1914–1919, Circulaire No. 65 de L. Malvy, Ministre de l'intérieur, 21 October 1916.



simply have a different nationality: they were fundamentally alien. They could not be integrated into society. The perspective shifted from refugees coming from *somewhere* else to refugees being determined by *something* else. In the language of the day, that meant race.

On the Balkan, Ottoman and Eastern Fronts, invasions, counter-invasions and forced displacements made the movement and suffering of civilian populations even more dramatic. In 1914 the Russians advanced east, causing panic and terror, before the Central Powers turned the tables and thrust, in the summer of 1915 and after the Revolution in 1917–18, into the diverse immensity of Russia. As empires reorganized themselves internally, some displacements took the form of forced homogenization, reassembling and reordering society on social or racial lines. In Russia, the military had no qualms about how to treat “suspect populations” – Jews and subjects of German origin. They were locked up or transferred well away from the front. This “ethnic cleansing” marked a turning point: from being internal refugees, many were now deportees.

A wave of pogroms coincided with other widespread violence by combatants against Jews, nourished by long-held ideas among the peasants of the Jews as “traitors”, “infidels”, “hoarders” and “speculators”. The authorities ordered the courts not to prosecute: people could “have a crack at the yid” with impunity, and many regular



Figure 5. Image from Abel Pann, *In the Name of the Czar: 24 Original Pictures*, American Jewish Chronicle, 1918.

military units committed war crimes.<sup>10</sup> Waves of anti-Semitic violence continued on a massive scale between 1918 and 1920, as boundaries shifted and territories were carved up. The refugee could be said to be both the first to suffer in the war and the last.

## Concentration camps

In 1917, Gustave Ador, the president of the ICRC, said:

Civilian internees are an innovation of this war; the international treaties did not foresee it. At the beginning of the war it may have been logical to immobilize them in order to detain suspects; a few months would have sufficed, it would appear, to separate the wheat from the chaff.

We must, from different points of view, integrate civilian internees with civilian deportees in enemy countries, as well as the inhabitants of territories occupied by the enemy. These civilians have been denied their liberty, and their situation differs little from that of the prisoners.

After three full years of war, we ask that the different categories of civilians in this war be the object of special attention and that a resolution to their situation, which in some regards is crueller than that of military prisoners, be seriously considered before the arrival of the fourth winter of this war.<sup>11</sup>

The war raised many questions. What should we call people who were in a particular geographical situation because of the conflict going on around them, who did not run away in time, who had become refugees and who had sometimes been captured and then locked up? “Internees”? “Deportees”? “Prisoners”? What should we do with them? They were not soldiers; there was, therefore, no international treaty to protect them.

Although “normal” war always involves the violent separation of civilians from soldiers, who may be wounded or die, the elation of heroism and the consent given to fight for one’s country may in part compensate for the soldier’s suffering. But there was none of that here: no heroism, no consent. There was just pure suffering on the part of civilians, made worse by the authorities’ inability to uncover abuses or identify the victims. The administrative and military texts simply said “captured civilian”; there was no mention of gender or age, and their specific situation was simply ignored. That was the paradox facing civilians in prison camps. The war homogenized their cases and favoured combatants. The landscape of the Great War was scarred by concentration camps, watchtowers and barbed wire – which was at times electrified. But in a world in which heroes

10 Nicolas Werth, “Dans l’ombre de la Shoah, les pogroms des guerres civiles russes”, introduction to *Le livre des pogroms: Antichambre d’un génocide, Ukraine, Russie, Biélorussie, 1917–1922*, Calmann-Lévy, Paris, 2010, pp. 36–37.

11 Speech at the International Conference of the Red Cross on the issue of civilian prisoners: ICRC Archives, 411/10, “Introduction sommaire à la question concernant les civils”, September 1917, p. 1.



Figure 6. “Holzminden”. Archives of the ICRC, Geneva.

were dying on the battlefield, few paid the civilian internees any attention. Civilian victims were marginalized, practically invisible.<sup>12</sup>

“Deportation” became synonymous with “concentration camps”. It was normal to displace people as a way of forcing them to work or keeping them under surveillance, often as a form of punishment. Detention was administrative and/or military, never judicial, because the deportees were never tried or sentenced. The word *deportatio* in classical Latin (“cart”, “carry away”) came to mean “expulsion” or “exile” in Late Latin. The modern term blends both meanings, combining being taken from one’s home and being expelled. Already before the war, the concepts of deportation and concentration camps were being fused by the means that made them possible – railways – and the objective: the separation of civilians – old men, women and children – from soldiers, so that the former would not “bother” the latter because of their family ties. This went on in a context of social Darwinism that grew out of colonialism: concentration camps had been invented by the Spanish in Cuba in 1896 and almost simultaneously reinvented in South Africa by the British during the Boer War.

Because Europeans had immediately made the war global by attacking other countries’ colonies and calling on their own to come to their aid, concentration camps existed throughout the world in 1914. Civilian citizens of countries that had become enemies were labelled “enemy aliens” and interned in camps not only in their home countries but also in the colonies (e.g., Ukrainians in Canada, Germans in Australia, Galician Poles of Austria-Hungary in France).

12 Annette Becker, *Les cicatrices rouges, 14–18: France et Belgique occupées*, Fayard, Paris, 2010.

Fig. 7 - B/W online, B/W in print



Figure 7. “Civilian Prisoners in Portugal”. Archives of the ICRC, Geneva.

Men were the main target. Those who were of fighting age were seen as potential spies. Paradoxically, those of fighting age thus interned were saved from death at the front by this decision, however arbitrary it may have been. They were deemed to be military prisoners, saved from the trenches by capture and the original Geneva Convention.

Men and women soon suffered the same fate of deportation, something that was coming to be viewed as normal, even banal, as early as 1914. John Reed, an American journalist, caught the mood of the time:

Everybody kept up an incessant and anxious discussion as to whether Greece and Bulgaria would intervene, and on what side. For at any moment they might be cut off from home and condemned to perpetual wandering on neutral seas; they might be captured on landing and penned into concentration camps; they might be taken off the ship as alien enemies by a hostile cruiser.<sup>13</sup>

The populations of areas that had been invaded and then occupied by enemy armies formed a second group of civilian prisoners, who suffered different kinds of alienation and internment. This ranged from being isolated from their compatriots to being deported to concentration camps where, in some circumstances, they were held as hostages or subjected to forced labour. The major problem facing the economies of the warring countries was a shortage of manpower. Global, total war required global, total means. But if men had been mobilized *en masse*, women, prisoners of war and colonial workers in Great Britain and France were needed on the home front. The Central Powers turned

13 John Reed, *The War in Eastern Europe*, Charles Scribner's Sons, New York, 1916. In spring 1915, John Reed was on the ship *Torino* sailing from Brindisi to Thessalonica.

to forced labour in their occupied areas: Belgian and French miners, Lithuanian (Ober Ost) or Serbian lumberjacks and farmers. Thousands, in some cases hundreds of thousands, of Belgians, French, Germans, Italians, Romanians, Russians and Serbs<sup>14</sup> suffered the same fate, in Europe and the colonies. This was not only forced labour but a return to a kind of slavery.

The presence of women in the camps was an extraordinary novelty of this war, which was peculiar in mixing soldiers with civilians, uniforms with everyday clothes. Women in dresses, their bundles of belongings in hand, seemed incongruous and, indeed, out of place. The things that civilian prisoners made – as did their so similar and yet so different counterparts, the military prisoners – show how much they tried to improve their everyday conditions materially and psychologically. They were fighting boredom and depression, so often the causes of “barbed wire disease”, and doing time, the time in prison replacing that of the war. The handicraft of civilians caught up in the war is like the handicraft of the trenches: objects from the war to represent the war; objects from the camp to represent the camp.<sup>15</sup>

## The murder of a nation<sup>16</sup>

The Armenians of the Ottoman Empire represent the most extreme case of civilian displacement during the Great War; indeed, the case was so extreme that there was no word at the time for their deportation-extinction. The catastrophe grew out of the Turkish dread that their national security was at risk and from the decision to begin “ethnic cleansing” – Christians in Anatolia being forced to make way for Muslim refugees from the Balkans. For the Young Turks, the Armenians were powerful traitors, an enemy within. They were represented as pests, as beasts, their humanity denied. They needed to be “taken care of”, shorthand even then for murder.<sup>17</sup> Talaat Pasha, one of the heads of the Committee of Union and Progress that ruled the Ottoman Empire, described these deportations, which began with the children, as logical retribution against “traitors”, people who were obviously in the pay of Russia: “The expulsion of Armenians from our eastern provinces is a military necessity.”<sup>18</sup>

As is all too typical when groups decide on mass murder, the Turks blamed their own crimes on their victims and claimed to be defending themselves from these “civilized criminals”, an oxymoron more apt as self-definition in this case.

14 The ICRC estimates that there were 100,000 Belgians and French people deported to Germany and Germans deported to Russia. Some Italians were deported close to their home villages or to camps, set up by the Austrians, which mixed civilian and military prisoners.

15 Nicolas Saunders, *Trench Art: Materialities and Memories of War*, Berg, Oxford, 2003.

16 This term was coined, in relation to the mass extermination of Armenians, by Arnold J. Toynbee, *The Armenian Atrocities: The Murder of a Nation*, preface by James Bryce, Hodder & Stoughton, London, 1915.

17 Turkish document sent to Pope Benedict XV, Vatican Archives, ASV, Guerra 1914–1918, 244, fasc. 110; *Vérité sur le mouvement révolutionnaire arménien et les mesures gouvernementales*, Constantinople, 1916.

18 *Berliner Tageblatt*, 4 May 1916.

When deportations of Armenians to Syria began in April 1915, nothing had been done to prepare for their arrival. It is probable that the Armenians were not expected to survive the uprooting, or the thirst, starvation, rapes and massacres along the way. Armin Wegner, a nurse in the German army, recorded a telegram exchange between the mayor of Aleppo and Talaat Pasha. The mayor asked: “Thousands of deported Armenians have arrived. What should I do with them?” To which Talaat is alleged to have replied: “The destination of the deportation is: nowhere.” Wegner adds: “That was another name for the desert.”<sup>19</sup>

Finally, in July 1915, camps were organized by the Aleppo Sub-Directorate of Deportees that handled the deportees when they arrived by train. The camps consisted of tents – when available, most were simply cloth hung to provide some shelter against the sun – and had no sanitary facilities or food; they were generally situated over 25 kilometres from the railway station, and had to be reached on foot. Famine and typhus were rife, doing the murderers’ work for them before they emptied the camps, one by one, by sending the living further east or finishing off those who remained. The Ras ul Aïn site was described by some as a “death camp”.

Even as early as 1915, the massacre of the Armenians was being called a “crime against humanity and civilization”. But this was not an official term in international law at the time – that had to wait until after 1945 and the Nuremberg trials. This was a cry for vengeance raised by the Triple Entente against the Central Powers and their ally, the Ottoman Empire. But although the Allies made much use of these crimes against the Armenians during the war as damning propaganda, they were quickly forgotten once the war was over. There was a shift from the “banality of evil” to the “banality of indifference”,<sup>20</sup> and silence.

## Conclusion

The war began with many expressing their determination and willingness to take part, but these attitudes shifted to rejection and outright pacifism after the conflict. As Freud said as early as 1915, modern warfare had produced extraordinarily traumatizing situations that nobody was prepared for: the mutilated bodies, the death of so many young people – an entire generation lost – and the massive destruction of homes and of hope. A nineteenth-century vision of progress and civilization had left behind nothing but barbarity – cruelty, brutality, internalized violence expressed as visceral patriotism – which whether it was accepted or rejected, fought or given into, would be reflected and refracted in

19 Armin T. Wegner *e gli Armeni in Anatolia, 1915: Immagini e testimonianze*, Milan, Guerini e Associati, 1996, p. 88.

20 Yair Auron, *The Banality of Indifference: Zionism and the Armenian Genocide*, Transaction Publishers, New Brunswick, NJ, and London, 2000.



the post-war period, in the private sphere and in the political, literary and artistic worlds.<sup>21</sup>

From his earliest work in the 1920s, the Polish jurist Raphael Lemkin was motivated by what had happened during the invasions and occupations of the Great War. In a report prepared for the Fifth Conference for the Unification of Criminal Law in Madrid in 1933, he proposed calling these specific offences against the law of nations “acts of barbarism” and “acts of vandalism”. He had understood – although he did not put it as clearly then as he later did – that the extermination of a people was not a random act of cruelty but the essence of this kind of war against civilians and the desire to homogenize peoples and religions. Lemkin went as far as he could in 1933 towards finding a legal term that encompassed offences against cultures and against individuals because they belonged to certain groups. He was looking for a legal chain of reasoning that would enable such unprecedented acts to be punished.

Invasions, occupations, atrocities, deportations and massacres of civilians kept pace with the radicalization of the fighting on the battlefield, yet they have been practically obliterated from the collective memory of the war. It would take another war – a total war on an even greater scale – for the word “genocide” to be coined by Lemkin. Memory had been defeated. It was laid low by the hyper-commemoration of those who were seen either as heroes or as victims of the trenches, and by collective amnesia with regard to all the others, including the Armenians and the prisoners of war. Who now remembers the fate of the British prisoners – mainly Indians – forced to march across the desert of Iraq, to die there in their thousands?

Raymond Aron spoke about those he believed had got it wrong post-1918: “The Second World War reminded us that memory which was too faithful was just as dangerous as forgetting. The best way to precipitate a catastrophe is to employ the means that would probably have prevented the preceding one.”<sup>22</sup> He was thinking of the pacifists, who would no longer go to war under any circumstances, and those who had not understood that loyalty to the soldiers of the trenches was preventing people from thinking about the war to come – the military aspects of modernity, the tanks and the aerial bombardments. And yet Heinrich Vierbücher, a German who had served as a translator to General Liman von Sanders in the Dardanelles, had as far back as 1930 said that to deport civilians, women and children, to make them die of thirst, starvation and ill treatment, to slaughter them like cattle in the abattoir, was worse than the war of the trenches:

The 50 long months of terror engendered by the Great War did not reach their climax on the battlefields of Vaux and Douaumont but in the mountain passes

21 Nicolas Beaupré, Heather Jones and Anne Rasmussen (eds), *Dans la Guerre 1914–1918: Accepter, endurer, refuser*, Les Belles Lettres, Paris, 2015.

22 Raymond Aron, “Alain et la politique”, in *Hommage à Alain, 1868–1951: Textes inédits*, NRF Gallimard, Paris, 1952, p. 158.



of the Caucasus, that Golgotha of the Armenians which lies beyond anyone's imagination of horror, beyond even the visions of Grünewald, Goya and Bruegel.<sup>23</sup>

23 Heinrich Vierbücher, *Was die kaiserliche Regierung den deutschen Untertanen verschwiegen hat, Armenien 1915: Die Abschachtung eines Kulturvolkes durch die Türken*, 1930, translated as *Armenia 1915: What the German Imperial Government Concealed from Its Subjects: The Slaughter of a Civilized People at the Hands of the Turks*, Armenian Cultural Foundation, Arlington, MA, 2006.



# Will the Trojan War take place? Violations of the rules of war and the Battle of the Dardanelles (1915)

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## Abstract

*The Battle of the Dardanelles is one of the key episodes of World War I on the Ottoman front between the British, the French, the Australians and New Zealanders on the one side, and the Ottoman army under German command on the other. Immediately after the Great War, the former belligerents engaged in another war, which protracts up until the present day: allegations of violations of the rules of war are mutually addressed, in order to become a salient element of political propaganda. Through the analysis of the major controversial issues (use of dum-dum bullets and asphyxiating gases, attacks on non-military objects and sites, treatment of prisoners of war) and the study of various sources (official documents, correspondence and reports issued by belligerent forces, memoirs of Dardanelles' veterans, ICRC reports) this article scrutinizes two crucial questions. Were the rules of war taken seriously on the battlefield? Was the law instrumentalized by the belligerents?*

**Keywords:** Battle of Dardanelles, World War I, international humanitarian law, International Committee of the Red Cross, propaganda, respect for international humanitarian law, asphyxiating gases, dum-dum bullets, indiscriminate attacks, prisoners of war, Ottoman Empire, Turkey, Australian and New Zealand Army Corps.

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## Introduction

The Battle of the Dardanelles is one of the key episodes of World War I (WWI) on the Ottoman front between the Franco-British allies and their colonial troops on the one side, and the Ottoman army under German (and to a lesser extent Austrian) command on the other. It can be divided into two stages.<sup>1</sup> From 19 February to 18 March 1915 the allied fleet attempted in vain to penetrate the Dardanelles Straits. That failure led to an allied landing on the Gallipoli Peninsula on 25 April 1915, which triggered a land battle that lasted until 9 January 1916. Having tried in vain to move through the peninsula, the Allies left the region as they had arrived, by sea.

Whereas the Battle of the Dardanelles is a relatively neglected event in the collective British and – especially – French memory of the Great War, it occupies, on the other hand, a central place in the Turkish national memory and in that of the former British Crown Dominions, Australia and New Zealand. That place is attested today by the scale of the increasingly elaborate battle commemorations that have been organized in Turkey in recent years. For the aforementioned countries, the battle was, and therefore remains, a key episode in the account of how the nation State was formed. That account draws attention to the violence of the fighting but also, by contrast, to the loyalty of the enemy – if not the chivalry – demonstrated by the nation's own combatants and, to an extent, by the enemy or by some enemies, Australian and New Zealand Army Corps (the ANZACs). Indeed, Turkish rhetoric focuses on an aspect that is presented as unifying: the “Turks”<sup>2</sup> and the ANZACs were both victims of Western imperialism, as were the Franco-British colonial African or Indian troops, who were hoodwinked by their leaders and their senior officers. In the southern hemisphere people have come to terms with the idea of a brutal but civilized “gentlemen’s war”.

In April 2002, an Australian national presented the police with a human skull from his home, saying that it had belonged to a “Turkish” soldier who had fought in the Dardanelles. The skull was finally handed over to the Turkish authorities and buried on 18 March 2003 in a small monument to the unknown soldier that was set up for that purpose in the commemorative area on the Gallipoli Peninsula.<sup>3</sup> While the handing over of the skull illustrates the converging manner in which Turkey and Australia commemorate the battle, that atmosphere is not to everyone’s taste. On Turkish discussion forums, some wonder what could have prompted an ANZAC soldier to take home a “trophy” like that and prefer instead to underscore the “savagery” of the former enemies. On Australian forums, it is the bad treatment experienced by ANZAC prisoners

1 See for instance Peter Hart, *Gallipoli*, Oxford University Press, Oxford, 2011.

2 Contemporary Western sources often present the Ottoman army as the “Turkish army” and Ottoman combatants, in particular, are referred to as “Turks”.

3 Alexandre Toumarkine, “L’invention permanente des soldats inconnus en Turquie”, in François Cochet and Jean-Noël Grandhomme (eds), *Les soldats inconnus de la grande guerre: La mort, le deuil, la mémoire*, SOTECA 14–18 eds, Saint-Cloud, 2012, pp. 191–206.

that tarnishes that unity. Alongside those discussions, mention should be made of the growing number of historiographical studies in Turkey in the 2000s and 2010s that have been based, in particular, on documents from the Ottoman archives and the Ottoman press. Those publications often highlight the war crimes committed by the Franco-British enemy and, conversely, maintain that the Ottomans complied with international law. The conduct of the armies can be roughly assessed under four headings: the projectiles used and, in particular, the use of expanding “dum-dum” bullets; gas warfare; attacks on non-military objects and sites, especially on medical facilities; and, lastly but most important of all because it is a controversial matter, the treatment of prisoners of war. Those categories reflect the essential criteria that, during and immediately after the Great War, fed the reciprocal accusations of violating international law and broadly match those put forward on other fronts. Those were also the humanitarian issues that the International Committee of the Red Cross (ICRC) had looked at and they were based on positive international law as it was at the time.

In this article, we will look at each of them in turn, after investigating the anti-“Turkish” prejudices that helped to paint a largely fantasy picture of the enemy at the start of the Dardanelles campaign. Mutual allegations of the use of dum-dum bullets and asphyxiating gases will be addressed as major controversial issues. If the attacks on non-military objects and sites during the campaign seems to be an indisputable fact, their extent and scope are, nonetheless, debatable. Last but not least, the respect of the rules of war concerned with the standards of treatment beyond the battlefield, namely in the camps for the prisoners of the adversary (the allied forces’ prisoners were detained in camps located in Ottoman territory, while those designated for Ottoman prisoners were placed in various territories under Allied rule), remains questionable. This article is primarily based on official documents, correspondence and reports issued by belligerent forces, as well as on the memoirs of Dardanelles’ veterans of various nationalities, which naturally reflect a prejudiced understanding of the facts. ICRC reports have also been consulted. The overall study of the violations of the rules of war relating to the Battle of the Dardanelles raises two questions: firstly, whether the law of war was instrumentalized by the belligerents; and secondly, whether the rules were taken seriously.

## **Initial anti-“Turkish” prejudices and their disappearance during the fighting**

Allied soldiers arrived at the Dardanelles with their baggage of anti-“Turkish” prejudices, nurtured by the propaganda of their respective armies, which must have found a fertile orientalist ground, according to the *esprit du temps*. The combat was expected, therefore, to be a clash between the civilized and uncivilized worlds. The conception of the enemy as an inhuman, pitiless monster vanished during the fighting, where the enemy – now finally visible – appeared as

a human being like any other, and at the truce negotiations, which allowed a certain kind of friendly dialogue between the enemy forces.

In a work that was published in 1956 and swiftly became a classic on the battle of the Dardanelles, the Australian war correspondent Alan McCrae Moorehead<sup>4</sup> gave a summary of how the “Turks” were perceived by their enemies before the land battle began and at its very beginning:

... there was at this early stage another and perhaps deeper feeling that there was a monstrosity and inhumanity about the Turks: They were cruel and sinister fanatics, capable of any sort of vice and bestiality – in brief, it was the popular picture that had been drawn of them by Byron and the emotions of Gladstonian liberal England. The Turks were “natives” – but natives of a peculiarly dangerous and subtle kind. And so the Australian and New Zealand soldiers fought, not an ordinary man, but a monster prefigured by imagination and by propaganda; and they hated him.<sup>5</sup>

He goes on to emphasize, as we have seen in the passage quoted above, the fact that this stereotype had been patiently constructed in Western public opinion with regard to the Eastern Question and the idea of the need to protect non-Muslim minorities against “Turkish” barbarity. One might wonder to what extent this stereotype was shared not only by the communities made up of inhabitants of former Western colonies but also by all the troops of the British and French Empires.

In the case of the French, the image of the Ottoman enemy was always tied to the idea of the Germans that had been inherited from the 1870 Franco-Prussian War. Evidence of that confusion is found in the use of the expression “*Turco-boches*” (“Turko-Krauts”) in the memoirs and the correspondence of men who had fought in the Dardanelles, for whom – out of ignorance – the Ottoman Empire did not conjure up any particular images. The French military command does not appear to have made any particular attempt to stir up hatred of the “Turks”. In his war memoirs entitled *Combats d'Orient. Dardanelles-Salonique (1915–1916)*, Captain Canudo points out that in the early months of the conflict, this was still the case and that it was well received, recalling: “General Gouraud<sup>6</sup> told his troops not to place the “Turks” in the sphere of racial resentment and pitiless hatred that was to be reserved for the Germans.”<sup>7</sup>

Canudo goes one step further in suggesting that the attitude of the Turkish soldiers in the first hostilities helped to change the French perception for the better.

4 Author's note: Alan M. Moorhead (1910–1983) was a correspondent during the Second World War and not the First.

5 Alan Moorehead, *Gallipoli*, Wordsworth Editions, London, 1997, p. 148 (first published in 1956).

6 As Gouraud had been seriously wounded and repatriated to France in June 1915, this speech was made between the landing at the end of April and late June 1915.

7 Captain Canudo, *Combats d'Orient. Dardanelles-Salonique (1915–1916)*, Hachette, Paris, 1917, p. 51. Riccio Canudo (1877–1923) was an Italian writer who had settled in Paris in 1902 and enlisted in the Foreign Legion at the start of the Great War.

“Besides, there is a degree of nobility in the Turks’ way of making war. ... It combines serenity and bravery.”<sup>8</sup>

With regard to the ANZACs, the British historian Robert Rhodes James observes that the initial, very caricatural perception was not immediately toned down, but rather reinforced. Physical mutilations caused by the violence of the hostilities, coupled with the unprecedented, terrifying impact of the weapons used, went a long way towards reinforcing the stereotyped brutality of the “Turks”.<sup>9</sup>

Moorehead considers that the shock over the brutality and inhumanity of the “Turks” ceased in May 1915, when the first huge scale attacks and counter-attacks took place but were unsuccessful, even giving way to incidents of fraternization across enemy lines, which were reminiscent of those that had taken place on the Western front in the winter of 1915 and put the military command in an awkward position:

Much the most important result of the battle and the truce, however, was that from this time onwards all real rancour against the Turks died out in the ANZAC ranks. They now knew the enemy from their own experience, and the Turk had ceased to be a propaganda figure. He was no longer a coward, a fanatic or a monster. He was a normal man.<sup>10</sup>

The Ottoman subject Münim Mustafa<sup>11</sup> also refers in his memoirs to the quickly dashed hopes engendered by gestures of friendship:

When the English bombardiers planned to throw bombs into our trenches, they sometimes threw tins of jam and sardines to surprise our guards, who retaliated by throwing packets of cigarettes. How wonderful it was if it carried on like that! But when bombs were later exchanged instead of gifts of things to eat and smoke, the din put an end to the good humour.<sup>12</sup>

The feeling of camaraderie among combatants that is emphasized in a number of sources carries little weight in the face of the reciprocal denunciations of violations of international law, which come as much from combatants’ recollections as from the military institutions.

## **The use of dum-dum bullets: Between misperceptions and propaganda arguments**

Expanding bullets (dum-dum bullets), which were invented by the British and used in the Indian Empire as well as more generally in the colonies, were included in the categories of explosive missiles prohibited by the Hague

8 Canudo, above note 7, pp. 46–47.

9 Robert Rhodes James, *Gallipoli*, Pimlico, London, 1999, pp. 176–177. (First published in 1965.)

10 A. Moorehead, above note 5, pp. 158–159.

11 Münim Mustafa was studying law when war broke out. He was enlisted as a reserve officer. His memoirs were published for the first time in 1935, when they were serialized in the Turkish magazine *Hayat*.

12 Münim Mustafa, *Cepheden Cepheye*, Vol. I, Ege Basım Evi, Istanbul, 1940, p. 65.



Convention of 1899.<sup>13</sup> The warring parties accused each other of nonetheless having made use of them since the start of the war. In the Dardanelles,<sup>14</sup> those accusations were made right at the beginning of May 1915 by the Intelligence Office (*İstihbarat dairesi*) in the Ottoman command, an entity which was in charge of both intelligence and propaganda: photographs of bullets taken from the body of a wounded Ottoman national who had been admitted to hospital in Thrace were sent to the Ministry of Foreign Affairs. Then, in early June, medical reports of soldiers treated in a hospice in Istanbul were made public through the *Waqfs* department and the Sheikh ul-Islam. On 14 August 1915 the aforementioned Intelligence Office denounced the now intensive use of those bullets.<sup>15</sup> Subsequently, in September 1915, the War Minister Generalissimo Enver Pasha appealed at least twice to the Ottoman Ministry of Foreign Affairs for dum-dum bullets and then, as proof of the allegations, photographs of dum-dum bullets to be sent to the embassies of neutral countries, and particularly to the United States embassy.<sup>16</sup>

Those chronological markers clearly show how, like the other powers, the Ottoman command took diplomatic advantage of the issue of using bullets prohibited by the 1899 Convention and capitalized on the international public opinion that presumably “civilized” armies did not refrain from using uncivilized methods of warfare.

What about the soldiers themselves? Several British or ANZAC sources suggested that, rather, it was “Turkish” snipers who were equipped with explosive bullets.<sup>17</sup> Münim Mustafa, a “Turkish” veteran of the battle, refers in his memoirs to another means of recognizing the bullets: the noise. Trusting the more experienced fighters, new arrivals concluded that bullets which made a noise similar to firecrackers were dum-dum bullets,<sup>18</sup> that description is also found in accounts by Australian soldiers.<sup>19</sup>

13 To be more precise, by the Declaration (IV, 3) Concerning Expanding Bullets, 29 July 1899 (entered into force 4 September 1900).

14 For the Ottoman archives on which the examples given in this paragraph are based, see Muzaffer Albayrak (ed.), *Osmanlı Belgelerinde Çanakkale Muharebeleri*, Başbakanlık Devlet Arşivleri Genel Müdürlüğü, Ankara, Vol. I, p. 98 and pp. 136–141 and Vol. II, p. 11, pp. 218–221 and p. 225.

15 A war diary of the first battalion of the Herefordshire Regiment, for example, has the following entry for 16 November 1915: “Sniper using ‘exploding’ bullets. These explode on impact, 1 man having his head shattered.” See Ray Westlake, *British Regiments at Gallipoli*, Pen & Sword Books, Barnsley, 1996, p. 245. Cecil Harold Duncan, New Zealand lance corporal in the Otago Battalion, wrote in a letter: “one [sniper] was shot with his own bullets”. See Glyn Harper and Major General Rhys Jones, *Letters from Gallipoli: New Zealand Soldiers Write Home*, Auckland University Press, Auckland, 2011, pp. 129–130.

16 Evidence has been found that the Ottoman Ministry of Foreign Affairs approached the Netherlands Ministry of Foreign Affairs, representing a neutral country, on such matters in December 1915.

17 See R. Westlake above note 15; G. Harper and R. Jones, above note 15.

18 M. Mustafa, above note 12, p. 49.

19 Lieutenant William Britt noted: “They [the Turks] were using dum-dums and explosive bullets, which crack over your head like a cracker.” See “Lt Britt Describes the First Day on Gallipoli”, *Australians at War*, available at: [http://www.australiansatwar.gov.au/stories/stories\\_ID=100\\_war=W1\\_next=yes.html](http://www.australiansatwar.gov.au/stories/stories_ID=100_war=W1_next=yes.html). On the role of aural recognition, see also the account by the Australian lieutenant H. D. Skinner (D.C. M.): “There was bang under my very heels – an explosive bullet, I suppose.” “Extracts from the letters of Lieut. H.D. Skinner, D.C.M.”, *Victoria University College Review*, 1917, available at: [http://nzetc.victoria.ac.nz/tm/scholarly/tei-VUW1917\\_31Spik-t1-body-d10.html](http://nzetc.victoria.ac.nz/tm/scholarly/tei-VUW1917_31Spik-t1-body-d10.html).

In *Témoins: essai d'analyse et de critique des souvenirs de combattants édités en français de 1915 à 1928* (1929), the historian Jean Norton Cru emphasized the need to treat with caution reports by combatants on the Western front (France) of the enemy's use of dum-dum bullets or explosives, as the shockwave created by the impact of the bullets had misled the soldiers. The very impressive damage caused by the weapons used during the war also helped to bolster the idea of their use – most of all in the Dardanelles, where the enemy trenches or lines were extremely close.

This brief examination of the accusations and counter-accusations of the use of expanding bullets highlights several aspects: the symmetrical instrumentalization of the issue by the warring parties, based on perfect knowledge of international law and the testimony of neutral actors; the symmetrical nature of the accusations, as well as of the perceptions on which they were based; and lastly, the difficulty of finding support for those perceptions. This shows how necessary it is to put the accusations back in the timeline of the conflict and to locate them with the greatest possible accuracy in the course taken by the battle.

## Non-recourse to asphyxiating gases: mutual dissuasion?

The Hague Declaration prohibited the use of lethal chemical substances for military purposes.<sup>20</sup> During the Great War, each side accused the other of violating the prohibitions envisaged in this instrument. While on the Western front the French had made limited use of asphyxiating grenades and cartridges in February 1915, recourse to gas warfare by the Germans at Ypres on 22 April 1915 unleashed veritable panic among the French troops.<sup>21</sup> The British then used asphyxiating gases at Loos on 28 September 1915, followed shortly afterwards by the French.<sup>22</sup> When the Ottoman embassy in Athens sent a coded telegram to warn its ministry that the Allies were about to use asphyxiating gases in the Dardanelles,<sup>23</sup> those gases had therefore not yet been used by the Franco-British on the Western front. During the winter of 1914–1915, i.e. before the Gallipoli landing in late April 1915, their use was nevertheless considered; but Churchill and Kitchener objected for fear of possible reprisals.<sup>24</sup> Only three days after that landing, asphyxiating gases were used for the first time by the Germans on the Western front.<sup>25</sup> The British were extremely worried: what if the Germans were sending

20 See the Declaration (IV, 2) Concerning Asphyxiating Gases, 29 July 1899, (entered into force 4 September 1900), Preamble. "The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases".

21 Charles Ridet, "Gaz de combats", in Jean-Yves Le Naour (ed.), *Dictionnaire de la Grande Guerre*, Larousse, Paris, 2014, pp. 242–245.

22 *Ibid.*

23 For the correspondence sent from Athens, see Ahmet Tetik and Mehmet Şükrü Güzel, *Osmanlılara Karşı İşlenen Savaş Suçları (1911–1921)*, Türkiye İş Bankası Kültür Yayınları, İstanbul, 2013, pp. 144–145.

24 Yigal Sheffy, "The Chemical Dimension of the Gallipoli Campaign: Introducing Chemical Warfare to the Middle East", *War in History*, Vol. 12, No. 3, 2005, p. 284.

25 *Ibid.*, p. 281.

asphyxiating gases to the Ottomans? A warning about the imminent arrival and hence about the possible use of asphyxiating gases was sent by the British general, Maxwell from Egypt in early May 1915.<sup>26</sup> Defensive equipment – very rudimentary gas masks – was then sent to the British troops that had landed on the Gallipoli Peninsula.<sup>27</sup> However, offensive gas bombs were not sent to them. Winston Churchill, the Lord of the Admiralty, was in favour of doing so; but General Hamilton and Admiral Robeck, head of the British Expeditionary Corps and head of the British naval forces, respectively, were opposed, as were most of the members of the War Council, and they maintained that position until the end of May 1915. The dispatch of offensive gases (in the form of grenades) was nonetheless requested in case reprisals needed to be carried out following the anticipated use of gases by the “Turco-German” forces.<sup>28</sup>

On 2 July 1915 the Ottoman high military command asked its Ministry of War to communicate its objection to the enemy’s use of gas to the embassies of the neutral countries, and in particular to the United States, at this time a neutral country, and threatened the Allies with reprisals.<sup>29</sup> Notably, *The Laws of War on Land* (1880), a manual drafted by a member of the ICRC, Gustave Moynier, provided that “if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.”<sup>30</sup> On 4 July 1915 the Ottoman Intelligence Office reported the use of shrapnel that emitted a green-coloured gas,<sup>31</sup> which was generally considered as indicating the use of chlorine (also known as bertholite), an asphyxiating gas. The British Ministry of War chose the press of a neutral country, the Netherlands,<sup>32</sup> as the place to deny the Ottoman accusations conveyed by military communiqués that were published in the Ottoman press on 27 July 1915.<sup>33</sup> Those accusations were repeated by the Intelligence Office in September 1915.<sup>34</sup> However, asphyxiating gases were not sent to the British Expeditionary Corps. According to Yigal Sheffy, there were two reasons for that decision: the first has to do with the priority given to the Western front; the second relates to a mixture of a desire not to violate international law, ethical reasons and, quite simply, a desire to avoid being stigmatized by international public opinion.

The alleged use of asphyxiating gas by the “Turks” was denounced by the French Expeditionary Corps in the Dardanelles, which announced on 26 and 27

26 *Ibid.*

27 *Ibid.*, p. 283.

28 *Ibid.*, pp. 282–283.

29 For the letter of 2 July 1915, see M. Albayrak, Vol. II, above note 14, p. 225.

30 Quoted in François Cochet, “Haye (La), droit et conventions de”, in François Cochet and Rémy Porte (eds), *Dictionnaire de la grande guerre, 1914–1918*, Robert Laffont, Paris, p. 532.

31 M. Albayrak, Vol. I, above note 14, p. 147.

32 The newspaper *Nieuwe Rotterdamsche Courant*, according to M. Albayrak, Vol. I, above note 14, p. 192.

33 Official statement from military headquarters, published in *İkdam*, 27 July 1915, No. 6624, in Murat Çulcu, *İkdam Gazetesi’nde Çanakkale Cephesi*, 3 November 1914–3 February 1916, Vol. 2, Denizler Kitabevi, Istanbul, 2004, p. 517.

34 M. Albayrak, Vol. II, above note 14, pp. 30 and 85.

November 2015: “To our left, the Turks used asphyxiating gas for the first time.”<sup>35</sup> With regard to non-use by the Ottomans and two motives – apart from ethical reasons and respect for the rules of war – posited by Turkish historians on the basis of the Ottoman archives, two arguments were put forward by Anglo-Saxon historians in the late 1980s. For William Moore, if toxic gases had been dispatched to the Ottomans, they would have been used on the peninsula.<sup>36</sup> For Fritz Haber, the non-use of such gases by the parties to the conflict is explained by the poor atmospheric conditions and the Allied evacuation,<sup>37</sup> which seems plausible. Great Britain did use asphyxiating gases offensively on the Balkan and Palestinian fronts on dates subsequent to the Battle of the Dardanelles.<sup>38</sup>

As in the case of dum-dum bullets, the case of toxic gases highlights the need to place the allegations of their use in a chronological framework that is as accurate as possible and to make comparisons with other fronts; reciprocity is then also seen to be at work, but this time supplemented by a new element, the role of expectations about the enemy’s possible or probable use of the weapon whose deployment had previously been rejected because of the various costs that its use would entail.

## Attacks on non-military objects and sites: An indisputable fact

In sources that refer to the Battle of the Dardanelles, the Franco-British and ANZAC forces reported enemy artillery fire which damaged field hospitals that had been set up on the peninsula. The notoriety of the German artillerymen in the Ottoman battery system explains why it was more systematically attributed to the Germans than to the Ottomans. That was in keeping with the widespread belief within the Expeditionary Corps that the real enemy – and the savagery – was German<sup>39</sup>; the brutality of the Ottomans was thought to follow the German example rather than being styled as supposed eastern savagery.

Strikes against medical facilities are also mentioned in the Ottoman archives or in the memoirs published by Germans and Turks. The incidents of aerial bombardment testify to the allied air force’s command of the skies. The bombing from British battleships or submarines shows that although the Ottoman naval victory on 18 March 1915 prevented the Allies from crossing the Dardanelles Straits, it did not annihilate the ability of the Expeditionary Corps’ naval fleet to inflict harm. Recent Turkish historiography on the violations of the

35 “Communiqués relatifs aux opérations militaires” published in the *Journal Officiel*, 29 November 1915, p. 8687, referred to in the *Journal de droit international*, Vol. 43, 1916, p. 267.

36 *Ibid.*, p. 280, n. 5. Sheffy refers to William Moore, *Gas Attack: Chemical Warfare 1915–18 and Afterwards*, Leo Cooper, London, 1987, p. 88.

37 W. Moore, above note 36, p. 280, which is based on Fritz Haber, *Poisonous Cloud. Chemical Warfare in the First World War*, Clarendon Press, Oxford, 1986, p. 18.

38 Y. Sheffy, above note 24, p. 279.

39 See above note 9.

rules of war draws, in particular, on documents from the Ottoman archives to support the thesis that the allied armed forces systematically, and hence intentionally, bombed infirmaries and hospitals although they were appropriately marked.

In some cases, it was difficult to distinguish medical facilities, particularly when they were housed in *tekke*, Sufi brotherhood convents. That was the case of the hospital in the town of Lapseki, which was bombed in early June 1915, but especially of the hospital in the port of Akbas on the peninsula between Gallipoli and Eceabat (called Maydos at the time), opposite the Anatolian coast.<sup>40</sup>

Notably, some of these facilities were used for multiple purposes or might have been placed in the vicinity of legitimate military objectives, and thus the attack on them might not have been unlawful *per se*. For example, an important arms store, medical centre and a hospital complex, the port of Akbas was the target of several bombings during the Dardanelles campaign.<sup>41</sup> Akbas was used to transport troops and materials as well as to transfer wounded soldiers away from the front. On 25 April 1915, the very day of the allied landing on the peninsula, the E-11, a British submarine which had its sights trained on logistics transfers, sank the steamship *Halep* with dozens of wounded on board, drowning them all along with the crew.

There is only one proven instance of a religious building being struck by an attack: the mausoleum (*türbe*) of Şehzade Suleyman Pasha,<sup>42</sup> which was some way from the combat zones, overlooking the Gulf of Saros. The mausoleum was damaged on 29 March 1915 by bombing from the *Agamemnon*, a British battleship. On 20 April 1915 the deputy of the German General Liman von Sanders, the commander of the Ottoman army, Friedrich (Fritz) Bronsart von Schellendorf, sent a strongly worded telegram of protest to the Foreign Office through the Ottoman Ministry of Foreign Affairs, pointing out that in 1912 during the Balkan wars, the Serbs had protected the mausoleum of Sultan Murad I despite the fact that their ancestors had been defeated by the Ottomans in 1389 in the Battle of Kosovo Polje.<sup>43</sup>

Aerial and naval bombings also targeted towns and villages, causing material damage and affecting civilians, particularly at the start of the expedition in April–May 1915. The highest number of allied attacks on non-military objects and sites relate, however, to medical facilities. Those strikes were denounced with the utmost vigour by the Ottoman authorities and by the Red Crescent. Although the Allies expressed their regret, for example in the case of the bombing of a hospital in Akbas in May 1915, promised to respect the Geneva Convention of 1906,<sup>44</sup> and

40 For the following paragraph, see *Harp Tarihi Gezileri II (Çanakkale – Gelibolu)*, Genelkurmay Askeri Tarih ve Stratejik Etüt Başkanlığı Yayınları, Genelkurmay Basımevi, Ankara, 2010, pp. 90–92.

41 Alongside other older military cemeteries, the martyrium (*şehitlik*) on the hilltops, was built in 1945 and restored between 1999 and 2013; it contains, in particular, the symbolic burial places of wounded people who were killed in those bombings and torpedoings.

42 Suleyman Pasha (1316–1359) was the son of Sultan Orhan. He is remembered for the major role that he played in the Ottoman conquests of the Balkans.

43 For a facsimile of the telegram, see M. Albayrak, Vol. I, above note 14, pp. 70–71.

44 See the correspondence forwarded at the end of October 1915 via the United States embassy in Constantinople and referring to the July 1915 bombing of the hospital at Halil Pasha farm.

even admitted that they had hit civilian objects,<sup>45</sup> they often presented a series of extenuating circumstances. The arguments focused on the accidental nature of the strikes but also criticized the Ottomans for placing their hospitals too close to frontlines or to military buildings, and even suggested that the hospitals might contain military stores. They also pointed out that medical services were not always clearly marked as such and that their aircraft flew too high to be able to pick out mobile hospitals.

The identification of medical services was an issue that was at the core of the arguments put forward by the Ottomans, who insisted that the Red Crescent emblem was clearly visible on the ground and on the flags flown from masts and protested, as did the Allies, against the misuse of medical services for military purposes. Great Britain was accused of having used a Red Cross vehicle in late June/early July 1915 to reconnoitre the tip of the peninsula between Sedd el Bahr and Tekke Burnu,<sup>46</sup> and of having concealed a warship behind a hospital ship. Those accusations were taken up by their German ally, whose government published a memorandum on 29 January 1917 on the abuse of hospital ships by Great Britain in violation of the Geneva and the Hague Conventions. The *Bulletin International des sociétés de la Croix-Rouge*, which later became the *International Review of the Red Cross*, then reported on that memorandum, stating that Germany was accusing its enemy of using hospital ships for military purposes and primarily to transport troops. In sum, non-military objects were struck by both belligerents, which admitted their deeds, but provided justifications and/or extenuating circumstances.<sup>47</sup>

## The treatment of prisoners of war: A recently revived post-war controversy

The Ottoman Empire's international legal obligations with regard to the treatment of prisoners were primarily defined by the Hague Convention of 1899,<sup>48</sup> which the *Sublime Porte* ratified on 12 June 1907,<sup>49</sup> and the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 6 July 1906.<sup>50</sup> Nonetheless, numerous violations of respective rules on the treatment of prisoners of war have been documented. These instruments themselves did not

45 These kinds of statements were made in the cases of the bombardment of Lapseki (through the British Red Cross), Gallipoli (through the Ministry of Foreign Affairs for France) or Maydos (through the military authorities).

46 The ambulance was said to have stopped for some 15 minutes at each strategic position.

47 See *Bulletin International des sociétés de la Croix-Rouge*, Vol. 48, No. 190, 1917, pp. 186–188.

48 Other belligerent powers were parties to other international conventions.

49 *Düstur*, (1. Tertip), Vol. VII, 1941, pp. 307–301. It is interesting to note that the text was published in this collection of Turkish laws in the Republican era (and right in the middle of the Second World War), which confirms once again the legal continuity between the Ottoman Empire and Turkey. See Emre Öktem, "Turkey: Successor or Continuing State of the Ottoman Empire?" *Leiden Journal of International Law*, Vol. 24, 2011, pp. 561–583.

50 Ratified on 24 August 1907. See ICRC, "Turkey- Historical documents", *Treaties, States Parties and Commentaries*, available at: [https://www.icrc.org/applic/ihl/dih.nsf/vwTreatiesHistoricalByCountrySelected.xsp?xp\\_countrySelected=TR](https://www.icrc.org/applic/ihl/dih.nsf/vwTreatiesHistoricalByCountrySelected.xsp?xp_countrySelected=TR).

envisage the system of repressions in case of non-compliance. According to a report presented to the British Attorney General in January 1919:

... The Hague Conventions nowhere prescribe punishment for breaches of the laws of war. But the well-known usages as to punishment are not abrogated; and they are implied in the Regulations annexed to Convention II of 1899 and Convention IV of 1907. As late as 1880, the Institute of International Law accepted the principle that a belligerent is entitled to punish by such laws as he prescribes violations of the laws of war.<sup>51</sup>

With regard to the questioning of prisoners, Article 9 of the Regulations concerning the Laws and Customs of War on Land appended to the Convention (IV) of 18 October 1907 is of particular relevance stating that: “Every prisoner of war is bound to give, if questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.”<sup>52</sup> There have also been reported cases of compliance with the Hague Convention. For instance, Luscombe, an Australian who was taken captive in August 1915, was interrogated by General Liman von Sanders himself “in accordance with the Hague Convention”.<sup>53</sup>

The treatment of prisoners of war during WWI, and particularly during the Battle of the Dardanelles, is a matter that has been taken up regularly in Turkey since the early 2000s.<sup>54</sup> However, to say that is being “debated” today it is not entirely accurate because the Turkish studies, which are based on various archives but also at times on prisoners’ accounts, all follow the same line of thought and emphasize two symmetrical dimensions. Firstly, they begin by defending the idea that foreign prisoners in Anatolian territory were well treated,<sup>55</sup> like “guests of the Sultan”, as Yücel Yanıkdağ<sup>56</sup> puts it, using an expression initially employed in the training manual for Ottoman soldiers. As for the sources that represent recollections by prisoners in Ottoman hands, who were very negative about the treatment they received, the historian Yücel Yanıkdağ reports that they are today reviewed critically in some studies by European historians.<sup>57</sup> Secondly, some

51 *Interim Reports from the Committee of Inquiry into Breaches of the Laws of War*, report presented to the Attorney General on 13 January 1919, Art. 24; quoted in Doğan Şahin, *Türklerle Esir Olmak – Osmanlı’dan Cumhuriyet’e Savaş Yıllarında Yabancı Esirler*, Ozan Yayıncılık, İstanbul, 2015, p. 89.

52 Similar provision is made in Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 17(1) and (2).

53 L.H. Luscombe, *The Story of Herold Earl – Australian*, W.R. Smith & Paterson, Brisbane, 1970, quoted in D. Şahin, above note 51, p. 121.

54 See the foundational work by Cemalettin Taşkıran, *Ana Ben Ölmedim – I. Dünya Savaşında Türk Esirleri*, Türkiye İş Bankası Kültür Yayınları, İstanbul, 2001.

55 See, in particular, the most recent study by Doğan Şahin, above note 51.

56 Yücel Yanıkdağ, “Prisoners of War (Ottoman Empire/Middle East)”, 1914–1918 Online. *International Encyclopedia of the First World War*, Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer and Bill Nasson, (eds), Freie Universität Berlin, Berlin 2014-10-08, available at: <http://dx.doi.org/10.15463/ie1418.10269>.

57 Y. Yanıkdağ, above note 56.



emphasize that, conversely, “Turkish” prisoners were not well treated by the Allies, particularly in Sidi Bashir camp near Alexandria, in Egypt.<sup>58</sup>

First of all, it may be noted that the death rate among prisoners on the Ottoman fronts was higher than among prisoners of war (POWs) on the Western one. It should also be pointed out that it is difficult to draw up an exhaustive map of the camps and to systematically count the prisoners, and that it is not easy to single out the prisoners from the Gallipoli Peninsula because they were often held with prisoners from other areas.

The camps for Ottoman prisoners in Egypt, or even in eastern Asia (e.g. India and Burma), which included combatants from the Dardanelles, were also considered worse;<sup>59</sup> the natural conditions, especially the climate, and, where relevant, the distance from the Ottoman Empire, played a role in some of those views.

The Afyon camp was chosen because of its location at the railway crossing; it was used as a distribution camp for other camps, including the camps in Kayseri, Ankara, Çankırı. In 1916 a second camp was set up there for British prisoners. Official British reports about the camp were issued in November 1918, at the start of the British occupation of Istanbul. They criticized the lack of visits and especially the management of the camps, which did not give prisoners any opportunity to voice complaints.<sup>60</sup> The *Report on the Treatment of British Prisoners of War in Turkey* released in the autumn of 1918 and produced by a government committee headed by Lord Justice Younger, describes the camp as follows:

Some of the prisoners from the Dardanelles were here early in 1916. ... The British were lodged in an old Armenian church with its outbuildings – cold and dirty quarters. ... And... suffered severely under a barbarous discipline... Fortunately, [camp commander Major Mazlum Bey’s] behaviour became notorious, and the Turkish Government, under pressure, removed him early in 1917... The dead were buried by their comrades in the Christian cemetery of the town. ... Yet all communication between officers and men was flatly forbidden ... English doctors had thus to wait inactive, knowing that the men were dying almost daily... All this was afterwards happily changed<sup>61</sup> since then and Afion became a good camp; the men there ... enjoy considerable freedom and have plenty of occupation and amusement...the embargo on communication with the officers has been removed, so that sickness can be properly treated... on Christmas Day, there being no firewood and twenty degrees of frost, the officers took their dinner in bed... They had books and

58 Ahmet Altunay, *Katran kazanında sterilize. Bir Türk subayının İngiliz esir kampında üç yıl*, Tarih Düşünce Kitapları, İstanbul, 2004; see also Cemil Yurseven, *Gözlerim Eyvah!*, Çukurovalı yay, Adana, 2009.

59 See C. Taşkıran, above note 54, pp. 58–115.

60 See *Report on the Treatment of British Prisoners of War in Turkey*, presented to Parliament by Command of His Majesty, November 1918, published by His Majesty’s Stationery Office, UK, 1918, pp. 2–3.

61 This change came about after Mazlum Bey was transferred.

games indoors, fixed hours of study, and a flourishing run of amateur theatricals.<sup>62</sup>

During the construction of a stretch of the Berlin–Baghdad railway 70 kilometres from Adana, a veritable German village was established in 1907 in the Bilemedik region, not far from Pozanti. It had a population of 35,000 and contained a modern hospital, a church, a mosque, a cinema and a brothel.<sup>63</sup> The *Report on the Treatment of British Prisoners of War in Turkey* paints a less idyllic picture of the war period:

Bilemedik was in a deep valley, under towering mountains, a bad place for malaria... On Sundays the men could go and picnic by the river, play cricket and bathe... (All camps) were under the same rule – that of the civilian chief engineer, usually a German or Austrian; there would be a few Turkish sentries, supposed to guard the prisoners, but no real military organisation. It is probable that there was very little active ill-treatment ...<sup>64</sup>

The ICRC fulfilled its duty by sending delegations to inspect the camps whose administration was a matter of controversy between the belligerents. The ICRC inspected the British camps in Egypt, India and Burma and the French camps in France to determine whether prisoners were treated in conformity with international law. It also visited the Ottoman camps in Anatolia. Despite the Ottoman government's unfavourable view of the Red Crescent intervention on behalf of POWs, the Red Crescent set up a "Prisoners' Commission". The ICRC started to ask for lists of prisoners, highlighting the ineffectiveness of government policy in that field. The Red Crescent provided lists of French and British prisoners in April 1915, which made it possible to start negotiations with a view to obtaining lists of Turkish prisoners.<sup>65</sup> Two ICRC delegates visited the camps in Turkey in October 1916 and January 1917 to determine whether the prisoners were being treated in conformity with international law. It was reported that prisoners were made to sign statements in which they undertook not to try to escape,<sup>66</sup> which seems to indicate that attempted escapes were a problem.<sup>67</sup>

When the sources on the treatment of prisoners related to the exposure of POWs to public curiosity are compared, a mixed picture appears. There are several references to the Ottomans exhibiting prisoners before the local people. In his memoirs, Lushington relates how he was paraded through the streets of Istanbul,

62 *Report on the Treatment of British Prisoners of War in Turkey*, above note 60, pp. 11–12, 15.

63 *Ibid.*, pp. 175–176. The remains of the German cemetery have been transferred but its location is marked by a monument that was inaugurated in 2005.

64 *Report on the Treatment of British Prisoners of War in Turkey*, above note 60, p. 13.

65 *Ibid.*, pp. 175–176.

66 A. Altınay, above note 56, p. 182.

67 Compare with the article 8 of the 1899 Hague Regulations stipulates that "Escaped prisoners who are retaken before succeeding in escaping from the enemy's actual sphere of action, or before being able to rejoin the armed force to which they belong, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight". Similar provisions were later adopted in the Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929 (not in force), Art. 50 and in GC III, Arts 91–92.

where the crowd looked at him with curiosity but without hostility.<sup>68</sup> The Australian national Daniel Creedon pointed out that the cart transporting prisoners made frequent stops to allow the people to gaze at the English, a real curiosity.<sup>69</sup> Lastly, Randall reported that Turkish women insulted the prisoners.<sup>70</sup>

The work carried out by Ottoman prisoners, a widespread practice in the French camps, was presented favourably in the ICRC report. However, it could also be considered forced labour or, for example in Belemelik and on Cyprus, where Ottoman prisoners were made to work in the port of Famagusta, loading ships carrying logistics material to the British army in Suez.<sup>71</sup> In Afyon, officers called for greater freedom to move around the market and the right to make purchases there.<sup>72</sup>

As per mutilations, the most infamous – and most controversial – incident was the alleged blinding of POWs by British or Armenian doctors in the Sidi Bashir camp in Egypt. A resolution of the Grand National Assembly of Turkey of 28 June 1921 (i.e. in the midst of the war of independence), signed by Mustafa Kemal and eleven ministers, called for legal action to be taken against the garrison commander, the officers and the doctors who allegedly deliberately blinded approximately fifteen thousand prisoners in the prison camps in Egypt.<sup>73</sup> In addition, in May 1919 Ali Nadir Pasha, the commander of an army corps in Izmir, reported to the high command that 303 of the soldiers in the fourth group repatriated from Egypt were blind. A circular sent by the high command to the army corps that same month confirmed this. The Ottoman press in both Istanbul and Anatolia made these allegations public. Notably, in post-war occupied Istanbul, British General Milne gave orders to stop the publication of the daily newspaper *Öğüt*, which was publishing regular information about the soldiers who had been blinded, and had it closed down. Mustafa Kemal then sent a telegram to the regional government in Konya inviting the townspeople to organize a meeting to protest the violation of freedom of the press. A demonstration by five thousand people took place on 23 January 1920.<sup>74</sup>

68 R. F. Lushington, *A Prisoner with the Turks, 1915–1918*, Simpkin, Marshall, Hamilton, Kent & Co. Ltd, London, 1923, in D. Şahin, above note 51, pp. 121–122.

69 D. Şahin, above note 51, pp. 139–140.

70 Randall Family Papers, State Library of Victoria, MSB 401, MS 11287, in D. Şahin, above note 51, pp. 122–123.

71 Cemalettin Taşkıran, *Ana Ben Ölmedim – I. Dünya Savaşında Türk Esirleri*, Türkiye İş Bankası Kültür Yayınları, İstanbul, 2001, pp. 149, 156 and 159.

72 Osman Akandere and Hasan Ali Polat, “Esirler Perspektifinden Çanakkale Muharebelerinin Dramatik Yüzü”, *Gelibolu, Efsane ve Anı*, İstanbul Medeniyet Üniversitesi, 2013, pp. 190–192.

73 That resolution was likely the outcome of a motion tabled by two members of parliament from Edirne, Faik Bey and Şeref Bey, on 28 May 1921 regarding the repatriation of Turkish prisoners to Malta, the last part of which asks for “the doctors, the officers and the British commander who, with malice aforethought and under the pretext of medical sterilization, methodically plunged 15,000 children of the homeland into a bath containing too much cresol be pronounced criminals”. Having taken the floor, Şeref Bey then explained to the Assembly that “Turkish” prisoners were first plunged in this bath up to their necks; British soldiers then forced them to immerse themselves fully by threatening them with bayonets; that was how 15,000 “Turks” allegedly lost their sight. A. Altınay, above note 56, p. 15.

74 C. Taşkıran, above note 72, pp. 143–144. Notably, Mustafa Kemal then sent a telegram to the regional government in Konya inviting the townspeople to organize a meeting to protest about violation of freedom of the press: a demonstration by five thousand people took place on 23 January 1920.

It was also alleged that Armenian doctors working in the prison camps in Egypt took advantage of eye diseases to carry out surgery with the intention of blinding “Turkish” patients.<sup>75</sup> The ICRC’s report on its visit to the camps in Egypt shows that 20% of the prisoners in the camp in Heliopolis had conjunctivitis, which had been caused by the long period that they had spent in the desert before they were taken captive; they were treated with zinc sulphate and protargol. In addition, four prisoners had long-standing trachoma.<sup>76</sup> There were also allegations of insults against “Turkish” officers at the Sidi Bashir camp. Ahmet Altınay cites reports that Armenian interpreters systematically asked new arrivals “How many Armenians have you killed?” during registration.<sup>77</sup>

According to the Turkish historian Taşkıran, hundreds of prisoners came home blind from Egypt.<sup>78</sup> It is impossible to prove the allegations of those prisoners being deliberately blinded by chemical treatment or surgical interventions. The official reports, as well as the recollections of repatriated prisoners, emphasize the fact that the British treated their prisoners well and gave them good medical care. According to Taşkıran, it nonetheless cannot be ruled out that some prisoners lost their sight because of medical errors nor that, in a spirit of revenge, Armenian doctors subjected some patients to treatment that the doctors may have deliberately deprived them of their sight.<sup>79</sup> This case displays a clear controversy, and there is no clear and convincing evidence to substantiate either side.

## Conclusion

An analyses of the practices used by the parties to the conflict during the battle of Dardanelles shows that violations of the rules of war was of concern to many political and military actors. Those actors came from the parties to the conflict but also from elsewhere, for example from embassies of neutral countries and, of course, the ICRC. Despite their limitations, the two reports that the ICRC published on its visits to prison camps are extremely valuable. This also shows that systematic use of the ICRC archives enable current knowledge to be supplemented.

The statements regarding the violations of the laws of war and the call for the parties to the conflict to comply therewith, made at the time by third parties or

75 It was alleged that two Armenian doctors carried out surgery in the Sidi Bashir camp under the auspices of physician Colonel E.G. Garner. C. Taşkıran, above note 72, pp. 143–144.

76 ICRC, Report on visits to camps in Egypt, p. 45. See also ICRC, *Turkish Prisoners in Egypt. A Report by the International Committee of the Red Cross*, London, 1917, pp. 9–10.

77 A. Altınay, above note 58, p. 15.

78 Yücel Yanıkdağ (2014). The historian Yücel Yanıkdağ draws attention to the fact that illnesses killed or disabled many prisoners in the British camps in Egypt: trachoma, an infectious and contagious eye disease, and pellagra, an illness caused by malnutrition, which is said to have affected 9300 Ottoman prisoners. He points out that pellagra develops primarily because of ill treatment or insufficient supply of B3 vitamins, resulting from differences in the European and non-European diet. Y. Yanıkdağ, above note 56.

79 ICRC, above note 78, p. 45. See also *Turkish Prisoners in Egypt. A Report by the International Committee of the Red Cross*, above note 78, pp. 145–147.

actors like the ICRC, ran the risk of being instrumentalized by the adversaries. In fact, alleged violations of the rules of war were manipulated by the States involved at the highest level.<sup>80</sup> That manipulation paradoxically is evidence to the fact that the law was taken into account, even if it was distorted. The propaganda that stemmed from that instrumentalization was aimed at neutral countries and international public opinion, which were called to bear witness. It is also an internal propaganda tool that operated through the press.

The list of violations of the law is ultimately very mixed. Understandably, that does not relate solely to the obvious differences between the four types of violation reviewed in this article. Many other variables need to be included. The study of prisoners' treatment shows that officers were given preferential treatment as they were not assigned to the same type of accommodation as ordinary soldiers. There was also disparate treatment of people from the Empires from different ethnic groups. However, there does not seem to have been discrimination based on religion.

Time and space were also key factors. A finely tuned chronology is needed to take account of the variations that occurred over time as well as the interaction with other fronts. As shown by the above discussion of the use of gas warfare, predicting enemy conduct was also an important factor. It is appropriate to delve as far as possible into the local level to gain a better understanding of the extent to which the natural environment and the proximity of the two armies may have played a role, as well as the extent of differences between camps.

The principle of reciprocity, which entails reprisals by the enemy and is referred to many times in this article, appears to be a key factor in the analysis and in the conduct of the belligerents.<sup>81</sup> Its position points to another – legal – reality with regards to international law. In that respect, the Ottoman Empire is considered to be an actor on a par with the others. Paradoxically, it was during the war that led to its final collapse and its dissolution that the Ottoman Empire, which was recognized in the Treaty of Paris of 1856 as a power permitted to

80 See for example the personal involvement of Enver Pasha through his correspondence appealing to the Ottoman Ministry of Foreign Affairs discussed above.

81 Needless to say that nowadays, the principle of reciprocity is extraneous to IHL and reprisals used to the detriment of persons protected by IHL are prohibited. The rejection of reciprocity in IHL progressively pervaded international human rights law. See René Provost, "Reciprocity in human rights and humanitarian law", *British Year Book of International Law*, 1994, pp. 383 ff; Maria Felicità Gennarelli, "Le riserve ai trattati sui diritti umani", *Rivista della cooperazione giuridica internazionale*, Vol. IV, No. 11, 2002, p. 40; Gérard Cohen-Jonathan, "Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux", in *Revue générale de droit international public*, Vol. 4, 1996, p. 916 ; Richard D. Kearney & Robert E. Dalton, "The Treaty on Treaties", *American Journal of International Law*, Vol. 64, No. 3, 1970, p. 540; Francesco Caportorti, "L'extinction et la suspension des traités", *Recueil des Cours de l'Académie de Droit International*, Vol. 134, No. 3, 1971, p. 554; Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), art. 50§1c; France, Norway, Denmark, Sweden and Netherlands v. Turkey, 6 December 1983 (admissibility), European Commission on Human Rights, Decisions and reports, 35, p. 196, §39.

“participate in the advantages of the public law and system of Europe”,<sup>82</sup> finally became a full participant in the interplay between the European powers, regardless of whether those powers were fighting against it or were its allies.

The aforementioned principle of reciprocity is a complex phenomenon that would be worth studying in its own right. Well absorbed by the actors on the battlefield, it often seems to have been a factor that has dissuaded States from infringing the law. However, reciprocity may also lead to a chain of violence stemming from reprisals, which is sometimes a threat that is held high. There is lastly a human element, which is not predictable and cannot be predicted by senior command officers. That explains erroneous perceptions during warfare (see the above discussion of dum-dum bullets), but can also attenuate conditions in which prisoners are held.

The final aspect to which we would like to refer here is that of history. The passage of time diminishes the power of personal accounts in different contexts, although it also causes long-forgotten issues to re-emerge not only as matters of remembrance but also – and importantly – as political factors when history is juxtaposed with new realities. The writer Jean Giraudoux, a veteran of the Dardanelles who became a fervent pacifist after the Great War, titled his 1935 play *La guerre de Troie n'aura pas lieu* (The Trojan War will not take place). In the tumult of the years preceding a new, seemingly imminent conflict, he used peacetime to express strong criticism of the political manipulations of the law. The study of violations of the rules of war relating to the battle of the Dardanelles shows that the rules were taken seriously, even if the law of war was instrumentalized by the belligerents. It also shows that the matter of alleged violations does not disappear once the war is over and that it continues to point to persistent or recurrent tensions.

82 See Emre Öktem, “Le traité de Paris de 1856 revisité à son 150ème anniversaire: quelques aspects juridiques internationaux”, *Le congrès de Paris (1856) un événement fondateur*, Gilbert Ameil, Isabelle Nathan and Georges Soutou (eds), Directorate of Archives, French Ministry of Foreign and European Affairs, 2009, pp. 151–170.

# Out of sight, out of reach: Moral issues in the globalization of the battlefield

Éric Germain\*

Éric Germain is a historian and specialist in the anthropology of religion. Since 2009 he has been reflecting on the ethics of newly emerging weapons technology.

## Abstract

*The Great War ushered in a new era of long-distance combat. For the first time, weapons with a very long range were massively deployed, in previously unheard-of places: under the sea and in the air. Stealth fighting also included espionage and propaganda, now orchestrated on a global scale. In reaction to the carnage in the trenches, a degree of moral rehabilitation came to be conferred on the weapons initially associated with a “cowards’ war”. This in turn encouraged experimentation with the new, unmanned technology that would lead to the first prototypes of guided munitions and drones.*

**Keywords:** Great War, First World War, Second World War, weapons technology, strategic bombing, U-boat, Zeppelin, drone, robot, cyber, guided munition, espionage, propaganda, censorship, jihad, special forces, post-traumatic stress disorder, international humanitarian law, ethics, stealth, disengaged combat, lethal autonomous weapons systems.

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\* The opinions expressed in this article are solely those of the author, writing in his private capacity. He wishes to dedicate his article to his great grandfather, Louis Gousseau, who served as a Major in the infantry during the First World War, and to his great grand-mother Laure and her sisters, Acélie and Louise, who served as volunteer nurses in a military hospital under the banner of the Red Cross. The article has been translated from French to English by Veronica Kelly. Unless otherwise noted, all translations are ours.



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*“War carried out by gas and bombing is no longer war, it is a kind of bloody surgery. Each side settles down behind a concrete wall and finds nothing better to do than to send forth, night after night, squadrons of planes to blow out the guts of the other side (...).”*

Antoine de Saint-Exupéry, *Terre des hommes*, 1939 (English translation by Lewis Galantieri: *Wind, Sand and Stars*, London, The Folio Society, 1990, p. 189).

*“I remember once, looking through an eyeglass, I spotted one of our observation aircraft falling onto enemy lines. Its fall seemed slow to me, because of the distance. Every war, seen from afar, is like an abstract game, not at all offensive to the eye. The courage, the resolution, the anguish and the suffering of two men – all that was wiped out instantly under a small heap of earth.”*

Émile-August Chartier (Alain), *Mars ou la guerre jugée*, 1936, p. 66.

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Conjuring up images very different from those of the trenches, the words “Zeppelin”, “Big Bertha”, “U-boat” and “spy mania” bring to mind a second memory of the First World War.<sup>1</sup> They are a reminder of the emergence of a new type of long-distance warfare, whose weapons – out of range of retaliation, and sometimes out of sight – were originally regarded as immoral.

In this new kind of warfare, the civilian population became a target for both bombing<sup>2</sup> and propaganda. Progress in technology opened up new areas for fighting, in the air and under the sea. The development of telegraphy and wireless telephony completely transformed the role played by spies, who could now inform an enemy submarine of the exact time a ship would be putting out to sea.<sup>3</sup> Telecommunications also meant that gunners could adjust their aim without being able to see their targets.

The Great War was globalized: its theatre of operations was just as much at the rear as at the front, it was fought in neutral countries as well as those officially at war, and it involved the civilian population as much as the fighting forces. The ethical and political questions raised at the time by the new “weapons, means or methods”<sup>4</sup> of long-distance warfare have remained remarkably relevant today.

1 “Zeppelin” was the generic name given to all German airships. Similarly, the name “Dicke Bertha”, or “Big Bertha”, was used not just for the 420-mm howitzer from the Krupp factories, but also (incorrectly) to describe all long-range cannons, including the *Pariser Kanonen* that bombarded Paris in 1918. “U-boat” was an abbreviation of *Unterseeboot*, which means submarine in German, and “spy mania” was the neologism coined during the Great War to describe the paranoia of those who thought they saw spies everywhere.

2 The aim sought was not so much military and local (tactical) as political and global (strategic): to undermine the morale of the civilian population at the rear, and push the government to negotiate.

3 G. Marin, “L’espionnage par T.S.F.”, *Lectures pour tous*, January 1923, pp. 516–518.

4 I am deliberately using the wording of Article 36 of the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), on new weapons, which binds the contracting nations to verify that “a new weapon, means or method of warfare” complies with international law.

Fig. 1 - B/W online, B/W in print

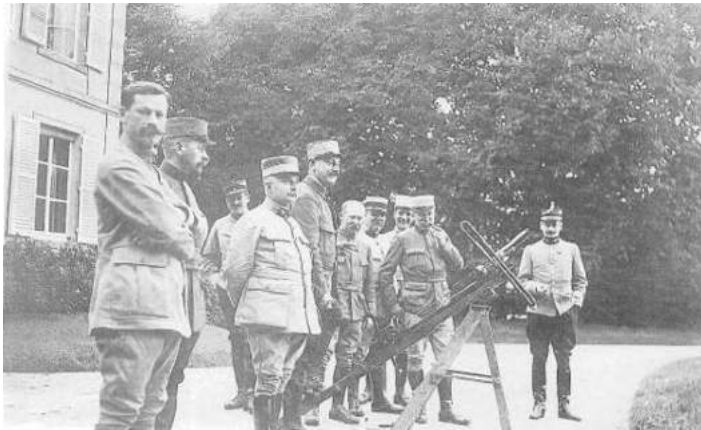


Figure 1. Crossbow “Letellier” – model “Grasshopper Type A”, June 1915, *Éric Germain’s private collection*.<sup>5</sup>

At a century’s remove, a new “global” war against terrorism<sup>6</sup> is now confirming the growing power of three long-range military capabilities: armed drones, special forces and cyberweapons. All three are evidence of a different kind of warfare, so disengaged that many non-governmental organizations (NGOs) have condemned the emotional as well as the physical remoteness of its operators.<sup>7</sup> A report published in October 2014 by the Rand Corporation talks about the *ethos* of a “quiet professional” which, it claims, a cyber-warrior might share with a fighter in the special forces.<sup>8</sup> In the past seven years, I have taken part in many international working groups and conferences on the ethics of roboticized weapons technology, and I am struck by the frequent references to the Great War. For example, I have heard the far-away pilot of an armed drone – having dinner with his family in a Las Vegas suburb after a day “waging war” 12,000 kilometres away – being compared to French fighter pilot Charles Guynemer who, in 1917, drank a glass of champagne at Maxim’s following an

5 The crossbow is the most famous historical example of the moral issues raised by a long-distance weapon since its use (against Christians) has been forbidden under penalty of anathema by Pope Innocent II at the Second Lateran council in 1139. It had been re-invented in winter 1914 to be used as a soundless grenade launcher to “treacherously” hit soldiers of the opposite trench. This photograph of a crossbow “Letellier” presented to the chief of staff of the French Fifth Army was taken by a young Major, Louis Gousseau, great grandfather of the author, *Éric Germain*.

6 In March 2003, President George W. Bush created a “Global War on Terrorism Expeditionary Medal”.

7 Among them the Fellowship of Reconciliation (FoR), an NGO founded in England in December 1914, which has condemned the “virtualization” of warfare using drones. FoR, *Convenient Killing: Armed Drones and the “PlayStation mentality”*, Oxford, September 2010, available at: <http://dronewarsuk.files.wordpress.com/2010/10/conv-killing-final.pdf> (all online references were accessed in September 2016). The operator of a drone or a “cyberweapon” is at an obvious physical distance, but the same is also true of a special forces soldier on certain missions (e.g. a sniper).

8 Christopher Paul, Isaac Porche and Elliot Axelband, *The Other Quiet Professionals: Lessons for Future Cyber Forces from the Evolution of Special Forces*, RAND Corporation, Santa Monica, CA, 3 October 2014, cf. “Lessons from the Analogy”, pp. 42–46, available at: [www.rand.org/t/rr780.html](http://www.rand.org/t/rr780.html).

afternoon's fighting high up over the trenches.<sup>9</sup> This comparison with the First World War shows that issues raised by combatants fighting not necessarily on a battlefield are not unheard-of. Is there really nothing new? Or to be more specific, did the conflict that took place between 1914 and 1918 open up a new age – one we are still living in today?

Taking a historian's view may help clarify what is at stake in the development of methods of combat – a development that began in 1914 not just with aerial and submarine warfare, but also with espionage, propaganda and, during the latter years of the conflict, with the invention of prototypes of radio-piloted and radio-guided weapons, known today as drones and missiles.

## The emergence of a new, multi-space battleground

The progress of weapons technology is often presented as a kind of continuum. From the invention of the first thrown weapon, so the theory goes, man constantly lengthened the distance between himself and his enemy, the better to ward off retaliation. From the slingshot to the crossbow (Figure 1), from the musket to the missile – so it is said – there was never really a revolution in weapons technology, just a series of more or less noticeable evolutions.

All the same, without wishing to question the existence of the so-called preservation instinct that is said to drive *Homo sapiens* (and therefore *prudens*) to extend the range of his new weapons,<sup>10</sup> the Great War may be regarded as opening up a radically different era. It was then, for the first time in history, that very long-range weapons were used on a massive scale. With artillery guided by radiotelegraphy, and weapons operated from previously unheard-of places (in the air and under the sea), targets were increasingly disappearing from the field of vision of the fighter who was deploying them.

Early in the morning of 23 March 1918, Parisians thought the bombs being dropped on them must be coming from a Zeppelin or a Gotha bomber flying at a very high altitude. Then they learnt that they were actually being targeted by cannons operating at the incredible distance of 121 kilometres away.<sup>11</sup> These *Pariser Kanonen* required ballistic calculations of such complexity that mathematicians were sent specially from Berlin to ready them for firing. For the first time in history,

9 Éric Germain, "L'ennemi... Toujours plus loin", 1914–2014: *Un siècle de guerre*, *Le Monde*, October–December 2013, p. 31. Charles Guynemer moved in high-society circles with the actress Yvonne Printemps. By the time of his death, on 11 September 1917, the French flying ace had achieved a total of fifty-three officially recognized victories.

10 The American biologist Paul Bingham goes a good deal further, presenting this ability to kill or injure other human beings from a distance as the main force driving the evolution of the human species towards "cooperative social adaptation" (to the extent that, as he puts it, the ability to kill remotely dramatically reduces "the individual cost of punishing non-cooperative behaviour by allowing these costs to be distributed among multiple cooperators"); P.M. Bingham, "Human Uniqueness: A General Theory", *Quarterly Review of Biology*, Vol. 74, No. 2, June 1999, pp. 133–169.

11 The fighter planes had been sent to fly over Paris in order to reconnoitre. "Le canon qui bombardait Paris" (The cannon that bombed Paris), *Les Canons de l'apocalypse*, 19 August 2001, available at: <http://html2.free.fr/cannons/canparis.htm>. The *Pariser Kanonen* were initially confused with Big Berthas.

projectiles manufactured by human beings were now crossing the stratosphere, where the low air density allowed the shells to travel these remarkable distances.<sup>12</sup>

### “Unfair” weapons of warfare on land, under the sea and in the sky

Even before the war broke out, the international community had tried to ban bombing from the air. People realized that, because they were so inaccurate, these bombs would mainly strike non-military targets, including the civilian population. The Austro-Hungarian balloons’ attempt to bomb Venice in the summer of 1849 had not been forgotten. Banning aerial bombing was one of the major aims set for the peace conference held in The Hague, in The Netherlands, from 18 May to 29 July 1899.<sup>13</sup>

### *In 1899, a preventive attempt to ban “blind” weapons*

In a letter to St Petersburg’s embassies on 24 August 1898<sup>14</sup> Tsar Nicholas II proposed “to convene a Conference (...) [aimed] above all [at] limiting the progressive development of existing armaments”.<sup>15</sup> The Tsar wished to ban the “throwing of projectiles or any explosives from balloons or by similar means” (at the time, heavier-than-air aircraft was still a futuristic technology).<sup>16</sup> This humanitarian goal was achieved in one of the texts of the 1899 Convention, but only for a period of five years. Declaration (IV, 1) “to prohibit (...) the launching of projectiles and explosives from balloons, and other new methods of similar nature” was adopted by most of the nations, with the notable exception of the United Kingdom.<sup>17</sup> The United States of America signed the document, but did not ratify it.<sup>18</sup>

12 They could reach a maximum altitude of some forty kilometres, and had a theoretical range of 130 kilometres. Alain Huyon, “La Grosse Bertha des Parisiens – Historique d’une arme de légende”, *Revue historique des armées*, No. 253, 2008, pp. 111–125, note 9, available at : <https://rha.revues.org/4682>.

13 Although placed on the agenda for the conference, the banning of submarines was quickly dismissed. Howard S. Levie, “Submarine Warfare: With Emphasis on the 1936 London Protocol”, in Michael N. Schmitt and Leslie C. Green (eds), *International Law Studies: Levie on the Law of War*, Vol. 70, 1998, pp. 294–295.

14 At first, some States suspected this was a Russian manoeuvre to offset the backwardness of their defence industry. They quickly became convinced of the sincerity of the Tsar, who was following in the Romanov tradition of military ethics (as exemplified by the 1804 initiative of Alexander I, who proposed to the British Prime Minister a system for the peaceful settlement of conflicts and a declaration designed to ban the use of certain projectiles in time of war (Saint Petersburg Declaration), 29 November–11 December 1868).

15 French Ministry of Foreign Affairs, *Documents Diplomatiques. Conférence Internationale de la Paix*, 1899, Imprimerie nationale, Paris, p. 4, available at : <http://gallica.bnf.fr/ark:/12148/bpt6k56137625/f13.image>. The final act of the conference was signed on 29 July 1899 by twenty-seven nations, most of whom were belligerents in the First World War.

16 *Ibid.*, p. 5. The first really motorized, manoeuvrable aerostat (“dirigible”, balloon or airship) was designed in 1884, but the first motorized aircraft (heavier than air) did not appear until the very beginning of the twentieth century.

17 List of States party to Declaration (IV, 1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, The Hague, 29 July 1899, available at : [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPAGES\\_NORMS&tatesParties&xp\\_treatySelected=160](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMS&tatesParties&xp_treatySelected=160).

18 List of States signatory to Declaration (IV, 1), The Hague, 29 July 1899, available at : [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPAGES\\_NORMStatesSign&xp\\_treatySelected=160](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesSign&xp_treatySelected=160).

At the Second Hague Conference in 1907, by contrast, Declaration XIV “prohibiting the discharge of projectiles and explosives from balloons” was ratified by the United Kingdom and the United States, but by neither France nor Germany<sup>19</sup> (Austria-Hungary did sign the text, but did not ratify it).<sup>20</sup> France and Germany thus found themselves bound by the sole – unanimously accepted – principle that the aerial bombing of undefended towns was not permitted.<sup>21</sup> The United Kingdom’s change in attitude may have been partly influenced by the popularity of machine-oriented science fiction prophesying the horrors to be expected from the weaponization of the sky.

In 1908, H.G. Wells published a serialized version of his novel *The War in the Air*.<sup>22</sup> In it, he depicts a world war waged by aerial vehicles (airships, aeroplanes and “ornithopters”) armed with new weapons of mass destruction that lead to the extinction of civilization. The book came out three years before Lieutenant Giulio Gavotti carried out the very first aeroplane bombing against Ottoman troops in Libya, thereby launching the era of aerial warfare. Italy justified this action by claiming it was lawful under the Hague Convention which, it said, banned only aerial bombing carried out from airships.<sup>23</sup>

Although this first Italian aerial bombardment was restricted to military targets, such restraint quickly disappeared at the start of the war. From London to Salonica, from Paris to Warsaw, the hearts of European cities were hit. All the same, none of the belligerents admitted to a deliberate desire to target the civilian population. When the conflict began, Kaiser Wilhelm II formally forbade the bombing of the centre of London, both in the name of humanist principles and out of a concern not to hurt his cousins in the British royal family.<sup>24</sup> Later, on 16 June 1915, at the urging of his chief of staff, he used the many civilian losses sustained in the French air force bombing of Karlsruhe as a pretext for authorizing the bombing of the City, with the exception of the royal residences and certain iconic monuments.

19 List of States Parties to Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, available at: <https://www.icrc.org/ihl/INTRO/245?OpenDocument>.

20 List of signatory States to Declaration (XIV), The Hague, 18 October 1907, available at: [https://www.icrc.org/applic/ihl/dih.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesSign&xp\\_treatySelected=245](https://www.icrc.org/applic/ihl/dih.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=245).

21 According to Article 25 of Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, the Hague, 29 July 1899, “The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited”. Hague Convention II, 29 July 1899, entered into force on 4 September 1900. Available at: <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=88354A9664EEA72FC12563CD00515E46>.

22 H.G. Wells, *The War in the Air*, George Bell and Sons, London, 1908. This subject also recurred in many other books at the time, including *Aerial Warfare* by R.P. Hearne, John Lane, London and New York, 1909.

23 R.G. Grant (ed.), *Flight: 100 Years of Aviation*, Dorling Kindersley Publishing, Inc., London, 2004, p. 59.

24 Stewart H. Ross, *Strategic Bombing by the United States in World War II: The Myths and the Facts*, McFarland & Company, Jefferson, NC, 2003, p. 20.

### *Civilian victims become less and less “collateral”*

From the first aerial bombings of the civilian population, in Paris in 1914 and then in London in 1915, to the very long-range artillery fire of the *Pariser Kanonen* at the end of March 1918, the humanist principles that had inspired the Hague Conventions of 1899 and 1907 were violated.

At the start of the war all the belligerents declared that they were aiming solely at military objectives, even though they must have known perfectly well that, more often than not, in urban engagements their shells and bombs missed their targets causing civilian losses. Soon, however, some voices in the army commands put forward the “strategic” argument that, by weakening the morale of a country’s population, these bombings would force a government to sue for peace.<sup>25</sup> They swung from ethics based on absolute values to so-called consequentialist ethics whereby, if the ultimate goal sought is a moral one (peace), then “bending” principles (i.e. violating the neutrality of a country or a flag, or targeting a civilian population) becomes acceptable.

The first strategic aerial bombardments were launched from rigid airships with a very long range manufactured by the firms of Zeppelin and Schütte-Lanz (Figure 2). These dirigibles – painted black to blend in with the darkness – were swiftly named “baby killers” by the British press. This furtive, “cowardly” technology aroused such abhorrence that it came to be condemned in the same terms as the submarine war waged by the U-boats. Indeed, an airship’s ability to rise swiftly to altitudes where it was out of reach of anti-air artillery and night fighters perfectly mirrored a submarine’s ability to avoid retaliation by diving into the abyss.<sup>26</sup>

Before the war, the British Admiralty had looked with some disdain on submarine vessels, which they saw as a “weapon for maritime Powers on the defensive”<sup>27</sup> – some senior officers going so far as to say that their use would be contrary to English values.<sup>28</sup> Although in 1901 the Royal Navy did decide to adopt them as a weapon,<sup>29</sup> it was nonetheless surprised and deeply disconcerted by the use the Germans made of them in their “all-out war”.<sup>30</sup> The demonization

25 *Ibid.*, p. 18, quoting the Rear Admiral Paul Behncke, deputy chief of the German Naval Staff.

26 For these altitudes, crews were equipped with respiratory masks attached to bottles of oxygen.

27 Statement by the First Lord on 6 April 1900 in the House of Commons, quoted by Paul Akermann, *Encyclopaedia of British Submarines 1901–1955*, 1989, p. 112.

28 In 1901 Admiral Arthur Wilson, Controller of the Royal Navy, declared that underwater warfare was “underhand, unfair and damned un-English”. He went so far as to threaten to hang any captured submariner like a pirate. “Royal Navy Submarine Service – History”, available at: <http://www.royal-navy.org/node/7>.

29 In 1914 the Royal Navy had fifteen submarines capable of missions on the high seas, while the German fleet had fourteen. “The First World War 1914–1918”, in “*Most Dangerous Service*”: *A Century of Royal Navy Submarines*, available at: <http://archive.iwm.org.uk/upload/package/12/submarines/ww1.htm> and Hans J. Koerver (ed.), *German Submarine Warfare 1914–1918 in the Eyes of British Intelligence: Selected Sources from the British National Archives*, Kew, 2012, LIS Reinisch, Steinbach, p. xvii.

30 In 1915, and especially from 1917 onwards, the *Reichsmarine* had decided to torpedo civilian ships without first searching them or checking the conditions for rescuing passengers and crew members. This violated existing customs underpinning maritime law.



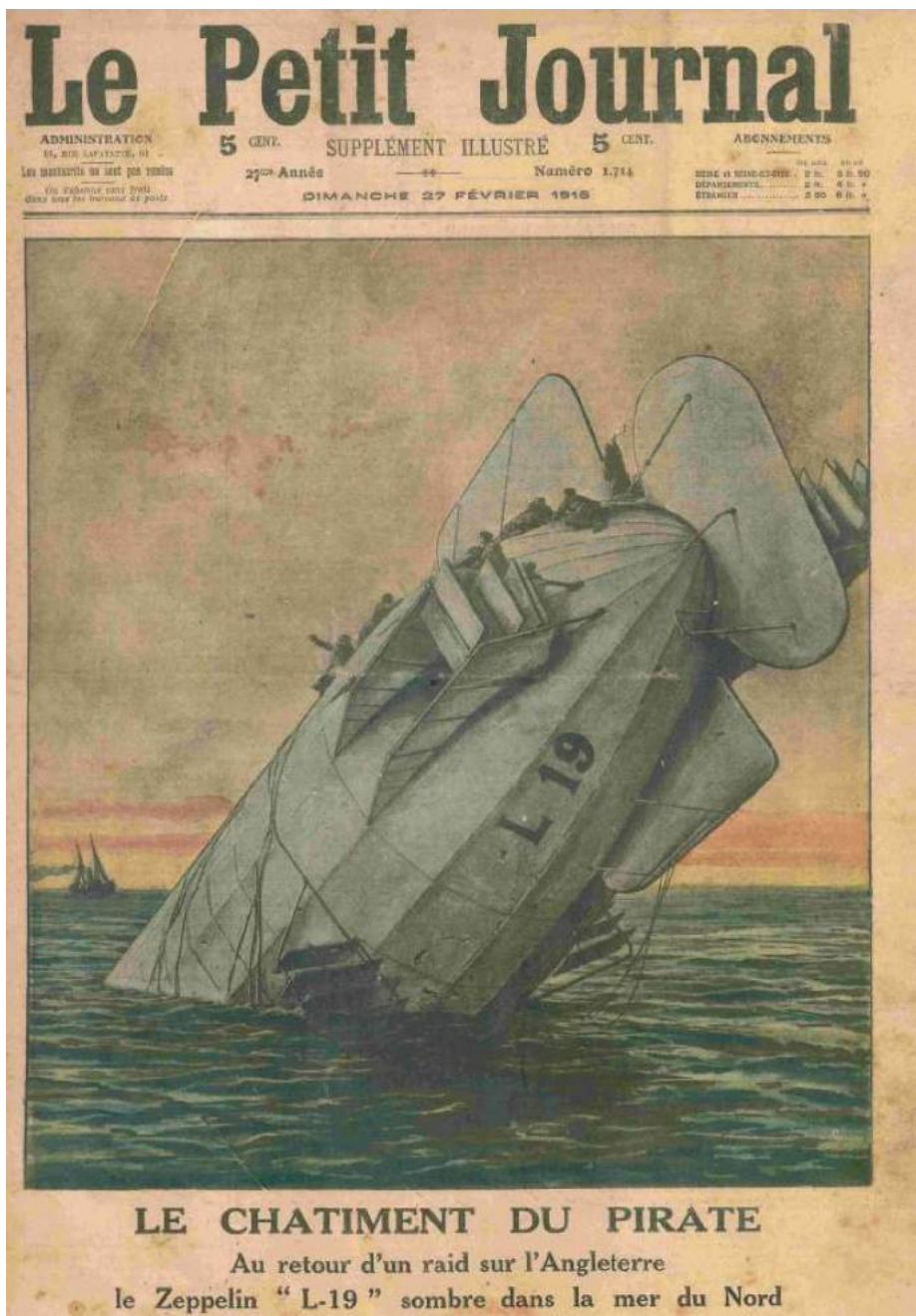


Fig. 2 - Colour online, Colour in print

Figure 2. “Punishing the Pirate – A Zeppelin L-19 sinking in the Channel while returning from a raid over England”, front cover of *Le Petit Journal*, Paris, 27 February 1916, *Éric Germain’s private collection*.



of these “ghost ships” also seems to have affected the military staff in their investigation into methods for combating an elusive threat. The British Admiralty even engaged the services of a medium to see if she could locate U-boats on a map of the Atlantic.<sup>31</sup> The emotional reaction to this new war technology gradually subsided, with the emergence of methods for dealing with attacks by using aircraft (anti-aircraft guns, telemetry and special munitions)<sup>32</sup> and submarines, along with the constant effort to innovate both tactics (convoys, camouflage paint, Q-ships and other “disguised” ships) and weapons (mines and anti-submarine grenades).

### *Targets beyond visual range*

In 1917, the French navy set up a submarine warfare laboratory in which physicists Paul Langevin and Constantin Chilowski carried out research on ultrasonic echoes, laying the foundations for modern underwater acoustics.<sup>33</sup> At the end of the summer of 1918, in Toulon harbour, they tested a sonar prototype designed for pursuing and attacking submerged submarines.

Research on acoustics also made it possible to locate enemy batteries made invisible by distance and camouflage. By 1915, scientists and self-taught inventors alike were coming up with different types of recorders that equipped sound-ranging sections to identify where firing was coming from, using triangulation.<sup>34</sup>

In offensive action, submarines were the first weapon to glimpse the possibility of vanishing completely from human view in order to detect and aim at their target. From 1917 onwards, U-boats were equipped with microphones, which enabled them to locate the ships to be torpedoed. On land, in the air or at sea, the operators of the new long-range weapons all shared an inability to distinguish clearly those they were firing at – sometimes even to see them at all.

The philosopher Alain wrote of his “war seen, so to speak, over the telephone”. Before joining the third heavy artillery regiment, all he knew about telephones was “the receiver and the microphone – that little box filled with grains of carbon – that you speak into”.<sup>35</sup> Now he had been placed at the head of “a thirty-two-line apparatus which was the intermediary between divisional

31 David A. H. Wilson, “Avian anti-submarine warfare proposals in Britain, 1915–18: The Admiralty and Thomas Mills”, *International Journal of Naval History*, Vol. 5, No. 1, April 2006, p. 8.

32 “Genèse de la DCA française”, in *Base documentaire Artillery-BAS'ART*, available at: [http://basart.artillery.asso.fr/article.php3?id\\_article=738](http://basart.artillery.asso.fr/article.php3?id_article=738).

33 Marc Saibène, “La lutte anti-sous-marine, 1939–1940”, *Marines, Guerre & Commerce*, No. 62, August–September 1999, pp. 35–39; Claude Gazanhes, “Du laboratoire de la guerre sous-marine de Toulon au laboratoire de mécanique et d’acoustique de Marseille”, *La revue pour l’histoire du CNRS*, February 2000, available at: <http://histoire-cnrs.revues.org/2772>.

34 There was the invention by the soldier Ferdinand Daussy (Hubert Saur and Henri Tribout de Morembert, “Ferdinand Daussy”, *Académie nationale de Metz*, 1968, available at: <http://documents.irevues.inist.fr/handle/2042/34140>), the devices invented by the physicists Alexandre Dufour, Pierre Weiss and Aimé Cotton, and the one developed by the engineer Ludovic Driencourt in collaboration with Gustave Ferrié. Pierre Lamandé, *Rapport Science-Industrie-États: L’impact de la Première Guerre mondiale*, Report, Nantes University, 2009, p. 15, available at: [http://foad.refer.org/IMG/pdf/AUF-cours\\_UEF2.pdf](http://foad.refer.org/IMG/pdf/AUF-cours_UEF2.pdf).

35 Émile-August Chartier (Alain), *Souvenirs de guerre (Memories of War)*, Paul Hartmann, Paris, 1937, republished in Georges Bénézé (ed.), *Les Passions et la sagesse*, Bibliothèque de la Pléiade, Paris, 1960, p. 476.

artillery and infantry”.<sup>36</sup> Alain described the telephone as a ten-kilometre-long sword with a foot-soldier’s corpse on its tip.<sup>37</sup>

A fighter in the trenches sometimes experienced reality in both of these ways, as a gunner and a foot soldier. The poet Guillaume Apollinaire, for example, was posted to a field artillery regiment before being transferred to the infantry. On the evening of his fourth day at the front line he described his experience of being a “bulwark of living flesh”, contrasting it with a gunner’s war, which he depicted as “an outing where the risks are not much greater than in mountaineering”.<sup>38</sup>

## Long-distance warfare rehabilitated in reaction to the horror of the trenches

The technological tools of distance warfare were developed in a conflict distinguished by extreme proximity between belligerents. Paradoxically, it was trench warfare that was to confer a degree of moral rehabilitation on distance.

### *The flying ace: a useful heroic figure from olden days*

The early days of fighter aircraft were studded with chivalrous acts that were harder to imagine in the brutality of hand-to-hand combat on the ground where, by comparison with the knives of the wretched “trench sweepers”, the much-reinvented (less lethal) club seemed like a “humanist” weapon. Significantly, while aviators kept their leather helmets throughout the conflict, in the trenches the képi, side cap and peaked cap had to be replaced by helmets.<sup>39</sup>

From the end of the sixteenth century, the foot soldier’s metal helmet had gradually fallen into disuse among European armies.<sup>40</sup> It resurfaced at the same time as hand-crafted shields and many other forms of protection that were an odd reminder of the armour of bygone days. The British helmet was directly inspired by the kettle hats worn by foot soldiers in the Hundred Years’ War.<sup>41</sup>

36 *Ibid.*, p. 495. Lieutenant-Colonel Gustave Ferrié had built a model of a mobile wireless telegraphy unit, over 12,000 of which were to equip the allied armies between 1914 and 1918. P. Lamandé, above note 34, p. 13.

37 Émile-August Chartier (Alain), *Mars ou la guerre jugée*, Éditions Gallimard, Paris, 2nd ed., 1936, p. 205. (English edition published under the title *Mars; Or the Truth about War*, New York, Jonathan Cape & Harrison Smith N.D., 1930).

38 Guillaume Apollinaire, *Lettres à Madeleine (Letters to Madeleine)*, Laurence Campa (ed.), Gallimard, Paris, 2005, letter of 2 December 1915, p. 363. In his *Souvenirs de guerre*, Alain confirms this feeling of inequality (above note 35, p. 447), although in another text he puts this “immunity” into perspective by recalling the heavy losses suffered by artillerymen in the Battle of the Marne. É. Chartier, above note 37, p. 117.

39 In the trenches, fewer wounds were inflicted by direct fire than by shrapnel. At the end of 1914 the French army distributed a metal skull cap, known as a *cervelière* (brain-cap), to reinforce the képi.

40 In September 1915 the “Adrian” steel helmet was distributed to the troops en masse. Its equivalents, the German *Stahlhelm* and British Brodie helmet, appeared the following year. Details of the Adrian helmet may be found on the World War Helmets website at: <http://www.world-war-helmets.com/fiche.php?q=Casque-Francais-Adrian-Mle-15>.

41 *Ibid.* This was particularly true of the facial protection that adapted the Adrian helmet and transformed it into a kind of barrel helm, and of the breastplates that gave protection from howitzers’ shrapnel (like the German *Sappenpanzer*, which could be worn either on a foot soldier’s chest or on his back).

The return to medieval forms of protection, however, was by no means accompanied by a resurgence of chivalry in ground fighting, which had become extraordinarily deadly.

In the air, a fighter pilot's talent and daring could offset the disadvantages of having a less powerful aircraft than his adversary. This relative degree of fair play gave licence for the elegant behaviour of some aviators, who dared to disobey orders, for example if they wanted to give the enemy news of their fallen pilots.<sup>42</sup> In October 1917, at a time when camouflage techniques were widespread, the decision by the pilot Manfred von Richthofen to have his new triplane painted bright red was not without a certain panache.<sup>43</sup> The Red Baron, as he was known henceforth, became the most famous of these "aces", who provided the German press with valuable heroes.

First the press, and then literature, highlighted a code of honour among fighter pilots which reassured public opinion. Their "air duels" showed that some of civilization's values were being upheld despite the horrors of a war in which, more often than not, the only law was necessity, and the heroic figure of the aviator played an increasingly important role in keeping up the morale of the civilian population. This explains why the German command decided to bring its last flying ace, Oswald Boelcke, back from the front until his Fokker monoplane – now obsolete – could be replaced by the brand-new Albatros D1.<sup>44</sup>

Even bombing, the form of aerial warfare most objected to, appeared to be better tolerated by the end of the conflict. In 1914, aerial bombing was considered legitimate only in actions against military infrastructure,<sup>45</sup> but as fight succeeded fight it gained in acceptability, even when targeting troops and no longer just equipment. At the end of 1916 the Germans created an "aerial infantry". Former soldiers and non-commissioned officers from the trenches were trained to pilot small biplanes flying at a very low altitude. In attacks known as "strafing", these "assault aviators" (*Sturmflieger*, or storm flyers) machine-gunned and bombarded the enemy to support their comrades advancing on the ground.<sup>46</sup> After feeling stuck in the stalemated war in the trenches, superiority in the air revived their hope of being able to carry out offensive actions with minimal loss of life among their own forces. Two months before the armistice was signed, confidence in a reversal of the balance of power enabled the Secretary of State of British aviation to write to General Hugh Trenchard: "I should be very glad if you could unleash

42 The Italian ace Francesco Baracca who, on 7 April 1916, flew down to shake hands with an Austrian pilot forced to land, exemplifies these elegant gestures, to be found in each camp. Georges Pagé, *L'aviation française 1914–1918*, Grancher, Paris, 2011, Ch. 33.

43 Although this decision was also a tactic whereby his squadron remained hidden, under cloud cover – the better to swoop on an adversary absorbed in the combat he had initiated.

44 This was done in mid-September 1916. John H. Morrow, "Les airs", in Jay Winter (ed.), *La Première Guerre mondiale – tome 1: Combats*, Fayard, Paris, 2013, p. 397.

45 Such as the dropping of bombs by a French plane on the Zeppelin hangars in the Metz-Frescaty base, on 14 August 1914. Jean Daçay, "Celui qui survola le premier les hangars de Frescati", *La Guerre Aérienne Illustrée* (Paris), Vol. 21, No. A1, 5 April 1917, pp. 330–331, available at: <http://gallica.bnf.fr/ark:/12148/bpt6k6246433d/f1.image>.

46 Georg P. Neumann (ed.), *In der Luft unbesiegt: Erlebnisse im Weltkrieg* (*Undefeated in the Air: Experiences of the World War*), Lehmanns, Munich, 1923; quoted by J.H. Morrow, above note 44, pp. 403–404.

a bloody great fire on one of the German cities (...). The German is sensitive to bloodletting.”<sup>47</sup> *Vae victis!*

### *Aerial bombing accepted as a means to destroy more inhumane weapons*

Did all moral objections to the bombing of civilians fade away in the four years of conflict? No. Even at the end of the war, many political leaders remained opposed to the idea of deliberately striking the civilian population. President Woodrow Wilson, for example, refused to allow the American air force to take part in a messy bombing of industrial and commercial sites, or of the people of enemy countries, which would not meet a demonstrated military need.<sup>48</sup>

All the same, the ethical principles underpinning the rules of engagement as stated and practised in 1918 were no longer as intangible as they had been at the start of the conflict. On 26 May 1915, for instance, it was solely in retaliation to the German army's use of asphyxiating gas that the French air force was authorized to bombard the chemical factory at Ludwigshafen am Rhein. At the time, taking the risk of killing the workers in an armaments factory was justified by the lack of alternative means of stopping the manufacture of an odious weapon. To exonerate the military command from this first large-scale bombing of German territory, newspapers stressed the use of asphyxiating gas during the Battle of Artois.<sup>49</sup> A caricature in the British press also drew a parallel between this raid and the bombing of a London suburb by a Zeppelin on the very same day (which killed two women and injured a child). The Kaiser was shown as a dunce in short trousers, under the wrathful glare of his teacher, in front of a blackboard on which was written: “An act of war – French raid on Ludwigshafen” and “An act of murder – German air raid on Southend.”<sup>50</sup>

This need for moral justification was felt again when it came to the use of incendiary ammunition filled with phosphorus, which was explicitly banned by the Saint Petersburg Declaration of 11 December 1868.<sup>51</sup> The British christened these

47 J.H. Morrow, above note 44, 2013, p. 411. This argument may be compared with that put forward by Rear Admiral Paul Behncke, deputy chief of the German Naval Staff who said in August 1914 that the proposed attacks “may be expected, whether they involve London or the neighbourhood of London, to cause a panic in the population which may possibly render it doubtful that the war can be continued”; quoted by S. Ross, above note 24, 2003, p. 18, note 7.

48 Harvey A. DeWeerd, *President Wilson Fights His War: World War I and the American Intervention*, Macmillan, New York, 1968, p. xx, quoted in Wilfried Wilms, “Hollywood's Celluloid Air War”, in W. Wilms & W. Rasch (eds), *Bombs Away! Representing the Air War Over Europe and Japan*, *Amsterdamer Beiträge zur neueren Germanistik*, Amsterdam, Rodopi, Vol. 60 (2006), p. 360.

49 See the article “War”, *The Straits Times*, 29 May 1915, p. 10, and the report in *L'Aérophile*, 1–15 June 1915, available at: <http://gallica.bnf.fr/ark:/12148/bpt6k6553361f/texteBrut>.

50 Cartoon printed with the caption “Wilfully Stupid” in *How did London civilians respond to the German airship raids of 1915?*, available at: <http://www.londonairshipraids1915.co.uk/introduction.htm>.

51 The use of such projectiles was regarded as “contrary to the laws of humanity”, as these weapons would “uselessly aggravate the sufferings of disabled men, or render their death inevitable”. Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles (St Petersburg Declaration), Saint Petersburg, 29 November/11 December 1868, Preamble, available at: [https://www.icrc.org/applic/ihl/ihl.nsf/ART/130-60001?OpenDocument&xp\\_articleSelected=60001](https://www.icrc.org/applic/ihl/ihl.nsf/ART/130-60001?OpenDocument&xp_articleSelected=60001).

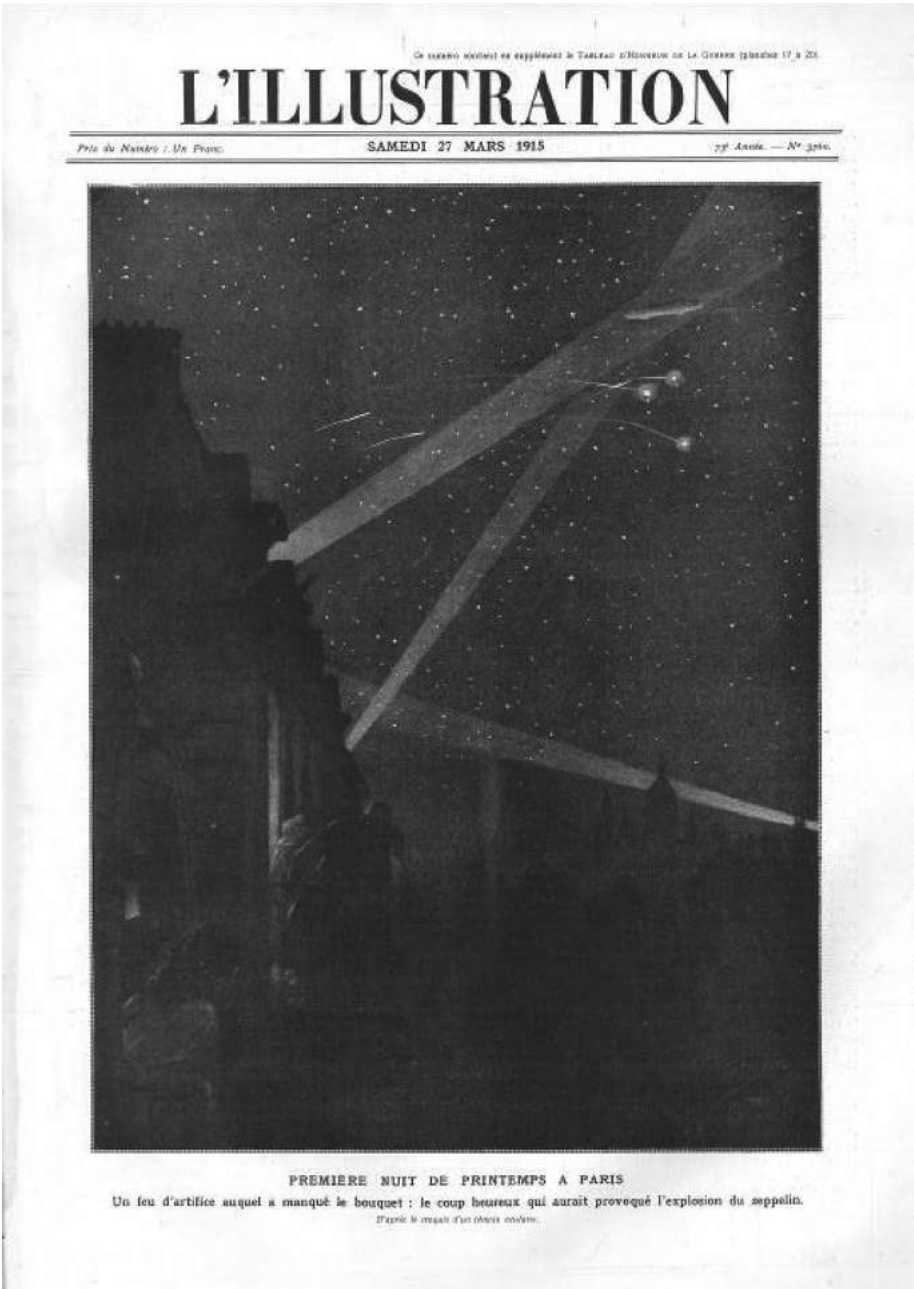


Fig. 3 - B/W online, B/W in print

Figure 3. “First Spring night in Paris – Fireworks missing its browning piece”, front cover of *L'Illustration*, Paris, 27 March 1915, *Eric Germain's private collection*.

“Buckingham” bullets, to justify using them against the Zeppelins that deliberately hit the civilian population of London. The Germans, for their part, gave their fighter pilots written orders stipulating that the incendiary bullets they took on board were strictly reserved for firing at airships, and were never to be used against planes.<sup>52</sup> The French and British pilots asked for a similar document, for fear they would be shot if captured with this type of ammunition in their possession.<sup>53</sup>

A 1921 adventure story, *L'aéroplane invisible*, illustrates the post-war fragility of the moral rehabilitation of aerial warfare.<sup>54</sup> In literature for the edification of the young, it is considered acceptable for a bombardier to be invisible only if he is destroying a German submarine base – submarines having been discredited by being used against civilian and non-belligerent targets.<sup>55</sup> A “sneaky” weapon seemed legitimate only for combat against other “unfair” weapons, and in the post-war period an aircraft that could not be seen from the ground was still regarded as being incompatible with military ethics.<sup>56</sup> This reservation may also be found in the work of the commission of jurists meeting in The Hague from December 1922 to February 1923 which, interestingly, combined two new elements in long-distance combat: wireless telegraphy and air warfare.

The “Rules concerning Air Warfare” they drew up forbade “any bombardment of cities, towns, villages, habitations and building [*sic*] which are not situated in the immediate vicinity of the operations of the land forces” (Art. 24(3)), but they state that air bombing directed against a military target in urban areas is lawful “in the immediate vicinity of the operations of the land forces” if “there is a reasonable presumption that the military concentration is important enough to justify the bombardment” (Art. 24(4)).<sup>57</sup>

As so often in this post-war literature, the character at the centre of the plot in *L'aéroplane invisible* is a spy. For, in the collective imagination, the new long-range weapons used in the first worldwide conflict were closely associated with the (even sneakier) tools of long-distance warfare – espionage and propaganda – which were facilitated by the dawn of a new era in communications technology.

52 Norman Archibald, *Heaven High, Hell Deep: 1917–1918*, A. C. Boni, Inc., New York, 1935, p. 186.

53 *Ibid.*, pp. 186–187.

54 H. Gorsse and P. Guitet-Vauquelin, *L'aéroplane invisible*, Hachette, Paris, 1921.

55 During the Second World War a similar ethical justification underpinned American General “Hap” Arnold’s plan to turn bombers into drones so they could be sent to explode over German submarine bases. Sarah Kreps and Micah Zenko, “The Next Drone Wars: Preparing for Proliferation”, in *Foreign Affairs*, March–April 2014, available at: <http://www.foreignaffairs.com/articles/140746/sarah-kreps-and-micah-zenko/the-next-drone-wars>.

56 Regardless of whether the aircraft’s “stealth” was the result of high altitude, a night flight or, as in this novel for young people, the invention of new camouflage technology such as the clear dope covering the wings and fuselage of the German Taube bomber, “making it almost transparent against a bright sky”. Marshall Michel, “Stealth, 1914 style”, available at: <http://www.kaiserslauternamerican.com/stealth-1914-style/>.

57 *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*, Part II: Rules of Air Warfare/Chapter IV: Hostilities/Bombardment; Article 24, available at: [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/275-370036?OpenDocument&xp\\_articleSelected=370036](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/275-370036?OpenDocument&xp_articleSelected=370036).



## The hidden face of long-distance weaponry: wireless warfare

The First World War was marked by the extreme physicality of the front – a battlefield whose western border barely shifted for the whole duration of the conflict. The fighting there ploughed up a landscape whose relief, a century afterwards, is still visibly shaped by those shells.

The rear was defined as being behind the lines where the foot soldiers were fighting, but that did not put it beyond the area of conflict. It was a target not only for aerial bombing but also for (real or perceived) acts of espionage and sabotage, as well as propaganda to influence the population, which had now become “public opinion”.<sup>58</sup>

### Seeing without being seen: espionage and “the enemy within”

Espionage activities and the new weapons for long-distance combat were linked in many ways. In the field, spies gave the enemy precise information about the targets to bombard: the railway convoy at the platform, the weapons factory, the ship whose sailing times they had obtained. Progress in wireless transmission enabled them to send the information with previously unheard-of speed and reliability. In the air, the possibility of flying over enemy territory without being seen (or without giving an adversary time to hide its troops or vehicles) clearly represented an extremely valuable advantage.<sup>59</sup> In 1912 Admiral Sir John Fisher prophesied that wireless telegraphy would become “the pith and marrow of war!”.<sup>60</sup>

Airborne intelligence was a task explicitly entrusted to the “spy basket” (*Spähkorb*), or “spy gondola” (*Spähgondel*), a feature of many models of German airships.<sup>61</sup> The single-seater nacelle, or basket, was suspended by a steel cable (joined to a telephone wire) a few hundred metres below the Zeppelin.<sup>62</sup> This observation post made it easier to navigate and to aim the bombs, while still allowing the airship to remain hidden by cloud cover. A scene from the film *Hell's Angels*, shot by Howard Hughes in 1930, illustrates the ethical dilemma facing the operator of a “spy basket”, who refuses to bombard Trafalgar Square and deliberately aims his Zeppelin's bombs at the waters of the Thames.

58 Since the Crimean War, in the middle of the nineteenth century, the print media had played a key role in covering even faraway conflicts by enabling people to experience them from day to day, as they developed. Jean-Pierre Bacot, “Le rôle des magazines illustrés dans la construction du nationalisme au XIXe siècle et au début du XXe siècle”, *Réseaux*, No. 107, 2001, pp. 265–293.

59 Article 29 of the Hague Convention II states that “soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies”, above note 21.

60 Admiral Sir R. H. Bacon (ed.), *The Life of Lord Fisher of Kilverstone*, Vol. 2, London, 1929, p. 144, quoted in Heidi J. S. Tworek, “Wireless Telegraphy”, 8 March 2016, available at: [http://encyclopedia.1914-1918-online.net/article/wireless\\_telegraphy](http://encyclopedia.1914-1918-online.net/article/wireless_telegraphy).

61 Ernst Lehmann, *Auf Luftpatrouille und Weltfahrt, Volksverband der Bücherfreunde (Air Patrols and World Travel: Book-Lovers' Unit)*, Berlin, 1936, pp. 60 and 67.

62 The “spy basket” of the Zeppelin LZ90, found near Colchester in September 1916, is displayed in the Imperial War Museum in London.



## *A new type of combatant: the spy*

The watching eyes in the sky were not the only ones: there were also those of the “traitor” who blended into the population and gave the enemy intelligence about targets. Spies became active participants in the globalization of warfare: they were the individuals a submarine could infiltrate, and subsequently exfiltrate, on the isolated coast of an enemy nation, and also in a neutral country, or a remote colony.<sup>63</sup>

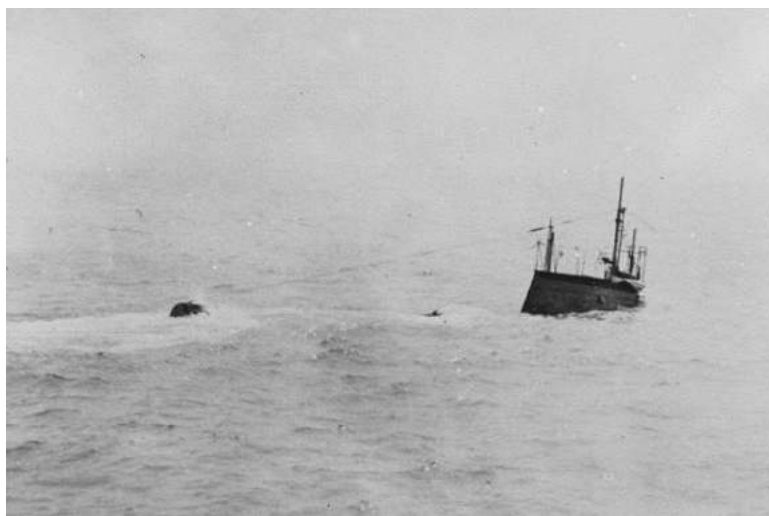


Fig. 4 - B/W online, B/W in print

Figure 4. British submarine, 1917, *Éric Germain's private collection*.<sup>64</sup>

Today, our view of espionage in the Great War seems inextricable from the narrative constructed about it in the inter-war years with the publication of novels and what purported to be memoirs, often adapted for the cinema.<sup>65</sup> The reality was less romantic, and it remained significantly different from that of previous wars. During the course of the conflict, espionage and counter-espionage activities became a good deal more professional, and came to be incorporated into the planning and conduct of hostilities.<sup>66</sup>

63 Like Lieutenant Conrad von Belke, a character in Joseph Storer Clouston's novel *The Spy in Black* (William Blackwood, Edinburgh, 1917, made into a film by Michael Powell in 1939).

64 Text printed on the back “*With the British Navy in wartime. A submarine submerging*” with stamps “*Official Photograph issued by the Press Bureau*” and “*Passed for transmission abroad*”.

65 Chantal Antier, “Espionnage et espionnes de la Grande Guerre” (Spying and Female Spies in the Great War), *Revue historique des armées*, No. 247, 2007, pp. 42–51, available at <http://rha.revues.org/1963>.

66 Bertrand Warusfel, “Histoire de l’organisation du contre-espionnage français 1871–1945”, *Cahiers du Centre d’Études d’Histoire de la Défense*, Vol. 1, CEHD, Paris, 1996, p. 13, available at: [http://www.droit.univ-paris5.fr/warusfel/articles/HistoireCE\\_warusfel96.pdf](http://www.droit.univ-paris5.fr/warusfel/articles/HistoireCE_warusfel96.pdf); Paul Émil von Lettow-Vorbeck et al., *L’espionnage et le contre-espionnage pendant la guerre mondiale d’après les archives militaires du Reich*, Nouveau Monde éditions, Paris, 2012.

Although espionage constituted an extreme form of long-distance warfare, those who became spies out of patriotism – both men and women – regarded themselves as actual combatants.<sup>67</sup> At the same time, despite the risks they ran, these spies were conscious that they had a more enviable lot than combatants at the front. On this subject we have the account of the British writer Somerset Maugham, who was working at the time for the Secret Intelligence Service. The writer-cum-secret agent describes his unbearable, overwhelming feeling when, on a mission to Russia in 1917, he found himself face to face with a mutilated Russian soldier on the platform of a Trans-Siberian Railway station. He – the soldier without a uniform, as he calls himself, operating in the comfort of the rear – felt a painful empathy with this man who was begging, and singing in a voice that told of the terror, suffering and death he had faced on the battlefield.<sup>68</sup>

Somerset Maugham's eyewitness account is also a reminder that espionage is not the only "invisible" form of warfare. That is also – and above all – the war waged after a conflict, with the (mostly visible) physical wounds of disfigured veterans and the (mostly inaudible) psychological scars. The label "shell shock" was given to one of the syndromes that would be included today in the category of "post-traumatic stress disorder", affecting the lives of soldiers and their families many years after a war had ended. This conflict ushered in an age in which people began to realize that a war could have more casualties after the cessation of hostilities than under enemy fire.<sup>69</sup>

Like other weapons of long-range combat, espionage was to be somewhat rehabilitated in the post-war years, when the physical courage and moral qualities of some of its protagonists were recognized. In this respect the Great War fits in with an older trend in the evolving relationship between States – to codify espionage and, thereby, legitimize it. The Hague Convention of 1899 – signed by all the First World War belligerents – guaranteed that a spy caught in the act on enemy territory would be given a trial (Hague (II), Article 30).<sup>70</sup> The following article added that: "A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

67 As affirmed by the Belgian spy Marthe McKeena, *Comment on devient espion*, Payot, 1935, quoted by C. Antier, above note 65. Victor Saville, *I Was a Spy!*, 1933.

68 William Somerset Maugham recounts this episode in the 1941 preface to his short-story collection *Ashenden, or The British Agent* (first published in 1927).

69 After the most recent conflicts the United States has been involved in, there have been more veterans' suicides than there were deaths on the battlefield. Herbert Hendin, "Healing The Hidden Wounds of War: Treating The Combat Veteran With PTSD at Risk For Suicide", *Huffington Post*, 18 September 2013, available at: [http://www.huffingtonpost.com/herbert-hendin/healing-the-hidden-wounds\\_b\\_3948156.html](http://www.huffingtonpost.com/herbert-hendin/healing-the-hidden-wounds_b_3948156.html).

70 Chapter II of the Hague Convention (II) is devoted to spies, and defines the category by specifying its legal status in a conflict. The text is careful to stipulate that "individuals sent in balloons" must be considered combatants, not spies (Article 29).

## *From espionage to spy mania: a new battleground emerges*

The relative normalization of legal measures to combat espionage in wartime was also partly due to its rapid expansion in the preceding decades. The upsurge in hostile actions in peacetime had pushed most European countries to adopt new legislation to punish and deter spies.<sup>71</sup> Moreover, on the outbreak of war, codes of military justice regained their full value in the belligerent countries. In France, it was pursuant to Article 206 of the French code that fifty-six people convicted of espionage were shot between 1914 and 1918 (more than half of them in the first year of the war).<sup>72</sup> Despite the media coverage given to some convictions (such as that of Margaretha Zelle, alias Mata Hari, who was executed on 15 October 1917), this double-digit number suggests that there was actually far less espionage going on than what society perceived. The fear of espionage, which was evident well before the war broke out, also reflected growing xenophobia.<sup>73</sup> Spy mania was based on a high degree of irrationality, but for the public authorities this collective paranoia had the advantage of strengthening the involvement of the whole nation in the war effort, and justifying the sacrifices asked of people.

With the threat of espionage hanging over them, silence and discretion were required of civilians. Propaganda reminded them incessantly that, in the World War II slogan, “careless talk costs lives”, that the smallest piece of *a priori* harmless information could prove to be of real military interest to the enemy. In factories, on the docks or in a train station, the supposed presence of spies brought the battlefield to well behind the front lines. In 1915, French Minister of War Alexandre Millerand ordered posters to be put up to warn people: “Keep quiet! Be on your guard! Enemy ears are listening.”<sup>74</sup> (Figure 5)

71 On this kind of legislation, adopted in the last third of the nineteenth century, see Sébastien Laurent, *Politiques de l'ombre. État, renseignement et surveillance en France (Politics of the Shadows. The State, Intelligence and Surveillance in France)*, Fayard, Paris, 2009.

72 According to a report by a working group headed by Antoine Prost, *Quelle mémoire pour les fusillés de 1914–1918? Un point de vue historique*, Report submitted to the Minister Delegate for Veterans' Affairs, 1 October 2013, p. 12, available at: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000666/0000.pdf>.

73 In France, this was reflected in the 1912 vote making it compulsory for Nomadic people to carry an anthropometric identity booklet, and the 1917 decree introducing a compulsory identity card for foreigners. Even after the war had ended, an order dated 14 December 1918 introduced a special identity card for people from Alsace and the Moselle, who were divided into four classes, A to D, depending on their degree of “Germanic” or “French” ancestry.

74 This was the slogan officially adopted by the ministerial circular of 28 October 1915; <http://verdun-meuse.fr/index.php?qs=fr/ressources/objet-du-mois—novembre-2010—assiette-tais>.

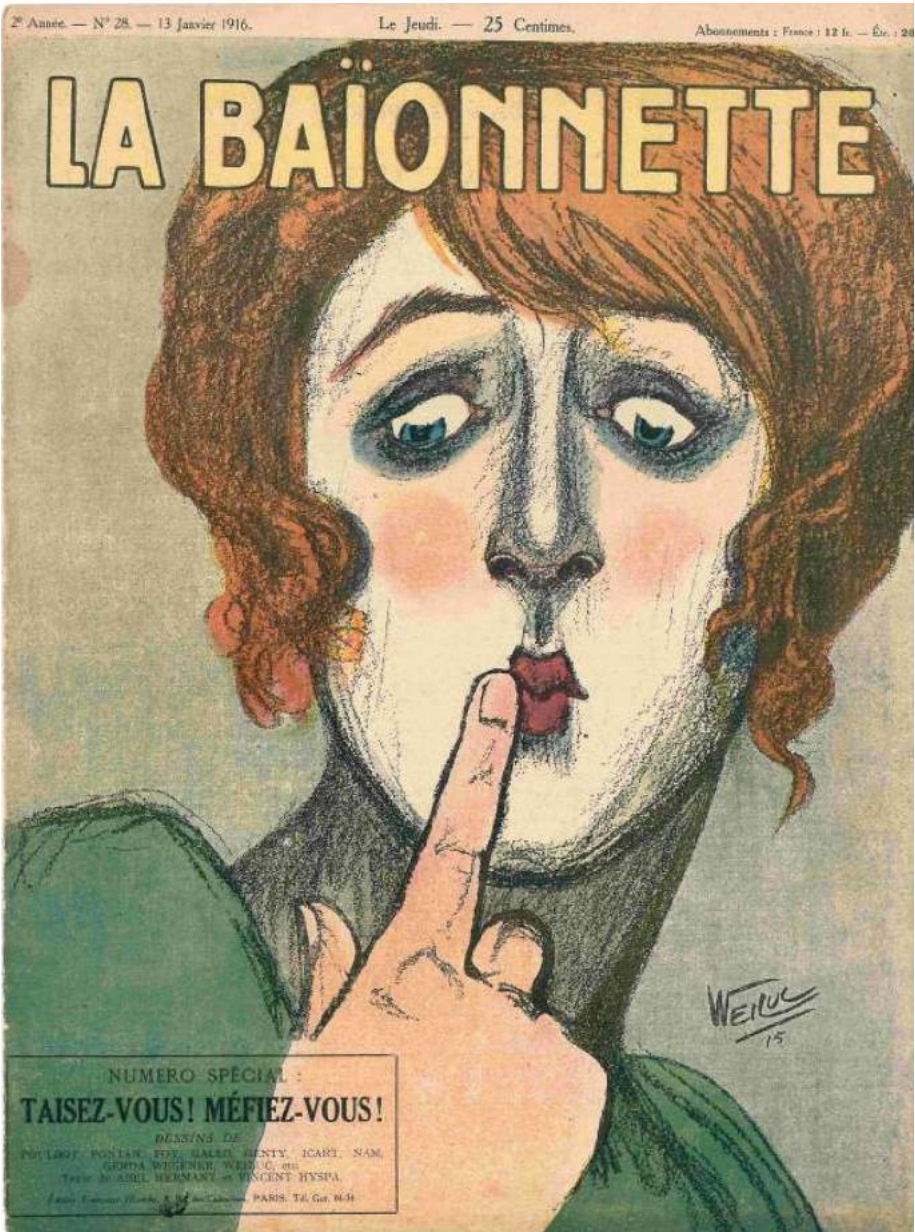


Fig. 5 - Colour online, Colour in print

Figure 5. Special number “Shut up – be wary” of the satirist review *La Baïonnette*, front cover of No. 28, Paris, 1 January 1916, *Éric Germain’s private collection*.

In passing the Espionage Act on 15 June 1917 in the United States, thousands of kilometres away from the military theatres of operation, President Woodrow Wilson extended the concept of a spy to opponents of the war. The following year, the Sedition Act made it possible to imprison influential pacifists such as the trade unionist Eugene Debs.<sup>75</sup> The 1917 Espionage Act was to have a surprising legacy, from the Rosenbergs to the more recent cases involving Bradley Manning and Edward Snowden, as it has been regarded as an effective tool of war in peacetime.

## Propaganda transformed into “psychological warfare”

The war experienced by the soldiers of the shadows was genuinely worldwide. It brought a growing need for clandestine communication, which sparked the development of new technology, such as wireless transmission.<sup>76</sup> As the conflict went on, dissimulation methods became more advanced. Formulas for invisible ink, for example, which were invented in both camps, show such a level of ingenuity that they would be the oldest secret documents kept by the Central Intelligence Agency (CIA) and not declassified until 2011.<sup>77</sup>

### *From wire tapping to the semantics of deception*

The sabotaging of German underwater cables by the Royal Navy was the very first military action carried out after war was declared on 4 August 1914.<sup>78</sup> Aware of the fragility of their networks, the Germans had anticipated this threat by developing radio stations to keep in touch with their African colonies.<sup>79</sup> In 1914 the German Admiralty set up its telecommunications centre in the long-wave radio station built in 1906 by the Telefunken group in Nauen, near Berlin.

Throughout the conflict, the Allies had the benefit of a secure network of underwater cables, while the Entente countries were forced to use Hertzian communication, which was susceptible to wire-tapping. As a result, techniques for encryption and decryption and for locating transmitters (radio direction finding) became major challenges at which the Allies showed a marked superiority. In early 1917, the interception and decryption of the Zimmermann

75 Daniel G. Donaldson, *The Espionage and Sedition Acts of World War I: Using Wartime Loyalty Laws for Revenge and Profit*, LFB Scholarly Publications, El Paso, TX, 2012.

76 In the immediate post-war period, this progress (described in the article by G. Marin, above note 3, pp. 516–518) caused radio to take off as a means of communication.

77 “CIA reveals invisible ink recipes used by WWI spies”, *BBC News*, 20 April 2011, available at: <http://www.bbc.co.uk/news/world-us-canada-13141473>. At her trial, Mata Hari admitted that she had thrown the compromising inkbottle into the sea.

78 Some of these sectioned cables would be used to make new connections, such as the cables linking Brest with Casablanca in 1915 and Casablanca with Dakar in 1916. Gérard Fouchard, “Le câblage de l’Afrique de l’Ouest”, *Bulletin de l’Association des amis des câbles sous-marins*, No. 47, June 2013, p. 16, available at: <http://www.cablesm.fr/bulletin47.pdf>.

79 Association des amis des câbles sous-marins (Friends of Underwater Cables), “Le réseau gouvernemental et les compagnies télégraphiques allemandes”, available at: [http://www.cablesm.fr/Les%20compagnies%20allemandes%20\\_2\\_.pdf](http://www.cablesm.fr/Les%20compagnies%20allemandes%20_2_.pdf).



telegram by the British Admiralty's intelligence services played a crucial role in leading the United States of America into the war.<sup>80</sup>

Fear of espionage prompted the belligerents to develop ground-breaking semantics of deception around the new weapons, especially those used in long-distance fighting. The first German air squadron – created in November 1914 for bombarding Britain – was thus christened “Ostend Homing Pigeons Detachment” (*Brieftauben Abteilung Ostende*). In the same spirit, the British engineer Archibald Low gave the name “Aerial Target” to his radio-controlled aeroplane project, to make the Germans think it was about research on a simple target drone to test anti-aircraft capabilities.<sup>81</sup>

The prime example from this semantic jamming war, however, was the word “tank”, which Lieutenant-Colonel Swinton suggested as the name for the British project on an armoured fighting vehicle. In 1914, Lord Kitchener sent Ernest Swinton to the western front to serve as a war correspondent. His task was to give the news to journalists, who were not authorized to go onto the battlefields. No stranger to the workings of propaganda, the Scottish officer (the same one we have to thank for coining the term “no man’s land”)<sup>82</sup> came up with the idea of using the word “tank” to deceive the enemy about the purpose of the armoured car.

While it may be easy enough to keep a new weapon secret at the experimental stage, this becomes infinitely more difficult when it moves to production in the factory. Its designers therefore decided not just to avoid names that were too explicit, such as “land-cruiser” or “land-ship”,<sup>83</sup> but also to build stories around the word “tank” (Figure 6). This resulted in the propagation of rumours whereby these so-called “tanks” were mobile, armoured containers of water intended for troops fighting in the deserts of Egypt and Mesopotamia, or else that they were snow ploughs for the Russian front.<sup>84</sup>

In a booklet published before the end of the hostilities, Colonel Swinton claimed that his choice had contributed to the element of surprise in September

80 The telegram sent on 16 January 1917 by the German Minister for Foreign Affairs, Arthur Zimmermann, to the Mexican government proposed that Mexico should enter the war against the United States in exchange for financial support and the promise that it could annex three American states (Texas, Arizona and New Mexico).

81 Gary Warne, “The Predator’s Ancestors – UAVs in The Great War”, 25 July 2012; available at: <http://warnepieces.blogspot.ca/2012/07/the-predators-ancestors-uavs-in-great.html>.

82 Ernest Swinton used this expression to refer to the “wilderness of dead bodies... between the opposing lines” in his short story “The Point of View”, published under the pseudonym of Ole Luk-Oie. *The Green Curve and Other Stories*, Doubleday, Page & Company, Garden City, NY, 1914, p. 243.

83 According to John Weldon the word “tank” was used instead of “machine gun destroyer”. John Weldon, “A short history of tank development: Seven tanks for armoured warfare”, *Meccano Magazine*, July 1970, pp. 370–373.

84 Ernest Swinton, *The Green Curve and Other Stories*, above note 82, 1918, p. 4. We are not told whether these rumours were created deliberately or whether they were just left to occur naturally, in accordance with a phenomenon ably examined by Marc Bloch (quoted below).

1916 (Battle of Flers-Courcelette, where tanks were used for the first time), and the psychological shock that hampered the response by the German forces.<sup>85</sup>



Figure 6. A British tank taken in the battle of Menin Road, September 1917, *Éric Germain's private collection*.<sup>86</sup>

### *Winning hearts and minds: from text to image*

Ernest Swinton presented himself as the inventor of “psychological warfare”.<sup>87</sup> In October 1914, his first feat of arms was to drop 25,000 pamphlets printed in German on the lines of the Central Powers. Their typography and the colour of the paper (arsenic green) were carefully chosen to reinforce the psychological

85 “... it was naturally realised that the greatest results to be expected from the employment of this new weapon would be attained if it could be launched unexpectedly, so that the enemy might be caught unprepared to meet it.” Ernest Swinton, *The “Tanks” (by request and with permission)*, George H. Doran Company, NY, March 1918, p. 3, available at: [https://archive.org/stream/tanksbyrequestwi00swin\\_0/tanksbyrequestwi00swin\\_0\\_djvu.txt](https://archive.org/stream/tanksbyrequestwi00swin_0/tanksbyrequestwi00swin_0_djvu.txt).

86 Text printed on the back side of the photograph: “Official Photographs taken on the British Western Front. The Battle of the Menin Road [20–25 September 1917]” and interestingly the text continues: “One of our latest tanks going to destroy German machine gun positions” [the machine gun being considered as a more “inhuman” type of modern weaponry]; with stamps “Official Photograph issued by the Press Bureau” and “Passed for transmission abroad”.

87 In fact, it was a German monoplane that carried out the first “psychological warfare” operation by flying over Paris on Sunday, 30 August 1914 with a banner in the colours of the Reich. It dropped pamphlets bearing the message: “The German army is at the gates of Paris, it only remains for you to surrender.” Jean Hallade, 1914–1918: *De l’Aisne on bombardait Paris*, Imprimerie de l’Aisne Nouvelle, 1979; quoted in “L’aviation allemande bombarde Paris, en août et septembre 1914”, 1914 – Première bataille de la Marne – First Battle of the Marne, available at: <http://1914ancien.free.fr/parisbom.htm>.



impact of the text.<sup>88</sup> According to Swinton, the initiative was discontinued because of fear of the treatment that would be meted out to the pilot of an aeroplane captured on this type of mission. Indeed, the airborne propaganda actions, which proliferated from 1917 onwards, drove the German authorities to court-martial captured pilots.<sup>89</sup> In August 1915, France was the first country to create a department of airborne propaganda. On the British side the activities carried out to weaken the adversary's morale met with hostility from the Royal Flying Corps, which felt that they did not merit the risks run by the pilots. The propaganda office, set up at the start of 1916 within the military intelligence section of the War Office, concentrated on domestic public opinion.

To boost public support for the war effort, British propaganda posters readily used the icons of German long-distance warfare: airships and submarines. These new weapons made the British public realize that their protective insularity, hitherto guaranteed by the superiority of their navy, was at an end. A 1915 recruiting poster showed a Zeppelin flying over London on a moonless night, and a caption that read: "It is far better to face the bullets than to be killed at home by a bomb. Join the army at once and help stop an air raid."<sup>90</sup>

German airships became a dominant theme in propaganda posters, especially in English-speaking countries, which often depicted the black silhouette of a "cowardly" Zeppelin driven out by the crossed beams from anti-aircraft defence projectors. One poster underlines the "murderer's impunity" by a chromatic contrast between the pastel-tinted sky, in which two airships are cruising peacefully, and the garish colours of the explosions lighting up the dead bodies of women and children.<sup>91</sup> The image was skilfully designed to inspire a feeling of outrage at the Zeppelin crews "serenely" striking civilians, whose status was reduced to that of innocent prey.<sup>92</sup>

In this war-by-image, photography played an increasingly important role: it showed those living behind the lines pictures of the "reality" of the front, which it

88 Ernest Swinton, *Eyewitness: Being Personal Reminiscences of Certain Phases of the Great War, Including the Genesis of the Tank*, Doran & Company, Garden City, NY, 1933, pp. 47–50.

89 In June 1917 the German Minister for Foreign Affairs told his Swiss counterpart that any aviator dropping propaganda would be regarded as breaking the laws of war – a threat carried out in December of the same year. Bernard Wilkin, "Propagande militaire aérienne et législation durant la Première Guerre mondiale", *Revue historique des armées*, No. 274, 2014, pp. 87–94, available at: <http://rha.revues.org/7976>.

90 Available at: [http://upload.wikimedia.org/wikipedia/commons/e/ec/It\\_is\\_far\\_better\\_to\\_face\\_the\\_bullets.jpg](http://upload.wikimedia.org/wikipedia/commons/e/ec/It_is_far_better_to_face_the_bullets.jpg). See also the poster "Zeppelins Over Your Town", available at: <http://www.iwm.org.uk/collections/item/object/30918>. For the print media, see the photo of an airship under the beams of projectors, which appeared on the front page of the 8 November 1915 issue of the American illustrated weekly *The Independent* and of *L'Illustration*, No. 3760, 27 March 1915 (see Figure 3).

91 W. A. Gullick, "Enlist, by staying at home you are giving your approval to this kind of thing", picture, in *Collection of New South Wales recruitment posters for World War I*, available at: <http://nla.gov.au/nla.pic-an7697018-3>.

92 An analogy with an entertaining hunting activity currently featuring in anti-armed drones campaigns which condemn the "PlayStation mentality" of pilots accused of having a virtual – and obscenely game-inspired – image of their targets.

presented as having been taken “live”.<sup>93</sup> In 1914, the Germans were way ahead of the French in their use of this new medium, with a *Militärische Film und Photostelle* which centralized production and distribution in a single body. The Leipzig office flooded neutral countries with German photographs, to the point where the French foreign ministry was alerted. In 1915 they encouraged their military authorities to set up the army’s photographic and cinematographic sections (SPA and SCA).<sup>94</sup> Camera operators in the SCA shot short documentaries and a weekly news film. The latter (*Annales de la guerre*) was screened in cinemas before the main film. The propaganda films made by the French army were scripted, and were sometimes even filmed by experienced directors using professional actors.<sup>95</sup>

### *Distance humour and rumours to counter globalized propaganda*

In the first half of 1915, the major warring countries decided to set up central censorship bureaus,<sup>96</sup> which soon became united with propaganda offices. The British MI7, founded in January 1916, exemplified this innovative approach by including censorship as part of a comprehensive propaganda strategy.<sup>97</sup>

Neither soldiers nor the general population remained passive in the face of this industrialized information war. The fact was that alongside organized propaganda consisting of selective truths and outright lies, there also developed a vast realm of gossip and make-believe which emerged spontaneously. In a 1921 article about the war’s cacophony of “false news”, historian Marc Bloch recalled that, in the trenches, censorship gave rise to the feeling that “anything could be true except what was allowed to be printed”<sup>98</sup> – words that have the ironic ring often found in post-war writings. Indeed, during the conflict, humour – sometimes bordering on nonsense<sup>99</sup> – was another form of reaction to the most overt forms of propaganda, although it was sparked primarily by the difficulty of

93 This despite the fact that there was nothing spontaneous about the pictures, which had been carefully staged. *Sur le vif* and *J’ai vu* were two magazines, founded during the war, in which illustrations were more important than commentary. Hélène Guillot, “La section photographique de l’armée et la Grande Guerre”, *Revue historique des armées*, No. 258, 2010, pp. 110–117, available at: <http://rha.revues.org/6938>.

94 The SPA and SCA were merged in January 1917. Violaine Challeat, “Le cinéma au service de la défense, 1915–2008”, *Revue historique des armées*, No. 252, 2008, pp. 3–15, available at: <http://rha.revues.org/2983>.

95 Such as the screenwriter and director Henri Desfontaines, *ibid.*, note 7. Across the Atlantic, Charlie Chaplin was making several propaganda films: *Zepped*, *The Bond* and the comedy *Shoulder Arms*. “World One War: Charlie Chaplin”, *HubPages*, 29 April 2011, available at: <http://snnmchannon.hubpages.com/hub/World-One-War-Charlie-Chaplin>.

96 The *Bureau de la Presse* in Paris in January, the *Oberzensurstelle* in Berlin in February and the Official Press Bureau in London in June 1915; Eberhard Demm, “Censorship”, 8 March 2016, notes 4 and 9, available at: <http://encyclopedia.1914-1918-online.net/article/censorship>.

97 *Ibid.*, note 11.

98 Marc Bloch, “Réflexions d’un historien sur les fausses nouvelles de la guerre” (A historian’s reflections on false news during the war), *Revue de synthèse historique*, Vol. 33, August–December 1921, p. 32.

99 This feeling of irrationality and false reality found radical artistic expression, for example in the Dada movement, which emerged in those years and spread throughout the world.

responding directly to the absurdity of the army command's decisions in trench warfare.

For official communication, two areas were demarcated in France: an internal zone and an army zone. Even though it was placed under the strict control of the military authorities, the latter did not escape the "curious efflorescence of the collective imagination".<sup>100</sup> Marc Bloch recounts the manufacturing of one of these rumours, which he witnessed when serving at the front as an intelligence officer:

We saw how one day (in September 1917), by virtue of imaginations heated by tales of espionage, a burgher from Bremen [*"Brême" in French*] [a German soldier who had just been captured] was transformed into a spy who had treacherously settled in Braisne [*pronounced "Brêne" in French*] [a small town south of the Chemin des Dames plateau, on the front line of the Aisne battlefield, where his regiment was].

Where did this transfiguration first take place? Not quite along the line of fire, but a little farther away from the enemy, in the batteries, the convoys, the kitchens. It was from this relative "rear" that the rumour flowed back to us. That was the route almost always followed by false news. (...) In that little world of the trenches, it was the kitchens that stood in for the market square.

... On a map of the front, a little behind the intertwining lines recording the infinite detours of the front positions, one could shade in a continuous zone in hatching; that would be the zone where legends were created.<sup>101</sup>

Marc Bloch invites us to consider a new cartography for this "army zone". He reminds us that, while there was a front and a rear, the fighting front itself had its own "relative rear".

This was also true on a broader scale, and those designing propaganda gradually realized that their sphere of influence needed to be worldwide. The German news agency – significantly named Transocean (Trans-Ocean)<sup>102</sup> – sent messages at least twice a day to its North American wireless station in Sayville. The Telefunken transmitter, located near New York City, had the most advanced technology available<sup>103</sup> and was used as a relay for reaching Asia and South America.<sup>104</sup>

100 *Ibid.*, p. 19.

101 *Ibid.*, pp. 32–33.

102 On the role played by this news agency in connection with German consuls, businessman volunteers and associations of Germans resident overseas, see Jamie Bisher, *The Intelligence War in Latin America, 1914–1922*, McFarland, Jefferson (NC), 2016, p. 32.

103 <http://www.sayville.com/wireless.html>.

104 After declaring war on Germany on 6 April 1917, one of the first hostile acts of the United States was to seize the Sayville Station. However, this had little effect on the German world broadcasting capacity, as by that time the long-wave radio station at Nauen could transmit messages over 11,000 kilometres. H. Tworek, 2016, above note 60.

In their efforts to customize their war propaganda, the Germans displayed great inventiveness, both in the media they used and in the intellectual and emotional arguments they marshalled. In Muslim countries, with the help of the Turkish authorities they created the ideological framework for a “holy war” which was intended to set the French, British and Dutch colonial empires ablaze. “Jihad made in Germany” was master-minded in the Berlin-based Oriental News Department.<sup>105</sup>

The orientalist and archaeologist Max von Oppenheim theorized about an ideology of pan-Islamic *jihad* which was scientifically designed to be a tool in a war encompassing the religious psyche.<sup>106</sup> Despite rather lacklustre results, this nevertheless represented the first modern use of a strategy for manipulating the emotional sphere of religion in order to spread a bellicose ideology.

## Are there lessons to be learnt for the new battlefields of the twenty-first century?

If the First World War may be regarded as a watershed moment in the development of long-distance warfare techniques, it is partly because of the experiments with the first guided munitions and unmanned aerial and naval vehicles. Although they mostly remained at the prototype stage, the emergence of this category of weapons shows that the concept of the legitimacy of military action was evolving.

### First marine, ground and aerial drones invented between 1909 and 1917

“Manned” and “remotely driven” military aviation came into being within a few years of one another. On the French side, the pioneer of the so-called “automatic” aviation was Captain Max Boucher, who began to experiment with radio-controlled aeroplanes in the summer of 1917.<sup>107</sup> The military command encouraged this research in the hope of preserving its precious, qualified human resources at a time when the life expectancy of a fighter pilot operating in French skies was six weeks at most.<sup>108</sup> The controls for these biplanes were operated by radio waves, which meant that they had to be guided within sight of the pilot on the ground. It is conceivable, therefore, that they may have been initially intended

105 Wolfgang G. Schwanitz, “Euro-Islam by ‘Jihad made in Germany’”, in Nathalie Clayer and Éric Germain (eds), *Islam in Inter-War Europe*, Hurst, London, 2008, pp. 271–301.

106 The British effort at mobilizing religious affects seems to have been more amateurish. In 1933 Colonel Swinton admitted that his idea of painting hideous genies on the armour of tanks sent to fight in Palestine – in the hope of giving the enemy an even greater fright – had been inspired more by his familiarity with the *Arabian Nights* than by any real knowledge of the region’s culture. E. Swinton, *Eyewitness*, above note 88, 1933, pp. 260–261. To encourage the Bedouin tribes to revolt, T. E. Lawrence had inflamed not their religious affects but nationalist Arab feeling.

107 “L’avion sans pilote” (The Pilotless Plane), in *Journal des Voyages*, 4 April 1929, reprinted in *Le Piège*, No. 208, March 2012, available at: <http://www.aea.asso.fr/public/lepiege/sommaires/2012.html>.

108 J. H. Morrow, above note 44, p. 411.

for observation at close range, or even for anti-aircraft defence, to dissuade or neutralize enemy airships, as had already been imagined in the English film of 1909, *The Airship Destroyer*.<sup>109</sup>

An identical project was being developed on the far side of the Channel by Captain Archibald Low, who was working on a model of a radio-controlled aeroplane.<sup>110</sup> In the same period, the British engineer is said to have designed the first radio-guided missile. In the United States, meanwhile, Elmer Sperry, the inventor of the gyroscope, and his son Lawrence, were developing the concept of a drone-cum-aerial torpedo loaded with trinitrotoluene (TNT).<sup>111</sup> The first test flight of the Curtiss-Sperry Flying Bomb was on 6 March 1918, although it was not until 1926 that the project was revealed by the American press.<sup>112</sup>

109 This little silent film, inspired by H. G. Wells and Jules Verne and directed by Walter Booth, imagined the city of London attacked by a fleet of aircraft but saved by the invention of a radio-guided aerial torpedo. IMDb entry available at: [http://www.imdb.com/title/tt0000790/?ref\\_=ttrel\\_rel\\_tt](http://www.imdb.com/title/tt0000790/?ref_=ttrel_rel_tt).

110 Jonathan Sale, "The secret history of drones", in *The Guardian*, 10 February 2013, available at: <http://www.theguardian.com/world/shortcuts/2013/feb/10/secret-history-of-drones-1916>.

111 "Deadly Air Torpedo Ready at War's End: Elmer Sperry's Invention Is Told", in the *New York Times*, 8 December 1926, quoted in Thomas P. Hughes, *American Genesis: A Century of Invention and Technological Enthusiasm, 1870–1970*, University of Chicago Press, Chicago, 2004, p. 128.

112 In Germany, the Krupp factories had been working on the concept of an aerial torpedo from 1909, drawing on the work of a Professor Weichert: "Torpedoes That Fly In The Air: Krupp's Subvention of a New Aerial Monster", *New Zealand Herald*, Vol. 46, No. 14079, 5 June 1909, p. 2, available at: <http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=NZH19090605.2.98.32>.



Fig. 7 - Colour online, Colour in print

Figure 7. “Aeroplane Torpedo”; front cover of *Le Pays de France*, Paris, 2 December 1915, Éric Germain’s private collection.



The idea of remotely controlling not the delivery vehicle (the drone) but the munitions themselves (the rocket or torpedo) emerged very quickly, with the first “radio-automatic” torpedoes tested by Gustave Gabet in the waters of the Seine in 1909.<sup>113</sup> The French engineer, a committed pacifist, presented his invention to the navy command as a deterrent.<sup>114</sup>

At the start of 1915, Paul Aubriot, a trade unionist and Socialist deputy for the fifteenth arrondissement in Paris, proposed to the minister for war that he should assign Gustave Gabet to the technical section of the Engineers.<sup>115</sup> In July, thanks to private financial aid from François de Wendell, an industrialist from Lorraine and also a deputy, Gabet gave a demonstration of a prototype electric, wire-guided “ground torpedo” mounted on caterpillar tracks.<sup>116</sup>

Some months later he presented a more impressive model, an “armoured, automobile blockhouse” armed with a 37-mm cannon under a turret operated by two men.<sup>117</sup> The “Gabet Electric Blockhaus”, adapted from an American Caterpillar tractor, was first produced in an electric version (powered by a cable) before being given autonomy through motorization. It was one of the many prototypes that preceded the effective introduction of the new armoured weapon – the “tank” – on the battlefields of the Somme on 15 September 1916.

The pioneering research conducted on munitions and unmanned aerial and marine vehicles was abandoned at the end of the conflict. However, the ambition of gaining ground in an engagement from a distance, and thereby protecting soldiers’ lives, was pursued through a doctrinal reflection on aerial bombing and operational use which was experimented with many miles from European soil.

113 Agence Rol, “Torpille radio automatique Gabet”, picture, Rol 7510, 24 December 1909, available at: <http://gallica.bnf.fr/ark:/12148/btv1b6913022n>; Agence Rol, “Torpille dirigible Gabet”, picture, Rol 5070, 31 August 1909, available at: <http://gallica.bnf.fr/ark:/12148/btv1b6912353x>. See also “Invention d’une torpille radio automatique”, *Le Petit Journal*, 14 February 1909.

114 Reminiscent of the words of Orville Wright: “When my brother and I built and flew the first man-carrying flying machine, we thought that we were introducing into the world an invention which would make further wars practically impossible.” Orville Wright to C. M. Hitchcock, letter, 21 June 1917, available at: [http://www.smithsonianeducation.org/educators/lesson\\_plans/wright/flights\\_future.html](http://www.smithsonianeducation.org/educators/lesson_plans/wright/flights_future.html).

115 Paul Aubriot, “Chars d’assaut – premiers efforts” (Tanks – first attempts), in *Le Midi*, 7 September 1918, available at: [http://images.midi.bibliotheque.toulouse.fr/1918/B315556101\\_MIDSOC\\_1918\\_09\\_07.pdf](http://images.midi.bibliotheque.toulouse.fr/1918/B315556101_MIDSOC_1918_09_07.pdf).

116 This pioneering research is described in Peter Singer’s best-seller, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Press, New York, 2009; and in Robert Work and Shawn Brimley (eds), *20YY: Preparing for War in the Robotic Age*, report, Center for a New American Security (CNAS), Washington, DC, 22 January 2014, p. 22, available at: <http://www.cnas.org/20YY-Preparing-War-in-Robotic-Age#UzU9ldhAfeY>.

117 “1919 – Quelques chars, guerre et après-guerre” (1919 – Some tanks, war and post-war), *Vieux-Papiers*, 14 February 2010, available at: <http://vieux-papiers.over-blog.com/article-1919-quelques-chars-guerre-et-apres-guerre-44917424.html>; “Torpille Terrestre” (Ground Torpedo), *Le Bestiaire Extraordinaire de l’Armée Française*, 2005, available at: [http://modelarchives.free.fr/Bestiaire/Torptier\\_P/](http://modelarchives.free.fr/Bestiaire/Torptier_P/); “1915 Cuirasse Aubriot-Gabet”, *Un siècle d’histoire des engins blindés français* (French Armoured Vehicles: A Century of History), available at: [http://www.chars-francais.net/new/index.php?option=com\\_content&task=view&id=787&Itemid=36](http://www.chars-francais.net/new/index.php?option=com_content&task=view&id=787&Itemid=36).



Air power and the temptation of a war without foot soldiers<sup>118</sup>

After 1918, theories began to emerge around the idea of a “contactless” engagement. For air combat, Giulio Douhet, an Italian general, developed the first doctrine of “air power”, a force that relied on strategic bombardments and whose effectiveness would make war with foot soldiers obsolete.

Winston Churchill was one of the first politicians to interest himself in modern ways of using the new aerial weapon. In 1919, when he became Secretary of State for War, he was up against the collapse of military budgets combined with fierce public hostility to the prospect of again seeing Tommies shed their blood. In this situation, a colonial air force seemed like “a manpower-compensating component”.<sup>119</sup> On the advice of General Hugh Trenchard, Churchill decided to set up a permanent contingent of the Royal Air Force (RAF) in Mesopotamia, to deal with the many revolts that were undermining the Empire.<sup>120</sup> In the 1920s, British squadrons successfully carried out several air strike campaigns to suppress rebellions in Somaliland, Iraq, Kurdistan and Waziristan.

It is tempting to draw a parallel with the contemporary situation that has led the American president, Barack Obama, also to gamble on air power (although remotely controlled) to carry out drone strikes in these same areas of Somalia, Iraq, Kurdistan and Waziristan. This choice was also made out of a concern to spare human and material resources, when faced with the necessity of making safe a world shaken by terrorist shocks. Comparing two historical moments is a risky game, but it does have some advantages. Here it reminds us that immediately after the Great War people believed that developing technology for keeping fighters at a distance from one another would make it possible to escape the “blood sacrifice”.

This illusion did not last long – only for the 1920s, in a colonial context featuring a marked asymmetry in material capacity.<sup>121</sup> In 1935, after Adolf

118 This section draws on some ideas originally presented in the article by É. Germain, “L’ennemi...Toujours plus loin”, above note 9, p. 31–32.

119 Colonel Armengaud, “L’aviation militaire au Maroc au cours du 2e trimestre 1925. Les opérations”, *Revue de l’aéronautique militaire*, September–October 1925, p. 101, quoted by Jérôme Millet, “L’aviation militaire française dans la guerre du Rif” (The French air force in the Rif War), *Revue historique des armées*, No. 166, March 1987, p. 49.

120 The efficacy of the British “air control” doctrine was somewhat downplayed on the French side. According to the commander of the colonial air force in Morocco, the experience of the Rif War showed that “it is not enough, as some have feigned to believe, to reach the Rifian in his home with aerial bombings; we must conquer his country’s sensitive points by bringing a column of all kinds of weapons there...”. Colonel Armengaud’s report of 19 July 1925 for his superior, Marshal Lyautey, quoted by J. Millet, *ibid.*, p. 52.

121 An asymmetry that was already precarious, as illustrated by a 1925 intelligence memorandum warning that Abd el-Krim might resort to mercenary pilots for flying his three planes in Morocco. *Ibid.*, p. 57.

Hitler had come to power, and finding himself faced with the prospect of confronting an enemy equipped with similar technology, Winston Churchill critically reassessed an air power that, he said, could as easily put an end to a civilization as to a war.<sup>122</sup>

During the Somaliland campaign in 1920, the use of RAF bombardments was still regarded, ethically, as an exception. The asymmetry of the military resources deployed was justified by the supposed abnormality of the adversary: “religious fanatics” led by a person known in the London press as the “Mad Mullah”. In the following years, air strikes – outside of tactical missions giving “fire support” to troops on the ground – became commonplace and no longer sought any particular ethical justification.

From the Second World War on, high-altitude bombing by the United States (US) air force again raised this ethical question, in a different context, depending on the type of weapon used: conventional in Dresden and Tokyo, nuclear in Hiroshima and Nagasaki. In the spring of 1999, before “precision-guided munitions” became widespread, the North Atlantic Treaty Organization (NATO) bombing in Yugoslavia was to be the last episode in the trade-off – challenged on moral grounds – whereby a high altitude which increased crew safety was given precedence over the aim of reducing collateral damage.

### Today’s challenges of disengaged warfare and detached public opinion

In April 1916, the British 39 Squadron was formed in order to fight the infamous “baby killers” – the Zeppelins. Disbanded several times, the 39 Squadron was reformed on 1 January 2007 to host the pilots of the RAF armed Reaper aircraft at Creech Air Force Base,<sup>123</sup> from which the drone fleets of the US Air Force – and, very probably,<sup>124</sup> the CIA – were also operated. In the past decade the CIA’s “drone war”<sup>125</sup> has brought fresh acuity to the debate on disengaged combat. The

122 Winston Churchill, “...one can clearly see that the conquest of the air may mean the subjugation of mankind and the destruction of our civilization”, House of Commons, 7 June 1935, quoted by Richard M. Langworth (ed.), “Churchill and the ‘Flying Peril,’ 1913–1955”, available at: [http://www.winstonchurchill.org/images/pdfs/for\\_educators/The%20Flying%20Peril.pdf](http://www.winstonchurchill.org/images/pdfs/for_educators/The%20Flying%20Peril.pdf).

123 Royal Air Force, “Remotely Piloted Air System (RPAS): 39 Squadron”, available at: <http://www.raf.mod.uk/organisation/39squadron.cfm>.

124 Chris Woods, “CIA’s Pakistan drone strikes carried out by regular US air force personnel”, in *The Guardian*, 14 April 2014, available at: <http://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary>.

125 A very particular kind of war, with no declaration of war and even no army, with terrorists on one side and a civilian intelligence agency on the other. Moreover, this fleet of armed drones is said to be piloted mostly by operators from private companies, under contract. See Peter W. Singer, “Double-Hatting Around the Law: The Problem with Morphing Warrior, Spy and Civilian Roles”, in *Armed Forces Journal*, Brookings Institution, Washington, DC, 1 June 2010, available at: <http://www.brookings.edu/research/opinions/2010/06/01-military-roles-singer>.

remotely piloted aircraft and their ammunition (which is both miniaturized and “intelligent”) are presented as offering the most technologically advanced countries the promise of completing the transition from the “bloody surgery” (to use Antoine de Saint-Exupéry’s words) of long-distance warfare in 1914 to the “clean surgery” of modern conflicts.<sup>126</sup> We have not yet fully realized that this borderless drone war is being fought after a century-old process of blurring the distinction between front and rear.

Today, when the spouse of a drone pilot is driving her husband to work, does she become a legitimate military target? Many jurists specializing in the law of armed conflict may agree that she does. The questions raised by “cyber warfare” appear just as troubling. The post-traumatic syndromes that affect both cyber-activists and drone pilots show that the reality of the violence they watch is far from disembodied.<sup>127</sup> But does this mean that “cyber-activists” are warriors? Where do their combats take place? The ubiquity of a (no longer merely worldwide, but global) war with the previously unheard-of capabilities offered by remote-controlled, automated forms of technology has radically transformed our concept of military action and the law and ethics relating to it.

On Monday 7 August 1911, announcing the first test of a torpedo controlled by Hertzian waves, the daily newspaper *Le Gaulois* prophesied the transformation of warfare this invention could lead to:

The question of remote control has thus been raised, and it is a good one, and the time is doubtless not far off when, from the Eiffel Tower, our officers will be able to blow up bridges and detonate mines beneath the feet of marching battalions. (...)

When that time comes, we shall see aeroplanes (...) criss-crossing space, blindly obeying orders from the transmitter. (...)

The time is not far off when remote control will perform veritable miracles and will transform (...) war itself.<sup>128</sup>

In one century, Western societies have come from a bloody conflict with over eighteen million casualties<sup>129</sup> to military operations that are both more disembodied and more contained. Are we to regard this as progress in humanizing war?

126 With the accuracy of the air-dropped guided munitions touted in the CNAS report 20YY: *Preparing for War in the Robotic Age*, above note 116, pp. 10–16.

127 There is even talk about hackers being affected by this type of post-traumatic stress disorder. The group of internet activists going by the name of Telecomix – whose We Rebuild campaign has enabled activists from the revolutions in Tunisia, Egypt and Syria to bypass censorship since 2011 – have set up a help unit for members who have been psychologically damaged by viewing unbearable images.

128 “L’œuvre d’un grand français” (The Work of a Great Frenchman), *Le Gaulois*, 7 August 1911, available at: <http://gallica.bnf.fr/ark:/12148/bpt6k5351462.texte>.

129 Philip J. Haythornthwaite, *The World War One Source Book*, Arms & Armour Press, London, 1993. Each camp lost more than nine million lives, both military and civilian.

The laudable concern to save the lives of soldiers and of the civilian population is currently leading to investment in more discreet technology and resources, which are less sensitive to public opinion. The development of weapons and means and methods of warfare for which the involvement and consent of a country's citizens is no longer a requirement is something we should be worried about.

Democracies that have abandoned conscription in favour of professional armies must take care to maintain the conscious, responsible involvement of the nation and its representatives in acts of war carried out in their name. Early in 1917, German Chancellor Theobald von Bethmann Hollweg resigned after failing to contain an all-out underwater war that “placed the fate of the Reich in the hands of a hundred U-boat commanders”.<sup>130</sup> In tomorrow's wars, will it not be just as risky to entrust the artificial intelligence of a hundred totally autonomous future robots with the responsibility of distinguishing between civilians and combatants?<sup>131</sup>

History will perhaps remember that it was actually in 2014, the year of the centenary of the outbreak of the Great War, that an international discussion on the issues at stake in lethal autonomous weapons systems (LAWS) began in Geneva.<sup>132</sup> The particular sensory and cognitive capacities of those future LAWS are still hard to imagine, as the technology is still in its infancy. We do already know, however, that they are likely to be used in a type of ubiquitous warfare that is not completely unknown to us, because most of its distinctive features first emerged during the four years of the First World War.

130 Bernhard Schwertfeger, *Kaiser und Kabinettschef: nach eigenen Aufzeichnungen und dem Briefwechsel des [...] Rudolf von Valentini* (The Kaiser and the Head of Cabinet: from Rudolf von Valentini's own records and correspondence), Gerhard Stalling, Oldenburg, 1931, p. 144, quoted in Bayerische Landeszentrale für Politische Bildungsarbeit, “Keine Chance auf Frieden? Außenpolitik 1917” (No Chance for Peace? Foreign Policy 1917), March 2007, available at: [http://www.blz.bayern.de/blz/eup/03\\_07\\_themenheft/3.asp](http://www.blz.bayern.de/blz/eup/03_07_themenheft/3.asp).

131 On the issues raised by “autonomous lethal robots”, which I include in the wider category of “coercion robotics”, see Éric Germain, “La campagne pour l'interdiction des ‘robots tueurs’ se trompe-t-elle de cible?” (Is the campaign to ban ‘killer robots’ mistaking its target?), in *Le Monde*, 24 June 2013, available at: [http://www.lemonde.fr/idees/article/2013/06/24/la-campagne-pour-l-interdiction-des-robots-tueurs-se-trompe-t-elle-de-cible\\_3435578\\_3232.html](http://www.lemonde.fr/idees/article/2013/06/24/la-campagne-pour-l-interdiction-des-robots-tueurs-se-trompe-t-elle-de-cible_3435578_3232.html).

132 A high-level meeting of experts, chaired by the French ambassador, was held at the Palais des Nations (UN) in Geneva from 13 to 16 May 2014 under the 1980 Convention on Conventional Weapons (CCW); the agendas for the three meetings organized since then, and their final reports, are available at: [http://www.unog.ch/80256EE600585943/\(http://Pages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](http://www.unog.ch/80256EE600585943/(http://Pages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument).



# The ICRC in the First World War: Unwavering belief in the power of law?

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## Abstract

*This article provides insight into how, during the First World War, the ICRC handled the oversight of the respect of the 1906 Convention on the Wounded and Sick and the 1907 Hague Convention on Maritime Warfare, steadfastly working to uphold the law. It examines the ICRC's view on the applicability of the Conventions, describes its handling of accusations of violations of international humanitarian law and, finally, shows how the ICRC engaged in a legal dialogue with States on the interpretation of various provisions in the 1906 Convention.*

**Keywords:** International humanitarian law, Geneva Convention 1906, treatment of the wounded and sick, International Committee of the Red Cross, First World War.

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## Introduction

The First World War is seen as a watershed moment in the history of public international law. The cataclysmic nature of the conflict led many to question

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whether international law itself could survive the onslaught. Yet the international legal system was not broken by the war, and the *ius in bello* itself was eventually strengthened, rather than done away with, after the end of the conflict.

One of the most shocking things about the First World War is the sheer number of killed and wounded, even during lawful combat, in seemingly futile battles. On the western front, hundreds of thousands were killed and wounded in the major battles, with thousands dying “on a quiet day”.<sup>1</sup> From today’s perspective, it seems astonishing that it was not somehow illegal to plan battles in which 10,000 casualties per day – for one’s own side alone – were expected.<sup>2</sup> It seems unconscionable and outrageous that generals continued to send soldiers to walk across fields with almost no protection, directly into the line of machine gun fire, after lengthy but inefficient artillery barrages. The descriptions of the well-known battles of 1914–1918, and the numbers of dead and wounded, are mind-boggling. The law could do little to stop much of that carnage, as much of it was lawful – and still would be today.<sup>3</sup>

Added to that were the millions of prisoners of war (POW), held for years as the war dragged on. Also during the First World War, vast territories were occupied and civilians were dragged into the miasma of total war.<sup>4</sup> Moreover, because it was a war fought between empires, it quickly became a global war, even if western historical memory remains stubbornly fixated on the trenches of Western Europe.<sup>5</sup> Likewise, while the static nature of trench warfare often dominates our impression of the conflict, the beginning and the end of the war was mobile, even in Western Europe; moreover, elsewhere in the world, trench warfare was uncommon.<sup>6</sup>

At the time of the outbreak of the First World War, the International Committee of the Red Cross (ICRC) was “a small philanthropic organization” consisting of about a dozen people.<sup>7</sup> Within two months, it had multiplied by a factor of ten to a staff of 120, and yet again to 1200 only a few months later.<sup>8</sup> How could a little Swiss organization respond effectively to such large-scale carnage and worldwide strife?

1 Leo van Bergen, *Before my Helpless Sight: Suffering, Dying and Military Medicine on the Western Front, 1914–1918*, UK, Ashgate, 2009.

2 Mark Harrison describes the fact that the British public began to consider its servicemen more compassionately beginning in the 1850s. See Harrison, *The Medical War: British Military Medicine in the First World War*, Oxford University Press, 2010, p. 7 ff. See also Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War*, Ithaca, Cornell University Press, 2014, p. 3.

3 Hull makes the same point, *ibid.* See also Stephen Neff, *War and the Law of Nations*, Cambridge, Cambridge University Press, 2005, p. 203, who makes the point that the law at the time was more limited when it comes to prohibitions on certain weapons.

4 Hew Strachan, “The First World War as a global war”, *First World War Studies*, vol. 1, 2010; Marc Ferro, *La Grande Guerre 1914–1918*, Editions Gallimard, 1966 (reprint 1990).

5 H. Strachan, above note 4.

6 David Reynolds, *The Long Shadow: The Great War and the Twentieth Century*, London, Simon and Schuster, 2013, pp. xix–xxiii.

7 Daniel Palmieri, “An institution standing the test of time? A review of 150 years of the history of the International Committee of the Red Cross”, *International Review of the Red Cross*, vol. 95, 2013, p. 7.

8 *Ibid.*, footnote 21 and accompanying text.



New research on humanitarian action of the Great War period is shedding light on the complex constellation of actors and re-shaping the way we think about the early days of the humanitarian movement.<sup>9</sup> The ICRC is well known for its monumental efforts in respect of POWs during the First World War. This article investigates a different facet of the ICRC's work, however. It aims to provide some insight into how, during the First World War, the ICRC handled the oversight of the respect of the 1906 Convention on the Wounded and Sick<sup>10</sup> and the 1907<sup>11</sup> Hague Convention on Maritime Warfare.<sup>12</sup> Its central argument is that, by steadfastly seeking to apply the 1906 and 1907 Conventions, the ICRC demonstrated a stubborn belief in the power of law to limit the nefarious effects of conflict, even in an era of industrialized warfare and at a time when international law itself was in turmoil.

This paper relies on the *International Bulletin of Red Cross Societies* published by the ICRC during the war as one of its key primary sources. The *Bulletin* was an important tool for communication and exchange of information between the Red Cross Committees (today known as National Red Cross or Red Crescent Societies) of all States, which the ICRC had been mandated to facilitate.<sup>13</sup>

## The 1906 Geneva Convention and 1907 Hague Convention X

The First World War broke out on the eve of the fiftieth anniversary of the adoption of the Geneva Convention for the Amelioration of the Condition of

- 9 See for example Annette Becker, *Les Oubliés de la Grande Guerre: Humanitaire et culture de guerre*, Paris, Hachette, 2003; Heather Jones, "International or transnational? Humanitarian action during the First World War", *European History Review*, vol. 16, 2009; Bruno Cabanes, *The Great War and the Origins of Humanitarianism 1918–1924*, Cambridge, Cambridge University Press, 2014; Branden Little, "An explosion of new endeavours: global humanitarian responses to industrialized warfare in the First World War era", *First World War Studies*, vol. 5, 2014; see also other articles in the same "Special Issue: Humanitarianism in the Era of the First World War", *First World War Studies*, vol. 5, 2014. For histories of the ICRC with a section on ICRC action during the First World War, see John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Colorado, Westview Press, 1996, pp. 280–285; André Durand, *History of the International Committee of the Red Cross: from Sarajevo to Hiroshima*, Geneva, Henry Dunant Institute, 1978/1984; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Geneva, ICRC, 2003.
- 10 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906 (entered into force 9 August 1907).
- 11 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907 (entered into force 26 January 1910).
- 12 There are many other important aspects of its work that are interlinked with this issue – in particular, its position on the use of poison gas, which deserves further research in its own right. See also Leo van Bergen and Maartje Abbenhuis, "Man-monkey, monkey-man: neutrality and the discussions about the 'inhumanity' of poison gas in the Netherlands and International Committee of the Red Cross", *First World War Studies*, vol. 3, 2012, among others.
- 13 See *Bulletin International des Sociétés de la Croix-Rouge*, no. 2, January 1870, p. 60. Berlin Conference of 1869. The first *Bulletin International des Sociétés de la Croix-Rouge* (BISCR) was published in October 1869, and it appeared four times per year thereafter. The limited primary sources on which this paper is based (ICRC Archives) means that it cannot claim to be part of a "critical" history of the institution, but hopefully makes a meaningful contribution to the debate. See also the contribution of Daniel Palmieri in this volume.

the Wounded in Armies in the Field of 1864.<sup>14</sup> The 1864 Convention was only ten articles long and had proven to be relevant but insufficient as early as 1871, following the Franco-Prussian war.<sup>15</sup> It was revised in 1906 following the Russo-Japanese war, around the same time as the revision of the Hague Conventions of 1899.

The 1906 Geneva Convention contained thirty-three articles and was similar in substance to the 1929<sup>16</sup> and 1949<sup>17</sup> Conventions on the Wounded and Sick, which contain thirty-nine and sixty-four articles, respectively. It required that the wounded and sick be ‘respected and cared for, without distinction of nationality, by the belligerent in whose power they are.’<sup>18</sup> It set down obligations to search for the wounded after every engagement and ‘to protect the wounded and dead from robbery and ill treatment’, and required that the dead be properly interred and that information on the wounded, sick and dead be forwarded to the authorities of their country.<sup>19</sup> Furthermore, it provided rules on the protection of medical personnel of the armed forces – the ‘sanitary formations’ in the language of 1906.<sup>20</sup> Much like the law as it exists today, in 1906 medical personnel were protected from attack as long as they were not “used to commit acts injurious to the enemy”.<sup>21</sup> Finally, the Convention contained rules on the return of medical personnel who had fallen into the hands of the enemy.<sup>22</sup> The interpretation and application of these latter rules was a source of controversy during the war, one which illustrates an important aspect of how the ICRC engaged in a dialogue on the interpretation of international humanitarian law (IHL) at the time.

In addition to the 1906 Convention, the ICRC oversaw the implementation of Hague Convention X of 1907<sup>23</sup>, which essentially contained the adaptation of the Geneva Convention on Wounded and Sick to conflicts at sea.<sup>24</sup>

14 Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field, Geneva, 22 August 1864 (entered into force 22 June 1865).

15 E. Odier, “La Convention de Genève par le Dr. C. Lueder”, *BISCR*, no. 26, April 1876, p. 84.

16 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

17 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

18 Article 1 of the 1906 Convention.

19 Articles 3 and 4 of the 1906 Convention.

20 Articles 6–9 of the 1906 Convention.

21 Article 7 of the 1906 Convention.

22 Articles 9 and 12 of the 1906 Convention.

23 Hague Convention on Maritime Warfare, above note 11.

24 Hague Convention X of 1907 was the revised version of Hague Convention III of 1899. See Neville Wylie, “Muddled Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906”, in Maartje Abbenhuis, Annelise Higgins and Christopher Barber (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907*, Abingdon, Routledge, forthcoming.

## Role of the ICRC in implementation of the 1906 Convention

The 1906 Convention did not give the ICRC a formal role in overseeing its implementation.<sup>25</sup> States seem, however, to have expected it to be involved in monitoring and the ICRC did so in the following ways: first, by reminding States parties to the conflict of their obligations under the Convention; second, by transmitting and publishing allegations of violations of the Convention it received; and third, by issuing legal interpretations of the 1906 Convention and 1907 Hague Convention X, initiating a dialogue with States on the interpretation of the law. Its closely related activities included working to enable the repatriation of severely sick and wounded POWs and issuing a very small number of appeals on its own initiative. These all occurred in addition to its efforts to coordinate the work of National Societies, which were very active as auxiliaries to the medical services of the National Armed Forces, and, of course, alongside its work in favour of POWs.<sup>26</sup>

### Reminding the Parties of their obligations under the Convention

For the law to be effective, States have to know it applies and give orders to comply with it. From the very start of the war, in August 1914, the ICRC had received complaints of violations of the 1906 Convention. Citing an attack on a hospital, the Austrian Red Cross requested the ICRC to remind all belligerents of their obligations under the 1906 Convention.<sup>27</sup> On 21 September 1914, the ICRC thus issued what may be considered its first “*rappel du droit*”: it sent an appeal to all States parties to the conflict, reminding them of the need “to ensure the rigorous and faithful application” of the Geneva Convention of 1906.<sup>28</sup>

The appeal stated:

To the highest authorities of the belligerent powers

The International Committee of the Red Cross respectfully takes the liberty to remind your government of the need to see to it that the Geneva Convention of 6 July 1906 is rigorously and faithfully applied.

The accusations that have been expressed on both sides and reproduced by the press seem to show that the provisions relating to the respect of wounded and sick, without distinction of nationality, and to the protection of medical personnel and equipment ... are not sufficiently observed.

25 The ICRC had been given the mandate, through the Resolutions adopted at Red Cross Conferences, to coordinate the work of the National Societies.

26 See especially A. Durand, above note 9, pp. 31–96; J. Hutchinson, above note 9, pp. 280–283. The ICRC’s role in assessing legal aspects of the treatment of POWs is beyond the scope of this article.

27 *BISCR*, vol. 45, no. 180, October 1914, pp. 239–240. Also reprinted in André Durand, *De Sarajevo à Hiroshima*, p. 36.

28 A *rappel du droit* is probably best thought of as a kind of *note verbale*.

The extent of the battlefields and size of the armies present doubtless make monitoring difficult at times, but we are convinced that if precise instructions are given to army commanders, the Geneva Convention will be respected everywhere and always, for the greater good of the belligerents.

In appealing to your government, the International Committee, central organ of the Red Cross Societies, whose intervention is founded solely on its recognized moral authority, is conscious of its duty to fulfil the humanitarian mission that has been conferred on it.

It hopes that its voice will be heard by all and will contribute, by recalling the charitable purposes of the Convention, to improve the fate of wounded or sick soldiers.<sup>29</sup>

At the time of the outbreak of the First World War, the ICRC was in the practice of issuing a bulletin to all Red Cross and Red Crescent National Societies at the beginning of an armed conflict to encourage all National Societies to assist the States in conflict. The appeal of 21 September 1914, however, is the first instance of an appeal directly to State governments to respect their obligations under the Convention.<sup>30</sup>

The tone of the appeal suggests the ICRC had some trepidation about taking this initiative. It was careful to emphasize that its appeal to States was based solely on its recognized moral authority and reiterated that it was conscious of its own need to fulfil the humanitarian mission with which it is entrusted. Furthermore, when it reprinted the appeal in the *Bulletin*, the ICRC pointed out that it issued the appeal at the behest of the Austrian Red Cross.<sup>31</sup>

Nowadays, it is standard ICRC practice to provide a document known (in the ICRC) as a “rappel du droit” to each party to an armed conflict. This document outlines, in the ICRC’s view, certain key legal obligations of the parties during the conflict and serves as the basis for the ICRC’s dialogue with the parties to the conflict.<sup>32</sup>

When it comes to the substance of the appeal, two aspects stand out. First of all, the expression of the ICRC’s conviction as to the effectiveness of precise instructions for ensuring the respect for the law in the third paragraph of the appeal demonstrates that, already at the time, the ICRC clearly understood that for the Conventions to be effective, armed forces needed to be instructed to do

29 *BISCR*, no. 180, October 1914, pp. 239–240 (author’s translation).

30 During the Franco-Prussian war of 1870–71, instead of issuing the appeal itself, the ICRC planned to ask the Swiss Federal Council to obtain the word of the French and German governments that they would “se conformer” not only to the 1864 Geneva Convention, but also to the 1868 draft articles (that had not been ratified). By coincidence, the Swiss had already planned to do so. See *BISCR*, no. 5, October, 1870, pp. 10–11. At the time of the Russo-Japanese war, the ICRC sent an offer of services to the National Societies of Russia and Japan and published their responses in the *Bulletin*. See *BISCR*, no. 137, January 1904, p. 136.

31 *BISCR*, no. 180, October 1914, p. 239.

32 For examples of notes verbales, or *rappels du droit*, see ICRC, “Conflict in the Middle-East”, *International Review of the Red Cross*, vol. 31, issue 280, 1991, pp. 22–28.

what their States had signed up for. Article 26 in the 1906 Convention called for its dissemination to troops and “to the people at large”; educating armed forces and the public on the rules of IHL continues to this day to be an important aspect of the work of States, national Red Cross and Red Crescent societies, and the ICRC to ensure the laws of armed conflict are respected.<sup>33</sup> The obligations to respect and ensure respect of the Convention as well as to ensure its execution have, furthermore, been reinforced in the subsequent iterations of the Geneva Conventions.<sup>34</sup>

In this light, it is interesting to note that Isabel Hull, an American historian, has argued in respect of the First World War that the States that had integrated the obligations in the various Geneva and Hague Conventions into their military manuals and distributed them to their forces long before the war showed, in her analysis, better overall respect for international law during the war.<sup>35</sup>

The second aspect in relation to the *rappel du droit* is more surprising from a legal point of view. Curiously, legally speaking, the 1906 Convention did not formally apply during the First World War. The 1906 Convention contained a *si omnes* clause, which meant that it only applied in a conflict if *all parties to the conflict* were parties to the Convention.<sup>36</sup> In 1919 Paul des Gouttes, Secretary of the ICRC and the principal legal adviser at the time, published an article in the very first issue of the *International Review of the Red Cross* in which he summarized the law applicable during the conflict.<sup>37</sup> He acknowledged that, since Montenegro was not a party to the 1906 Geneva Convention and had been a party to the conflict since the start of the war, “we must conclude that in *strict law the Geneva Convention of 6 July 1906...never had binding force, in this war, for the belligerent States.*”<sup>38</sup>

Was the ICRC conscious of this state of affairs when it issued the appeal to States to respect the 1906 Convention? Given that the issue of the *Bulletin* of July 1914 (just prior to the outbreak of the war) was a special issue commemorating the fiftieth anniversary of the 1864 Convention, containing lists of States signatories or adherents to the 1864 and 1906 Conventions, and given that it listed Montenegro with no date of signature or ratification of the 1906 Convention, it was certainly in a position to be aware of this lacuna.<sup>39</sup>

33 See also the updated Commentary on Article 47 of the First Geneva Convention, ICRC, *Commentary on the First Geneva Convention*, 2016.

34 See especially Article 1 common to all four Geneva Conventions and Article 45 of the First Geneva Convention. The predecessor to Article 45 is Article 25 in the 1906 Convention: “It shall be the duty of the commanders in chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this convention.”

35 I. Hull, above note 2, pp. 83–88.

36 Article 24 of the 1906 Convention reads: “The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention”.

37 Paul Des Gouttes, “De l’applicabilité des Conventions de La Haye de 1889 [sic] et de 1907, ainsi que de celles de Genève de 1864 et de 1906”, *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, vol. 1, issue 1, 1919, pp. 3–10.

38 *Ibid.*, pp. 9–10, emphasis in original (author’s translation).

39 *BISCR*, no. 179, July 1914, pp. 171–174.

The Hague Conventions also contained *si omnes* clauses. Beginning in 1917, the ICRC published assessments on the applicability of 1907 Hague Convention X.<sup>40</sup> It did so to substantiate the legal basis of a communication it had issued condemning the decision announced by the German Imperial government that it would torpedo and sink, without warning and without distinction, all hospital ships leaving a specified zone of the English Channel and the North Sea.<sup>41</sup> The first study, published in 1917, concluded that since all parties to the conflict had signed the 1899 and 1907 Hague Conventions on maritime warfare, the 1907 Convention was fully applicable between them.<sup>42</sup>

That interpretation was updated in a second study in 1918 to take into account the entry of twelve additional States in the war. In addition, that study amended the interpretation of 1917, which had concluded that since all States were *signatories* of the 1907 Maritime Convention, they were all bound by it.<sup>43</sup> That interpretation had not given full weight to Article 25 of that Convention, which requires that the Convention be ratified, and not just signed, to be binding.<sup>44</sup> Since Serbia and Montenegro had signed but not ratified the 1907 Hague Convention X, it was never binding. Furthermore, in regard to the Hague Convention (IV) on land warfare of 1907, the ICRC had acknowledged in the *Bulletin* in 1918 that even the 1899 version of that Convention had only been in force until August of 1917, when Liberia and Costa Rica entered the war.<sup>45</sup> Arriving at this conclusion, the ICRC insisted that it was best to have a rigorous legal interpretation, even if the result was negative. However, it went on, the tribunal of public opinion would judge the actions of States, no matter the niceties of the law.<sup>46</sup>

Considering the grave concerns with respect to the protection of hospital ships that arose during the war, and the fact that the ICRC based its vast activities for POWs on another of the Hague Conventions (and a resolution of the International Conference in 1912), the *de jure* non-applicability of the Hague Conventions had potentially serious consequences. However, in the article published in 1919, after the armistice, Paul des Gouttes insisted that no State denied the applicability of the Conventions on this basis.<sup>47</sup> He emphasized that

40 “Le torpillage des navires-hôpitaux: Etude de droit et de fait”, *BISCR*, vol. 48, no. 191 July 1917, p. 223; “De l’applicabilité des Conventions de La Haye de 1899 et de 1907 concernant les lois et coutumes de la guerre sur terre”, *BISCR*, vol. 49, no. 193, January 1918, p. 18.

41 The communication was published in *BISCR*, vol. 48, no. 190, pp. 140–142. See also *BISCR*, vol. 48, no. 191, July 1917, pp. 223–236.

42 *BISCR*, vol. 48, no. 191, July 1917, pp. 226–227.

43 Original interpretation: *BISCR*, vol. 48, no. 191, July 1917, pp. 226–227. Revised interpretation: *BISCR*, vol. 49, no. 193, January 1918, pp. 18–27.

44 See Paul des Gouttes, above note 37, p. 3. According to des Gouttes, this was a change from the 1899 Convention to the 1907 Convention – the 1899 Convention required only signature.

45 “De l’applicabilité des Conventions de La Haye de 1899 et de 1907 concernant les lois et coutumes de la guerre sur terre”, *BISCR*, vol. 49, no. 193, January 1918, p. 26. See, however, I. Hull, above, note 2, p. 89, stating that the Hague Convention II of 1899 was “in effect for the entire First World War” (citing Oppenheim).

46 *Ibid.*, pp. 26–27.

47 P. des Gouttes, above note 37, pp. 6 and 7.

States continued to consider themselves bound by the Conventions and, furthermore, that they developed the agreements on POWs on the basis of the Hague Conventions of 1899 and 1907.<sup>48</sup>

It is perhaps not entirely accurate to say that the applicability of the Hague Conventions was never challenged, however, as the following example illustrates. In November of 1914, Turkey had requested permission from Russia for free passage of its hospital ships through the Black Sea. Russia refused on the grounds of the “delay taken by Turkey in ratifying this Convention”.<sup>49</sup> In the *Bulletin*, the ICRC characterized this refusal as “purely formalistic” and “incapable of excusing the refusal which renounced all efforts to date to lessen the evils of war and to diminish the suffering that results from it.”<sup>50</sup> The ICRC’s position is consistent with its initial analysis that States that had signed, but not ratified, the Conventions were bound by them, on the basis of the 1899 text.

Despite this example, the picture painted by des Gouttes is, however, not inappropriately rosy. To the best of the author’s knowledge, other than this example, the response of States to the allegations of violations of the various Hague Conventions was not based on a general denial of the *de jure* applicability of the Conventions themselves or of a denial of the legal obligations therein.

Remarkably, however, neither of the studies published by the ICRC assessed the applicability of the 1906 Geneva Convention. According to des Gouttes, its applicability had never been questioned.<sup>51</sup> This was the case until almost the end of the war. It turns out that the question of its applicability was raised in one case, however. The United States, on the basis of the *si omnes* clause, stated its view that the Convention of 1906 was not applicable.

The issue arose when Dr Ferrière, on behalf of the Medical Personnel service of the International Prisoner of War Agency, proposed to contact the German Minister of War to request the release of twelve American medical personnel who were being interned in a German POW camp.<sup>52</sup> This proposal was accepted by the American Red Cross and the ICRC followed up on it.<sup>53</sup> The German War Ministry responded by saying that since the United States does not consider the Geneva Convention (1906) binding in the conflict, it did not see any reason to treat medical personnel in accordance with the treaty.<sup>54</sup> The President of the ICRC quickly followed up on the matter with the United States legal officer in Berne, who confirmed it as correct. The ICRC subsequently contacted

48 *Ibid.*

49 Original: “retard apporté par la Turquie à la ratification de cette Convention [Hague].”

50 *BISCR*, no. 181, January 1915, pp. 18–21 (author’s translation).

51 P. des Gouttes, above note 37, p. 10.

52 Letter (no. 8247) from Dr Ferrière to Carl P. Bennett (American Red Cross), 4 July 1918. Archives, CICR, A CS 069.

53 Letter (no. 8387) from Dr Ferrière to M le Docteur Hecker (Department of Medicine, War Ministry), 22 July 1918, Archives, CICR, A CS 069.

54 Letter in response to letter no. 8387, From “J.A.” (War Ministry) to the ICRC, 6 September 1918. Curiously, the ICRC does not seem to have pursued the avenue that this state of affairs opened up, which would have been to rely on the 1864 Geneva Convention and the principle that medical personnel must be entirely at liberty to choose whether they remain or return to their forces (Article 3), Archives, CICR, A CS 069.



the American Ambassador in Berne, expressing its “astonishment” at this interpretation.<sup>55</sup> It pointed out that “the American Red Cross, this gigantic institution in its international action is rooted in this convention”, and went on to say, “and we cannot well understand how today America says that the Convention is not binding upon her.” The letter emphasized that “All the belligerents especially the great Powers have always insisted on the principles of the Geneva Convention being enforced, and the newly made agreements between them on prisoners have taken the Convention as [their basis].” It closed with an enquiry as to whether America “maintains her point of view concerning the Geneva Convention.”<sup>56</sup>

The ICRC received confirmation of the legal interpretation of the United States on 9 December 1918, probably as the *Bulletin* was going to press and a month after the armistice was signed. This seems to be the most likely explanation for why des Gouttes appeared not to be aware of the issue earlier.<sup>57</sup>

In any case, the consequence is that, strictly speaking, as the 1864 Geneva Convention had no *si omnes* clause, the parties to it were bound by it throughout the First World War. However, aside from the American case described above, the *de jure* inapplicability of the 1906 Convention does not seem to have had any real impact on the treatment of the wounded and sick or the protection of medical personnel throughout the war.

Following the First World War, the *si omnes* clause was done away with. The ICRC had acknowledged in its studies on the Hague Conventions that the clause had been designed to ensure that States would be on an equal footing in a conflict, but that it was inserted at a time when no one had foreseen a conflagration like the First World War, with entirely distinct fronts and many parties.<sup>58</sup> In fact, the revised Conventions expressly rejected any approach that resembled the *si omnes* clause:

The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.<sup>59</sup>

55 Letter (no. 6048) from President Naville to Minister Stovall, 23 September 1918, Archives CICR, A CS 069. Note that the US Ambassador in Bern during the war had the title “Envoy Extraordinary and Minister Plenipotentiary”, which explains the use of the title “Minister”.

56 *Ibid.*

57 The letter from the United States Legation in Berne explaining the position based on Article 24 of the 1906 Convention was sent to Mr Naville on 9 December 1918, and des Gouttes’ article appeared in the January 1919 issue of the *International Review*. See Letter from R. [sic, P.] Stovall to Edouard Naville, 9 December 1918, A, CICR, A CS 069.

58 *BISCR*, vol. 48, no. 191, July 1917, p. 225. See also *BISCR*, vol. 49, no. 193, January 1918, p. 23.

59 Article 25 of the 1929 Convention on Wounded and Sick.

Article 2 common to the 1949 Geneva Conventions extends this principle even further, stating:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

In his commentary on the 1929 Geneva Convention on Wounded and Sick, Paul des Gouttes emphasized the evolution away from the *si omnes* clause and again reiterated that States had not claimed that the Convention did not apply to justify non-compliance during the First World War. Des Gouttes wrote, “the facts, backed by the signatures of the signatories and by the humanitarian interests of all, outweighed the law.”<sup>60</sup>

### Publication and transmission of allegations of violations of the 1906 Geneva Convention and 1907 Hague Convention

During the First World War, over the period 1914–1919, the ICRC published close to eighty allegations of violations of the 1906 Geneva Convention and 1907 Hague Convention on Maritime warfare in the *Bulletin*.<sup>61</sup> In fact, there was a section in every *Bulletin* published during the war entitled, “Complaints” (in French: “Protestations”). These allegations were not based on the ICRC’s own observations; rather, they were allegations received from the central committees of the National Red Cross or Red Crescent Societies of the States involved in the war. This method of oversight may come as a surprise for those familiar with the organization’s longstanding (and present-day) methods of working, and especially its confidential approach.<sup>62</sup>

From a historical perspective, it is interesting to note that as early as 1870, the ICRC was requested to denounce alleged violations of the 1864 Geneva Convention. However, taking the view that it could be counter-productive to decry each and every alleged violation, it decided to only raise its voice when the facts were general and undeniably common knowledge.<sup>63</sup> Furthermore, throughout the 1870s it expressed a preference for working quietly behind the

60 P. Des Gouttes, *Commentaire de la Convention de Genève de 1929 sur les blessés et maladies*, ICRC, 1930, p. 188; quoted in J. Pictet (ed.), *Commentary on the First Geneva Convention*, Geneva, ICRC, 1952, p. 34.

61 A. Durand, above note 9, p. 38.

62 ICRC, “The International Committee of the Red Cross’s (ICRC’s) confidential approach: Specific means employed by the ICRC to ensure respect for the law by State and non-State authorities. Policy document. December 2012”, *International Review of the Red Cross*, vol. 94, no. 887, 2012, pp. 1135–1144. See also ‘Memorandum: The ICRC’s privilege of non-disclosure of confidential information’, *International Review of the Red Cross*, vol. 97, issues 897/898, 2015, pp. 433–444.

63 *BISCR*, no. 5, October 1870, p. 11. In the words of the *Bulletin*, “d’une notoriété incontestable”. There may have been such requests made during the wars prior to the beginning of publication of the *Bulletin*, but the ICRC’s archives have not been consulted on this point.

scenes to encourage respect of the 1864 Geneva Convention.<sup>64</sup> Nevertheless, at the beginning of the Second World War, the ICRC reserved the right to publish the allegations of violations it received.<sup>65</sup> Max Huber, writing prior to the outbreak of the Second World War, stated that as a rule, it generally did so.<sup>66</sup>

The ICRC's reason for transmitting the allegations of violations it received was to encourage States to investigate them so that they could take measures to stop violations by their own armed forces.<sup>67</sup> One of the reasons the ICRC published the allegations in the *Bulletin* was that it was the principal tool of communication with all National Red Cross Societies. The ICRC therefore sought to inform all National Societies that were or could become active (in particular as auxiliaries to the medical service of the armed forces) of the issues that arose in the course of the conflict. The publication in the *Bulletin* did not occur in lieu of confidential communication with governments, but alongside it.

At the beginning of the First World War (at the time, the "European War"), the ICRC stated as its policy that it would publish some of the protests or allegations of violations received from the parties without ascertaining the veracity of the complaints therein and would also publish the responses received.<sup>68</sup> It did not publish all of the complaints it received, leaving aside those that the governments had made reciprocally or that they had sent to all powers, as it considered that such complaints were outside of its sphere of responsibility ("ressort").<sup>69</sup> Furthermore, in general the ICRC limited itself to publishing complaints regarding the implementation of the 1906 Geneva Convention and 1907 Hague Conventions on maritime warfare and aspects of the other Hague Convention related to POWs. However, even if the letters contained complaints of alleged violations of other aspects of the law, such as on the conduct of hostilities (attacking undefended towns), it seems that they were not necessarily redacted before publication.

64 *BISCR*, no. 25, April 1876, pp. 164–165.

65 "Memorandum sur l'activité du Comité international de la Croix-Rouge en ce qui a trait aux violations du droit international", *BISCR*, September 1939, vol. 70, no. 445, pp. 766–769.

66 Max Huber, "Croix-Rouge et neutralité", *Revue Internationale de la Croix-Rouge*, 18th year, May 1936 p. 359. The research undertaken for this paper did not include an empirical analysis to determine the accuracy of Huber's statement.

67 The Stenographic notes from the Stockholm Conference in 1948 reveal the ICRC's motivation for doing so, and also its despair at the end of the Second World War in relation to the effectiveness of this practice and the lack of investigations following the receipt of a complaint. See *XVIIe Conférence Internationale de la Croix-Rouge* (Stockholm, August 1948), Commission Juridique, Sténogramme des séances, "Sixième séance", 28 August 1948, pp. 121–124.

68 "La guerre européenne", *BISCR*, no. 180, October 1914, pp. 241–242. This was a continuation of a practice it had developed in the Balkan wars prior to the First World War. They also said, "Nous mentionnons, sous la rubrique des pays respectifs, les mémoires et rapports des commissions d'enquêtes officielles, dont les affirmations, ne fussent-elles que partiellement vraies, sont un tissu d'indescriptibles horreurs et procurent un invincible haut-le-cœur. Il ne nous appartient pas, heureusement, de nous prononcer à cet égard. Tout au plus pouvons-nous mentionner ici les violations précises de la Convention de Genève qui ont été portés directement à notre connaissance." "La guerre européenne", *BISCR*, no. 183, July 1915, p. 303 (but see also summary of reports in that issue, pp. 353 and 388–289).

69 "La guerre européenne", *BISCR*, no. 180, October 1914, p. 241.

The style and format of the complaints varies widely. They range from letters up to ten pages long, alleging a whole slew of violations, to telegraphs succinctly alleging one. Some included statements similar to depositions or witness statements that formed the basis of the complaint and yet others (allegations and responses) were apparently supported by photos.<sup>70</sup> Following the publication of the allegation of a violation, the ICRC published any response received from the National Society to which it was addressed. These responses were often drafted by the army high command and transmitted to the National Society to send on. In some cases, there was also a rejoinder. In rare cases, the ICRC also weighed in on the facts when it transmitted the letters from one Red Cross society to another.<sup>71</sup>

This exchange can be seen as creating a kind of forum in which States could work out the contours of the obligations of the 1906 Convention. In terms of substance, approximately thirty complaints alleged attacks on hospitals, dressing stations, or medical facilities by aerial bombardment or land attacks.<sup>72</sup> A further twenty or so alleged ill-treatment of medical personnel or of the wounded and sick, including capturing and arresting medical personnel, firing on the wounded and sick and alleged orders to fire on the wounded.<sup>73</sup> A small number of complaints addressed violations of the use of the Red Cross emblem. In regard to the 1907 Hague Convention on Maritime Warfare, the ICRC published in the *Bulletin* fifteen allegations relating to the seizure, torpedoing, bombardment and free passage of hospital ships.<sup>74</sup>

As a general rule, the ICRC did not comment on the well-foundedness of the complaints and announced that it would not investigate or interfere. This was particularly the case where the parties were alleging violations of the Convention that involved unlawful attacks on hospitals, ambulances, wounded and sick, or medical personnel. This is logical: the ICRC was not in a position to have first-hand knowledge of the circumstances leading to the complaint or to verify the complaint. However, it seems to have taken a slightly different approach in the situation of complaints involving requests, such as for the granting of free passage of a hospital ship, or the return of medical personnel. In these cases, the ICRC seems to have concluded that it could add its voice in support of the plea to

70 In at least one case, however, the ICRC pointed out that it had not received any photos along with the letter it reprinted, and presumably for that reason, no photos were reproduced in the *Bulletin*. See “La guerre européenne”, *BISCR*, no. 189, January 1917, pp. 15–17.

71 See, for example, the letter sent on 29 April 1916, in relation to the torpedoing of the hospital ship *Portugal*. In its letter of transmission to the Ottoman Red Crescent, the ICRC acknowledges that it cannot say whether, as the Ottoman government had alleged, the ship was being used as a troop transport and was not marked as a hospital ship in accordance with the Hague Convention, but it recalls that it had officially communicated that the *Portugal* was a hospital ship. *BISCR*, no. 187, July 1916, pp. 285–286.

72 See the enumeration of complaints in the *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, pp. 14–16.

73 See *ibid.* pp. 16–18. Numbers are approximate because the ICRC included complaints of allegations regarding events occurring during the Russian Revolution and other conflicts that followed the First World War in its 1921 Report.

74 *Ibid.* pp. 18–19.

respect the Convention. This occurred in relation to the request for free passage of a hospital ship (described above)<sup>75</sup> and is apparent in its publication of its views on the return of medical personnel (described below).

The replies published in the *Bulletin* unquestionably substantiate des Gouttes' claim that States did not invoke the *de jure* non-applicability of the Conventions to justify any violations. Thus, in a sense, what plays out in these pages can be seen as an interpretation of the law at the time.<sup>76</sup> At the same time, most often it comes down to a question of fact, with the parties to the conflict each presenting opposing views of the circumstances of the alleged violation.<sup>77</sup>

One must be careful not to misconstrue this manner of proceeding publically in dealing with allegations of violations by States as the ICRC engaging in a fully public dialogue with States in respect of the 1906 Convention. Although it is surprising that the ICRC published these allegations and responses in the *Bulletin*, rather than privately transmitting them to the governments concerned, it is important to note that it was not the ICRC itself alleging the violations.

Furthermore, it should be recalled that reciprocity and reprisals were heavily used during the First World War, to the grave detriment of the victims. The ICRC was acutely aware of the risk of reprisals – especially against POWs – and it appealed to the parties to stop using them.<sup>78</sup> There is also evidence that it worked behind the scenes to encourage parties to avoid creating circumstances that could give rise to reprisals. Thus we must surmise that the ICRC somehow weighed the potential costs in terms alleged violations being used to justify reprisals or for propaganda purposes and concluded that it was nevertheless beneficial to publish allegations received. On the other hand, reciprocity was a factor in the refusal to return medical personnel.

It is difficult to assess how representative the complaints were of the situation on the ground. It seems that some States (via their national societies) were more prone than others to complain to the ICRC regarding the implementation of the Conventions.<sup>79</sup> Furthermore, it is difficult, if not impossible, one hundred years after the fact, to properly assess the effectiveness of the approach of the ICRC at the time. One would also need to examine the relevant files in national archives, which unfortunately was not possible for this paper. Even so, the dialogue on the content of the obligations in the 1906 Geneva Convention and 1907 Hague Convention that it permitted provides a little

75 See above note 49 and accompanying text.

76 For example, in *BISCR*, vol 47, no. 185, January 1916, pp. 23–29.

77 In one case it was suggested that recourse be had to an arbitral tribunal, but this proposal was rejected. Baron von Spiegelfeld of the Austrian Red Cross made the suggestion. See *BISCR*, no. 188, October 1916, pp. 391–394.

78 Appeal of 12 July 1916. Again, the ICRC published the responses it received to its appeal in the *Bulletin*, *BISCR*, No. 188, October 1916, pp. 379–387.

79 Daniel Segesser made this point during the conference “Law as an Ideal? The Protection of Military and Civilian Victims to the Test of the First World War”, Geneva, 26–27 September 2014. He argues that the propensity of Balkan states to send protests to the ICRC flows from the action of the ICRC during the Balkan wars immediately preceding the First World War. By 1919, however, the ICRC remarked that governments were now contacting it directly in regard to violations, instead of going through Red Cross or Red Crescent National Societies. *BISCR*, no. 204, August 1919, p. 1000.

glimpse of how States understood the Conventions at the time. Furthermore, it substantiates des Gouttes' remarks at the end of the war that States did not attempt to justify violations by claiming that the Conventions did not apply. Given the turmoil in the international system at the time, it is indeed worthy of note that States did not seek to escape the limits set by the *ius in bello* in their entirety by insisting on the technical inapplicability of the law.

For the ICRC, this public dialogue served another important role. In an article published in 1920, des Gouttes, pleading for further codification of IHL, wrote,

Was it not a tribute to these conventions, flouted/besmirched though they were, that concern was shown on all sides to excuse one's own lapses, to try to justify the violations committed? We have constantly observed it during this war, and we cannot help believing in a better future in which, guided by precise and applicable texts, the fear of public stigma will stay the criminal arm.<sup>80</sup>

This is perhaps an odd trait of international lawyers – to seem less concerned by “violations” of a rule when at least the State engaging in that behaviour does not seek to assert that in fact there is no such rule. For international lawyers, these kinds of responses are taken as strengthening the legal norm because they do not call the norm itself into question. For those on the battlefield, however, paying lip service to the Conventions brings little or no relief. Des Gouttes' remarks also suggest that he fervently hoped that more detailed legal norms and morality would be mutually reinforcing and lead to more humane behaviour in wartime.

## Engaging in dialogue on the law by issuing legal interpretations

During the conflict, the ICRC also published its own interpretations of the 1906 Geneva Convention and 1907 Hague Convention on Maritime Warfare in the *Bulletin*, focusing on two topics of great concern to it.<sup>81</sup> This article will focus on the ICRC's interpretation of the rules on the retention of medical personnel under the 1906 Geneva Conventions.

Very early in the war, France and Germany were not returning each other's medical personnel, arguably contrary to what they were supposed to do under Article 12 of the 1906 Convention. Article 12 reads:

Persons described in Articles 9, 10, and 11 [medical personnel] will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power. When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as

80 Paul des Gouttes, “Les Conventions de la Haye de 1899 et de 1907 d'après le professeur A. Pillet”, *Revue Internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge*, vol. 2, issue 13, 1920, pp. 22–26, at p. 26 (author's translation).

81 See for example “Le torpillage des navires-hôpitaux Etude de droit et de fait”, *BISCR*, no. 191, July 1917, pp. 223–236.

may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

Article 9 of the Convention stipulates that medical personnel may not be treated as POWs, meaning they may not simply be held until the end of hostilities. According to the ICRC's report at the end of the war:

By the end of 1914, hundreds of doctors and many more than a thousand nurses and stretcher bearers, as well as many male and female persons from National Red Cross Societies and hundreds of military chaplains had been retained for weeks, or even months, since the fighting of August and September. They were held, inactive or almost inactive, in concentration camps or fortresses.<sup>82</sup>

As with all legal provisions, there is some room for interpretation in the terms of this article. For example, what circumstances suffice to conclude that “their assistance is no longer indispensable”? Are there limits on what it means to “continue” in the exercise of their functions? Does it include being transported with the members of the armed forces they serve to POW camps far away from where they were captured? If so, for how long? Can “continue” be interpreted to include providing care for new health problems that arise among the POWs during captivity, or is it limited to providing the care immediately needed by the wounded at the time of their capture? Can they be retained on the grounds that their assistance is needed (“indispensable”) to care for the wounded and sick of the detaining powers’ own armed forces?<sup>83</sup>

In the January 1915 *Bulletin*, which was the second one published since the start of the war, the ICRC expressed some reserve as to the appropriateness of providing an interpretation on Articles 9 and 12.<sup>84</sup> Nevertheless, it then proceeded to do just that in a fifteen-page-long essay, which was carefully reasoned, insisting on the law and the spirit of the agreement. The interpretation relied on treaty interpretation techniques familiar to today’s international lawyers, including paying attention to the plain meaning of the words,<sup>85</sup> the intentions of the drafters and the works of the most renowned publicists of the time from Belgium, France and Germany. It tried to distil principles underpinning different proposed conventions (and earlier proposals to revise the 1864 Convention) by an Austrian member of parliament and officers of the Swiss armed forces. Furthermore, it considered the antecedent of Article 12 in the 1864 Convention, acknowledging that the rule had

82 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 92 (author’s translation). This may have been particularly a problem in Europe: Mark Harrison indicates that captured medical personnel seem to have usually been returned in accordance with the Conventions between the UK and Turkey, for example. See Harrison, above note 2 at pp. 285–287.

83 An explanation of the regime on the retention of medical personnel under the 1949 Conventions can be found in the updated commentaries to Article 28 of the First Geneva Convention: ICRC, *Commentary on the First Geneva Convention*, 2nd edn, 2016.

84 In particular, the ICRC seems to have considered that while the 1864 Convention was clearly under its purview, the 1906 Convention was completely independent of the organization and within the domain of States. See *BISCR*, no. 181, January 1915, pp. 23–80 at p. 33.

85 *BISCR*, no. 181, January 1915, p. 37 (plain meaning of word “continue”).



changed,<sup>86</sup> to support its interpretation that the starting point is that medical personnel should be free.

The essay acknowledged that not all of the questions posed were addressed in the discussions in the drafting committee when the 1906 Convention was adopted, such that the *travaux préparatoires* could not provide all the answers.<sup>87</sup> Nevertheless, it set out answers to many of the questions above, arriving at the conclusion that it was only in limited circumstances and for limited reasons that medical personnel could be retained. Furthermore, according to the ICRC's interpretation, Article 12 did not permit a party to move retained personnel elsewhere; they could only be used to care for the wounded and sick with whom they are captured and who need medical personnel to *continue* caring for them.<sup>88</sup>

In a subsequent issue of the *Bulletin*, in July 1915, the ICRC published the interpretations that the German and British governments had circulated on Articles 9 and 12 of the 1906 Convention.<sup>89</sup> The German government's interpretation allowed for a slightly wider use of medical personnel who had fallen into enemy hands in that it allowed for them to continue to provide care for a longer period of time and tending to new health problems that may arise among the POW population, including in case of an outbreak of an epidemic. The British government's interpretation was more closely aligned with the stricter reading of the Article given by the ICRC.

These diverging interpretations arose at a time when there was a typhus epidemic raging in a number of German POW camps, with a death rate reaching 30% in places.<sup>90</sup> This was probably not a coincidence. The presence of medical personnel from the captured armed forces may thus have provided additional essential care at a time when it was urgently needed, with the advantage of a shared language and culture between medics and the sick. At the same time, this interpretation arguably lessened the burden on the detaining power's medical personnel, as it may have been used to reduce their exposure to the risk of contracting disease by relying on them as little as possible to provide care.<sup>91</sup>

86 In the 1864 Convention, medical personnel were to be free to choose whether they remained in captivity with their own armed forces or returned to the forces still in the field. See Article 3 of the Convention for the Amelioration of the Wounded in Armies in the Field, Geneva, 22 August 1864.

87 *BISCR*, no. 181, January 1915, p. 35.

88 *Ibid.*, pp. 44–45.

89 The German government circulated its interpretation in January 1915 and the British government circulated its in March 1915; the ICRC reproduced both in the July *Bulletin*. It is not entirely apparent that these interpretations were issued in response to that given by the ICRC. The ICRC indicates that the German government's interpretation was received in London on 28 January 1915; the British Government's response was dated 22 March. See *BISCR*, no. 183, July 1915, pp. 314–319.

90 Heather Jones, *Violence against Prisoners of War in the First World War: Britain, France and Germany, 1914–1920*, Cambridge, Cambridge University Press, 2011, pp. 93–110 especially at pp. 96–97; Frédéric Médard, *Les Prisonniers en 1914–1918: Acteurs méconnus de la Grande Guerre*, France, Editions Soteca, 2010, pp. 235–237.

91 Jones indicates that some British reports of German POW camps allege that POWs who had typhus were isolated and left to their fate. It is difficult, she acknowledges, however, to know to what extent these claims were based in truth and to what extent they were mostly propaganda. See H. Jones, above note 90, p. 97.

Obviously, it simultaneously increased the risk for the retained medical personnel.<sup>92</sup>

Even so, information was available at the time to show that only a minority of POWs who died did so as a consequence of battle wounds.<sup>93</sup> Thus even outside of situations such as the typhus epidemic, other illnesses contracted in detention proved fatal in greater proportion than war wounds.<sup>94</sup> This state of affairs may help to explain the impetus for the broader interpretation given by some parties of the care medical personnel could be retained to provide.

In every issue of the *Bulletin* published during the war, the ICRC repeated its concerns and reiterated the obligations of States to return medical personnel.<sup>95</sup> By January 1916, when France and Germany were not at all returning medical personnel, they viewed positively an accord between Austria–Hungary and Russia setting a percentage of what number of personnel could be retained in order to look after their own prisoners.<sup>96</sup> However, the ICRC considered that this agreement was acceptable due to the extenuating circumstances of vast numbers of POWs (almost one million on each side) and mutual ignorance of the other’s national languages.<sup>97</sup> The ICRC did not accept that the same circumstances could be invoked to justify such an agreement between Belgium, Britain, France and Germany.<sup>98</sup>

Even so, by the end of the war this approach was partially codified in the relevant Article in the 1929 Convention on the Wounded and Sick, which says, “In the absence of an agreement to the contrary, they shall be returned...”<sup>99</sup> Furthermore, the notion of agreeing on a percentage to retain was fully codified in the 1949 Convention on Wounded and Sick and remains the rule today.<sup>100</sup>

The ICRC was not always at ease with this interpretation of Article 12 of the 1906 Convention, however. In its report on its activities after the war, the ICRC wrote:

The reason given to justify this measure was that the care of prisoners in camps could, in case of generalized disease or epidemics, require the presence of doctors in a number proportionate to the number of prisoners, and that the state of war reduced to a minimum the number of available national doctors (military or civilian) near the camps.

Whatever this argument is worth, it was in any case in conformity with the spirit of the Geneva Convention to reduce to a minimum the number of

92 The issue of whether the typhus epidemics were intentionally permitted to ravage POW populations by the detaining power is irrelevant for the legal interpretation under scrutiny here. On that question, see H. Jones, above note 90, pp. 93–110.

93 F. Médard, above note 90, pp. 233–236.

94 *Ibid.*, p. 234.

95 See e.g. *BISCR*, no. 185, January 1916, pp. 41–42.

96 *BISCR*, no. 185, January 1916, pp. 70–72.

97 *Ibid.*

98 *Ibid.*, p. 72.

99 Article 12, paragraph 2 of the 1929 Convention on the Wounded and Sick.

100 Article 31, paragraph 2: “As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps.” See also the updated commentary on Articles 28 and 31 of the First Convention in ICRC, *Commentary on the First Geneva Convention*, 2nd edn, 2016.

doctors, nurses, stretcher bearers and chaplains retained for this purpose, and to return medical personnel, who were urgently recalled to the theatre of hostilities to their country and army. There was a question of law, of justice, of charity, and by reciprocity, of interest for each of the belligerents.<sup>101</sup>

The despair the members of the ICRC felt at the failure to return medical personnel is palpable in the pages of the *Bulletin*.<sup>102</sup> At the end of the war, in the General Report sent to all National Societies, the ICRC expressed the extent of its fear, saying,

As of the summer of 1915, no or almost no repatriation of medical personnel had taken place between France and Germany and we wondered whether we would henceforth have to consider the Geneva Convention to be nothing more than a token philanthropic agreement, only good for peacetime at best.<sup>103</sup>

In comparison with the tens of thousands killed and wounded, sometimes on a daily basis, the ICRC's concern with the failure to repatriate medical personnel quickly may seem overwrought and beside the point. Indeed, reading the *Bulletin*, one is struck by what is conspicuous in its absence – there are no clear mentions of the massive numbers of the wounded and killed in the major battles. However, the ICRC's preoccupation with the failure to return medical personnel makes much more sense when one considers that, from the organization's perspective, the best help it could provide to the enormous numbers of wounded on the battlefield was to make sure that there were medical personnel present in sufficient numbers to care for them.

The ICRC's spontaneous appeal to States in 1915 calling for short ceasefires to collect the wounded further supports this view. To this end, the ICRC had sent an open letter to all belligerent States calling for a short ceasefire (*suspension d'armes*) to permit the nurses of the armies present to collect the wounded and identify and bury the dead. At the end of the war, it lamented:

101 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 92 (author's translation).

102 In July 1917, Dr Ferrière's report on the POW Agency indicates some of the progress made on this file. In relation to yet another practical problem that impeded the timely return of such personnel, the German government had proposed the establishment of a uniform certificate, produced by the Defence Minister (war minister), to clearly prove the status of medical personnel and allow them to have the benefit of the Convention. Ferrière concedes that a uniform certificate would certainly provide a better guarantee than papers given by *chefs de corps* or units and is in principle accepted by the French. Expressing a hope that this solution will be applied regularly and will allow for rapid repatriation without new formalities or negotiations, Ferrière concludes, "If not, what is the Geneva Convention, and the humanitarian principal it wanted to ensure, worth?" "Agence internationale des prisonniers de guerre", *BISCR*, no. 191, July 1917, p. 296. Curiously, at the Conference of Neutral National Societies in 1917, acting President E. Naville presented the implementation of the 1906 Convention as greatly satisfactory. On the other hand, he presented the situation of POWs as highly worrisome due to the unprecedented scale of the situation. Of course, internal discord in an organization in terms of perception of a situation is not unusual and may explain the disconnection between Naville's remarks and Ferrière's despair. Furthermore, Naville probably wanted to encourage the Neutral National Red Cross Societies to focus on POWs, an area in which they may have had more agency.

103 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, p. 94 (author's translation).

Unfortunately, this suggestion, which would have eased many anxieties and likely saved many lives, was not accepted by governments. Only Italy and Russia showed themselves to be in favour of it; but, given the lack of reciprocity, such measures could not be contemplated.<sup>104</sup>

One historian states that up until 1917, the parties nevertheless sometimes observed pauses in hostilities to collect the wounded, even during major battles.<sup>105</sup> During such pauses, the medical personnel collected the wounded and sometimes even signalled the “enemy” wounded to the “enemy” medical personnel, thereby enabling them to be picked up and cared for by their own side.<sup>106</sup> Accounts indicate, however, that it took stretcher-bearers as long as ten hours to move 400 metres through deep mud – after a long wait for the stretcher-bearers to arrive to pick up the wounded person in the first place; and while a wounded person was likely to be picked up “sooner or later” during the battle of the Somme in 1916, by the time of the Battle of Passchendaele in 1917, “a stretcher case had no real chance at all” of being picked up.<sup>107</sup> At other times, orders were given to leave the wounded on the battlefield.<sup>108</sup>

In light of the horrific conditions of the war, the ICRC’s insistence on a strict reading of the rules on the return of medical personnel – and on the need to respect of the law more generally – becomes much more poignant. At the same time, the record indicates that, when it comes to the legal interpretation of the rules, it listened attentively to the concerns of the parties and pragmatically took into account the facts on the ground. Its insistence on the respect of the rule was principled and dogged, but not dogmatic, as is shown by its acceptance of the accords between Austria–Hungary and Russia on percentages of personnel to be retained.

## Conclusion

The publications and correspondence on IHL during the First World War examined above show that the ICRC placed enormous importance on reaching a shared understanding of IHL in order to enhance its implementation and respect. The Great War had caused it to fear, on occasion, that the 1906 Convention was “a token philanthropic agreement” and it worked hard to make sure it was not consigned to that fate.

The ICRC began by reminding the Parties of their obligations under the 1906 Convention. While it turns out that even in the ICRC’s legal reading at the

104 *Rapport Général du Comité international de la Croix-Rouge sur son activité de 1912 à 1920*, Genève, 1921, pp. 75–76 (author’s translation).

105 At least on the Western Front. The historical record available to the author does not permit to determine the extent to which this respect was generalized throughout the world.

106 This may be seen as an informal way to exchange the wounded on the battlefield, as provided for in Article 2 of the 1906 Convention.

107 van Bergen, above note 1, pp. 297–300.

108 *Ibid.*, pp. 292–294, 306.

end of the war the 1906 Convention was not formally binding on the Parties, up until the last months of the war its applicability was never called into question. The shock and utter dismay felt by the ICRC when it learned that the USA considered the Convention non-binding is evident in the correspondence. While from a legal point of view the interpretation by the USA should not have been surprising (and was perfectly correct in law), it can be surmised that the ICRC at the time felt the whole legal foundation on which it was built, including the extremely active National Societies, was being pulled out from under it. In later iterations of the 1906 Convention and the others, the potential for the inapplicability of IHL on such technical grounds was eliminated.

Moreover, the interpretations the ICRC published on Articles 9 and 12 of the 1906 Convention during the war display a rigorous and principled understanding of the law, as well as a willingness to take into account the extenuating circumstances of the conflict. The ICRC engaged in a semi-public dialogue with States on the law in addition to its usual bilateral, confidential discussions.

On a purely factual level, one should not draw the conclusion from this essay that the 1906 Convention on the Wounded and Sick was not respected during the First World War. In fact, the general picture of compliance appears to be somewhat mixed and rather suggests that implementation was fairly good overall. First of all, the States involved in the First World War took seriously their obligation to be able to provide care for the wounded and sick. States had invested heavily in creating effective medical services and leaned on the eager support of their National Red Cross Societies to help collect and care for the wounded and sick.<sup>109</sup> This was not something that the ICRC could take for granted: contrary to what one might imagine nowadays, in the past, armed forces' medical services did not devote many resources or much effort to preserving the health and welfare of its soldiers.<sup>110</sup> At the same time, it must be acknowledged that some historians have argued that without the medical service returning (healed) wounded and sick soldiers to the front, it would have been impossible to continue the war.<sup>111</sup> Among the French forces, for example, more than five million wounded and sick were cared for by the French medical service, 90% of whom afterwards were able to return to active service.<sup>112</sup> Half of those wounded were wounded at least twice, and hundreds of thousands were wounded

109 See, for example, Mark Harrison; Vincent Viet. The picture of readiness is uneven, however. While the British had 20,000 medical personnel at the start of the war (and 150,000 at the end), the Belgians had only five ambulances in 1914. Van Bergen, above note 1, p. 285 ff. The medical services of the colonial armed forces were also more sparsely staffed and equipped. Harrison, pp. 52–58.

110 Mark Harrison, *The Medical War*, pp. 3–8, comparing UK, US and German medical services. For the French, see Vincent Viet, *La santé en guerre 1914–1918: Une politique pionnière en univers incertain*, 2015, Presses de Sciences Po. Only some fifteen years prior to the outbreak of the First World War, for example, during the war in South Africa, Lord Kitchener had requisitioned medical transports for other purposes, with the result that thousands of servicemen sick and dying of typhus were left exposed near the front. Harrison, pp. 6–7.

111 Harrison (Conclusion) and van Bergen, above note 1.

112 Vincent Viet, *La santé en guerre 1914–1918: Une politique pionnière en univers incertain*, 2015, Presses de Sciences Po, pp. 294–295.

four times, only to return to the trenches.<sup>113</sup> Even so, it is infinitely more humane to provide care and treatment than to ignore the plight of the wounded and sick. In this respect, it seems that the imperatives of humanitarian law and military concerns coincided, probably greatly facilitating the respect of these obligations.

More broadly, two major historical accounts of the treatment of the wounded and sick seem to indicate that, aside from a fairly limited number of incidents, the wounded and sick themselves were by and large respected and protected. Indeed, when the war on the Western Front became a mobile war again in 1918, armed forces' medical services treated and cared for enemy wounded as their armies rapidly advanced through new territory – despite the challenges this entailed. There are accounts indicating this was also sometimes the case on other fronts (e.g. Gallipoli).<sup>114</sup> The historical record furthermore suggests that, at least on the Western Front, medical personnel and stretcher bearers were by and large respected on the battlefield. They were rarely deliberately shot at, but their work left them very exposed to enemy fire.<sup>115</sup> The evidence seems to suggest that the legal obligations regarding the treatment and care of the wounded and sick were well understood and integrated into the standard practice in many armed forces.

From today's perspective, it may be tempting to think that it was easier to implement IHL, and especially the obligations to protect the wounded and sick, during the “quaint” times of trench warfare in the First World War. The true picture appears to be more mixed. In any case, there was a rich dialogue on the contours of the legal obligations at the time, which has continued to this day.

<sup>113</sup> *Ibid.*

<sup>114</sup> Harrison, above note 2.

<sup>115</sup> On the Western Front, stretcher bearers had high casualty rates. van Bergen, above note 1, pp. 288 and 299.

# “A horrific photo of a drowned Syrian child”: Humanitarian photography and NGO media strategies in historical perspective

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## Abstract

*This article is a historical examination of the use of photography in the informational and fundraising strategies of humanitarian organizations. Drawing on archival research and recent scholarship, it shows that the figure of the dead or suffering child has been a centrepiece of humanitarian campaigns for over a century and suggests that in earlier eras too, such photos, under certain conditions, could “go viral” and achieve iconic status. Opening with last year’s photo campaign involving the case of 3-year-old Syrian refugee Alan Kurdi, whose body washed up on a Turkish beach near Bodrum in early September 2015, the article draws on select historical examples to explore continuities and ruptures in the narrative framing and emotional address of photos depicting dead or suffering children, and in the ethically and politically charged decisions by NGO actors and the media to publish and distribute such images. We propose that today, as in the past, the relationship between media and humanitarian NGOs remains symbiotic despite contemporary claims about the revolutionary role of new visual technologies and social media.*



**Keywords:** history of humanitarian photography, Syrian conflict, history and politics of humanitarian NGOs, media, communication, ethics, Alan Kurdi, image of the child.

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## Introduction

In early September 2015, a photograph of the lifeless body of 3-year-old Alan Kurdi, lying face-down on a Turkish beach near Bodrum, went viral on social media. The boy drowned along with his mother and 5-year-old brother Ghalib when the smuggler's boat in which they were riding capsized. Alan and his Kurdish family, natives of Damascus, were refugees fleeing the Syrian civil war, en route to Europe; only his father Abdullah survived. Within days, photos of Alan's body migrated from social media to news feeds and newspapers. As they did so, the story evolved beyond the tragic fact of Alan's death to focus on the astonishing rapidity with which the child's image had circulated on social media and the widespread anguish and outrage it had provoked.

This response, in fact, rendered the boy's fate newsworthy and initially dominated press reports. It suggested, yet again, the affective power of "the image".<sup>1</sup> When combined with the international reach of social media – in which networks of like-minded or tenuously connected friends, colleagues and acquaintances select, endorse and re-post compelling content – something striking happened. Viewers discussed the intensity of their visceral reactions to Alan's image online, or recognized echoes of their own emotions – and, by extension, their own values – in the postings of others. It seemed possible that this response, if sufficiently broad and persistent, could translate into grassroots political pressure substantial enough to alter national policies regarding the immigration of refugees and to win public support for greater humanitarian commitment to them.<sup>2</sup> Some stakeholders, such as human rights advocacy groups

- 1 Prominent literature on this issue includes Susan Sontag, *Regarding the Pain of Others*, Picador, New York, 2003; Susie Linfield, *The Cruel Radiancy: Photography and Political Violence*, University of Chicago Press, Chicago, IL, 2010; Luc Boltanski, *Distant Suffering: Morality, Media, and Politics*, Cambridge University Press, Cambridge, 1999. For a critique of the absence of attention by international relations scholars, see Roland Bleiker and Emma Hutchinson, "Fear No More: Emotions and World Politics", *Review of International Studies*, Vol. 34, 2008. In a recent article, Pierluigi Musarò claims that Susie Linfield and Lilie Chouliaraki underline that "it is impossible to imagine transnational organizations such as Amnesty International, Human Rights Watch, or Doctors Without Borders in the pre-photographic age. It is also difficult to understand the link between the visual projections of human suffering and the exponential growth of the humanitarian industry without taking into account the devastating imagery that circulated within a variety of Western print and broadcast media formats in the 1980s." Pierluigi Musarò, "The Banality of Goodness: Humanitarianism between the Ethics of Showing and the Ethics of Seeing", *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Vol. 6, No. 2, 2015, p. 318. The two books that Musarò reviews are Lilie Chouliaraki, *The Ironic Spectator: Solidarity in the Age of Post-Humanitarianism*, Polity, Cambridge, 2013; and S. Linfield, *ibid.*
- 2 Of course, expectations do not always produce results. While German policy liberalized in the wake of Alan's drowning, British policy toward Syrian refugees did not, even though an estimated 80% of Britons had seen the photo. Statistic is from Mukul Devichand, "Alan Kurdi's Aunt: 'My Dead Nephew's Picture Saved Thousands of Lives'", *BBC Trending*, 2 January 2016, available at [www.bbc.com/news/blogs-trending-35116022](http://www.bbc.com/news/blogs-trending-35116022) (all internet references were accessed in January 2016). The names

and humanitarian NGOs, hoped the response to Alan’s image would go transnational and push the grassroots political movement beyond national constituencies.

The meanings constructed around Alan’s image by the media have been insistently, and perhaps understandably, keyed to contemporary concerns: what does it tell us about the ongoing refugee crisis and the Syrian civil war? What does it tell us about the political influence of new social media? Here, we expand the temporal frame to see where Alan’s photos fit in the broader history of photography used for humanitarian purposes during and after armed conflicts. This essay is informed by our ongoing projects, as historians, to employ archival research in order to examine the representational practices and visual politics of humanitarianism, and their evolution, since the nineteenth century. This research, by us and others, is still under way. As a result, we cannot yet offer a comprehensive historical or theoretical analysis of the visual practices of humanitarianism over time. Rather, we focus on select moments and materials from multiple archives to historically contextualize contemporary practices – in this case involving the images of Alan Kurdi – and juxtapose them with those of the past. In the future, we hope that careful historical research will allow us to test some of the theorizing about these issues characteristic of media studies and the social sciences. For although such theory is repeatedly invoked in scholarly and public discussions, it is typically based on the examination of developments reaching back only a few decades or, at most, since the end of the Second World War. It is worth remembering that theory, like humanitarian practice, is shaped by historical forces.<sup>3</sup>

The decision by humanitarian actors to show a dead or dying child is not new. Neither is the idea that displaying shocking images of human suffering, in circumstances that humanitarian organizations deem to be exceptionally dramatic, might induce behavioural and political change. Since before the turn of the twentieth century, missionary societies and private organizations (e.g., NGO ancestors) have used newsletters, newspapers and other media to publicize and protest select incidents of human suffering stemming from natural or man-made causes. Prominent early examples include a focus on atrocities connected to the “new slaveries” in the Belgian Congo Free State starting in the 1890s, the deportation and massacre of Armenians in the Ottoman Empire during the First World War, and famine or policies resulting in starvation during or after armed conflict in South Africa (1899–1902), in post-revolutionary Russia, and in post-1918 Europe.<sup>4</sup>

of the children have been spelled in various ways: Alan is also called Aylan; Ghalib is sometimes spelled Galip.

- 3 Since this essay is focused on historical analysis, we do not discuss the expansive literature on the agenda-setting effects of media and visual images on national and international policy. See, for example, Larry Minear, Colin Scott and Thomas G. Weiss, *The News Media, Civil War and Humanitarian Action*, Lynne Rienner, Boulder, CO, 1996; and more recently, Lei Guo and Maxwell McCombs (eds), *The Power of Information Networks: New Directions*, Routledge, New York, 2015.
- 4 On late nineteenth- and early twentieth-century campaigns, see the essays in Heide Fehrenbach and Davide Rodogno (eds), *Humanitarian Photography: A History*, Cambridge University Press, Cambridge, 2015. The discussion in this essay draws on, and expands upon, the analysis in that book.

It bears emphasizing that for most of this history, the photographic depiction and publication of dead, dying or suffering children was not taboo. The broad circulation of these images in humanitarian public awareness and fundraising campaigns dates back to before the turn of the twentieth century. Such depictions in books, in newspapers and on postcards – although rarely for humanitarian purposes – are even older. The salient point is that the organized ethical regulation of such images in the humanitarian sector is a relatively new phenomenon, dating to the 1980s.<sup>5</sup>

We cannot state with certainty that the circulation of Alan's photo humanized the current crisis or that it alone explains why, for an ephemeral moment, some European governments, such as that of Germany, seemed less hostile to refugees reaching the European mainland from the eastern and southern Mediterranean. What we, as historians, can do is to set Alan's image in historical context and consider the continuities and ruptures in the role of humanitarian photography over the past century or so. We define humanitarian photography as the mobilization of photography in the service of humanitarian initiatives across State boundaries.<sup>6</sup> Here, we compare the contemporary use of Alan's images to past practices. Our aim is to sketch how humanitarians of various eras and political hues used photographic images and modern media technologies to develop and disseminate affecting tropes and narratives – such as the suffering “mother and child” or “child alone” – in order to train the ethical impulses of viewers and to win their support for the national or transnational relief, reform or improvement of select conditions at specific historical junctures.

## Humanitarian photography as moral rhetoric

Humanitarianism emerged and evolved in tandem with photographic technologies. During the second half of the nineteenth century, Europeans and North Americans increasingly used photography to generate empirical knowledge of previously unseen worlds: from the spiritual to the material, from the microscopic to the

The use of the Internet for humanitarian campaigns reaches back to at least 2008, when Save Darfur (<http://savedarfur.org/about/history>), a transnational advocacy group that took a clear position in favour of an intervention (armed included) in Sudan against what the organization labelled a genocide, massively campaigned using social media such as Facebook ([www.facebook.com/savedarfurcoalition/timeline](http://www.facebook.com/savedarfurcoalition/timeline)). Save Darfur did not use the image of a dead toddler. Kevin Lewis, Kurt Gray and Jens Meierhenrich, “The Structure of Online Activism”, *Sociological Science*, Vol. 1, 2014; Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror*, Verso, London, 2009.

5 A brief discussion of the ethical regulation of images of death and suffering can be found in the final section of this essay. On nineteenth-century depictions, see, for example, James Vernon, *Hunger: A Modern History*, Harvard University Press, Cambridge, MA, 2007, pp. 17–40; Heather D. Curtis, “Picturing Pain: Evangelicals and the Politics of Pictorial Humanitarianism in an Imperial Age”, in H. Fehrenbach and D. Rodogno (eds), above note 4. See also the travel and ethnographic literature on India published in book form, like Reuters special correspondent F. H. S. Mereweather's *Tour through the Famine Districts*, 1898, which featured graphic images of starving adults and children yet was not humanitarian in presentation or purpose.

6 H. Fehrenbach and D. Rodogno (eds), above note 4.

cosmic, from the sociological to the anthropological.<sup>7</sup> By the 1880s, journalists, missionaries and reformers were employing photos in illustrated newspapers, books, magazines and lantern-slide lectures to focus public attention on select examples of human misery in the world, thereby transforming specific episodes of privation and suffering into humanitarian “crises” and “campaigns”. Humanitarian imagery gave form and meaning to human suffering, rendering the latter comprehensible, urgent and actionable for European and American audiences.<sup>8</sup> Although realistic in style, the photographic evidence publicized since the late nineteenth century for humanitarian purposes has been necessarily interpretative.

In his classic book *The Photographer's Eye*, photographer and critic John Szarkowski reminds us that photography is “a process of selection”. The “factuality of pictures” differs from reality itself: “[m]uch is filtered out”, while other elements are “exhibited with an unnatural clarity, an exaggerated importance”. Photography is a plastic and interpretative medium. When we confront photos, “what we think about and act upon is the symbolic report and not the concrete event”.<sup>9</sup>

Humanitarian photos are composed, edited, narrated and circulated with an eye toward creating a specific effect: to stimulate emotion, such as empathy or outrage, in viewers, and cause them to act. In this essay, we analyze photos intended to raise public awareness and funds. However, it is clear from the historical record that in some cases, identical photos were used to *document*,

7 See Jennifer Tucker, *Nature Exposed: Photography as Eyewitness in Victorian Science*, Johns Hopkins University Press, Baltimore, MD, 2005; Corey Keller (ed.), *Brought to Light: Photography and the Invisible, 1840–1900*, Yale University Press, New Haven, CT, 2008; Robert A. Sobieszek, *Ghost in the Shell: Photography and the Human Soul, 1850–2000*, MIT Press and Los Angeles County Museum of Art, Cambridge, MA, and Los Angeles, CA, 1999; Elizabeth Edwards (ed.), *Anthropology and Photography*, Yale University Press, New Haven, CT, 1992; Christopher Pinney, *Photography and Anthropology, 1860–1920*, Reaktion Books, London, 2011; Anna Grimshaw, *The Ethnographer's Eye*, Cambridge University Press, New York, 2001; Eleanor Hight and Gary Sampson (eds), *Colonialist Photography*, Routledge, New York, 2002; Anne Maxwell, *Colonial Photography and Exhibitions*, Leicester University Press, Leicester, 2000; Marcus Banks and Jay Ruby (eds), *Made to Be Seen: Perspectives on the History of Visual Anthropology*, University of Chicago Press, Chicago, IL, 2011; Deborah Willis and Barbara Krauthamer, *Envisioning Emancipation*, Temple University Press, Philadelphia, PA, 2013.

8 Karen Halttunen, “Humanitarianism and the Pornography of Pain in Anglo-American Culture”, *American Historical Review*, Vol. 100, No. 2, 1995; Thomas Laqueur, “Bodies, Details, and the Humanitarian Narrative”, in Lynn Hunt (ed.), *The New Cultural History*, University of California Press, Berkeley, CA, 1989; Richard Wilson and Richard Brown (eds), *Humanitarianism and Suffering: The Mobilization of Empathy*, Cambridge University Press, Cambridge, 2009; L. Boltanski, above note 1; Erica Bornstein and Peter Redfield (eds), *Forces of Compassion: Humanitarianism between Ethics and Politics*, SAR Press, Santa Fe, NM, 2011; Daniel Bell and Jean-Marc Coicaud (eds), *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations*, Cambridge University Press, Cambridge, 2007; Craig Calhoun, “The Imperative to Reduce Suffering: Charity, Progress, and Emergencies in the Field of Humanitarian Action”, in Thomas Weiss and Michael Barnett (eds), *Humanitarianism in Question: Politics, Power, Ethics*, Cornell University Press, Ithaca, NY, 2008; Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, University of California Press, Berkeley, CA, 2011; Didier Fassin and Mariella Pandolfi, *Contemporary States of Emergency*, Zone Books, New York, 2010; Ilana Feldman and Miriam Ticktin (eds), *In the Name of Humanity: The Government of Threat and Care*, Duke University Press, Durham, NC, 2010.

9 John Szarkowski, *The Photographer's Eye*, Museum of Modern Art, New York, 2007 (first edition 1966), p. 8.

*authenticate* and *publicize* atrocities or famines.<sup>10</sup> As a result, no firm distinctions can be drawn between photos mobilized for fundraising and those used for evidentiary or archival purposes: these could be one and the same. Such photos graphically showed viewers that the worst *could* happen and, indeed, somewhere in the world, already did. Such photos were intended to connect British, European and North American viewers to distant subjects' suffering, visually and viscerally, through depiction and description. Humanitarian actors believed in the affective power of images, and deliberately worked to enhance this through careful presentation and narration, rendering photos effective tools for information and fundraising campaigns. If done well, such photos demanded attention and response. Some remain difficult to view.

Humanitarian photography is best understood as moral rhetoric. Historically, it has mobilized images of suffering, including extreme suffering, to enhance sympathy, empathy and a sense of responsibility or guilt in its viewers. Triggering emotional response has been, and continues to be, one effective way to shape public understanding of both what is going on "out there" and what is at stake. Humanitarian photography is designed and circulated with pragmatic purposes in mind: to fuel political pressure on governments for reform or humanitarian intervention, to raise funds for "good causes" and to establish the legitimacy of specific humanitarian campaigns, organizations and actors, and to convince targeted publics of their duty to act. For over a century, photo-centred appeals have continued to forge temporary communities of emotion and political action of like-minded viewers around specific causes. In the process, such strategies of representation and communication have produced a recognizable humanitarian imagery.<sup>11</sup>

## Humanitarian photography and the figure of the child

One significant strand of this humanitarian imagery has been its insistent focus on the figure of the child.<sup>12</sup> The photos of Alan are shocking, but viewed historically,

10 See, for example, the "Sole Survivor" discussion below; this was certainly not unique for the period.

11 For further analysis, see Heide Fehrenbach and Davide Rodogno, "The Morality of Sight: Humanitarian Photography in History", in H. Fehrenbach and D. Rodogno (eds), above note 4, pp. 3–4.

12 For a historical discussion regarding the humanitarian use of images of children, see Heide Fehrenbach, "Children and Other Civilians: Photography and the Politics of Humanitarian Image-Making", in H. Fehrenbach and D. Rodogno (eds), above note 4. On the humanitarian use of the image of the child, see Laura Briggs, "Mother, Child, Race, Nation: The Visual Iconography of Rescue and the Politics of Transnational and Transracial Adoption", *Gender & History*, Vol. 15, No. 2, 2003; Kate Manzo, "Imagining Humanitarianism: NGO Identity and the Iconography of Childhood", *Antipode*, Vol. 40, No. 4, 2008; Liisa H. Malkki, "Children, Humanity, and the Infantilization of Peace", in I. Feldman and M. Ticktin (eds), above note 8; Laura Suski, "Children, Suffering, and the Humanitarian Appeal", in R. A. Wilson and R. D. Brown (eds), above note 8; Philip Gourevitch, "Alms Dealers: Can You Provide Humanitarian Aid without Facilitating Conflicts?", *New Yorker*, 11 October 2010; Karen Wells, "The Melodrama of Being a Child: NGO Representations of Poverty", *Visual Communication*, Vol. 12, No. 3, 2013; Iain Wilkinson, "The Provocation of the Humanitarian Social Imaginary", *Visual Communication*, Vol. 12, No. 2013; L. Chouliaraki, above note 1. These social scientists have examined the focus on children as a post-1945 phenomenon and have not investigated or acknowledged its earlier evolution.

they are symptomatic of longer trends.<sup>13</sup> In fact, the two photos of Alan that circulated widely evoked century-old visual tropes in humanitarian photography: that of the solitary child suffering or dying alone (Figure 1), and that of the “rescue” photo (Figure 2).<sup>14</sup> In its formal composition, the latter echoes a subset of humanitarian photography that showcased the agents, and typically also the effectiveness, of humanitarian relief work. The images shown in Figures 1 and 2 were taken by Turkish photographer Nilüfer Demir for the Dogan News Agency; the first photo was cropped in social media and some news reports to show only the child’s body.<sup>15</sup>



Fig. 1 - Colour online, Colour in print

Figure 1. Alan lying face-down on the beach. Screenshot from the Dogan News Agency website. Other news organizations and Human Rights Watch featured a tight close-up of Alan’s body.



Fig. 2 - Colour online, Colour in print

Figure 2. Alan carried by policeman. Screenshot from the Dogan News Agency website.

13 This despite the fact that photo editors have congratulated themselves on “breaking taboos” and taking “an important step” in publishing and circulating photos of the lifeless Alan. See the quotations by Hugh Pinney of Getty Images and Nicolas Jimenez of *Le Monde* in Olivier Laurent, “What the Image of Alan Kurdi Says about the Power of Photography”, *Time*, 4 September 2015, available at: <http://time.com/4022765/Alan-kurdi-photo/>.

14 See *Time*’s slide show “See Front Pages from around the World Showing Drowned Syrian Boy”, 3 September 2015, available at: <http://time.com/4021560/drowned-syrian-boy-aylan-kurdi-photo-front-page/>.

15 Information on Alan Kurdi, his death and the photos is now available on Wikipedia at [https://en.wikipedia.org/wiki/Death\\_of\\_Alan\\_Kurdi](https://en.wikipedia.org/wiki/Death_of_Alan_Kurdi). We do not enter the theoretical debate on the so-called “connective turn” and “culture of connectivity” here, but our invitation to our readers to consult the



In his online dispatch “Why I Shared a Horrific Photo of a Drowned Syrian Child”, published on 2 September 2015, Peter Bouckaert, director of emergencies at Human Rights Watch (HRW), reflected on his personal reaction to the photo and his choice to circulate it:

I thought long and hard before I retweeted the photo of three-year-old Alan Kurdi. ... What struck me the most were his little sneakers, certainly lovingly put on by his parents that morning as they dressed him for their dangerous journey. One of my favorite moments of the morning is dressing my kids and helping them put on their shoes. They always manage to put something on backwards, to our mutual amusement. Staring at the image, I couldn't help imagine that it was one of my own sons lying there drowned on the beach. ... It is not an easy decision to share a brutal image of a drowned child. But I care about these children as much as my own. Maybe if Europe's leaders did too, they would try to stem this ghastly spectacle.<sup>16</sup>

While these words may accurately describe Bouckaert's experience in confronting Alan's image, they are also a strategic rhetorical argument for a political response to the refugee crisis based upon a particular narrative frame: the perspective of the observer-as-father. Our proper response to distant suffering, Bouckaert suggested, should be to view the sufferer as our own: to respond as nurturers, with the apparently natural and tender emotions of a parent. The moral heart of the argument – and the moral urgency of humanitarian aid – is keyed to the photo of the dead child, who was failed by politicians unwilling, or perhaps unmoved, to act. This is the incontrovertible “fact” of what is at stake. “I'm convinced that until you've shown this photograph, you haven't shown the reality of this crisis”, remarked Nicolas Jimenez, director of photography at *Le Monde*. His comments were quoted in a *Time* magazine article on “what the image of Alan Kurdi says about the power of photography”.<sup>17</sup>

Alan's death-image particularized the human costs of the Syrian civil war and refugee crisis for millions of viewers around the world. Reciprocally, the avid circulation of Alan's image has abstracted him into a representative symbol of

Internet signals our assumption that they rely on a specific connectivity culture and system. José van Dijck and Andrew Hoskin have suggested that “as memories are increasingly mediated and thus constructed by networked technologies, the boundaries between present and past are no longer given, but they are the very stakes in debating what counts as memory. Memory, after the connective turn, is a new mediatized memory that challenges currently dominant concepts of time and space.” José Van Dijck, “Flickr and the Culture of Connectivity: Sharing Views, Experiences, Memories”, *Memory Studies*, Vol. 20, No. 10, 2010, p. 4. See also Andrew Hoskin, “Digital Network Memory”, in Atrid Erll and Ann Rigný (eds), *Mediation, Remediation and the Dynamics of Cultural Memory*, de Gruyter, Berlin, 2009; José van Dijck, *Connectivity: A Critical History of Social Media*, Oxford University Press, Oxford, 2013.

16 Peter Bouckaert, “Dispatches: Why I Shared a Horrific Photo of a Drowned Child”, *Human Rights Watch* website, available at: [www.hrw.org/news/2015/09/02/dispatches-why-i-shared-horrific-photo-drowned-syrian-child](http://www.hrw.org/news/2015/09/02/dispatches-why-i-shared-horrific-photo-drowned-syrian-child). Bouckaert tweeted a tight close-up of the boy's body from a slightly different perspective. See the tweet and image at: [https://twitter.com/bouckap/status/639037338362978304?ref\\_src=twsrc%5Etfw](https://twitter.com/bouckap/status/639037338362978304?ref_src=twsrc%5Etfw).

17 O. Laurent, above note 13.



suffering Syrian refugees.<sup>18</sup> As we wrote this essay, news coverage of the boy and his photographed fate continued. A persistent theme remains the starkly affective impact of his death-image across national boundaries. And this, of course, is due to his status as child, as “innocent”, as victim: as a dependent minor who requires and deserves protection and nurture, whose youth releases him from political responsibility for armed conflict, and who embodies “our” survival (genetically, culturally, as a species) and hopes for the future.<sup>19</sup>

What is new about the publication of Alan’s photos? Certainly, the fact that they went viral on social media is a product of the era in which we are living. The idea of “going viral” specifically applies to social media. However, since the 1890s at least, other photos, mobilized to spur humanitarian action and which look quite similar to Alan’s, went viral in earlier communications networks that relied on print media and public lantern-slide lectures.<sup>20</sup> The speed of “virality” in the pre-internet era cannot be compared with our own,<sup>21</sup> but this is a difference of degree rather than kind. Since the late nineteenth century, networks that fostered virality have existed, as have gatekeepers who controlled the flow of information and connect networks to one another. Phenomena like word of mouth, bandwagon effects, homophily and interest networks, which help to explain the patterns of individual behaviour that make representations and campaigns spread rapidly, predate the internet age.

The earliest example of a mass, cross-class international humanitarian campaign was the Congo Reform Association (CRA), which was founded in 1904 by British journalist Edmund Dene Morel and evangelical Harry Grattan Guinness, head of the Regions Beyond Missionary Union, to publicize and protest atrocities committed on inhabitants of the Upper Congo, the site of the Belgian-run rubber trade. Although news of enslavement and other abuses in the Belgian Congo had circulated in Europe and the United States since the early 1890s, a protest and reform movement took a decade to materialize. When it did, under Morel’s leadership, it initially attracted elite male support; within a couple of years, however, it was showing signs of petering out. The CRA’s breakthrough as a mass international phenomenon happened only when Alice and John Harris – a married missionary couple from Regions Beyond who had served in the Upper Congo, returned to Britain and then toured vigorously, giving lantern-slide lectures on the conditions they had witnessed – took charge of the organization.

The photos themselves did not initially make the difference. Morel had used missionary photos of Congo atrocity victims in his publications, including the

18 Liisa Malkki has noted that contemporary humanitarian policy discussions have produced an abstracted and standardized “representational form” of the figure of the refugee, which has been taken up by news and media organizations. Liisa H. Malkki, “Speechless Emissaries: Refugees, Humanitarianism and Dehistoricization”, *Cultural Anthropology*, Vol. 11, No. 3, 1996, pp. 385–386.

19 This is a simplification, of course, but it sketches a cultural understanding of children and childhood that has informed national child welfare policy and international law in the past century. See the BBC piece cited above and the front-page article by Anne Barnard, “Family’s Tragedy Goes beyond One Boy”, *New York Times*, 28 December 2015, pp. A1, A6–7.

20 See, for example, Kevin Grant, *A Civilized Savagery: Britain and the New Slavery in Africa, 1884–1926*, Routledge, New York, 2005.

21 Karin Nahon and Jeff Hemsley, *Going Viral*, Polity, London, 2013.

famous photo taken by Alice Harris (Figure 3). Even though such photos provoked outrage among Morel's readership, they failed to ignite a mass humanitarian campaign. Only the efforts of the missionaries – with their vast organizational network, domestic and international connections, popular public lectures and subscription print culture, and substantial cultural and moral authority – could manage that.<sup>22</sup>

Fig. 3 - B/W online, B/W in print



Figure 3. Nsala of Wala with the remains of his 5-year-old daughter. Reproduced in E. D. Morel, *King Leopold's Rule in Africa*, London, 1904. Courtesy of Antislavery International.

Once missionary involvement had unlocked a broader participatory audience, photographic images fuelled the campaign and its popularity. The most widely circulated, exhibited and reproduced photo of the Congo reform campaign was the shot shown in Figure 3, which depicts Nsala, a man who arrived at the Harris's mission house carrying the meagre remains of his 5-year-old daughter. She had been killed and cannibalized, along with Nsala's wife and son, by

22 See the careful scholarship of Kevin Grant, above note 20, who has traced the CRA campaign in detail. See also Kevin Grant, "The Limits of Exposure: Atrocity Photographs in the Congo Reform Campaign", and Christina Twomey, "Framing Atrocity: Photography and Humanitarianism", in H. Fehrenbach and D. Rodogno (eds), above note 4; Christina Twomey, "Severed Hands: Authenticating Atrocity in the Congo, 1904–1913", in Geoffrey Batchen *et al.*, *Picturing Atrocity: Photography in Crisis*, Reaktion Books, London, 2012.

sentries working for the Anglo-Belgian Rubber Company. Harris’s photo is carefully composed as the intimate scene of a father’s quiet grief as, head bowed, Nsala contemplates the small severed hand and foot of his child. The photo is incomprehensible without its descriptive caption. The narrated image is an early example of humanitarian photography addressing viewers through the sentimental lens of the father–child relationship. It condemns the Congo atrocities using universal themes of filial love and loss, thereby inviting the viewer to both pity the father and empathize with him. This form of visual and narrative address structures viewer response: on the one hand, it distances the viewer (“Thank God I’m not him; thank God I’m not in the Congo”), but on the other, it encourages at least a passing sense of emotional identification with Nsala in his capacity as a mourning father. It is a rhetorical device: in order to feel moral indignation, viewers of the photo needed to understand his pain.<sup>23</sup>

## Photography, media strategy and the professionalization of humanitarianism

Humanitarian campaigns start with the intentional act of an agent to spread a given image, such as that of a suffering individual or the corpse of a dead child, in order to stimulate awareness and shape public opinion regarding events taking place elsewhere in the world. The intention of the agent does not necessarily guarantee success. It takes the right humanitarian, with the right network, media strategy and audience, for a humanitarian campaign to gain traction. Morel’s efforts only attracted a limited response for the CRA before the missionaries took charge.<sup>24</sup> The missionaries were able to engage with, and appeal to, their national and international networks that were already in place. The great difference between then and now is the speed of communication: missionaries had to rely on print culture and letter writing to spread the word and to advertise their public lectures. In the contemporary case of Alan, we know exactly who initiated the campaign and why. Peter Bouckaert of HRW was the first to post the picture taken by Turkish photographer Nilüfer Demir on his Twitter account. Did he expect the photo to go viral? The answer is, quite probably, yes.<sup>25</sup> And this is one of the reasons why the history of humanitarian photography should matter.

In our contemporary world, NGOs and humanitarians often claim that they need to piggyback on news coverage of emerging events or disasters in order to fundraise. This suggests that events happen and must first register in the media as “news” before humanitarian organizations can seize the short temporal

23 See Grant and Twomey, *ibid.*, on this and other Congo images.

24 The CRA campaign petered out until it was re-energized by Protestant missionaries and their long-time networks. To date there has been little scholarly attention devoted to comparing successful and failed humanitarian campaigns, apart from Kevin Grant’s work on the CRA.

25 Bryan Walsh, *Time*, 29 December 2015, available at: <http://time.com/4162306/alan-kurdi-syria-drowned-boy-refugee-crisis/> (see embedded video featuring interview with photographer Nilüfer Demir and Peter Bouckaert of HRW).

window of news coverage to make a difference while the world is paying attention to a particular reported “crisis”. However, sometimes the sequence leading to public awareness is differently ordered: the resonance of Alan’s photo grew from the deliberate actions of a human rights professional who used the image as a hook to focus public attention and emotions.<sup>26</sup> It is evident from his accompanying online dispatch that Peter Bouckaert expected the photograph, and its circulation, to provoke strong reactions, both favourable and unfavourable. He posted the photo on Twitter because he judged that platform likely to draw the largest audience. Bouckaert is employed by HRW, a non-profit NGO with a global staff of hundreds. Founded in 1978 and “known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy”, HRW annually publishes “reports and briefings on human rights conditions in some 90 countries, generating extensive coverage in local and international media”.<sup>27</sup> While his tweet regarding Alan’s death may have appeared spontaneous – a spur-of-the-moment gesture expressing his profound emotional response to the image – it was also the considered strategy of a man whose job is to undertake “targeted advocacy” through the “effective use of media”. HRW, like the missionaries of the Congo reform movement more than a century ago, benefits from having a ready-made audience of committed and participatory supporters that the organization has cultivated over time. As a result, when an HRW staff member tweets, it is received and read by an expansive yet targeted global audience who can engage in their chosen cause by the simple action of re-tweeting.

Humanitarian NGOs – operational ones as well as those that centre their activities on advocacy – have specific ideas of what a crisis is, how it unfolds, and when it shifts from emergency to extreme emergency or “disaster” (the terminology used varies). Of course, their reading of the unfolding of natural disasters is different from that of man-made disasters, especially prolonged civil wars like the one taking place in Syria since 2011. Humanitarians have their own interpretation of the tempo of a crisis and of how to be as effective as possible in a given situation. In the case of the current “refugee crisis”, the ups and downs of media coverage, the challenges of donor fatigue and the so-called “collapse of compassion” are part of the conditions within which NGOs operate and make decisions.<sup>28</sup> The specific strategic priorities of NGOs matter and help explain the pace or intensification of visual campaigns, press conferences and so on.

To our knowledge, Mr Bouckaert has not explained why Alan’s photo, in particular, was used. Why did he select representations of this particular death?

26 Media, especially large media with meaningful distribution, become strategic allies of crucial importance. Historically, however, there are several examples of major campaigns (from the CRA to Near East Relief to Save Darfur, more recently) in which those who call the shots are humanitarian professionals.

27 HRW website, available at: [www.hrw.org/about](http://www.hrw.org/about).

28 On donor fatigue, see Susan D. Moeller, *Compassion Fatigue: How the Media Sell Disease, Famine, War, and Death*, Routledge, New York, 1999; on the collapse of compassion, see C. Dary Cameron and B. Keith Payne, “Escaping Affect: How Motivated Emotion Regulation Creates Insensitivity to Mass Suffering”, *Journal of Personality and Social Psychology*, Vol. 100, No. 1, 2011.

How many Alans did he come across before this? How many times did he – for plausible reasons – decide not to post them on social media? This, again, points to the significance of a historical analysis. Archival sources can elucidate the circumstances informing decisions taken by women and men on the spot; such sources can also inform us of their relations with local (national) press and media, the influence of broader institutional strategies, and particular sensitivities or rationales leading to crucial, heavily charged decisions to use media campaigns to turn particular incidents into international “crises” and “causes”. After all, many twenty-first-century humanitarians, like earlier reformers in the Progressive Era, continue to trust the power of vivid accounts of suffering and its relief to unleash strong emotions in viewers and persuade them to support a cause and donate to it.

## Humanitarian photography in the era of world war

Scholars and journalists often characterize the professionalization of the humanitarian sector as a post-1945 or even a post-1989 development. When it comes to the use of media, however, humanitarians and their organizations have established propaganda departments (later called communications departments) and hired publicity directors since the turn of the twentieth century. Early on, these were important sources for journalists and news organizations. The American Committee of Armenian and Syrian Relief (ACASR, later Near East Relief), for example, fed news organizations the same photos it had used for its own awareness-raising and fundraising campaigns. Instead of following the news, humanitarian actors abroad sometimes made it.<sup>29</sup>

“The Sole Survivor” (Figure 4) was the first in a series of “Sixteen Striking Scenes”, a packaged set of photographic images and information produced and disseminated by the ACASR in late 1917 to generate discussion in church groups, Sunday Schools, and women’s and youth groups in the United States. Accompanying instructions note that the photos could also be used “for the purpose of reproduction in newspapers” at “nominal charge”. The caption identifies the “survivor” in the photo as a mother “weeping beside the dead bodies of her five little sons”. Fleeing Turkish aggression, the woman had first lost her husband “in a Koodish [Kurdish] attack”; her sons succumbed to disease sometime later.<sup>30</sup>

In mid-January 1918, the same photo, along with others from the “Sixteen Striking Scenes” packet, were published in the *New York Tribune* to illustrate a news

29 Since the nineteenth century, it has not been unusual for newspapers, government officials and scientists in Britain, Europe and North America to rely on missionaries, charitable workers, businessmen and other private citizens in the field for information and pictorial renderings of populations, built and natural environments, political and military developments and other subjects. See J. Vernon, above note 5; also T. Jack Thompson, *Light on Darkness? Missionary Photography of Africa in the Nineteenth and Early Twentieth Centuries*, William B. Eerdmans, Grand Rapids, MI, 2012.

30 Near East Committee Records, 1904–1950, Series 1, Box 3, File 11, MRL2, Burke Library Archives at the Union Theological Seminary and Columbia University, New York.



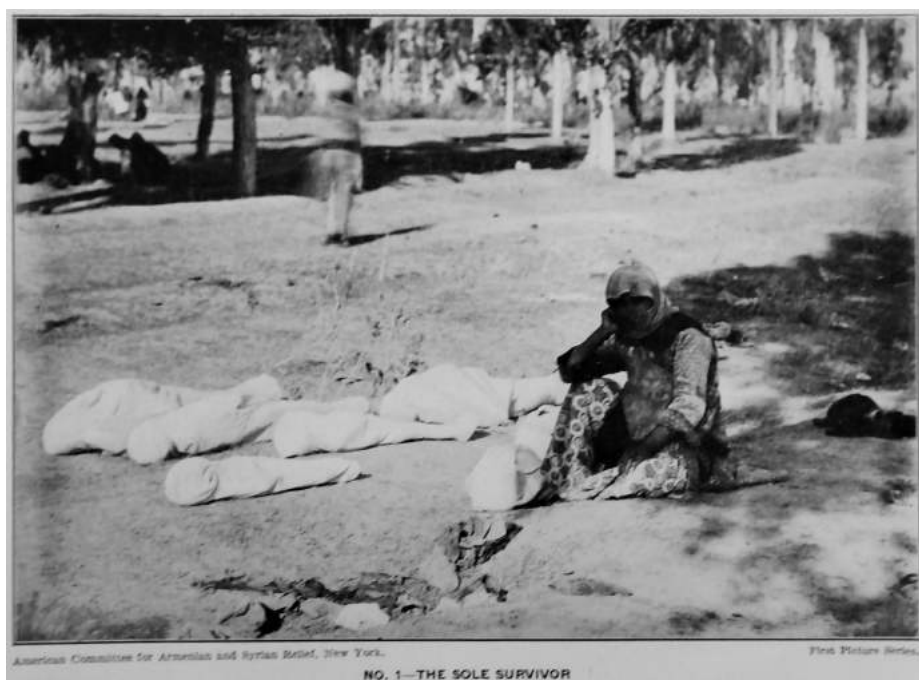


Figure 4. “The Sole Survivor”, from the “Sixteen Striking Scenes” Series. Near East Relief Collection, Burke Library at Union Theological Seminary, Columbia University in the City of New York.

article on American relief for the “agonized remnants” suffering from the brutal “work of the Hun and Turk in Armenia and Serbia” (Figure 5). Two months later, in March 1918, the images were again used in an article, “The Greatest Horror in History: An Authentic Account of the Armenian Atrocities”, authored by Henry Morgenthau, former US ambassador to the Ottoman Empire, and published in the *American Red Cross Magazine*. This time, the mother’s image was titled “Despair” and the caption identified her as being “surrounded by the bodies of her five sons massacred by the Turks”. Morgenthau used the photos as evidence of the “medieval barbarity” of Turks and Germans alike, insisting that Germans share responsibility for the “diabolical cruelty” against Armenian, Syrian and Greek Christians since they “could have prevented it” (emphasis in original). With an eye toward the post-war settlement, he argued that it was the duty of Christians in the United States and Europe to ensure that Armenians “be freed from the yoke of Turkish rule” and that their persecutors be neutralized and prevented from victimizing “fine, old, civilized” Christian minorities again.

In all three instances, the same image of a mother with the sheathed bodies of her dead sons served as evidence and as emotional provocation for three distinct purposes: to support public awareness and fundraising campaigns, to represent “the news”, and to advance a political polemic for how best to achieve post-war justice



Figure 5. “The Sole Survivor”, reprinted in the *New York Tribune*. Near East Relief Collection, Burke Library at Union Theological Seminary, Columbia University in the City of New York.

and lasting peace.<sup>31</sup> As the publishing life of this photo illustrates, there is no essential pictorial difference between humanitarian photos used for evidentiary, informational, fundraising or political purposes. Nor is there a necessary pictorial difference between humanitarian images, on the one hand, and war or atrocity photos, on the other. The difference between those genres is all in the narrative and interpretative framing, and in the publishing venue.<sup>32</sup>

In the era of the First World War and its immediate aftermath, both the American Red Cross and Near East Relief adapted advertising techniques for their public information and fundraising campaigns.<sup>33</sup> They engaged prominent commercial illustrators, whose work would have been familiar to readers of popular books and periodicals of the day, and drew from the professional repertoire of publishers, advertisers, marketers and the movies. Historian Kevin

31 Henry Morgenthau, “The Greatest Horror in History: An Authentic Account of the Armenian Atrocities”, *American Red Cross Magazine*, Vol. 13, No. 3, 1918.

32 For a discussion of photos taken, but not used, in the humanitarian campaign, see Peter Balakian, “Photography, Visual Culture, and the Armenian Genocide”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

33 *Ibid.* See also Julia Irwin, *Making the World Safe: The American Red Cross and a Nation’s Humanitarian Awakening*, Oxford University Press, Oxford, 2013.



Rozario has argued provocatively that “it was only when philanthropy became a marketing venture and when donors began to be treated and courted as consumers who had to be entertained that philanthropy could become a mass phenomenon”. Instead of viewing “sensationalism and humanitarianism as distinct and competing cultural developments”, he concludes, we should recognize modern humanitarianism as a “creation of sensationalist mass culture”.<sup>34</sup>

By the late 1910s, Near East Relief had cultivated a colourful commercial look for its fundraising materials, as is evident from a look at its posters and mailings. Some, like the “Lest We Perish” poster (Figure 6), have a muted palette to underscore the seriousness of the organization’s mission and the profound need of the image’s beseeching recipient – in this case, a beautiful young girl who would not have been out of place in a household magazine or a children’s book.

The pamphlet “Now or Never” (Figure 7) reproduces the charming photographic portrait of a young Armenian girl, reportedly taken prior to the deportations. In many Christian cemeteries, there is a tradition of inserting a photo or a small painting on the tombstone of the person who has passed away. The portrait set into the brick wall on the left of the image evokes this tradition of memorialization. Here the difference with the contemporary photo of Alan on the Turkish beach is tangible. Our view of Alan was of the little boy’s body, face-down; his death image is a warning of future deaths to come if policies toward Syrian refugees do not change. In Figure 7 we see the smiling face of a child. While we are not told of her individual fate, the framing suggests that she has died, “massacred” like thousands of others. The reader is left to imagine the atrocious murders of thousands children like her. The actual deaths are not displayed in this case; rather, the pamphlet opens with an artistic rendering (right) of the destitute and needy surviving children and mother figure. This image (the folded pamphlet’s front cover) tells us, the viewer, what to do: donate,



Figure 6. “Lest We Perish”, Near East Relief poster by Ethel Franklin Betts, c. 1918. US Library of Congress, Prints and Photographs Division, Washington, DC.

34 Kevin Rozario, “Delicious Horrors: Mass Culture, the Red Cross and the Appeal of Modern American Humanitarianism”, *American Quarterly*, Vol. 55, No. 3, 2003, pp. 418–419 (emphasis in original).

“now or never”. Near East Relief targeted churches and churchgoers as a primary audience for its appeals: it addressed viewers on the basis of a shared Christian identity with Armenian victims. Both the poster and the pamphlet (Figures 6 and 7) visually represent children in ways that show they are *worth saving* and deserving of aid. The accompanying drawing on the pamphlet illustrates the dismal present circumstances – the *ongoing* suffering of apparently fatherless families – in an effort to convey a sense of urgency and to motivate immediate viewer response.



Fig. 7 - Colour online, Colour in print

Figure 7. “Now or Never!”, Near East Relief pamphlet. Near East Relief Collection, Burke Library at Union Theological Seminary, Columbia University in the City of New York.

In contrast, mailings like “Share Your Christmas with the Orphans” (Figure 8) used bright, eye-catching primary colours and a blend of holiday cartoon kitch and photographic realism. This juxtaposition was – and remains – an important strategy of address and communication by humanitarian organizations and NGOs. On the one hand, it highlights and celebrates both a shared Christian heritage and a middle-class ideal of childhood, born of the Romantic period and subsequently sentimentalized and commercialized throughout the industrialized West. At the same time, it graphically depicts the reprehensible absence of that ideal in places “over there” – which would remain out of view, this mailing suggests, if cameras were not there to record it.

Fig. 8 - Colour online, Colour in print



Figure 8. “Share Your Christmas with the Orphans”, Near East Relief mailing. Near East Relief Collection, Burke Library at Union Theological Seminary, Columbia University in the City of New York.

NGOs of the period also continued the nineteenth-century tradition of using poetry to frame images and heighten readers’ emotions.<sup>35</sup> In 1921, the Save the Children Fund (London) was in its second year of operation and involved in relief efforts for the Volga famine, which was spurred by drought but exacerbated by disrupted agricultural production and food distribution during the First World War, Bolshevik Revolution and ensuing civil war. Just before Christmas 1921, a posed group photo of nine Tatar refugee children from the Saratov Province appeared in the organization’s newsletter (Figure 9). It was accompanied by a poem by British pacifist writer Israel Zangwill.<sup>36</sup>

In British, American and German publications, Russian famine photos of children were accompanied by artwork by children and sentimental poetry that celebrated childhood. In this instance, the mix of literary and visual forms sought to disarm British critics’ refusal of relief for “Bolshevik babies” by invoking the natural, and therefore universal, vulnerability of the young sufferers.

Since the early twentieth century, humanitarian imagery has had to compete for public attention in a diverse visual economy produced by commercial, religious and political actors. As the Volga famine worsened and the Russian civil war dragged on, communists too organized internationally to provide relief for Russian famine victims and to compete with the fundraising

35 There is a long tradition of humanitarian poetry devoted to far-away stricken populations. Davide Rodogno has counted no less than 500 poems in the French National Library written by Frenchmen on behalf of Greece. Paintings too, like Delacroix’s *The Massacres of Chios*, *The Ruins of Missolonghi*, had a political and humanitarian message; there is also an example of a Russian painting of the Bulgarian Martyrdom. Delacroix exhibited *Massacres of Chios* in the Louvre to support the work and ideology of the Philhellenes, to show that the Turk slaughtered, massacred, raped and killed women and children (all visible in the painting). That painting was completed and exhibited in record time for the nineteenth century, and “*le Tout-Paris*” saw it, causing a buzz. This is perhaps the equivalent of “going viral” for the period. Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914*, Princeton University Press, Princeton, NJ, 2012.

36 The Zangwill poem appeared in *The Record of the Save the Children Fund*, 15 December 1921.

## They Might Be Yours



TARTAR REFUGEE CHILDREN AT SARATOV.

Alas! for the wizened infants  
Sucking at stone-dry breasts;  
Alas! for the babies writhing  
In the grip of plagues and pests.  
They are fever-stricken and famished,  
They are rotten of skin and bone;  
Yet their mothers must die and leave them  
To suffer and starve alone;  
And any one of these children  
Might be your very own.

—Israel Zangwill.

Figure 9. “They Might Be Yours”, *The Record of the Save the Children Fund*, 15 December 1921, p. 107. Cadbury Research Library, Special Collections, SCF Box A670, University of Birmingham.

and relief efforts of organizations like Herbert Hoover’s American Relief Administration and the Save the Children Fund. The Internationale Arbeiterhilfe (IAH, Workers International Relief) was created in Berlin in autumn 1921 and had affiliates in Western Europe and the United States, where communist fundraising efforts were particularly successful. The use of photography by the IAH was more limited and selective than in non-communist campaigns. This likely had to do, in part, with the organization’s difficulty in obtaining photos. Evidence suggests that some images used in information and fundraising campaigns were borrowed from other organizations. In early 1922, for example, the US branch of the IAH published an image of a starving child’s agonies in its official mouthpiece, *Soviet Russia* magazine (Figure 10). A similar photo is located in the archives of the International Committee of the Red Cross (ICRC) in Geneva (Figure 11). In this era, before photographers professionalized and





Figure 10. Photograph published in *Soviet Russia* magazine (New York), 1 February 1922, p. 55.



Figure 11. Russian Famine victim, 1922. Archives of the ICRC, Geneva, V-P-HIST-02590-01A.

demanded credit lines and copyrights for their images, photos circulated more freely and were shared more among organizations and publishing venues than would be the case after the Second World War.<sup>37</sup>

37 For a discussion of the ICRC's film archive and its early use of film and photography, see Valérie Gorin, "Looking Back over 150 Years of Humanitarian Action: The Photographic Archives of the ICRC", *International Review of the Red Cross*, Vol. 94, No. 888, 2012; Francesca Piana, "Photography, Cinema, and the Quest for Influence: The International Committee of the Red Cross in the Wake of the First World War", in H. Fehrenbach and D. Rodogno (eds), above note 4.

Instead of drawing from commercial models and relying heavily on photography, the public information and fundraising campaigns of the IAH recruited prominent artists like Berlin-based Käthe Kollwitz to make artwork for posters, limited-edition artistic portfolios for sale, and other print-based fundraising efforts. Kollwitz’s woodcut, “Hunger”, was the most striking and dramatic example. While it showcased the revolutionary aesthetics of German expressionism, Kollwitz’s image was nonetheless characteristic of broader international and non-leftist trends in humanitarian image-making in its thematic focus on the anguished mother and dying child (Figure 12).

### Enduring tropes: “Mother and child” and “child alone”

The visual trope of the mourning mother and dying child in wartime humanitarian photography (Figure 13) can be traced back to at least the era of the Boer War

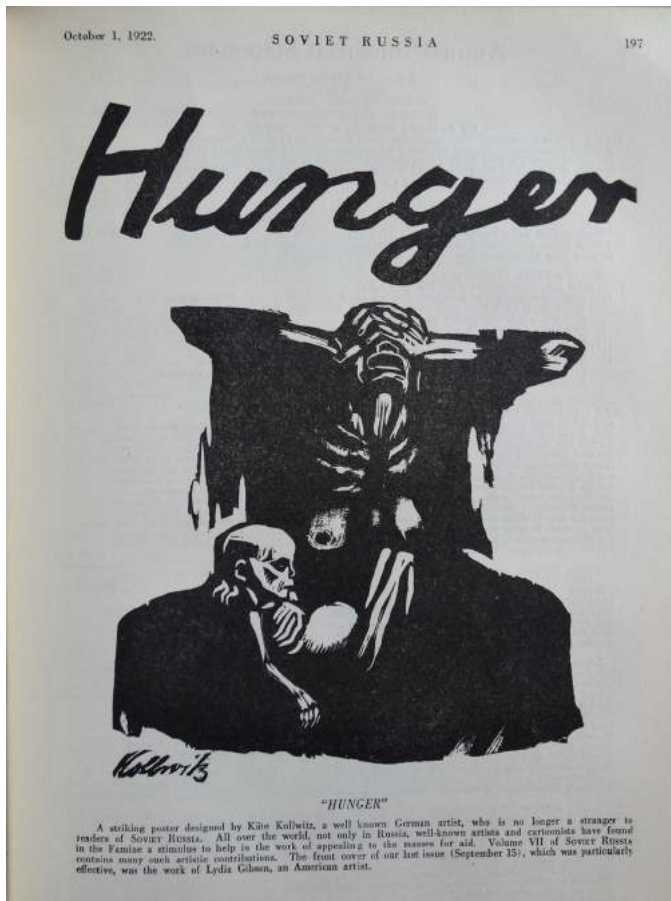


Fig. 12 - Colour online, Colour in print

Figure 12. Käthe Kollwitz, “Hunger”, *Soviet Russia* (New York), 1 October 1922, p. 197.

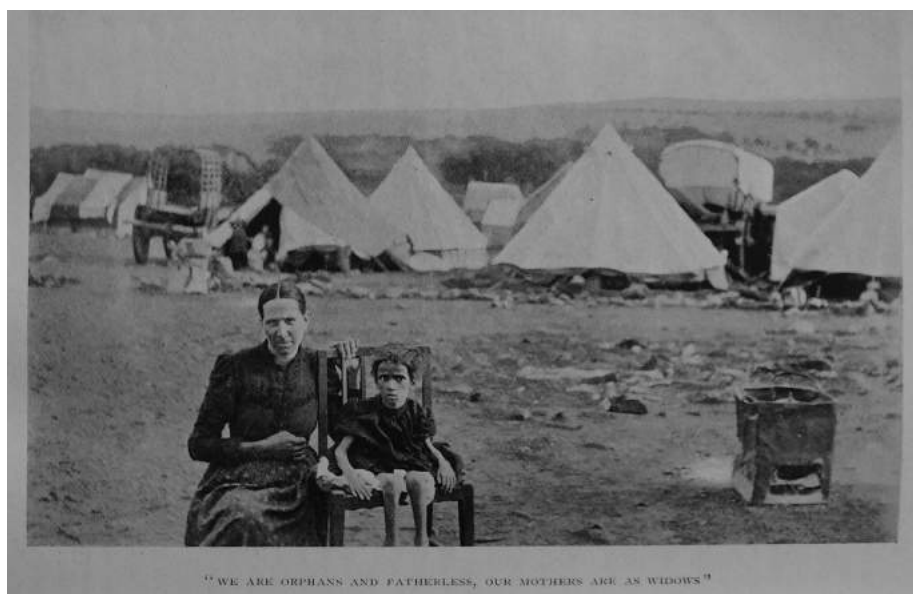


Figure 13. “We Are Orphans and Fatherless, Our Mothers Are as Widows”, in Emily Hobhouse, *The Brunt of War and Where it Fell*, London, 1902.

(1899–1902). In December 1900, the English Quaker reformer and pacifist Emily Hobhouse travelled to South Africa to investigate and protest British treatment of Afrikaner women and children interned in British concentration camps. These were white families of Dutch origin in the Orange Free State and South African Republic whose farmsteads had been razed by British troops due to concerns that they were surreptitiously supplying and assisting Afrikaner guerrilla actions against the British.

British officials characterized their scorched-earth tactics and military actions against non-combatants as “necessities of war”. Hobhouse, who toured the camps in early 1901, filed an unillustrated eyewitness report with Parliament, and helped found the South African Women and Children Distress Fund when she returned home, disagreed. She pressed British officials to improve camp conditions and provisioning in order to staunch high mortality rates among camp inhabitants. She took her quest public and met with hostility since she was criticizing the conduct of her own country at war. Ultimately, her campaign compelled British officials to improve camp conditions, but not until tens of thousands of Afrikaner women and children, and their black African workers and servants (segregated into separate camps), had died of malnutrition, dysentery and disease. In 1902, Hobhouse published the book *The Brunt of War and Where it Fell*, with nine photo illustrations, collected but not taken by her, in order to publicize Britain’s “barbarism”, which, she argued, contravened the 1899 Hague Convention and “civilized conduct” in war. Focusing on the treatment of women and children, her book employed statistics, interviews and photographs to document the dire effects of British policy on non-combatants.



Fig. 14 - B/W online, B/W in print



Figure 14. Photo of Lizzy van Zyl, Bloemfontein concentration camp. Public domain/Wikicommons.

Hobhouse intended to use a photo of the severely emaciated Lizzie van Zyl (Figure 14), whom she had befriended on her tour of Bloemfontein camp. The photo shows a tightly framed shot of the naked, dying girl, with a gaunt, empty gaze and no mother present, lying on a bed. The pro-government English press, along with Sir Arthur Conan Doyle, had already published the image to denounce Hobhouse and suggest that Lizzie's death was the result of maternal neglect, not camp conditions – a charge Hobhouse vigorously refuted. Her plan to reproduce Lizzie's image in her own book was blocked by her publisher, who considered it “too painful for publication”. Hobhouse questioned this ethical position in her book, asking readers “whether it is right to shirk from a typical representation, however distressing, of suffering which others have to endure, and which has been brought about by a sequence of events for which we are partly responsible”. Such loss of life, she argued, could have been avoided through more humane policies and planning; the English population therefore shared the moral responsibility.<sup>38</sup>

As these examples suggest, for over a century, humanitarian photography has increasingly relied on *specific* visual tropes – namely, the “mother and child” and the “child alone” – to accomplish its work. These tropes are informed by closely held cultural notions of children's innocence and pre-political status. This is why the most affecting photographs tend to feature young children who are unambiguously vulnerable and dependent, rather than older children or teens.

38 Emily Hobhouse, *The Brunt of War and Where It Fell*, Methuen, London, 1902, p. 215, also pp. 317–318.

The visual and narrative expressions of humanitarian photography have also reflected a marked perception of, and sensitivity to, the experiences of women and children in war. Historically, humanitarian photography and imagery have been informed by diverse political commitments. Nonetheless, one common theme has been a recognition, via visual representation, of the absence or *inadequacies* of the patriarchal protections of one's State, one's husband and one's father, particularly in wartime.<sup>39</sup>

### **“It could have been my child”: Strategies of identification and difference since 1945**

Still photography remains widely used, and perhaps preferred, for conveying messages, despite the availability of video.<sup>40</sup>

Dimitri Beck, editor of the photojournalism magazine *Polka* (France), stated that the power of Alan Kurdi's picture can be explained by its minimalism: “It's a simple photograph that deals with an essential truth.”<sup>41</sup> But what is the “truth” that the image contains or conveys? After all, the meaning of Alan's photos, like that of all photographic images, is dependent on narration and framing, text and context.

Humanitarian photography presents itself as revealing stark truths, hidden in plain sight, that need telling.<sup>42</sup> The fiction is that this truth is “discovered” by some photographer who stumbles upon and captures it. Yet photographs are cultivated products, whose careful framing, crafting and editing “lends a special kind of presence” to what is depicted.<sup>43</sup> Kevin Carter's Pulitzer

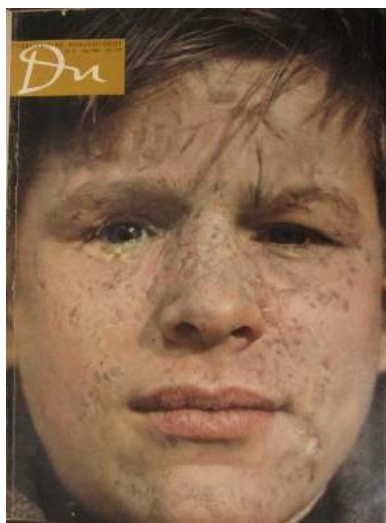


Figure 15. “The Future of Europe's Children” issue, *Du*, May 1946. Cover photo by Werner Bischof.

39 The analysis of the historical material in this and the previous section is drawn from H. Fehrenbach, “Children and Other Civilians”, above note 12.

40 For a discussion of “the parallel between moments arrested mechanically” by the camera, “experientially by the traumatized psyche”, and fixed into memory, see Ulrich Baer, *Spectral Evidence: The Photography of Trauma*, MIT Press, Cambridge, MA, 2002. Video of the discovery and recovery of Alan's body, for example, can be seen on YouTube (available at: [www.youtube.com/watch?v=gzw8L-Ubrik](http://www.youtube.com/watch?v=gzw8L-Ubrik); [www.youtube.com/watch?v=Uk1HE9kSGE](http://www.youtube.com/watch?v=Uk1HE9kSGE)), but at the time of writing it has attracted far fewer views (about 60,000) than the still photos of his body.

41 O. Laurent, above note 13.

42 See, for example, S. Linfield, above note 1, and her criticisms of Susan Sontag on the representation of the effects of violence.

43 Alan Trachtenberg, *Lincoln's Smile and Other Enigma*, Hill and Wang, New York, 2007, p. 110. On iconic images, see Robert Hariman and J. L. Lucaites, *No Caption Needed: Iconic Photographs, Public Culture and Liberal Democracy*, University of Chicago Press, Chicago, IL, 2007.

Prize-winning photograph of an unnamed starving toddler hunched, near death, on the arid ground and “stalked” by a vulture in 1993 Sudan is a famous case in point.<sup>44</sup> Since Carter’s untimely death at the age of 33 one year later, there have been numerous academic and press discussions of how he got the shot (including his long, patient wait for a vulture to approach the child so he could effectively frame the photo), his lack of assistance to the child, his uncertainty regarding her exact fate, and the ethics of such photographic practice (including whether this experience informed his decision to commit suicide the following year).<sup>45</sup>

The use of professional photographers by humanitarian organizations and NGOs did not become commonplace until after the Second World War.<sup>46</sup> With the introduction of the fast-shutter lightweight Leica camera in the interwar period and the rise of photojournalism, “war photographers” emerged as a profession. Taking to the field to cover the Spanish Civil War and Second World War, these photographers were predominantly male. Robert Capa, David “Chim” Seymour and Werner Bischof, for example, made their names and gained reputations as their photos appeared in glossy weekly and monthly magazines (like *Life*, *Look*, *Picture Post*, *Paris Match*, *Vu*, *Regards* and *Du*) throughout Europe and North America (Figure 15). In the process, new genres like the photo-story were developed that used photographs, carefully ordered in serial succession, to structure and dramatize news and human interest stories. In addition to publishing in news magazines, professionalizing photographers like Capa, Chim and female US expat Thérèse Bonney published their wartime photo-stories in popular book form.

Bonney, in particular, launched photo exhibits of her wartime work in prominent museums and venues throughout the United States in order to publicize the plight of European children and fundraise to feed them. Unlike her male counterparts, Bonney focused on the war’s effect on families and children in Europe. During the Second World War, photos like Bonney’s popularized the notion of “the civilian” as imagined through the figure of the innocent, endangered child. After war, this image of child-as-civilian was disseminated via the public relations material of the UN Relief and Rehabilitation Agency and

44 Available at: [https://en.wikipedia.org/wiki/Kevin\\_Carter#/media/File:Kevin-Carter-Child-Vulture-Sudan.jpg](https://en.wikipedia.org/wiki/Kevin_Carter#/media/File:Kevin-Carter-Child-Vulture-Sudan.jpg).

45 Arthur Kleinman and Joan Kleinman, “The Appeal of Experience, the Dismay of Images: Cultural Appropriations of Suffering in Our Times”, *Daedalus*, Vol. 125, No. 1, 1996. See the 2004 documentary by Dan Krauss entitled *The Death of Kevin Carter: Casualty of the Bang Bang Club*. It was nominated for an Academy Award in the documentary short subject category in 2006.

46 On the professionalization of news photography during the Spanish Civil War and Second World War, and the post-war engagement of wartime photographers by UN organizations, see, among others, Robert Lebeck and Bodo von Dewitz, *Kiosk: A History of Photojournalism*, Steidl, Göttingen, 2001; Cynthia Young (ed.), *We Went Back: Photographs from Europe 1933–1955*, International Center of Photography and Delmonico Books, New York, 2013. Immediately after the First World War, the American Red Cross hired US photographer Lewis Hine to go to Europe and take photos of the post-war misery there. Hine, by that time, was well known for his portraits of children in the workplace, which were used in the American campaign against child labour. However, the American Red Cross did not make use of Hine’s European photos for purposes of fundraising; why the organization did not exploit them for these purposes is not clear.

Fig. 16 - Colour online, Colour in print

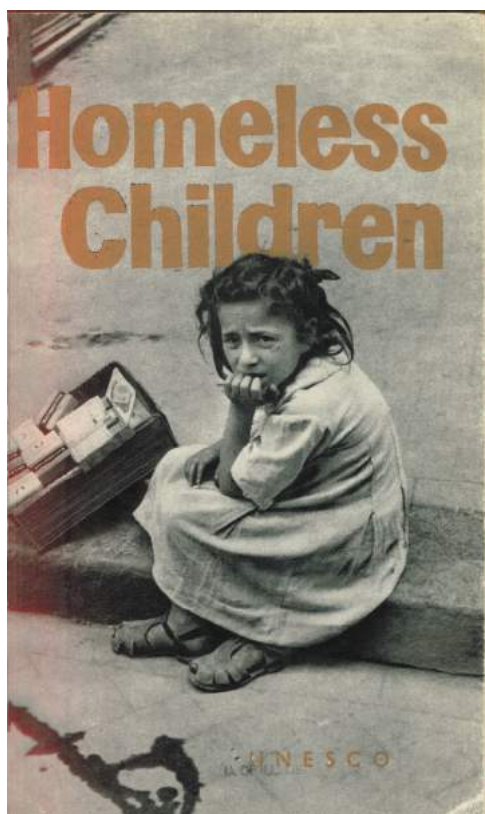


Figure 16. Thérèse Brosse, *Homeless Children*, Paris, 1950. Photo by David “Chim” Seymour for UNESCO.

viewer with the depicted subject. As Peter Bouckaert noted, regarding the photo of Alan: “It’s, sadly, a very well-composed image showing a little toddler that we can all identify with .... I think for a lot of the public, their first reaction is: ‘This could have been my child.’”<sup>47</sup> The beach location, after all, is the site of middle-class leisure; online comments show that viewers responded to Alan’s photo as an inverse horror shot of their happy, sun-filled family vacation photos. Bouckaert conceded that the child’s ethnicity played a role in the image’s impact. “This is a child that looks a lot like a European child”, he wrote. “The week before, dozens of African kids washed up on the beaches of Libya and were photographed and it didn’t have the same impact. There is some ethnocentrism [in the] reaction to this image, certainly.”<sup>50</sup> From the point of view of

through publications of UNESCO and other UN agencies in photo campaigns that advertised both the ongoing need of post-war populations and the effectiveness of the organizations tasked with meeting those needs (Figure 16).<sup>47</sup>

This doubly depoliticized category – *civilian-as-child* – is a visual trope and a moral construct. Yet Bonney’s camera lens gave it geographical and cultural particularity, depicting the “civilian” as a white European child. What is more, Bonney’s photos (Figure 17) evoked the genre of child portraiture. Her intentional reference to that familiar (and familial) photographic form helped make the moral argument on the basis of recognition: the civilian-as-European-child deserved the protection of Western viewers since violence against it could be violence against their own child.<sup>48</sup>

In practice, humanitarian photography has made very selective use of images based upon the anticipated identification of the

47 See, for example, Silvia Salvatici, “Sights of Benevolence: UNRRA’s Recipients Portrayed”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

48 The argument is drawn from Heide Fehrenbach, “Children and Other Civilians”, above note 12.

49 O. Laurent, above note 13.

50 *Ibid.*

Fig. 17 - B/W online, B/W in print

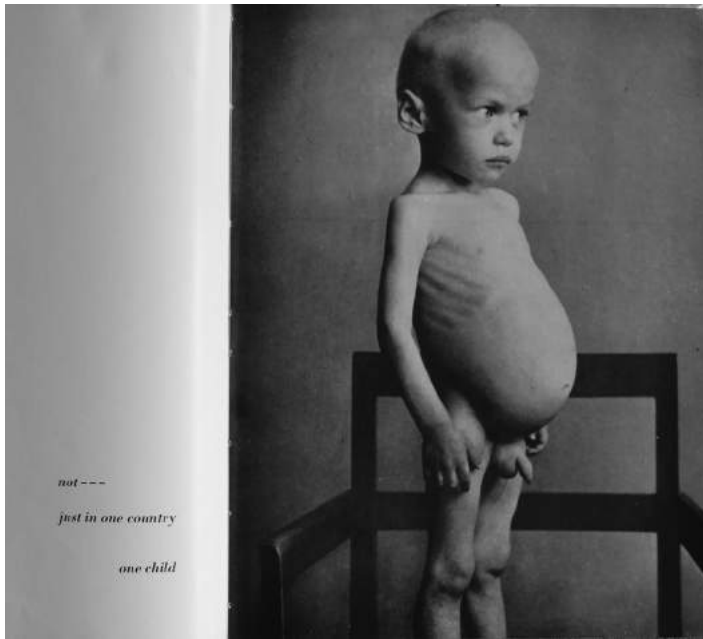


Figure 17. Thérèse Bonney, *Europe's Children*, 1939–1943, self-published, 1943.

humanitarian organizations, the choice of a photo and subject has never been random. Historically, humanitarian organizations have paid a lot of attention to skin colour.

The CRA's Congo reform campaign (1904–13) used images of children like Impongi (Figure 18), who was mutilated by agents in an effort to terrorize villagers and compel labour, productivity and profits for Belgian King Leopold's rubber trade. Yet initially the campaign did not spread widely and even when missionary networks enlivened it, children and child labour practices were not its focus – rather, acts of violence and Leopold's "perfidy" in not abiding by international agreements (on how to rule the Congo Free State and treat its indigenous inhabitants) were. The CRA depicted and circulated images of adult and child victims in rough parity. The main thrust of the campaign did not rest on the readiness of Western viewers to identify with a vulnerable Congolese child. Some ten years later, humanitarian organizations such as Near East Relief did not hesitate to whiten the skin of Armenian children whom they depicted in posters, pamphlets and other visual outlets in order to arouse public opinion and stimulate giving among white Christians in the United States and Europe.

A determined focus on the depiction of "Third World" children in humanitarian campaigns only took hold and proliferated in the era of accelerated decolonization after 1945. The World Health Organization, like various other international organizations, advertised its goals, effectiveness and technocratic savvy by showcasing images in its newsletter and glossy magazine of its medical





Figure 18. Impongi, Congo victim mutilated by State soldiers. Schomburg Center for Research in Black Culture, Jean Blackwell Hutson Research and Reference Div., New York Public Library. New York Public Library Digital Collections, available at: <http://digitalcollections.nypl.org/items/510d47df-f447-a3d9-e040-e00a18064a99>.

“African Auschwitz”, in an effort to underline the urgency of the crisis, yet suggested that the “worst could still be avoided” with the provision of immediate relief.<sup>52</sup> As in the case of the CRA or, in fact, the case of Alan Kurdi and HRW, humanitarians initiated the campaign and created alliances across religious denominations. Comparisons with the Holocaust, Heerten notes, were deliberately cultivated by Biafran propaganda in order to deflect politics (including criticisms of the unsavoury behaviour of Biafran rebels) and render the crisis a purely humanitarian affair.<sup>53</sup>

professionals eradicating disease among the children of affected non-white populations.<sup>51</sup> However, it was probably the Biafra crisis of the late 1960s that etched particular visual depictions of the “Third World” into Western imaginations while also showing remarkable continuities with a longer, colonial tradition. In summer 1968, the civil war between Nigeria and the breakaway Biafran region, which had eluded journalistic attention for a year, became an international media, protest and humanitarian event. Newspapers and TV networks in Europe and the United States flooded their audiences with relentless images of starving Biafran children. Campaigners united in transnational protest networks, criticized national governments’ inaction and raised funds for relief operations.

First and foremost, Biafra resonated with memories of the Holocaust. Many viewers, Jewish and non-Jewish alike, explicitly compared the 1968 photographs of Biafran children to Jewish victims of the Nazi camps (Figure 19). As historian Lasse Heerten has argued, humanitarians campaigning on behalf of Biafran children deliberately made this connection, stoking fears of an

51 Davide Rodogno and Thomas Davide, “All the World Loves a Picture: The World Health Organization’s Visual Politics, 1948–1973”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

52 Lasse Heerten, “‘A’ as in Auschwitz, ‘B’ as in Biafra: The Nigerian Civil War, Visual Narratives of Genocide, and the Fragmented Universalization of the Holocaust”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

53 *Ibid.* An appropriate current comparison to this strategy is perhaps the photos and videos released by the Syrian government allegedly showing starving children in Madaya, which circulated in late December

# 6 million



## Dear God, not again.

Does this scene look familiar? It should. It was only twenty-five years ago that similar scenes scarred the face of Europe, while nations turned their heads and said they did not know. You don't have that excuse.

Today Nigeria is engaged in the genocide of eight million Biafrans, calling it an "internal problem" and a "political solution." The Nigerian army which rapes, pillages and burns

everything in its path is supported by Russian Mig's flown by Egyptian pilots who are training for the next war with Israel.

The world stood silent while 6,000,000 Jews died. Are you going to stand by now?

The scene above exists today. Help today before it is too late. Write your senators and congressmen and insist on an immediate ceasefire and send contributions now to the American Committee To Keep Biafra Alive, Inc.,

1234 Broadway - Hotel Hudson  
New York, New York 10001  
(212) 736-2040

Figure 19. American Committee to Keep Biafra Alive. Clearing House for Nigeria-Biafra Information Records, DG168, Box 10, Swarthmore Peace Collection, Swarthmore, PA.

In the case of Alan's photo, such contextualization was, in a way, less necessary than in 1968. Viewers need not be reminded of meaningful precedents because they already carry these images – or subsequent presentations of pictorial moments of trauma – in their memories; they have become part of our “connected” public visual repertoire. The horror of the picture is enough, and

2015. “Starving Children in Madaya”, *LiveLeak*, available at: [www.liveleak.com/view?i=a3a\\_1452404656](http://www.liveleak.com/view?i=a3a_1452404656); “Syrian Govt to Allow Aid into Starving Town”, *Sky News*, 7 January 2016, available at: <http://news.sky.com/story/1618288/syrian-govt-to-allow-aid-into-starving-town>; Al Jazeera, “Inside Story – Starvation as a Tool of War in Syria”, available at: [www.youtube.com/watch?v=D1AewGozXoo](http://www.youtube.com/watch?v=D1AewGozXoo).



Alan's image has become an iconic representation of the current "crisis". Before his picture went viral, there was no single, vivid image that captured the tragedy of Syrian (and other) refugees, despite the efforts of many Syrian civilians and international organizations.<sup>54</sup> Before Alan Kurdi, the dominant image of refugees on television, in newspapers and in news feeds was that of masses of people crammed into drifting boats or rescued in Lampedusa or on some Greek island. Alan came to embody – in the sense of giving individual human form to – the tragedy of hundreds of thousands of refugees and civilian victims of the war.

In becoming an icon and a meme, Alan's photo encapsulated a meaningful moment in an otherwise long, uninterrupted campaign related to at least two intertwined crises: the Syrian conflict and the refugee crisis which extends beyond Syria. Biafra, in contrast, was a geographically localized humanitarian emergency. In the 1968 humanitarian campaigns, Biafrans, like Holocaust victims, were represented as archetypal figures rather than individuals: they were like the nameless inmates doomed to die in the *univers concentrationnaire*. In 2015, the narrative built around the photograph of the toddler's corpse lying on a Turkish beach is centred on his name: Alan. Like starving Biafrans, Alan is *the* victim, but nowadays campaigners know it would be inappropriate to invoke genocidal precedents. Singling out one child seems a more effective way to provoke and cultivate a virtuous circle of empathy, emotions and action.

## Fixed images, fluid meanings: Politics, ethics and media technologies

In the late 1960s, when it turned out that Biafra was not a pristine case of humanitarian need but a messy political conflict with bad behaviour on both sides (including the withholding of food aid from starving victims by Biafran forces), the momentum of the Biafra campaign could not be sustained.<sup>55</sup> It is too soon to say what will happen to the story of Alan Kurdi, but there have already been indications that his iconic image is far from sacrosanct.

In January 2016, the satirical French magazine *Charlie Hebdo* published a provocative cartoon attacking the presumptive innocence of the child – and the reverential treatment of his death image – by imagining the boy's future, had he lived, as a monkey-faced "ass groper" harassing European women (a reference to reports of sexual attacks on women in public by Syrian and immigrant men in Cologne, Germany, in December 2015.<sup>56</sup>) In response, Queen Rania of Jordan released a cartoon rejoinder, imagining Alan first as a

54 See, for instance, UNICEF celebrity campaign, "No Place Like Home", available at: <http://youtu.be/un4cZOKFK3M>; UNICEF videos in which refugee children narrate their experiences, available at: <http://youtu.be/AFVUoYQL6LA>.

55 L. Heerten, above note 52.

56 See [www.bbc.com/news/world-europe-35231046](http://www.bbc.com/news/world-europe-35231046).

student and then as a doctor as he moves into adulthood.<sup>57</sup> Just days later, the Chinese artist Ai Weiwei exhibited a photo of himself lying face-down on a beach on the Greek island of Lesbos, mimicking Alan’s pose, in tribute to the drowned child and to rally attention to the refugee crisis.<sup>58</sup> Although the *Charlie Hebdo* cartoon attracted substantial criticism in France and beyond, the cartoon skirmish and ongoing recontextualizations of Alan’s image make one thing clear: the meaning of what Alan Kurdi represents is up for debate. For some, he remains the embodiment of the innocent, suffering refugee fleeing violence and seeking succour and peace. Others are trying to manipulate Alan’s image into something quite different: the incipient threat of an alien immigrant incursion.<sup>59</sup>

But that, of course, conveniently ignores something crucial about the image: that it depicts a child who achieved representative status in these debates not by his own choice or volition but by the circumstances of his demise and the fact that his death-image was deemed shocking, useful and newsworthy by others. Hugh Pinney, vice president at Getty Images, a distributor of news images, had this to say in an interview with *Time*: “the reason we’re talking about it after it’s been published is because it breaks a social taboo that has been in place in the press for decades: a picture of a dead child is one of the golden rules of what you never published”.<sup>60</sup> Or as Nicolas Jimenez, director of photography at *Le Monde*, put it: “We’d written about it in the past, but we hadn’t shown it in such a hard way .... [T]o show it like this is an important step.”<sup>61</sup>

Pinney is correct that newspaper and magazine editors have generally followed a code of ethics that strongly discourages publishing graphic images of corpses – especially those belonging to one’s own nation or allied nations. During the Second World War, this was reinforced by government censorship: in the United States, Britain and Germany, for example, publication of photos showing one’s own dead (citizens or soldiers) was restricted or prohibited for reasons of wartime propaganda and morale, moral propriety, or emerging legal claims of privacy.

Such practices of pictorial restraint have rarely extended to those outside one’s sphere of national, cultural, religious or ethnic belonging, as the historical examples we have presented – from the Congo Free State, Armenia, South Africa and Nigeria – demonstrate. In fact, it took until the 1980s for humanitarian NGOs to develop written rules for the regulation of their photographic imagery in their public information and fundraising campaigns,<sup>62</sup> and even then, this

57 For the cartoon response by Queen Rania, see: [www.middleeasteye.net/news/jordans-queen-rania-responds-charlie-hebdo-cartoon-form-1272612906](http://www.middleeasteye.net/news/jordans-queen-rania-responds-charlie-hebdo-cartoon-form-1272612906); [www.bbc.com/news/world-middle-east-35333895](http://www.bbc.com/news/world-middle-east-35333895).

58 On Weiwei’s photo, see Rama Lakshmi, “Chinese Artist Weiwei Poses as Drowned Syrian Child”, *Washington Post*, 30 January 2016, available at: [www.washingtonpost.com/news/worldviews/wp/2016/01/30/chinese-artist-ai-weiwei-poses-as-a-drowned-syrian-refugee-toddler/](http://www.washingtonpost.com/news/worldviews/wp/2016/01/30/chinese-artist-ai-weiwei-poses-as-a-drowned-syrian-refugee-toddler/).

59 On the cartoon skirmish, see the BBC News website at: [www.bbc.com/news/world-middle-east-35333895](http://www.bbc.com/news/world-middle-east-35333895).

60 O. Laurent, above note 13.

61 *Ibid.*

62 “Code of Conduct: Images and Messages Relating to the Third World”, adopted by the General Assembly of European NGOs meeting in Brussels in April 1989. The strategy for implementation was assigned to the

trend was at first limited to Europe and was triggered by the widespread circulation of appalling images of suffering during the Ethiopian famine in 1984 and 1985. In Britain, television news coverage and tabloids alike covered the “Race to Save Babies”. Musician Bob Geldof founded Band Aid – which recorded and released the single “Do They Know It’s Christmas?” to raise funds for famine victims – and went on to promote an internationally televised charity concert, staged simultaneously in London and Philadelphia in July 1985 and viewed by an estimated 1.6 billion people.<sup>63</sup> The sheer scale of this philanthropic *qua* entertainment enterprise was unmatched in history. Yet in addition to attracting unprecedented international attention and donations, the negative images of African suffering, passivity and helplessness mobilized by Europeans and North Americans in relation to the Ethiopian campaign attracted withering criticism and a report on Western “Images of Africa” authored by representatives of thirteen countries. The report launched a period of sober self-assessment by humanitarian and development NGOs regarding their own representational practices. It resulted in the adoption of written guidelines meant to guarantee that NGO media practices respect the individual subjectivity, dignity, identity, culture and volition of those portrayed. By the turn of the 1990s, the trend among humanitarian NGOs (if not among purveyors of the news) was to request that their photographers produce “positive” imagery. The aim, which continues to this day, is to find engaging ways to brand the organization and depict its effectiveness, to showcase the resilience and activity of its clients, and to steer clear of depictions of death or of bodies in pain or in need.<sup>64</sup>

As this article goes to press, we can report, sadly, that the image of Alan, like similar ones from previous crises, has not entirely fulfilled the expectations of those who decided to make it public. The circulation of Alan’s photo in various media stimulated awareness of the problem and dangers of refugee migration

Liaison Committee’s Development Education Working Group. See also Nikki Van der Gaag and Cathy Nash, *Images of Africa: The UK Report*, Oxfam, Oxford, 1987; for a discussion of written regulations in Europe, see Henrietta Lidchi, “Finding the Right Image: British Development NGOs and the Regulation of Imagery”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

- 63 *Ibid.* There is a growing literature on celebrity humanitarianism which critically covers several crucial aspects of this phenomenon but leaves unaddressed the historical dimension. Lilie Chouliaraki, “Post-Humanitarianism: Humanitarian Communication beyond a Politics of Pity”, *International Journal of Cultural Studies*, Vol. 13, No. 2, 2010; Lilie Chouliaraki, “The Theatricality of Humanitarianism: A Critique of Celebrity Advocacy”, *Communication and Critical/Cultural Studies*, Vol. 9, No. 1, 2012; H. Louise Davis, “Feeding the World a Line? Celebrity Activism and Ethical Consumer Practices from Live Aid to Product Red”, *Nordic Journal of English Studies*, Vol. 9, No. 3, 2010; Ilan Kapoor, *Celebrity Humanitarianism. The Ideology of Global Charity*, Routledge, London, 2013; Cheryl Lousley, “Humanitarian Melodramas, Globalist Nostalgia: Affective Temporalities of Globalization and Uneven Development”, *Globalizations*, Vol. 13, No. 3, 2015; Mary Mostafanezhad, “‘Getting in Touch with Your Inner Angelina’: Celebrity Humanitarianism and the Cultural Politics of Gendered Generosity in Volunteer Tourism”, *Third World Quarterly*, Vol. 34, No. 3, 2013; Jemima Repo and Riina Yrjölä, “The Gender Politics of Celebrity Humanitarianism in Africa”, *International Feminist Journal of Politics*, Vol. 13, No. 1, 2011.

- 64 H. Lidchi, above note 62. See also Sanna Nissinen, “Dilemmas of Ethical Practice in the Production of Contemporary Humanitarian Photography”, in H. Fehrenbach and D. Rodogno (eds), above note 4.

from Syria; it did not, of course, solve these. Twitter and Facebook proved as inefficient, and as inadequate, as older media such as newspapers and news magazines in promoting more incisive and humane policies towards refugees and immigrants fleeing armed conflict in Syria, the Middle East and Africa. Since September 2015, many Alans have followed.<sup>65</sup>

What can make a difference? In this shifting media environment, some have put their faith in yet more sophisticated technology. Late last year, for example, the *New York Times* collaborated with Vrse, a virtual reality production studio, to create for its readers a more “immersive experience” (and, one imagines, to keep its business afloat, as newspapers and news organizations continue to contract and close). The *Times* unveiled its product on Sunday, 8 November 2015, using shared content across three media platforms, and dubbed the launch a “multimedia journey in text, photographs, and virtual-reality film”. That Sunday, the *New York Times Magazine* featured a story entitled “The Displaced”. On the magazine’s cover was a photo of 9-year-old Chuol making his way through a swamp in South Sudan as ominous grey storm clouds fill the horizon. “War has driven 30 million children from their homes”, read the accompanying text; “These are the stories of three of them.” The magazine, website and virtual reality video (available through a smartphone app) all told the stories of three children: Chuol, who “without his parents was forced to flee to the swamps of South Sudan” in order to survive; Oleg, 11, who was “living in the ruins of his former life in Ukraine”; and Hana, 12, who “has lived one-quarter of her life as a Syrian refugee in Lebanon”. Regular subscribers to the newspaper received a special cardboard “3-D viewer” with instructions on how to assemble it and insert their smartphone in order to achieve the full “360-degree immersion effect” while watching the 11-minute virtual reality video on the children.<sup>66</sup>

The *New York Times* newspaper, magazine and website subsequently featured a number of self-congratulatory essays extolling their adoption of the technology and its revolutionary possibilities, and discussing its ethical challenges. Readers, for their part, wrote in to say that watching the 3-D video was “an amazing experience”, that they were struck by “the immediacy and intimacy of the images” and that it “felt like I was standing there myself, not observing from

65 For example, the Italian newspaper *Corriere della Sera* reported news first published in the *Times of Malta* about a 2-year-old Syrian child who lost his life when the boat he was in crashed against the rocks of an Aegean Island. The news originated from the Migrant Offshore Aid Station, a humanitarian institution funded by US billionaire and philanthropist Christopher Catrambone. The Italian newspaper did not fail to invoke Alan, the original 3-year-old symbol of Syrian suffering, but did not re-run his photo. *Corriere* noted that 700 children have died in Mediterranean waters fleeing war and hunger; the slaughter (*strage*) continues in 2016. “Migranti, il gommone si schianta sulle rocce: Muore bimbo di 2 anni”, *Corriere della Sera*, 3 January 2016, available at: [www.corriere.it/esteri/16\\_gennaio\\_03/migranti-gommone-si-schianta-rocce-muore-bimbo-2-anni-191ded8c-b233-11e5-829a-a9602458fc1c.shtml](http://www.corriere.it/esteri/16_gennaio_03/migranti-gommone-si-schianta-rocce-muore-bimbo-2-anni-191ded8c-b233-11e5-829a-a9602458fc1c.shtml). The *New York Times* reported on 31 January 2016 that the bodies of at least ten more children had washed up on Turkish shores the day before. This time, it was reported not on the front page but on page 17.

66 “The Displaced” and advertising insert “Changing the Way Stories are Told”, *New York Times Magazine*, 8 November 2015.

afar". One leading expert explained that the technology was "like writing on the brain with indelible ink".<sup>67</sup> In order to channel such powerful effects, the *New York Times* included with the original multimedia rollout a column telling viewers "How to Help". The column provided readers with a list of aid organizations to which they could send "donations for child refugees". It also noted that "Save the Children and Unicef were involved in coordinating the reporting of 'The Displaced'", thus proving that the symbiotic relationship between media and humanitarianism – with its ambiguous politics and reliance on emotional and moral appeals – continues today.<sup>68</sup>

The viewing experience was indeed impressive. Still, what is not clear – as ever – is exactly *how* further enhancing our visual, perceptual and emotional experience of distant suffering will yield solutions to it. Might not these ever more intense impressions also prove fleeting? Will our stimulated emotions necessarily move us to action? And if so, of what sort? At the moment, the only thing that is incontestable is that commercial and entertainment companies like Cola-Cola, Volvo and HBO are, along with advertisers and marketers, exploring the uses of virtual reality for their own purposes of increasing their customer base and their profits.<sup>69</sup>

## Conclusion

Alan's photo, like humanitarian photographs in general, tells us more about us, the purveyors and observers of images, than about those whose suffering we depict, bemoan and re-tweet. This is an old dilemma, well known to scholars and practitioners of humanitarianism.<sup>70</sup> The parameters of the debate about the transformational possibilities of humanitarianism did not change because of the Internet and social media. Rather, its possibilities and pitfalls alike, while shaped by political and economic structures, remain informed by the subjective identities, social positioning, political commitments and moral values of its supporters, donors and workers.

67 Margaret Sullivan, "The Tricky Terrain of Virtual Reality", *New York Times*, 15 November 2015; Robert D. Hof, "Advertising: Brands Look Far and Wide for a Niche in Virtual Reality", *New York Times*, 16 November 2015.

68 Jaime Lowe, "How to Help", *New York Times Magazine*, 8 November 2015. The organizations named were the US Fund for UNICEF, USA for UNHCR, Save the Children, Mercy-USA for Aid and Development, and the World Food Programme. On Christmas Day 2015, "How to Help in a Global Refugee Crisis" was published in Tara Siegal Bernard's "Your Money" column, *New York Times*, 25 December 2015, available at: [www.nytimes.com/2015/12/26/your-money/how-to-help-in-a-global-refugee-crisis.html?ref=topics&\\_r=0](http://www.nytimes.com/2015/12/26/your-money/how-to-help-in-a-global-refugee-crisis.html?ref=topics&_r=0).

69 R. D. Hof, above note 67.

70 For an interesting recent discussion, see Liisa H. Malkki, *The Need to Help: The Domestic Arts of International Humanitarianism*, Duke University Press, Durham, NC, 2015.



Fig. 20 - B/W online, B/W in print

Figure 20. Full-page advertisement for the International Rescue Committee, *New York Times*, A11, 25 September 2015.

We should not be surprised that the contemporary practice of humanitarian photography, like that of the past, employs a narrow range of recognizable tropes, such as the “mother and child” and “child alone”. Such tropes have come to express our preferred view of the suffering “out there” that we judge to be worthy of response and remedy. That is why such images, and their expertly framed narratives, continue to touch our hearts and emotions. What they do not do – cannot do – is offer actual solutions. At most, humanitarian photography can aspire to portray problems in ways designed to influence public opinion and, through it, political agendas.

For over a century, humanitarian photography has mobilized the universalizing language of “humanity” through the sentimental lens of family. Over time, it has learned to wage politics via a consciously cultivated apolitical portrayal that suggests and showcases victims’ innocence. Humanitarian photography accomplishes this by erasing political context and complexity from its visual frame in order to focus attention on apparently unjust suffering. Peter Bouckaert’s use of Alan Kurdi’s photo was rooted, in this sense, in a century’s worth of humanitarian practice. As a result, he and HRW were convinced that the publication and circulation of that photo was the right thing to do.





## OPINION NOTE

# Technological change and the evolution of the law of war\*

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### Abstract

*Advances in military technology have led many, including the developers of such technology, to propose new regulation. International lawyers have extensively examined the adequacy of the existing law to address emerging technology, but they have devoted relatively little attention in these analyses to the prior development of the law as a result of, or despite, technological change. This essay highlights two challenges that those wishing to undertake such an exercise might encounter. The first of these is the general paucity of serious engagement with the history of international law applicable in armed conflicts and the perpetuation of a particular “origin myth” of international humanitarian law. The second challenge has to do with the controversies about the impact of technology on society in general, and the impact of military technology on warfare in particular. Nevertheless, the essay concludes by pointing towards some of the insight that might be gained from a more history-conscious analysis of the relationship between technology and law in the military context.*

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**Keywords:** law of war, law of armed conflict, international humanitarian law, arms control, military technology, law and technology theory, legal history.

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## Introduction

Warfare has been upgraded. The past few decades have seen an extraordinary technological change in conflicts and in military capabilities generally. Reportedly more than 100 States have established dedicated cyber-warfare units within their armed forces or intelligence agencies.<sup>1</sup> These units help States fend off hostile cyber-operations targeting their national infrastructure and – though this might not be equally publicized – undertake such operations against an adversary. Nearly as many States are said to operate unmanned aerial vehicles (UAVs) for intelligence, surveillance and reconnaissance, and allegedly some 30 States already have or are developing armed UAVs.<sup>2</sup> Military applications of artificial intelligence, nanotechnology and biotechnology are being actively devised and implemented.

This technological shift has sparked an extensive debate about the adequacy of the applicable international law, yet past developments of the law as a result of, or despite, technological change have garnered surprisingly little attention in these analyses. This Opinion Note aims to highlight a few obstacles in the path of those inclined to undertake a more historically inquisitive inquiry. Also, it seeks to foreshadow some of the insights that might be gained from such an exercise. These aims are modest. This paper does not purport to impart “history lessons” to guide policy-makers or commentators in their analyses of the governance of some new technology. It merely attempts to encourage a discourse more mindful of history.

Before proceeding, some terminological clarifications are in order. They seem necessary given that “technology” is a deceptively simple term. To many participants in the debates about the regulation of military technology, the word means weapons or, perhaps more broadly, military equipment. On this account, technology means human-made physical objects, especially tools, instruments and devices. However, technology can be construed more broadly than just technological artefacts. Wilbert E. Moore, for example, has defined technology as “the application of knowledge to the achievement of particular goals or to the solution of particular problems.”<sup>3</sup> Thus technology may be reasonably taken to

1 Fergus Hanson, “Waging War in Peacetime: Cyber Attacks and International Norms”, *The Lowy Interpreter*, 20 October 2015, available at: [www.loyyinterpreter.org/post/2015/10/20/Waging-war-in-peacetime-Cyber-attacks-and-international-norms.aspx](http://www.loyyinterpreter.org/post/2015/10/20/Waging-war-in-peacetime-Cyber-attacks-and-international-norms.aspx) (all internet references were accessed in October 2016).

2 Michael C. Horowitz and Matthew Fuhrmann, “Droning on: Explaining the Proliferation of Unmanned Aerial Vehicles”, 1 October 2015, available at: [ssrn.com/abstract=2514339](http://ssrn.com/abstract=2514339).

3 Wilbert E. Moore, “Introduction”, in Wilbert E. Moore (ed.), *Technology and Social Change*, Quadrangle Books, Chicago, 1972, p. 5.

cover “skills, routines, and methods as well as the knowledge needed to operate devices”; in this sense technology refers to “technique, a way of doing things”.<sup>4</sup> While there are further and even broader understandings of the notion of technology, for the purposes of this essay thinking of technology not just as an artefact (or even a set of interconnected artefacts) but also as technique appears adequate. From this point of view, both bullets and poison, for example, qualify as military technology. Even though a particular poison might not be a human-made object but, say, a toxin found in the natural environment, the extraction and the use of the poison to achieve a certain military aim (such as incapacitating an adversary) amounts to technology.

As for the law, the somewhat antiquated term “law of war” is used here. This is done advisedly in order to refer to all manner of international law rules and principles specifically meant to govern human conduct in war. This refers, first and foremost, to rules that restrict generally the choice of means and methods of warfare, and protect those not taking a direct part in hostilities. Such rules are collectively known as the “law of armed conflict” or “international humanitarian law”. However, conceived broadly, the law of war also encompasses those rules of international law that restrict the use – and often also the development, acquisition, stockpiling, and so forth – of specific weapons, means or methods of warfare. These rules usually attract the moniker “arms control law”.

While contemporary legal doctrine distinguishes rather sharply and consistently between these two branches of international law,<sup>5</sup> for present purposes they are best addressed together. For one, the distinction is of fairly recent vintage. Landmark documents from the 19th and early 20th century use the banner “laws of war” or “laws and customs of war” to refer to a range of international law rules and principles applicable in warfare. They do not distinguish neatly between rules pertaining to specific prohibited weapons, the conduct of hostilities, and the protection of certain persons and objects.<sup>6</sup> Remarkably, even the 7th edition of *Oppenheim’s International Law*, published in 1952, deals with prohibited means of warfare purely as a matter of the conduct of hostilities, rather than as a discrete area of arms control.<sup>7</sup> Thus a rigorous adherence to the distinction between international humanitarian law and arms control law in a paper addressing the history of the law would amount to an anachronism. As such, it would distort rather than clarify the subject matter. Also, much of the current discussion among non-lawyers about the need to revise the law is not entirely clear about which branch of the law needs to be amended. This suggests that the entire fabric of the law needs to be considered.

4 Garth Massey, *Ways of Social Change: Making Sense of Modern Times*, 2nd ed., Sage, Los Angeles, 2015.

5 See e.g. US Department of Defense, *Law of War Manual*, Washington DC, June 2015, para. 1.6.2; Robert J. Mathews and Timothy L. H. McCormack, “The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties”, *International Review of the Red Cross*, Vol. 81, No. 834, 1999, pp. 334–335.

6 See especially Institute of International Law, “The Laws of War on Land”, Oxford, 9 September 1880; Hague Convention (IV) regarding the Laws and Customs of War on Land, 205 CTS 27, 18 October 1907 (entered into force 26 January 1910).

7 Lassa Oppenheim, *International Law: A Treatise*, 8th ed., edited by Hersch Lauterpacht, David McKay Company, New York, pp. 340–345.

## The call for new law

The idea that the law of war has become inadequate in light of technological developments has gained some traction recently. All manner of pundits have considered it advisable to increase the regulation of cyberspace, some quite specifically insisting on a “Geneva Convention on Cyber Warfare”.<sup>8</sup> These proposals have a highly divergent degree of intelligibility: many of those publicly bemoaning the inadequacy of international law in relation to military operations in cyberspace do not explicate as to how, precisely, the existing law falls short. UAVs being a concrete set of devices, the suggestions for further regulations have been rather more specific. For one, civil society campaigns have advocated for a ban on all weaponized drones.<sup>9</sup> Somewhat more realistically, commentators have suggested reviewing existing regulatory mechanisms to reduce the likelihood of UAV-technology proliferation.<sup>10</sup>

The most organized and articulate have been the proponents of regulation of lethal autonomous weapon systems. Working under the auspices of organizations such as the International Committee for Robot Arms Control, they have sought to influence, for example, the ongoing discussion on such technology within the framework of the Conventional Weapons Convention. An open letter urging “a ban on offensive autonomous weapons beyond meaningful human control” has been signed by over 3000 researchers of robotics and artificial intelligence, as well as over 17,000 others (including prominent scholars and entrepreneurs).<sup>11</sup>

Some have gone one step further. Brad Allenby, in a jointly penned piece in *Slate* in 2012, claimed that new treaties addressing particular technologies, while having a degree of usefulness, “are mere attempts to update an already obsolete international regime”.<sup>12</sup> The word “obsolete” can make many law of war specialists wince. It is reminiscent of Alberto Gonzales, White House Counsel under President George W. Bush, describing some aspects of Geneva Convention III as “quaint” and “obsolete”.<sup>13</sup> However, to be fair, in his later, more academic writings, Allenby has been far more circumspect. He has noted, for example, that the law of war has “developed over a long period, with commentary and input

8 Chris Weigant, “We Need a Geneva Convention on Cyber Warfare”, *Huffington Post: The Blog*, 28 October 2013, available at: [www.huffingtonpost.com/chris-weigant/we-need-a-geneva-conventi\\_b\\_4171853.html](http://www.huffingtonpost.com/chris-weigant/we-need-a-geneva-conventi_b_4171853.html); Karl Rauscher, “It’s Time to Write the Rules of Cyberwar”, *IEEE Spectrum*, 27 November 2013, available at: [spectrum.ieee.org/telecom/security/its-time-to-write-the-rules-of-cyberwar](http://spectrum.ieee.org/telecom/security/its-time-to-write-the-rules-of-cyberwar).

9 See e.g. Drohnen-Kampagne, available at: [drohnen-kampagne.de](http://drohnen-kampagne.de); Ban Weaponized Drones from the World, available at: [act.rootaction.org/p/dia/action/public/?action\\_KEY=6180](http://act.rootaction.org/p/dia/action/public/?action_KEY=6180).

10 Micah Zenko and Sarah Kreps, *Limiting Armed Drone Proliferation*, Council of Foreign Relations, Washington DC, 2014.

11 “Autonomous Weapons: An Open Letter from AI & Robotics Researchers”, available at: [futureoflife.org/open-letter-autonomous-weapons](http://futureoflife.org/open-letter-autonomous-weapons).

12 Braden R. Allenby and Carolyn S. Mattick, “Why We Need New ‘Rules of War’”, *Slate: Future Tense*, 12 November 2012, available at: [www.slate.com/articles/technology/future\\_tense/2012/11/drones\\_cyberconflict\\_and\\_other\\_military\\_technologies\\_require\\_we\\_rewrite.html](http://www.slate.com/articles/technology/future_tense/2012/11/drones_cyberconflict_and_other_military_technologies_require_we_rewrite.html).

13 Alberto R. Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban”, Memorandum for the President, 25 January 2002, reproduced in Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, New York, 2005, pp. 118–121.

from many cultures”, such that “[i]t is neither desirable nor likely that such a robust and developed framework should suddenly become totally obsolete”.<sup>14</sup> In any event, the underlying point is an important one: concern about particular technologies only goes so far. Governance problems may well result from the totality of the technological change and the interaction of the various technologies with each other. In other words, technological change may well be a problem for the law of war as a whole.

## The law and technology enterprise

Technologists, scientists, ethicists and other commentators calling for legal renewal have entered into a symbiotic relationship with international lawyers writing about such matters – one feeds the other. Unsurprisingly, then, a staggering amount of international law literature has emerged over the past decade dissecting the challenges generated by new technologies that have, or might have, military use.

When it comes to scholarly literature on law and technology generally, much of it falls into a particular pattern. Drawing on the discussions on the regulation of outer space, *in vitro* fertilization and virtual worlds, Kieran Tranter has described a scholarly template which he calls the “law and technology enterprise”.<sup>15</sup> This template starts off with a technological crisis event – a specific technology that appears to have an uncertain future in that it promises both progress and peril.<sup>16</sup> This starting point, incidentally, meshes nicely with the (Western) mainstream consensus that technological developments have major impacts on society, and entail both problems and opportunities.<sup>17</sup> The law and technology enterprise then goes on to identify gaps in, or inadequacies of, the current law, to expound the need for legislative interventions and to outline the processes for law-making.<sup>18</sup> While doing all of this, the discussion shies away from engaging with the values that underlie the law and from expressing opinion on the substance of future regulation. As Tranter sums it up, “[l]aw is to be made, but the values and policies that inform this law-making should come from elsewhere.”<sup>19</sup>

The reader of the literature on law and emerging military technology will recognize at least some of the features of the law and technology enterprise.<sup>20</sup>

14 Braden R. Allenby, “Are New Technologies Undermining the Laws of War?”, *Bulletin of the Atomic Scientists*, Vol. 70, No. 1, 2014, p. 29.

15 Kieran Tranter, “The Law and Technology Enterprise: Uncovering the Template to Legal Scholarship on Technology”, *Law, Innovation & Technology*, Vol. 3, No. 1, 2011.

16 *Ibid.*, p. 69.

17 Nick Bostrom, “Technological Revolutions: Ethics and Policy in the Dark”, in Nigel M. de S. Cameron and M. Ellen Mitchell (eds), *Nanoscale: Issues and Perspectives for the Nano Century*, Wiley & Sons, Hoboken, 2007, p. 131; Roger Brownsword, *Rights, Regulation and the Technological Revolution*, Oxford University Press, Oxford, 2008, p. 25.

18 K. Tranter, above note 15, p. 69.

19 *Ibid.*, p. 70.

20 See, in relation to cyber-warfare, Samuli Haataja, “Technology, Violence and Law: Cyber Attacks and Uncertainty in International Law”, in Rauno Kuusisto and Erkki Kurkinen (eds), *Proceedings of the*

One such feature is the identification of, and a focus on, a particular disruptive technology, along with the challenges and opportunities that it appears to create. Most noticeably, this has generated separate discussions of the law as it pertains to cyber-warfare, UAVs, autonomous weapons, military nanotechnology and so on. The establishment of specialist journals on the law of cyber-warfare epitomises this siloing.<sup>21</sup>

Admittedly, the technology-specific approach cannot be easily avoided. The technologies in question are highly sophisticated and complex taken individually. As a result, overarching legal analyses prove challenging simply due to the scientific and technical knowledge required in order to make an informed contribution to the debate.<sup>22</sup> Thus the best strategy so far has been to make a link between the conversations about different technologies by conducting them alongside each other, as has been done in several edited volumes as well as symposium issues of journals, including this *Review*.<sup>23</sup>

Something sets this scholarship apart from the law and technology enterprise, though. Law of war experts readily talk about the substance of the rules and the values underlying the law, even though they often remain sceptical about the prospects of law-making. This preparedness to engage with values might have something to do with the widely accepted premise that the bulk of the law of war results from a balancing act between the contradictory considerations of military necessity and humanity – or, as Nobuo Hayashi has argued, from the joint satisfaction of those considerations.<sup>24</sup> While this leads to a seemingly endless debate about how best to reconcile military necessity and humanity, this is a debate about substance, not just form.

A further implicit feature of the law and technology enterprise, however, also characterizes the literature on new military technology. The law and the technology are seen as having a present and a future – a dangerously uncertain future at that – but no past. Relatively little attention has been paid to the development of the law of war in light of prior technological change. By and large, to borrow from Tranter, “[t]he lawyer trie[s] to save the future through a hybrid of speculation and description.”<sup>25</sup> This seems rather curious. One would

12th European Conference on Information Warfare and Security, ACPI, Sonning Common, 2013, pp. 317–318.

21 See e.g. the *Journal of Law & Cyber Warfare*, the *Journal of Information Warfare*, and the *International Journal of Cyber Warfare & Terrorism*.

22 However, see, for a more integrative approach, Michael N. Schmitt, “War, Technology and the Law of Armed Conflict”, in Anthony M. Helm (ed), *The Law of War in the 21st Century: Weaponry and the Use of Force*, US Naval War College, Newport, 2006.

23 See especially Dan Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Martinus Nijhoff, Leiden, 2013; Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, TMC Asser Press, The Hague, 2014; *International Review of the Red Cross*, Vol. 94, No. 866, 2012, pp. 457–817; *Utah Law Review*, No. 5, 2013, pp. 1215–1356; *International Law Studies*, Vol. 91, No. 1, 2014, pp. 468–516, 540–640, 699–728; *Case Western Reserve Journal of International Law*, Vol. 47, No. 1, 2015, pp. 1–238.

24 See Nobuo Hayashi, “Military Necessity as Normative Indifference”, *Georgetown Journal of International Law*, Vol. 44, No. 2, 2013.

25 K. Tranter, above note 15, p. 69.

think it interesting and potentially instructive to consider how the law has adapted or failed to adapt to technological breakthroughs of the past.

As promised in the introduction, the remainder of this essay seeks to do two things: to offer something by way of an explanation for this neglect of history, and to suggest that there are some benefits to a deeper engagement with the prior development of the law of war.

## The development of the law of war

In works on military history, the law of war tends to make a fleeting appearance, often not even in a minor role but merely as an uncredited extra. Some historians refer selectively to arms control and disarmament measures.<sup>26</sup> The outlawing of the crossbow among Christians by the Catholic Church in 1139 seems to be a perennial favourite as the ostensibly first attempt at arms control.<sup>27</sup> Others briefly mention the Battle of Solferino and the 1864 Geneva Convention on the protection of the wounded and sick.<sup>28</sup> John Keegan, in his well-regarded *History of Warfare*, devotes a couple of pages to the law.<sup>29</sup> One of the most notable exceptions to this overall neglect of the regulation of warfare is the *Oxford History of Modern War*, which despite its compact size contains a whole chapter on the law of war by Sir Adam Roberts.<sup>30</sup>

The relative lack of attention to the law of war by (military) historians may be something of a reflection on the capacity of the law to restrain the conduct of belligerents – or at least how historians perceive that capacity. Little surprise, then, that the history of the law of war in its own right has not exactly flourished as a field of study either. The most significant contemporary book-length works can be easily listed. Maurice Keen wrote in some detail on the medieval law of war, as did Theodor Meron, but through a Shakespearean lens.<sup>31</sup> Geoffrey Best's duology probably ranks as the best-known (and certainly the most entertaining) work on the history of the law of war from the mid-19th century until the

26 Robert L. O'Connell, *Of Arms and Men: A History of War, Weapons and Aggression*, Oxford University Press, New York, 1989, pp. 95–96, 274–275; R. Ernest Dupuy and Trevor N. Dupuy, *The Harper Encyclopedia of Military History: From 3500 BC to the Present*, 4th ed., Harper Collins, New York, 1993, pp. 307–308, 1123–1125; 1369–1371, 1485–1486.

27 R. L. O'Connell, above note 26, pp. 95–96; R. E. Dupuy and T. N. Dupuy, above note 26, pp. 307–308 (also referring to the broader attempts by the Church to limit warfare through the notions of “peace of God” and “truce of God”).

28 Christon I. Archer, John R. Ferris, Holger H. Herwig and Timothy H. E. Travers, *World History of Warfare*, University of Nebraska Press, Lincoln, 2002, pp. 422–423.

29 John Keegan, *A History of Warfare*, Alfred A. Knopf, New York, 1999, especially pp. 382–383.

30 Adam Roberts, “Against War”, in Charles Townshend (ed.), *The Oxford History of Modern War*, new ed., Oxford University Press, Oxford, 2005.

31 Maurice Keen, *The Laws of War in the Late Middle Ages*, Routledge & Kegan Paul, London, 1965; Theodor Meron, “Shakespeare's Henry the Fifth and the Law of War”, *American Journal of International Law*, Vol. 86, No. 1, 1992; Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare*, Oxford University Press, New York, 1998.



late-20th century.<sup>32</sup> Recently, John Witt has explored at length the role of the law of war in American history.<sup>33</sup>

In terms of universal histories of the law of war, one is largely left with two options: a slim book edited by Michael Howard, George Andreopoulos and Mark Shulman, which provides a highly readable but fairly cursory account,<sup>34</sup> and a three-volume opus by Alexander Gillespie, which supplies a wealth of historical data but little by way of analysis.<sup>35</sup> Overall, Stephen Neff's observation from a decade ago that "surprisingly little" attention has been devoted to the history of the law of war<sup>36</sup> still holds true today. This appears to be equally true for international humanitarian law as the most sizeable portion of the law of war as well as arms control law. As for the latter, Mark Moyar notes that "[n]o historian has as yet produced a broad history of arms control and disarmament that can be described as comprehensive."<sup>37</sup>

Law of war specialists, like other international lawyers, are not utterly disinterested in the past. They may be most interested inasmuch as the past reveals State practice. State practice, of course, constitutes one ingredient in the formation of customary rules of international law. Also, where the practice relates to a treaty, the practice may assist in the interpretation of the provisions of that treaty.<sup>38</sup> An examination of the preparatory work of the treaty and the circumstances of its conclusion – all a matter of historical record – amounts to a valid supplementary means of treaty interpretation.<sup>39</sup> However, such interest in history tends to be narrow: it attempts to elucidate the content of existing rules. As a result, international lawyers often have a good sense of how contemporary rules emerged and developed – for example, how the notorious mistreatment of prisoners of war during the Second World War influenced the drafting of Geneva Convention III.<sup>40</sup> The sense of the overall evolution of the law of war, however, tends to remain far sketchier.

Consistently with a highly pragmatic approach that focuses on the origins of current rules, broader views of history mostly focus on what has been called the "modern" law of war. According to a widely shared narrative – a kind of "origin myth" – the modern law was born in the 1860s with the promulgation of the

32 Geoffrey Best, *Humanity in Warfare*, Columbia University Press, New York, 1980; Geoffrey Best, *War and Law since 1945*, Clarendon, Oxford, 1994.

33 John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, Free Press, New York, 2012.

34 Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven, 1994.

35 Alexander Gillespie, *A History of the Laws of War*, 3 vols, Hart, Oxford, 2011.

36 Stephen C. Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, p. 1.

37 Mark Moyar, Arms Control and Disarmament, *Oxford Bibliographies*, 19 April 2015, available at: [www.oxfordbibliographies.com/view/document/obo-9780199791279/obo-9780199791279-0002.xml](http://www.oxfordbibliographies.com/view/document/obo-9780199791279/obo-9780199791279-0002.xml).

38 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 31(3)(b) (providing that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" must be taken into account in the interpretation of the treaty).

39 *Ibid.*, Art. 32.

40 See e.g. G. Best, *War and Law*, above note 32, pp. 135–136.

Lieber Code, and the adoption of the first Geneva Convention and the St Petersburg Declaration.<sup>41</sup> Earlier developments are seldom discussed in any detail and often appear as vignettes – historical curiosities of the sort preserved in glass jars.<sup>42</sup> Howard Levie once dismissed pre-1860 practices altogether because in that period “humanity played no part, or a very small and almost accidental part, in ... warfare”.<sup>43</sup> This widely (if implicitly) supported view links the genesis of the law of war exclusively to the advance of the ideals of humanity. In other words, the development of the law of war is seen as the process of placing on the conduct of hostilities ever-more elaborate restrictions, deriving from considerations of humanity. This approach is problematic for at least four reasons.

First, the interaction between the consideration of humanity and military necessity that nowadays characterizes the law is not the only way to construct a regulatory framework for warfare. For a long time, the law was largely encapsulated by military necessity. As Neff has put it, “[o]n the whole, the jealous lordship of the principle of necessity was very nearly unchallenged in the Middle Ages”.<sup>44</sup> This remained true for several centuries thereafter.<sup>45</sup> Military necessity is, admittedly, an elastic notion, perhaps capable of ruling out only the most obvious of excesses. However, even a law based on military necessity, imperfect as it may appear to the contemporary observer, had a role to play. As Martti Koskenniemi has noted, the significance of military necessity

was less to provide a criterion for measuring the permissibility of an act than to direct combatants – in practice, superior officers – to examine their conscience even in the midst of fighting and to suppress their desire to engage in “irrational” violence ....<sup>46</sup>

On this account, the notion of military necessity had, at the very least, an important enculturating and educational function: it compelled combatants to reflect upon the propriety of their own conduct.

Second, the developments from the 1860s onwards have been considered a “codification” of pre-existing military customs<sup>47</sup> and a “compilation” of principles articulated by publicists.<sup>48</sup> It is difficult to see how a codification or a compilation,

41 Instructions for the Government of Armies of the United States in the Field, General Order No. 100, 24 April 1863; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 129 CTS 361, 22 August 1864 (entered into force 22 June 1865); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 138 CTS 297, 11 December 1868 (entered into force upon signature).

42 As always, there are exceptions: for example, Leslie Green and Gerald Draper gave a lot of thought to the pre-modern development on the law of war.

43 Howard S. Levie, “History of the Law of War on Land”, *International Review of the Red Cross*, Vol. 82, No. 838, 2000.

44 S. C. Neff, above note 36, p. 65.

45 *Ibid.*, pp. 112–113.

46 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, p. 88.

47 H. S. Levie, above note 43, p. 340; S. C. Neff, above note 36, p. 113.

48 M. Koskenniemi, above note 46, p. 87 (describing the Lieber code as “a compilation of humanitarian principles taken from publicists from Grotius onwards”).

resulting in a law guided by the ideal of humanity, could have been possible if the earlier law had been completely devoid of humanitarian sentiments.

Third, if one treats the notion of humanity very strictly, not even all post-1860s law would qualify as humanitarian. Amanda Alexander has argued that the law truly embraced humanitarian values only towards the end of the 20th century, with the acceptance of the principles contained in the 1977 Additional Protocols.<sup>49</sup> While that may be an extreme view, the law certainly underwent a process of “humanization”, as Meron noted, as a result of the influence of human rights law and a greater weight being given to considerations of humanity.<sup>50</sup> Also, the term “international humanitarian law” appears to be a child of the 1970s.<sup>51</sup>

Fourth, the exclusive focus on the notion of humanity overlooks the role that honour – including its medieval incarnation, chivalry – has played in the development of the law of war. This neglect is problematic inasmuch as some notion of warrior honour seems to have a timeless and universal character.<sup>52</sup> Indeed, a nod to chivalry can be seen even in the contemporary law, which otherwise appears to be driven by humanitarian concerns.<sup>53</sup>

In short, a sharp distinction between the pre-modern and modern law, common though it may be, conceals more than it reveals. Significantly, it suggests a greater break with the past in the 1860s than warranted. Richer and subtler historical accounts of the development of the law of war have, moreover, been offered. Sometimes they have come about almost by accident. Perhaps the most thoughtful conceptual history of the law of war that extends beyond the modern period may be found in Stephen Neff’s *War and the Law of Nations*.<sup>54</sup> Yet, by his own admission, Neff did not set out to write a history of the law of war but rather a “history of ideas about the legal nature and character of war as such”.<sup>55</sup> His account nonetheless provides important insights into the overall evolutionary trajectory of the law of war, and identifies key ideas and periods in its development. It provides a valuable springboard into more detailed histories of the law of war.

## Technology-specific and technology-neutral law of war

Having overcome the aversion for the history of the law, anyone undertaking an enquiry into the role of technology in that history must clear a further hurdle. What is the impact of technology on law?

49 Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015.

50 Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000.

51 At least *Google Books Ngram Viewer*, available at: [books.google.com/ngrams](https://books.google.com/ngrams), suggests that the phrase “humanitarian law” entered the corpus of books in the 1970s.

52 See e.g. Paul Robinson, *Military Honour and the Conduct of War: From Ancient Greece to Iraq*, Routledge, London, 2006.

53 On the impact of chivalry on the contemporary law of war, see, e.g., Rain Liivoja, “Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict”, in Rain Liivoja and Saumets (eds), *The Law of Armed Conflict: Historical and Contemporary Perspectives*, Tartu University Press, Tartu, 2012.

54 S. C. Neff, above note 36.

55 *Ibid.*, p. 2.

Considering this rather thorny issue requires some preliminary conceptual housekeeping. The law can deal with technology on different levels of abstraction. This is by no means a unique feature of the law of war: the distinction between “technology-specific” and “technology-neutral” law, as well as the question about the desirability of the latter, have been extensively discussed in other contexts.<sup>56</sup>

Technology-specific law, as the term itself suggests, addresses a particular type of technology. The most obvious examples of technology-specific rules pertaining to warfare are those that either ban completely, or restrict in some way, the use of certain means of warfare, that is, particular weapons and projectiles. The prohibition of the use of poison and poisoned weapons constitutes one of the most long-standing examples.<sup>57</sup> The more recently introduced ban on weapons “the primary effect of which is to injure by fragments which in the human body escape detection by X-rays” provides another example.<sup>58</sup> There are, however, other technology-specific rules of the law of war, especially when it comes to the more technology-dependent naval and air warfare. For example, certain aspects of the protection of medical aircraft are provided for separately from the protection of other medical transports. For one, there are rules concerning the marking and identifying signals of medical transports that are specific to aircraft.<sup>59</sup> Also, medical aircraft are subject to detailed rules concerning flight plans and possible interception.<sup>60</sup>

Law can be considered technology-neutral “as long as it does not favour one specific technology over another”, even though it “might be closely related to or intertwined with technology”.<sup>61</sup> There are rules of the law of war that are quite fixated on technology, yet seem manifestly “technology-neutral”. In particular, this includes rules that address weapons by focusing on the effects of means of warfare generally rather than on a particular weapons technology. Such rules prohibit the use of inherently indiscriminate means of warfare,<sup>62</sup> as well as means of warfare of a nature to cause unnecessary suffering.<sup>63</sup> Similarly, there are rules banning the use of means of warfare with environmental effects above a certain threshold<sup>64</sup> and particularly egregious uses of the environment as a means of

56 See, in particular, Bert-Jaap Koops, “Should ICT Regulation Be Technology-Neutral?”, in Bert-Jaap Koops *et al.* (eds), *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners*, Asser, The Hague, 2006.

57 Hague Convention (IV) regarding the Laws and Customs of War on Land, 205 CTS 277, 18 October 1907 (entered into force 26 January 1910), Annex: Regulations concerning the Laws and Customs of War on Land (“Hague Regulations”), Art. 23(a).

58 Protocol on Non-Detectable Fragments, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1342 UNTS 168, 10 October 1980 (entered into force 2 December 1983).

59 See especially Geneva Convention I, Art. 36(2); Additional Protocol I, Annex I, Arts 7(1) and 9(1).

60 See especially Geneva Convention I, Art. 36(3)–(4); Additional Protocol I, Arts 29–30; Additional Protocol I, Annex I, Arts 13–14.

61 B.-J. Koops, above note 56.

62 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (“Additional Protocol I”), Art. 35(1).

63 Hague Regulations, Art. 23(e); Additional Protocol I, Art. 35(2).

64 Additional Protocol I, Art. 35(2).

warfare.<sup>65</sup> Indeed, the systematic use of the generic term “means of warfare” in the formulation of these prohibitions emphasizes their technology-neutral quality. The auxiliary obligation to determine *ex ante* whether the employment of “a new weapon, means or method of warfare” would be prohibited by international law is clearly also technology-neutral.<sup>66</sup>

Some rules “abstract completely away from technology”<sup>67</sup> such that “they apply to behaviour of the actors involved and the effects of that behaviour and not to the means through which the actors behave or by which those effects come about”.<sup>68</sup> Thus it becomes possible to speak of “technology-indifferent” law. The bulk of the law of war is technology-indifferent. The law of war governs the conduct of hostilities and offers protection to persons not taking part in hostilities – all quite irrespective of the means and methods of warfare the belligerents adopt and other technology that they use. As these rules seek to achieve certain (humanitarian) ends, all manner of technology may be involved in either breaching these rules or, conversely, securing compliance with them. It might in fact be the same technology depending on the circumstances: for example, various pharmacological agents and medical devices could be used to treat people (as required by the law) or to torture them (contrary to the law).

## From technological change to legal change

The different types of rules just mentioned have developed along somewhat different vectors. This is partly due to diverging ideologies. Fundamentally, the highly technology-specific rules of arms control law are not necessarily based on the same considerations as the more technology-neutral or technology-indifferent rules of international humanitarian law. While humanitarian concerns certainly inform the making of arms control law,<sup>69</sup> and probably increasingly so, restrictions on a particular weapon are often determined by strategic considerations (such as the cost of acquiring the weapon, its utility and so on).<sup>70</sup> Owing to the different ideological outlook, arms control treaties have been negotiated – ever since the First World War – in fora different from those where the protection of war victims has been considered.

On a very basic level, correlating the development of technology-specific rules with technological change is straightforward. The adoption of a treaty restricting the use of incendiary weapons must have something to do with the development of incendiary

65 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 18 May 1977 (entered into force 5 October 1978).

66 Additional Protocol I, Art. 36.

67 B.-J. Koops, above note 56.

68 Chris Reed, “Taking Sides on Technology Neutrality”, *SCRIPT-ed*, Vol. 4, No. 3, 2007, p. 269.

69 See R. J. Mathews and T. L. H. McCormack, above note 5.

70 For a particularly bleak view, see Chris af Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War,” *Harvard International Law Journal*, Vol. 35, No. 1, 1994, especially pp. 66–68 (regarding exploding bullets) and pp. 73–74 (balloons). See also R. Liivoja, above note 53, pp. 84–86 (concerning poison and crossbows).

weapons. Where such technology-specific law-making does take place, there can be little doubt that the technology has had some impact on the law. However, the simplicity stops there. The question as to why a particular legislative approach has been taken, or why there was no legislative reaction, defies an easy answer. A comprehensive response will likely identify a combination of strategic, economic, humanitarian and other factors. Moreover, where law-making does take place, it may happen at different stages of technological development. Mostly it occurs reactively, that is, after the introduction of a technology. Infrequently, law-making is proactive, anticipating (and possibly preventing) the introduction of a new technology: the ban on permanently blinding laser weapons serves as a rare example.<sup>71</sup>

As concerns technology-neutral and technology-indifferent rules, the link between technological change and the evolution of the law becomes weaker. One cannot presuppose that these rules would undergo change simply in response to technological change alone. Indeed, the abstract nature of technology-neutral and technology-indifferent rules should protect them against technological change, which is the reason why the use of such rules has been advocated. For technology to have an impact on technology-neutral or technology-indifferent rules, that impact would need to be indirect – mediated by a more general transformation of society. In relation to the law of war, the process would need to have two parts: technological change affecting the character of warfare in general and, in turn, the change in the character of warfare precipitating a change in the law.

The first part of this process is, of course, not a legal matter at all. Rather it pertains more generally to the relationship between technological change and social change. Put very simply, there has been considerable debate about whether technology provides tools that people can use as they see fit (the “instrumental” view of technology) or whether technology actually drives social change (the “deterministic” view of technology).<sup>72</sup>

This debate has also occurred in the context of warfare and military affairs. What appears to be widely recognized is that technology plays a significant role in warfare and that there is a strong correlation between the overall state of technology and the character of warfare. Many historians dealing with military technology have emphasized the significant role played by technology in warfare, while being at pains to avoid falling back on a purely deterministic position. For example, Martin van Creveld argues that “war is completely permeated by technology and governed by it” but goes on to note that “[m]erely because technology plays a very important part in war, it does not follow that it alone can dictate the conduct of a war or lead to a victory”.<sup>73</sup> Similarly, Alex Roland notes that

71 See Protocol on Blinding Laser Weapons, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1380 UNTS 370, 13 October 1995 (entered into force 30 July 1998).

72 The question whether technology embodies a set of values or is, rather, value-neutral, adds a further dimension to the problem. See, e.g., Andrew Feenberg, “What Is Philosophy of Technology?”, in John R. Dakers (ed.), *Defining Technological Literacy*, Palgrave Macmillan, New York, 2006.

73 Martin van Creveld, *Technology and War: From 2000 BC to the Present*, revised ed., The Free Press, New York, 1991, pp. 1 and 3.

Technology has been the primary source of military innovation throughout history. It drives changes in warfare more than any other factor. ... However much technology may change warfare, it never determines warfare – neither how it will be conducted nor how it will turn out. Technology presides in warfare, but it does not rule.<sup>74</sup>

In Roland's view, technology opens doors, though it is another matter whether societies pass through them. In relation to military technology in particular, there have been marked differences in the readiness of different societies, often due to cultural factors, to walk through particular doors. The initial development of gunpowder in China, but its rapid adaptation for military purposes in Europe, is perhaps one of the most prominent examples. Thus when assessing the impact of technology on warfare one must consider it alongside political, economic, cultural and other factors. This is by no means a simple exercise.

What complicates matters further is the associated dispute about the continuity of change in warfare. In the 1990s, the notion of "revolutions in military affairs" (RMAs) gained currency, suggesting that changes in military affairs happen, as it were, in bursts – that they are concentrated over relatively short periods of time rather than taking place at a steady pace. The original concept of RMAs related quite specifically to technological change, though later iterations regarded technological change as only one of the factors facilitating changes in warfare.

The notion of RMAs – later rebranded "military transformations" – became the subject of enormous controversy.<sup>75</sup> However, as historian Jeremy Black has noted, RMA is "at once description, analysis, prospectus and mission; and much of the confusion surrounding the use of the term reflects a failure to distinguish between these aspects of the situation."<sup>76</sup> The concept has proven particularly contentious when used as a "prospectus and mission" to advocate for a change in military technology, tactics or something else in order to gain the upper hand in an apparent RMA, and that change has failed to yield the anticipated advantages. The concept has been put to a better use when, rather than in an attempt to predict the future, it has been applied descriptively and analytically to developments in warfare with some hindsight. This is, for example, what Max Boot did in his excellent *War Made New: Technology, Warfare, and the Course of History*.<sup>77</sup>

The difficulties of assessing changes in the law of war in light of technological change are formidable, especially when it comes to changes in the technology-neutral and technology-indifferent rules that characterize international humanitarian law.

74 Alex Roland, "War and Technology", *FPRI FootNotes*, Vol. 14, No. 2, 2009, available at: [www.fpri.org/articles/2009/02/war-and-technology](http://www.fpri.org/articles/2009/02/war-and-technology).

75 For a recent discussion, see Jeffrey Collins and Andrew Futter (eds), *Reassessing the Revolution in Military Affairs: Transformation, Evolution and Lessons Learnt*, Palgrave Macmillan, New York, 2015.

76 Jeremy Black, "The Revolution in Military Affairs: The Historian's Perspective", *The RUSI Journal*, Vol. 154, No. 2, 2009, p. 98.

77 Max Boot, *War Made New: Technology, Warfare and the Course of History, 1500 to Today*, Gotham, New York, 2006.



Not only does one have to rely on a sketchy legal history, but one also gets drawn into highly polarizing debates about the impact of technology on warfare. That said, two major innovations in weapons technology could be mentioned that arguably had a completely different impact on the law.

The first of these was gunpowder. Along with knightly warfare of the European Middle Ages, there had developed a “law of arms” which encompassed codes of chivalry and some ancient customs, such as the protected status of heralds. This law of arms only applied between knights – the wealthy, cosmopolitan and Christian warrior elite. Lowly foot soldiers and other common folk, not to mention non-Christians during the Crusades, could expect little benefit from chivalric ideals. The so-called “gunpowder revolution” (*circa* 1500–1700) dealt a decisive blow to the mounted combatants of the Middle Ages, supplanting them with “infantrymen armed with missile weapons, first the longbow, then arquebuses and muskets”.<sup>78</sup> Whatever may have been the practical effect of chivalric ideals – by most accounts it was rather limited – a regulatory system based on class could not survive into the gunpowder era. The chivalric law of arms was shadowed and subsequently overtaken by codes of conduct promulgated for particular military operations.<sup>79</sup> These became the predecessors of contemporary codes of military discipline. In short, the technological change impacted on the conduct of warfare, which led to a change in the regulatory framework. Technology contributed to the development of a law of war that was more equal and universal in its application than the law of arms.

The innovation that ought to be mentioned in comparison is the “atom bomb”. There is no doubt that nuclear weapons represented an enormous technological change in the warfighting capabilities of States. Appropriately, nuclear weapons were subsequently caught in an elaborate, if incomplete, net of technology-specific disarmament and non-proliferation measures.<sup>80</sup> In parallel with these developments, some issues arose concerning the application of the law of war.

First, a number of States expressed their understanding that Additional Protocol I was not intended to govern nuclear weapons.<sup>81</sup> In the *Nuclear Weapons* Advisory Opinion, however, the International Court of Justice confirmed that the use of nuclear weapons would have to be “compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law”.<sup>82</sup> What this means is that those progressive rules of Additional Protocol I that have

78 *Ibid.*, pp. 17–105.

79 S. C. Neff, above note 36, pp. 74–75.

80 For an overview, see e.g. Dieter Fleck, “Nuclear Weapons”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016.

81 See declarations made on signature by the United Kingdom and the United States, and on ratification by Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the United Kingdom.

82 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 105(2)(D).

not entered the body of customary international law remain inapplicable to nuclear weapons.<sup>83</sup>

Second, the ambiguity of the *Nuclear Weapons* Advisory Opinion generated enormous controversy. As is well known, the Court opined that the use of nuclear weapons “would generally be contrary” to the rules of international law applicable in armed conflict.<sup>84</sup> Yet the Court felt unable to “conclude definitively whether the ... use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.<sup>85</sup> This could be read as suggesting that “extreme circumstances of self-defence” would permit the law of war restrictions to be set aside, a proposition wholly inconsistent with the basic tenets of the law of war. Such a reading was, however, not put before the Court by States and, in any event, has been roundly rejected in subsequent writings.<sup>86</sup>

These issues notwithstanding, nuclear weapons did not lead to a substantive change in the law of war. Why? One possible explanation is that, despite changing the strategic landscape, nuclear weapons did little to alter the mundane – indeed, “conventional” – form of warfare. As Andrew Ross has noted, “[t]he nuclear revolution had greater strategic than operational or tactical war-fighting implications. It has been about deterrence and how we think about deterrence rather than war-fighting.”<sup>87</sup>

## The significance of history

Gregory Mandel has noted that “[s]tudying how prior law and technology issues were handled, and particularly how they were sometimes mishandled, provides valuable lessons for responding to current and future law and technology issues as they arise”.<sup>88</sup> This rings true for the law and war and military technology as well. So what could be learned? Given the range of military technologies, both past and present, it would be audacious for a short paper such as this to proclaim definitive “lessons” that should be learned from history, or even to outline a

83 For a discussion and further reference, see Julie Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims”, *International Review of the Red Cross*, Vol. 84, No. 849, 2003.

84 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 105(2)(E).

85 *Ibid.*

86 See e.g. Timothy L. H. McCormack, “A *non liquet* on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law”, *International Review of the Red Cross*, No. 316, 1997; Dapo Akande, “Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court”, *British Yearbook of International Law*, Vol. 68, 1997, pp. 208–210.

87 Andrew L. Ross, “The Role of Nuclear Weapons in International Politics: A Strategic Perspective”, *FPRI FootNotes*, March 2009, available at: [www.fpri.org/article/2009/03/the-role-of-nuclear-weapons-in-international-politics-a-strategic-perspective](http://www.fpri.org/article/2009/03/the-role-of-nuclear-weapons-in-international-politics-a-strategic-perspective).

88 Gregory N. Mandel, “History Lessons for a General Theory of Law and Technology”, *Minnesota Journal of Law, Science & Technology*, Vol. 8, No. 2, 2007, p. 552.

methodology for figuring out such lessons. However, there are a few general observations that can be made with relative safety.

## Regularity of technological shocks

The law of war has been challenged by new technologies over and over again. Many technologies – especially weapons – have been perceived, at least initially, to be somehow at variance with the existing law. According to Best,

[t]he history of warfare has been repeatedly punctuated by allegations that certain new weapons are “unlawful”, because in some way “unfair” by the prevailing criteria of honour, fairness and so on, or because nastier their action than they need be.<sup>89</sup>

Best suggested that “[i]t is more often [the] unaccustomedness and immediate effectiveness [of a new weapon] that draws obloquy rather than objectively measurable nastiness.”<sup>90</sup> He concluded rather glumly that “whatever the nature and strength of the objections at first encountered, [new weapons] slip into common use as soon as the objectors can acquire them for themselves, whereupon the law adapts accordingly”.<sup>91</sup>

Whether Best was indeed correct about the adaptation of the law is really beside the point. What matters is that technological change is not a new type of challenge for the law of war. The allegedly precarious situation that the law currently finds itself in is not novel. What might well be true, however, is that technological change is occurring much faster now than previously, thereby exacerbating the problem that law tends to lag behind technology.

## Effectiveness of regulation

Previous encounters between law and technology give some indication about the resilience of the law in the face of new technologies and the effectiveness of legal solutions adopted in relation to such technologies.

In a domestic law context, there has been much talk about the desirability of technology-neutral law to help withstand technological change.<sup>92</sup> This is also an important issue for the law of war. In some instances, the law has been so specific as to be easily rendered inapplicable. The obvious example is the prohibition of gas warfare. The first prohibition on the use of gas in warfare was in the 1899 Hague Declaration where the contracting States agreed “to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.<sup>93</sup> During the First World War this undertaking was plainly

89 G. Best, *Humanity in Warfare*, above note 32, p. 62.

90 G. Best, *War and Law*, above note 32, p. 23.

91 *Ibid.*, p. 24.

92 For a discussion, see e.g. B.-J. Koops, above note 56; C. Reed, above note 68.

93 Hague Declaration (IV, 2) on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, 187 CTS 453, 29 July 1899 (entered into force 4 September 1900).

breached by the use of gas-filled artillery and mortar shells.<sup>94</sup> However, belligerents also sought ways to circumvent the prohibition. The Germans devised “a gas shell ... that also contained an explosive charge for producing a shrapnel effect” such that it was not the shell’s *sole* object to diffuse gas.<sup>95</sup> The belligerents also gassed each other (and occasionally themselves) by releasing chlorine and phosgene gas from cylinders, rather than by means of gas-dispersing *projectiles*.<sup>96</sup> It is no coincidence that the 1925 Geneva Protocol introduced a more comprehensive prohibition: it banned the “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.<sup>97</sup>

At the same time, highly technology-neutral law might not work well on the international plane. Institutional deficiencies of international law may well make it easier to ensure compliance with technology-specific law. In particular, the more technology-specific the rules on weapons or other means of warfare, the easier it might be to design effective disarmament verification and non-proliferation measures. For example, it is difficult to envisage a workable international verification regime for all indiscriminate or superfluously injurious weapons. Verification measures would likely bog down as a result of disputes about what weapons are covered by the prohibition.

That being the case, there arises an important question about the most effective balance between technology-neutral and technology-specific rules. The Chemical Weapons Convention provides the most elaborate example of one workable model. On the one hand, the Convention contains a comprehensive prohibition on the development, production, stockpiling and use of “chemical weapons”.<sup>98</sup> Such weapons are, in turn, defined by reference to “toxic chemicals”, which encompass substances that through “chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”.<sup>99</sup> Verification measures, on the other hand, apply to chemicals that have been listed in an annex to the Convention.<sup>100</sup> Thus the Chemical Weapons Convention marries rules that have different degrees of technology-specificity in order to create a broad but workable regime.

## Weapons, weapon systems and military technology

Focus on weapons can be misleading. Admittedly, as suggested above, the adoption of projectile weapons and particularly gunpowder played a role in bringing to an end

94 See e.g. Kim Coleman, *A History of Chemical Warfare*, Springer, Berlin, 2005, pp. 27ff.

95 *Ibid.*, p. 14; see also Ulrich Trumpener, “The Road to Ypres: The Beginning of Gas Warfare in World War I”, *Journal of Modern History*, Vol. 47, 1975, p. 468.

96 K. Coleman, above note 95, pp. 16ff; see also U. Trumpener, above note 96, p. 468.

97 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65, 17 June 1925 (entered into force 8 February).

98 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997), Art. I.

99 See *ibid.*, Arts II(1) and (2).

100 See *ibid.*, Annex on Chemicals.

the era of medieval warfare, but in other instances, a single weapon technology has not had that impact. As Schmitt notes, “fully understanding combat operations requires consideration of *all* the technologies having a direct causal relationship to weapons employment”.<sup>101</sup> In other words, one needs to consider weapon systems. This is certainly true in a historical perspective. Thus the adoption of the stirrup – not in itself a weapon – led to the development of what was effectively a weapon system – a mounted knight with a forward-pointing lance – and the beginning of the era of medieval warfare.

One might even need to take a step further. The technological shifts that have shaped warfare from 1800 onwards have been characterized by broader changes in technology. Thus for example, the “first industrial revolution” in warfare (1856–1914), as described by Boot, notably led to the development of rifled artillery and automatic firearms.<sup>102</sup> However, perhaps an even greater impact was made by the introduction of the steam engine, which facilitated the building of railroads and factories, which in turn made it possible to move and equip large conscription-based armies. More obviously, perhaps, digital computing has impacted on military affairs in a myriad of ways, not only in relation to weapons or even weapon systems.

## Newness of technology

The novelty of particular technology must inevitably be assessed within a historical frame of reference. After all, things are new only in relation to things that are old. However, it is easy to overestimate the newness of technology without adopting a sufficiently broad frame of reference. (A related difficulty has to do with the danger of being blinded by technological achievements, especially when scientific and technical experts are all testifying to new abilities.<sup>103</sup>) Perhaps the debate around UAVs has so far most benefitted from the adoption of a more historical perspective. Commentators have noted the continuity between UAVs and pre-existing technologies,<sup>104</sup> and drawn attention to earlier controversies about increasing distance between the adversaries in conflict.<sup>105</sup> This approach has highlighted that UAV technology is novel only to a degree. Arguably, the novelty of the currently ongoing technological change – ranging from robotics to biotechnology – has to do with the unique combination of multiple technologies, rather than the development of any single technology. However, something similar can be found in previous technological shifts. The first industrial revolution mentioned earlier also involved a range of technologies.

101 M. N. Schmitt, above note 22, p. 142.

102 M. Boot, above note 77, pp. 107–201.

103 G. N. Mandel, above note 88, pp. 559–563.

104 See e.g. P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Press, New York, 2009, p. 46ff; Sarah E. Kreps, *Drones: What Everyone Needs to Know*, Oxford University Press, Oxford, 2016, pp. 9–12; see also Rain Liivoja, Kobi Leins and Tim McCormack, “Emerging Technologies of Warfare” in R. Liivoja and T. McCormack (eds), above note 80.

105 Stephanie Carvin, “Getting Drones Wrong”, *International Journal of Human Rights*, Vol. 19, No. 2, 2015.

A related issue is that of “newly controversial” as opposed to “new” technology.<sup>106</sup> In the context of military technology, landmines provide an example. Non-explosive forerunners of landmines – nasty contraptions involving hidden pits with stakes in them – were used several millennia ago.<sup>107</sup> A closer predecessor of the modern landmine, a pressure-operated explosive device, was introduced in the 1700s and became widely used during the American Civil War.<sup>108</sup> Yet it was only in the 1970s that sufficient consensus appeared as to the need to restrict their use, leading to the adoption of Protocol II to the Conventional Weapons Convention.<sup>109</sup> It took another 17 years for a comprehensive ban on anti-personnel mines to be agreed upon in the form of the Ottawa Convention.<sup>110</sup>

The factors leading up to this development cannot be fully explored here. Suffice it to say that the desirability of limiting the use of landmines came about as a consequence of the large numbers of civilians being wounded or killed by landmines. That in turn may be attributed to two factors: the development of compact landmines that could be dropped from aircraft to create large mine fields, and the increased presence of civilians in or near battlespaces. Thus a combination of technological factors and overall changes in the character of warfare created a humanitarian catastrophe, which made the landmine “newly controversial”.

## Concluding remarks

In his recent book *Future War*, Christopher Coker makes a compelling case for future-gazing through science fiction. Science fiction writers tend to analyse contemporary trends and stretch them beyond the present, thus offering, as Coker puts it, “a line of sight into the future”.<sup>111</sup> Furthermore, science fiction can become a “self-fulfilling prophecy” such that its authors not so much predict the future but actually shape it.<sup>112</sup> Importantly, as Coker also points out, “science

106 This notion derives from Thérèse Murphy, “Repetition, Revolution and Resonance”, in Thérèse Murphy (ed.), *New Technologies and Human Rights*, Oxford University Press, Oxford, 2010, p. 8.

107 See Mike Croll, *The History of Landmines*, Pen & Sword, Barnsley, 1998, pp. 4–5.

108 *Ibid.*, pp. 10 and 15.

109 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1342 UNTS 168, 10 October 1980 (entered into force 2 December 1983).

110 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on the Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999). See also Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996), annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2048 UNTS 93, 3 May 1996 (entered into force 3 December 1998) (distinguishing between anti-tank and anti-personnel landmines, and placing further restrictions on the use of the latter).

111 Christopher Coker, *Future War*, Polity, Cambridge, 2015, p. 15.

112 *Ibid.*, p. 29.

fiction in particular penetrates the social imaginaries of the military”.<sup>113</sup> As a result, one can ill afford to dismiss science fiction when considering possible emerging military technologies and the regulatory challenges that they may create.

Likewise, one cannot neglect history books. The literature on past advances in military technology, and the role of this technological change in shaping warfare, is rich and fascinating.<sup>114</sup> Regrettably, this is not matched by the history of the law of war, which remains dominated by a very particular evolutionary tale that opens with the feats of Messrs Lieber and Dunant, and fixates on the notion of “humanity”. While this can make a historically informed examination of the interaction between military technology and the law of war difficult, this enquiry appears to hold considerable promise.

This paper has consciously avoided passing judgement on whether a Geneva Convention on cyber-warfare or a Hague Convention on remotely controlled weapons systems would be desirable. To do so in such a short paper would be presumptuous and disrespectful to the vast number of commentators who have given careful thought to the regulation of emerging military technologies. It is submitted, however, that only by having regard to the continuous evolution of military technology and the law of war can one properly evaluate the seriousness of new challenges and the adaptability of the law.

113 *Ibid.*, p. 28.

114 See in particular, R. L. O’Connell, above note 26; M. van Creveld, above note 73; M. Boot, above note 77.





# The state of conflicts today: Can humanitarian action adapt?

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## Abstract

*How do the dynamics of contemporary armed conflict shape, and constrain, humanitarian action? Is the international humanitarian “system”<sup>1</sup> really at breaking point, as is often claimed? Or will it adapt to the changing realities not just of warfare but of global geopolitical shifts – as it has done repeatedly in the past – and evolve into something different? By way of response, the first part of this article offers a snapshot of today's armed conflicts and other situations of violence, focusing initially on the trends and features apparent in the Syrian conflict – which has in many ways come to define twenty-first-century warfare – and moving on to other countries and regions, many of which share at least some of these features, albeit in varying degrees. It considers the humanitarian consequences of today's armed conflicts and other situations of violence, and the implications for humanitarian response – which, at least on an international level, is indeed facing a watershed. The second part aims to show that even a glance back at key aspects of the evolution of humanitarian action over the past century – largely in response*

\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

*to the evolving nature of warfare and the developing international system – will remind us of quite radical changes in the face of major upheavals and challenges, not all of them dissimilar to those of today. The third part suggests that in today’s global environment, international humanitarian response will continue to evolve and ultimately take on a different shape: one that reflects the changing nature of conflict and the geopolitical power shifts that go with it. With the rise of the global South, and the increasing recognition of the importance of local actors to humanitarian action, particular attention is given to the evolving relationship between local and international actors. In conclusion, the article reiterates some of the main reasons why humanitarian action – and international humanitarian actors in particular – will likely continue to adapt (albeit with varying degrees of success) to a changing world.*

**Keywords:** armed conflict, humanitarian action, adapt, trends.

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## A snapshot of contemporary conflicts

### Trends and features of today’s conflicts: Syria and beyond

The armed conflict in Syria – from its beginnings in anti-government protests in March 2011 to its descent into a brutal war drawing in regional and world powers – has in many ways become emblematic of the state of conflicts today and of the challenges facing humanitarian action, encapsulating many of the key trends and features of both. As such, while it is just one of numerous internecine conflicts around the world causing immeasurable suffering, it does warrant special focus.

If one considers who is fighting the Syrian war, how it is being fought, and what for<sup>2</sup> – as well the catastrophic impact on the civilian population – one can quickly appreciate why it has been widely labelled as the most complex conflict of this century so far.

1 As noted by John Borton in *Future of the Humanitarian System: Impacts of Internal Changes*, Feinstein International Center, Somerville, MA, November 2009, a striking feature of the “humanitarian system” is the lack of clarity on what precisely it consists of and where the boundaries lie. There is no universal definition: some writers preface the term with “international” to distinguish it from national and local elements within affected countries, while some reject the use of the word “system” altogether on the grounds that it implies actors oriented towards common goals. See also Hugo Slim, “Global Welfare: A Realistic Expectation for the International System?”, *ALNAP Review of Humanitarian Action*, Vol. 6, 2006, where Slim defines the “formal international humanitarian system” as “the mainly Western-funded humanitarian system which works closely within or in coordination with the international authority of the United Nations and Red Cross movements”.

2 See Martin Van Creveld, *On Future War*, Brassey’s, London, 2001. The author develops what he calls a “non-trinitarian” theory of warfare, based on five key issues. He contrasts this with Carl von Clausewitz’s classic “trinity” of the people, the government and the army.

The parties to the conflict have become a myriad of shifting alliances on many levels, fighting on multiple fronts, with diverse and often opaque motivations for doing so. What began with unarmed protesters calling for President Assad's resignation – galvanized by the Arab Spring protests sweeping the region – steadily escalated into violent clashes between security forces and opposition supporters. This eventually spiralled into full-blown civil war as armed opposition groups and government forces battled each other for control of cities and strategic areas. The fighting evolved along increasingly sectarian lines, with Syria's Sunni majority pitted against Assad's Shi'a Alawite sect. Syria's neighbours were quickly drawn into a proxy conflict, with predominantly Shi'a States such as Iran and groups including Lebanon's Hezbollah supporting the government, and States such as Saudi Arabia, Turkey and Qatar supporting the Sunni-dominated opposition.

The proliferation of radical non-State armed groups, including jihadist groups such as Islamic State (IS), has added another dimension, with social media networks providing the main breeding ground for radicalization and recruitment of more and more mainly young people from around the world.<sup>3</sup> IS has effectively been fighting a "war within a war" against the Al Nusra Front (affiliated to Al Qaeda) as well as against Kurdish and government forces.<sup>4</sup> Adding to the overall chaos are unknown numbers of local militias with different patrons and fluid chains of command.

In September 2014, a multinational US-led coalition launched air strikes primarily against IS targets inside Syria, part of a "comprehensive and sustained counterterrorism strategy".<sup>5</sup> One year later, in September 2015, Russia joined in the fray with its own military intervention aimed at relieving the pressure on President Assad's forces.

The methods and means of warfare used in the Syrian conflict are as diverse and multilayered as the actors employing them. Weaponry is just one aspect of this complexity. Just as the suffering of civilians in Syria had already reached unprecedented levels from the use of conventional weapons, large-scale use of chemical weapons in rural Damascus in August 2013 – in blatant violation of international humanitarian law (IHL) – killed hundreds of people and injured many more.<sup>6</sup> Despite the subsequent destruction of Syria's chemical weapons arsenal, under a joint mission led by the United Nations (UN) and the Organization for the Prohibition of Chemical Weapons (OPCW), there have been continuing allegations of the use of toxic chemicals such as chlorine gas, and in

3 Jytte Klaussen, "Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq", *Studies in Conflict and Terrorism*, Vol. 38, No. 1, 2015.

4 BBC News, "Guide to the Syrian Rebels", 13 December 2013, available at: [www.bbc.com/news/world-middle-east-24403003](http://www.bbc.com/news/world-middle-east-24403003) (all internet references were accessed in December 2015).

5 Barack Obama, "Statement by the President on ISIL", 10 September 2014, available at: [www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1](http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1).

6 Statement by ICRC, "Toward the Complete Elimination of Chemical Weapons – Meeting of the Chemical Weapons Convention, 2013", The Hague, 3 December 2013, available at: [www.icrc.org/eng/resources/documents/statement/2013/chemical-weapons-convention-states-parties.htm](http://www.icrc.org/eng/resources/documents/statement/2013/chemical-weapons-convention-states-parties.htm).

some cases “compelling confirmation” that it was “systematically and repeatedly” used as a weapon.<sup>7</sup>

The conflict has seen the indiscriminate use of weapons – many of them heavy or highly explosive – in densely populated urban areas, with devastating humanitarian consequences for civilian populations.<sup>8</sup> Shelling and aerial bombardment, including the use of barrel bombs, have continued in defiance of a UN Security Council resolution<sup>9</sup> in February 2014 demanding that they cease. There have also been reports of the use of cluster munitions, which by their very nature are indiscriminate and contrary to IHL.<sup>10</sup> Indeed, key notions of IHL governing the conduct of hostilities – such as “military objective”, the “principle of proportionality” and “precaution” – have been regularly disregarded in the Syrian conflict.

The use of remotely piloted aircraft (armed drones) in US-led air strikes in Syria has also been highly controversial (as it has been in other countries including Iraq, Yemen and Pakistan).<sup>11</sup> Defenders of drone strikes insist that their relative precision greatly minimizes the risk of collateral damage, while critics argue that they can constitute extrajudicial killing and that hundreds of civilians have died in such strikes. While the use of armed drones is not *per se* illegal under IHL, once used in armed conflict they have to comply with principles of distinction, proportionality and precaution.<sup>12</sup>

Flagrant violations of IHL – including direct attacks against civilians and services such as hospitals and schools – have characterized the Syrian conflict and have been committed by various parties, mostly with impunity. In the case of groups such as IS, contempt for IHL appears deliberate and pronounced, with mass killings of captured fighters from rival armed groups and executions, including the beheading of hostages, glorified on social media and used for propaganda purposes.

The readiness of some armed groups to commit atrocities on foreign soil – and the perception of these, in some cases, as “acts of war” – has added another layer of complexity. The legal frameworks governing terrorism and IHL are fundamentally different, with distinct rationales, objectives and structures. Crucially, in legal terms, certain acts of violence are considered lawful in armed conflict and others unlawful, whereas acts of violence designated as “terrorist” are

7 OPCW Fact-Finding Mission, “‘Compelling Confirmation’ that Chlorine Gas Used as a Weapon in Syria”, 10 September 2014, available at: [www.opcw.org/news/article/opcw-fact-finding-mission-compelling-confirmation-that-chlorine-gas-used-as-weapon-in-syria/](http://www.opcw.org/news/article/opcw-fact-finding-mission-compelling-confirmation-that-chlorine-gas-used-as-weapon-in-syria/).

8 UN, “‘Running Out of Words’ to Describe Horror in Syria, Senior United Nations Officials Tell Security Council, Calling for More Vigorous Action”, 25 February 2015, available at: [www.un.org/press/en/2015/sc11801.doc.htm](http://www.un.org/press/en/2015/sc11801.doc.htm).

9 UNSC Res. 2139, adopted 22 February 2014.

10 ICRC, “Cluster Munitions: Overview”, 30 November 2011, available at: [www.icrc.org/eng/war-and-law/weapons/cluster-munitions/overview-cluster-munitions.htm](http://www.icrc.org/eng/war-and-law/weapons/cluster-munitions/overview-cluster-munitions.htm).

11 Chris Cole, “The Dirty Consequences of Our Clean Wars”, *Drone Wars UK*, 5 December 2014, available at: <http://dronewars.net/2014/12/05/the-dirty-consequences-of-our-clean-wars/>.

12 Jelena Pejic, “Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications”, ICRC, 7 May 2015, available at: [www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications](http://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications).

always unlawful. The blurring of terrorism and war – particularly prevalent after the 11 September 2001 attacks in the United States and resurging again more recently – has tended to seriously undermine the construct of IHL, and to cause problems particularly when the term “terrorism” (or “acts of terrorism”) is used for political ends.<sup>13</sup>

The rules of IHL governing humanitarian access to populations in need<sup>14</sup> have likewise been routinely disregarded by the parties to the conflict, particularly in besieged areas, leaving millions of residents in desperate need of food, water and health services (see section “Challenges to Humanitarian Response”, below). A series of 2014 UN Security Council resolutions calling, among other things, for sieges of populated areas to be lifted and authorizing cross-border UN aid operations without Syrian government consent were ultimately “ignored or undermined by the parties to the conflict, other UN member states, and even by members of the UNSC itself”, according to a report signed by twenty-one humanitarian and human rights organizations.<sup>15</sup>

A divided UN Security Council and a general lack of international convergence is another characteristic feature of the Syrian conflict. Numerous attempts by the Arab League and the UN to broker ceasefires and initiate dialogue have invariably failed, with a political solution appearing as elusive as ever. Indeed, the failure of the international system more broadly to deal effectively with the causes and consequences of violent crises – that have in some cases engulfed entire regions – has placed an increasingly heavy burden on humanitarian organizations to protect and assist the people affected by them.

While the Syrian conflict may be particularly complex, its features are by no means atypical in today’s global environment. Multiple protracted armed conflicts, often with regional repercussions, are typically characterized by complex webs of asymmetric warring parties, in particular fragmented and multiplying non-State armed groups (as well as by private military and security companies, urban gangs, militias and a broad range of transnational criminal entities, including “terrorist” groups); by a widespread lack of respect for even the most fundamental rules of IHL; and by a lack of any viable political solution to end them. Failing infrastructure and public services, chronic hardship and poverty, and displacement on a massive scale – reversing development gains previously made – are just some of the outcomes (see section “Humanitarian Consequences of Today’s Conflicts”, below). And globally, armed conflict and armed violence are increasingly concentrated in urban areas, with catastrophic humanitarian

13 32nd International Conference of the Red Cross and Red Crescent, *Background Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, 32IC/15/11, 2015, pp. 16–21, available at: <http://rcrcconference.org/wp-content/uploads/sites/3/2015/10/32IC-Report-on-IHL-and-challenges-of-armed-conflicts.pdf>.

14 See Peter Maurer, “IHL and Humanitarian Principles are Non-negotiable – Syria Is No Exception”, 15 February 2014, available at: [www.icrc.org/eng/resources/documents/article/editorial/2014-02-15-syria-maurer-humanitarian-principles.htm](http://www.icrc.org/eng/resources/documents/article/editorial/2014-02-15-syria-maurer-humanitarian-principles.htm).

15 Martin Hartberg, Dominic Bowen and Daniel Gorevan, *Failing Syria: Assessing the Impact of UN Security Council Resolutions in Protecting and Assisting Civilians in Syria*, 12 March 2015, available at: [www.oxfam.org/en/research/failing-syria](http://www.oxfam.org/en/research/failing-syria).

consequences. Some 50 million people living in urban areas today face protracted and repeated armed violence.<sup>16</sup>

On a regional level, Syria and Iraq are at the centre of spiralling chaos in the Middle East – a multidimensional battlefield of entangled and competing ideological and political interests at the local, regional and global levels. The fallout of the conflict-driven humanitarian crisis in Syria weighs heavily on its neighbours: Turkey, Lebanon, Jordan and Iraq are between them hosting over 4 million refugees fleeing the chaos.<sup>17</sup>

Yemen's deepening armed conflict has likewise pulled in numerous countries in the region.<sup>18</sup> Months of heavy fighting and sustained air strikes have created a catastrophic humanitarian situation, with a mounting death toll and the basic means of survival running out for people already struggling to cope with the effects of recurrent upheaval, drought and chronic impoverishment.<sup>19</sup> In the longest military occupation in modern times, heightened tensions saw a resurgence of violence in Israel and the Occupied Territories, with dozens of people killed in a spate of clashes in October 2015 alone.<sup>20</sup> And in another development with significant implications for regional – and global – power politics and conflict dynamics, world powers finally reached a deal with Iran in July 2015 limiting Iran's nuclear activity in return for the lifting of sanctions.<sup>21</sup>

Elsewhere, armed conflict and armed violence similarly affect entire regions. The ongoing fighting in northeastern Nigeria, for example, is being felt throughout the Lake Chad region. While Nigeria itself is suffering the main impact of its army's fight against Boko Haram – a group as diffuse as it is radicalized – the conflict has spread beyond Nigeria's borders into neighbouring Chad, Cameroon and Niger, displacing more than 1.5 million people (mostly within Nigeria itself).<sup>22</sup> Across the Sahel region, people continue to suffer the effects of armed conflict in northern Mali and in Libya, exacerbated by a severe food crisis and environmental pressures.

South Sudan, the Central African Republic, Somalia and the Democratic Republic of Congo (DRC) are mired in protracted armed conflicts (the latter with

16 ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, October 2015, available at: [www.icrc.org/en/document/urban-services-protracted-conflict-report](http://www.icrc.org/en/document/urban-services-protracted-conflict-report).

17 See UN Office for the Coordination of Humanitarian Affairs (OCHA), "Syrian Arab Republic", available at: [www.unocha.org/syria](http://www.unocha.org/syria).

18 Jeremy Shapiro, "Why Are 10 Countries Attacking Yemen?", Brookings, 26 March 2015, available at: [www.brookings.edu/blogs/order-from-chaos/posts/2015/03/26-why-attack-yemen-shapiro](http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/26-why-attack-yemen-shapiro).

19 ICRC, "Conflict in Yemen: Political Solution Needed to End the Suffering", 11 August 2015, available at: [www.icrc.org/en/document/yemen-political-solution-needed](http://www.icrc.org/en/document/yemen-political-solution-needed).

20 Al Jazeera, "Mapping the Dead in Latest Israeli-Palestinian Violence", 24 November 2015, available at: [www.aljazeera.com/indepth/interactive/2015/10/mapping-dead-latest-israeli-palestinian-violence-151013142015577.html](http://www.aljazeera.com/indepth/interactive/2015/10/mapping-dead-latest-israeli-palestinian-violence-151013142015577.html).

21 Julian Borger, "Iran Nuclear Deal: World Powers Reach Historic Agreement to Lift Sanctions", *The Guardian*, 14 July 2015, available at: [www.theguardian.com/world/2015/jul/14/iran-nuclear-programme-world-powers-historic-deal-lift-sanctions](http://www.theguardian.com/world/2015/jul/14/iran-nuclear-programme-world-powers-historic-deal-lift-sanctions).

22 ICRC, "Nigeria: Massive Long-Term Effort Required to Tackle Humanitarian Crisis in the North", 21 May 2015, available at: [www.icrc.org/en/document/nigeria-massive-long-term-effort-needed-tackle-humanitarian-crisis-north](http://www.icrc.org/en/document/nigeria-massive-long-term-effort-needed-tackle-humanitarian-crisis-north).



repercussions throughout the Great Lakes Region). After decades of intermittent armed conflict in Afghanistan, in 2015 fighting intensified again and the overall numbers of civilian casualties were on the rise. And in Ukraine, even though a fragile ceasefire was holding in late 2015, the likelihood of protracted political and humanitarian crisis seems little diminished.

On a more optimistic note, towards the end of 2015 Colombia looked close to a historic peace agreement that would end more than fifty years of civil war – one of the world’s longest ongoing armed conflicts, which has displaced millions and caused suffering on a huge scale. However, armed violence continues to be a serious problem in various urban areas, and threats, disappearances, sexual violence, mines and unexploded ordnance are continuing to take their toll on civilians in different parts of the country.

Indeed, elsewhere in Latin America, the phenomenon of armed violence – much of it drug-related violent crime – continues to kill many thousands of people every year. According to the 2015 *Global Burden of Armed Violence* report (that serves the Geneva Declaration on Armed Violence and Development), the three most violent countries in the world (based on numbers of violent deaths in 2012) were Syria, Honduras and Venezuela.<sup>23</sup>

## Humanitarian consequences of today’s conflicts

### *Casualties and displacement*

The number of armed conflicts around the world has been progressively declining in recent years, yet the number of fatalities appears to have increased dramatically (in 2008, a global total of sixty-three armed conflicts produced 56,000 fatalities, whereas in 2014 a global total of forty-two armed conflicts produced 180,000 fatalities, according to the International Institute for Strategic Studies (IISS)).<sup>24</sup> Even with the caveats that the business of assessing numbers of war casualties is notoriously complex and often controversial, and that statistics should in many cases be treated with caution,<sup>25</sup> there does seem to be a strong argument that armed conflicts have become more deadly over the last few years.

Beyond direct casualties, increased massive displacement across continents is one of the most visible consequences of today’s armed conflicts and violence. By the end of 2014, worldwide displacement was at the highest level ever recorded, with a staggering 59.5 million people forcibly displaced.<sup>26</sup> Syria has become the world’s single-largest driver of displacement, and has alone made the Middle East the

23 Geneva Declaration on Armed Violence and Development, *Global Burden of Violence 2015: Every Body Counts*, Geneva, May 2015, available at: [www.genevadeclaration.org/measurability/global-burden-of-armed-violence/gbav-2015/press-release.html](http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/gbav-2015/press-release.html).

24 IISS, *Armed Conflict Survey 2015*, May 2015, available at: [www.iiss.org/en/publications/acs/by%20year/armed-conflict-survey-2015-46e5](http://www.iiss.org/en/publications/acs/by%20year/armed-conflict-survey-2015-46e5).

25 Adam Roberts, “Lives and Statistics: Are 90% of War Victims Civilians?”, *Survival*, Vol. 52, No.3, 2010, pp. 115–136.

26 Office of the UN High Commissioner for Refugees (UNHCR), *Global Trends 2014: World at War*, Geneva, June 2015, available at: [www.unhcr.org/558193896.html](http://www.unhcr.org/558193896.html).

biggest producer and host of displaced people. As of the end of October 2015, almost 4.2 million registered refugees from Syria were being hosted by neighbouring countries, and more than 6.6 million were internally displaced – in total around half of the pre-war population of 22 million. As of December 2015, the UN estimated that 13.5 million people were in need of humanitarian assistance inside Syria.<sup>27</sup>

The “migrant crisis” that began to unfold in Europe in 2015 – with hundreds of thousands of refugees, asylum seekers and other migrants arriving on European shores and borders, with the promise of many more to come – is just one part of this. The vast majority of the migrants making the perilous journey to Europe are fleeing the wars in Syria and Afghanistan, many having seen their homes and livelihoods destroyed and/or their loved ones killed or injured, and seeing no hope for a viable existence where they were. The levels of devastation inside Syria are such that, even if the fighting were to end, there may be few Syrians who see any realistic prospect of returning there in the near future.

Moreover, this is part of a much bigger picture: countless numbers of migrants living in – or crossing through – countries affected by armed conflict or violence in various parts particularly of Central America, the Sahel region of Africa, Southeast Asia and the Arabian Peninsula have in recent years risked their lives in search of safety and a better future for themselves and their families. Migration will clearly be a defining feature of the twenty-first century, with people fleeing armed conflict or violence, economic hardship, climate change, food scarcity or, increasingly, a combination of all of these.

### *Impact on people's resilience*

There are different ways in which the characteristics of contemporary conflict or violence impact on people's vulnerabilities and needs, as well as on their resilience. In the first instance, there are those directly affected, with civilians in many cases deliberately targeted, often on religious, ethnic or sectarian grounds. As outlined above, in numerous contexts civilians are the main targets of systematic abuses of IHL and human rights by parties to conflict. In some cases they fall victim to the use of illegal weapons – such as chemical weapons or cluster munitions – or to indiscriminate bombardment of populated areas. Mines, explosive remnants of war and booby traps in some contexts pose a major threat to both resident and returning populations. Apart from the death and injury sustained, the destruction of property, livelihoods, vital infrastructure and services such as health-care facilities and schools – or simply the lack of access to them – has a devastating effect with long-term repercussions.

Constrained access to emergency and basic health-care services in many situations of armed conflict and violence is of particular concern, caused by a widespread lack of respect for the rules of IHL related to the protected status of the medical mission, and seen in recurrent attacks on health-care staff and

27 OCHA, above note 17.

facilities. Egregious attacks such as the highly publicized one against the Médecins Sans Frontières (MSF) hospital in Kunduz, Afghanistan, in October 2015, are just one small part of a much bigger picture: the International Committee of the Red Cross (ICRC) documented almost 2,400 attacks against health care (personnel, facilities, transport and patients), by a range of perpetrators, in eleven countries over three years up to December 2014.<sup>28</sup> The impact of such attacks cannot be overestimated: following the destruction of one of its hospitals in Yemen's Saada province in October 2015, MSF reported that at least 200,000 people were left without access to vital medical care.<sup>29</sup> Close to 100 similar incidents were reported in Yemen alone between March and November 2015, according to the ICRC.<sup>30</sup>

Also directly affected by conflict or violence are persons deprived of their liberty in these settings. They are particularly vulnerable to torture and even summary executions in some cases, as well as cruel, inhuman or degrading treatment, be it physical and psychological ill-treatment or material conditions amounting to the same.

Other than those directly affected, many more people are affected by the cumulative, long-term effects of conflict or protracted situations of violence – there is a gradual breakdown of water, electricity and sanitation services, while collapsing infrastructure means that hospitals and health-care services can no longer care for the wounded or treat chronic diseases.<sup>31</sup> This is exacerbated by the loss of employment and education opportunities, leading to situations of chronic poverty and hardship that make people less resilient to sudden shocks.

### *Vulnerabilities of specific groups*

Then there are groups of people with specific vulnerabilities related to their gender and/or age, such as women, children and the elderly. The demographics of Europe's "migrant crisis" raise questions in this regard: of the almost 800,000 refugees, asylum seekers and other migrants who had arrived in Europe via the Mediterranean Sea between January and November 2015, women represented only 15% of the total, and children 23% (according to data from the Office of the UN High Commissioner for Refugees (UNHCR)<sup>32</sup>), whereas the average percentages of women and children in refugee and migrant populations are generally much higher than this.

28 ICRC, *Health Care in Danger: Violent Incidents Affecting the Delivery of Health Care (January 2012–December 2014)*, Geneva, 2015, available at: [www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp](http://www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp).

29 MSF, "Yemen: MSF Hospital Destroyed by Airstrikes", 27 October 2015, available at: [www.doctorswithoutborders.org/article/yemen-msf-hospital-destroyed-airstrikes](http://www.doctorswithoutborders.org/article/yemen-msf-hospital-destroyed-airstrikes).

30 ICRC, "Yemen: Attacks on Health Care Facilities Must Stop", 10 November 2015, available at: [www.icrc.org/en/document/yemen-attacks-health-care-facilities-must-stop](http://www.icrc.org/en/document/yemen-attacks-health-care-facilities-must-stop).

31 ICRC, above note 16.

32 UNHCR, "Refugees/Migrants Emergency Response – Mediterranean", available at: <http://data.unhcr.org/mediterranean/regional.php>.

There may be different reasons for this disparity. As the numbers of refugees fleeing places like Syria and Afghanistan have surged, there have undoubtedly been many women and children among those too weak and vulnerable to make the perilous journey that has already claimed thousands of lives. Protection needs remain acute during and after flight too, with women and children refugees and migrants particularly exposed to abuse and exploitation. The journey is also an expensive one to make (a fact exploited by traffickers): in some cases the men may leave first, hoping to be able to send for their families later. On the other hand, many other women may be staying behind because of their role and responsibilities as head of the household, looking after others who are unable to flee. Their strength and resilience are in many cases the lifeblood of their families and extended community networks.<sup>33</sup>

Clearly, war has always impacted men and women differently, with relatively few numbers of women participating directly in hostilities. Yet in contemporary armed conflicts – be they in Syria or Afghanistan, Yemen or the DRC – women and children increasingly suffer disproportionate harm (in 2008, a well-known UN force commander, having served in the eastern DRC, famously asserted that it is more dangerous to be a woman than to be a soldier in modern conflict<sup>34</sup>).

In an alarming number of cases, women and girls are deliberately targeted as a tactic of warfare, subjected to horrific sexual violence and other injury, and vulnerable to trafficking and other forms of exploitation. They may also be left as the sole breadwinners of their households, with responsibility for supporting families on their own. In northeastern Nigeria, for example, the conflict has left many thousands of women widowed. With little or no formal education, many are unable to find work and have been reduced to begging, unable to provide for their children. In turn, huge numbers of children – many of them displaced – have no opportunities to go to school and are likewise sent to beg or to do menial work at a very young age. In conflict-affected countries globally, a staggering 34 million children are estimated to be out of school.<sup>35</sup>

Children in armed conflicts are particularly vulnerable in a number of ways. Despite the protection provided by law, children are still being recruited by (or are otherwise associated with) national armed forces and by armed groups in various conflicts around the world – tens of thousands of boys and girls in more than

33 See, for example, UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis – Greece and the former Yugoslav Republic of Macedonia*, 20 January 2016 (based on field assessments carried out in November 2015), available at: [www.unhcr.org/569f8f419.html](http://www.unhcr.org/569f8f419.html). See also Katharine Donato, *The Invisibility of Today's Women Refugees*, 3 November 2015 (with additional references), available at: <https://thesocietypages.org/specials/the-invisibility-of-todays-women-refugees/>.

34 Major General Patrick Cammaert, quoted in *2008 Parliamentary Hearing at the United Nations*, New York, 20–21 November 2008.

35 Hayley Cull, "7 Ways the World is Failing to Keep Children Safe in Wars and Disasters", 5 November 2015, available at: <http://blogs.unicef.org.uk/2015/11/05/how-the-world-is-failing-to-keep-children-safe-in-wars-and-disasters-in-7-shocking-statistics/>.

20 countries.<sup>36</sup> Vulnerability particularly to recruitment and use by armed groups is seen to be increasing as conflicts are becoming “more brutal, intense and widespread”.<sup>37</sup> While in many situations children carry arms and actively take part in the fighting, they are also used in supporting roles such as messengers, porters and cooks, and for forced sexual services. Some are abducted or forcibly recruited, while others are driven by poverty, abuse or a desire for revenge. The likelihood of children becoming child soldiers is increased when they are already separated from their families, displaced from their homes, and given limited access to education.

### *The invisible scars of war*

One of the most significant consequences of armed conflict and other situations of violence in general is the impact on the mental health and psychosocial well-being of the people affected. The psychosocial, psychological and psychiatric problems caused or exacerbated by conflict are of huge concern, even long after conflicts end. Those affected may include families of the missing in countries like Colombia and Nepal; victims of sexual violence in the DRC, South Sudan, the Central African Republic and Syria, to name but a few; other victims of violence, including unaccompanied minors and front-line health-care workers; detainees; and many more. The psychological effects of war, such as post-conflict trauma, have been shown to hinder peace and economic growth, sowing the seeds of further rounds of conflict and violence.<sup>38</sup>

## Challenges to humanitarian response

### *External pressures*

While the number and complexity of simultaneous conflict-driven crises around the world today has produced humanitarian needs on an epic (albeit hard to quantify) scale, the gap between those needs and the ability of international humanitarian actors to address them appears greater than at any other time in recent history.<sup>39</sup>

Just as it has come to define many of the key features of contemporary warfare, the Syrian conflict, in all its complexity, also encapsulates many of the

36 UNICEF and UN Special Representative for Children and Armed Conflict, “More Brutal and Intense Conflicts Leave Children Increasingly at Risk of Recruitment”, 12 February 2015, available at: [www.unicef.org/media/media\\_79775.html](http://www.unicef.org/media/media_79775.html).

37 *Ibid.*

38 See Alex Whiting, “Post-War Trauma Endangers Peacebuilding, Economic Growth – Experts”, *Thomson Reuters Foundation*, 6 October 2015, available at: [www.trust.org/item/20151006230243-is1tu/](http://www.trust.org/item/20151006230243-is1tu/).

39 While this article outlines various reasons for this gap, humanitarian financing is one of the more quantifiable ones: see High Level Panel on Humanitarian Financing Report to the Secretary General, *Too Important to Fail – Addressing the Humanitarian Financing Gap*, December 2015, available at: <http://reliefweb.int/report/world/high-level-panel-humanitarian-financing-report-secretary-general-too-important-fail>, which states that while in 2015 the amount of humanitarian assistance worldwide was 12 times greater than in 2000, “never before has generosity been so insufficient” (p. v).

reasons for this gap. The main reason is the politicization of aid, which is the single biggest threat to the ability of humanitarian organizations such as the ICRC to reach people in need of protection and assistance through an impartial, neutral and independent approach, in Syria as in other parts of the world.<sup>40</sup>

We have already seen that the rules of IHL requiring military forces and armed groups to facilitate the delivery of humanitarian relief supplies, and to respect medical neutrality so that all those needing medical treatment may receive it, are frequently ignored. Increasingly assertive States tend to insist on their own definition or understanding of “humanitarian assistance” – for example, restricting it to emergency relief – or impose administrative obstacles in order to hinder humanitarian assistance to contested parts of the country. Some even consider a neutral and independent approach as a challenge to their sovereignty. Partly as a result of this, some host States are increasingly favouring local responses over international ones, which is accelerating the decentralization and fragmentation of humanitarian response in general. The increasing empowerment of local actors, though broadly seen as a positive and necessary development, nevertheless poses particular challenges to international humanitarian actors in conflict settings (these are considered separately in the section “Localization of Aid: The Future of Humanitarian Action?”, below).

At the same time, a sometimes bewildering array of non-State armed groups may be dismissive of both IHL and “traditional” (i.e., Western) humanitarian norms and practices, rejecting what they see as the imposition of Western values and therefore refusing access and failing to provide security. The difficulty of engaging with such groups – especially those which glorify atrocities – poses a particular challenge for organizations, like the ICRC, working in the field of protection. The designation of certain non-State armed groups as “terrorist” – effectively criminalizing principled humanitarian action in those contexts – only adds to this challenge.

The use of humanitarian aid as a tool for conflict management and counter-insurgency strategies – where the political, military and humanitarian agendas of key international players may be hard to distinguish – further jeopardizes perceptions of a principled approach and ultimately hinders the ability of organizations to gain impartial humanitarian access to people on both sides of a conflict. This has been the case in practically every context where international military intervention has been authorized in recent times (be it through UN Security Council resolutions invoking the “responsibility to protect”<sup>41</sup> or through other means), including Syria, Yemen, Libya, Iraq and Afghanistan (in the latter,

40 The humanitarian action of the Red Cross/Red Crescent Movement is specifically based on seven Fundamental Principles, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality. For further information, see: [www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm](http://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm). See also statement by Taderatu Konoe and Peter Maurer, “Fundamental Principles: Reaffirming our Humanity, Reasserting our Neutrality and Impartiality”, 8 October 2015, available at: [www.icrc.org/en/document/50th-anniversary-fundamental-principles-reaffirming-our-humanity-reasserting-our-neutrality](http://www.icrc.org/en/document/50th-anniversary-fundamental-principles-reaffirming-our-humanity-reasserting-our-neutrality).

41 For information on the concept of “responsibility to protect” or R2P, see: [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org).

humanitarian aid was overtly used to “win hearts and minds” through means such as the NATO-led Provincial Reconstruction Teams).

Just as the “counterterrorism” strategies adopted particularly in the wake of the 9/11 attacks have impacted on the acceptance and reputation of humanitarian actors who might be perceived to be associated with them, so too has the “counter violent extremism” narrative that has gained momentum in recent years. Its “soft”, prevention-oriented focus also raises a number of protection concerns, such as “de-radicalization” programmes inside prisons and more broadly by contributing to the legitimization of restrictive measures that may be difficult to monitor and safeguard against.

A diverse range of emerging actors claiming to deliver “humanitarian assistance” – when it is in fact relief assistance that is underpinned by political, military or economic objectives – further contributes to the blurring of agendas. The NGO Spirit of America, which in the words of advisory board member General (Rtd) Stanley McChrystal is a “philanthropic rapid response team providing humanitarian and economic assistance in support of our nation’s interests”,<sup>42</sup> is just one example – projects include the provision of (non-lethal) equipment to a unit of the Nigerian Army fighting Boko Haram, and medical equipment to Ukrainian soldiers being trained by the US Army.<sup>43</sup> Other examples abound, including private sector actors, faith-based organizations and civil society organizations responding in a broad range of humanitarian crises around the world.

The challenge in an increasingly crowded environment of new actors is to clearly distinguish and separate principled humanitarian action from pure relief assistance, and to be unequivocal that “humanitarian assistance” must at the very least be based on the principles of humanity and impartiality, regardless of the mandate or approach of the particular actor.

All of this is subsumed into the single most critical issue for humanitarian organizations working in the most difficult conflict situations (in places like Syria and Yemen today), which is to gain greater acceptance, access and proximity to the people directly affected, on both sides of the front lines. Lack of security is clearly a major constraint. National Societies have suffered a particularly high death toll of staff members and volunteers: in Syria, for example, by the end of 2015, a total of fifty staff members from the Syrian Arab Red Crescent and eight from the Palestine Red Crescent had been killed while carrying out humanitarian activities since the conflict began in March 2011. In Yemen, two ICRC staff members were killed in September 2015 and at least six Yemeni Red Crescent volunteers lost their lives between April and September of that year. Another ICRC staff member was killed in Mali in March 2015. Others still have been injured in attacks or taken hostage.

42 See: <https://spiritofamerica.net/>.

43 *Ibid.*



## *Internal constraints*

There are other, largely self-imposed reasons why very few humanitarian organizations are able to operate effectively in today's conflict zones. A key factor is that humanitarian agencies are increasingly outsourcing their response – and the risk that goes with it – to local implementers, resorting to “bunkerization” and remote management and retaining little or no control over how and where aid is distributed and no proximity to the people they are trying to help.<sup>44</sup> The “do no harm” principle<sup>45</sup> espoused by humanitarian actors in the past has, it seems, been replaced by one of “take no risk”. One consequence is that the impartiality and relevance of the humanitarian response are jeopardized, especially where any credible perspective of the real needs and resilience of affected communities is lost.

MSF, in a 2014 report,<sup>46</sup> pinpoints some of the key internal deficiencies in the international humanitarian aid “system” as a whole. Slow, inefficient and ineffective humanitarian response in conflict zones is attributed largely to the increasing absence of UN agencies and international NGOs from field locations, with international staff withdrawing and programmes being suspended just as needs become most acute. Little effort is made to reach people in remote, difficult areas. The trends of risk aversion and outsourcing mean that many humanitarian actors are effectively technical experts, intermediaries or donors rather than field actors, according to the report. The UN comes in for particularly tough criticism for being largely inflexible and ineffective in hotspots. The current UN system is said to hinder good decision-making especially in displacement crises where a number of UN agencies have a responsibility to respond. The report further contends that while largely bureaucratic international NGOs may profile themselves as emergency responders, they often lack the technical or human capacity to respond quickly and effectively. Often implementers for the UN, they are largely dependent on the geopolitical interests in play. Overall, the massive growth of the humanitarian sector in recent years has generally not been matched by improved performance.

Then, of course, comes the issue of money. Shortfalls in humanitarian funding as well as the systems by which it is disbursed are clearly factors contributing to the overall paucity of effective humanitarian response in today's conflict-driven crises (albeit not the only ones, as some actors might like to pretend. Large-scale funding appeals should – generally – be viewed with the caveat that there is in fact no objective or reliable measurement of global

44 Sarah Collinson and Mark Duffield, *Paradoxes of Presence: Risk Management and Aid Culture in Challenging Environments*, Humanitarian Policy Group (HPG), Overseas Development Institute (ODI), London, March 2013, available at: [www.odi.org/publications/7514-risk-humanitarian-remote-management](http://www.odi.org/publications/7514-risk-humanitarian-remote-management).

45 See Mary B. Anderson, *Do No Harm: How Aid Can Support Peace – Or War*, Lynne Rienner, Boulder, CO, 1999.

46 MSF, *Where is Everyone? Responding to Emergencies in the Most Difficult Places*, London, July 2014, available at: [www.msf.org.uk/msf-report-where-everyone-responding-emergencies-most-difficult-places](http://www.msf.org.uk/msf-report-where-everyone-responding-emergencies-most-difficult-places).

humanitarian needs, due partly to lack of data, partly to imprecise and sometimes competing needs assessments, and partly to the complex, chronic nature of crises. Neither does the scale of an appeal necessarily match the available capacity to deliver services).

Still, funding figures tell their own story. Considering only the Syrian conflict with its regional repercussions, the resources required to even try to address this crisis are vast: the \$3.8 billion pledged by donors in Kuwait in March 2015 was still less than half of what the UN alone requested for the year to cope with the ever-growing needs inside Syria and its refugee-hosting neighbours.<sup>47</sup> Critical funding shortages have forced the World Food Programme (WFP), for example, to reduce the level of assistance it provides to almost 1.3 million vulnerable Syrian refugees in the region: with the value of food vouchers reduced, most are now living on around 50 cents a day. Inside Syria, WFP says it received only a fraction of its funding requirements in 2015; this has resulted in a significant decrease in the size of food rations, meaning that families have to eat smaller meals, less frequently.<sup>48</sup>

Globally, as of November 2015, there was a \$10.4 billion shortfall in the amount requested in the UN's emergency appeals to tackle competing humanitarian crises around the world.<sup>49</sup> Even appeals for "high-profile" conflicts such as Yemen were less than 50% funded, while for places like Djibouti, which is struggling to cope with the influx of Yemeni and Somali refugees, the figures were much lower still (a mere 15% of requested funds for Djibouti were met). And as more crises drag on for longer periods of time, the gap between available funding and humanitarian needs can reasonably be expected to grow.

At the same time, "non-traditional" or informal funding systems are on the increase, although these are hard to quantify as they do not participate in global reporting systems. They include "emerging" State donors (such as China, India and various Gulf States) which are largely outside the Organisation for Economic Cooperation and Development's Development Assistance Committee and independent of the Good Humanitarian Donorship Initiative<sup>50</sup> (and which tend to channel funds to neighbouring host States, preferring bilateral aid to multilateral mechanisms), as well as increasing numbers of non-governmental donors, including from the private sector and diasporas (in the form of remittances). As humanitarian needs continue to grow and the budgets of many traditional donor governments become more restricted, humanitarian organizations will need to become increasingly innovative in finding diverse new funding sources.

Moreover, traditional UN-centric donor funding systems are very well documented as being slow, inflexible, inefficient and often ineffective.<sup>51</sup> NGOs in

47 OCHA, "Syria: UN and Partners Launch Major Appeal for 2015", 18 December 2014, available at: [www.unocha.org/top-stories/all-stories/syria-un-and-partners-launch-major-appeal-2015](http://www.unocha.org/top-stories/all-stories/syria-un-and-partners-launch-major-appeal-2015).

48 See: [www.wfp.org/emergencies/syria](http://www.wfp.org/emergencies/syria).

49 See OCHA Financial Tracking Service, available at: <https://fts.unocha.org/>.

50 See: [www.ghdinitiative.org](http://www.ghdinitiative.org).

51 For an overview and literature review, see Global Humanitarian Assistance/Development Initiatives, *Think Piece: Humanitarian Financing*, 2015, available at: [www.globalhumanitarianassistance.org/report/think-piece-humanitarian-financing](http://www.globalhumanitarianassistance.org/report/think-piece-humanitarian-financing).

particular have long voiced concerns that UN-managed multilateral funding mechanisms (such as the Central Emergency Response Fund and pooled funding mechanisms) tend to hinder the delivery of emergency assistance to those in need, and that the proportion of direct bilateral aid from donors to front-line delivery agencies has decreased, thereby reducing the speed, timeliness and predictability of funding. Save the Children, for example, recently called for a greater proportion of funding to go to agencies directly involved in delivering aid (with an emphasis on non-UN and local actors) rather than UN agencies who subcontract to operational partners, thus reducing “double-handling” of humanitarian funds and improving efficiency on the ground. It also urged “[m]ore inventiveness in acquiring humanitarian funding by tapping the tens of billions from the corporate sector and from very wealthy individuals”.<sup>52</sup>

In a global environment of mainly protracted or recurrent conflicts and chronic humanitarian needs – where a vicious circle of conflict, poverty and weak governance in fragile States is easily perpetuated – a critical challenge is to “find a way to break down financial and institutional silos and work towards plans that make all resources count for crisis-affected people”.<sup>53</sup> While the remit of humanitarian response is being stretched ever wider, the rigidly separate mechanisms in place for humanitarian funding and development assistance – despite all the rhetoric around “early recovery” in recent years – are not suited to today’s realities. Reform of these mechanisms towards a more holistic approach is crucial; so too is the need to better harmonize resource flows from different sources and from different communities, be they national or international, public or private.

Closely connected to this, there is an increasing focus on the need to boost the resilience of communities affected by multiple crises around the world in order to save lives but also to reduce the overall cost of humanitarian assistance and disaster recovery.<sup>54</sup> While resilience-building is rooted in disaster preparedness, the concept is gaining ground in protracted armed conflicts too. Speaking at the Resilience Development Forum in Jordan in November 2015, Helen Clark, head of the United Nations Development Programme (UNDP), emphasized the critical importance of resilience-based development to the international response to the crisis in Syria and its regional neighbours, stressing that “[r]esilience-building requires greater and more-predictable investments and we must pursue more practical, novel and innovative funding modalities and instrument[s] beyond existing classifications of international aid.”<sup>55</sup>

52 See: [www.savethechildren.net/article/humanitarian-system-urgently-needs-reform-save-more-lives-warns-save-children-world](http://www.savethechildren.net/article/humanitarian-system-urgently-needs-reform-save-more-lives-warns-save-children-world).

53 Global Humanitarian Assistance/Development Initiatives, above note 51.

54 El-hadj As Sy, quoted in Kieran Guilbert, “Boost Resilience to Save Lives in West Africa – Red Cross Head”, *Thomson Reuters Foundation*, November 2015, available at: [www.trust.org/item/20151110203218-fss2n/](http://www.trust.org/item/20151110203218-fss2n/).

55 UNDP, “UN Development Chief: Resilience Critical to More Effective Syria Response”, November 2015, available at: [www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/11/10/un-development-chief-resilience-critical-to-more-effective-syria-response.html](http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/11/10/un-development-chief-resilience-critical-to-more-effective-syria-response.html).

The issue can nevertheless be sensitive in armed conflicts, with a need for caution that building the resilience of conflict-affected people and communities in terms of their economic security, disease prevention and psychosocial recovery does not become blurred with the intolerable idea of trying to make them resilient to abuses and repeated violations of IHL.

A broader problem with humanitarian funding is that it is generally not targeted impartially, according to need. This is partly because of the aforementioned lack of an accurate picture of global needs, and also because global funding allocations still tend to favour responses in geographically or politically strategic countries over neglected or protracted crises.<sup>56</sup> And while the information revolution and innovative uses of communication technologies are increasingly empowering crisis-affected communities to articulate their needs and how they should best be addressed (and by whom), the international humanitarian system as such is still struggling to fully embrace this fundamental power shift and the vision of a different future that comes with it (see section “Localization of Aid: The Future of Humanitarian Action?”, below).

## **Evolution of humanitarian action in a changing world: A short history**

The gap between today’s overwhelming humanitarian needs and the constraints on international humanitarian actors’ efforts to address them is seen by some as unbridgeable, pushing organizations to “breaking point”. In 2014, then head of the UNHCR António Guterres said that the scale of forced displacement caused by conflicts around the world had created “a situation where humanitarian needs are growing exponentially and the capacity to respond is not able to match”, and that “the humanitarian community [had] reached its limit”.<sup>57</sup> Jan Egeland, former UN emergency relief coordinator and now head of the Norwegian Refugee Council, despaired that “the system is totally broken”.<sup>58</sup>

With its capacity overstretched and its acceptance and relevance challenged as never before – particularly by non-Western donors and recipient States, emerging non-State groups and increasingly by local actors and beneficiaries themselves – the international humanitarian system is undoubtedly facing a critical test. Indeed, the very concept of one neatly drawn, interconnected “system” seems outdated in what has become a much wider “ecosystem” of diverse actors within the global

56 Ingrid Macdonald and Angela Valenza, *Tools for the Job: Supporting Principled Humanitarian Aid*, Norwegian Refugee Council and HPG, ODI, London, October 2012, available at: [www.odi.org/node/17771](http://www.odi.org/node/17771).

57 “Aid Groups ‘Can’t Cope’ with Spate of Global Conflicts”, *Independent.ie*, 5 November 2014, available at: [www.independent.ie/world-news/middle-east/aid-groups-cant-cope-with-spate-of-global-conflicts-30720065.html](http://www.independent.ie/world-news/middle-east/aid-groups-cant-cope-with-spate-of-global-conflicts-30720065.html).

58 Quoted in Lyse Doucet, “A Broken System for a Broken People”, *BBC News*, 6 January 2015, available at: [www.bbc.com/news/world-middle-east-30699835](http://www.bbc.com/news/world-middle-east-30699835).

humanitarian landscape.<sup>59</sup> At best, there may be multiple “systems” – working on local, national and international levels – with varying degrees of organization, different approaches and different goals. This broad humanitarian landscape and all of its features are evolving constantly, shaped by the increasing complexities of the causes and consequences of war, violence and disasters, and will inevitably assume quite a different shape in the years to come (this will be discussed further in the following section).

Yet in many ways, this has always been the case. While the humanitarian gesture can be traced back centuries in different parts of the world – particularly in religious belief and in the articulation of the laws of war – “modern” international humanitarian action has undergone major transformations since its broad origins in the nineteenth century and the largely European (and American) experience of war.<sup>60</sup> There does now appear to be a growing awareness that historical analysis – which needs to go beyond just the Western-centric experience – can inform reflection on the current challenges facing international humanitarian action and better preparation for the changes that may take place in the future.<sup>61</sup> While it is beyond the scope of this article to offer such analysis, even a brief and partial scan of the evolution of international humanitarian action over the last century and a half helps to frame the current challenges and put them into a certain perspective.

More than fifty years before the First World War, the creation of the ICRC in 1863 was undoubtedly pivotal in the birth of modern humanitarian action. Witnessing the carnage on the battlefield at Solferino four years earlier, Henry Dunant clearly recognized the need not only for impartial medical services that would treat wounded soldiers on both sides of the front line, but also for organized humanitarian relief and trained volunteers, as well as the importance of international cooperation to achieve this. Dunant and four fellow Geneva citizens went on to establish the ICRC and draw up the First Geneva Convention of 1864, aimed at protecting sick and wounded soldiers and those caring for them from attack. The subsequent formation of National Red Cross and Red Crescent Societies saw the development of concerted and coordinated humanitarian action for a successively broader range of victims of war, on the basis of a growing body of IHL. The concept of neutral, impartial and independent humanitarian action carried out by workers under the protection of a distinctive emblem continues to be at the heart of the Red Cross and Red Crescent Movement – now comprising the ICRC, the International Federation of Red Cross and Red Crescent Societies (IFRC) and 190 individual National Societies.

59 See Randolph Kent, Justin Armstrong and Alice Obrecht, *The Future of NGOs in the Humanitarian Sector*, Humanitarian Futures Programme, Kings College London, August 2013, available at: [www.humanitarianfutures.org/events/the-future-of-humanitarian-ngos/](http://www.humanitarianfutures.org/events/the-future-of-humanitarian-ngos/).

60 Eleanor Davey, John Borton and Matthew Foley, *A History of the Humanitarian System: Western Origins and Foundations*, HPG, ODI, London, 2013, p 5.

61 See ODI project on “A Global History of Modern Humanitarian Action”, available at: [www.odi.org/projects/2547-global-history-modern-humanitarian-action-moving-forward-hpg](http://www.odi.org/projects/2547-global-history-modern-humanitarian-action-moving-forward-hpg).

Dunant was also astute enough to foretell changes in the nature of warfare. “If the new and frightful weapons of destruction which are now at the disposal of nations seem destined to abridge the duration of future wars,” he wrote in *A Memory of Solferino*, “it appears likely, on the other hand, that future battles will only become more and more murderous.” Less than a decade later, the St. Petersburg Declaration was the first formal agreement prohibiting the use of certain weapons in war.

At the same time, humanitarian action was being shaped by imperial expansion and colonial power structures which would stay intact until the second half of the twentieth century. Impartiality was lost in an enterprise that prioritized the health needs of Europeans in the colonies. Christian missionaries played an important part in expanding this effort to indigenous populations through religious conversion.<sup>62</sup>

The outbreak of the First World War in 1914 posed an unprecedented challenge to humanitarian response, causing more death and destruction than any previous conflict. New weapons and methods of warfare were introduced, including chemical weapons and long-range bombardment. Ten million people – servicemen and civilians – were captured and sent to detention camps. The ICRC, supported largely by volunteers of the thirty-eight National Societies in existence at the time (the ICRC had only twelve paid staff at the start of the war<sup>63</sup>), expanded its traditional front-line work with wounded or sick soldiers to include working on behalf of prisoners of war, protecting and assisting civilians (especially those living in enemy-occupied territory), campaigning against the use of chemical weapons, and in the immediate post-war period, dealing with the consequences of civil war in the wake of the Russian and Hungarian revolutions.

The aftermath of the Great War – with its massive challenges around food security, outbreaks of disease (notably the flu epidemic of 1918–19 that killed an estimated 50 million people), mass displacement and statelessness – saw the increasing international coordination and institutionalization of humanitarian practice. National Societies came together under the League of Red Cross Societies in 1919, the predecessor of the IFRC. The following year, the Geneva-based League of Nations was born of US president Woodrow Wilson’s vision of international reform – the first international body whose sole purpose was to maintain world peace. While the League’s inherent weaknesses foretold its ultimate failure on a political level, it did score some successes on other levels, notably in the creation of the Nansen International Office for Refugees, the predecessor of the UNHCR, under Fridtjof Nansen. Another notable development around this time was the establishment of what has been described as the “first recognisable trans-national humanitarian NGO”<sup>64</sup>, the Save the

62 Michael Barnett and Thomas G. Weiss, “Humanitarianism: A Brief History of the Present”, in M. Barnett and T. G. Weiss (eds), *Humanitarianism: Politics, Power, Ethics*, Cornell University Press, Ithaca, NY, 2008.

63 David Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005.

64 Peter Walker and Daniel G. Maxwell, *Shaping the Humanitarian World*, Routledge, London, 2009, p. 25.

Children Fund, which quickly expanded from its British base to sections in various countries.

The Second World War marked a new turning point. Trench warfare was overtaken by mechanized warfare, and massive air strikes targeted primarily civilian populations. Civilians were also the main targets of ruthless occupation policies first by Nazi Germany and its allies and later by conquering armies. Governments and private voluntary agencies led relief efforts. Yet the scale of humanitarian needs was unprecedented – on five continents simultaneously – and far surpassed the capacity of available response resources, both human and financial. The ICRC, for its part, further expanded its activities and worked increasingly to meet the needs of civilians, including famine relief in places like the Greek Aegean Islands. However, the ICRC's notorious failure to denounce Nazi atrocities, and to work on behalf of civilians in the occupied areas or those deported to death camps, "remains synonymous with tragedy in the institution's memory".<sup>65</sup>

The atomic bombing of Hiroshima and Nagasaki in August 1945 precipitated the end of the war and a new era in international relations: one dominated by tensions between two blocs and the threat of nuclear war. The demise of the League of Nations and the establishment of the UN in 1945 was followed by the creation of specialized agencies such as UNICEF, the UN Food and Agriculture Organization (FAO), the World Health Organization and the UNHCR in 1951, and ten years later, the FAO-run World Food Programme, born of the US "food for peace" policy that was driven by surplus agricultural production. Also in the post-war period, a number of important normative and legal frameworks were established, including the Universal Declaration of Human Rights (1948), the Convention on the Prevention and Punishment of Genocide (1948) and the 1949 Geneva Conventions, which updated and expanded the laws of war.

During the Cold War, the process of decolonization and the emergence of the "third world" shifted the focus of international humanitarian action from European relief and reconstruction to helping the hungry and needy in newly independent, "less developed countries". As Michael Barnett notes, "humanitarianism had gone global".<sup>66</sup> NGOs that had been established during the Second World War – such as Oxfam, CARE, Catholic Relief Services and many others – dramatically expanded their budgets and the scope of their activities, while many new ones were created, often with extremely close ties to the Cold War policies and priorities of their home governments.<sup>67</sup> At the same time, the international development discourse gathered momentum, with many new States joining the UN and making their demands heard on a global platform.

The Nigeria–Biafra civil war and the ensuing famine in the late 1960s set a critical test for international humanitarian action – one which was largely failed by

65 See ICRC, "1939–1945: Overview", available at: [www.icrc.org/eng/who-we-are/history/second-world-war/overview-2-world-war.htm](http://www.icrc.org/eng/who-we-are/history/second-world-war/overview-2-world-war.htm).

66 Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, NY, 2011.

67 E. Davey, J. Borton and M. Foley, above note 60.



all concerned (not least the ICRC, whose massive yet muddled relief effort was aborted when one of its planes was shot down by the Nigerian government, and whose neutrality was seen by some as an excuse for inaction or worse). The crisis caused a serious split in the international humanitarian community and gave birth to a new generation of rights-based humanitarianism based on “bearing witness” and the principles of denunciation and the right to intervention, of which MSF is the best-known protagonist (although it later became clear that the partisanship of NGOs vis-à-vis the Biafran cause had been overtly instrumentalized by the secessionists, prolonging the conflict and causing more suffering). In recent years, however, the ICRC and MSF have become much closer in terms of their approach – essentially a “Dunantist” one – in difficult situations of armed conflict, where they are often among the very few international actors who are effective front-line responders (this will be discussed in more detail in the following section).

Famine in Africa became a major defining factor for international humanitarian action in the 1970s and 1980s, with the Ethiopian famine of 1984–85 coming to symbolize the prevailing media-driven mobilization, lack of coordination and ultimately manipulation of relief aid. But by the time the Cold War ended in the early 1990s, there was an unprecedented number of mostly non-international armed conflicts in different parts of the world,<sup>68</sup> many of which came to be known as “complex emergencies” due to the multiplicity of their causes, the diversity of actors involved and the wide range of humanitarian consequences requiring a multisectoral response.

At the same time, there was a rapid increase in the number of UN peacekeeping missions around the world, with the Security Council authorizing a total of twenty new operations between 1989 and 1994, raising the number of peacekeepers from 11,000 to 75,000 (the first of an increasing number of operations explicitly mandated to protect civilians only came in 1999: UNAMSIL in Sierra Leone). The 1990s were however marked by the catastrophic failures of UN peacekeeping in the Somalia conflict, the Rwandan genocide and the Balkans – and by the overt politicization and instrumentalization of humanitarian response (with the collusion of some humanitarian actors themselves). Perceptions and respect for international humanitarian action as a whole had sunk to a new low.<sup>69</sup>

The international humanitarian community reacted to the criticisms and perceived shortcomings with much debate and a number of initiatives in the 1990s and beyond, such as various codes of conduct (which have proliferated since the creation of the 1994 Red Cross/NGO Code of Conduct), including the Sphere Project Minimum Standards in 1997 and numerous country-specific codes; the Good Humanitarian Donorship initiative in 2003; and the UN-led Humanitarian Response Review in 2005, a landmark initiative aimed at addressing perceived weaknesses, particularly in coordination, leadership and

68 Halvard Buhaug *et al.*, *Global Trends in Armed Conflict*, Peace Research Institute Oslo, 2007.

69 See David Rieff, *A Bed for the Night: Humanitarianism in Crisis*, Simon and Schuster, New York, 2002.

funding. The resulting reforms created, *inter alia*, the “cluster system” of coordination and a number of new funding mechanisms. Sorely tested by both natural disasters (such as the 2010 earthquake in Haiti) and the increasing scale and complexity of conflict-driven crises, the effectiveness and ultimately the future of these structures and mechanisms is once again under debate.<sup>70</sup>

Indeed, it is hard to think of a time in recent decades when international humanitarian action was not in crisis. The 9/11 attacks and the humanitarian consequences of the so-called “global war on terror” triggered another turning point, with international relations becoming polarized and the political, military and humanitarian objectives of Western donor governments becoming increasingly indistinct. US-led military interventions in Afghanistan and Iraq posed major challenges to upholding humanitarian principles in these contexts (as discussed earlier in this article). The 2003 bombing of UN headquarters and ICRC offices in Baghdad marked a low point in terms of perceptions and acceptance of humanitarian action in the early post-9/11 era.

Now, with the massive humanitarian fallout from the Syrian conflict and the many other concurrent crises around the world, familiar criticisms of an inept and broken humanitarian response system are resurging again.<sup>71</sup> History shows that many of the challenges are also familiar: massive humanitarian needs outstripping available response capacity and resources; the politicization of humanitarian aid and its use as a vehicle for other agendas (including the deliberate blurring of terrorism and war); the role of the media; the erosion of humanitarian principles; poor coordination and leadership among humanitarian organizations; inefficient and ineffective funding mechanisms; and the questionable relevance and effectiveness of international humanitarian response. And, as in the past, change from within – through structural and mechanical reform – will only achieve so much.

All the forces at play in today’s turbulent humanitarian landscape are already changing the shape of international humanitarian action, whether the actors like it or not. For these actors, the choice “is not about whether to like or dislike the world that is emerging in the second decade of the 21st Century, the choice is about adaptation, collaboration and re-discovering their role, or not”.<sup>72</sup>

## Localization of aid: The future of humanitarian action?

The future shape of humanitarian action will be determined by various factors, including the increasing assertiveness of States and insistence on sovereignty, the politicization of aid, the proliferation and diversification of new actors, security

70 See Paul Knox Clark and Leah Campbell, *Exploring Coordination in Humanitarian Clusters*, ALNAP, London, June 2015.

71 MSF, above note 46. See also Paul Currión, “The Humanitarian Future”, September 2014, available at: <https://aeon.co/essays/humanitarianism-is-broken-but-it-can-be-fixed>.

72 R. Kent, J. Armstrong and A. Obrecht, above note 59. While the authors refer to NGOs, their assertion is relevant to all parts of the humanitarian “system”.

issues, new technologies and the drive towards a common approach to emergency relief and development. While it is beyond the scope of this article to re-examine these issues, on which there is already a wealth of literature,<sup>73</sup> one issue in particular that has been increasingly central to debates on humanitarian reform and the future of humanitarian action will be looked at more closely here, namely the “localization” of aid.

The debate around this issue – in terms of the role of local humanitarian actors and that of crisis-affected people (which may naturally overlap) – has been dominant in the various reform-oriented UN initiatives currently under way, not least the process around the Sustainable Development Goals (SDGs) and the 2016 World Humanitarian Summit (WHS). The latter aims to “put people at the heart of humanitarian action”, building on the ethos of the SDGs, through which world leaders “have pledged to leave no-one behind”.<sup>74</sup> The global consultations ahead of the WHS emphasized that “affected communities, their organizations and their communities should be recognized as the primary agents of their preparedness, response and recovery”, that “all humanitarian actors, both national and international, should complement local coping and protection strategies wherever possible”, and that “people affected by crises should be enabled to exercise greater voice and choice in humanitarian action”.<sup>75</sup> According to the IFRC, local actors are the “key to humanitarian effectiveness”, and “there is a growing feeling that strengthening the role of local actors may finally help to redress some of the perennial challenges of humanitarian aid, such as shrinking access, fragmentation and incoherency in operations, and the gaps between response, recovery and development”.<sup>76</sup>

In a similar vein, the Future Humanitarian Financing Initiative<sup>77</sup> envisages a future in which “much of the cost of providing humanitarian assistance will be borne by local and domestic actors, including affected governments, communities, civil society groups, businesses and regional organizations”, and where rising and emerging donors will challenge and reshape modes of assistance, supporting the rise of new responding actors.

73 See, for example, the collection of articles in the thematic issue on “The Future of Humanitarian Action”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011, available at: [www.icrc.org/en/international-review/future-humanitarian-action](http://www.icrc.org/en/international-review/future-humanitarian-action). See also Justin Armstrong *et al.*, *The Future of Humanitarian Security in Fragile Contexts*, Humanitarian Futures Programme, April 2014, available at: [www.humanitarianfutures.org/publications/2507/](http://www.humanitarianfutures.org/publications/2507/); IFRC, *World Disasters Report 2013: Technology and the Future of Humanitarian Action*, 2013, available at: [www.ifrc.org/en/publications-and-reports/world-disasters-report/world-disasters-report-2013/](http://www.ifrc.org/en/publications-and-reports/world-disasters-report/world-disasters-report-2013/).

74 2030 Agenda for Sustainable Development, available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

75 WHS, *Restoring Humanity: Global Voices Calling for Action (Synthesis Report of the Consultation Process)*, October 2015, p. 2, available at: [www.worldhumanitarianissummit.org/whs\\_global/synthesisreport](http://www.worldhumanitarianissummit.org/whs_global/synthesisreport).

76 IFRC, *World Disasters Report 2015*, September 2015, p. 11, available at: <http://ifrc-media.org/interactive/world-disasters-report-2015/>.

77 Catholic Agency for Overseas Development *et al.*, *Future Humanitarian Financing: Looking Beyond the Crisis*, May 2015, available at: <http://reliefweb.int/report/world/future-humanitarian-financing-looking-beyond-crisis>. (This initiative is linked to the IASC Task Team on Humanitarian Financing and ultimately to the UN High Level Panel on Humanitarian Financing.)

More broadly, in view of the widely held belief that “the global South remains one of the defining terrains for humanitarian action in the twenty-first century”,<sup>78</sup> how international humanitarian actors interrelate with predominantly non-Western, “local” actors, and with crisis-affected populations themselves, may reasonably be seen as critical to their future.

Discussions about the importance of “localizing aid” – closely connected to the concepts of participation of crisis-affected people, capacity-building and accountability – are of course nothing new, growing out of development theory and practice in the 1980s and 1990s. This was recognized as important not only as a matter of dignity for people affected by crisis, but to make response as relevant and effective as possible, mainly in the context of disaster risk reduction, preparedness and recovery. Local aid actors, in all their diversity,<sup>79</sup> are invariably the first to respond in emergencies: their proximity and first-hand knowledge and understanding of their own contexts cannot be matched. The increasing recognition of the importance of building the resilience of crisis-affected people and communities – in terms of disaster risk reduction and preparedness but also in situations of protracted conflict – puts a premium on the role of local actors.

While the concept of engaging with crisis-affected people has been institutionalized in countless resolutions, aid policies, codes of conduct and standards, practice on the ground has been inconsistent at best, with generally more rhetorical than real results. This has been partly due to some genuine constraints, particularly in complex and fragmented situations of armed conflict where access and actual presence are problematic. It has also been due in some cases to the perceived condescension of humanitarian actors, whose efforts to engage beneficiaries have been dismissed as donor-appeasing tokenism, and to services that lack quality and relevance.<sup>80</sup>

In situations of armed conflict, the localization agenda brings with it some real concerns and a number of broad assumptions, principally about aid being delivered in accordance with humanitarian principles and a weakening of the protection aspect of humanitarian response. Local actors may have additional political goals – but then, so too may multi-mandated international organizations that are part of a “coherence” agenda (as in UN integrated missions, for example). Especially in the case of new, “untested” local actors (regardless of their knowledge, capacity and networks), international agencies tend to be wary not only of their adherence to humanitarian principles, but generally of their

78 E. Davey, J. Borton and M. Foley, above note 60.

79 There is no universally accepted definition of what “local” means in this context. One suggested differentiation is that “[t]raditional humanitarian actors are the networks of international and national organizations that deliver aid in accordance with core principles and are included in the formal humanitarian system. Local aid actors encompass charities, civil society groups, faith-based organizations, volunteer groups, private sector actors, communities and diaspora bodies involved in providing protection and assistance in ways that may not be explicitly aligned with core principles and/or outside of the formal humanitarian system.” IFRC, above note 76, p. 152.

80 See Dayna Brown, Antonio Donini and Paul Knox Clarke, *29th ALNAP Annual Meeting: Engagement of Crisis-Affected People in Humanitarian Action*, February 2014, available at: [www.alnap.org/resource/10439.aspx](http://www.alnap.org/resource/10439.aspx).

professionalism, transparency and accountability, and of their operational standards. Excessively rigid criteria for partnerships have certainly led to lost opportunities.<sup>81</sup> At the same time, the general increase in remote management and “bunkerization” by international actors raises ethical questions about risk transfer to local implementing “partners”.

Establishing solid, well-managed operational partnerships usually takes time and effort, building on mutual respect and real commitment. This can lead to operational delays, while genuine integrity and security management concerns must also be carefully managed. In the experience of the ICRC and National Societies, this initial investment pays off in successful operational partnerships once clear structures and processes are created, strengthening both partners’ access and acceptance, enhancing their capacity and making assistance more relevant.<sup>82</sup>

Although there is relatively little systematic research and literature on South–South humanitarian responses in conflict settings,<sup>83</sup> even anecdotal evidence points to the growing role of local actors in some of the most challenging environments. In Syria, for example, where humanitarian access for international actors is particularly constrained, the Syrian Arab Red Crescent is a key actor (and the ICRC’s main partner in the country), although it too faces enormous challenges, not least in terms of security, as discussed earlier in this article. Meanwhile, the “informal” system is growing exponentially. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), the number of diverse local NGOs providing different kinds of relief assistance in Syria – including a wide range of professional bodies, diaspora groups, faith-based groups and fighting groups or activists – increased from twelve at the start of the conflict to 600–700 in 2015, about a fifth of them based inside Syria. While many diaspora organizations started off in an *ad hoc* manner, the professionalism of their approach and their resources soon grew.<sup>84</sup> In Somalia, to take just one other example, different types of commercial actors have played a significant role in meeting the relief needs of conflict-affected populations.<sup>85</sup>

The relationships and types of engagement between international and local actors in conflict settings – and between local actors themselves – are highly contextual and constantly shifting with the dynamics of the conflict itself. Yet, regardless of different terminologies of “engagement”, “partnership”, “cooperation” or “collaboration” – and despite the aspirational visions of the

81 IFRC, above note 76, p. 161.

82 ICRC, *Guidelines for Effective National Society and ICRC Partnerships*, internal document, revised ed., Geneva, 2012.

83 Julia Pacitto and Elena Fiddian-Qamiyeh, *Writing the “Other” into Humanitarian Discourse: Framing Theory and Practice in South-South Responses to Forced Displacement*, Research Paper No. 257, Refugee Studies Centre, University of Oxford, July 2013.

84 Eva Svoboda and Sara Pantuliano, *International and Local/Diaspora Actors in the Syria Response*, HPG, ODI, London, March 2015.

85 Rukhe Zehra Zahidi, Samuel Carpenter and Joanna Burke, *Commercial-Humanitarian Engagement in the Horn of Africa Crisis: A Scoping Study of the Response in Kenya and Somalia*, Humanitarian Futures Programme, Kings College London, London, 2012.

localization of aid – the reality remains one of “unequal power relations ... between international and local relief actors”.<sup>86</sup> The WHS global consultations conceded that “the current system remains largely closed, with poor connections to ... emerging donors and increased South-South cooperation, and to a widening array of actors”. The system, it says, “is seen as outdated”.<sup>87</sup> “While contributing to humanitarian action in immense ways, national/state institutions and local organizations have often been kept at arm’s length by the international humanitarian community”, says another study.<sup>88</sup>

This imbalance is starkly illustrated by global humanitarian funding patterns. According to Development Initiatives, between 2009 and 2013, local and national NGOs combined received a total of \$212 million – 1.6% of the total given directly to NGOs and 0.2% of the total international humanitarian response over the period.

The prevailing power imbalance in this domain is being met with growing impatience by some NGOs from the global South. At the WHS global consultations, held in Geneva in October 2015, there was heated debate about the issue, with some southern NGOs levelling accusations of “neo-colonial” behaviour. A leading voice was Degan Ali, executive director of African Development Solutions (Adeso), who told the meeting of government representatives, UN officials and humanitarians that “Southern NGOs are demanding accompaniment rather than direction. Prepare to be uncomfortable.”<sup>89</sup> She laid out plans for the establishment of a southern NGO network, lobbying for a pooled fund managed by NGOs headquartered in the global South, and a target of 20% of all humanitarian funding to go directly to local organizations, among others. There was a dominant view that any attempt at humanitarian reform would have to address the “institutionalized discrimination” that currently exists. Although Southern NGOs might not yet present a united front, their power and momentum will only grow.

While some international NGOs reacted defensively, others conceded that “aid must be as local as possible, and as international as necessary. We in the INGO community are ready and prepared to be part of that change.”<sup>90</sup>

Many would say there is no choice: international humanitarian organizations must accept change and adapt accordingly, which may entail accepting a smaller role. In 2015, the Geneva-based Steering Committee for Humanitarian Response, an alliance of major international humanitarian organizations (currently chaired by the ICRC), laid out a stark vision of where ongoing changes were leading, at least in “straightforward” crises where access is relatively unproblematic:

86 IFRC, above note 76, p. 159.

87 WHS, above note 75, p. 6.

88 Steven Zyck and Hanna Krebs, *Localising Humanitarianism: Improving Effectiveness through Inclusive Action*, HPG, ODI, London, July 2015, p. 1.

89 Quoted in Imogen Wall, “Gloves Off between Local and International NGOs”, *IRIN*, 22 October, available at: [www.irinnews.org/report/102141/gloves-off-between-local-and-international-ngos](http://www.irinnews.org/report/102141/gloves-off-between-local-and-international-ngos).

90 Ian Ridley, Senior Director of World Vision, quoted in *ibid*.

In just a few years from now, the face of international humanitarian action as we know it will be irrevocably transformed. People and communities affected by crisis – informed, connected and empowered through easy access to technology – will choose from increasingly diverse sources of aid, be they public or private, local or international, while the aid industry risks becoming precisely that: a large-scale business. The role of “traditional” humanitarian actors – beyond helping to facilitate this inexorable power shift – will be limited to pockets of “off grid” situations of protracted conflict and extreme violence, where access will be a prevailing challenge.<sup>91</sup>

There is undoubtedly some credence to this view. Brown and Donini assert that as people globally have better access to information and technology, crisis-affected communities are increasingly likely to demand higher levels of engagement in decisions that concern them, and demand increasing accountability from national authorities via the ballot box. While there “may well continue to be situations where national authorities or non-State actors are unwilling or unable to uphold humanitarian principles and where international humanitarian agencies will continue to play a key role, the tolerance for sub-par services and arrogant behaviour will diminish”.<sup>92</sup> They further contend that as middle-income countries develop their national capacity to prepare for and respond to crises, the role of international humanitarian agencies will inevitably change and become more advisory and less operational. Oxfam has likewise suggested that international NGOs will become “humanitarian brokers: facilitating, supporting, and bringing together local civil society”,<sup>93</sup> and this role may also increase as more international actors resort to remote management.

Even in the “off grid” situations where international humanitarian actors may still play an important role, they will need to be ever more innovative to prove themselves as relevant and effective. This will mean different things to different actors. Better harnessing the enormous opportunities posed by new technologies, continuously looking for new ways to better communicate with and empower the people at the centre of humanitarian response, and connecting better to increasingly diverse stakeholders and potential partners – including from the private sector, civil society and the full range of “local” actors – will be increasingly common objectives in all environments.

More effective, and sincere, capacity-building of local humanitarian actors may be one factor in this adaptation. According to François Audet,

if the humanitarian movement is to maintain its purpose, preserve its value, and respond to criticism about the impact of its action ... international organizations need to rethink their actions and transform their management model from one of “delivering services” to one of “support and local

91 Yves Daccord, *From “victims” to “consumers”?: changing perceptions of humanitarian aid beneficiaries*, Humanitarian Practice Network, ODI, London, 2 March 2015.

92 D. Brown, A. Donini and P. Knox Clarke, above note 80, p. 16.

93 Edmund Cairns, *Crises in a New World Order: Challenging the Humanitarian Project*, Oxfam Briefing Paper No. 158, Oxfam International, February 2012, p. 3.



capacity-building”. This change implies that they should no longer be guided according to their own interests and capacities, but according to the interests and capacities of their Southern partners.<sup>94</sup>

For the ICRC – and others of the “Dunantist” humanitarian tradition, such as MSF, working in constrained and complex situations of armed conflict – this will mean working harder than ever to demonstrate the value and practical application of humanitarian principles by responding to actual needs, ensuring proximity to the people at the centre of the response, and engaging with all stakeholders. More broadly, collaboration in the development of innovative approaches to humanitarian action is one important factor.<sup>95</sup> Principled yet pragmatic operational partnerships – primarily within the Red Cross and Red Crescent Movement, but also with certain UN agencies and non-governmental agencies, both international and national – are another.

In short, for all international humanitarian actors, this will include finally walking the talk about engaging and empowering beneficiaries – that is, increasingly ceding decision-making powers to those directly affected by crisis, and recalibrating the balance of power between international and local humanitarian actors.

## Conclusion

The state of conflicts today – and the overall paucity of effective response to the overwhelming humanitarian needs they produce – has prompted critics from many quarters to declare the “end of humanitarianism”, or more precisely, “the end of international humanitarian action”.<sup>96</sup> This article has sought to make the case that the question facing humanitarian action is less one of “make or break” than it is of accepting that the ever-shifting dynamics of war and violence, and all the geopolitical realities around them, will in any case naturally reshape the nature and form of humanitarian response. It also seeks to highlight some of the opportunities facing humanitarian actors in an increasingly diverse landscape.

A descriptive analysis of some of the key trends and features in today’s conflict-driven crises, the impact these have on the needs, vulnerabilities and resilience of people affected by them, and the challenges that they, in turn, pose particularly to international humanitarian actors leads to a reasonable conclusion that the humanitarian system is, at best, facing a very serious test. As the Syrian

94 François Audet, “What Future Role for Local Organizations? A Reflection on the Need for Humanitarian Capacity Building”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011, p. 1164.

95 See, for example, the various initiatives launched through the ICRC’s “Global Partnerships for Humanitarian Impact and Innovation” platform, available at: <http://blogs.icrc.org/gphi2/>.

96 See, for example, Daniel Nelson, “Afghanistan: The End of Humanitarianism?”, *One World News*, 10 December 2012, available at: <http://oneworld.org/2012/12/10/afghanistan-the-end-of-humanitarianism>; Christopher J. Coyne, *Doing Bad by Doing Good: Why Humanitarian Action Fails*, Stanford University Press, Stanford, CA, 2013; Yves Daccord, “The End of Humanitarianism, Again?”, Thomson Reuters Foundation, 2 December 2014, available at: <http://news.trust.org/item/20141201075225-n0dsh/>.

armed conflict demonstrates, war is more complex<sup>97</sup> and generally more protracted than ever before, and while the number of armed conflicts has decreased in recent years, the number of fatalities has nevertheless been rising, while other situations of violence have also been increasing. The number of concurrent, drawn-out crises around the world is producing humanitarian needs on an overwhelming scale. And the various parts of the international humanitarian system are beset by internal weaknesses and external challenges to such an extent that they are increasingly paralyzed, if not absent altogether, in conflict zones where the needs are greatest.

Looking back at the evolving humanitarian landscape of the past 150 years or so, it is clear that humanitarian response has always had to adapt – more or less successfully – to the changing realities confronting it, and the continuous challenges to its acceptance, relevance and effectiveness. The major landmarks of the twentieth century and beyond – the trauma of the two World Wars; decolonization and the wars of liberation; the polarization of the Cold War and the fragmentation caused by its end; the globalization of humanitarianism in the 1990s as non-international armed conflicts reached a peak; the post-9/11 era with its so-called “global war on terror” and more recently the rise of radical jihadism and the “counter violent extremism” narrative – have all set enormous challenges to the integrity and value of international humanitarian action, which has naturally undergone transformative changes as a result.

Now, the evolution of the international environment towards a new multipolar order – with the rise of the “global South” and its challenge to the predominance of the “West” – is likewise reflected in the evolving paradigm of humanitarian aid, one which is again testing the acceptance and relevance of international organizations. In the face of increasing State-based assertions of sovereignty, and the overt politicization and militarization of aid, humanitarian response as such is likely to become increasingly diversified and fragmented among different actors, both local and international. Different types of aid will most likely coexist, including initiatives led by the private sector, deployment of military assets, bilateral State aid, UN-led integrated approaches, and neutral and impartial humanitarian action. Increasingly diverse, “non-traditional” donors will likewise impose their own agenda, challenging the monopoly of Western States on humanitarian funding. And in such a competitive humanitarian arena, recipients of humanitarian aid may increasingly “decide who they want to help them, in what ways, and for how long”.<sup>98</sup> This would effectively increase the onus on providers of aid to prove themselves in terms of relevance, effectiveness and overall value – to donors, to the public at large, and most particularly to crisis-affected people themselves.

The “system” as such is not deaf to criticism: various efforts have been made over the past two decades or so to rectify some of the more glaring

97 For an analysis of modern-day “complex” wars (as opposed to “conventional” wars), see Martin van Creveld, “War in Complex Environments: The Technological Dimension”, *PRISM*, Vol. 1, No. 3, 2010.

98 D. Brown, A. Donini and P. Knox Clarke, above note 80, p. 25.

weaknesses, albeit with limited success. Many of the codes and standards formulated in the 1990s were, in effect, simply reaffirmations of humanitarian principles and statements of good intent that are hard if not impossible to monitor and enforce. UN structural reforms have also yielded mixed results, with the key areas of funding, coordination and leadership once again at the centre of debate. The UN-led World Humanitarian Summit in 2016 – the culmination of a nearly three-year consultation process focusing on conflict, humanitarian effectiveness, reducing vulnerability and managing risk, and transformation through innovation – offers a new opportunity to improve aid delivery to those affected by crisis.<sup>99</sup>

However, while the perennial debate about the future of humanitarian action still revolves largely around money, principles and institutional reform, many see the crux of the matter to be a question of power – more precisely, how much of it international humanitarian organizations are willing to give up. The international humanitarian “system” is only one part of a much wider ecosystem of humanitarian response, parts of which have been largely marginalized but are now demanding fair recognition. As Paul Currian compellingly writes, “humanitarian organisations must become hubs, connecting individuals and communities to enable them to share knowledge and resources more freely, and using their position to embed humanitarian principles within their networks”.<sup>100</sup> These organizations must aim to create a “people’s humanitarianism rather than the private club that exists now” and must seize the opportunities provided by new communication technologies towards this end.<sup>101</sup>

“Local” actors in all their diversity – including well-informed, tech-savvy and empowered beneficiaries themselves – will increasingly determine the type, source and duration of aid. The question is not about local replacing international actors – both have roles to play – but a better, fairer balance must be struck.

International humanitarian actors will continue to adapt to a changing world and redefine their role as they have in the past, not only because they must in order to stay relevant and continue to exist, but also as long as the fundamental desire and ambition to uphold human dignity even in the midst of armed conflict continues to be their main driving force.

99 WHS, above note 75.

100 P. Currian, above note 71.

101 *Ibid.*

# The updated Commentary on the First Geneva Convention – a new tool for generating respect for international humanitarian law

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## **Abstract**

*Since their publication in 1950s and 1980s, respectively, the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977 have become a major reference for the application and interpretation of these treaties. The International Committee of the Red Cross (ICRC), together with a team of renowned experts, is currently updating these Commentaries in order to document developments and provide up-to-date interpretations. The work on the first updated Commentary, the Commentary on the First Geneva Convention relating to the protection of the wounded and sick in the armed forces, has already been finalized. This article provides an overview of the methodology and process of the update and summarizes the main evolutions in the interpretation of the treaty norms reflected in the updated Commentary.*

**Keywords:** international humanitarian law, First Geneva Convention, updated Commentary, International Committee of the Red Cross, State practice, protection of wounded and sick, non-international armed conflict, duty to respect and ensure respect, classification of armed conflict, offer of services, gender, dissemination, criminal repression.

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## A contemporary interpretation of humanitarian law

In 2011, the International Committee of the Red Cross (ICRC), along with a number of renowned external experts embarked on a major project: updating the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977.<sup>1</sup> Since the drafting of the original Commentaries in the 1950s and 1980s, the Geneva Conventions and their Additional Protocols have been put to the test on numerous occasions, and there have been significant developments in how they are applied and interpreted in practice. With the project of updating all six Commentaries, the ICRC seeks to ensure that these developments are captured in the Commentaries and that up-to-date and comprehensive interpretations of the law are provided. The project is carried out as part of the ICRC's role "to work for the understanding and dissemination of knowledge of international humanitarian law" (IHL) and for its faithful application.<sup>2</sup>

With the completion of the updated Commentary on the First Geneva Convention on the Protection of the Wounded and Sick of Armed Forces in the Field, the first major milestone has been reached. The Commentary is available free of charge on the ICRC website.<sup>3</sup>

The First Convention elaborates the fundamental obligation of IHL that was originally championed by the founders of the ICRC, i.e. that the wounded and sick members of the armed forces are to be respected and protected in all circumstances, be treated humanely and cared for, whether friend or foe. As such, the First Convention more than any other IHL treaty represents the embodiment of Henry Dunant's idea that the soldier who is wounded or sick, and who is therefore *hors de combat*, is from that moment inviolable.<sup>4</sup> As an essential

1 See Jean-Marie Henckaerts, "Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, pp. 1551–1555.

2 See Statutes of the International Red Cross and Red Crescent Movement, 1986, Arts 5(2)(g) and (4), available at: <https://www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm>.

3 See <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. A hard-copy version will be published by Cambridge University Press in the second half of 2016 and the Commentary, which is currently available in English only, will be translated into Arabic, Chinese, French, Russian and Spanish.

4 For a description of the circumstances that led to the founding of the ICRC and the International Red Cross and Red Crescent Movement, starting with the battle of Solferino and culminating in the adoption of the first Geneva Convention in 1864, see Francois Bugnion, "Birth of an idea: The founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, pp. 1299–1338, available at: <https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-888-bugnion.htm>.

condition for the wounded and sick to be collected and cared for, protection is also afforded to military medical personnel, units, material and transports. Furthermore, the First Convention contains the provisions relating to the use and protection of the emblem, both reaffirming the protective function of the emblem and clarifying the restrictions on its use.

However, the importance of this milestone further derives from the fact that the updated Commentary on the First Convention also provides updates on the articles common to all four Geneva Conventions. Among these are articles that are central to the application and protection provided by the four Conventions, such as common Article 1 dealing with the obligation to respect and to ensure respect for the Conventions in all circumstances, and common Article 2 defining their scope of application. Within the group of common articles, common Article 3 stands out in particular, as it is the only provision in the universally ratified 1949 Geneva Conventions that was specifically designed to govern non-international armed conflicts.<sup>5</sup> Neither the drafters of the 1949 Geneva Conventions, nor the drafters of the initial Commentary in 1952 could foresee the prevalence that non-international armed conflicts would take in the decades following the adoption of the Convention. The new Commentary takes this prevalence into account and analyses the legal regime contained in common Article 3 in unprecedented detail.

This article provides a brief overview of the process of updating the Commentary on the First Convention and summarizes the main evolutions in interpretations of the treaty norms since 1949 that have been found in State practice and international jurisprudence and literature. The examples listed in this summary are not exhaustive but they serve to highlight the continued relevance of international humanitarian law in contemporary armed conflicts. Throughout the Article references to the updated Commentary guide the reader to more detailed discussions of the topics listed.

## **The updating of the Commentary in a nutshell**

The 2016 Commentary on the First Convention, as well as the updated Commentaries on the Second, Third and Fourth Conventions and on the Additional Protocols that are currently still worked on, aim to contribute to the clarification of IHL by providing contemporary, thoroughly researched interpretations of IHL.

It preserves the format of the 1952 Commentary (also known as the “Pictet Commentary”), that is to say an article-by-article commentary on each of the provisions of the Convention. It is based on research that includes an analysis of

<sup>5</sup> In comparison, Additional Protocol II is not universally ratified and its scope of application is more limited, without, however, modifying common Article 3's existing conditions of application. For the current status of the Conventions and Protocols, see: [www.icrc.org/eng/resources/documents/misc/party\\_main\\_treaties.htm](http://www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm).

State practice in the application and interpretation of the treaties, e.g. in military manuals, national legislation or official statements; interpretations and clarifications provided in case law and scholarly writings. Additionally, the contributors to the Commentary were able to draw on research in the ICRC Archives and to reflect the application and interpretation of the Convention since its adoption in light of the practice witnessed by the ICRC in past armed conflicts.

In the updated Commentary, practitioners and scholars will find detailed information relevant for a comprehensive understanding of each provision in the First Convention. The updated Commentary provides a picture of the current understandings of the law. This not only includes interpretations supported by the ICRC, but also indications where there are diverging views or where there are issues that are not settled and require further discussion. As such, it is not the final word but a solid basis for further discussion about the implementation, clarification and development of IHL. Importantly, it serves as a new guidance tool for States, international organizations, courts and humanitarian actors in their efforts aimed at reasserting the importance of IHL and at generating respect for the law.

The drafting process of the updated Commentary has benefited from considerable external involvement and has thus gone far beyond the drafting process of the initial Pictet Commentaries. Authors drafting one of the updated commentaries to a specific article had the opportunity to read and comment on the updated commentaries on all other articles of the Convention. This review provided a layer of scrutiny and helped to ensure that the interpretations are coherent throughout the Commentary. Furthermore, the whole Commentary was reviewed by an Editorial Committee, which includes senior ICRC and non-ICRC lawyers.<sup>6</sup>

In addition, more than 60 practitioners and academics from all corners of the world have been asked to peer review the draft Commentary and have provided valuable comments and input into the final product. This elaborate process helped to ensure that all main views were taken into account.<sup>7</sup> As a result, the updated Commentary reflects the ICRC's interpretation of the law, whenever there is one, and presents the main schools of thought where divergences of views exist on the interpretation of any particular provision. Given the Commentary's nature as an interpretative and practical guidance tool, however, it should be noted that there has been no formal consultation process with States as part of the drafting process.

In preparing the updated Commentary, the authors followed the rules of the Vienna Convention on the Law of Treaties (VCLT) on treaty interpretation, in particular, Articles 31–32 VCLT. They looked at the ordinary meaning of the terms of the provisions and its context, the preparatory work and subsequent

6 The external members of the Editorial Committee are Liesbeth Lijnzaad and Marco Sassòli, and the ICRC members are Philip Spoerri and Knut Dörmann. Information on authors/members of the Reading Committee, as well as on the group of Peer Reviewers, can be found in the Acknowledgements to the Commentary, see <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryAckAbb>.

7 See e.g. Commentary on Article 12 of the First Convention, section E.1.



practice, in the form of State practice (or sometimes the absence thereof) and case law, as well as other relevant rules of international law.<sup>8</sup>

Other relevant rules of international law include customary IHL, the three Additional Protocols, as well as other treaties of international law, such as those relating to international criminal law and human rights law.<sup>9</sup> When the Geneva Conventions were adopted, many areas of international law were still in their infancy, like human rights law, international criminal law and refugee law, but they have grown significantly in the meantime. These areas of law all seek to provide protection to persons in need of it. IHL is not a self-contained body of law but interacts with these other areas of international law in a way that it is often complementary. Therefore, the interpretations offered in the new Commentary take the developments in these areas into account whenever required for a comprehensive interpretation of a Convention rule. In addition, there are developments in other areas of international law, such as the law on State responsibility or the law of treaties, which are also reflected in the new Commentary.<sup>10</sup>

With respect to international human rights law, the new Commentary does not purport to discuss every aspect of the complex relationship between rules of the Geneva Convention and human rights law. Rather, based on the premise of the complementary nature of both bodies of law, the new Commentary refers to human rights law wherever relevant, for example in order to interpret shared concepts (e.g. cruel, inhuman and degrading treatment).<sup>11</sup>

Human rights law may also be referenced where the application of the Conventions may be affected by international human rights obligations. The use of the death penalty is an example. While common Article 3 as well as Articles 100 and 101 of the Third Convention and Article 68 of the Fourth Convention anticipate the possibility of the use of the death penalty, the updated commentaries on these Articles would be incomplete without a reference to international treaties aiming to abolish the death penalty.<sup>12</sup> These references are not so much a matter of interpreting the obligations in the Conventions through

8 For more details on the methodology, please refer to the General Introduction of the Commentary available online at <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryIntroduction>.

9 It should be noted that treaties, other than the Conventions themselves, that are referred to in the Commentaries are used on the understanding that they only apply if all the conditions in terms of their geographic, temporal and personal scope of application are fulfilled. In addition, they only apply to States that have ratified or acceded to them, unless they are reflective of customary international law.

10 For examples on State responsibility, see e.g. the Commentary on common Article 1, paras 144, 160 and 190 and on common Article 2, paras 267–270. For an example on the law of treaties, and in particular the law on succession to treaties, see Article 60, section C.4.

11 See ICRC, *Commentary on the First Geneva Convention*, 2nd ed., Cambridge University Press, 2016, paras 615–623.

12 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953), Protocol 6; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Second Optional Protocol; and American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (entered into force 18 July 1978), Protocol to Abolish the Death Penalty. See the commentary on Common Article 3, para. 677.

the lens of human rights law, but of mentioning parallel obligations in order to provide a complete overview of the relevant international legal rules.

With respect to international criminal law, the growing body of case law from the various international criminal courts and tribunals, as well as national courts, provides material illustrating the way in which identical or similar concepts and IHL obligations have been applied and interpreted for the purpose of assessing individual criminal responsibility. To the extent that this case law is relevant for the interpretation of the Conventions, it has been examined.

Another example is the 1979 International Convention against the Taking of Hostages, which has become a starting point for the interpretation of the notion of the taking of hostages. This is also borne out by subsequent practice, e.g. in the form of the war crime of hostage-taking in the International Criminal Court (ICC) Statute of 1998 and the definition in the ICC Elements of Crimes of 2002 and case law.<sup>13</sup>

That being said, it is important to underscore that a humanitarian treaty obligation may be broader than the criminalized parts of it in a rule contained in an instrument of international criminal law. IHL treaty obligations exist independently of the rule of international criminal law on which the case law is founded. The content of the obligation may therefore not be identical in both bodies of law and differences are pointed out wherever they exist. For example, under IHL a biological experiment is outlawed even if it does not cause death or seriously endanger the health of the victim. However, for such an experiment to reach the threshold of a grave breach under Article 50, it must seriously endanger the health or integrity of the protected person. In this respect, the scope of the criminal responsibility for conducting biological experiments is more restricted than the scope of the prohibition to carry out such experiments in IHL.<sup>14</sup>

## Examples of evolutions in the interpretations since 1949

The Pictet Commentary was based primarily on the negotiating history of the respective treaties, as observed first hand by the authors, and on prior practice, especially that of the Second World War. They contain important institutional and historical knowledge and, in this respect, retain their value.

Over six decades later, the updated Commentary on the First Convention is able to offer a more detailed approach that takes into account the issues and challenges witnessed in contemporary armed conflicts, the developments in technology and in international and national law. The analysis carried out in preparing the updated Commentary reaffirms many of the 1952 interpretations, but it also departs from them in certain cases.

The analysis has shown that circumstances for the application of some of the provisions of the First Convention that had received much attention during the

<sup>13</sup> For details, see the Commentary on common Article 3, section G.3.

<sup>14</sup> ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, para. 2994. Another example would be the prohibition of violence to life; see *Ibid.*, para. 886.

Diplomatic Conference have rarely arisen. Consequently, these provisions have not had the relevance in armed conflicts since the Second World War that was attached to them during the Diplomatic Conference. In other cases, subsequent practice and the developments in international law have meant that the commentaries on certain provisions were considerably expanded – in substance and in length. The following paragraphs will provide examples of these findings.

## Common Articles

### *The duty to respect and ensure respect found in common Article 1*

One evolution in interpretation contained in the new Commentary relates to common Article 1, which requires States to “respect and ensure respect” for the Conventions. While the 1952 Pictet Commentary stated that common Article 1 was not applicable in non-international armed conflicts, the updated Commentary, based on developments over the last six decades, concludes that it is.<sup>15</sup> This interpretation corresponds with the fundamental nature of common Article 3, which has been qualified by the International Court of Justice (ICJ) as a “minimum yardstick” in the event of any armed conflict.<sup>16</sup>

The interpretation of common Article 1 today is influenced by the practice of States, international organizations and courts who have recognized the obligation to respect and ensure respect in both its internal and external aspects. The internal aspect covers States’ obligation to respect and ensure respect for the Conventions by their own armed forces and other persons or groups whose conduct is attributable to them, as well as by the whole population over which they exercise authority.<sup>17</sup> The external aspect relates to ensuring respect by others, in particular other parties to a conflict regardless of whether the State itself is party to that conflict. This external aspect has become increasingly important.<sup>18</sup>

Based on practice, the new Commentary gives further details on the negative and positive obligations that comprise the external aspect of the obligation. Under the negative obligation States must abstain from encouraging, aiding or assisting in violations of the Conventions. The positive obligations require States to take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party. The duty to ensure respect is to be carried out with due diligence. This means that its content depends on the specific circumstances, including the gravity of the breach, the

15 See ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 125–126, compared with Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol 1: Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 26.

16 ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgement, 1986, para. 218.

17 See the commentary on common Article 1, sections E.1 and E.2.

18 See the commentary on common Article 1, section E.3.

means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach. The new Commentary also provides a list of examples of steps States can take to ensure respect for IHL.

### *Classification of armed conflict in common Article 2*

The updated Commentary takes into account the various types of international armed conflicts that have arisen in the period since the Pictet Commentaries were published. For instance, the updated Commentary affirms that an armed conflict can arise when one State unilaterally uses armed force against another State, even if the latter does not or cannot respond by military means. The simple fact that a State resorts to the use of armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Geneva Conventions.<sup>19</sup>

The evaluation of military involvement by a foreign State in a non-international armed conflict in the updated Commentary is an example of how interpretations have evolved over the past decades adjusting to the complexities of contemporary multi-party conflicts. While the ICRC had suggested to the 1971 Conference of Government Experts that the military involvement by a foreign State in a non-international armed conflict internationalizes the conflict as a whole, making IHL governing international armed conflict applicable in relations between all the opposing Parties,<sup>20</sup> a differentiated approach has become widely accepted and is today also followed by the ICRC. This approach distinguishes between whether an outside State fights in support of a State or non-State Party to the conflict. The armed conflict will remain non-international in the first case, because it continues to oppose a non-State armed group and State armed forces. While the original armed conflict between the non-State armed group and the State armed forces also remains non-international in character in the second case, a parallel international armed conflict between the intervening foreign State and the State party to the original armed conflict also arises, because in that instance two States are opposed. Lastly, where several foreign States intervene on either side of the original non-international armed conflict, the international or non-international character of each bilateral conflict relationship will depend on whether the opposing Parties only consist of States or involve non-State armed groups.<sup>21</sup>

The updated Commentary also addresses issues such as the question of the classification of the conflict in a situation where a State controls an organized non-State armed group that is fighting another State. The question of the degree of control the State must exercise over the armed group in order for the whole

19 ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 222–223.

20 The proposal read: “When, in case of non-international armed conflict, one or the other Party, or both, benefits from the assistance of operational armed forces afforded by a third State, the Parties to the conflict shall apply the whole of the IHL applicable in international armed conflicts”; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the work of the Conference*, ICRC, Geneva, 1971, p. 50. Among the reasons noted by the experts to reject the proposal was that it would encourage non-international armed groups to seek support from foreign States; see *ibid.* pp. 51–52.

21 For details see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 402–405.

conflict to be classified as international has arisen in different instances in international courts and tribunals.<sup>22</sup> While acknowledging that views diverge on the necessary level of control for the purposes of attribution under the law of State responsibility and for the purpose of classifying conflicts as international or non-international, the Commentary sets out the view of the ICRC that “the overall control test is appropriate because the notion of overall control better reflects the real relationship between the armed group and the third State, including for the purpose of attribution.”<sup>23</sup>

### *The regulation of non-international armed conflicts in common Article 3*

It is almost a platitude to observe that the vast majority of armed conflicts in the last 60 years have been non-international in nature. Owing to this fact, common Article 3 has become a central provision of IHL. The quality of common Article 3 as a “Convention in miniature” for conflicts of a non-international character was already noted during the 1949 Diplomatic Conference.<sup>24</sup> Since then, the fundamental character of its provisions has been recognized as a “minimum yardstick”, binding in all armed conflicts, and as a reflection of “elementary considerations of humanity”.<sup>25</sup>

The updated Commentary addresses the various legal issues surrounding the circumstances in which this miniature Convention operates. These issues include the geographical and temporal scope of application of common Article 3,<sup>26</sup> its binding force on non-State armed groups and on multinational forces,<sup>27</sup> the persons protected,<sup>28</sup> fundamental obligations of the parties to a non-international conflict,<sup>29</sup> humanitarian activities,<sup>30</sup> special agreements,<sup>31</sup> and the legal status of the parties to the conflict.<sup>32</sup>

22 See for example International Criminal Court for the Former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 102–145; International Court of Justice (ICJ), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, paras 404–405. For a discussion of these cases and the tests they applied, see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 265–273.

23 For a discussion of the overall control test, see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 265–273, in particular para. 271.

24 See Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 326. At the time, this expression was used to point out the brevity and self-contained character of the draft ultimately adopted as common Article 3, in distinction to other approaches considered at the Diplomatic Conference that would have made certain provisions of the Geneva Conventions as such applicable in non-international armed conflicts.

25 See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, paras 218–219.

26 ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 452–502.

27 *Ibid.*, paras 503–517.

28 *Ibid.*, paras 518–549.

29 *Ibid.*, paras 550–580.

30 *Ibid.*, paras 779–840.

31 *Ibid.*, paras 841–860.

32 *Ibid.*, paras 861–869.

To take one example, the updated Commentary elaborates on what the obligation to collect and care for the wounded and sick – which is expressed rather in summary form in common Article 3 – entails. The interpretation draws on the general obligation in common Article 3 to treat the wounded and sick humanely to emphasize that the wounded and sick must be respected and protected. It also relies on the detail set out in Additional Protocol II and the rules of customary IHL to complete the assessment of the protections that are considered implicit in the basic obligation to care for the wounded and sick, including the protection of medical personnel, facilities and transport, and the use of the emblem, to name a few.<sup>33</sup>

Furthermore, it is now recognized that serious violations of Common Article 3, such as murder, torture and hostage-taking, also constitute war crimes in non-international armed conflicts, as recognized as a matter of the ICC Statute and customary IHL.<sup>34</sup> The commentary on common Article 3 discusses these prohibitions in light of the case law of international criminal courts and tribunals, as well as in national courts.<sup>35</sup> In addition, discussions on a number of other legal debates regarding the protection available in non-international armed conflicts have been added to the new Commentary, such as the prohibition of sexual violence,<sup>36</sup> the applicability of the principle of *non-refoulement* during non-international armed conflict,<sup>38</sup> and detention outside a criminal process.<sup>37</sup>

Another example relates to the prohibition of sexual violence. This prohibition is only explicitly mentioned in the Geneva Conventions in relation to international armed conflict (see Article 27 of the Fourth Geneva Convention). However, it is also implicitly mentioned for non-international armed conflicts in the Geneva Conventions in the obligation of humane treatment. The Commentary references the case law and the statutes of international criminal tribunals and concludes that sexual violence is prohibited in all armed conflicts, as it can amount to violence to life and person, torture, mutilation, or cruel treatment, all of which are absolutely prohibited.<sup>39</sup>

### *Offer of services in common Articles 3 and 9*

Another evolution can be found in the interpretation of common Article 9 and common Article 3(2) regarding the offer of services, by the ICRC or other impartial humanitarian organizations, in international and non-international armed conflicts. While the 1952 Commentary stated that the decision whether to consent to humanitarian activities on their territory was entirely up to the belligerent Power and no reason needed to be given for refusing an offer of

33 *Ibid.*, paras 768–778.

34 *Ibid.*, paras 881–888.

35 *Ibid.*, paras 581–695.

36 *Ibid.*, paras 696–707.

38 *Ibid.*, paras 708–716.

37 *Ibid.*, paras 717–728.

39 *Ibid.*, paras 696–707.

services,<sup>40</sup> the new Commentary concludes that, nowadays, such an offer of services may not be refused on arbitrary grounds. Since 1949, international law in general, and IHL in particular, has evolved and it has now become accepted that the Party to the conflict whose consent is sought must assess an offer of services in good faith and in line with its international legal obligations in relation to humanitarian needs.<sup>41</sup> Thus where a Party to an armed conflict is unwilling or unable to address those humanitarian needs, it must accept an offer of services from an impartial humanitarian organization. If humanitarian needs cannot be met otherwise, the refusal of an offer of services from an impartial humanitarian organization would be arbitrary, and therefore in violation of international law.<sup>42</sup>

## Developments in other areas

### *Protection of the wounded and sick*

The principal objective of the First Geneva Convention is to ensure the respect and protection of wounded and sick members of the armed forces in times of armed conflict. Warfare has evolved enormously since this idea was first set down in international treaty law in 1864, and has continued to evolve since the adoption of the Geneva Conventions in 1949. The updated commentary on Article 12, while taking into account the contemporary context in which the wounded and sick must be respected and protected, affirms that this obligation remains a cornerstone of IHL. With the benefit of the precise definitions set out in Additional Protocol I, the updated commentary on Article 12 confirms that the decisive criteria for determining whether a member of the armed forces is wounded or sick are that the person is in need of medical care, no matter the gravity of the condition, and refrains from any act of hostility.<sup>43</sup>

Furthermore, the updated Commentary captures the key aspects of the obligation to respect and protect the wounded and sick, from taking their presence into account in a proportionality assessment when planning and conducting attacks,<sup>44</sup> to affirming the prohibition against so-called ‘dead check’ or ‘double tap’,<sup>45</sup> to the general obligation to have medical services in the first place.<sup>46</sup> In addition, the updated Commentary points to the need to consider the potential presence of civilians and medical personnel rushing to the scene of an attack to provide care when contemplating (and before carrying out) a second strike on a military objective.<sup>47</sup>

40 J. Pictet, above note 15, p. 110.

41 ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, report to the 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2011, p. 25.

42 ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 833–834 and 1173–1174.

43 *Ibid.*, paras 1341–1351.

44 *Ibid.*, paras 1355–1357.

45 *Ibid.*, para. 1404. Both terms refer to a practice of intentionally shooting the wounded to make sure they are dead.

46 *Ibid.*, paras 1389–1391.

47 *Ibid.*, para. 1750.



Finally, in the decades since 1949, there has been debate on a topic of tremendous operational relevance to military authorities: whether military medical personnel, units and transport may be armed and, if so, which limits apply. The First Geneva Convention itself only deals with that topic in one place: Article 22(1), which stipulates that the fact that “the personnel of the (military medical) unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge” may not be considered as a condition to deprive that unit or establishment of its protection. Thus the Convention remains silent altogether as to whether weapons may be mounted on these units. The same situation arises when looking at the provisions dealing with military medical transport, including medical aircraft. Finally, whereas the principle that military medical personnel may be armed is recognized by the quoted provision, the text provides no guidance as to the applicable limits, if any, in terms of type of weapons they may be provided with, nor in terms of the circumstances in which they may be used. The updated Commentary discusses in which way the law on this question, left unaddressed by the First Convention, has developed, and also analyses the implications of the arming of military medical personnel, units and transports has in terms of the entitlement to display the distinctive emblem of the Geneva Conventions.<sup>48</sup>

### *The duty to disseminate*

While the Pictet Commentary primarily reflected the conviction of the drafters at the time that the spreading of knowledge would, in and of itself, generate respect, the new Commentary takes into account empirical research that indicates that knowledge alone does not suffice to induce a favourable attitude towards a norm and that military doctrine, education, training and equipment, as well as sanctions, are key factors in shaping the behaviour of weapon bearers during military operations.

The updated Commentary states that in order to be effective, IHL must not be taught as an abstract and separate set of legal norms, but must be integrated into all military activity, training and instruction. Such integration should aim to inspire and influence the military culture and its underlying values, in order to ensure that legal considerations and principles of IHL are incorporated, as much as possible, into military doctrine and decision-making.<sup>49</sup>

48 See *Ibid.*, paras 1862–1869; 2005–2006; 2393–2402 and 2449.

49 *Ibid.*, paras 2773–2776. For more on this, see Andrew J. Carswell, “Converting treaties into tactics on military operations”, *International Review of the Red Cross*, Vol. 96, Nos 895/896, 2014, pp. 919–942, available at: <https://www.icrc.org/en/international-review/article/converting-treaties-tactics-military-operations>; Elizabeth Stubbins Bates, “Toward effective military training in international humanitarian law”, *International Review of the Red Cross*, Vol. 96, Nos 895/896, 2014, pp. 795–816, available at: <https://www.icrc.org/en/international-review/article/towards-effective-military-training-international-humanitarian-law>.

## *Criminal repression of breaches*

Article 49 of the First Convention deals with the suppression of abuses and penal sanctions and a similar provision has been incorporated in all four 1949 Geneva Conventions. The new commentary on Article 49 was considerably expanded in order to reflect the important developments in this field over the past decades. While the historical background section of Article 49 is shorter than in the 1952 predecessor version, the updated Commentary covers entirely new issues, such as an overview of how States have implemented the grave breaches regime in their domestic legislation, as well as an analysis of the concept of universal jurisdiction and its interpretation by States.<sup>50</sup> It also contains critical assessments on whether the grave breaches regime contained in Article 49 has functioned and an analysis of whether States have prosecuted and/or extradited suspected war criminals on the basis of the Geneva Conventions,<sup>51</sup> discussions of the concept of immunity of Heads of States,<sup>52</sup> and the possible extension of the grave breaches regime to non-international armed conflicts.<sup>53</sup>

The developments in international criminal law, and in particular the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and more recently the ICC, have allowed more refined definitions of a number of prohibitions of IHL both in international and in non-international armed conflicts, such as the prohibition of murder, torture, mutilation or, as mentioned above, the prohibition of biological experiments in common Article 3 and Article 12 of the First Convention.

## *Some cross-cutting issues*

### *A gender perspective to interpreting the First Convention*

The updated Commentary describes, where relevant, how the application in practice of a provision may affect women, men, girls and boys differently. The reference in the original Commentary to women as “weaker than oneself and whose honour and modesty call for respect” would no longer be considered appropriate.<sup>54</sup> Of course, the original Commentaries were a product of the social and historical context of the time. Today, however, there is a deeper understanding that women, men, girls and boys have specific needs and capacities linked to the different ways armed conflict may affect them. The new Commentary reflects this understanding in relevant articles and takes into account the social and international legal developments in relation to equality of the sexes.

50 ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 2863–2867.

51 *Ibid.*, paras 2857 and 2858.

52 *Ibid.*, paras 2872–2877.

53 *Ibid.*, paras 2903–2905.

54 See J. Pictet, above note 15, p. 140.

In addition to the updated commentary on Article 12(4) of the First Convention that deals specifically with the treatment of women,<sup>55</sup> examples of the inclusion of a gender perspective in the revised Commentary on the First Geneva Convention can be found in the discussions of concepts such as humane treatment, non-adverse distinction and the obligation to care for the wounded and sick in common Article 3 and in Article 12,<sup>56</sup> and in the commentaries on Articles 6, 11, 23 and 31 of the First Convention.<sup>57</sup>

### *New technologies*

A contemporary interpretation of IHL requires that new technologies and their impact on warfare are taken into account when discussing the application of specific treaty rules.

For example, it is nowadays recognized that the marking of medical facilities might also involve the communication of GPS coordinates to other Parties in addition to, or in lieu of, marking them with the distinctive emblem.<sup>58</sup> GPS coordinates may also help to identify persons and indicate the exact location of graves.<sup>59</sup>

Another example is the use of email to transmit information as the quickest method of communication.<sup>60</sup> Email might also be used to communicate a warning where warnings are required under IHL.<sup>61</sup> While the use of GPS coordinates and email to enhance the protection foreseen in the Geneva Convention is uncontroversial, the application of IHL with regard to other technologies is more challenging and often still an issue of debate. The updated Commentary discusses these challenges and captures the current debate, for example regarding the question of treating cyber operations as armed force amounting to armed conflict,<sup>62</sup> or the issue of drone strikes and the obligation to collect and care for wounded and sick in Article 15 of the First Convention.<sup>63</sup>

A last example in this regard is the possibility of DNA sampling that creates new opportunities with regard to the identification and collection of information about the wounded and sick or the dead. The updated Commentary discusses these opportunities and the safeguards required for the use of DNA sampling and analysis.<sup>64</sup>

55 ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 1427–1429 and 1435.

56 *Ibid.*, paras 553, 578, 766, 1362, 1373 and 1395.

57 *Ibid.*, paras 966, 1293, 1931 and 2273.

58 *Ibid.*, paras 775 and 2649.

59 *Ibid.* paras 1577, 1667 and 1713.

60 On forwarding of information under Article 16 by email, see *Ibid.*, paras 1593 and 1598; on communication of ratifications or accessions by email, see para. 3259.

61 See *Ibid.*, para. 1850.

62 *Ibid.*, paras 253–256.

63 *Ibid.*, para. 1491.

64 *Ibid.*, paras 1584, 1661 and 1673.

## Specific issues related to State practice

### *Areas where there has been little practice since 1949*

For a number of provisions, the review of State practice and court cases has revealed that these provisions have played little to no role in armed conflicts since 1949. The new Commentary indicates this and evaluates for these cases whether a rule has fallen into desuetude. Examples are Articles 28, 30 and 31 of the First Convention, which regulate the conditions under which military medical and religious personnel and staff of voluntary aid societies may be retained when they have fallen into enemy hands. While belligerent Parties had retained large numbers of enemy medical personnel over extended periods of time during the Second World War,<sup>65</sup> such practice has proven to be rare in international armed conflicts since 1949. While the Commentary concludes that the provisions governing retention remain applicable and relevant to the issue, research has shown that the number of international armed conflicts in which they have been called upon to play a role has decreased over time.<sup>66</sup> Another example is the placing of staff of national aid societies, such as of a Red Cross or Red Crescent Society, at the disposal of army medical services. While this remains a valid option, it has not occurred in recent decades and thus the articles related to these personnel, their material and their identification have not played a very significant role since 1949.<sup>67</sup>

The appointment of Protecting Powers as regulated in Article 8 of the First Convention represents another example. While the Diplomatic Conference of 1949 made the Protecting Powers the lynchpin of the system for monitoring compliance with the Geneva Conventions in international armed conflict, practice since 1949 has not developed in this direction and the appointment of Protecting Powers in case of an international armed conflict has been the exception rather than the rule. Since the 1949 Conventions were adopted, Protecting Powers are only known to have been appointed in five conflicts.<sup>68</sup> Seemingly, practice since 1949 has evolved to the point of considering the appointment of Protecting Powers as optional in nature. This does not preclude, however, that Protecting Powers may still be appointed in future international armed conflicts on the basis of Article 8.<sup>69</sup>

The absence of practice in the application of a provision does not, in and of itself, lead to the falling into desuetude of such a provision. Desuetude means that a treaty rule is no longer applicable or has been modified, a conclusion that should not

<sup>65</sup> See J. Pictet, above note 15, p. 237.

<sup>66</sup> For a recent example of return of medical personnel, see *Ibid.*, para. 2610.

<sup>67</sup> See the commentaries on Articles 26, 27, 32, 34 and 43.

<sup>68</sup> Protecting powers are known to have been appointed in the Suez Conflict (1956) between Egypt on one side and France and the United Kingdom on the other, the conflict between France and Tunisia over Bizerte (1961), the Goa crisis (1961) between India and Portugal, the conflict between India and Pakistan (1971), and the Falkland/Malvinas Islands conflict between Argentina and the United Kingdom (1982); see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, para. 1115.

<sup>69</sup> See the commentary on Article 8, section H.

be reached lightly. It is subject to stringent conditions and requires the agreement, at least tacit, of the parties or the emerging of an inconsistent rule of customary international law.<sup>70</sup> Although certain provisions do not seem to have been applied extensively in the past six decades, no evidence has been found that would suggest that they no longer apply.

### *Procedures in the Convention that have not been applied as such*

For certain procedures foreseen in the Geneva Convention, research has revealed that State practice has diverted from the exact formulas foreseen in the Geneva Convention, but has nevertheless followed the underlying principles and rationale of these mechanisms foreseen by the drafters.

State practice indicates that the use of good offices that were foreseen as part of the conciliation procedures in Article 11 of the First Convention in practice were used flexibly and have not been limited to activities purely facilitating contacts between opposing Parties. Taking into account this evolution, as well as the humanitarian purpose of Article 11, the updated Commentary clarifies that reference to “good offices” in paragraph 1 should not be understood restrictively and allow for the use of any diplomatic initiatives that may serve the interest of protected persons.<sup>71</sup>

Similarly, the enquiry procedure as foreseen in Article 52 of the First Convention so far has never been used. This does not mean that the general idea behind the provision to investigate alleged violations of IHL has been rejected. On the contrary, such investigations take place regularly in the form of formal investigations on the initiative and under the aegis of the international community, through investigation procedures within the UN system or fact-finding as part of the work undertaken by international criminal tribunals. Despite the fact that the enquiry procedure under the 1949 Geneva Conventions has not been used so far, the updated Commentary does not conclude that the provision has fallen into desuetude, and some experts still support it as a potentially attractive option for the purposes of enhancing compliance for IHL.<sup>72</sup>

### *State practice diverging from the literal meaning of the text*

With regard to certain provisions, research has revealed that the practice of States has not followed the literal meaning of the text, but nevertheless adhered to the general ideas and principles underlying the provisions. Article 38 of the First Convention, for example, provides for the use of the red crescent (or red lion and sun) only “in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground”.

<sup>70</sup> See *Ibid.*, paras 51 and 52 with further references.

<sup>71</sup> For a definition of the term “good offices” in international law and how its understanding has evolved, see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, above note 11, paras 1282–1286.

<sup>72</sup> *Ibid.*, paras 3059–3064.

Technically, this means that none of the dozens of new States created or established since 1949 would be in a position to choose to adopt an emblem other than the red cross upon becoming a party to the Geneva Conventions. However, a thorough examination of State practice revealed that no State has ever insisted on this rule, demonstrating – in essence – a belief that there should be no hierarchy among the distinctive emblems.<sup>73</sup> The updated Commentary thus reflects the equality of the distinctive emblems, including the red crystal, which is also confirmed in the 2005 Third Additional Protocol.<sup>74</sup>

The evolution of the way Article 8 on Protecting Powers is interpreted can also be seen as a departure from the strict reading of the text. The obligation that the Convention “shall be applied with the cooperation and under the scrutiny of the Protecting Powers” is today no longer seen as an obligation but rather an option.<sup>75</sup>

## Conclusion

The work required to update the Commentary on the First Convention has shown that the Convention is as relevant today as it was at the time of its adoption. While warfare is changing and new weapon systems are being developed, armed conflicts continue to be characterized by scores of people in urgent need of protection. The Geneva Conventions provide such protection and are of burning relevance today.

The First Convention has proven to be crucial for ensuring the care and protection of the wounded and sick of the armed forces, and for the protection of military medical personnel, units and transport. It has had a profound influence on the development of national military policies and procedures and on resource allocation, training and implementation. On the basis of the Convention’s rules, the ICRC calls upon States to abide by certain standards of treatment of the wounded and sick in times of armed conflict; and these rules, among others, enable the ICRC to carry out its humanitarian mission in the field and to offer humanitarian activities during armed conflict.

Nevertheless, armed conflicts continue to cause suffering that States had hoped to eradicate when agreeing on the four revised and partly new Conventions in 1949. Disrespect of the law remains the biggest challenge for all those committed to alleviating human suffering during war. The Commentaries on the Geneva Conventions and their Additional Protocols represent an important guidance tool in the efforts of the ICRC, States, international organizations, courts and humanitarian actors to generate respect for the law.

The updated Commentary on the First Geneva Convention is the first in a series of updated Commentaries to be published by the ICRC over the coming years. Currently, research is ongoing with regard the protection of the wounded, sick and

73 *Ibid.*, paras 2547–2551.

74 See Article 2 of the Third Additional Protocol Additional relating to the adoption of an additional distinctive emblem of 8 December 2005.

75 For details, see the Commentary on Article 8, section H.

shipwrecked members of the armed forces at sea (Second Convention), the protection of prisoners of war (Third Convention) and the protection of civilians in time of war (Fourth Convention). Updated Commentaries will be published consecutively on these Conventions, as well as on their Additional Protocols I and II over the coming years. Next, the updated Commentary on the Second Geneva Convention is scheduled to be published in 2017.



# The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict

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## **Abstract**

*This article looks at the legal position of the International Committee of the Red Cross (ICRC) on situations in which a State, a coalition of States or an international or regional organization intervenes in a pre-existing armed conflict, either giving support to one of the parties or exercising control over a non-State armed group party to the armed conflict (hereafter “non-State party”). For the purposes of this article, foreign intervention is considered to be a form of “co-belligerency” of such a degree that it makes the intervening power a party to the armed conflict. Situations in which there is no objective link between the foreign intervention in the territory of a third State and a pre-existing armed conflict in that same territory are therefore excluded from the scope of this article.*

*The aim of this article is to describe how the ICRC determines the applicability of international humanitarian law to such situations, based on the existing law and an approach that examines each bilateral relationship between belligerents separately.*

*The article also explains why the ICRC abandons the use of the term “internationalized internal armed conflict”, which is misleading in that it suggests*

*that only the law of international armed conflict applies. The ICRC is therefore using new terminology for the legal classification of such situations; this change is intended to align the terminology used with the realities of the applicable law.*

**Keywords:** IHL, Geneva Conventions, armed conflict, foreign intervention, military support, ICRC.

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## Introduction

An examination of contemporary armed conflicts shows that belligerents are often supported in their military operations by one or more third parties. The involvement of these third parties can vary in terms of the form and intensity of the support given: direct involvement in the conduct of hostilities, logistical assistance, or financial or political support. The intervening parties may be States, acting on their own or in coalition with other States, or supranational organizations with or without a United Nations (UN) mandate. The parties receiving support may be governments or non-State armed groups, depending on the goals pursued by the intervening power(s).

The legal position of the International Committee of the Red Cross (ICRC) on the notion of armed conflict involving foreign intervention refers only to situations in which the foreign intervention has a bearing on the application of international humanitarian law (IHL). This article does not, therefore, cover situations involving foreign intervention in support of a party to an international armed conflict (IAC), because these situations raise no specific legal issues concerning the determination of the applicable IHL rules. In such cases, the application of IHL is clear: all the different relationships between belligerents are governed by the law of IAC. This article is concerned only with situations in which foreign intervention is a component added into a pre-existing non-international armed conflict (NIAC).

It does not, however, cover all forms of direct and indirect foreign intervention in a pre-existing NIAC. Situations involving financial or political support are not included, as this type of assistance has no bearing on the application of IHL.

A look at recent conflicts shows that there are numerous examples of the types of situations examined in this article.<sup>1</sup> Despite the frequency with which such situations occur, there remains some uncertainty when it comes to determining the law applicable to them. It may seem, at first glance, that these armed conflicts are in a grey area of IHL, with no specific rules applicable to them. They may also appear not to fit into the traditional IAC/NIAC dichotomy

<sup>1</sup> See, for example, the situations in Afghanistan, Mali, the Democratic Republic of the Congo and Somalia.

established in this body of law, casting doubt on the nature and scope of the legal framework governing them.

This difficulty in assessing armed conflicts involving foreign intervention raises the possibility of them being considered a third category of armed conflict,<sup>2</sup> in addition to the traditional categories of IAC and NIAC. Such an interpretation of the law would be problematic in that it would open the door to a definition of the applicable legal framework based on a subjective choice of rules,<sup>3</sup> or to an overly idealistic approach to the application of IHL.<sup>4</sup>

For the ICRC, armed conflicts involving foreign intervention do not form a third category of conflicts, but merely constitute a specific manifestation, in a particular context, of an IAC, a NIAC or both types of conflict simultaneously. The notion of armed conflict involving foreign intervention therefore fits perfectly well into the traditional IAC/NIAC dichotomy established by IHL.

The rules applicable to IACs and NIACs can be transposed to armed conflicts involving foreign intervention, because such situations are merely a form of IAC or NIAC; the rules of IHL are sufficiently flexible to govern such situations effectively and to deal with any humanitarian issues arising from them.

In light of these considerations, the ICRC's position is based on three key points:

1. The components of the notion of armed conflict involving foreign intervention are clearly defined. The ICRC's position identifies the various relationships between belligerents stemming from the notion of armed conflict involving foreign intervention and specifies the situations that are excluded.
2. The rules of IHL applicable to the various situations covered by the notion of armed conflict involving foreign intervention are determined. The ICRC confirms the choice of a fragmented approach for this purpose, based on the factual relationships between the belligerents and the traditional criteria for determining the existence of an armed conflict established in the relevant provisions of IHL. The ICRC's position therefore specifies how the various situations should be classified, qualifying them as an IAC, a NIAC or, in

2 Since IHL treaties contain no specific provisions on this type of conflict.

3 The *sui generis* nature of the situation might lead the belligerents to decide not to apply the whole of IHL and instead pick and choose the rules to be applied. This would result in greater emphasis on the rights established by this body of law than on the obligations it imposes on the parties to the conflict. Such an approach would lead to considerable legal insecurity and risk weakening the protection provided under IHL.

4 In other words, the application of the law of IAC to all the parties, with no regard for legal, political (in the case of States) or practical (in the case of non-State armed groups) contingencies. On the application of the law of IAC to all the parties to a conflict, see Éric David and Jean Salmon, *Droit international public*, 26th ed., Vol. 3, Presses Universitaires de Bruxelles, Brussels, 2012, pp. 728 ff.; Paolo Benvenuti, "The Implementation of International Humanitarian Law in the Framework of UN Peace-Keeping", in *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Office for the Official Publications of the European Communities, Luxembourg, 1995, pp. 96 ff.; Claude Emanuelli, "Les forces des Nations Unies et le droit international humanitaire", in Luigi Condorelli *et al.* (eds), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1996, pp. 357 ff.; Robert Kolb, *Droit humanitaire et opérations de paix internationales*, 2nd ed., Helbing & Lichtenhahn, Brussels, 2006, pp. 57 ff.

some cases, a conflict with dual IAC-NIAC classification, in which the laws governing both types of armed conflict apply in parallel. Based on a factual assessment of the situation, using the traditional criteria for establishing the applicability of IHL, armed conflicts involving foreign intervention are classified under the classic IAC-NIAC dichotomy. This same classification is used to identify the applicable legal framework (law of IAC, law of NIAC or both), which determines the terminology used to qualify the situation.

3. The term “internationalized internal armed conflict”, a source of confusion in the determination of applicable IHL, will no longer be used. It quite wrongly suggests a blanket application of the law of IAC in such situations, which is contrary to the fragmented approach described above. It could also give the impression that these situations form a third category of armed conflicts. The ICRC now uses new terminology consistent with the IHL applicable to the situations in question.

## **Types of situation covered by the notion of armed conflict involving foreign intervention**

### **Types of intervention covered by the ICRC’s position**

In order to define the scope of application of the ICRC’s position as precisely as possible, the notion of armed conflict involving foreign intervention must first be analyzed.

“Internationalized internal armed conflict” was the term used by the ICRC for many years to refer to situations in which one or more third States intervened in a pre-existing armed conflict affecting all or part of the territory of a given State. While this criterion remains valid, it is important to identify the characteristics of foreign intervention more precisely.

As explained in the introduction to this article, contemporary armed conflicts are increasingly characterized by the intervention of third parties in support of one or more of the parties to the conflict.<sup>5</sup> Such interventions, which vary in form and intensity, generally consist of military, financial, logistical or political support. However, not all types of intervention by a third party in support of one or more of the belligerents are taken into account in the ICRC’s position on the concept of armed conflict involving foreign intervention. While political and/or financial support provided by third parties to the belligerents might have implications in

5 Sylvain Vit  , “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 70–75, 89–93; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford, 2010, pp. 92–102; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 56–70; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report to the 31st International Conference of the Red Cross and Red Crescent, October 2011, pp. 7–12, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf) (all internet references were accessed in September 2016).

terms of the law of international responsibility,<sup>6</sup> this type of assistance has no bearing on the applicability and application of IHL to the situation in question. Support of this kind is not therefore taken into account in the ICRC's position, which only covers foreign intervention that actually affects the applicability of IHL. Military or logistical support provided by third parties to one of the parties to a pre-existing conflict can, on the other hand, influence the application of IHL – and therefore falls within the scope of application of the ICRC's position – if it is considered as contributing to the collective conduct of hostilities.

In some cases, the support provided by a third power is an action integrated into a military operation conducted by the party to the pre-existing conflict and is therefore considered an “act of war”. Such an act must be regarded as an integral part of the pre-existing NIAC. Therefore, actions such as logistical support involving the transportation of the troops of one of the belligerents on the front line, the provision of intelligence used immediately in the conduct of hostilities and the involvement of members of the third power in planning and coordinating military operations conducted by the supported party are all types of support that fall within the scope of application of the ICRC's position – in the same way as direct involvement by the intervening power in combat operations does – because they have a bearing on the applicability *ratione personae* and *ratione materiae* of IHL. In the ICRC's view, a third power supporting one of the belligerents can be regarded as a party to the pre-existing NIAC when the following conditions are met: (1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.

According to this support-based approach, the nature of the intervening power's involvement in the pre-existing NIAC could mean that it is considered a “co-belligerent”, making it a party to the conflict. When there is a close link between the action of the intervening power and the pre-existing NIAC, the assessment can be made on the basis of the nature of the support provided rather than on the traditional criteria for determining the existence of a NIAC, which will already have been met for the pre-existing conflict.

It is important to note that this approach, which takes into account the support provided to one of the parties to a pre-existing NIAC, complements, but does not replace, the test for determining the application of IHL based on the

6 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd Session, 2001, Art. 16; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, New York, 2002, pp. 148–151; Christian Dominicé, “Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State”, in James Crawford, Alain Pellet and Simon Olleson (eds), *Oxford Commentaries on International Law: The Law of International Responsibility*, Oxford University Press, Oxford, 2010, pp. 285–287; Shabtai Rosenne, *The International Law Commission's Draft Articles on State Responsibility, Part I, Articles 1–35*, Martinus Nijhoff, Dordrecht, 1991, pp. 282–288.

traditional criteria established in this body of law.<sup>7</sup> It also prevents a situation in which powers making an effective contribution to military operations and undeniably involved in the collective conduct of hostilities in the context of a pre-existing NIAC can avoid being considered as parties to the conflict and therefore claim protection from direct attacks on their armed forces, under the pretext that the intensity of the armed violence has not reached the required threshold.

The ICRC therefore draws a distinction based on the nature of the internationalization of the conflict. It distinguishes between internationalization in the factual sense of the term (manifestation of a foreign intervention, whatever the form or extent) and internationalization that has a bearing on the applicability of IHL *ratione personae* (intervening power becomes a party to the conflict) or, depending on the circumstances, alters the scope of application of IHL *ratione materiae* (extension of the legal framework when application of the law of IAC – including occupation law, where relevant – is triggered).

The ICRC's position also takes into consideration the diversity of intervening powers, extending the circle to cover international and regional organizations. International organizations are increasingly involved in military operations to assist one or more parties already involved in an armed conflict. In recent years, the UN (in the Democratic Republic of the Congo (DRC)), NATO (in Afghanistan and Libya) and the African Union (in Somalia) have been directly involved in both international and non-international armed conflicts. The particular status of international and regional organizations under public international law<sup>8</sup> means that they must be considered – through their subsidiary organs, which are the missions they deploy on the ground (such as MONUSCO,<sup>9</sup> the UN mission in the DRC, and ISAF,<sup>10</sup> the NATO mission in Afghanistan) – parties to the international or non-international armed conflict,<sup>11</sup> if the criteria for determining that IHL applies to them are met.

7 For more details on this approach, see Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* above note 5, p. 21–23; ICRC, *Commentary on the First Geneva Convention*, 2nd ed., 2016, paras 445–446.

8 They have international legal personality – established explicitly or implicitly in their charters – distinct from that of their member States; see ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 178.

9 United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

10 International Security Assistance Force.

11 There is no longer any question today that it is by examining the purposes and functions of an international or regional organization, as explicitly or implicitly defined in its charter, that it can be determined what rules of international law are applicable *ratione personae* to it. It follows that international and regional organizations which have the material means to become involved in military operations also have, by extension, the subjective capacity to become belligerents within the meaning of IHL and therefore subjects of this body of law. The activities of an international organization cannot, however, be governed by IHL unless the forces it has at its disposal take part in military action that reaches the threshold required for it to be considered an armed conflict, be it international or non-international (see Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: Forces de paix et administrations civiles transitoires*, Bruylant, Brussels, 2005, pp. 117–127; Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff, Dordrecht, 2005, pp. 151–158). As international and regional organizations cannot be party to IHL treaties, when they are involved in an armed conflict they are bound by customary IHL.

Lastly, it is important to note that situations in which there is no objective link between foreign intervention in the territory of a third State and a pre-existing armed conflict in that territory are not included in the scope of the ICRC's position, as the notion of armed conflict involving foreign intervention presupposes the existence of such a link. Such situations occur when a third power intervenes in a territory where a pre-existing NIAC is in progress, but not in support of one of the parties and without exercising overall control over a non-State party, or when it intervenes in a territory where there is no conflict taking place.<sup>12</sup>

Similarly, spillover NIACs that extend into the territory of one or more neighbouring States, with the express or tacit consent of the government(s) concerned,<sup>13</sup> are not covered by the ICRC's position on the notion of armed conflict involving foreign intervention, unless a third party intervenes in the pre-existing armed conflict.<sup>14</sup>

In short, the ICRC's position covers foreign intervention by one or more States, a coalition of States or an international or regional organization that become a party to a pre-existing conflict as defined by IHL.

## Different forms of foreign intervention covered by the ICRC's position

Situations covered by the ICRC's position on the notion of armed conflict involving foreign intervention are those in which a factual link can be established between the intervention of one or more third powers and the pre-existing or concomitant armed conflict. This link can take two possible forms.

### *Foreign intervention in support of one of the parties to a non-international armed conflict*

Foreign intervention can take place with a view to providing *support* to one of the parties to the conflict. Very often, this support (which can be regarded as a form of "co-belligerency") consists of pooling military resources with one of the parties to the pre-existing or concomitant armed conflict in joint military operations aimed at weakening or neutralizing the adversary. Collaboration of this kind sometimes

12 Although it is hard to conceive of foreign intervention in the territory of a State where a NIAC is in progress not constituting support to one of the parties involved in the pre-existing NIAC, such situations do arise. One example is the initial US intervention in Afghanistan in October 2001 against the Taliban (triggering an IAC), at a time when the latter were involved in a NIAC against the Northern Alliance. The lack of a factual link between the two parallel conflicts meant that they were excluded from the scope of application of the ICRC's position, because the United States did not initially intervene in support of the Northern Alliance and did not exercise overall control over it. Several months after the launch of its military operations against the Taliban, however, the United States carried out actions in support of the Northern Alliance, thereby bringing the situation into the scope of application of the ICRC's position on the notion of armed conflict involving foreign intervention.

13 In general, these situations occur when government forces undertake action in pursuit of an armed group seeking to take refuge in the territory of a neighbouring State.

14 However, if the State into whose territory the NIAC has spilled over intervenes, undertaking military action in support of one of the parties, then the situation falls within the scope of application of the ICRC's position on the notion of armed conflict involving foreign intervention.



calls for the establishment of military coordination arrangements, consisting of common structures or platforms or even, at their most advanced, an integrated chain of command. However, the intervening power's support is not always so readily apparent. It may be military action of a more unilateral nature, although the purpose is the same: to weaken the military resources of a party to the conflict for the benefit or on behalf of the adversary. The key issue is to assess whether the military action of the third party in the prevailing circumstances can be reasonably and objectively interpreted as action designed to support one of the parties to the conflict to the detriment of the other. If it can, this military action will effectively be considered part of the collective conduct of hostilities by the intervening power and the supported party against the enemy. It would therefore clearly be considered support as defined by the ICRC's position.

*Foreign intervention in the form of overall control over one of the parties to a non-international armed conflict*

The link between the intervention of one or more third parties and the armed conflict is stronger when the intervening power exercises some sort of *control* over the supported party. In some conflict situations, foreign intervention involves exercising significant and progressive control over one of the parties to a pre-existing armed conflict. Most commonly, it is over an insurgent non-State party in a pre-existing NIAC that control is exercised by a third party.<sup>15</sup> One such example was the conflict in the former Yugoslavia in the 1990s, when the Serbian government exercised control over certain armed groups fighting in the NIACs taking place in Bosnia and Croatia. This kind of control entails a relationship of subordination between the non-State party and the intervening power.

In order to determine the existence of such a relationship of subordination, it must be proved that the non-State party is indeed acting on behalf of the intervening power. A link must therefore be established between the actions of the non-State party and the intervening power for those actions to be legally regarded as being committed directly by the latter. The question of attribution thus plays a major role – if the actions of the non-State party can be attributed to the intervening power,<sup>16</sup> the relationship of subordination is thereby established.

15 Overall control could conceivably precede the outbreak of the NIAC. This would be the case if a foreign power were to establish overall control over an organized armed group that had not yet undertaken any military operations against the State party. In such a situation, any hostilities would immediately be governed by the law of IAC.

16 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 104: "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of the conditions on which under international law an individual may be held to act as a *de facto organ of a State*. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the grave breaches regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather,

Attribution, which is the process of establishing a link between an act and the individual or entity deemed to have carried it out, is particularly complicated in the case of collective entities such as States and international organizations, which must necessarily act through individuals. The second step in this process, after establishing who carried out the act (or series of acts), is to determine whether the individual or group of individuals concerned discharges a function within the collective entity. If this is the case, the acts of the individual or individuals can be interpreted as being those of the entity itself.<sup>17</sup> Applied to the situations covered by the ICRC's position, the concept of attribution will help to reveal the extent of the relationship between the non-State party and the intervening power and play a crucial role in establishing whether the members of the non-State armed group can be considered agents of the latter, which will have legal implications, particularly with regard to the classification of the situation under IHL. Attribution ensures that the intervening power is prevented from hiding behind a proxy to avoid its international obligations and responsibilities under IHL and from refusing to be considered a party to the conflict.<sup>18</sup>

IHL is silent on the issue of attribution. It does not contain any specific criteria for establishing that an armed group initially perceived to be acting independently in a pre-existing NIAC is, in fact, subordinate to a third power, which would turn the conflict into an international one.<sup>19</sup> The only reference to such a relationship of subordination is to be found in Article 4A(2) of the Third Geneva Convention of 1949, but it describes it in a factual way, without defining the legal conditions for establishing that a group of individuals forming an organized militia or resistance movement within the scope of this provision ultimately "belongs" to an intervening third power.<sup>20</sup> As there is no specific test

the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international."

17 Hervé Ascensio, "La responsabilité selon la Cour internationale de Justice dans l'affaire du génocide bosniaque", *Revue Générale de Droit International Public*, No. 2, 2007, p. 288.

18 Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18, No. 4, 2007, p. 656. See also ICTY, *Tadić*, above note 16, para. 117.

19 The members of the group must then be considered *de facto* agents of the intervening third power. See *ibid.*, para. 104; ICRC, *Commentary on the First Geneva Convention*, above note 7, paras 265–273.

20 Article 4A(2) of the Third Geneva Convention (GC III) states: "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: ... (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging* to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions" (emphasis added). According to the analysis of the ICTY Appeals Chamber—a view shared by the ICRC—armed conflict becomes international when the non-State party "belongs", within the meaning of Article 4A(2) of GC III, to the intervening third power, and this belonging is determined based on the attribution of the actions of the former to the latter in accordance with the overall control criterion. See D. Akande, above note 5, pp. 57 ff.

under IHL for establishing whether a non-State armed group “belongs” to a third power, one must refer to the general rules of public international law, which help to determine when and under what conditions private individuals (including members of non-State armed groups) are ultimately held to be acting as *de facto* agents of a third power.

In this regard, international law on responsibility and the developments therein concerning attribution offer suitable solutions that can be transposed to IHL. To all intents and purposes, the test for determining a connection between a non-State party and a third power for the purpose of classifying a conflict under IHL – just like under the international law on responsibility – involves attributing actions carried out by an individual or a group of individuals to a bearer of international obligations (a State or international organization).<sup>21</sup>

The International Law Commission (ILC),<sup>22</sup> international courts such as the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC) and the European Court of Human Rights,<sup>23</sup> and doctrine<sup>24</sup> have also established that the question of attribution linking the acts of a *de facto* entity to an intervening outside power is determined by the notion of control. As Stefan Talmon so rightly points out, “the question of whether or not an act of a secessionist entity can be attributed to an outside power thus becomes a question of how one defines ‘control’”.<sup>25</sup> International courts called on to examine this question initially interpreted the concept of control in different ways when it came to attributing the actions of a non-State party to a third power. The different tests put forward, such as effective control and overall control, became the subject of a doctrinal debate.

International jurisprudence and doctrine have long wavered between the stricter effective control option favoured by the ICJ in a decision rendered in

21 Marten Zwanenburg, “International Organisations vs. Troop Contributing Countries: Which Should Be Considered as the Party to an Armed Conflict During Peace Operations?”, Proceedings of the Bruges Colloquium, “International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility”, 12th Bruges Colloquium, 20–21 October 2011, *Collegium*, No. 42, Autumn 2012, p. 26; Marina Spinedi, “On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia”, *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 832–833.

22 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted by the International Law Commission at its 53rd Session, 2001; see in particular the Commentary on Article 8, pp. 47–49.

23 See below.

24 See D. Akande, above note 5, pp. 57 ff; Marko Milanovic, “State Responsibility for Genocide”, *European Journal of International Law*, Vol. 17, No. 3, 2006; A. Cassese, above note 18, pp. 649–668.

25 Stefan Talmon, “The Responsibility of Outside Powers for Acts of Secessionist Entities”, *International and Comparative Law Quarterly*, Vol. 58, July 2009, p. 496.

1986,<sup>26</sup> and the broader notion of overall control espoused by the ICTY in 1999.<sup>27</sup> In its judgment of 17 July 1999 on the *Tadić* case, the ICTY held that:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.<sup>28</sup>

The notion of overall control does not therefore refer simply to monitoring or checking, but also requires the exercise of some form of authority over the entity in question. There is no question, however, that the concept of authority referred to is broader and more general than the issuing of orders, and refers rather to general direction and coordination.

The recent case law of international courts displays a clear tendency towards applying the overall control test for the purpose of classifying armed conflicts.

The ICTY was clearly the forerunner in this area, as it was in its cases that the concept of overall control was first developed.<sup>29</sup> This approach was later followed by the ICC, whose Pre-Trial Chamber and Trial Chamber used the overall control test in the *Lubanga* case. The Pre-Trial Chamber made it clear that “where a State does *not intervene directly* on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State”.<sup>30</sup> Some years later, the ICC Trial Chamber echoed the analysis of the Pre-Trial Chamber in its judgment of 14 March 2012, in which it stated that:

26 ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, ICJ Reports 1986, p. 14, para. 115. Effective control as reflected in this judgment means that the party subject to control was not only in the pay of or financed by the intervening foreign power and that its actions were supervised by it, but also that it received direct instructions from it.

27 This wavering is clearly reflected in the commentaries of the ILC on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Discussing the notion of control in its Commentary on Article 8, the ILC declines to choose between effective control and overall control, simply stating: “In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it” (p. 48).

28 ICTY, *Tadić*, above note 16, para. 131.

29 The concept of overall control appears in the *Aleksovski* case (ICTY, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999). In this judgment, Judges Vohrah and Nieto-Navia concluded, in their joint opinion regarding the applicability of Article 2 of the Statute (para. 27), that “the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina. The majority of the Trial Chamber finds that the HVO was not a *de facto* agent of Croatia .... Therefore, the Prosecution has failed to establish the internationality of the conflict to the satisfaction of a majority of the Trial Chamber.”

30 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, para. 211.

As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State.<sup>31</sup>

Lastly, in its decision of 26 February 2007, the ICJ expressly stated that the notion of overall control could be used to determine the legal characterization of a situation under IHL: “Insofar as the ‘overall control’ test is employed to determine whether or not an armed conflict is international, ... it may well be that the test is applicable and suitable.”<sup>32</sup>

The ICRC has consistently opted to apply the overall control criterion for the purpose of determining the legal classification of a conflict situation under IHL when there seemed to be a close connection, if not a relationship of subordination, between a non-State party and a third power. The reason for this choice is that the notion of overall control takes better account of the reality of the relationship between the non-State armed group and the third power, in that it does not imply that the armed group is not subordinate to the State if specific instructions are not issued for every belligerent act. Additionally, the overall control test is particularly useful because it assesses control over the non-State party as a whole, thereby allowing its *overall actions* to be attributed to the intervening foreign power. This is wholly consistent with the classification of armed conflicts in IHL, whereby the overall actions carried out by persons participating in organized armed violence are objectively assessed based on criteria established by the rules of this body of law.<sup>33</sup>

The option chosen by the ICRC is therefore in line with recent international jurisprudence of the ICJ, the ICTY and the ICC.<sup>34</sup>

31 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, Trial Chamber I, 14 March 2012, para. 541.

32 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, para. 404.

33 Proving effective control for every single operation would be virtually impossible, because it would require a level of proof unlikely to be attained. *A fortiori*, the “complete dependence” criterion, advocated by some authors (Marko Milanovic, for example) and used by the ICJ in 2007 in the *Genocide* case to determine responsibility for an internationally wrongful act, makes the attribution test even stricter. According to H. Ascensio, above note 17, pp. 290–292, “taken literally, the term [complete dependence] is absurd, because virtually the only actors that would meet the criteria are *de jure* organs with circumscribed powers! Any shred of discretionary power would destroy the hypothesis [for attributing the actions in question to a third State] .... With the criteria envisaged by the Court, no puppet State ... would ever be identified for what it is: a fiction.” See also Jörn Griebel and Milan Plücker, “New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v. Serbia*”, *Leiden Journal of International Law*, Vol. 21, No. 3, 2008. It is important to note that although the ICJ used the “complete dependence” test to establish whether certain acts committed by Bosnian Serb militias could engage the international responsibility of the Serbian State, it nonetheless expressly stated that the less restrictive test of overall control could be used to classify a conflict in IHL. For the ICJ, then, both tests are valid but each should be used for different purposes.

34 It is important to clarify, however, that acceptance of this option – and the legal reasoning behind it – is not unanimous. A (minority) part of the doctrine holds that the use of the overall control test for classifying armed conflicts in IHL is based on a legal analysis that is faulty on two counts. First, some authors call into question the soundness of the reasoning in relation to overall control, arguing that it

The use of the notion of control for determining applicable IHL has a decisive legal impact, because the non-State party becomes subordinate to the intervening third power. In the eyes of international law, the members of the non-State armed group become agents of the third power. In terms of IHL application *ratione personae*, this means that the intervening power entirely substitutes the non-State party and becomes itself a party to the pre-existing armed conflict instead of the non-State armed group.<sup>35</sup> The link between the foreign intervention and the pre-existing armed conflict – whether it takes the form of support given to one of the parties to the armed conflict or overall control over that party – is the crucial element that places an armed conflict involving foreign intervention within the scope of the ICRC's position.

It is important to note, in this regard, that the timing of the support given by one or more intervening powers can vary. The intervention generally takes place once the NIAC is in progress, but it can also coincide with the outbreak of the conflict, although this is more uncommon. The vast majority of armed conflicts involving foreign intervention fall into the first category. Some examples are MONUSCO in the DRC (from 2008) and NATO operations in Libya (2011) and Afghanistan (from 2003).

Foreign intervention resulting in *control* over the non-State party is less common, although not exceptional, as evidenced by the situations observed in the former Yugoslavia between 1992 and 1996.

The different relationships between belligerents covered by the ICRC's position on the notion of armed conflict involving foreign intervention are as follows:

- State party v. non-State party;<sup>36</sup>
- State, coalition of States or international or regional organization intervening in support of the State party v. non-State party;

would be legally and conceptually inappropriate to use the secondary rules of public international law (attribution as defined in international law regulating responsibility) to determine the scope of application of primary rules of international law (IHL). In the view of these authors, although IHL is silent on this matter, it should be possible to deduce from this body of law attribution rules of its own to establish the link between a State and a non-State armed group. The second argument made by these authors is that the concept of overall control could not be used to attribute the *overall* actions of a non-State actor to a State. In this regard, they point out that the ICJ, in its 2007 decision in the Bosnia-Herzegovina *Genocide* case, specified that the effective control test could only be used to attribute individual and specific acts and that only the complete dependence criterion was suitable for attributing the overall actions of a *de facto* entity to a State. However, the proponents of this argument seem to have ignored the fact that the ICJ made a distinction between the situations in para. 404. It opened the door to the use of the overall control test in classifying conflicts in IHL, but indicated that it was insufficient to establish the international responsibility of a State for actions carried out by a non-State group. For a more detailed analysis of these arguments, see M. Milanovic, above note 24; Marko Milanovic, "State Responsibility for Genocide: A Follow-Up", *European Journal of International Law*, Vol. 18, No. 4, 2007; S. Talmon, above note 25; D. Akande, above note 5, pp. 57 ff.; Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law", *European Journal of International Law*, Vol. 21, No. 1, 2010; Theodor Meron, "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout", *American Journal of International Law*, Vol. 92, No. 2, 1998.

35 The legal implications for IHL application *ratione materiae* are examined below.

36 Although this initial belligerent relationship does not, in itself, involve intervention by a third party, it is essential, because it is the basic component onto which are grafted all the other belligerent relationships that are covered by the ICRC's position.

- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party;
- State party v. State, coalition of States or international or regional organization exercising overall control over the non-State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. State, coalition of States or international or regional organization intervening in support of the non-State party or exercising overall control over it.

## The ICRC and the rules of IHL applicable to armed conflicts involving foreign intervention

As the question of determining IHL applicable to armed conflicts involving foreign intervention is open to controversy, the ICRC has undertaken to clarify how IHL is applicable to this type of conflict.

For the ICRC, determining the applicable law involves the objective application of the traditional criteria for armed conflict to the facts on the ground. On this question, both the prevailing doctrine<sup>37</sup> and international jurisprudence<sup>38</sup> have consistently maintained that armed conflicts should be classified based on an assessment of the facts in light of the conditions established for IACs in Article 2 common to the four Geneva Conventions and Article 1 of Additional Protocol I (AP I) of 1977, and for NIACs in Article 3 common to the four Geneva Conventions and Article 1 of Additional Protocol II (AP II) of 1977.<sup>39</sup> In connection with the *Boškovski* case, the ICTY noted the following:

Consistent with this approach, Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the

37 See Éric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, p. 120; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, pp. 75–76; Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 47–48; Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law and Business, New York, 2012, pp. 72, 80.

38 See, for example, US Military Tribunal, Nuremberg, *United States v. Wilhelm List*, Case No. 47, February 1948; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 8, 1949, p. 59; ICTY, *The Prosecutor v. Mladen Naletilić, aka “Tuta”, and Vinko Martinović, aka “Štela”*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, para. 211; ICTY, *The Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, Trial Chamber II, 10 July 2008, para. 174.

39 For a more detailed analysis of the criteria for defining armed conflicts, see ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, March 2008, available at: [www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf](http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* above note 5, pp. 7–12; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, New York, 2010, pp. 149–156; E. Wilmshurst (ed.), above note 5; Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell and Philip Leach, “International Law Meeting Summary: Classification of Conflicts: The Way Forward”, Chatham House, 2012, available at: [www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf); S. Vité, “Typology of Armed Conflicts in International Humanitarian Law” above note 5, pp. 69–94.



fighting and the organisation of the armed group or groups involved depending on the facts of each case.<sup>40</sup>

The ICRC proposes a fragmented approach to the determination of applicable law. It has used this approach consistently for this purpose in numerous cases involving different types of armed conflict. The approach consists of determining applicable IHL by examining each bilateral relationship between belligerents separately in light of the facts on the ground. This fragmented approach reflects the current state of the law, as it has been validated by the ICJ<sup>41</sup> and reaffirmed by the ICTY<sup>42</sup> and more recently the ICC. In the *Lubanga* case, the Pre-Trial Chamber of the ICC specified that

an internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if i) another State intervenes in that conflict through its troops (direct intervention) or if ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>43</sup>

Most of the doctrine also supports this approach.<sup>44</sup>

This fragmentation in the application of legal regimes according to the parties involved in the armed conflict means that applicable IHL – law of IAC, law of NIAC or both – depends on the nature of the different bilateral relationships, as identified above, that can exist between belligerents in an armed conflict. In other words, according to this fragmented approach, when different

40 ICTY, *Boškovski and Tarčulovski*, above note 38, para. 176; ICTY, *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgment, Trial Chamber, 26 February 2009, para. 125: “The existence of an armed conflict does not depend upon the views of the parties to the conflict.” See also International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Chamber I, 2 September 1998, para. 603: “If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto.”

41 ICJ, *Nicaragua*, above note 26, p. 14.

42 ICTY, *Tadić*, above note 16, para. 84, and Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, para. 77: “the conflicts in the former Yugoslavia have both internal and international aspects”.

43 ICC, *Lubanga*, Decision on the confirmation of charges, above note 30, para. 209. See also ICC, *Lubanga*, Judgment pursuant to Art. 74 of the Statute, above note 31, paras 536, 565.

44 Marco Sassòli, “The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in Sienho Yee and Tieya Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001; Luigi Condorelli, “Les attentats du 11 septembre et leurs suites: Où va le droit international?”, *Revue Générale de Droit International Public*, No. 4, 2001; Hans-Peter Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon”, *American University Law Review*, Vol. 33, 1983; James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003; Robert Kolb, *Ius in bello, le droit international des conflits armés, Précis*, 2nd ed., Bruylant, Brussels, 2009, pp. 183–192; D. Akande, above note 5, pp. 63–64; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, pp. 26–28; Dietrich Schindler, “International Humanitarian Law and Internationalized Internal Armed Conflicts”, *International Review of the Red Cross*, No. 230, September–October 1982, pp. 255 ff.

types of actors – State and non-State – are involved in the same conflict, the rules of IHL applicable to them vary depending on the nature of the relationship that each belligerent has with each of the others. When a State party is engaged in military activities against one or more non-State parties, the relationship is governed by the law of NIAC. If this same State is also fighting against another State in the context of that same conflict, their relationship will be governed by the law of IAC. Accordingly, the direct intervention of a third State in support of one or more non-State parties does not internationalize all the relationships between the parties to the conflict, and the law of IAC does not apply to all the actors involved in that conflict. In this case, the intervention of a third power is a separate component added onto the pre-existing NIAC, leading to a situation in which there are two armed conflicts, different in nature, existing concurrently with each other in the same territory.<sup>45</sup>

This fragmented approach, supported by most of the jurisprudence and doctrine,<sup>46</sup> responds to the need to adopt a method that results in a legal outcome more consistent with the reality of the conflict on the ground. It has the advantage of being precise, because by focusing on the bilateral relationships, it takes better account of the nature of the parties to the conflict and their ability to implement the relevant provisions of IHL. Furthermore, the fragmented approach

45 This fragmented approach, endorsed by international jurisprudence, is not, however, without its critics. Some have questioned it, decrying the legal complexity involved in applying different sets of law-of-war rules in the same territory, depending on the nature of the parties to the conflict. See T. Meron, above note 34, pp. 236–238. In the same vein, see also ICTY, *The Prosecutor v. Duško Tadić, aka “Dule”*, Case No. IT-94-1-T, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, separate opinion of Judge Li, para. 7; George H. Aldrich, “The Laws of War on Land”, *American Journal of International Law*, Vol. 94, No. 1, 2000, p. 63; E. David and J. Salmon, above note 4, pp. 728 ff. These positions were, however, disregarded by the ICC in 2009 in the *Bemba Gombo* case, when the Pre-Trial Chamber decided that the conflict in the Central African Republic should be classified as non-international despite the intervention of foreign troops in support of the government in power (ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the confirmation of charges, Pre-Trial Chamber II, 15 June 2009, para. 246).

46 Besides the arguments outlined above, States are very clearly in favour of maintaining the IAC-NIAC distinction underlying the fragmented approach. One of the main reasons for this is their concern to preserve their sovereignty (States are averse to the idea of merging these two types of conflict for fear of legitimizing the actions of insurgent groups, being required to grant prisoner-of-war status to members of rebel groups and not being able to prosecute all the actions carried out by such groups in connection with the armed conflict). At the conferences of experts held in 1971 and 1972, the ICRC proposed that the whole of IHL should apply in the event of foreign intervention in an internal conflict. This proposal was not, however, accepted by the States. It was argued that the proposal would contribute to increasing the scale of such conflicts, as it would encourage insurgent parties to actively seek the intervention of third States in order to benefit from the application of the law of IAC (ICRC, “Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts”, Geneva, August 1971, pp. 50 ff). See also Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses of the Hague Academy of International Law*, Vol. 163, 1979, p. 150. According to E. Wilmshurst, above note 5, p. 489, “there is still some support for taking a global view ... and regarding them all as international. But what is perhaps the common view, and the view espoused by the contributors to this book, is that the only acceptable way of classifying mixed conflicts is to split them up into their component parts.”

tends to preserve the coherence of the legal system established under IHL<sup>47</sup> and avoids negative responses from States and international organizations, which are always averse to the idea of applying the law of IAC to their relationships with non-State armed groups.

In summary, the fragmented approach has the twofold advantage of being accepted by States and international organizations – which have also opted for a differentiated approach to the application of IHL in armed conflicts involving foreign intervention – and of resulting in a practical outcome that is more consistent with the realities of contemporary armed conflicts.

## Law applicable in the case of foreign intervention in support of the State party

Pursuant to the fragmented approach described above, the ICRC considers that when a foreign power intervenes in support of the State party, the law of NIAC applies. The belligerent relationship between the State party and the non-State party is governed by the law of NIAC, as is the belligerent relationship between the intervening foreign power and the non-State party.

In accordance with the fragmented approach described above, the situation referred to here therefore covers the following two belligerent relationships:

- State party v. non-State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. non-State party.

As explained above, the applicability of IHL to the relationships between belligerents identified in the context of foreign intervention in support of the State party is determined – as it is for relationships between the parties in “traditional” armed conflicts – with reference to the classic criteria for NIAC pursuant to common Article 3 and Article 1 of AP II.

The legal framework governing the situation described above is therefore as follows: common Article 3, AP II (provided that the State party has ratified the Protocol and the conditions of applicability are met) and customary law of NIACs will be applicable to the belligerent relationship between the State party supported by the intervening power on one side and the non-State party on the other.<sup>48</sup>

Foreign intervention does not therefore alter what IHL applies (it is still the law of NIAC); it simply extends the scope *ratione personae* to include the party

47 Specifically, IHL considers – pursuant to Articles 2 and 3 common to the four Geneva Conventions of 1949 – that the law of IAC only applies when the opposing parties are all States or other entities with international legal personality. *A contrario*, IHL calls for the application of the law of NIAC in all situations in which a State or some other entity with international legal personality is fighting one or more non-State actors.

48 This identification is based on the four Geneva Conventions of 1949 and the two Additional Protocols of 1977; it does not refer to other applicable IHL treaties.

Fig. 1 - Colour online, Colour in print

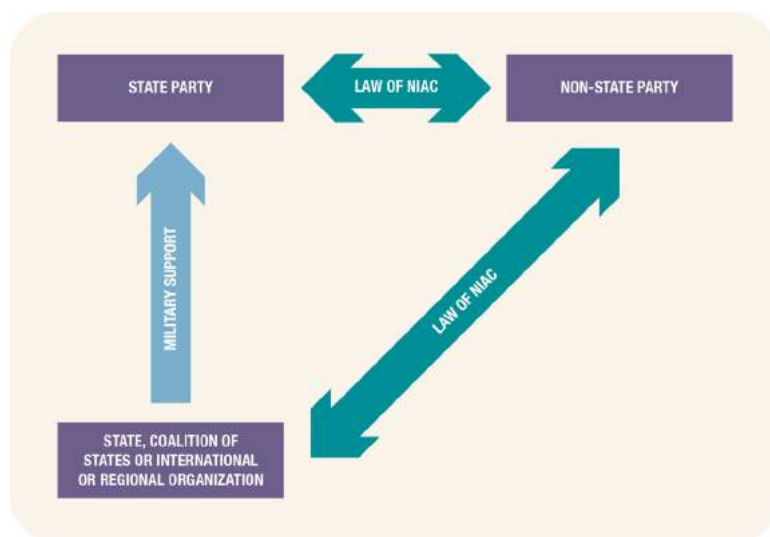


Figure 1. Relationships between the parties to the conflict and the IHL applicable in this scenario.

intervening in support of the State party, regardless of whether that party is a multinational force,<sup>49</sup> a State or a coalition of States.

The main reasons for rejecting the option of applying the law of IAC in such situations include the following.

First, common Article 2 implies that the law of IAC only applies when the armed conflict is between at least two entities possessing international legal

49 The term “multinational force” refers to the armed forces made available for a peace operation by troop-contributing countries. There is no clear-cut, recognized definition of peace operations in public international law. Generally speaking, the term “peace operations” covers both peacekeeping and peace enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter. The nature of armed conflicts involving multinational forces and the determination of the rules of IHL applicable to them has been the source of much controversy. For some authors, such situations are to be equated with IACs. In their view, as the military operations are decided, defined and carried out by international organizations, they are, by their very nature, to be included in this category. For these authors, the special status of international organizations and their international legal personality would prevail over the non-State status of the insurgent party and would be enough, in itself, to determine the nature of the conflict. See Claude Emanuelli, “Les forces des Nations Unies et le droit international humanitaire”, in Luigi Condorelli *et al.* (eds), *Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law: Proceedings of the International Symposium Held on the Occasion of the 50th Anniversary of the United Nations (Geneva, 19, 20 and 21 October 1995)*, Pedone, Paris, 1996, pp. 357 ff.; R. Kolb, above note 4, pp. 57 ff. However, this position (which does not consider the non-State component of the belligerent relationship and therefore disregards the fact that legal classification in IHL always takes into account the nature of the parties to the conflict) is not borne out by the practice of States and international organizations recently involved in conflict situations, which reveals consistent support for the fragmented approach advocated by the ICRC. See S. Vité, “Typology of Armed Conflicts in International Humanitarian Law” above note 5, pp. 87–88; E. Wilmschurst, above note 5, p. 487: “Although not without controversy, the better view is that such conflict is indeed non-international, regardless of the international component of the multinational force.”

personality, be it a conflict between two States or between one State and a coalition of States. On the other hand, when the conflict is between an entity with international legal personality and a non-State armed group with no legal status under international law, the law that applies is that of NIAC.

Second, a blanket application of the law of IAC would not be an acceptable solution for the State party or for the powers intervening to assist it, because the implementation of the relevant rules would mean them having to grant members of the non-State armed groups combatant and prisoner-of-war status (provided that the established criteria were met), and that in itself would make it impossible for them to be prosecuted for the mere fact of having taken up arms. It is quite inconceivable that States would be willing to renounce the possibility of dealing with individuals taking part in armed uprisings under domestic law.

Third, application of the law of IAC would require not only State parties and intervening States but also non-State parties to fulfil the relevant IHL obligations. IHL is intended to be a realistic and pragmatic body of law based on the principle of effectiveness. It is therefore pointless to impose on a party to a conflict obligations that the party cannot fulfil because it does not have the means to do so. The law of IAC was designed to be applied by States possessing logistical means that the vast majority of non-State armed groups simply do not have. Making the whole of IHL applicable *de jure* to non-State armed groups incapable of complying with its provisions would render those provisions meaningless and prevent them from fulfilling the purpose for which they were crafted. Systematic failure to respect a body of law spells its demise; it is therefore much more realistic to require non-State armed groups to implement the more basic provisions established in the law of NIAC.

## Law applicable in the case of foreign intervention in support of a non-State party

In this scenario, the ICRC considers that when a foreign power intervenes in support of a non-State party, the law of NIAC and the law of IAC apply in parallel. The belligerent relationship between the State party and the non-State party is governed by the law of NIAC, while the belligerent relationship between the State party and the intervening foreign power is governed by the law of IAC.

In accordance with the fragmented approach described above, the scenario referred to here therefore covers the following two belligerent relationships:

- State party v. non-State party;
- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party.

It is here that the full significance of the fragmented approach advocated by the ICRC can be appreciated, as such situations give rise to the application of a composite legal framework including both the law of IAC and the law of NIAC.

As explained above, the applicability of IHL to the relationships between belligerents identified in the context of foreign intervention in support of the

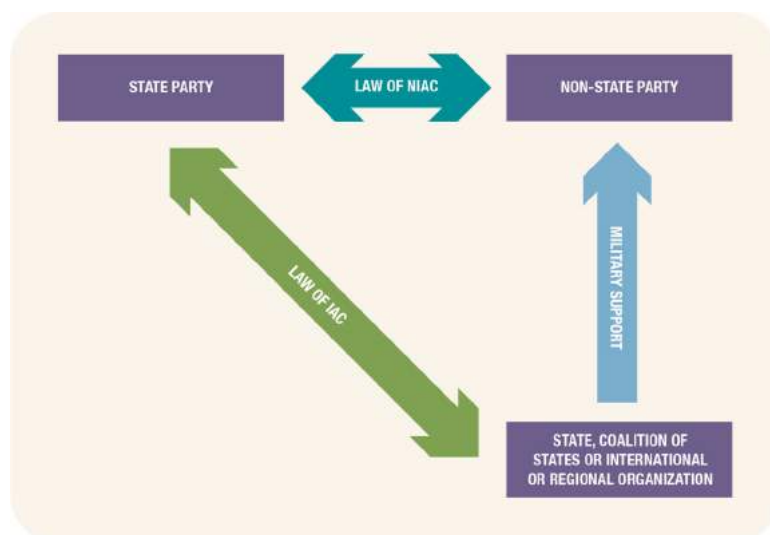


Figure 2. Relationships between the parties to the conflict and the IHL applicable in this scenario.

non-State party is determined with reference to the classic criteria pursuant to common Article 2 and Article 1 of AP I (for IACs) and the criteria drawn from common Article 3 and Article 1 of AP II (for NIACs). If foreign intervention in support of the non-State party involves the occupation of territory, Article 42 of the Regulations annexed to Hague Convention IV of 1907 (complemented by paragraph 2 of common Article 2) provides the criteria for determining whether occupation law applies to the situation in question.<sup>50</sup>

Therefore, pursuant to the fragmented approach, the belligerent relationship between the State party and the non-State party will be governed by the law of NIAC and, at the same time, the belligerent relationship between the State party and the foreign intervening party will be governed by the law of IAC. The legal framework governing the NIAC situation will be common Article 3, AP II (provided that the State party has ratified the Protocol and the conditions of applicability are met) and customary law relating to NIACs. The IAC situation existing alongside the NIAC will be governed by treaty law and customary law relating to IACs (including occupation law, where relevant), specifically the provisions of the Geneva Conventions, AP I and the Regulations annexed to Hague Convention IV of 1907.

The involvement of UN-mandated multinational forces as an intervening party in no way modifies the determination of IHL applicable to these situations.

<sup>50</sup> Occupation law – as a branch of the law of IAC – applies when foreign intervention results in effective control over all or part of the territory in question. For more details on the notion of effective control, see Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

The same approach is used as in armed conflicts in which there is foreign intervention by a State or coalition of States without a UN mandate.

Lastly, in practical terms, this fragmented approach will have little impact in terms of the law of the conduct of hostilities, because the vast majority of the IHL treaty-based rules applicable in IACs are also generally accepted as applying in NIACs as a matter of customary law. The status of detainees is, however, a different matter.<sup>51</sup> The fragmented approach means that the legal rules applicable to persons captured and detained in the context of the belligerent relationship between the State party and the non-State party are not the same as those applicable to persons captured and detained in the context of the belligerent relationship between the State party and a State, a coalition of States or an international or regional organization intervening in support of the non-State party.<sup>52</sup>

### Law applicable in the case of foreign intervention in support of both the State party and the non-State party

In this scenario, the ICRC considers that when foreign powers intervene in support of both the State party and the non-State party, the law of NIAC and the law of IAC apply in parallel:

- The law of NIAC governs the belligerent relationship between the State party and the non-State party and the belligerent relationship between the foreign power intervening in support of the State party and the non-State party.
- The law of IAC governs the belligerent relationship between the State party and the foreign power intervening in support of the non-State party and the belligerent relationship between the foreign power intervening in support of the State party and the foreign power intervening in support of the non-State party when the criteria for international armed conflict are satisfied for both belligerent relationships.

51 Similarly, the fragmented approach will have a bearing on the legal basis for the ICRC's activities. In an IAC, the ICRC will carry out its humanitarian activities under a strong treaty-based mandate (specifically, the *right* granted to the ICRC under IHL to visit people detained in connection with an IAC), while in a NIAC it can only undertake activities if its offer to provide its services is accepted by the parties to the conflict (who are free to deny the ICRC access to detainees in a NIAC).

52 The application of the law of IAC and the law of NIAC in parallel in no way weakens the prohibition – established in Article 12 of GC III and Article 45 of GC IV – on transferring to the non-State party persons detained in the context of an IAC between the third State and the State party (because an insurgent group cannot be party to the Geneva Conventions). In the event that such a transfer were to be undertaken, it would not compromise the legal protection provided under the law of IAC for persons initially detained by the third State. Detainees transferred to the non-State party would continue to be protected under GC III or GC IV.



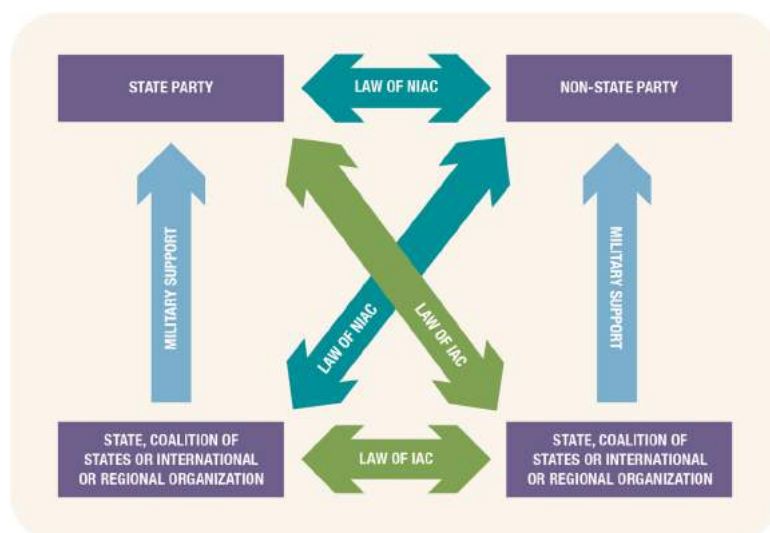


Figure 3. Relationships between the parties to the conflict and the IHL applicable in this scenario.

The scenario referred to here is a combination of the situations examined above:

- State party v. non-State party;
- State party v. State, coalition of States or international or regional organization intervening in support of the non-State party;
- Non-State party v. State, coalition of States or international or regional organization intervening in support of the State party;
- State, coalition of States or international or regional organization intervening in support of the State party v. State, coalition of States or international or regional organization intervening in support of the non-State party.

An example of such a case is the situation in the DRC in 1998–99, when the FARDC<sup>53</sup> were supported by Angolan, Namibian, Chadian and Zimbabwean forces in a NIAC against a rebel group known as the Rally for Congolese Democracy, which received military support from Burundian, Ugandan and Rwandan forces. In this situation, the law of IAC governed the relationships between the States allied with the State party (Angola, Namibia, Chad and Zimbabwe) and the States allied with the non-State party (Burundi, Uganda and Rwanda).

As explained above, a belligerent relationship between two or more entities with international legal personality is governed by the law of IAC. Consequently, the belligerent relationship between the State party and a power intervening in support of

<sup>53</sup> Armed Forces of the Democratic Republic of the Congo.

Fig. 4 - Colour online, Colour in print

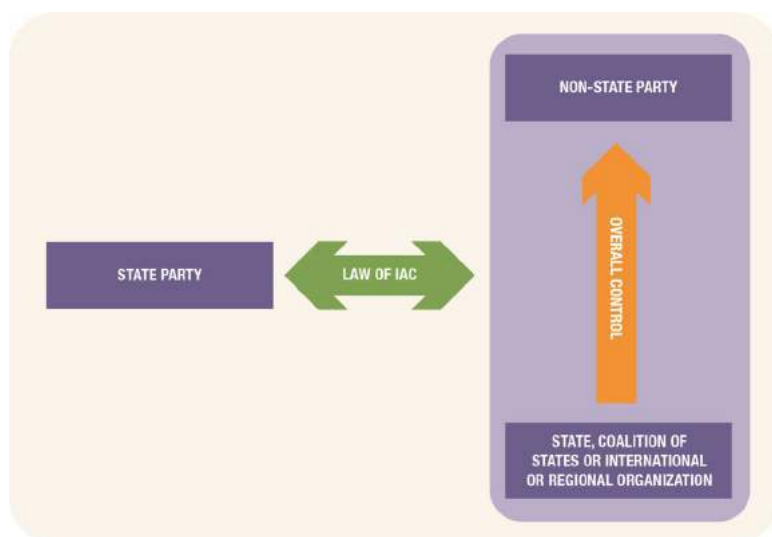


Figure 4. Relationships between the parties to the conflict and the IHL applicable in this scenario.

the non-State party and the relationships between the intervening powers are governed by the law of IAC. In accordance with the fragmented approach described above, the belligerent relationships existing correlatively between the State party and the non-State party and between the non-State party and the power intervening in support of the State party are, however, governed by the law of NIAC.

### Law applicable in the case of foreign intervention resulting in control over the non-State party

In this scenario, the ICRC considers that when foreign intervention in support of the non-State party results in a situation in which the intervening foreign power exercises control over it, the law of IAC alone applies. The belligerent relationship between the State party and the non-State party disappears, and the only belligerent relationship remaining is the one between the State party and the intervening foreign power.

In accordance with the fragmented approach described above, the scenario referred to here therefore covers the following belligerent relationship:

- State party v. State, coalition of States or international or regional organization exercising overall control over the non-State party.

The ICRC therefore considers that, in the event of foreign intervention resulting in overall control over the non-State party by the intervening power, it is the law of IAC that applies.

In this scenario, the initial support provided by the intervening power turns into control over the non-State party.<sup>54</sup>

As explained above, since IHL does not provide its own criteria for the notion of control, it is necessary to look to public international law (particularly developments in the law of responsibility) in order to determine whether a non-State armed group is acting on behalf of a third party. If it is established that such control does exist, the acts of the non-State armed group can be attributed to the intervening party.

Under this specific hypothesis, when the control exercised can be legally qualified as “overall control”, the non-State armed group is considered to have been “absorbed” by the foreign intervening power and to have become its agents under public international law. The intervening power therefore substitutes the non-State party, becoming the single party engaged in armed conflict against the government forces of the territory in which the military operations are taking place.

As the members of the non-State armed group are considered agents of the intervening power because they are under its control, the law of IAC will govern the relationship between the State party and the intervening power, now the only party fighting the government forces. The initial NIAC between the State forces and the non-State party turns into an IAC.

The law of IAC applicable in such cases is to be found in the Geneva Conventions of 1949, AP I (when the conditions of applicability are met) and customary law relating to IACs.

This legal framework also includes occupation law (Regulations annexed to Hague Convention IV of 1907, the Fourth Geneva Convention and AP I), when the third State exercises overall control over a non-State armed group or groups exercising effective control over a given territory.<sup>55</sup>

54 In this regard, the notion of control is of crucial importance in determining the legal framework applicable to armed conflicts involving foreign intervention. See above.

55 The concept of indirect effective control has been put forward recently to avoid the creation of a legal loophole allowing States to use proxies as a way of sidestepping their responsibilities under occupation law. Effective control can be exercised by proxy armed forces, as they are under the overall control of the foreign State. In such situations, a State would be considered an occupying power for the purposes of IHL when it exercises overall control over *de facto* local authorities or other local organized groups exercising effective control over all or part of a given territory. The existence and soundness of this theory are corroborated by a number of verdicts handed down by international courts. In the *Tadić* case, for example, the ICTY decided that “the relationship of *de facto* organs or agents to the foreign Power includes those circumstances in which the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local *de facto* organs or agents” (ICTY, *The Prosecutor v. Duško Tadić, aka “Dule”*, Case No. IT-94-1-T, Judgment, Trial Chamber, 7 May 1997, para. 584). In the *DRC v. Uganda* case, the ICJ examined the question of whether Uganda exercised overall authority over the Congolese insurgent groups (ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 77). This clearly shows that the ICJ had adopted the position established by the ICTY, accepting the possibility of an occupation carried out by an indirect effective authority. For more details on this theory, see T. Ferraro, above note 50; ICRC, *Expert Meeting – Occupation and Other Forms of Administration of Foreign Territory*, Geneva, March 2012, p. 23.

## **Terminology used by the ICRC to refer to armed conflict situations involving foreign intervention**

The term “internationalized internal armed conflict” is misleading, as it blurs the fundamental distinction between IACs and NIACs established in IHL. It might seem to suggest that a single legal framework – the law of IAC – applies to such situations or that they constitute a third category of armed conflict for which the applicable legal framework is uncertain.

As the legal reality is otherwise, the ICRC has chosen to use terms that are consistent with the IHL applicable to the various situations covered by the notion of armed conflict involving foreign intervention.

Based on this, the ICRC considers that armed conflict involving foreign intervention is simply a manifestation, in a particular context, of an IAC, a NIAC or both in parallel, depending on the specific circumstances.

Therefore, when a foreign power intervenes in favour of the State party against the non-State party, the ICRC classifies the situation as a NIAC, because the law of NIAC alone applies.

As the aim is to align the terminology with applicable law, these situations will henceforth be considered by the ICRC to be NIACs, and not internationalized NIACs, as only the law of NIAC is applicable. While it is true that this new designation gives no indication that the NIAC involves foreign intervention, it is, legally speaking, more accurate, in the sense that the applicable legal framework is clearly identified from the outset, without the determination being clouded by ambiguities about the scope of application of IHL *ratione materiae* inherent in the concept of internationalized internal armed conflict.

When a foreign power intervenes in support of a non-State party over which it does not have overall control, the ICRC classifies the situation as an “armed conflict with a double legal classification”, as the law of IAC and the law of NIAC apply in parallel in accordance with the fragmented approach advocated by the ICRC.

It was in relation to this situation in particular that the ambiguity created by the term “internationalized internal armed conflict” was particularly troublesome, because it misleadingly gave the impression that the law of IAC applied to the entire situation, ignoring the fragmented approach described earlier in this article.

When foreign powers intervene in support of the State party and in support of a non-State party over which the foreign power does not exercise overall control, the ICRC also classifies the situation as an “armed conflict with a double legal classification”, as the law of IAC and the law of NIAC apply in parallel in accordance with the fragmented approach advocated by the ICRC.

This new terminology will also be applicable when support given to the non-State party results in occupation of the territory where the armed conflict is taking place. As occupation is a form of IAC and occupation law is itself a branch of the law of IAC, effective control of the territory by the intervening power following on from the support provided to the non-State party therefore

fits in perfectly with the concept of an armed conflict with a dual legal classification, provided that this effective control over the territory does not also entail overall control over the rebel forces.

Lastly, when the State party is in conflict with an intervening foreign power exercising overall control over a non-State armed group, the ICRC classifies the situation as an IAC, as the law of IAC alone applies. The situation qualifies as a state of “occupation” if foreign intervention accompanied by overall control over the non-State armed group results in effective control over all or part of the territory in question.

The position also draws inferences, with regard to the terminology to be adopted, from the notion of overall control and its implications in terms of applicable IHL.

When the non-State party is legally absorbed by the foreign power because it is considered to be under its overall control, the only two parties remaining in the conflict are the intervening foreign power and the State party. Such situations are therefore classified as IACs, with any other classifications becoming superfluous.

However, when non-State armed groups under the overall control of the intervening foreign power exercise effective control over all or part of the territory concerned, occupation law applies. Based on this and for the sake of accuracy and consistency between the terminology and applicable IHL, the situation is classified as occupation.

# Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?

**Christiane Johannot-Gradis\***

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## Abstract

*In war, individuals are vulnerable not only physically but also in terms of their cultural identity, and the obliteration of cultural heritage often becomes a central issue. This is particularly the case in armed conflicts with an ethnic, cultural or religious character. In some regions, cultural heritage consists more of monuments and objects; it is a “tangible” heritage, mostly protected by the law of armed conflict. Elsewhere, where structures are impermanent, cultural heritage is mainly expressed through orality, gestures, rituals, music and other forms of expression that individuals create using various media and instruments. Such heritage is mainly “intangible”. This essay aims to show that cultural heritage is both tangible and intangible, and that the law which protects such heritage is not limited to the*

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*law of armed conflict. Cultural heritage also benefits from the protection of other applicable instruments, such as human rights treaties and the UNESCO cultural heritage conventions.*

**Keywords:** law of armed conflict, international human rights law, UNESCO cultural conventions, tangible cultural heritage, intangible cultural heritage, cultural property, conduct of hostilities, misappropriation and illicit traffic, different types of harm to cultural identity, indigenous peoples, military occupation, non-international armed conflict.

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## Introduction

In September 1914, one month after the outbreak of the First World War, Reims Cathedral in France was heavily bombed in an attack that endangered the building's very existence. In July 2014, mosques and sanctuaries in Iraq – including the prophet Jonah's tomb, a Muslim pilgrimage site – were destroyed along with other cultural property. In both cases, what was attacked was the cultural and religious heritage of the people affected by these conflicts. Through the destruction of their places of worship, thereby hindering them from celebrating their rituals and traditions, it is their both tangible and intangible heritage that was harmed. A century separates these two events – a period that has seen innumerable conflicts whose nature has continually changed, both in terms of the parties to the conflict and of the stakes involved, as these two examples illustrate. This century has also seen a major evolution in science and technology, and in their application to military means, which have become more and more sophisticated and accurate; and, at the same time, it has seen an important development in the law. Indeed, while in 1914 the law on cultural heritage was confined to a few rules of warfare, there is now a law of armed conflict that offers a vast array of norms, including those that protect cultural heritage in its many dimensions.

The recent events in Syria, coming on the heels of similar upheavals in Iraq and Mali, highlight the paradox that such conflicts now pose for the protection of cultural heritage. Exceptional components of these countries' heritage – most of them inscribed on the United Nations Economic, Social and Cultural Organization (UNESCO) World Heritage List – were deliberately destroyed, although the law that applies to them nowadays would provide a hitherto unequalled normative framework for their protection in these circumstances. Among many others, the destruction of Jonah's tomb<sup>1</sup> and the Arch of Triumph in Palmyra, Syria,<sup>2</sup> unquestionably illustrates the deliberate character of Islamic

- 1 UNESCO, "A Call to Save Iraq's Cultural Heritage", 30 September 2014, available at: [www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/a\\_call\\_to\\_save\\_iraqs\\_cultural\\_heritage/](http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/a_call_to_save_iraqs_cultural_heritage/) (all internet references were accessed in December 2015).
- 2 UNESCO, "UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra: 'Extremists Are Terrified of History'", 5 October 2015, available at: <http://en.unesco.org/news/unesco-director-general-condemns-destruction-arch-triumph-palmyra-extremists-are-terrified>.



State Group's destruction of the heritage of these countries. Such acts seem to reflect its members' intention not only to erase forever these vestiges of the region's past, but in so doing also to obliterate all traces of the cultural and spiritual identity of the populations concerned. This poses a major challenge to the international community, for it signifies a refusal to implement norms – many of which now have the status of customary rules – aimed at protecting both cultural heritage and people exposed to conflict.<sup>3</sup>

In the string of wars throughout human history, the emergence of such trends in armed conflict is not, however, a new phenomenon. The obliteration of Carthage by the Roman troops, the sack of Constantinople by the Crusaders and the dismantling of the statuary ornamenting the cathedrals during the wars of the Reformation – as well as, more recently, the destruction of synagogues during the Second World War and of mosques during the conflict in the Balkans at the end of the last century – similarly reflect the attacking forces' intention to eradicate all traces of the cultural and spiritual identity of enemy populations by destroying their cultural heritage, the symbol of that identity.<sup>4</sup>

Hence it must be recognized that in conflicts with a strong ethnic, cultural and religious character, the destruction of cultural heritage frequently becomes an issue. This cultural heritage is multiform. Where it exists mainly in the form of sites, buildings and objects, the heritage that comes under attack is largely "tangible". Elsewhere, however, where structures are impermanent and the heritage is expressed more through orality, gesture and other forms of expression that individuals create using various media and instruments, the heritage is mainly "intangible". In the latter case, it is not so much objects that are targeted but the individuals who are the bearers or interpreters of this heritage. The solutions that the law must provide to ensure the protection of cultural heritage must therefore also have multiple elements.

The law of armed conflict, a *lex specialis* in time of war, expressly regulates the protection of cultural property – that is, mainly "tangible" cultural heritage – through the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Convention).<sup>5</sup> This instrument, adopted shortly after the Second World War, enshrined the measures that the law must provide to prevent a recurrence of the unprecedented destruction and pillage to which the world's cultural heritage had been subjected during this conflict. It thus filled major gaps in the previous regulatory frameworks. The protection conferred in the event of armed conflict by – to this date – the only convention devoted exclusively to cultural property is of course essential. However, the Convention's impact is insufficient to protect the cultural heritage exposed to contemporary conflicts, which also includes its "intangible" dimension.

3 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), in particular Rules 38, 39, pp. 127–132.

4 ICTY, *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment, 2 March 2000, paras 227–228.

5 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (entered into force 7 August 1956) (1954 Convention).

The “intangible” dimension of cultural heritage cannot in fact be protected solely on the basis of the 1954 Convention. To that end, other instruments must be applied, whether they belong to the law of armed conflict or to other legal regimes, such as international human rights law, the numerous conventions adopted within UNESCO’s framework for the protection of cultural heritage, or the various relevant norms of instruments developed by the International Labour Organization (ILO) or even the World Intellectual Property Organization (WIPO). The material scope of application of these various treaties now makes it possible to extend the concept of cultural heritage to elements other than purely cultural property, which in fact is only one of its components. The definition of legally protected cultural heritage, both tangible and intangible, has thus been enriched by the major regulatory development seen in recent decades, particularly within the United Nations (UN) system, even if its exact contours are still left to a certain extent to the discretion of States.

In addition to the different facets of cultural heritage, the various types of harm to which such heritage may be subjected should be emphasized. Such harm differs considerably depending on the phases of the armed conflict. Indeed, the effects of active hostilities on cultural heritage concern more specifically the tangible heritage like Reims Cathedral, which was directly affected by the fighting.<sup>6</sup> This type of harm is distinguished from that which the heritage may also suffer in enemy hands, when the weapons have gone silent. Such situations, especially in the form of military occupation, can alter the daily life of the concerned population and may thereby also affect the expressions of a cultural heritage that is of a more intangible dimension. The disappearance of the practice of rituals in the sacred sites of Timbuktu during the Malian conflict in 2012 is one example among many.<sup>7</sup> The distinctions between the various types of harm that can affect the different components of cultural heritage are similarly reflected in the norms aimed at preventing them.

The purpose of this article is to demonstrate that cultural heritage as a whole continues to enjoy legal protection in all phases of an armed conflict, regardless of its character. This statement is not only based on the applicable legal norms, which are discussed below, but is also supported by the case law of the international criminal tribunals, State practice and doctrine. The article begins with a historical overview revealing the existence, since time immemorial, of customary norms under which belligerents are required to spare cultural heritage in such situations. This is followed by a discussion of the applicable law which protects that heritage, both during hostilities and once the heritage has fallen under the control of enemy forces. Such legal framework consists of the law of armed conflict and other norms affirmed in human rights instruments and

6 Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006, p. 39.

7 UN, “Mali: Deux experts de l’ONU dénoncent les ‘violations des droits culturels et de la liberté religieuse’”, UN News Centre, 10 July 2012.

UNESCO cultural heritage conventions, the applicability of which can also be claimed in the event of armed conflict.

## History of the protection of cultural heritage in armed conflict

The obligation to protect cultural heritage in the event of armed conflict preceded the adoption of any regulations agreed upon by nations to preserve it. The prohibition against attacking a given site, building or object in such circumstances stemmed from the dictates of authorities, who were usually prompted by religious or sacred considerations.<sup>8</sup> This phenomenon is found in many civilizations that have shaped human history.

In view of the activities undertaken in armed conflict, particularly during the phase of active hostilities, which can lead to the destruction or burning of property, the obligation to protect cultural heritage focused mainly on buildings that were symbols of the values to be preserved or that housed ceremonies, festivals and rituals, together with the media and instruments required to perform them. The prohibition against harming such property therefore applied to the container, but by the same token, it often aimed to preserve the content as well.<sup>9</sup> Cultural heritage, then, formed a whole that was made up of tangible as well as intangible elements, the latter of which gave it life and ensured the transmission of the knowledge and components of the cultural identity of the populations affected by conflict.

The prohibition against harming cultural heritage has been handed down through the centuries, from one end of the globe to the other. Evidence of this in the West includes the protection often granted to the sacred sites of the ancient Mediterranean, or the temples and Christian churches spread throughout the Roman Empire and elsewhere, among other sites whose destruction would have met no military need, as Cicero emphasized.<sup>10</sup> During the Middle Ages, the obligation to protect such property was further formalized. On the initiative of the Christian Church in Europe, various codifications of measures to be respected by belligerents were adopted and enshrined in oaths taken by knights<sup>11</sup> or in the

8 In ancient Greece, for example, sacred sites such as Delphi, Delos and Mount Olympus were recognized as inviolable in the event of armed conflict. No acts of hostility were allowed on these sites, and fleeing enemies could take refuge in them. These prohibitions had a spiritual and religious basis, and similar rules are found in many civilizations. See Pierre Ducrey, *Guerres et guerriers dans la Grèce antique*, Payot, Paris, 1969, p. 243.

9 As an example, the first Caliph, Abu Bakr Siddiq, gave this instruction to his soldiers fighting in Iraq and Syria: "You will come upon a people who live like hermits in monasteries, believing that they have given up all for Allah. Let them be and destroy not their monasteries." See François Bugnion, "The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict", 14 November 2004, available at: [www.icrc.org/eng/resources/documents/article/other/65shtj.htm](http://www.icrc.org/eng/resources/documents/article/other/65shtj.htm).

10 M. Tulli Ciceronis, *Actionis in C. Verrem secundae liber quartus (De signis): De officiis ad Marcum filium*, cited in Stanislaw Edward Nahlik, "Des crimes contre les biens culturels", *Annuaire de l'Association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye*, Vol. 9, 1959, p. 14.

11 Such as the "Peace of God" and the "Truce of God", which enshrined the commitment by belligerents to obey numerous rules, some of which also protected cultural heritage, both tangible and intangible. Michel

capitularies signed by military leaders before entering battle; these agreements dictated that what was sacred must be preserved, be it tangible, intangible or human, and also prohibited the unnecessary (in relation to the main goals of a given conflict) destruction of property belonging to civilians who didn't take part in combat.<sup>12</sup> With the Renaissance, works of art – including those with no sacred character<sup>13</sup> – and, when nation States arose, also buildings, such as historical monuments and property that symbolized the national values and history, were added to the category of such protected objects.<sup>14</sup>

These rules, constituting customs of war and stipulated frequently in agreements between belligerents, were not set down in universally binding regulations until the end of the nineteenth century. By then, many international conferences had been held – such as in Saint Petersburg in 1868 and in Brussels in 1874 – that had culminated in declarations or draft conventions formalizing these rules.<sup>15</sup> It was only in 1899 that States formally adopted the first treaties on the law of war, of which some norms prescribe binding obligations with regard to cultural heritage in particular. These were the 1899 Hague Conventions, revised in 1907. While the norms they prescribe, which vary with the different phases of an armed conflict, refer mainly to tangible property – “buildings dedicated to religion, art, science, or charitable purposes” – the intangible element is clearly also present, even if only implicitly.<sup>16</sup> Thus, the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, and its annexed Regulations (1907 Hague Regulations), definitively introduced into positive international law the customary rule that the elements of cultural heritage must be preserved. Under its provisions, furthermore, the heritage in question is shown to be both tangible and intangible.

Balard, Jean-Philippe Genet and Michel Rouche, *Le Moyen Âge en Occident*, Hachette Supérieur, Paris, 2003, pp. 104–105, 175.

- 12 These bodies of rules setting down prohibited conduct – the “capitularies”, or covenants – were binding on men in armed conflict, not on the States in question. The rules, moreover, formally protected not only sacred property but also private property, in accordance with the principle of military necessity. If the destruction of such property did not meet the requirement of conferring military advantage, it was unnecessary and therefore prohibited. See Theodor Meron, *War Crimes Law Comes of Age*, Oxford University Press, New York, 1998, p. 13.
- 13 This development grew out of the writings of various jurists and thinkers of the time, in particular those of Alberico Gentili. In his view, among the private property to be preserved in armed conflict, cultural property should also and especially be protected. See Alberico Gentili, *De Jure Belli Libri Tres*, cited in R. O’Keefe, above note 6, p. 6.
- 14 Thus, in France, on the initiative of a deputy, the Abbé Grégoire, a commission on historical monuments was established in 1830 aimed at countering the “vandalism” that had raged during the French Revolution of 1789 and after. See “Rapport sur les destructions opérées par le vandalisme, et sur les moyens de le réprimer”, in *Œuvres de l’Abbé Grégoire*, Vol. 2: *Grégoire, député à la Convention nationale*, KTO Press and EDHIS, Nendeln and Paris, 1977, p. 257.
- 15 For example, the 1868 Declaration of Saint Petersburg or the 1874 Brussels Declaration. The latter expressly regulated the treatment of property likely to be part of the cultural heritage.
- 16 Such property is expressly mentioned in Article 27 of the Regulations Annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (1907 Hague Regulations). Article 56 of the Regulations adds “education”. The choice of these buildings shows clearly that it is not only the property itself – the tangible heritage – that is protected, but the activities carried out and the knowledge transmitted in the property – the intangible heritage – as well.

These were the instruments that governed the two major conflicts which ravaged the globe in the twentieth century,<sup>17</sup> but after the Second World War the law of armed conflict underwent a major development, in particular with the adoption of the four Geneva Conventions of 1949, supplemented in 1977 by the two Additional Protocols.<sup>18</sup> This was complemented by the 1954 Convention,<sup>19</sup> which gave complete protection to cultural property and was in turn followed by the 1954 and 1999 Protocols.<sup>20</sup> This body of law is not, however, limited to preserving only the tangible elements of the cultural heritage – that is, cultural property. Indeed, many provisions of the law of armed conflict also contribute, particularly in conjunction with the 1949 Geneva Conventions, to protecting the intangible dimension of this heritage.<sup>21</sup> Such protection also derives from instruments developed under different legal regimes and subsequently adopted, such as the human rights treaties,<sup>22</sup> and the numerous UNESCO conventions on cultural heritage.<sup>23</sup> Together, these provisions constitute a formal codification expressly ensuring the protection of cultural heritage, both tangible and intangible, in armed conflict. The material scope of this normative framework

17 The attacks on cultural heritage during these two major wars were considerable; some are emblematic, such as the attack on the Louvain university library during the First World War and on the Montecassino Abbey during the Second World War. The vagueness of the regulations, coupled with the imprecision of the weaponry of the time, greatly contributed to the large number of sites affected by these armed conflicts.

18 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), applicable in the event of international armed conflict, profoundly transformed the regulation of the conduct of hostilities in relation to that prescribed by the 1907 Hague Regulations; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), applicable in the event of non-international armed conflict, further developed the applicable law in such situations, which up to then had been governed only by Article 3 common to the four Geneva Conventions of 1949. Each of these two instruments contains a provision expressly prescribing the obligation of belligerents to ensure the protection of the “cultural or spiritual heritage of peoples”.

19 See above note 5.

20 The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (entered into force 7 August 1956) (1954 Protocol), deals with the protection of cultural property in the event of military occupation; the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (entered into force 9 March 2004) (1999 Protocol), incorporated more recent developments in the law of armed conflict, such as those relating to the conduct of hostilities, into the system for protecting cultural property.

21 This applies in particular to Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

22 Like the UN covenants – i.e., the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR), and International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976) (ICESCR).

23 According to UNESCO’s mandate, which is to promote culture in particular, several instruments regarding cultural heritage have been adopted under its initiative, such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970 (entered into force 24 April 1972) (1970 Convention); the Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 (entered into force 17 December 1975); the Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003 (entered into force 20 April 2006) (2003 Convention); and the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, 20 October 2005 (entered into force 18 March 2007).

now covers cultural heritage in its totality and is no longer limited solely to cultural property.

## Cultural heritage during the conduct of hostilities

During any armed conflict, active hostilities<sup>24</sup> cause harm to the cultural heritage of the belligerents. At first sight it is the tangible heritage that is primarily affected by the fighting, but the damage caused to museums, theatres, cathedrals and other cultural sites can also affect the intangible dimension of this cultural heritage. The effects on cultural heritage during the conflict in Mali in 2012 illustrate this. While the international community remembers the physical destruction of the Timbuktu mausoleums, this was accompanied by the simultaneous, less visible harm caused to the intangible heritage at these sites.<sup>25</sup> The abrupt halt during the conflict to the practices and rituals, both cultural and spiritual, that had gone on in these places demonstrates this.<sup>26</sup> While some performances and ceremonies that have been deprived of their usual settings can be held elsewhere temporarily, this may not be true for others. Certain rituals and celebrations, like those that were practised in the mausoleums, have to be held in specific places.

The conduct of hostilities is regulated exclusively by the law of armed conflict, the only body of law that prescribes in precise form the conduct in which belligerents are forbidden or permitted to engage under these circumstances. Therefore, it unquestionably constitutes a *lex specialis* in this area. The codification that this legal regime provides is built around four fundamental principles relating to the conduct of hostilities in armed conflict. These are the principles of military necessity, distinction, proportionality and precaution. The International Court of Justice (ICJ) has described them in its jurisprudence as “cardinal” principles.<sup>27</sup> These four principles will be discussed in turn below.

### The principle of military necessity

The principle of military necessity represents a customary norm contained in the 1868 Declaration of Saint Petersburg, according to which only such military force as the belligerents need to attain their objective is lawful.<sup>28</sup> It is therefore a restrictive

24 An armed conflict can consist of several phases: the hostilities phase, when fighting takes place between the adverse parties, followed by a phase in which one party falls into the power of the opposing party. This situation may stem from a military occupation, depending on the circumstances in each case. During this second phase, other provisions of the law of armed conflict govern situations of this type.

25 See UNESCO, “World Heritage Committee Calls for End to Destruction of Mali’s Heritage and Adopts Decision for Its Support”, 3 July 2012, available at: [www.unesco.org/new/en/media-services/single-view/news/world\\_heritage\\_committee\\_calls\\_for\\_end\\_to\\_destruction\\_of\\_malis\\_heritage\\_and\\_adopts\\_decision\\_for\\_its\\_support/#.VgPwpsuqHw](http://www.unesco.org/new/en/media-services/single-view/news/world_heritage_committee_calls_for_end_to_destruction_of_malis_heritage_and_adopts_decision_for_its_support/#.VgPwpsuqHw).

26 UN, above note 7.

27 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 78.

28 The Declaration recognizes “[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy” and “[t]hat this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men”; therefore, where the means

principle aimed at limiting the right of belligerents to conduct all-out war. First codified in a binding instrument of the law of armed conflict, namely the 1899 Regulations that would be revised in 1907, it was, along with the principle of humanity, one of the two principles out of which this body of law grew. However, the simultaneous inclusion in one set of regulations of both principles, those of military necessity and humanity, led to the introduction into positive law of a formal reservation to some of its prescriptions. In this way, the principle of military necessity, which began as a restrictive doctrine, then became more of a permissive exception. In a ruling issued in the wake of the Second World War, a British judge recalled in this regard that the requirement relating to the implementation of this principle involved military “necessity” and not military “advantage”.<sup>29</sup>

In the law governing the protection of cultural heritage in armed conflict, the exception of military necessity, which puts a strain on several provisions, does indeed mitigate the prohibition against committing an act of hostility during combat, regardless of the regime protecting the object in question. Moreover, in both the 1907 Hague Regulations and the 1954 Convention, the application of this legal reserve is left largely to the discretion of the belligerents. The attacks on cultural heritage during the conflict in the Balkans in the 1990s, such as the destruction of the Old Bridge in Mostar and the partial destruction of the Old City of Dubrovnik, demonstrated once more to the international community that various provisions of the 1954 Convention needed to be revised without further delay. A second protocol to that Convention, the 1999 Protocol, was adopted shortly after the end of this conflict. It now clarifies, among other questions, the implementation of the principle of military necessity by restating, in its Article 6, the rule contained in Article 52(2) of Additional Protocol I (AP I) concerning “military objectives”.<sup>30</sup> From now on, the invocation of this exception with regard to cultural property must comply with clearly defined conditions,<sup>31</sup> and the belligerents have considerably less discretion to assess its legitimacy.

## The principle of distinction

The second principle is that of distinction, whereby belligerents must at all times distinguish components of cultural heritage from other property. This principle is essential to preserving cultural heritage, as it prohibits the parties to the conflict both from committing acts of hostility against these components and from using

and methods envisaged prove “useless” with regard to the outcome of military operations, military necessity ceases to exist.

29 See United Kingdom, Military Court at Hamburg, *A. D. Case*, 19 December 1949, p. 522, cited in Éric David, *Principes du droit des conflits armés*, Bruylant, Brussels, 2002, p. 270.

30 AP I, Art. 52(2), stipulates: “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

31 1999 Protocol, Art. 6(a), provides that, in order for military necessity to be invoked lawfully, the property in question must have “by its function, been made into a military objective”, on the one hand, and there must be “no feasible alternative available to obtain a similar military advantage”, on the other.



them for military purposes. The initial prohibition against hostile acts has been clarified by incorporating the regulations in AP I into the 1999 Protocol, which confers greater protection on cultural heritage.<sup>32</sup> From now on, the obligation to distinguish is no longer limited solely to differentiating components of the heritage from other property; rather, for an act of hostility to be lawful, the property in question must also have been turned into a military objective.<sup>33</sup> The 1999 Protocol also dictates additional conditions in this regard;<sup>34</sup> in order to make a valid distinction, the parties to the conflict have various obligations, such as the obligation to verify, assess and take precautions, whose demands increase with the importance of the object in question.<sup>35</sup>

Secondly, the principle of distinction also prohibits belligerents from “using” components of cultural heritage for military purposes. Indeed, in many cases, such use harms the property in question and can constitute the precondition and principal motive for the subsequent launching of an attack.<sup>36</sup> This prohibition, which was absent from the 1907 Hague Regulations, was introduced in Article 4(1) of the 1954 Convention and further strengthened by the 1999 Protocol. In addition to the specific conditions laid down in this instrument with regard to the possibility of such property becoming a military objective, Article 6 of the 1999 Protocol also places the belligerents under additional obligations, such as the obligation for the attacking forces to ensure that there is “no feasible alternative available to obtain a similar military advantage”.<sup>37</sup>

The case of the Church of the Nativity in Bethlehem, Palestine, illustrates this, even though the 1999 Protocol was not formally applicable under the circumstances. Having been used in 2002 as a refuge by troops of the Palestine Liberation Organization during clashes with Israeli forces – hence for military purposes, thereby violating the principle of distinction – the church potentially became a military objective. An attack could therefore be considered by the Israeli army, if various other conditions were met. Among the specific conditions laid down in the

32 Under the regime of the 1907 Hague Regulations, the principle of distinction chiefly concerned the differentiation between “defended” and “undefended” cities and towns; Article 27 of the Regulations nonetheless provides that, even in the case of defended cities and towns, certain property – i.e., “buildings dedicated to religion, art, science, or charitable purposes” – must be spared “as far as possible”. Even in these circumstances, therefore, the principle of distinction must be observed.

33 The adoption of the concept of “military objective” in AP I was aimed at differentiating such objectives from civilian objects. Thus, even before an attack is launched, Article 52 of AP I requires belligerents, in accordance with the principle of distinction, to differentiate military objectives from civilian objects. Under this provision, therefore, civilian objects are, for the first time, expressly protected.

34 The 1999 Protocol specifies the conditions under which an object can be turned into a military objective by requiring that it be so transformed “by its function”; this requirement implies an immediate use of the object for military purposes, thereby enhancing its protection.

35 Depending on whether the object in question enjoys “general” protection, according to both the 1954 Convention and the 1999 Protocol, or “special” or “enhanced” protection, respectively regulated by Articles 8–11 of the 1954 Convention and Articles 10–14 of the 1999 Protocol.

36 Among the causes for an object’s transformation into a “military objective”, Article 52 of AP I expressly refers to the object being “used” in such a way as to “make an effective contribution to military action”.

37 1999 Protocol, Art. 6(a)(ii); Article 7 of this instrument also dictates various precautions that constitute means of implementing the obligation to comply with the principle of distinction.

1999 Protocol with which the Israeli forces would have had to comply, there is one that would have proved decisive in this context, namely that in these circumstances there would have been “no feasible alternative available to obtain a similar military advantage” other than attacking the building.<sup>38</sup> In fact, the decision to lay siege to the church rather than attack it – an approach that the Israelis adopted because of the major international pressure aroused by the situation – undoubtedly contributed to its preservation.<sup>39</sup>

## The principle of proportionality

The third principle, that of proportionality, is a general principle of law.<sup>40</sup> It signifies the search for a balance between military considerations and the concern with ensuring respect for fundamental values, a search that belligerents must constantly engage in as part of the conduct of hostilities. It reflects the very essence of the law of armed conflict, the purpose of which is to reconcile military necessity with the requirements of humanity. This principle was expressly enshrined in positive law only through Article 57(2)(a)(iii) and (b) of AP I, and also, in terms of instruments protecting cultural heritage, by Article 7(c) and (d)(ii) of the 1999 Protocol.

However, the observance of this principle by belligerents poses problems of implementation. In order to determine whether a contemplated military action is or is not lawful, a party to a conflict must evaluate a ratio between two hypothetical values related to a cultural property, i.e. the “direct and concrete advantage” resulting from attacking that property, on the one hand, and the “excessive damage” that it might be expected to cause, on the other hand. While battle-hardened soldiers are generally prepared to assess the first term of this ratio, the same is not so true of the second. Indeed, assessing the probable severity of the damage that may be caused to a cultural property is indeed particularly complex, for it requires a precise knowledge of the property in question, its quality and its value. These are subjective judgements, which differ, among other relevant factors, according to the degree of training of the forces present. Moreover, information concerning the object may be unavailable or incomplete, or exceptional components of the heritage may be found there, unbeknown to those whose task it is to make the proportionality assessment. Hence, judging whether the damage would be excessive is complicated, especially as the decision to attack must frequently be taken at a moment’s notice.

The case of the Temple of Ur in Iraq during the First Gulf War in 1991 illustrates the two terms of the ratio. Military officials had placed an Iraqi military aircraft next to the Temple, giving the aircraft a kind of protection against enemy

38 As the 1999 Protocol did not apply to this scenario, this analysis is hypothetical.

39 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 163.

40 ICRC Customary Law Study, above note 3, p. 47.

attack.<sup>41</sup> The aircraft could unquestionably have been defined as a military objective, but the military advantage anticipated from its destruction was negligible; it was completely isolated and far from any landing strip, and its destruction did not therefore offer any “concrete and direct military advantage” to the coalition forces. As for the “excessive damage” to the temple that destroying the aircraft could be expected to cause, it too was easily assessable. Destroying the aircraft would certainly have entailed major damage to the property, which was more than 2,000 years old. That the damage could be expected to be excessive was also easily recognizable: the loss of a well-known important cultural property, identified on military staff maps as requiring protection, was clearly excessive in relation to the slight military advantage to be gained from its destruction. The special nature of this situation, and the exceptional quality of the property, facilitated the coalition forces’ compliance with the principle of proportionality. However, this is not always the case; the “excessive damage” consideration is often not easily quantifiable, usually because the people who have to make such decisions lack the requisite knowledge of the enemy’s cultural heritage, especially when it comes to cultural property that is less well known.<sup>42</sup>

## The principle of precaution

The fourth and final principle, that of precaution, strengthens compliance with the principle of distinction and the principle of proportionality by clarifying many aspects of their implementation. The measures it prescribes are intended to limit and minimize the damage resulting from the conduct of hostilities. As is true of the principle of distinction, the conduct dictated by the obligation to respect this fourth principle varies according to whether it applies to the attacking or the defending party. With regard to cultural heritage, once again, the legal development embodied in AP I<sup>43</sup> and restated in the 1999 Protocol confers considerably greater protection on the components of this heritage.<sup>44</sup> Such protection is expressed through a series of measures that differ according to whether the heritage is or is not in the hands of a given party. These cover the need for belligerents to pay particular attention during hostilities to their choice of means and methods of warfare and the need for certain decisions to be taken by

41 See US Department of Defense, “Report to the Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War”, *International Legal Materials*, Vol. 31, 1992, p. 626, cited in R. O’Keefe, above note 6, p. 219.

42 The existence of a specific emblem whose purpose is to facilitate the identification of protected cultural property by belligerents in the event of an armed conflict is prescribed in particular by Articles 16 and 17 of the 1954 Convention. The use of this emblem, the blue shield, is compulsory only for cultural property that has been granted the status of “special” protection.

43 The prescriptions in Part IV, Section I of AP I, and specifically in its Articles 52, 57 and 58, are restated in Articles 6 and 7 of the 1999 Protocol concerning cultural property. The purpose of the latter two norms was to clarify Article 4 of the 1954 Convention, according to which the obligation to “respect” cultural property could be lifted with only one condition, that of military necessity.

44 AP I, Art. 57, and 1999 Protocol, Art. 7, respectively.

senior officers, and also specific actions such as deadlines to be observed and warnings to be given.

Mention can be made, for example, of two cities which experienced heavy bombing in different conflicts and eras, namely Isfahan, Iran, in 1985 and Dubrovnik, Croatia, in 1991. These two cases illustrate the obligations of the attacking party and the defending party, respectively, with regard to the principle of precaution.

During the Iran–Iraq War (1980–86), the Iraqi air force carried out a missile attack on Isfahan, where large petroleum refineries were situated. This severely damaged the Jameh (Friday) Mosque, one of the oldest mosques in the Islamic world. It appears that numerous measures dictated by the principle of precaution were not complied with at the time; for instance, there was no verification of the military objective targeted and no monitoring, either of the presence of a component of cultural heritage or of whether the means and methods deployed were appropriate in view of the situation at the site.<sup>45</sup> This attack could therefore be described as indiscriminate and thus unlawful.<sup>46</sup>

The attacks on the Old City of Dubrovnik during the Balkan conflict (1991–95) illustrate the obligations of the defending party. According to the Serbs, the attacks were justified by the alleged presence of a munitions depot on the outskirts of the city. Yet one of the obligations of parties holding components of cultural heritage is to move military objectives away from such property.<sup>47</sup> The proximity of military objectives to cultural property – formally proscribed by law – is indeed liable to dissuade the enemy forces from launching an attack against the military target. In the event of conflict, military equipment is frequently stored next to cultural objects so that the latter can serve as shields, as in the case of the Temple of Ur. In this case, during the years preceding the conflict, the competent authorities had scrupulously evacuated from the Old City of Dubrovnik any object or activity liable to be identified with a military objective.<sup>48</sup> The complete demilitarization that had been carried out there was aimed at preventing any attack, and no attack could therefore be justified on those grounds. The attack launched in December 1991 was thus clearly illegal, as the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded in the 2005 *Strugar* judgment.<sup>49</sup>

The different situations described above show that in the hostilities phase of a given conflict, the greatest risks to cultural heritage result most frequently from its use for military purposes and the battles to which this leads. They also result from choices of means and methods of warfare that are frequently unsuitable and which can often cause indiscriminate attacks against such property. Compliance by the armed forces

45 AP I, Art. 57(2)(a)(i) and (ii).

46 See UNESCO, “Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict”, The Hague, 1954, 1989 *Reports*, Doc. CC/MD-11, December 1989, notes 4–8.

47 AP I, Art. 58(b).

48 Clémentine Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik: La protection internationale des biens culturels*, Pedone, Paris, 2005, pp. 41, 47.

49 ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005, para. 295.

engaged in combat with the four principles defined above is therefore an essential firewall against such harm. While the current state of technological development of armaments enables certain corrections to be made to the risks associated with the choice of means and methods of warfare, the human factor is still fundamental to the protection of cultural heritage in the event of armed conflict, as shown in particular by the principle of proportionality. Indeed, the knowledge required to assess and differentiate the components of cultural heritage, particularly in order to comply with the principles of distinction and proportionality, results from the perception of duly trained individuals when they are faced with situations of this kind.

## **Tangible cultural heritage fallen into enemy hands**

Harm to cultural heritage when it is under the control of enemy forces occurs mainly in situations of military occupation and of non-international armed conflict. Such harm usually results from violations of the said forces' obligations to ensure the protection of both the people and the property that have fallen into their power. These obligations are based on a more diverse range of instruments than those governing the conduct of hostilities alone. The components of cultural heritage that are affected in these situations are then likely to increase in scope, and the intangible dimension of the heritage, which is sometimes given a lower priority during hostilities, proves to be particularly at risk when fallen into the enemy's power.

Indeed, a military occupation, or any other similar situation,<sup>50</sup> can, because it is frequently long-lasting, involve profound changes to the economic and social fabric and to the lifestyles and behaviour patterns of the societies concerned. These changes are liable to undermine the cultural identity of individuals. Moreover, internal armed conflicts may often have a religious, cultural or ethnic character which can contribute to endangering not only cultural property but also the cultural and spiritual expressions linked to it, as shown by the Malian example mentioned above. As the applicable legal instruments focus on one or another dimension of cultural heritage, the analysis of the protection they confer deals first with the tangible heritage and then with the intangible heritage. The premise that any component of cultural heritage is bidimensional nonetheless still stands, and is underscored in the discussion below. Across different armed conflicts, cultural heritage may suffer different types of harm, and three of these will be discussed here.

### **Harm resulting from destruction of components of cultural heritage**

The first type of harm is "destruction". It differs from the destruction resulting from combat during hostilities, in that it involves the demolition, dismantlement or

50 The "similar situations" referred to here are those in which the cultural heritage is in the hands of enemy forces, but no military occupation has been formally recognized; aside from contested cases of military occupation, these situations also include non-international armed conflicts, in which the parties having control over the territory are also in control of its cultural heritage.

abandonment – and subsequent deterioration due to lack of maintenance – of property. Examples include the demolition of the Mughrabi Quarter in East Jerusalem,<sup>51</sup> the Orthodox churches in ruins in the occupied part of Cyprus and, more recently, the wrecking of the Hatra archaeological vestiges in Iraq by forces of Islamic State Group. The law applicable to cultural heritage differs considerably depending on whether an international armed conflict, a military occupation or an internal conflict is involved. While the first two situations are largely regulated by the law of armed conflict, the same is not true for the third, particularly when the property concerned does not meet the definition of cultural property under the 1954 Convention. The instruments belonging to regimes other than the law of armed conflict – some of whose provisions nonetheless remain applicable in such situations – are then likely to constitute an additional source of legal protection that can sometimes prove essential.

In the event of military occupation, as in two of the examples above, the law of war expressly forbids “destruction”,<sup>52</sup> and the *lex specialis* concerning cultural property, namely Article 5 of the 1954 Convention, prescribes the occupying forces’ abstention requirements, thereby maintaining the primary jurisdiction of the national authorities assigned to protect cultural heritage. In so doing, Article 5 *a fortiori* also proscribes all types of harm to this heritage. In an internal conflict, however, it is only cultural property – as defined by the 1954 Convention, or that which represents what Article 16 of Additional Protocol II (AP II) describes as the “cultural and spiritual heritage of peoples” – that formally enjoys protection under the law of armed conflict.

Thus, in circumstances such as the civil war that tore Guatemala apart (1960–92), the destruction of the cultural heritage of the Rabinal Mayan communities in Guatemala – i.e., the masks, costumes and musical instruments essential to their celebrations of the Rabinal Achí<sup>53</sup> – was not formally prohibited by the applicable provisions of the law of armed conflict.<sup>54</sup> These objects were not considered by the military forces into whose power they had fallen as meeting the definitions of cultural property or the cultural and spiritual heritage of peoples under Article 1 of the 1954 Convention and Article 16 of AP II respectively. To confer a form of protection on those objects, therefore, it would have been necessary to resort to other norms, such as those concerning intangible cultural heritage in the 2003 Convention (had it been applicable at the time),

51 See UNESCO Executive Board, “Report of the UNESCO Technical Mission to the Old City of Jerusalem”, Doc. 176 EX/Special Plenary Meeting/INF.1, 12 March 2007.

52 Among the applicable provisions in this regard, mention can be made of Article 56 of the Hague Regulations and Article 52 of GC IV, as well as Article 5 of the 1954 Convention and Article 9 of the 1999 Protocol, specifically for “cultural property”.

53 The Rabinal Achí is a cultural and spiritual celebration held in Rabinal, Guatemala. It has been recognized by UNESCO as one of the Masterpieces of the Oral and Intangible Heritage of Humanity.

54 These objects were regarded as mere civilian property by the Guatemalan armed forces in whose power they were being held. Hence, their destruction was not prohibited by common Article 3, the only one of the norms of the four Geneva Conventions that applies to internal armed conflicts. Nor does AP II expressly forbid the destruction of such property; its Article 16 alone proscribes all attacks against the “cultural and spiritual heritage of peoples”, to which, in the eyes of the soldiers present, these objects did not belong.

those of the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), or the cultural rights provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>55</sup>

## Harm resulting from changes in the function of components of cultural heritage

The second type of harm involves a “change of function” of property or sites belonging to the cultural heritage. Examples include the Oued Hanin mosque near Ramallah,<sup>56</sup> which was turned into a synagogue; certain Angkor temples, which were used as warehouses under the Khmer Rouge regime;<sup>57</sup> and the Saint Anastasia Church in the village of Lapithos, Cyprus, which became a hotel.<sup>58</sup> There are no norms expressly prohibiting such actions, but such a prohibition can be inferred, implicitly or indirectly, from certain provisions of the law of armed conflict concerning situations of military occupation, such as those prohibiting the seizure or appropriation of cultural property.<sup>59</sup> It should be emphasized, furthermore, that this type of harm not only affects the property or sites so transformed. A change in function is also liable to destroy the intangible components of the heritage concerned, such as the knowledge and history linked to the property, which gives it meaning and value, and the events, ceremonies and rituals which take place in the property. Such components can indeed be affected or even destroyed by the changes made to an object or a site, as evidenced by the above examples of different places of worship.

Some episodes of the 2003 Iraq War offer an illustration of these types of harm to cultural heritage in its various dimensions, such as the conversion of the Babylon archaeological site into a military base in 2003, decided on by US forces and then continued by Polish forces up to 2004.<sup>60</sup> Such a change in function involved considerable damage, both tangible and intangible. The construction at this site of a military base with a helicopter landing pad not only led to the destruction of numerous vestiges dating back thousands of years, but also, because of massive additions of soil from elsewhere, caused intermingling of sands at the site that had not yet been studied. These sands contained countless pieces of information on past civilizations, which are now lost forever. The history that their study would have revealed was thus obliterated. The damage resulting from the

55 For example, ICESCR, Art. 15, which enshrines everyone’s cultural rights; and ICCPR, Art. 27, which protects the cultural rights of “ethnic, religious or linguistic minorities”.

56 M. Abou Khalaf, “Profanation des sites islamiques en Palestine”, in *Protection des sanctuaires chrétiens et islamiques en Palestine*, Islamic Educational, Scientific and Cultural Organization, 2000; Amira Samir, “Mosquées transformées en autre chose que leur objectif naturel”, *Al-Ahram Hebdo*, 17–23 March 2010.

57 Etienne Clément and Fabrice Quinio, “La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l’application de la Convention de La Haye de 1954”, *International Review of the Red Cross*, Vol. 86, No. 854, 2004, p. 395.

58 “Anastasia Resort Hotel (Lapithos)”, press release, Embassy of Cyprus in Paris, 21 June 2008.

59 Namely, 1907 Hague Regulations, Art. 56(2), and 1954 Hague Convention, Arts 4(3), 5.

60 Rory McCarthy and Maev Kennedy, “Babylon Wrecked by War”, *The Guardian*, 15 January 2005.



change in the function of the Babylon site by the occupying forces therefore caused severe harm to the Iraqi cultural heritage in its multiple dimensions.

The law of military occupation, as regulated by the 1907 Hague Regulations, the only instrument formally applicable in this instance,<sup>61</sup> unconditionally forbids such action, mainly through the prohibition against “seizure” and “destruction” of such property contained in Article 56 of the Regulations. The 1954 Convention, in imposing an abstention requirement on the occupying forces,<sup>62</sup> would also have prevented such action. But the 1999 Protocol, had it been applicable, would specifically have proscribed this type of conversion. Whereas the protection furnished by the preceding instruments was only implied, the 1999 Protocol now marks a clear breakthrough in the application of the law of armed conflict to such situations. In fact, its Article 9 expressly forbids, in paragraph (1)(b), “any archaeological excavation” and, in paragraph (1)(c),<sup>63</sup> the destruction of “cultural evidence”, thereby ensuring the preservation of cultural heritage in both its tangible and intangible dimensions.

## Harm related to the removal of components of cultural heritage

Cultural heritage can also be harmed by the “removal”, in various forms, of its components. This occurs frequently in armed conflict when the national authorities exercising oversight of cultural property are disorganized or even non-existent. Such circumstances encourage pillage, theft and all other forms of appropriation or diversion of property. These acts are usually followed by illicit transfers of movable cultural property from war-torn countries to third States, where it is sold, thereby fuelling a market in works of art that can be contrary to the applicable law, both international and national.

Unlike the other acts mentioned above, acts of pillage are prohibited by the law of war in all cases of armed conflict, regardless of the conflict phase in which they occur.<sup>64</sup> Furthermore, this prohibition applies to all property, not only to cultural property. The situation is different with regard to theft or any form of unlawful appropriation: such conduct is not proscribed by the law of armed conflict unless it involves components of cultural heritage duly recognized as such. Instruments such as the 1954 Convention and its two Protocols (1954 and 1999) regulate such actions, and the prohibition against this type of harm is laid down mainly in the

61 Neither the United Kingdom nor the United States were party to the 1954 Convention. The United States did not ratify it until 2008.

62 In addition to Article 5 of the 1954 Convention, which imposes on the occupying forces an abstention requirement, Article 4(1) prohibits “any use ... likely to expose [the objects] to destruction or damage”. This provision also applies in the event of military occupation.

63 1999 Protocol, Art. 9(1)(c), requiring in particular the condition of intent, could not have applied in this scenario.

64 In particular, Articles 28 and 47 of the 1907 Hague Regulations, Article 33(2) of GC IV and, in the event of internal armed conflict, Article 4(2)(g) of AP II; for cultural property alone, Article 4(3) of the 1954 Convention prohibits such acts in all armed conflicts, and Article 19(1) specifically in armed conflicts not of an international character. To this is added, in the event of any armed conflict, the Article 15(e) of the 1999 Protocol, criminalizing such acts and thus facilitating the implementation of the prohibition against pillage.

event of military occupation.<sup>65</sup> The law of armed conflict sometimes seems patchy in this regard, mainly in internal armed conflicts, when the property in question does not have the status of cultural property or is not recognized as such by enemy belligerents.

In some cases, it may be necessary to resort to other instruments under legal regimes other than the law of war. With regard to cultural property, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>66</sup> can sometimes fill certain gaps in the law of armed conflict, e.g. by providing additional mechanisms for the return or restitution of cultural property, especially when it is in private hands. Other gaps arise from the absence of norms applicable in non-international armed conflicts that would ensure the protection of property which does not have the status of cultural property.<sup>67</sup> Only norms of the law of armed conflict aimed at protecting such property, such as the provisions of the 1907 Hague Regulations governing international armed conflicts, which are applicable as customary rules, seem to be able to be invoked in the event of non-international armed conflict, based in particular on the jurisprudence of international judicial bodies, which enshrine their applicability in such situations as well.<sup>68</sup>

One illustration of the need to resort to different instruments in connection with the removal of cultural property is the case of the Dead Sea Scrolls. These objects, discovered in the 1950s in the Qumran Caves on the West Bank, were exhibited at the Palestine Archaeological Museum in East Jerusalem until 1967. They were then withdrawn from that museum and transferred to the Shrine of the Book in Israel.<sup>69</sup> This act was contrary to various norms of the law of armed conflict applicable in the event of military occupation, such as Article 56(1) of the 1907 Hague Regulations, which prohibits the “seizure” of property by the

65 Article 4(3) of the 1954 Convention expressly prohibits “theft”, “misappropriation ... of cultural property”, “acts of vandalism” and “requisitioning movable cultural property situated in the territory of another High Contracting Party”. The 1954 Protocol, which is applicable in the event of military occupation, prohibits the exportation of such property from an occupied territory, even if the latter is not party to the Protocol. The 1999 Protocol reiterates this prohibition in its Article 9(1)(a), proscribing “any illicit export, other removal or transfer of ownership of cultural property”.

66 International Institute for the Unification of Private Law (UNIDROIT), Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

67 It should be noted that, within the framework of the 1954 Convention, the designation of property as cultural property falls under the jurisdiction of the State holding the property. However, in armed conflicts, it is the enemy forces that are required to spare cultural property, especially in the context of hostilities. If these forces have not been previously notified by the holding State or by an authority such as UNESCO of the presence of protected cultural property, it is nevertheless their responsibility to identify such property. In the event of armed conflicts with a religious, ethnic or cultural character, such identification may prove difficult, and there is a risk that the property in question may then be considered mere civilian property. Even in such cases, the property nonetheless continues to enjoy the protection due to it under the law of armed conflict, which is applicable under both treaty law and customary law.

68 ICRC Customary Law Study, above note 3, Rules 38–39 and 7–10 recognize the prohibition (subject to certain conditions) against attacks and damage by belligerents on both civilian and cultural property as a rule of customary law, applicable in the event of both international and non-international armed conflict.

69 AFP, “UNESCO: Plainte jordanienne sur la propriété des manuscrits de la mer Morte”, press release, *Le Point.fr*, 11 January 2010.

occupying forces. In this instance, therefore, the withdrawal of the Scrolls was unlawful. These objects, which were indisputably cultural property, were covered by the 1954 Convention. Article 5 of the 1954 Convention imposes an abstention requirement on the occupying forces; seizure, in particular, is incompatible with this obligation. Paragraph 1 of Part I of the 1954 Protocol further requires such forces to prevent the exportation of property from occupied territories; hence, this obligation, too, was breached. Moreover, during an exhibition of the Scrolls in Canada in 2009, the Palestinian Authority and Jordan, citing paragraphs 2 and 3 of the 1954 Protocol, asked that they be sequestered and then returned. The request was not complied with. If the 1970 Convention or the 1995 UNIDROIT Convention had been applicable, the mechanisms they establish might have encouraged the return of this property.

## **Intangible cultural heritage fallen into enemy hands**

Intangible cultural heritage includes various forms of cultural expression and events, such as dance, music and theatre, as well as beliefs, rituals and know-how, which reflect the traits of a given group and convey its cultural and spiritual identity. Individuals give life to this heritage, using instruments, tools, costumes and other objects. The protection of this property has been addressed above; this section deals only with the protection of individuals. The primary protection that the law must provide is clearly to safeguard the life and physical well-being of every person, and the law of war prescribes such protection in all circumstances of armed conflict. Nevertheless, giving life to intangible cultural heritage requires the individuals concerned to fulfil many other functions, which must also be legally protected in order to safeguard their heritage. War harms people and disrupts the pattern of their lives, and this section focuses on three types of harm that show how an armed conflict can hinder the expression and preservation of intangible cultural heritage in such circumstances.

### **Harm to the realization of intangible cultural heritage**

Intangible cultural heritage comes to life, first and foremost, through its “realization” by interpreters or bearers. Such people may be actors, musicians or dancers; writers, painters or poets; or officiants, clergy or spiritual leaders. With regard to the latter, the law of armed conflict ensures the specific protection of “ministers of religion” and their function, regardless of the nature of the armed conflict.<sup>70</sup> The same cannot be said, however, for the functions of actors and creators. The protection that the law affords them breaks down into two stages: first the “knowledge” connected with the cultural expression is preserved, and then the actual “activity” is guaranteed. Yet the law of armed conflict proves deficient with regard to protecting the functions of actors and creators, and the necessary legal protection

70 For example, among other provisions, see GC I, Art. 24; AP I, Art. 15(5); AP II, Art. 9.

must therefore be sought in other bodies of law, such as international human rights law, in particular the ICCPR and ICESCR,<sup>71</sup> as well as the UNESCO cultural property conventions.<sup>72</sup>

The fate of the performers of *Sbek Thom*, a Cambodian shadow theatre decimated during the civil war that took place under the Khmer Rouge regime in the 1970s, can be mentioned as an example. Given the state of the law of armed conflict applicable at the time, only common Article 3 to the four Geneva Conventions could be invoked. While it conferred protection on the lives and physical well-being of the performers, none of its provisions could really be interpreted in such a way as to extend that protection to the functions of the performers, whether they were musicians, puppeteers or storytellers, as the *Sbek Thom* performers were. Hence, other legal bases had to be found to protect these functions, such as international human rights law, which provides broad protection for freedom of thought and expression and cultural rights in general. And among the conventions adopted under the auspices of UNESCO that enshrine the protection of cultural heritage, the 2003 Convention would probably have been able, had it been applicable at the time, to confer protection not only on individuals but also on the knowledge they embodied and the actions they performed to give life to the component of intangible cultural heritage that was the *Sbek Thom* theatre.

## Harm to participation in expressions of the intangible cultural heritage

The second function of intangible cultural heritage that armed conflict can also harm is the free “participation” of groups and communities in events related to this heritage. This implies, in particular, the ability to move, to get together and to have access to places where the heritage is expressed. The law of armed conflict prescribes various norms ensuring that the populations concerned have the right to maintain their daily lives and to have their “habits and customs” respected, but this applies mainly to situations of military occupation. In other contexts of armed conflict, such as internal armed conflicts, the law of armed conflict has gaps that must be filled by resorting to other applicable provisions, such as human rights norms.<sup>73</sup>

The difficulties that Palestinians face in gaining access to some of their spiritual ceremonies held in the Old City of Jerusalem, such as those that take place during Holy Week, are a clear illustration of the constraints that occupying

71 It should be recalled in this regard that there are only a few of the freedoms enshrined in international human rights law, such as freedom of thought, conscience and religion (ICCPR, Art. 18), from which no derogation is permissible in times of armed conflict; other rights, like freedom of expression (ICCPR, Art. 19), may be derogated from and/or restricted if the requisite conditions are met, including the emergence of situations similar to an armed conflict. Nevertheless, while the application of these provisions may be restricted, such restrictions cannot undermine these rights.

72 The purpose of these various instruments’ stipulations protecting cultural heritage and the human rights relating thereto is not only to prohibit constraints on the manifestations of that heritage, but also, in some cases, to require that they be supported to ensure the heritage’s continuation.

73 Such as freedom of movement (ICCPR, Art. 12) and freedom of assembly (ICCPR, Art. 21).

forces can place on the participation of the populations concerned in expressions of their cultural heritage. The law of armed conflict applicable in the event of military occupation or similar situations specifically prescribes these forces' obligation to respect people's freedom to practise both their religion<sup>74</sup> and their customs, which includes the celebration of feasts or rituals belonging to their own cultural and spiritual heritage.<sup>75</sup> Many norms protecting human rights that are in any event applicable as *lex generalis* guarantee the same rights with regard to participation in such celebrations. It should be recalled in this regard that the ICJ confirmed the applicability of such norms in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as the impossibility of any abrogation or limitation of these provisions in the case in question.<sup>76</sup>

### Harm to the transmission of intangible cultural heritage

A third type of harm liable to seriously affect intangible cultural heritage is the obstruction of its "transmission" to future generations. While the Angkor Wat temples have managed, despite the vicissitudes of history, to remain standing through the centuries, the same is not true, for example, of the Sbek Thom theatre, which because of its intangible character could survive only by being handed down from one generation to the next. It is in fact a living heritage, staged by some individuals so that others can absorb its content, become its repositories and hand it down in turn. Yet, in situations of armed conflict, the transmission of intangible cultural heritage, which necessarily involves encounters between qualified individuals and the populations concerned, as well as conditions conducive to the ability to teach, exhibit and produce, is frequently hindered. This is seen in family, educational, professional and other environments, for war usually sows chaos in everyone's life. The law of armed conflict has no specific answers for countering this type of harm; they must be sought mainly in its norms ensuring respect for family rights and people's daily lives, customs and beliefs, or for their means and ways of producing their art and craftwork.

The provisions of the law of armed conflict that are the most specific in this regard belong to the law of military occupation. The Sufi masters' transmission of religious practices to their pupils during the Soviet occupation of Afghanistan in the 1980s benefited from the protection afforded by various norms of this body of law

74 The obligation to respect "religious convictions and practice" is set out in Article 46 of the 1907 Hague Regulations. For its part, Article 27(1) of GC IV provides that persons in the power of enemy military forces "are entitled ... to respect for ... their religious convictions and practices".

75 Various provisions of the law of armed conflict lay down the obligation to respect the daily lives of people who are in the power of enemy military forces. Among them, Article 27(1) of GC IV requires the military forces in whose power enemy civilian populations are held to respect their "manners and customs". Article 43 of the 1907 Hague Regulations further requires that the "laws in force" in a militarily occupied country also be respected, and Article 46(1) states that "family honour and rights [and] the lives of persons" shall be respected.

76 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras 108, 112.

that were applicable in this instance. The situation would have been different in other circumstances of armed conflict, such as internal armed conflicts, where it must be acknowledged that there are certain gaps in the legal instruments belonging to the law of armed conflict that might otherwise ensure the effective transmission of intangible cultural heritage. The gradual disappearance of the ceremonies conducted by shamans among the indigenous communities on Mindanao Island in the Philippines can serve as one example of this. Having been denied access to the forest because of the armed conflict, the shamans could no longer go there to search for the plants they needed for their rituals. The transmission of this knowledge to succeeding generations was deeply impaired as a result. Only the application of other provisions under different legal regimes could have safeguarded these components of Mindanao's intangible cultural heritage. Such provisions include, in addition to certain human rights norms applicable in these circumstances, those whose aim is to preserve intangible cultural heritage, such as the provisions of the 2003 Convention, as well as some norms of the 1989 ILO Convention No. 169 and possibly of the instruments whose elaboration is currently in progress at WIPO and which are designed to protect traditional cultural expressions, traditional knowledge and genetic resources.<sup>77</sup>

## Conclusion

Recent armed conflicts – like the one in Mali, in which the attack on the Timbuktu mausoleums cannot be separated from the impediment to the ceremonies that were held there – illustrate in particular the multidimensional character of any component of cultural heritage, although the predominance of the tangible or intangible dimension varies from one case to the next. The protection that the applicable law in such situations must provide to cultural heritage cannot, therefore, be limited to one or another of its components. The law of armed conflict only partially meets this requirement through the system of the 1954 Convention and its two Protocols, which aim mainly to ensure the preservation of cultural property; the protection of intangible cultural heritage that these instruments prescribe is at best implicit or indirect. The law of armed conflict, the *lex specialis* in these circumstances, is not, however, deficient in this regard. Various norms of the 1949 Geneva Conventions and their Additional Protocols confer protection on individuals as regards both their physical well-being and their human dignity, and in particular, their cultural and spiritual identity; in so doing, they too help ensure the preservation of the “living” cultural heritage of the populations concerned, which is constituted by their intangible cultural heritage.

<sup>77</sup> The binding norms protecting intangible cultural heritage, along with various rights related to the cultural identity of indigenous peoples, appear in the 2003 Convention and in ILO Convention No. 169. As for WIPO, deliberations are now taking place within that body on the possible adoption of regulations concerning traditional knowledge, traditional cultural expressions and genetic resources.

Having said that, these norms are not always precise enough to afford the best protection to the intangible cultural heritage at risk. Indeed, the protection that they offer is sometimes only inferred, and it also often derives from a broad interpretation of the provisions in question, one based mainly on their aim, which is to ensure respect for human dignity. Furthermore, while several of these provisions can be invoked in the event of military occupation, the same is not true of internal armed conflicts, in which frequently only common Article 3 and the relevant provisions of the law of armed conflict (viewed as customary norms) are applicable. Resorting to the protection that other legal regimes, such as international human rights law and the UNESCO cultural conventions – various norms of which are *lex generalis* – might offer in these circumstances, and invoking the applicability of these norms, seems therefore to be both possible and necessary.<sup>78</sup> Indeed, their application, complementing that of the law of armed conflict, would ensure the effective protection of cultural heritage, both tangible and intangible, in any armed conflict situation.

Such an approach is, moreover, currently being discussed at UNESCO, in the Committee for the Protection of Cultural Property in the Event of Armed Conflict, where various States have supported the implementation of synergies between the 1954 Convention and other UNESCO instruments, particularly the 2003 Convention,<sup>79</sup> that aim to ensure the protection of cultural heritage.<sup>80</sup> This consensus, which can also be found in other bodies such as the Committee for the Safeguarding of Intangible Cultural Heritage,<sup>81</sup> reflects the international community's recognition of the existence of a law protecting cultural heritage, both tangible and intangible. Nevertheless, the accession by a large number of States to these legal instruments does not negate the challenge of applying them, and the current destruction of the Syrian and Iraqi cultural heritage is an issue to which there has been no response up to now.

78 The applicability of such norms in the event of armed conflict is extensively analyzed and demonstrated in the author's research work. See Christiane Johannot-Gradis, *Le patrimoine culturel matériel et immatériel: Quelle protection en cas de conflit armé?*, Schulthess, Geneva, 2013, pp. 149–184.

79 During its 10th session (10–11 December 2015), the Committee for the Protection of Cultural Property in the Event of Armed Conflict adopted Decision 10.COM 4 para. 6, whereby the Committee expressly invites its Bureau to develop synergies with the 2003 Convention, parallel to those with the 1970 and 1972 Conventions.

80 See UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, "Development of Synergies with Other Relevant UNESCO Normative Instruments and Programmes and Strengthening Partnerships", Doc. CLT-14/9.COM/CONF.203/7, 18–19 December 2014.

81 The Committee for the Safeguarding of Intangible Cultural Heritage, at its 10th session (Windhoek, 30 November–4 December 2015), emphasized the necessity of promoting the application of the 2003 Convention "including in situations of armed conflict": Decision 10 COM/15a, Annex para. 5.





# The danger of “new norms” and the continuing relevance of IHL in the post-9/11 era

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## Abstract

*In the post-9/11 era, the label “asymmetric wars” has often been used to question the relevance of certain aspects of international humanitarian law (IHL); to push for redefining the combatant/civilian distinction; and to try to reverse accepted norms such as the bans on torture and assassination. In this piece, we focused on legal and policy discussions in the United States and Israel because they better illustrate the dynamics of State-led “norm entrepreneurship”, or the attempt to propose opposing or modified norms as a revision of IHL. We argue that although these developments are to be taken seriously, they have not weakened the normative power of IHL or made it passé. On the contrary, they have made it more relevant than ever. IHL is not just a complex (and increasingly sophisticated) branch of law detached from reality. Rather, it is the embodiment of widely shared principles of morality and ethics, and stands as a normative “guardian” against processes of moral disengagement that make torture and the acceptance of civilian deaths more palatable.*

**Keywords:** IHL, asymmetric war, norm entrepreneurs, targeted killing, torture, terrorism, moral disengagement.

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## Introduction

There is broad agreement in military, political and academic circles that after 9/11 and the launch of the “global war on terror”, the way we think about war has changed, as perhaps has the way many wars are fought. The label “asymmetric war” has often been used to capture a variety of armed conflicts.<sup>1</sup> Asymmetric wars are clearly not a new reality; small, low-intensity civil wars, and non-State armed groups battling much more powerful enemies, have a long history. Yet, after 9/11 the label of “asymmetric war” has come to represent an influential perspective and has impacted on how we think about wars, potentially even testing international humanitarian law (IHL).

Traditionally, the concept of “asymmetric war” refers to the attempt of a much weaker party to offset an overwhelmingly more powerful enemy by using non-conventional tactics. The use of certain tactics that have been commonly linked to the concept of “asymmetric war”, such as deliberately targeting non-combatants or hiding behind them, has been said to violate the moral and legal principles of distinction between civilians and combatants and to put the weaker party at a moral disadvantage.<sup>2</sup> These tactics, however, are chosen because they make it difficult for the stronger party to fight effectively while adhering strictly to the rules of IHL. They strategically create a certain balance in conflicts that would otherwise be grossly unequal, allowing for no clear sign of success on either side.<sup>3</sup>

These features of “asymmetric war”, thus understood, have been particularly discussed in relation to post-9/11 US-led interventions in the context of the “global war on terror,” as well as the Israeli–Palestinian conflict. They have had important consequences. Over the past two decades, a significant part of the law and policy debate in both Israel and the United States has focused on the need for better protection from weaker but “existentially threatening” enemies, who are seemingly unfettered by legal and moral constraints. This debate has been marked by questions regarding the relevance of IHL in contemporary warfare – in some cases, by a push towards redefining the combatant/civilian distinction, and in others, by an attempt to reverse accepted norms such as the prohibitions against torture and assassination.

In this piece, we argue that although these developments are to be taken seriously, they have not weakened the normative power of IHL, or made it passé. On the contrary, they have made it more relevant than ever. In the past two decades, the acceptance of IHL, as well as the acceptance of human rights, has been making significant progress both internationally and domestically.<sup>4</sup> When States attempt to adapt or circumvent international law (as in the case of the

1 For a quick survey, see Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassinations, and Blackmail in an Age of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2010.

2 *Ibid.*, p. 14; For a discussion of the ethics of asymmetric tactics from a consequentialist and deontological point of view, see David Rodin, “Ethics of Asymmetric War”, in Richard Sorabji and David Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions*, Ashgate, Aldershot, 2006.

3 M. L. Gross, above note 1, p. 19; D. Rodin, above note 2, pp. 155–156.

4 Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge Studies in International Relations, No. 126, Cambridge University Press, Cambridge, 2013.

“unlawful enemy combatant” theory), or justify violations thereof (as in the case of torture), they act as “norm entrepreneurs”.<sup>5</sup> It is in this analytical context that we focus on the United States and Israel, as they offer the opportunity to illustrate the dynamics of norm entrepreneurship in the current historical period. Not only do they discount legal and normative stances, but they also propose opposing or modified norms. Yet, in both the case of torture and the unlawful enemy combatant theory, a new “norm internalization” failed to take place. Instead, what took place was an enormous effort to conceal violations and to reframe or justify them when they were exposed, coupled with expressions of remorse. This has in fact served to reaffirm the status of IHL and other international norms. The following sections examine the examples of torture and targeted killings in turn to demonstrate this point.

## Torture

In the aftermath of 9/11, the Bush administration attempted to legitimize the practice of torture during interrogation, as well as detention without trial, by using the counter-norm of anti-terrorism.<sup>6</sup> A shocked and grieving American public accepted the state of emergency, which was presented as a necessary counterterrorism measure. Even some prominent human rights advocates contemplated chipping away at the norm and law against torture, for torture was a “lesser evil”. This was presented as a pragmatic balancing act: “A clear prohibition [against torture] in the name of human dignity comes up against a utilitarian case also grounded in the dignity claim, namely the protection of innocent lives.”<sup>7</sup>

The initial consensus on counterterrorism, shared by US allies, at first lowered the risk of internal and international contestation. The Bush administration showed a remarkable lack of vulnerability to potential moral and political pressure against its violation of both IHL and domestic law. It created its own legal category of “unlawful enemy combatants”, applicable to Al Qaeda members and the Taliban, giving the illusion that they were completely outside the law.<sup>8</sup> It also crafted its own vocabulary. In the discourse of US defence and

5 We borrow this term from constructivism, to identify actors that propose normative changes. See Kathryn Sikkink and Martha Finnemore, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No.4, 1998.

6 Kathryn Sikkink, “The United States and Torture: Does the Spiral Model Work?”, in T. Risse, S. C. Ropp and K. Sikkink (eds), above note 4.

7 Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, Princeton, NJ, 2005, pp. 140 ff.

8 The administration correctly argued that these combatants are not entitled to receive POW status and the full protections of the Third Geneva Convention; see William J. Haynes II, “Enemy Combatants”, *Council on Foreign Relations*, 12 December 2002, available at: [www.cfr.org/international-law/enemy-combatants/p5312](http://www.cfr.org/international-law/enemy-combatants/p5312) (all internet references were accessed in December 2015). However, it failed to add that they are protected by the Fourth Convention and the relevant provisions of Additional Protocol I. For a detailed legal analysis on this point, see Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003.

political circles, practices such as slamming a detainee's head against the wall or choking him with water until he was nearly drowning – all clear violations of both the Convention against Torture<sup>9</sup> and the US criminal code<sup>10</sup> – were dubbed “enhanced interrogation techniques”<sup>11</sup> and thus reinterpreted as permissible.

On torture, the Bush administration did not just turn a deaf ear to criticism; it built a legal defence of it. As Kathryn Sikkink argues, this “*actively undermined* the prescriptive status of the norm, ... a fact that profoundly influenced US behavior as well as behavior in other countries”.<sup>12</sup> A series of legal memos, many of them written by Deputy Assistant Attorney General John Yoo, created the “golden shield” requested by the CIA to protect the administration from potential prosecution for war crimes. These memos rejected the application of the Geneva Conventions to detainees from the war in Afghanistan by re-labelling them as enemy combatants,<sup>13</sup> provided a new definition of torture to help US interrogators avoid prosecution,<sup>14</sup> and explicitly justified the very aggressive techniques approved by Secretary of Defence Donald Rumsfeld.<sup>15</sup>

9 See Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Part 1, Art. 1, available at: <http://hrweb.org/legal/cat.html>.

10 See United States Code Title 18, para. 2340(1) and (2), available at: <http://uscode.house.gov/>.

11 A definition of “enhanced interrogation techniques” was given by then CIA director George Tenet in “Guidelines on Interrogations Conducted Pursuant to the [redacted]”, which he issued on 28 January 2003, available at: [www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc12.pdf](http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc12.pdf). In this document, these are techniques that “*do* [emphasis added] incorporate significant physical or psychological pressure beyond standard techniques”. These guidelines followed the 2 December 2002 Department of Defense memo summarizing approved forms of interrogation, available at: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.12.02.pdf>. This memo talked instead of “counter-resistance techniques”. However, it is the term “enhanced interrogation techniques” that has become more popular in public discourse as an alternative, euphemistic way of talking about torture: this is discussed in more detail later in the article.

12 K. Sikkink, above note 6, p. 156. While there has not been any official disclosure of the number and identity of foreign countries involved in the US government's secret detention and extraordinary rendition programs, an Open Society Justice Initiative report mentions the participation of fifty-four governments in such operations. See Open Society Justice Initiative, “Foreign Government Participation in CIA Secret Detention and Extraordinary Rendition”, in *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, Open Society Foundations, New York, 2013, available at: [www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf](http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf). High-profile court cases have exposed individual countries. See European Court of Human Rights (ECtHR), “Secret Detention Sites”, Factsheet, July 2014, available at: [www.echr.coe.int/documents/fs\\_secret\\_detention\\_eng.pdf](http://www.echr.coe.int/documents/fs_secret_detention_eng.pdf); and ECtHR, *Nashiri v. Poland*, Case No. 28761/11, Judgment, 24 July 2014. Among the many serious consequences for US society is the role played by psychologists and the conduct of their professional association, the American Psychological Association, in the CIA's torture programme. A comprehensive discussion of this issue can be found in Steven Reisner, “CIA on the Couch: Why There Would Have Been No Torture without Psychologists”, *Slate*, 12 December 2014.

13 John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees”, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Washington, DC, 9 January 2002, available at: [www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf](http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf).

14 Jay S. Bybee, Assistant Attorney General, “Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A”, Memorandum for Alberto R. Gonzales, Counsel to the President, Washington, DC, 1 August 2002, available at: [news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf](http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf).

15 Donald Rumsfeld, Secretary of Defence, “Subject: Counter-Resistance Techniques in the War on Terrorism (S)”, Memorandum for The Commander, US Southern Command, Washington, DC, 16 April 2003, available at: [www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf](http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf).

Yet, a powerful criticism was mounted by scholars,<sup>16</sup> international organizations<sup>17</sup> and domestic human rights groups,<sup>18</sup> the media,<sup>19</sup> local legislatures,<sup>20</sup> members of the Supreme Court, and individuals within the very institutions that formulated and often secretly implemented the Bush administration’s illegal policies. Some of these individuals and groups managed to bring these policies to light and if not end them, at least curb their excesses.<sup>21</sup> The Supreme Court ruled that the Geneva Conventions applied to Al Qaeda, and

- 16 Apart from a variety of public statement made by legal scholars, we mention two important criticisms of torture: Georgetown professor of philosophy and law David Luban made his arguments against torture in “Liberalism, Torture and the Ticking Bomb”, *Virginia Law Review*, Vol. 91, No. 6, 2005; and Philippe Sands, professor of international law at University College London, discussed the issue in *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values*, Palgrave Macmillan, New York, 2008.
- 17 Two confidential reports by the International Committee of the Red Cross (ICRC), *The Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (published in February 2004) and *The Treatment of Fourteen “High Value Detainees” in CIA Custody* (published on February 2007), have been published without the consent of the organization. See “Report by the ICRC on the Coalition Forces’ Treatment of Persons held in Iraq”, News Release 04/35, 7 May 2004, available at: [www.icrc.org/eng/resources/documents/misc/5yrl67.htm](http://www.icrc.org/eng/resources/documents/misc/5yrl67.htm).
- 18 To mention a few: the Center for Constitutional Rights has been consistently engaged in representing victims of torture at Guantanamo and various rendition sites as well as prosecuting US officials in the Bush administration in foreign courts (see: <https://ccrjustice.org/home/what-we-do/issues/torture-war-crimes-militarism>); Human Rights Watch sought to investigate detention facilities in Afghanistan as early as 2002 and continues to monitor, report, denounce abuses and lobby for accountability (for the most recent position, see Laura Pitter, Senior National Security Counsel, “Delusion of Justice on CIA Torture”, *The Hill*, 14 December 2015); and the American Civil Liberties Union (ACLU) has been particularly effective in its use of the Freedom of Information Act (FOIA) to gain access to documents and in its efforts to build coalitions with other human rights groups in order to ask for accountability.
- 19 Scathing reports by media that used the term “torture” to describe how prisoners were interrogated in detention facilities at several sites – from Afghanistan to Iraq and Cuba, to name the largest – began to appear as early as December 2002. Dana Priest, Barton Gellman and Rajiv Chandrasekaran at the *Washington Post*, and Tim Golden and Carlotta Gall at the *New York Times*, investigated the issue. An international “scandal” on the abusive treatment of detainees in the Iraqi prison of Abu Ghraib exploded when CBS’s *60 Minutes* aired graphic photos on 28 April 2004, and a few days later the *New Yorker* published Seymour Hersh’s report on the same story. Jane Mayer at the *New Yorker* and Mark Danner at the *New York Review of Books* have contributed important investigations. At least two documentaries have investigated detention abuses: the 2007 Academy Award winner *Taxi to the Dark Side*, by Alex Gibney, and the 2008 film *Standard Operating Procedures*, by Errol Morris, a recipient of the Silver Bear at the Berlin International Film Festival.
- 20 In her excoriating indictment of the Bush administration’s policies after 9/11, Elaine Scarry also provides an interesting overview of the perhaps little-known resistance of towns and cities against the Patriot Act. See Elaine Scarry, *Rule of Law, Misrule of Men*, Boston Review Books, MIT Press, Cambridge, MA, 2010.
- 21 This is not the place to list all the internal dissent, and we will only give a few examples. It is understood that even among CIA interrogators there were critics of “enhanced interrogation techniques”, for example John Kiriakou, the officer who first publicly revealed the practice of waterboarding and was later sentenced for leaking classified information. At the Defense Department, General Counsel of the Navy Alberto Mora led a campaign opposing the use of coercive interrogation techniques at Guantanamo Bay. For these efforts, he was honoured in 2006 with the John F. Kennedy Profile in Courage Award. Now at Harvard, Mora is leading a three-year research programme investigating the foreign policy and military consequences of the United States’ use of torture following 9/11. To mention one of the high-ranking US Army officers who refused to abide by the Bush administration policies on interrogation, General Martin Dempsey, current joint chief of staff, prohibited maltreatment of prisoners while commanding the 1st Armored Division in Iraq from 2003 to 2004. See Douglas A. Pryer, *The Fight for the High Ground: The U.S. Army and Interrogation during Operation Iraqi Freedom I, May 2003–April 2004*, CGSC Foundation Press, Fort Leavenworth, KS, 2009, p. 68.

that *habeas corpus* applied to Guantanamo's detainees.<sup>22</sup> The 2014 report on the CIA's interrogation and detention programme, authored by the US Senate Select Committee on Intelligence,<sup>23</sup> further exposed the extent of the use of torture, causing domestic and international outrage. The report discovered that the torture programme was "amateurish";<sup>24</sup> that the CIA probably knew it was practicing torture,<sup>25</sup> despite denial; and that it misrepresented the extent to which torture practices had been effective<sup>26</sup> in providing useful information, with the consequence that even the justification based on the "lesser evil" argument began to crumble.<sup>27</sup> That torture still remains an issue of contention is confirmed by the strong challenge to the conclusion of the Senate study expressed both in the Republican minority opinion and the comment drafted by the CIA.<sup>28</sup>

Torture and rendition have been publicly discussed and criticized, and effectively abandoned since 2008.<sup>29</sup> From fairly different perspectives and reaching different conclusions, Jack Goldsmith and Kathryn Sikkink largely agree that the reverse in the original practice started under the Bush administration was at least in part due to pressure from elements within the administration (both Bush's and, later, Obama's). These elements had internalized the norm against torture and considered it an unacceptable practice.<sup>30</sup> At the time

22 See US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507 (2004); and *Boumediene v. Bush*, 553 US 723 (2008). The Court held that the US Constitution also guaranteed the right of *habeas corpus* in Guantanamo. In *Hamdan v. Rumsfeld*, 548 US 557 (2006), the Court ruled that the military commissions set up in Guantanamo violated both the US Uniform Code of Military Justice and the four Geneva Conventions of 1949, and mentioned in this regard Article 3 common to the four Geneva Conventions.

23 The complete study, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 3 December 2014, is available at: [www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf](http://www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf).

24 *Ibid.* Limiting the following references below to the "Findings" section of an otherwise monumental document, see Finding 11, on the unpreparedness of the CIA to operate its detention and interrogation programme six months before being granted the authority; Finding 12, on the deep flaws of the programme, including the lack of training and experience among interrogators; and Finding 15, on the lack of a comprehensive and accurate account of the number of detainees.

25 *Ibid.* In Findings 3 and 4, the Senate Committee concluded that interrogation techniques and detention conditions had been much harsher than was represented by the CIA. Knowing it was overstepping the legal boundaries set up by the administration memos, the Agency asked for a "necessity defense" to be included in the memos in order to "avoid prosecution of U.S. officials who tortured to obtain information that saved many lives" (Finding 5, emphasis added).

26 *Ibid.* According to its own review of the programme, the CIA knew it had not been effective (Finding 1) but still claimed that it had been (Finding 2).

27 For a short assessment of the US Senate Select Committee on Intelligence's study, the executive summary of which alone is 500 pages long, see Mark Danner and Hugh Eakin, "The CIA: The Devastating Indictment", *New York Review of Books*, 5 February 2015.

28 Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program: Minority Views*, 20 June 2014, available at: <https://repositories.lib.utexas.edu/handle/2152/28132>; CIA, *Comments on the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Former Detention and Interrogation Program*, 27 June 2013, available at: [www.cia.gov/library/reports/CIA%20June2013\\_Response\\_to\\_the\\_SSCI\\_Study\\_on\\_the\\_Former\\_Detention\\_and\\_Interrogation\\_Program.pdf](http://www.cia.gov/library/reports/CIA%20June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf).

29 Executive Order 13941, "Ensuring Lawful Interrogations", 22 January 2009, available at: [www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

30 Goldsmith, who served in the Office of Legal Counsel in the Bush administration, argues that while President Obama was initially critical of Bush counterterrorism policies, he embraced them later because the pushback from the courts, the media and human rights groups had already altered and legitimated them by the time



of writing, the official position of the Obama administration with regard to torture is very clear:

[A]ll U.S. personnel are legally prohibited under international and domestic law from engaging in torture or cruel, inhuman, or degrading treatment or punishment at all times, and in all places. There are no gaps, either in the legal prohibitions against these acts by U.S. personnel, or in the United States’ commitment to the values enshrined in the Convention, and the United States pledges to continue working with our partners in the international community toward the achievement of the Convention’s ultimate objective: a world without torture.<sup>31</sup>

Yet, the Obama administration has thus far decided not to prosecute anyone who either approved or practiced torture back in 2008, and has given no signs of changing this attitude in light of the 2014 Senate Study on the CIA’s detention and interrogation programmes. President Obama is facing direct criticism for this choice, which fails to satisfy the obligations that the United States has under Article 7 of the Convention against Torture. The United Nations (UN) High Commissioner for Human Rights, as well as the Special Rapporteur on counterterrorism and human rights, have demanded accountability for such egregious violations.<sup>32</sup>

These democratic dynamics of domestic questioning by a divided public and international pressure by human rights advocates and other principled actors have provided strong counter-forces to the United States in its effort to claim a “state of exception”, or in its desire to position its actions “at the limit between politics and the law”.<sup>33</sup>

## Targeted killings

Since 2000, in the aftermath of the Second Intifada, Israel has fully acknowledged the routine use of targeted killings of suspected terrorists<sup>34</sup> – a practice that has been

he took office. Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, W. W. Norton, New York, 2012. According to Sikkink, it was the Obama administration, more sensitive to domestic and international pressure, that took steps to reverse Bush’s policy on torture and other policies early on, but it decided not to “pursue accountability for past violations, and some of its initial efforts, for example, to close the detention center at Guantánamo, have failed”. K. Sikkink, above note 6, p. 162.

31 See “Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Committee Against Torture”, November 2014, available at: [www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a](http://www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a).

32 Office of the High Commissioner for Human Rights, “Zeid: Landmark U.S. and Brazil Reports Highlight Need to Eradicate Torture on 30th Anniversary of Convention”, 10 December 2014, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15405&LangID=E-sthash.LjaLVZeE](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15405&LangID=E-sthash.LjaLVZeE); and United Nations Human Rights Office of the High Commissioner for Human Rights, *Feinstein Report: UN Expert Calls for Prosecution of CIA Officers and Other US Government Officials*, Geneva, 9 December 2014, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15397&LangID=E).

33 Mark Danner, “After September 11: Our State of Exception”, *New York Review of Books*, 13 October 2011, available at: [www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/](http://www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/).

34 Gabriella Blum and Philip Heymann, “Law and Policy of Targeted Killing”, *Harvard National Security Journal*, Vol. 1, 27 June 2010, p. 151.

facilitated by the availability of unmanned aerial vehicles (better known as drones), weapons that allow great accuracy and no risk for their operators. The United States has been using the same means in the post-9/11 period to hunt Al Qaeda and other suspected terrorists, although these missions are conducted by the CIA in a covert manner and have become public mostly through leaks to the media.<sup>35</sup> Initiated by President Bush, targeted killings have escalated during the Obama administration, according to a close observer of counterterrorism policies, perhaps in an effort to compensate for the abandonment of practices such as torture and rendition.<sup>36</sup>

Despite public approval<sup>37</sup> in both Israel and the United States for the use of drones, the practice of targeted killing is the object of considerable criticism, including questions about its precision and challenges to its legality, which we discuss below. It is important to notice here that despite its association to the norm-breaking practice of assassination,<sup>38</sup> targeted killing is, instead, often presented as a positive evolution from (indiscriminate) bombing; as if the technological precision in striking a legitimate target also included the normative and legal distinction that helps to protect non-combatants.<sup>39</sup>

Since World War II, be it because of concerns with reputation or legitimacy, or the aversion to the huge devastation caused by bombing both at home and internationally, the United States has focused on decreasing the number of civilian casualties during bombing (collateral damage) by paying more attention to proportionality and improving military technology.<sup>40</sup> The high point of this goal was the 1999 US-led NATO military intervention in Kosovo and Serbia. On that occasion, legal advisers played an unprecedented role in reviewing military targets and ensuring the protection of civilians, even though no particular

35 For the latest comprehensive treatment of this, see Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army and a War at the Ends of the Earth*, Penguin Books, New York, 2013.

36 *Ibid.*, pp. 218–219. For President Obama's legacy on rights and counterterrorism, see Kenneth Roth, Human Rights Watch, "Obama & Counterterror: The Ignored Record", *New York Review of Books*, 5 February 2015.

37 According to a March 2013 Gallup Poll, 65% of Americans approve of the use of drones: Gallup, "In U.S. 65% Support Drone Attacks on Terrorists Abroad", 25 March 2013, available at: [www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx](http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx). On activism, see Medea Benjamin, *Drone Warfare: Killing by Remote Control*, Verso Books, London, 2013, pp. 165–200. Among the recently published US books on drones, see Brian Glyn Williams, *Predators: The CIA's Drone War on al Qaeda*, Potomac Books, Washington, DC, 2013; Lloyd C. Gardner, *Killing Machine: The American Presidency in the Age of Drone Warfare*, The New Press, New York, 2013; Shahzad Bashir and Robert D. Crews (eds), *Under the Drones: Modern Lives in the Afghanistan-Pakistan Borderlands*, Harvard University Press, Cambridge, MA, 2012; M. Shane Riza, *Killing Without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict*, Potomac Books, Washington, DC, 2013; P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Books, New York, 2009; Sarah Kreps and John Kaag, *Drone Warfare*, Polity Press, Cambridge, 2014.

38 Editor's note: the normative framework governing the legality of such practices can differ and the consideration as to whether or not the incident in question is norm-breaking, in addition to factual considerations, would heavily depend on whether it is judged from the standpoint of international law or from the perspective of relevant domestic law.

39 S. Kreps and J. Kaag, above note 37, pp. 133–135; Michael L. Gross, "Murder, Self-Defense, or Execution? The Dilemma of Assassination", in M. L. Gross, above note 1, pp. 100–121.

40 Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, Cornell University Press, Ithaca, NY, and London, 2001, pp. 147–179.

innovation in the law had required this level of reviewing.<sup>41</sup> It was the real-time media scrutiny of the war, or what was then known as the “CNN Factor”, that made “distant suffering”<sup>42</sup> observable and awakened a universal moral repugnance to killing of civilians not only by ethnic cleansers, but also by their NATO rescuers.<sup>43</sup>

Military lawyers, known as JAGs (members of the Judge Advocate General’s Corps), are an increasingly strong presence in all branches of the US Army. They advise on the fundamental IHL principles – proportionality, distinction and precautions in attack – in a time of great technological precision.<sup>44</sup> Yet, despite the strong focus on accuracy and legality that experts provide, progress in the technology of bombing creates new moral and political hazards. For example, conducting a safer, remote war in which the vaunted “surgical precision” is partly illusory might make assassinations more frequent and less concerned with the principles of distinction and proportionality. The key questions that absorb legal and ethical debates on targeted killing are how accurate the killing really is and who is targeted.

The first question, or the possibility that despite precision, civilian casualties might be much greater than expected and/or publicly known, is a concern of human rights groups as well as the military, who object on consequentialist grounds.<sup>45</sup> As the Obama administration has admitted to small or no collateral damage, but without divulging any figures,<sup>46</sup> reports by the New American Foundation and estimates from the London-based Bureau of Investigative Journalism indicate that the ratio of civilian to militant casualties oscillates from 12% to 26%.<sup>47</sup> Besides the moral outrage over the high number of civilian victims, there is a growing awareness among critics that civilian deaths have become a new recruitment tool for terrorist groups and generate hostility among the affected populations.<sup>48</sup>

41 For Wesley Clark’s comments on the force of moral constraint, see *ibid.*, p. 168.

42 On “distant suffering”, see Luc Boltanski, *Distant Suffering: Morality, Media and Politics*, Cambridge University Press, Cambridge, 1999.

43 W. Thomas, above note 40, pp. 171–172.

44 A good discussion of the role of “booted lawyers” can be found in Ariel Colonomos, *The Gamble of War: Is It Possible to Justify Preventive War?*, Palgrave Macmillan, London, 2013, pp. 112–116 (first published as *Le pari de la Guerre: Guerre Préventive, Guerre Juste?*, Denoël, Paris, 2009).

45 See Michael Doyle, “The Costs and Consequences of Drone Warfare”, *International Affairs*, Vol. 89, No. 1, 2013, pp. 1–29. Minimizing civilian casualties is stated as a priority in the 2006 US Army *Counterinsurgency Field Manual*, as success is gained by protecting the populace, not the military. See also statements by US generals such as that of Stanley McChrystal, following civilians death in Afghanistan due to an airstrike, available at: [www.mcclatchydc.com/2010/02/22/87352/us-concedes-air-strike-killed.html](http://www.mcclatchydc.com/2010/02/22/87352/us-concedes-air-strike-killed.html).

46 See the widely publicized June 2011 comment by John Brennan, currently CIA director but then Obama’s top adviser on counterterrorism, that there had been no collateral civilian deaths in the drone programme: Scott Shane, “CIA is Disputed on Civilian Toll in Drone Strike”, *New York Times*, 11 August 2011, available at: [www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all&_r=0).

47 International Human Rights and Conflict Resolution Clinic, Stanford Law School, and Global Justice Clinic, NYU School of Law, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, September 2012, available at: <http://chrhg.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

48 Michael J. Boyle, “Is the US Drone War Effective?”, *Current History: A Journal of Contemporary World Affairs*, Vol. 113, No. 762, 2014.

The second question, or who is targeted, catalyzes the debate on extrajudicial killings, and this is related to a legal debate on whether the applicable law is IHL or human rights law.<sup>49</sup> In the context of war, killing a combatant is lawful, but if the law of war does not apply, killing a criminal is lawful only when there are no other means (e.g. arrest) to stop an imminent threat of death or serious injury. Further, as the distinction between civilians and combatants becomes increasingly blurred, the identification of a lawful target itself is subject to disagreement.

Some of these questions have also been debated in the courts; in fact, the term “lawfare” is nowhere more relevant than in the litigation on targeted killings.<sup>50</sup> In the United States, the American Civil Liberties Union (ACLU) has played a major role in challenging the administration’s policies. It has focused on the legality of targeting US citizens abroad and on a strategy of Freedom of Information Act (FOIA) requests, searching for more transparency.<sup>51</sup> While most of this litigation has been dismissed thanks to the US government’s insistence on secrecy for national security reasons, it has brought to light the administration’s legal rationale for targeted killings.<sup>52</sup>

The Israeli Supreme Court has engaged more directly with the legality of targeted killings. It has concluded that the practice is not unlawful, but needs justification and proportionality,<sup>53</sup> and has addressed the thorny question: if the

49 David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, *European Journal of International Law*, Vol. 16, No. 2, 2005, available at: [www.ejil.org/pdfs/16/2/292.pdf](http://www.ejil.org/pdfs/16/2/292.pdf).

50 Major General Charles J. Dunlap Jr., US Air Force, “Lawfare Today: A Perspective”, *Yale Journal of International Affairs*, Winter 2008, available at: [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship).

51 In April 2014 a federal district court in Washington, DC dismissed the case of *Al-Aulaqi v. Panetta* (US District Court, District of Columbia, *Al-Aulaqi v. Panetta*, Civil Action No. 12-1192 (RMC), 2004), in which the ACLU and the Center for Constitutional Rights charged that the 2011 killing of three US citizens by drones in Yemen violated the Constitution’s fundamental guarantee of due process of law. In the same month, the US Court of Appeals for the Second Circuit reversed a January 2013 district court decision, and held that the government must disclose a memo relating the targeting killing of a US citizen. In March 2013, a federal appeals court reversed a previous ruling and held that the CIA could no longer deny its interest in the government’s targeted killing programme, given the numerous public statements made by CIA and administration officials. In the FOIA request on civilian deaths at Al-Majalah, the ACLU and the Center for Constitutional Rights requested information about a December 2009 US missile strike in Yemen that killed dozens of civilians, including at least 21 children. The US government has yet to release basic information about the strike. In 2010, a federal court dismissed the challenge to the government’s authority to carry out targeted killings of US citizens located far from any armed conflict zone (*Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52–54 (DDC 2010)).

52 David J. Barron, Acting Assistant Attorney General, Office of the Assistant Attorney General, “Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi”, Memorandum for The Attorney General, Washington, DC, 16 July 2010, available at: [www.aclu.org/sites/default/files/assets/2014-06-23\\_barron-memorandum.pdf](http://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf). The release was preceded by a leak to the media of a white paper derived from the memo: NBC News, *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, available at: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

53 Supreme Court of Israel, *Public Committee Against Torture in Israel (PCATI) et al. v. The Government of Israel et al.*, HCJ 769/02, 11 December 2005, available at: [www.haguejusticeportal.net/Docs/NLP/Israel/Targetted\\_Killings\\_Supreme\\_Court\\_13-12-2006.pdf](http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf).

target has a shifting identity as an occasional participant in terrorist activities, is he a combatant or a civilian? The Court has rejected the idea that there is a third category beside civilians and combatants, namely the individuals who can be lawfully killed as members of a terrorist group but who do not enjoy protection as combatants. It has concluded that “as far as existing law goes, the data before us are not sufficient to recognize this third category”,<sup>54</sup> and that “an unlawful combatant is not a combatant, rather a ‘civilian’”. However, he is a civilian who is not protected from attack “as long as he is taking a direct part in the hostilities”.<sup>55</sup>

Why is this important? “Booted normativists”, as Ariel Colonomos dubbed the ethicist who developed an ethics of war for the Israel Defense Forces,<sup>56</sup> have attempted to reinterpret the civilian/combatant distinction, which is the bedrock of IHL. Although they acknowledge working in the context of the conflict between Israel and various Palestinian organizations and individuals,<sup>57</sup> they suggest that their proposed new distinctions, conceptions and norms introduced “for the case of fighting terror, can and should be adapted for the case of ordinary international armed conflicts”<sup>58</sup> – that is, they “are intended to be universal”.<sup>59</sup> These individuals propose a detailed classification of participation in conflict, with nine categories of direct participation, from bearing weapons or explosives to making the general operational decisions, and five categories of indirect participation, including funding terrorism and praising suicide bombers.<sup>60</sup> Michael Walzer dismisses such categories as neither necessary nor useful.<sup>61</sup> More importantly, he objects to the claim that “when the state does not have effective control of the vicinity, it does not have to shoulder responsibility for the fact that the persons who are involved in terror operate in the vicinity of persons who are not”.<sup>62</sup>

The Israeli Supreme Court is clear about the status of a civilian who has directly participated in combat: if he previously took “a direct part in hostilities once, or sporadically, but [has since] detached himself from them (entirely, or for a long period), he is not to be harmed”.<sup>63</sup> The same individual loses his civilian protection, the Court continues, if engaged in the “revolving door” phenomenon, alternating periods of activities with periods of rest. Between these two

54 *Ibid.*, “D. A Third Category: Unlawful Combatants?”, para. 28.

55 *Ibid.*, “C. Civilians”, para. 26.

56 A. Colonomos, above note 44.

57 Asa Kasher and Amos Yadlin, “Military Ethics of Fighting Terror: An Israeli Perspective”, *Journal of Military Ethics*, Vol. 4, No. 1, 2005; Asa Kasher and Amos Yadlin, “Assassination and Preventive Killing”, *SAIS Review of International Affairs*, Vol. 25, No. 1, 2005.

58 A. Kasher and A. Yadlin, “Military Ethics of Fighting Terror”, above note 57, p. 28.

59 *Ibid.*, p. 4.

60 *Ibid.*, pp. 13–14.

61 Michael Walzer, “Response”, *Journal of Military Ethics*, Vol. 6, No. 2, 2007.

62 This formulation is in A. Kasher and A. Yadlin, “Military Ethics of Fighting Terror”, above note 57, p. 18. Writing with Avishai Margalit, Michael Walzer strongly criticizes the elevation of the lives of soldiers above those of enemy civilians in a non-occupied territory, for the ethical implications that it has. See Avishai Margalit and Michael Walzer, “Israel: Civilians and Combatants”, *New York Review of Books*, 14 May 2009.

63 From the Court opinion, see *PCATI*, above note 53, “F. The Third Part: ‘For Such Time’”, para. 40.

possibilities, there are the “gray” cases, which require careful examination of “each and every case”. The guidelines for such examination are precise: good and verified information on the identity of the target is needed; the burden of proof of this information rests on the army; a civilian taking direct part in hostility cannot be attacked if less harmful means can be employed; if an attack could not be avoided, it should be thoroughly and independently investigated afterwards; and any collateral damage “must withstand the proportionality test”.<sup>64</sup> This Court opinion also states that “customary international law has not yet crystallized”<sup>65</sup> on the definition of the direct participation of a civilian in combat. Yet, an interpretive guidance by the International Committee of the Red Cross (ICRC) provides a functional approach to what is permissible under the harsh conditions of war: “civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities”.<sup>66</sup>

The debate on distinction and proportionality on targeted killings confirms the existence of disagreement, but also the salience of IHL. A recent report by Ben Emmerson, the UN Special Rapporteur on counterterrorism and human rights, has concluded that both the United States and Israel must make a greater effort to comply with IHL and human rights law when using drones.<sup>67</sup> Specifically, he calls upon States to investigate any plausible indication of civilian casualties and to be more transparent and accountable in the use of such practices. More fundamentally, Emmerson’s report asks for better clarification of the thorny legal issues raised by the use of drones such as a definition of self-defence and prevention, as well as the “global war on terror” and the notion of direct participation in hostilities.<sup>68</sup> These and other points are made in the common letter sent to the UN Human Rights Council by an array of major human rights groups, which testifies to the increasing international pressure on the issue.<sup>69</sup>

64 *Ibid.*

65 *Ibid.*

66 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, Part I, ICRC Recommendation VII, available at: [www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf).

67 See Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Third Annual Report, UN Human Rights Council, 28 February 2014, available at: <http://justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>.

68 *Ibid.*, “D. Achieving a Consensus on the Applicable Legal Principles”, para. 71.

69 Joint letter by eleven human rights and civil rights organizations: American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice and Global Justice Clinic (NYU School of Law), Center for Civilians in Conflict, Center for Constitutional Rights, Human Rights Clinic (Columbia Law School), Human Rights First, Human Rights Watch, International Commission of Jurists and Open Society Foundations, *Joint Letter to the UN Human Rights Council on Targeted Killings and the Use of Armed Drones*, 18 September 2014, available at: [www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones](http://www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones).



## Moral disengagement and morality shifting

The brief review presented above on the issues of torture and targeted killings clearly suggests that in spite of attempts to do so by norm entrepreneurs, there is no need and little support for relaxing IHL to fit the “new” reality of wars. States, particularly those engaged in asymmetric conflicts as described above, will continue to try to push the boundaries of IHL. From our perspective, and to the extent that such attempts are made through the courts and legislative bodies, they are not inherently problematic. They foster debate on these complicated issues and contribute to reaffirming existing norms and the rule of law.

What we see as highly problematic and potentially very damaging is the political and social discourse about armed conflict, because of the consequences it has on the image of the enemy. In 2004, former CIA contractor David Passarro was charged, and later convicted, for the death of Abdul Wali, an Afghan who had been arrested on suspicion of involvement in an attack on a US base. Accounts by witnesses revealed that Passarro used torture and hit Wali repeatedly, causing his death. Passarro himself admits to some of the techniques he used during his interrogation of Wali. Importantly for our concerns here, this is how he justified his actions:

After 9/11, President Bush got on national television, and said, not only are we going to go after the terrorists, but we’re going to go after those that harbor the terrorists, and we will do so under any or with any means necessary. In other words, all the rules and regulations no longer applied.<sup>70</sup>

Needless to say, Passarro’s interpretation of President Bush’s words is at best anecdotal evidence of the influence that political discourse can have on the men and women who end up dealing with suspects and prisoners and making decisions on who to kill as well as the cost of targeted killings in terms of civilian deaths. A host of evidence from the social sciences, however, tells us that words matter when it comes to discussing a conflict and depicting an enemy. Those involved in torture do not call it torture.<sup>71</sup> They call it “enhanced interrogation techniques”, a euphemism that has its own acronym, “EITs”. The death of civilians in drone attacks becomes acceptable “collateral damage”. Psychologists call such renaming “euphemistic labelling” and consider it a moral disengagement strategy: a psychological process that helps people construe a version of reality in which their own actions are not reprehensible.<sup>72</sup>

70 PBS, “Convicted Former CIA Contractor Speaks Out about Prisoner Interrogation”, 20 April 2015, at: [www.pbs.org/newshour/bb/convicted-former-cia-contractor-speaks-prisoner-interrogation/](http://www.pbs.org/newshour/bb/convicted-former-cia-contractor-speaks-prisoner-interrogation/).

71 David Bromwich, “Euphemism and American Violence”, *New York Review of Books*, 3 April 2008, available at: [www.nybooks.com/articles/archives/2008/apr/03/euphemism-and-american-violence/?page=1](http://www.nybooks.com/articles/archives/2008/apr/03/euphemism-and-american-violence/?page=1).

72 Albert Bandura, “Selective Activation and Disengagement of Moral Control”, *Journal of Social Issues*, Vol. 46, No. 1, 1990; Emanuele Castano and Roger Giner-Sorolla, “Not Quite Human: Infrhumanization in Response to Collective Responsibility for Intergroup Killing”, *Journal of Personality and Social Psychology*, Vol. 90, No. 5, 2006, available at: [www.newschool.edu/uploadedFiles/Faculty/NSSR/Castano\\_GinerSorolla2006\\_1.pdf](http://www.newschool.edu/uploadedFiles/Faculty/NSSR/Castano_GinerSorolla2006_1.pdf).



Next to such explicit strategies, other psychological mechanisms exist that are more subtle. Dehumanization and demonization of the enemy are a case in point.<sup>73</sup> Primo Levi, a survivor of Nazi concentration camps, observes that the degradation imposed on the prisoners was not a matter of cruelty, but a *necessary* process: for those operating the gas chambers not to be overwhelmed by distress, victims had to be reduced to subhuman objects beforehand.<sup>74</sup> Dehumanization facilitates violence, and in turn, violence enhances the dehumanization of the victim. Research shows that when people are reminded of atrocities committed by their own fellow countrymen, either 200 years prior or in current times, they defend against the threat to their psychological equanimity by depicting the victim group as a whole in a dehumanized manner.<sup>75</sup> Americans who read about the torture and killing of detainees in an Iraqi prison will dehumanize Iraqis more, and will perceive the suffering inflicted on the family of those tortured and killed as lesser, when they read that the perpetrators were US soldiers as opposed to Iraqi or Australian soldiers. Research also shows that the use of these moral disengagement strategies results in lessened demands for both retributive and restorative justice.<sup>76</sup>

Evidence stemming from social psychological studies such as these goes even further. When we have to make a decision about, say, whether or not to torture or kill a person, or the acceptable degree of civilian deaths, we rely on the law, of course, but also on a sense of what is right and wrong, on our understanding of what is morally appropriate. Morality, however, is best understood in the plural. Theorizing and research in the social sciences reveals at least four different systems or foundations of morality, which applied to the same specific event would result in very different decisions, all allegedly defensible as moral. The best-developed model of morality in psychological theory is Haidt's social intuitionist model, in which four moral foundations are identified: harm, fairness, loyalty and authority.<sup>77</sup> Of direct relevance for our purposes here, experiments tested whether being confronted with scenarios of IHL violations carried out by one's in-group (e.g. US soldiers for American participants), as

73 Roger Giner-Sorolla, Bernhard Leidner and Emanuele Castano, "Dehumanization, Demonization, and Morality Shifting: Paths to Moral Certainty in Extremist Violence", in Michael A. Hogg and Danielle L. Blaylock (eds), *Extremism and the Psychology of Uncertainty*, Wiley-Blackwell, London, 2011.

74 Primo Levi, *Se questo è un uomo*, Einaudi, Torino, 1981.

75 E. Castano and R. Giner-Sorolla, above note 72.

76 Bernhard Leidner, Emanuele Castano, Erica Zaiser and Roger Giner-Sorolla, "Ingroup Glorification, Moral Disengagement, and Justice in the Context of Collective Violence", *Personality and Social Psychology Bulletin*, Vol. 36, No. 8, 2010.

77 Jonathan Haidt and Jesse Graham, "When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize", *Social Justice Research*, Vol. 20, No. 1, 2007, p. 98. Harm morals demand that people do not harm others, and fairness commands people to treat others fairly and justly. In-group/loyalty morals reflect a tendency to see something as moral to the extent that it benefits one's in-group. The moral foundation of authority consists of values related to subordination, such as duty, obedience and conformity to in-group norms, while that of purity, shaped by the psychology of disgust and contamination, concerns itself with defending purity from possible contaminants – e.g., maintaining the purity of the "Aryan race". Clearly, depending on which of these moral foundations is applied to decide upon the morality of a specific behaviour, the behaviour can appear as moral or immoral.

opposed to an out-group (e.g. Australian soldiers), leads to a shift in the accessibility of these morality principles.<sup>78</sup> When violations of IHL were carried out by in-group members, the principles of harm and fairness receded to the background of the participants’ minds, and were thus less likely to be used to judge the morality of the events. On the contrary, the principles of loyalty and authority became more accessible, and were thus more likely to guide participants’ interpretation of the events.<sup>79</sup> Practically, this means that when we ponder the morality of an action taking place either in the past or in the future, our decision depends upon the moral principle at work; individuals will use the principles that are more likely to lead to an outcome that allows them to maintain psychological equanimity.<sup>80</sup> As an example, when deciding whether or not to torture a prisoner, if the harm/fairness principle is very salient/accessible in the potential torturer’s mind, it is likely that the torture will not happen. If, on the contrary, the situation is all about in-group loyalty and/or authority, or purity (in cases where the prisoner belongs to a despised group that has been the target of denigration and is considered the “cancer” of the society), then torture will seem like the moral thing to do – especially if it is purported as a means to save one’s fellow in-group members.

Most soldiers in regular armed forces know that targeting non-combatants, raping women, and destroying churches, mosques or other safe havens are criminal acts. They learn this in training, but they also know it well before becoming soldiers. Those who violate these norms do so because they undergo a process of radicalization and essentialization of the enemy: “they” are all combatants, wild and subhuman creatures (“irreconcilables”, in the terms of the US manual of counter-insurgency);<sup>81</sup> women of the enemy population become a threat to individual and collective safety; religious sites/safe havens become shields of the enemy. The law still applies to non-combatants, women and religious and safe sites, but these are re-labelled and re-categorized in an attempt to exempt them from the protection of the law. The research discussed above shows how these mechanisms often operate automatically and unconsciously. In many cases, however, they are purposely utilized in order to prepare public opinion for, and to justify, violations of IHL.

78 “Accessibility” is a psychological term that refers to the extent to which a certain concept is available for use in a person’s mind, at the forefront of their perception and cognitive processes. The more accessible a concept is, the more likely it is that it will affect our interpretation of the word around us, and thus our decision-making and behaviour.

79 Bernhard Leidner and Emanuele Castano, “Morality Shifting in the Context of Intergroup Violence”, *European Journal of Social Psychology*, Vol. 42, No. 1, 2012, available at: <http://onlinelibrary.wiley.com/doi/10.1002/ejsp.846/abstract>.

80 This is particularly true among “high glorifiers” – that is, those individuals who tend to see their group, in this case the United States, in superior, aggrandizing terms.

81 *Multi-National Force – Iraq Commander’s Counterinsurgency Guidance*, 15 July 2008, p. 1, available at: [www.rs.nato.int/images/stories/File/COMISAF/15%20July%202008%20MNF%20COIN%20Guidance.pdf](http://www.rs.nato.int/images/stories/File/COMISAF/15%20July%202008%20MNF%20COIN%20Guidance.pdf).

## Conclusion

Scholars and practitioners widely acknowledge that over the last couple of decades, the nature of conflict has changed, and especially since 9/11 and the advent of “asymmetric wars”. There is, however, disagreement with regard to the implications that this evolution has or should have for IHL. Is IHL obsolete?

In this article, we focused on a series of specific practices by “norm entrepreneurs” that have attempted to challenge or redefine some of the pillars of IHL, such as the ban against torture and the distinction and protection of civilians. While it is certainly true that these States have attempted to make a case for the necessity and even the legality of torture programmes and targeted killings, it is our opinion that, by and large, they have failed. Various actors in the international community, from States to international organizations and NGOs, have condemned these practices as immoral and opened questions about their legality. A strong critique and demands for accountability have come from domestic actors including the media, legislative bodies and significant parts of the population.

IHL and other bodies of international law are not simply legal obligations that States have committed to, and that make those States accountable. First, their strength and reach are propelled by an emerging synthesis of the laws of war, human rights and international justice – what legal scholar Ruti Teitel calls “humanity law”.<sup>82</sup> Second, they have the power to influence behaviour by prompting public debates, providing mobilizing agendas for civil society actors and individuals, and suggesting monitoring activities.<sup>83</sup> This is why, when States in which the rule of law is prevalent violate IHL with apparent impunity, they never or rarely manage, for all their power, to remain unchallenged. They cannot insulate themselves from the aspiration and pressure of the many domestic and international actors, and, perhaps most importantly, of their own citizenry, because they want to maintain legitimacy in the broader international political and legal order. Whether they follow a “logic of appropriateness”, which presumes the influence of norms in suggesting patterns of appropriate behaviour, or are merely sensitive to concerns for their “reputation”, the outcome is the same.

IHL and other bodies of international law, which operate in a complex moral and political environment, stand as normative “guardians” against processes of moral disengagement that make torture and the acceptance of civilian deaths more palatable. Teitel writes:

What the waging of the “war on terror” has made abundantly clear is that humanity law need not run out – that, indeed, there is no category of persons on the globe that is not covered or protected. Indeed, by turning to the overlapping regimes, coverage can be ensured.<sup>84</sup>

82 Ruti Teitel, *Humanity's Law*, Oxford University Press, Oxford, 2011.

83 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, Cambridge, 2009.

84 R. Teitel, above note 82, p. 133.

It is the law that provides crucial support in the struggle to define the humanity of the enemy, because when the enemy is not only dehumanized but also demonized,<sup>85</sup> and the conflict is framed in terms of loyalty, authority or purity, violations of IHL can become moral imperatives. Upholding IHL is not separable from monitoring types of political discourse and social climates that lead to processes of moral disengagement and demonization of the enemy.

All in all, we contend that IHL is as widely supported as it was a few decades ago, if not more so. And the reason is that while at times it may appear so, IHL is not just the complex creation of sophisticated jurists who have little knowledge of the reality of conflict. Rather, it is the embodiment of widely shared principles of morality and ethics, and as such it should and does keep its ground, irrespective of momentary lapses in judgement and opportunistic thinking.

85 R. Giner-Sorolla, B. Leidner and E. Castano, above note 73.



## OPINION NOTE

# Reconciling the rules of international humanitarian law with the rules of European human rights law

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### Abstract

*States party to the European Convention for the Protection of Human Rights and Fundamental Freedoms that engage in military operations abroad face an increased risk to be held responsible for violations of the Convention, given the relatively recent case law adopted by the European Court of Human Rights. This article examines some of the issues raised by the concurrent applicability of international humanitarian law and European human rights law. It also seeks to identify ways to reconcile these two different, but not incompatible, branches of international law.*

**Keywords:** European Convention on Human Rights, European Court of Human Rights, European human rights law, extraterritorial armed conflicts, international humanitarian law, right to life, administrative detention.

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\* The opinions expressed herein are those of the authors and do not necessarily reflect the views of the French Ministry of Defence.

## Introduction

In judgements delivered over the last few years, the European Court of Human Rights (ECtHR or the Court) has ruled that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is applicable to the actions of the armed forces of States Parties engaged in military operations conducted outside their territory, which are also governed by international humanitarian law (IHL).<sup>1</sup> This extension of the scope of application of the Convention has considerably increased the potential number of complaints that could be brought against Council of Europe member States, as evidenced by the recent cases brought before the Court against the Netherlands and the United Kingdom<sup>2</sup> and also before national judges,<sup>3</sup> the primary enforcers of the Convention.<sup>4</sup> Yet while there is no question that the increasingly important place given to European human rights law (EHRL) in times of extraterritorial armed conflict extends the protections afforded to individuals, a too strict application of its rules could impose unrealistic obligations on States in this type of situation. In the long term, this could make them less inclined to comply with the law, and possibly with more basic rules of other branches of law, in particular with rules of IHL.<sup>5</sup>

The Court does, however, seem to be aware of this risk. When interpreting the Convention “in light of” the relevant rules of the law of international armed conflicts (IACs) relating to internment or administrative detention – even though it involved a “judicial rewriting of an express provision of the Convention”<sup>6</sup> – the Court effectively reconciled it with the rules of IHL, which it readily recognized as playing “an indispensable and universally accepted role in mitigating the

1 See European Court of Human Rights (ECtHR), *Issa and Others v. Turkey*, Application no. 31821/96, 16 November 2004; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, 2 March 2010; ECtHR, *Al-Skeini v. the United Kingdom* (Grand Chamber), Application no. 55721/07, 7 July 2011; ECtHR, *Al-Jedda v. the United Kingdom* (Grand Chamber), Application no. 27021/08, 7 July 2011; ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), Application no. 47708/08, 20 November 2014.

2 See ECtHR, *Jaloud v. the Netherlands*, above note 1; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, above note 1; ECtHR, *Al-Skeini v. the United Kingdom*, above note 1; ECtHR, *Al-Jedda v. the United Kingdom*, above note 1.

3 High Court of Justice of England and Wales (EWHC), *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB), 2 May 2014; Court of Appeal of England and Wales (EWCA), *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, [2015] EWCA Civ 843.

4 See Frédéric Sudre, *Droit européen et international des droits de l'homme*, PUF, Paris, 11th ed., 2012, pp. 209–210.

5 Françoise Hampson, “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law”, *International Law Studies*, Vol. 87, No. 1, 2011, p. 192: “If some rules are perceived to be unrealistic, this is likely to lessen respect for those rules that can be applied in practice”.

6 Nicolas Hervieu, “La jurisprudence européenne sur les opérations militaires à l'épreuve du feu”, *La Revue des droits de l'homme, Actualités Droits Libertés*, 20 October 2014, para. 52, available at: <http://revdh.revues.org/890> (all internet references were accessed in September 2016); see ECtHR, *Hassan v. the United Kingdom*, (Grand Chamber), Application no. 29750/09, 16 September 2014.



savagery and inhumanity of armed conflict”.<sup>7</sup> Articles 2 and 5 of the ECHR, guaranteeing the right to life and the right to liberty and security, respectively, can apply to situations also governed by the rules of IHL, which are less precise and sometimes depart from the rules conceived to apply in peacetime.

Interpreting the Convention in the light of IHL, although not part of its core mandate,<sup>8</sup> appears to be the only way for the Court to deal with the issues raised by the concurrent applicability of these two branches of international law – IHL and EHRL – which, while not incompatible, are nonetheless different.

## Reconciling the obligations arising under Article 2 (right to life) with the relevant rules of IHL

Without a comprehensive interpretation, obligation of States party to the ECHR to protect the life of all persons within their jurisdiction<sup>9</sup> – possibly including their military personnel – could pave the way for an excessive judicialization of warfare, through negligence claims. A strict interpretation of Article 2<sup>10</sup> could also lead the Court to consider a military action undertaken in the course of an armed conflict in the light of the criterion of “absolute necessity”, in spite of the fact that this is a test specific to EHRL, primarily applicable to law enforcement operations.

7 ECtHR, *Loizidou v. Turkey* (Merits), Reports 1996-VI, 18 December 1996, para. 43; ECtHR, *Varnava and Others v. Turkey* (Grand Chamber), Application no. 16064/90, 18 September 2009, para. 185; ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), above note 6, 16 September 2014, para. 102.

8 Article 19 of the ECHR provides that the Court is responsible for ensuring “the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”. It does not therefore *a priori* have jurisdiction to monitor compliance with IHL. However, in some cases brought before the Court, the respondent States themselves referred to the applicability of IHL in their argument. Furthermore, drawing on the case law made by other international judges, the Court has developed techniques that allow it to try cases relating to human rights violations committed during armed conflicts and therefore to address the interplay between EHRL and IHL. See Olivia Martelly, “L’évolution historique de la jurisprudence de la Cour européenne des droits de l’homme face aux conflits armés”, in *Les interactions entre le droit international humanitaire et le droit international des droits de l’homme*, Proceedings of the conference organized by the Department of Legal Affairs of the French Ministry of Defence on 22 October 2014, pp. 16–30.

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953), (ECHR), Art. 2. Article 2 of the ECHR establishes, first and foremost, a negative obligation binding on States and their agents not to take the lives of individuals. In its case law, the Court has also drawn two positive obligations from this provision, one substantive and the other procedural: States must protect the lives of individuals within their jurisdiction (substantive positive obligation) and they must also conduct an effective, independent and impartial investigation when a person is killed (procedural obligation), regardless of whether a State or individuals are responsible for the act in question.

10 Article 2 of the ECHR provides, in substance, that no one may be deprived of their life intentionally, except when it results from the use of force that is absolutely necessary to: (a) ensure the defence of any person from unlawful violence; (b) effect a lawful arrest or prevent the escape of a person lawfully detained; or (c) take lawful action to quell a riot or insurrection. See ECtHR, *McCann and Others v. the United Kingdom* (Grand Chamber), 27 September 1995, para. 161; ECtHR, *Ergi v. Turkey*, 28 July 1998, Application no. 23818/94, para. 82; ECtHR, *Jaloud v. the Netherlands*, (Grand Chamber), above note 1, 20 November 2014, para. 186.

## Obligation to protect life and the fear of an excessive judicialization of warfare

The Court could interpret the positive obligations it has drawn from Article 2<sup>11</sup> as requiring States – through their military leaders – to protect the lives of their own soldiers, although their work entails an inherent risk of death.

The Court has, in fact, already ruled, in relation to an alleged violation of Article 2, that commanding officers must take “necessary and sufficient measures to protect the physical and mental integrity of the conscripts under their command”.<sup>12</sup> If the Court has not had to rule on a case involving a kill in action thus far<sup>13</sup>, it was, however, the hypothesis in the case of the Uzbin Valley ambush in Afghanistan, which was brought to court in France. In this case, the relatives of the soldiers who had been killed filed a complaint against the military hierarchy (more precisely against an unnamed person). The charges were endangering the life of others and failing to prevent a crime.<sup>14</sup> This case is unique in France, but similar complaints have been brought before the United Kingdom’s courts,<sup>15</sup> and there were fears in France’s military circles about the implications it could have on the ground.

However, it is not a given that the ECtHR would rule in favour of the applicants, were such a case to be brought before it. As Nicolas Hervieu points

11 See note 9 above.

12 Frédéric Sudre (ed.), *Les grands arrêts de la Cour européenne des droits de l’homme*, PUF, Paris, 6th ed., 2011, p. 142, citing ECtHR, *Abdullah Yılmaz v. Turkey*, Application no. 21899/02, 17 June 2008, para. 57.

13 An application was lodged with the Court in the case of *Pritchard v. the United Kingdom*, but was struck from the docket of the Court on 18 March 2014, as the parties had reached an out-of-court settlement. It is worth noting that the Court did not, at the outset, rule the application inadmissible on the grounds that it was manifestly ill-founded. See ECtHR, *Pritchard v. the United Kingdom* (Decision), Application no. 1573/11, 18 March 2014.

14 On 18 and 19 August 2008, ten French soldiers belonging to the United Nations Security Council-mandated International Security Assistance Force operating in Afghanistan were killed, while on patrol, in an ambush in the Uzbin Valley, carried out as part of an enemy offensive. This was the biggest loss of life for the French Army since the Beirut Drakkar barracks bombing in 1983. The families of eight of the French soldiers killed in the ambush filed a complaint against an unnamed person. The charges were endangering the life of another and failing to prevent a crime, because they considered that their deaths had occurred as a result of negligence attributable to the military hierarchy. The investigating judge chose to amend the charge to involuntary manslaughter. The proceedings have not yet been concluded. At this stage, subject to appeals, the French courts have not recorded any convictions. See Pierre-Jérôme Delage, “La chambre criminelle et l’embuscade d’Uzbin”, in *Revue de sciences criminelles*, No. 2, 2012, pp. 353–360; Judgement No. 12–81.197, 10 May 2012 in Court of Cassation, Criminal Chamber, “Bulletin des Arrêts” (official bulletin of judgments), No. 5, pp 182 ff., May 2012; Sabrina Lavric, “Recevabilité de l’action des familles de soldats français tués en Afghanistan”, *Dalloz Actualité*, 22 May 2012. In this judgement, the Criminal Chamber ruled that the complaint with an application for the determination of damages filed by the families of the soldiers killed during the Uzbin Valley ambush was admissible. This admissibility would no longer be recognized, however, under the new wording of Article 698–2 of the Code of Criminal Procedure, as amended by the Military Planning Act of 18 December 2013. See Act 2013–1168 of 18 December 2013 on planning for the period 2014–2019, containing several provisions on defence and national security, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028338825&categorieLien=id>.

15 See the judgement handed down by the UK Supreme Court in the case *Smith and Others v. Ministry of Defence*, [2013] UKSC 41, available at: [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0249\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0249_Judgment.pdf).

out, “the Court accepts (...) a considerable degree of flexibility in view of operational requirements and other serious constraints on the ground” and “often refrains from ruling on the appropriateness of operational choices”.<sup>16</sup> This comprehensive approach could also help solve the potential conflicts of paradigms between IHL and EHRL that could arise regarding the application of the right to life in an armed conflict situation.

## The right to life and potential conflicts of paradigms between IHL and EHRL

Application of the negative obligation established in Article 2 of the ECHR – the prohibition of arbitrary deprivation of life – does not appear to conflict in real terms with any competing rule of IHL, although Article 2 does not specifically include “lawful acts of war” in the list of circumstances in which deprivation of life may be justified. The only reference to this indeed appears in Article 15(2), which provides, in substance, that no derogation may be made from Article 2 except “in respect of deaths resulting from lawful acts of war”. The Court therefore appears to accept that acts that violate the right to life, but could be considered lawful under IHL, are never contrary to Article 2 and not only when a State exercises its right of derogation, as provided for under Article 15 of the Convention.<sup>17</sup> In the judgement handed down in the case of *Varnava and Others*, the Grand Chamber of the Court held that “Article 2 must be interpreted so far as possible in light of the general principles of international law, including the rules of international humanitarian law”, although “Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities”, even when the respondent State had not exercised its right of derogation and advanced the argument that the actions in question were “lawful acts of war”.<sup>18</sup>

However, the Court held on several occasions that “Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life”.<sup>19</sup> The Court could therefore apply case law relating to Article 2 in the case of the incidental killing of a protected person as the result of the use of force in circumstances considered lawful under IHL. The test for determining if there has been an excessive use of force by the agents of a State requires the Court to

16 See Nicolas Hervieu, “La jurisprudence de la Cour européenne des droits de l’homme sur les opérations militaires: entre louables progressions et regrettables imperfections”, in *Les interactions entre le droit international humanitaire et le droit international des droits de l’homme*, Proceedings of the conference organized by the Department of Legal Affairs of the French Ministry of Defence, above note 8, citing ECtHR, *Al-Skeini and Others v. the United Kingdom*, above note 1, para. 168; ECtHR, *Vassiss and Others v. France*, Application no. 62736/09, 27 June 2013; ECtHR, *Hassan and Others v. France*, Application no. 46695/10, 4 December 2014; ECtHR, *Ali Samatar and Others v. France*, Application no. 17110/10, 4 December 2014.

17 For a case involving an international armed conflict situation, see ECtHR, *Varnava and Others v. Turkey*, above note 7, para. 185. For a situation that could maybe have been classified as a non-international armed conflict, see ECtHR, *Isayeva and Others v. Russia*, Application no. 57947/00, 24 February 2005, para. 181.

18 ECtHR, *Varnava and Others v. Turkey*, above note 7, para. 185.

19 ECtHR, *Al-Skeini v. the United Kingdom*, above note 1, para. 162.

decide whether that use of force was “absolutely necessary” to achieve one of the permitted aims defined in Article 2.<sup>20</sup>

The solution reached in the *Varnava and Others* judgement referred to above suggests that there is no real problem in categorizing use of force under one of these aims. A military engagement in the context of a non-international armed conflict (NIAC) can, it seems, be readily included under the aim described in Article 2(2)(a), which is to act in defence of any person from unlawful violence, as presumed by the Court in its judgement in *Isayeva and Others v. Russia*, “given the context of the conflict in Chechnya at the relevant time”.<sup>21</sup>

In contrast, the criterion of absolute necessity, which the Court considers to be a “stricter and more compelling” test,<sup>22</sup> differs significantly from the principles governing the conduct of hostilities established in IHL.<sup>23</sup> In order to be considered “absolutely necessary” within the meaning of Article 2 of the Convention, the force used must be strictly proportionate to the aim pursued and be part of an operation that was planned and controlled so as to minimize, to the greatest extent possible, recourse to lethal force.<sup>24</sup> Therefore, under EHRL, force can only be used as a last resort, even against targets considered legitimate under IHL. The principle of precaution, in particular, which is used by the Court to assess respect for the absolute necessity standard, has a different meaning from the principle of precaution in IHL. It requires all precautions to be taken to avoid, as far as possible, all use of force as such, and not just against protected persons and property, as dictated by the principle of precaution in IHL.<sup>25</sup> Therefore, within a strict interpretation of the Convention, damages inflicted on civilians as the result of an attack that would be considered lawful under IHL – because it complies with the principles governing the conduct of hostilities – could be nevertheless scrutinized by the Court in the light of the principle of “absolute necessity” and deemed to be contrary to Article 2.

These potential conflicts between IHL and EHRL paradigms<sup>26</sup> are not, however, unsolvable. As Professor Frédéric Sudre explains, while IHL is a branch of international law quite distinct from EHRL, the fact remains that they both have “the same concern – to ensure the protection of human life – ... and inevitably share a number of basic rules”.<sup>27</sup> The interpretative techniques commonly used by the Court allow it to reconcile these different logics. Thus in

20 F. Sudre, above note 12, pp. 125–131.

21 ECtHR, *Isayeva and Others v. Russia*, above note 17, para. 181.

22 ECtHR, *McCann and Others v. the United Kingdom*, above note 10, para. 149.

23 ICRC, *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, Report, pp. 8–9, available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>.

24 ECtHR, *McCann and Others v. the United Kingdom*, above note 10, para. 194.

25 See the ICRC study, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I, Rules*, Cambridge University Press, Cambridge, 2005, Rule 15, pp. 51–55; see *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23, pp. 8–9.

26 See *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23.

27 See F. Sudre, above note 4, p. 33.

the case of *Isayeva and Others v. Russia*, while the Court refrained from automatically applying the rules of IHL and setting aside the potentially competing rules of the Convention, it did not apply the principle of precaution as understood in EHRL, even though this was what its case law appeared to require. It did not seek to determine whether the persons suspected of unlawful violence could have been spared,<sup>28</sup> examining only the question of whether the operation concerned “was planned and executed with the requisite care for the lives of the civilian population”.<sup>29</sup>

Such case law developments<sup>30</sup> are crucial in ensuring respect for the complementary relationship between IHL and human rights, recognized in the International Court of Justice (ICJ) case law,<sup>31</sup> which has been referred by the ECtHR as relevant international law.<sup>32</sup> Taking these two branches of international law as a coherent and complete whole appears to be the only satisfactory solution for dealing with the issues raised by their concurrent application.

## Reconciling Article 5 (right to liberty and security) with administrative detention

The existence of a legal basis for internment or administrative detention<sup>33</sup> in IHL texts, and hence the compatibility of this type of detention with EHRL, is a question that has recently been raised both in doctrine and case-law.<sup>34</sup>

In its judgement in the case of *Hassan v. the United Kingdom* of 16 September 2014, the Court accepted for the first time that the exhaustive and limitative list of permitted grounds for restricting the right to liberty and security established in Article 5 of the Convention should be “accommodated”

28 See *Expert Meeting: The use of force in armed conflicts, interplay between the conduct of hostilities and law enforcement paradigms*, above note 23.

29 ECtHR, *Isayeva and Others v. Russia*, above note 17, para. 199.

30 These developments do not necessarily mean that a finding of violation is not made in such cases, as the Court ruled that a violation of Article 2 had occurred in the case of *Isayeva and Others v. Russia* referred to above.

31 See International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106; see ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, ICJ Reports 2005, para. 216.

32 See O. Martelly, above note 8, p. 24, citing ECtHR, *Al-Skeini v. the United Kingdom*, above note 1, paras 90–91; ECtHR, *Hassan v. the United Kingdom*, above note 6, paras 35–37.

33 Administrative detention or internment is a non-punitive measure that may be taken for security reasons in armed conflict. See Jelena Pejic, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 375–391.

34 *Serdar Mohammed v. Ministry of Defence*, above note 3; *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Commonwealth Office*, above note 3. See also: Jelena Pejic “The European Court of Human Rights’ Al-Jedda judgment: the oversight of international humanitarian law”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 365–382; Gabor Rona, “Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?”, *International Law Studies*, Vol. 91, No. 1, 2015, pp. 32–59.

with the forms of detention referred to in IHL.<sup>35</sup> However, the Court confined its analysis to situations of IAC,<sup>36</sup> as it considered that “[i]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers”.<sup>37</sup> The fact that Articles 43 and 78 of the Fourth Geneva Convention (GC IV) lay down a number of clearly defined procedural safeguards for administrative detention in particular was key to the Court’s finding in this case that no violation of Article 5(1) had been committed.

Unfortunately, the safeguards established in Article 3 common to the four Geneva Conventions of 1949 and Article 5 of the Additional Protocol II of 1977 – the only IHL provisions applicable to administrative detention in NIAC – are not as extensive and precise as those laid down for situations of international armed conflict. For its part, the High Court of Justice of England and Wales, in the case of *Mohammed v. Ministry of Defence*, held that there is nothing in the language of these provisions applicable to NIACs to suggest that they are intended to provide a legal basis for the deprivation of liberty.<sup>38</sup>

Several solutions have been put forward to address this thorny issue, which would allow States to comply with their obligations under the Convention, while continuing to carry out administrative detentions for imperative reasons of security in NIACs<sup>39</sup>. However, none of these solutions is in itself sufficient without significant case law developments, such as those introduced by the Grand Chamber of the Court in its judgement in *Hassan v. the United Kingdom* concerning an IAC situation.

## Extraterritorial application of Article 15

The possibility of derogating from obligations established in the Convention, provided for in Article 15, would seem, at first glance, to provide the most appropriate solution, permitting States to continue complying with their obligations under the Convention and, at the same time, use administrative detention in armed conflict situations. However, the Court considers that the meaning of the expression “[i]n time of war or other public emergency threatening the life of the nation”, used in Article 15(1) of the Convention<sup>40</sup> refers to “an exceptional situation of crisis or emergency which affects the whole

35 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 104.

36 *Ibid.*, para. 100.

37 *Ibid.*, para. 104.

38 *Serdar Mohammed v. Ministry of Defence*, above note 3, para. 243.

39 See in particular, G. Rona, above note 34, pp. 32–59; Marko Milanovic, “Hassan v. United Kingdom, IHL and IHLR, and other News in (Extra-) Territoriality and Shared Responsibility”, *EJIL: Talk! – Blog of the European Journal of International Law*, 18 December 2013, available at: <http://www.ejiltalk.org/hassan-v-united-kingdom-ihl-and-ihrl-and-other-news-in-extra-territoriality-and-shared-responsibility/>.

40 Article 15(1) of the ECHR provides as follows: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this



population and constitutes a threat to the organised life of the community of which the State is composed”.<sup>41</sup> As Jelena Pejic puts it, “[i]t would appear that recent armed conflicts involving ECtHR countries in the territory of a third ‘host’ state could not be deemed to have reached the requisite threat level to them”.<sup>42</sup>

The Court made reference to Article 15 in its judgement in *Hassan v. the United Kingdom*, as it had done previously in the *Al-Jedda v. the United Kingdom* judgement.<sup>43</sup> This could indicate that the Court would not rule out the validity of a derogation from the Convention, even when the case brought before it concerned an extraterritorial NIAC. In such a case, however, it would have no choice but to change its previous case law since the criteria relating to the “the whole population” being affected and the “threat to the organised life of the community” could *a priori* not be met.

Furthermore, if the Court were to accept such a derogation, the State that had been authorized to exercise its right to derogate from Article 5 of the Convention in the territory of a third State would be unlikely to want to suspend the application of this provision in its own territory. This would no doubt conflict with the concept of extraterritorial jurisdiction, which is underpinned by the idea that, as the Court’s case law reflects, “Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory”.<sup>44</sup>

A derogation under Article 15 would not then have the effect of completely exonerating the State from respecting the safeguards established in it. First of all, the State has a duty of notification when it triggers Article 15<sup>45</sup> and is required to justify the decision to take derogating measures in the light of the circumstances of the situation referred to above.<sup>46</sup> While the Court allows States “a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency”,<sup>47</sup> it has already stated that “it is ultimately for

Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

41 See ECtHR, *Lawless v. Ireland*, Application no. 332/57, 1 July 1961, para. 28.

42 J. Pejic, above note 34, p. 850.

43 ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, para. 40.

44 ECtHR, *Issa and Others v. Turkey*, above note 1. However, the Court had already ruled that a State party could exercise its right of derogation only in a part of its own territory. See ECtHR, *Sakik and Others v. Turkey*, Application nos 87/1996/67/897–902, 26 November 1997, para. 39. However, some authors do believe that extraterritorial derogations are permissible. See in particular Marko Milanovic, “Extraterritorial Derogations from Human Rights Treaties in Armed Conflict”, in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges*, Oxford University Press, Oxford, 2016 (forthcoming).

45 Article 15(3) of the Convention provides that: “Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.

46 ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996, para. 68; ECtHR, *Brannigan and McBride v. the United Kingdom*, Application nos 14553/89 and 14554/89, 26 May 1993, para. 43.

47 ECtHR, *A and Others v. the United Kingdom* (Grand Chamber), Application no. 3455/05, 23 September 1998, para. 184.



the Court to rule whether the measures were ‘strictly required’<sup>48</sup>. It has also indicated that “where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse”.<sup>49</sup> Thus assuming that Article 15 allows States to derogate from the provisions of Article 5 only in relation to administrative detentions carried out in the territory of States that are not party to the Convention – which is not a given – the Court could nevertheless verify that the measures taken by States are strictly required by the exigencies of the situation.

The outcomes of the cases brought before the ECtHR also depend, in this regard, on the safeguards afforded to the persons detained by the State wishing to exercise its right to derogate. The Court accepted British derogations (at the national level) from its obligations under Article 5 of the Convention in its *Brannigan and McBride* judgement in relation to measures authorizing the detention of people suspected of terrorist offences without judicial control for a maximum period of seven days<sup>50</sup>. It did not, however, acknowledge the validity of a State derogation in relation to a fourteen-day detention of a similar nature in its *Aksoy v. Turkey* judgement. The Court stated, in the *Brannigan and McBride* case, that “the remedy of *habeas corpus* was available to test the lawfulness of the original arrest and detention” and that there was “an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor”.<sup>51</sup> In contrast, in the *Aksoy* case, the Court considered that “the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him”.<sup>52</sup>

The solution provided by Article 15 of the Convention is therefore not one that is indisputably available. Furthermore, it would not allow a State to completely disregard the application of Article 5 in relation to administrative detentions made in armed conflict situations outside its own territory and ignore certain safeguards which although not the same as those required for detentions in peacetime, provide parallel protections.

## Authorization to detain granted by the United Nations Security Council

Pursuant to Articles 25 and 103 of the United Nations Charter, UNSC decisions are binding on States and override any other conflicting obligations they have under

48 *Ibid.*

49 *Ibid.*

50 ECtHR, *Brannigan and McBride v. the United Kingdom*, above note 46, paras. 62–66.

51 ECtHR, *Aksoy v. Turkey*, above note 46, para. 82.

52 *Ibid.*, para. 83.

other international treaties, such as the ECHR. However, the Grand Chamber of the Court recently held in the case of *Al Dulimi and Montana Management Inc. v. Switzerland* of 21 June 2016 that

where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights ..., the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonization, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.<sup>53</sup>

In the context of the implementation of sanctions against individuals or entities at the national level, the Court thereby confirmed the presumption it previously established in its judgement of 7 July 2011 in the case of *Al-Jedda v. the United Kingdom*.<sup>54</sup>

Thus the mere inclusion of a reference to administrative detention in a UNSC resolution, without an explicit – and highly unlikely – exclusion of Article 5, could not have the effect of displacing this provision.

Nevertheless, in *Al-Jedda v. the United Kingdom*, the Court did not formally reject the possibility for a UNSC resolution to constitute a legal basis for administrative detention.<sup>55</sup> It seems that the reason why this argument was not accepted by the Court in this case was the lack of an express mention of administrative detention in the resolution in question. It is at least the reading of the Court's case law recently adopted by the High Court of Justice of England and Wales and subsequently confirmed on appeal.<sup>56</sup>

However, if the interpretations of the Court in its judgement in the case of *Hassan v. the United Kingdom* are followed, the UNSC resolution would also have to provide for a number of legal safeguards, in order for it to be deemed constitutive of a legal basis for administrative detention that could be “accommodated” with the theoretically exhaustive list of permitted grounds for deprivation of liberty set out in Article 5(1) of the Convention, which does not include this type of detention.<sup>57</sup>

This solution is therefore likely to encounter political obstacles, as such precise language has not been used in a Security Council resolution to date. It

53 See ECtHR, *Al Dulimi and Montana Management v. Switzerland*, Application no 5809/08, 21 June 2016, para. 140.

54 See ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, paras 101–102.

55 See *Ibid.*, paras 101–102. In the *Al-Jedda* judgement, the Court adopted a narrow reading of Article 103 of the United Nations Charter, considering that it is implied that a mere *authorization* granted by the UNSC to breach an international obligation is not sufficient to allow derogation from it; the resolution would have to contain an explicit *duty* to derogate from the obligations in question. However, it is very likely that the Court was simply responding to the argument advanced by the respondent government, which maintained the existence of such a duty in the Security Council resolution to justify its treatment of the applicant in this case. This is what seems to emerge from the *Hassan* judgement. See ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 99.

56 *Serdar Mohammed v. Ministry of Defence*, above note 3, paras 193–207 and para. 211; *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, paras 158–163.

57 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 104.

would also have the disadvantage of having to be activated prior to each operation, which would not be ideal as far as the principle of legal certainty is concerned.

### Legal basis in the domestic law of the sending State, of the host State or in a bilateral agreement

In the *Serdar Mohammed* case, before determining whether IHL applicable to NIACs contained a legal basis for administrative detention, the British High Court of Justice examined whether UK domestic law and the law of the host State where the operation took place permitted this form of detention.<sup>58</sup>

However, a solution that involves relying on the domestic law of the host State does not seem wholly satisfactory, as in the majority of cases it would contain no specific provision for administrative detention. The relevant legislation would therefore have to be introduced urgently at the start of the military operation and, more often than not, it would be impossible to enact it in time. In addition, the text would have to provide certain safeguards in order for it to be considered by the Court as constituting a legal basis within the meaning of Article 5. Political obstacles associated with respect for the sovereignty of the host State where the operation takes place – assuming it is not party to the ECHR – could also hamper the success of this legislative or regulatory reform.

Another solution would be to include an explicit reference to the sending State's power to use administrative detention, guaranteeing the required safeguards, in an agreement signed with the host State at the start of the operation. This solution is less likely to encounter political obstacles, as only the sending State, and not the host State, would undertake to provide all the safeguards guaranteed to detained persons. The host State would only undertake to refrain from subjecting individuals transferred to it by the sending State to treatment contrary to Articles 2 and 3 of the Convention, or from taking measures that would violate these provisions.<sup>59</sup> This solution might, however, fail to meet foreseeability and accessibility requirements for constituting a legal basis within the meaning of the Court's case law.<sup>60</sup>

58 *Serdar Mohammed v. Ministry of Defence*, above note 3, paras 110–111.

59 See Article 10 of the status of forces agreement (SOFA) signed between France and Mali in 2013; Decree no. 2013–364 of 29 April 2013 concerning the publication of the agreement in the form of an exchange of letters between the Government of the French Republic and the Government of Mali determining the status of the “Serval” force, signed in Bamako on 7 March 2013 and in Koulouba on 8 March 2013, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103> (in French).

60 The Court considers that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential, according to the Court's case law, that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard that requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail. See, among others, ECtHR, *Medvedev and Others v. France* (Grand Chamber), Application no. 3394/03, 29 March 2010, paras 80–103.

Yet another solution would be to establish a legal basis for administrative detention in the domestic legislation of the sending State. However, in order for the legal basis to be valid according to the Court's case law, the text would have to expressly provide for it to be applicable to NIAC situations and, in particular, to extraterritorial NIACs and be sufficiently comprehensive in terms of procedural guarantees. In addition to the difficulty of achieving a piece of legislation of this kind, the ECtHR would, in the event of such cases being brought before it, undoubtedly have to make adjustments similar to those adopted in the *Hassan* judgement, because administrative detention does not figure among the cases of deprivation of liberty listed in Article 5(1). Such domestic legislation could not be considered as falling within the scope of Article 5(1)(b) of the Convention, which concerns "the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law", because the Court's case law rules out this possibility. It requires there to be an unfulfilled obligation incumbent on the person concerned by the measure intended to "secure the fulfilment" of an obligation prescribed by law,<sup>61</sup> which must be specific and concrete.<sup>62</sup> Yet administrative detention is motivated simply by imperative reasons of security associated with an armed conflict situation in progress<sup>63</sup> and not by a breach of an obligation to do or not do something.

It is therefore only by interpreting Article 5 in light of the provisions of this source of domestic law, which would supplement the relevant rules of IHL (in particular, those applicable to NIACs), that the Court could consider this type of detention as consistent with Article 5(1).

### *Lex specialis* or systemic interpretation?

Often put forward as a potential solution to conflicts arising between IHL and EHRL, the maxim *lex specialis derogat legi generali*, according to which a law governing a specific subject matter overrides a law which only governs general matters, cannot, however, be invoked to overcome the lack of recognition of administrative detention in EHRL. The Court did not, in any event, rely on this rule in its judgement in *Hassan v. the United Kingdom*,<sup>64</sup> and the British High Court of Justice expressly refused to apply it to the NIAC situation it was examining, holding that, as IHL does not provide a legal basis for this type of detention in NIACs, there is no conflict between IHL rules and the provisions of the Convention.<sup>65</sup>

61 ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, p. 13, available at: [http://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf).

62 ECtHR, *Ciulla v. Italy*, Application no. 11152/84, 22 February 1989, para. 36.

63 See ICRC, *Strengthening international humanitarian law protecting persons deprived of liberty: Concluding Report*, June 2015, EN 32IC/15/XX, p. 29: "A significant number of States considered that the most appropriate articulation of grounds for internment was 'imperative reasons of security'".

64 Despite the fact that both the Government and the Third party did refer to this principle. See ECtHR, *Hassan v. the United Kingdom*, above note 6.

65 *Serdar Mohammed v. Ministry of Defence*, above note 3, para. 287.

In contrast to the principles of *lex posterior* and *lex superior*, the principle of *lex specialis* does not find expression in the provisions of the Vienna Convention on the Law of Treaties of 23 May 1969,<sup>66</sup> although it has been used by the International Law Commission and various international courts and tribunals, including the International Court of Justice.<sup>67</sup>

The principle of systemic interpretation<sup>68</sup> is, on the other hand, included among the principles established in the Vienna Convention, which provides, in Article 31(3)(c), that “[t]here shall be taken into account, together with the context ... [a]ny relevant rules of international law applicable in the relations between the parties”.

In reality, as Silvia Borrelli explains, the ICJ

in characterizing international humanitarian law as *lex specialis* in its two Advisory Opinions, did so in a very particular sense. It is relatively clear that it did not intend to refer to the maxim *lex specialis derogat legi generali*, or, at least, that it did not intend the consequence to be the disapplication of international human rights law in favor of international humanitarian law. Rather, the recourse to Latin appears to have been used merely to indicate that the rules of international humanitarian law were to be given effect, as far as possible, where relevant in the assessment of whether there had been compliance with obligations under international human rights law.<sup>69</sup>

The Grand Chamber of the Court has itself applied the principle of systemic interpretation in its judgement in the case of *Hassan v. the United Kingdom*. It indeed ruled that a case of detention not provided for in Article 5 of the Convention did not constitute a violation, considering that this provision should be interpreted in the light of the principles of IHL.<sup>70</sup> In making this ruling, the Court chose to make an exceptional departure from its case law, which holds that the list of permitted grounds for deprivation of liberty contained in Article 5(1) is exhaustive.<sup>71</sup>

It is hard to see what would prevent the Court from using systemic interpretation if a case were brought before it involving administrative detention,

66 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Arts 30(3), 53, 59 and 64.

67 Silvia Borrelli, “The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict”, in Laura Pineshi (ed.), *General Principles of Law: The Role of the Judiciary*, Springer, 2015, p. 3, available at: <http://ssrn.com/abstract=2575076>.

68 Systemic interpretation refers to a reading that “seeks to elucidate the meaning of a fragment of the text with reference to another text or texts”. See Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique*, PUF, Paris, 2003, p. 844. See also Giovanni Distefano and Petros C. Mavroidis, “L’interprétation systémique: le liant de l’ordre international”, in Olivier Guillod and Christoph Müller (eds), *Pour un droit équitable, engagé et chaleureux: Mélanges en l’honneur de Pierre Wessner*, Basel, Neuchâtel, 2011, pp. 743–759.

69 S. Borrelli, above note 67, p. 10.

70 ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 102.

71 See ECtHR, *Ireland v. the United Kingdom*, Application no. 5310/71, 18 January 1978, para. 194; ECtHR, *A and Others v. the United Kingdom*, above note 47, paras 162–163; ECtHR, *Al-Jedda v. the United Kingdom*, above note 1, paras 99–100; ECtHR, *Hassan v. the United Kingdom*, above note 6, paras 104–105.

with the provision of certain safeguards, occurring in a NIAC rather than in an IAC. While it is true that common Article 3 and Article 5 of Additional Protocol II are not as well detailed as Articles 43 and 78 of the Fourth Geneva Convention, it is also clear that in expressly referring to detention or internment and specifying procedural rules and minimum safeguards in the two texts applicable to NIACs, the States intended to restrict their freedom to use administrative detention and, in doing so, affirmed the existence of this power, which allows them to “mitigate the violence and the human cost of armed conflict”.<sup>72</sup>

Contrary to what the British Court of Appeal affirmed in the *Serdar Mohammed* case, the power of States to use administrative detention is not derived solely from the absence of a prohibition,<sup>73</sup> but from a reference to this power and its regulation which, while subject to improvement, are present.<sup>74</sup> Articles 43 and 78 of the Fourth Geneva Convention, on which the ECtHR relied in its judgement in *Hassan v. the United Kingdom* to declare that internment was one of the “accepted features of international humanitarian law” in international armed conflict,<sup>75</sup> merely regulate the exercise of this power and make no reference to an explicit right to detain. In fact, only Article 21 of the Third Geneva Convention explicitly recognizes the right of States to detain in relation to prisoners of war. Article 42 of the Fourth Geneva Convention, cited by the British Court of Appeal in the *Serdar Mohammed* case as conferring a “power ... to detain civilians where ‘the security of the Detaining Power makes [this] absolutely necessary’”<sup>76</sup> simply regulates the use of detention in the case of protected persons.<sup>77</sup>

Although some States maintained that there was no point trying to regulate detention in NIAC because it was, in their view, essentially a matter of domestic law,<sup>78</sup> at the Diplomatic Conference held to draft Additional Protocol II, the

72 ICRC background document, Meeting of All States on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty, Geneva, 27–29 April 2015, p. 3, available at: <https://www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015>.

73 *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, para. 202.

74 See ICRC, Opinion Paper, *Internment in Armed Conflict: Basic Rules and Challenges*, November 2014, p. 7: “One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it implicitly. Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC. This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment”.

75 ECtHR, *Hassan v. the United Kingdom*, above note 6, paras. 104–105.

76 *Mohammed v. Secretary of State for Defence; Rahmatullah and Others v. Ministry of Defence and Foreign and Commonwealth Office*, above note 3, para. 173.

77 Article 42 (1) of the Fourth Geneva Convention provides that “[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary”.

78 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974–1977*, Vol. IV, p. 333, available at: [http://www.loc.gov/tr/frd/Military\\_Law/RC-dipl-conference-records.html](http://www.loc.gov/tr/frd/Military_Law/RC-dipl-conference-records.html)

majority did consider it important to retain Article 5. At this conference, the International Committee of the Red Cross (ICRC) also confirmed, in response to a question raised by the United Kingdom, that draft Article 5 of Additional Protocol II, which it had itself written, covered three forms of detention, one of which was non-criminal detention.<sup>79</sup>

There are various indications that the States have reserved the power to use administrative detention in NIACs. This power was recently reaffirmed at the 32nd International Conference of the Red Cross and Red Crescent in the preamble to the Resolution on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty in NIACs.<sup>80</sup> However, the States apparently failed to anticipate the possible interplay between provisions applicable to NIACs and instruments protecting human rights and did not therefore see any point in retaining the set of safeguards initially included in the draft prepared at that time by the ICRC.

## Conclusions

If the Court applied the principle of systemic interpretation each time a case involving an armed conflict situation was brought before it, it could accommodate the rules of Article 2 of the Convention with the rules of IHL governing the conduct of hostilities. This would allow it to reconcile these two sets of rules in a manner fully consistent with ICJ case law related to the complementary nature of the relationship between IHL and human rights law. In the same way, it could bring administrative detention in NIACs within the scope of Article 5 – as it did for IACs in the *Hassan* judgement – respecting the specificity of the rules of IHL applicable to the treatment of persons in the power of the enemy, the majority of which do not have an underlying criminal or legalistic logic. In this regard, it should be noted that IHL applicable to administrative detention does not provide for or govern accessory measures associated with criminal detention, such as identity checks and security searches. An overly strict interpretation of the Convention could result in multiple findings of violations not only in relation to Articles 2 and 5 of the Convention, but also in relation to Article 8, which guarantees the right to private life and family life, solely on the grounds that measures of this kind, which States have sometimes to take for security reasons in extraterritorial armed conflicts, have no clear legal basis.<sup>81</sup>

79 *Ibid.*, p. 350, paras 10 and 17.

80 32nd International Conference of the Red Cross and Red Crescent, Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty, 32IC/15/R1, Geneva, 8–10 December 2015. Available in the Reports and documents section of this edition of the *Review*.

81 Article 8(2) of the ECHR states that any restriction to the right to privacy must be “in accordance with the law”. A legal basis is therefore needed for interferences with Article 8 of the ECHR. According to the Court’s case law, the legal basis in question must be sufficiently precise and contain a measure of protection against arbitrariness by public authorities. When the Court finds a violation on the basis that the powers provided by the legislation were not ‘in accordance with the law’, it considers that



The use of systemic interpretation, however, would not prejudice any findings of violations of the safeguards listed in Article 5 that might subsequently be made by the Court. For administrative detention to come fully within the scope of Article 5(1) of the Convention and meet the requirements of Articles 5(2) and 5(4),<sup>82</sup> the protections and safeguards applicable in NIACs must be clarified and, above all, effectively afforded to individuals by State authorities that carry out administrative detention. The most recent meeting of States organized as part of the ICRC initiative to strengthen legal protection for persons deprived of their liberty in NIACs, which took place in Geneva from 27 to 29 April 2015, highlighted the keen interest of the majority of States in this subject and their commitment to achieving the goal of strengthening legal protection of individuals in such cases.<sup>83</sup>

Although the use of systemic interpretation could be perceived by EHRL experts as a “capitulation”<sup>84</sup> to IHL, it seems to be the only way for the Court to avoid making the Convention *lex superior* over IHL, which would lead to a regrettable lack of dialogue between the ECtHR judges and the Hague judges.

there is no need to analyse whether the measures were ‘necessary’. See Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, p. 454.

82 In the judgement in *Hassan v. the United Kingdom*, the Court held that Article 5(3) had no application, because the applicant had not been detained in accordance with the provisions of paragraph (1)(c) of Article 5, that is, with a view to prosecution. See ECtHR, *Hassan v. the United Kingdom*, above note 6, para. 106.

83 ICRC, *Detention in non-international armed conflict, Meeting of all States, Chair’s Conclusions*, 27–29 April 2015, p. 3, available at: <https://www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015>.

84 See N. Hervieu, above note 6, para. 72.



# Factors shaping the legal implications of increasingly autonomous military systems

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## Abstract

*This article identifies five factors that will shape the legal implications of the use of autonomous military systems. It contends that the systems which present legal challenges are those programmed to “make decisions” that are regulated by law. In so doing, they transfer control of, and responsibility for, those decisions away from those who have been traditionally seen as decision-makers to persons responsible for developing and deploying the system. The article also suggests that there may be limits to the extent to which the rules of international humanitarian law can appropriately regulate the altered relationship between soldiers and their increasingly autonomous weapon systems.*

**Keywords:** IHL, autonomous weapon systems, weapon development, weapons law, military technology.

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## Introduction

It is well known that various States are actively developing military systems which will utilize advanced technologies to assist, supplement and, to an extent, replace human soldiers in combat roles. Development efforts underway today have already produced machines that can replicate some of the functions of fighter pilots<sup>1</sup> and sentries,<sup>2</sup> among others, and it appears inevitable that military system capabilities will continue to expand into areas traditionally the domain of human operators. These systems, commonly described as “autonomous”,<sup>3</sup> promise vast operational changes in the conduct of hostilities over the next few decades. Accordingly, the prospect has sparked interest among lawyers working in fields related to armed conflict.

Initial legal analyses of the proposed systems have revealed two significant challenges facing those who attempt to reconcile these systems with international humanitarian law (IHL), beyond the usual challenge of obtaining reliable information about military developments. First, the subject matter is highly technical, with legal issues potentially arising from the nature of a host of technologies, most notably those relating to robotics and artificial intelligence. In addition to being specialized subjects well outside the typical field of expertise of lawyers, the state of the art in these areas is advancing rapidly and any detailed legal analysis is at risk of becoming obsolete before it is complete. Second, with few exceptions, systems currently in use appear to have a very low capacity for autonomous operation, generally below that needed to raise significant legal questions. Published plans give only general descriptions of the future forms of more advanced systems, the technologies driving them and the manner in which they will be used. Machines available for examination today, such as the Phalanx Close-In Weapon System<sup>4</sup> and missiles employing active terminal guidance and similar technologies,<sup>5</sup> display only the precursors to the capabilities which will be seen in future autonomous systems.

Due in no small way to the resulting uncertainty about the eventual capabilities of highly autonomous systems, there are many significant unanswered

1 Lockheed Martin, “UCLASS”, available at: [www.lockheedmartin.com.au/us/products/uclass.html](http://www.lockheedmartin.com.au/us/products/uclass.html) (all internet references were accessed in May 2015).

2 Jean Kumagai, “A Robotic Sentry for Korea’s Demilitarized Zone”, *IEEE Spectrum*, 1 March 2007, available at: <http://spectrum.ieee.org/robotics/military-robots/a-robotic-sentry-for-koreas-demilitarized-zone>.

3 The concern here is not with remotely operated weapons such as the unmanned aerial vehicles (UAVs), or drones, currently being employed in various conflicts. Such devices are manually controlled by human operators in respect of their critical functions. While it is true that autonomous vehicles would also generally be crewless, this article discusses only issues arising from a machine’s capacity for “making decisions” autonomously.

4 Raytheon, “Phalanx Close-In Weapon System (CIWS)”, available at: [www.raytheon.com/capabilities/products/phalanx/](http://www.raytheon.com/capabilities/products/phalanx/).

5 For an overview of these technologies see Advisory Group for Aerospace Research and Development, North Atlantic Treaty Organization (NATO), *Precision Terminal Guidance for Munitions*, Advisory Report No. AGARD-AR-342, February 1997, available at: [www.cso.nato.int/Pubs/rdp.asp?RDP=AGARD-AR-342](http://www.cso.nato.int/Pubs/rdp.asp?RDP=AGARD-AR-342).

questions about their compatibility with existing IHL. It is important that those questions be answered in the near future; the expected magnitude of the changes in the conduct of hostilities demand at least a precautionary investigation, and their uncertain timeline presents a degree of urgency. Also, this is an all-too-uncommon opportunity for lawyers to prepare for the advent of a new military technology, or even influence development of new systems in advance of their being deployed, rather than attempt to address their misuse after the fact.

This paper sets out a basis for a systematic analysis of issues that may arise under IHL due to the use of autonomous military systems. No attempt is made here to conduct a full legal analysis, but only to present a discussion of some aspects of machine autonomy which are most likely to be significant, as well as some guidelines for identifying potential legal problems, in order to provide others with a basis for investigating each issue in detail. The essential characteristic of this approach is to focus the legal analysis on the decisions and actions of people who develop and work with autonomous systems, rather than on the operational capabilities of machines. Two terminological choices bear explaining.

First, while most discussion and most contentious legal questions relate specifically to autonomous weapons, this paper frequently refers more generally to “autonomous military systems”. “System” in this context may refer to any piece of hardware or software, or any structured set of hardware and/or software components, that performs a defined task. A crewless aircraft or a weapon such as a gun turret is a system for the purposes of this paper, but so is a network of sensors distributed over a wide area, or a “cyber-weapon”,<sup>6</sup> or even a piece of software that analyzes data to inform a commander’s decisions. “System” may be considered roughly synonymous with “means of warfare”<sup>7</sup> as that phrase is used in various legal instruments.<sup>8</sup> This choice was made because, as discussed below, the technologies of interest are likely to be integrated into military hardware and software that would not normally be classified as weaponry but may still influence combat operations in a manner similar to autonomous capabilities in a weapon. For example, an autonomous intelligence, surveillance and reconnaissance (ISR) system that employs sensors mounted on UAVs, satellites, ships or other platforms to gather and process information about potential targets before providing it to a human weapon operator may play a similar role in relation to a firing decision as would an autonomous decision-making system which forms part of the weapon system itself.

6 A cyber-weapon is software and/or hardware “used, designed, or intended to be used” to conduct “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”: Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, pp. 106 (Rule 30), 141 (Rule 41).

7 It is possible that use of an autonomous military system may also relate to a method of warfare, such as where the process leading to the decision to employ the system is at issue, or where the system has more than one mode of operation. For an example of the second case, see: *ibid.*, p. 142, paras 4 and 5.

8 See, e.g., Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Part III.

Second, in contrast to what is becoming common practice, this paper does not distinguish between “automated” and “autonomous” systems. Very generally, systems are elsewhere described as “automated” when they can perform only low-level tasks without outside assistance, or when they are locked into a rigid repetitive operational routine defined by fixed programmed procedures, and they are called “autonomous” when they can be given higher-level instructions and appear to exercise some degree of “choice” or “decision-making” ability in determining how to carry out those instructions.<sup>9</sup> This paper argues that such a distinction is artificial and poorly defined and is not useful in a legal analysis. The precise capabilities of individual systems do not fall clearly into distinct categories; rather, they appear to exist in a continuum of several dimensions, and it must be expected that as the relevant technologies develop further, system capabilities will likewise move beyond the bounds of current definitions. Lawyers wishing to discern durable legal principles should avoid framing them in terms of categories which are likely to change, and the approach presented here avoids that trap. Furthermore, the distinction relies on anthropomorphic notions of machines making decisions, exercising discretion and in some way doing something more than simply executing a program. While such terms may be useful metaphors for technical purposes, they are not accurate descriptions of the actual operation of the systems in question from a legal perspective, and are misleading if employed in a legal discussion. All systems which may be described as “automated” or “autonomous” are still merely machines, constructed, or programmed, to relieve a human operator of some decisions and actions that would otherwise have been carried out manually. This point is discussed in more detail below.

The key finding presented here is that lawyers should assess “autonomous” systems not according to whether they can act with some degree of independence or whether they display some human-like behaviour, but according to which decisions are delegated to them and how human operators relate to them. Systems that should be of interest to lawyers in this respect are those which relieve humans of decisions or actions that are regulated by law, and in so doing transfer some control of, and responsibility for, those decisions away from a manual operator to another party, perhaps the party who defines the behaviour of the system or the party responsible for its employment.

The paper contains three sections. The first discusses three aspects of machine autonomy which are relevant to a legal analysis of proposed military systems. The second discusses two aspects of the development proposals that have been put forward by military organizations. The third section explains how the proposed developments relate to IHL and offers guidelines for persons analyzing specific legal issues: to remember that responsibility for legally significant decisions remains with humans, to understand that the nature of those

9 There is, however, considerable disagreement about the precise definitions even in the technical community; see, e.g., the discussion in M. Shane Riza, *Killing Without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict*, Potomac Books, Washington, DC, 2013, p. 13.

decisions will change when working with autonomous systems, and to be careful to distinguish between legal and technical issues.

## Aspects of machine autonomy relevant to a legal analysis

A rational assessment of the impact of making weapons “autonomous” must be based on a clear understanding of what machine autonomy actually is. In the context of a legal analysis, it is unnecessary to focus in great depth on the technical means by which autonomous behaviour will be achieved and much more important to accurately specify how autonomous capabilities will affect the interactions between such systems and the rest of the world, most notably interactions with operators and supervisors and those subject to the effects of the systems.

Unfortunately, while autonomy may initially seem unambiguous, it is difficult to fully capture the notion in a definition.<sup>10</sup> Indeed, the concept carries quite different meanings in different fields of study. Here it is used in a strictly technical sense, but even within the technical literature on machine autonomy it seems there are almost as many definitions as there are authors who define it. Nevertheless, at a high level we may say that most definitions focus broadly on two interrelated aspects of autonomy. Some definitions focus on how an operator interacts with the system: autonomous systems are those that can operate “without any form of external control for extended periods of time”.<sup>11</sup> Others frame the issue in terms of the system’s own capabilities: autonomy is “the capacity of a system to select and decide within limits its own behaviour”.<sup>12</sup> Of course, these and other definitions each cover just a few of the facets of machine autonomy that are of interest for specific purposes, and lawyers wishing to conduct an investigation must also decide on which aspects are relevant for that purpose. Rather than provide yet another (inevitably incomplete) definition, this section attempts to orient the reader by presenting a high-level view of how machine autonomy is achieved in practice and then discusses the aspects of autonomous systems that are likely to be of greatest legal significance in a

10 See, e.g., the discussion in Henry Hexmoor, Christiano Castelfranchi and Rino Falcone, “A Prospectus on Agent Autonomy”, in Henry Hexmoor, Christiano Castelfranchi and Rino Falcone (eds), *Agent Autonomy*, Kluwer, Boston, MA, 2003, p. 3.

11 George A. Bekey, *Autonomous Robots: From Biological Inspiration to Implementation and Control*, MIT Press, Cambridge, MA, 2005, p. 1. Similarly, “[a] system with a high level of autonomy is one that can be neglected for a long period of time without interaction”: Michael A. Goodrich and Alan C. Schultz, “Human-Robot Interaction: A Survey”, *Foundations and Trends in Human-Computer Interaction*, Vol. 1, No. 3, 2007, p. 217.

12 Charles François (ed.), *International Encyclopedia of Systems and Cybernetics*, Vol. 1, K. G. Saur, Munich, 2004, p. 51. Similarly, “[a]utonomy is a capability (or a set of capabilities) that enables a particular action of a system to be automatic or, within programmed boundaries, ‘self-governing’”: Defense Science Board, *The Role of Autonomy in DoD Systems*, US Department of Defense, July 2012, p. 1, available at: [www.acq.osd.mil/dsb/reports/AutonomyReport.pdf](http://www.acq.osd.mil/dsb/reports/AutonomyReport.pdf).



military context and which should be borne in mind by lawyers studying development proposals. In particular, as explained below, it is inappropriate to regard the process simply as weapon development.<sup>13</sup>

### How autonomy is achieved

The analysis commences with a basic understanding of the operations of an autonomous weapon system. Designers generally represent autonomous systems as consisting of two main components: the “plant” is the system or process to be controlled, and the “controller” is the device which directly governs the behaviour of the plant.<sup>14</sup> The term “plant” is carried over from chemical engineering; in a military context it would refer to the equipment which, if not capable of autonomous operation, would be directly operated by a human, such as a vehicle or gun turret. The controller of an autonomous system consists of the hardware and software that manages the vehicle, weapon or other device according to a program provided by a developer.<sup>15</sup> Figures 1 and 2 give a conceptual outline of how these components work together in manually operated and autonomous systems. The solid arrows show the typical interactions between the various components. These diagrams do not relate to specific weapon systems; they merely describe the generic functionality of each type of system.

Several points can now be made about machine autonomy to inform a legal analysis.

Fig. 1 - B/W online, B/W in print

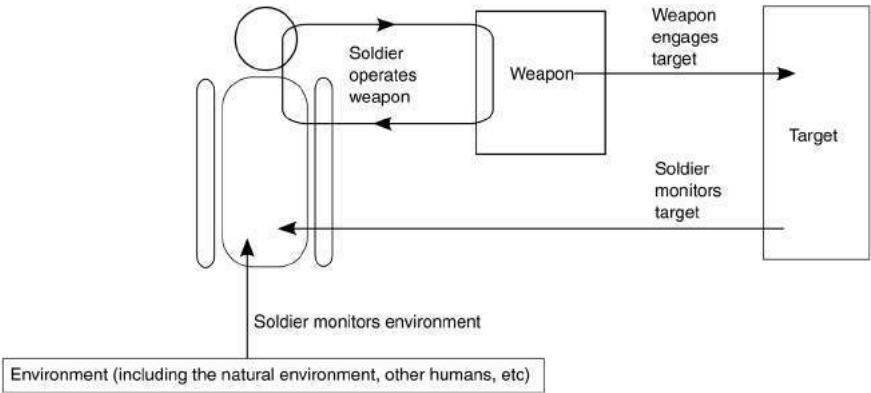


Figure 1. Manual weapon system.

13 The appropriateness of categorizing autonomous systems as weapons is also discussed in Hin-Yan Liu, “Categorization and Legality of Autonomous and Remote Weapons Systems”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 627.

14 See, e.g., Zdzislaw Bubnicki, *Modern Control Theory*, Springer, Berlin and New York, 2005, pp. 3–4.

15 For a general introduction to autonomous control systems, see Panos J. Antsaklis, Kevin M. Passino and S. J. Wang, “An Introduction to Autonomous Control Systems”, *IEEE Control Systems*, Vol. 11, No. 4, 1991, p. 5.

Fig. 2 - B/W online, B/W in print

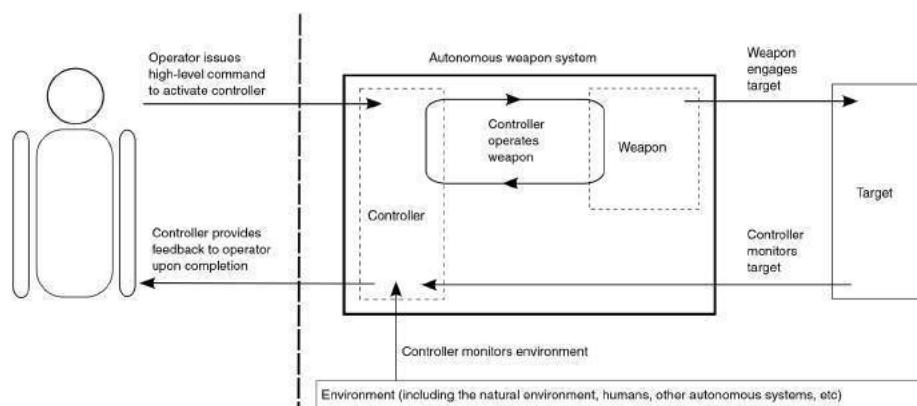


Figure 2. Autonomous weapon system.

## Autonomy is neither fixed nor uniform

It is common for legal authors to refer to autonomous weapons as a discrete category of devices which are easily distinguishable from non-autonomous systems and to refer to the “level” of autonomy that a particular system exhibits as though such levels are intrinsic properties of particular systems.<sup>16</sup> This simplistic distinction does not reflect the range of capabilities of systems that exist today and it does not correspond with the development roadmaps<sup>17</sup> that have been made public by various armed forces. In fact, the levels of autonomy exhibited by proposed military systems may be expected to vary in complex ways.

Possible degrees of autonomy vary widely, as do the ways in which tasks are allocated between an operator and an autonomous system, and the behaviour of a system may be expected to change according to both the specific task being performed and the circumstances in which the system is operating. Establishing the relative degrees of control exercised by a human operator and a computer control system in respect of a particular action for legal or other purposes may be a complex process. The aim of the brief descriptions in this section is not to furnish the reader with all the technical knowledge necessary for such an undertaking, but to demonstrate the fluid nature of control over tasks in an environment where humans interact with advanced autonomous systems.

### *Degree of computer control*

Machine autonomy is not an all-or-nothing capability; there is a continuum ranging from complete human control over some function to complete machine control.

16 See, e.g., Markus Wagner, “Taking Humans Out of the Loop: Implications for International Humanitarian Law”, *Journal of Law, Information and Science*, Vol. 21, No. 2, 2011.

17 See, e.g., Army Capabilities Integration Center, US Army, *Robotics Strategy White Paper*, 19 March 2009, available at: [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA496734](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA496734); US Air Force, *Unmanned Aircraft Systems Flight Plan 2009–2047*, 18 May 2009, available at: [www.fas.org/irp/program/collect/uas\\_2009.pdf](http://www.fas.org/irp/program/collect/uas_2009.pdf).

Many ways of describing this continuum have been proposed.<sup>18</sup> One of the best-known, which recognizes ten levels of automation, is reproduced in Table 1. Once again though, these “levels” are merely ways of describing points on a continuum; there are no discrete levels of machine autonomy in reality.

The US National Institute of Standards and Technology developed a somewhat more complex taxonomy, the Autonomy Levels for Unmanned Systems (ALFUS) framework.<sup>20</sup> The ALFUS framework characterizes autonomy levels as a three-dimensional model, in terms of mission complexity,

Table 1: *Sheridan and Verplank’s ten levels of automation*

100% human control	<ol style="list-style-type: none"><li>1. Human does the whole job up to the point of turning it over to the computer to implement.</li><li>2. Computer helps by determining the options.</li><li>3. Computer helps determine options and suggests one, which human need not follow.</li><li>4. Computer selects action and human may or may not do it.</li><li>5. Computer selects action and implements it if human approves.</li><li>6. Computer selects action, informs human in plenty of time to stop it.</li><li>7. Computer does whole job and necessarily tells human what it did.</li><li>8. Computer does whole job and tells human what it did only if human explicitly asks.</li><li>9. Computer does whole job and tells human what it did only if it, the computer, decides<sup>19</sup> he should be told.</li></ol>
100% computer control	<ol style="list-style-type: none"><li>10. Computer does whole job if it decides it should be done, and if so tells human only if it decides he should be told.</li></ol>

Source: Thomas B. Sheridan and William L. Verplank, *Human and Computer Control of Undersea Teleoperators: Technical Report*, Massachusetts Institute of Technology, 1978, pp. 8–17.

18 Peter A. Hancock and Stephen F. Scallen, “Allocating Functions in Human–Machine Systems”, in Robert R. Hoffman, Michael F. Sherrick and Joel S. Warm (eds), *Viewing Psychology as a Whole: The Integrative Science of William N Dember*, American Psychological Association, Washington, DC, 1998, p. 521.

19 “Decide” in this case does not imply a human-like decision-making capability; it simply means the action is initiated by the computer according to its programming rather than in response to a command from the human operator.

20 NIST Engineering Laboratory, National Institute of Standards and Technology, *Autonomy Levels for Unmanned Systems*, 16 June 2010, available at: [www.nist.gov/el/isd/ks/autonomy\\_levels.cfm](http://www.nist.gov/el/isd/ks/autonomy_levels.cfm).

environmental complexity and independence from a human operator, with each of those factors broken down further into a series of lower-level considerations.

Other organizations have proposed alternative taxonomies of autonomy levels intended for various purposes, such as NASA's eight-level model for its Spacecraft Mission Assessment and Re-planning Tool (SMART),<sup>21</sup> and the US Army Science Board's eleven-level model from its study on human-robot interface issues.<sup>22</sup>

It is not necessary to delve further into these rather detailed models. The important point to note is just that it is not useful to attempt to describe a machine as autonomous, semi-autonomous or manually operated as though those are discrete, objective categories. Autonomous capability is a continuously varying phenomenon.

### *Methods of human-machine interaction and task allocation*

Even highly autonomous systems that may need no significant human input during completion of their allocated tasks will be operating alongside other entities, both human and electronic, and will need to exchange information with those entities in order to receive instructions, coordinate efforts, report results and so on. The study of human-computer interaction and more recently that of human-robot interaction are multidisciplinary fields which have received considerable and increasing attention over the last two decades as computing and robotic capabilities have expanded.<sup>23</sup> Several alternative paradigms have emerged to describe how this interaction may be structured and how tasks may be allocated to either entity, with implications for the roles of humans. Very broadly, humans may occupy either supervisory or collaborative roles when working with autonomous systems, and may move between those roles during execution of a series of tasks. For example, one taxonomy lists five roles that humans may play when working with robots: supervisor, operator, mechanic, peer and bystander.<sup>24</sup> These roles may not be static; one design paradigm, called mixed-initiative interaction, "refers to a flexible interaction strategy where each agent can contribute to the task what it does best".<sup>25</sup> In the mixed-initiative paradigm, the respective roles of human and computer (or robot) are often not determined in advance, but are "negotiated" in response to evolving circumstances. At different times either the human operator or the machine might have direct control over a task, with the other assisting, or they might be working independently.

21 Ryan W. Proud, Jeremy J. Hart and Richard B. Mrozinski, *Methods for Determining the Level of Autonomy to Design into a Human Spaceflight Vehicle: A Function Specific Approach*, NASA Johnson Space Center, September 2003, p. 4, available at: [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515467](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA515467).

22 US Army Science Board, *Ad-hoc Study on Human Robot Interface Issues*, September 2002, p. 16, available at: [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA411834](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA411834).

23 For an overview, see M. Goodrich and A. Schultz, above note 11.

24 Jean Scholtz, "Theory and Evaluation of Human Robot Interactions", in *Proceedings of the 36th Annual Hawaii International Conference on System Sciences*, Hawaii, 6–9 January 2003.

25 Marti A. Hearst, "Trends & Controversies: Mixed-Initiative Interaction", *IEEE Intelligent Systems*, Vol. 14, No. 5, 1999, p. 14.

Human–robot interaction is an active field of research, with new principles emerging continually. While it is safe to assume that humans collectively will continue to exercise a high level of control over robotic weapons employed in armed conflict, lawyers should be cautious when assessing the roles of, and the degree of control exercised by, particular individuals.

### *Variations by function*

It is common to refer to autonomy as a property of a system as a whole, but in practice technologies which contribute to a capability for autonomous operation will be, and are being, applied to individual subsystems which form parts of military hardware and software. In respect of robotic systems, development is occurring separately in the areas of autonomous navigation, autonomous targeting and other functions required of an advanced weapon system. As systems with greater capabilities for autonomous operation are developed over the coming years, there is no reason to suppose that all their functions will be subject to the same degree of direct human supervision; it is probable that some functions, presumably those for which the cost/benefit analysis of automation is more favourable in some way, will be made “more autonomous” than others. A system may therefore be operating at more than one “level” of autonomy simultaneously, with respect to different tasks, and lawyers examining such systems will need to assess their behaviour, and the levels of human and machine involvement, in relation to particular functions of interest such as course planning, navigation or weapon release.

Looking more closely at the six-step targeting process used by the Australian Defence Force,<sup>26</sup> for example, weapon systems with the ability to autonomously locate and observe potential targets, and perhaps take some precautions to minimize collateral damage, may not be trusted to release a weapon autonomously, and may need input from a human operator or other autonomous systems to assess whether the target is a valid military objective and whether any expected collateral damage would be disproportionate to the anticipated military advantage of an attack.<sup>27</sup> If such a system were to be involved in an incident which led to an inquiry about whether a civilian might have been targeted, it would be important to establish at which stage an error may have occurred, and what levels of human and machine control were exercised at that stage, in order to determine whether a human operator exercised sufficient control to be held criminally liable. Similar considerations would also apply to a

26 Ian Henderson, *The Contemporary Law of Targeting*, Martinus Nijhoff, Boston, MA, and Leiden, 2009, p. 237.

27 For a more detailed discussion of how a balance between human control and autonomous operation may be achieved at different stages of the targeting process, see Mark Roorda, “NATO’s Targeting Process: Ensuring Human Control Over and Lawful Use of “Autonomous” Weapons”, Amsterdam Center for International Law Research Paper No. 2015-06, 2015, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2593697](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593697).

“system of systems” situation involving communication between different systems with varying levels of autonomy.

### *Variations by circumstance*

Whereas the functions of an autonomous system refer to tasks the system is performing, circumstances are the situations in which it is performing those tasks. As noted above, even where a designer has determined that a particular system function will be subject to a level of computer control, that level may vary according to circumstances, where the circumstances in question may be defined in terms of, for example:

- the phase of a mission, such as planning, initiation, implementation or termination;
- a disruptive event, such as where an unmanned aerial vehicle (UAV) that is ordinarily remotely operated may be programmed to autonomously return to base, fly in circles or even defend itself if it loses contact with the operator;
- an unexpected opportunity arising during a mission.

The US Department of Defense summarizes this variability thusly: “The key point is that humans and computer agents will interchange initiative and roles across mission phases and echelons to adapt to new events, disruptions and opportunities as situations evolve.”<sup>28</sup>

### *Summary*

Machine autonomy is a much more nuanced phenomenon than popular images of Terminator-like robots would lead one to believe. It is a rapidly advancing set of technologies, some still in their infancy, and many issues which will one day prove critical are no doubt yet to emerge, but two in particular stand out for lawyers investigating the area today. First, a machine’s autonomous capabilities directly affect primarily its supervisors and operators, not necessarily (in the case of a weapon) those against whom it is directed. In particular, the role of the operator is altered in important ways but not eliminated; there is no such thing as “complete” autonomy in the sense of a machine operating entirely independently of any human. Second, the precise form of the relationship between operator and machine is likely to change across different systems, at different times, in relation to different tasks. Lawyers must be wary of drawing inferences purely on the basis of a weapon being described as “autonomous”. One may gain a sense of the possible complexity of the relationships between an autonomous system and its operators and supervisors by examining the US Defense Science Board’s recently proposed Autonomous Systems Reference Framework,<sup>29</sup> a system for allocating functions and responsibilities to either the

<sup>28</sup> Defense Science Board, above note 12, p. 27.

<sup>29</sup> *Ibid.*, p. 24.

computer or one of several human operators or supervisors during the system design phase. This framework considers how autonomy supports each of the various human users of a particular system in a military hierarchy, how communication between those users may be facilitated, how allocation of tasks to human or machine may vary over the course of a mission, and several other factors.

## Autonomy is about the relationship between machine and operator

In the context of robotics in general, and the proposals for autonomous military systems in particular, autonomy refers to a capability, not to a specific technology, a particular device or a certain behaviour. It is simply the ability of a system to perform its function, whatever that may be, with less interaction with a human operator than a manual system would require. Autonomy is thus concerned with the relationship between the system and its human operator, not the nature of the system's task or the manner in which it performs that task. As explained above, this relationship exists on a spectrum running from complete human control to (effectively) complete machine control over specific tasks, depending on the degree of autonomous capability present in the system.

When a manual system or process is replaced with a system that is capable of some degree of autonomous operation, the controller "steps into the shoes" of the human operator of the manual system to some extent. The operator's (or a system developer's) understanding of how to control the system is expressed in software and programmed into the controller. The physical means by which the operator manipulates the system is converted to a set of actuators<sup>30</sup> which the controller can activate. Some form of sensor or feedback mechanism is provided by which the controller can monitor the system. Other sensors may also be provided which allow the controller to monitor relevant environmental factors. The controller manipulates information from all these sensors in accordance with its programming and generates output signals which are sent to the actuators to regulate the system. This process is encapsulated in the well-known "sense-think-act" paradigm which is often used as the operational definition of a robot.<sup>31</sup>

Military development proposals often discuss autonomy in terms of the "observe, orient, decide, and act" (OODA) loop,<sup>32</sup> the model of a combatant's recurring decision-making cycle developed by US Air Force Colonel John Boyd.

30 An actuator is simply a device through which a controller controls a plant. One example would be an electric motor which pivots a gun turret based on a signal from the turret's software-based control system.

31 "Sense-think-act" refers to the continuous process by which a robot perceives its environment, uses that information to "make decisions" according to its programming, and acts on those decisions; see, e.g., G. A. Bekey, above note 11, p. 2.

32 See, e.g., US Air Force, above note 17, p. 16. The OODA loop may be seen as another expression of the "sense-think-act" loop, and some literature on human-machine interaction also refers to an OODA-like loop to describe four types of functions that may be performed by an autonomous system: information acquisition, information analysis, decision selection and action implementation. See, e.g., Raja Parasuraman, Thomas B. Sheridan and Christopher D. Wickens, "A Model for Types and Levels of Human Interaction with Automation", *IEEE Transactions on Systems, Man and Cybernetics*, Vol. 30, No. 3, 2000, p. 288.



The OODA model describes the ongoing mental and physical processes involved in observing one's environment and responding to changes therein in pursuit of some goal. A high-level goal may involve several subtasks, each with its own OODA loop to be completed in pursuit of the overall goal. In a manual system, all steps in a loop are completed by a human: observing the environment to extract raw information, orienting oneself in relation to the environment by processing that information to form a useful model, making a decision based on that model and acting on the decision. In terms of the OODA loop, the purpose of developing autonomous systems is to assign part or all of the loop to a machine in order to realize some operational advantage such as greater speed or endurance, lower cost or less risk to the operator's life. A highly autonomous system is one that can execute most or all of the OODA loops required to achieve some goal, using only the operator's high-level instruction as guidance in the decision stage of a loop, such that the "nearest" human functions similarly to a commander. A system with a lower level of autonomy is only able to execute the lower-level loops, or only certain parts of a loop, and must work together with a human operator to achieve a high-level goal, casting that person as more of a collaborator. One example of such a system might be a radar warning receiver; a simpler system might only be able to detect a possible threat and issue a warning to a human operator, while a more highly autonomous system might be able to implement countermeasures, such as dispensing chaff and flares, without human intervention.

The fact that autonomy operates on the relationship between operator and machine carries three important implications for lawyers.

First, autonomous systems will perform some or all mission tasks in place of humans, but not necessarily differently to humans. There is nothing in the concept of machine autonomy itself that supports an inference that an autonomous system must necessarily perform a task in a different manner than would a human or team of humans performing the same task manually. This is not to say, of course, that future autonomous systems will function identically to an equivalent human-operated system; the "persistence" of systems that do not require constant human interaction, the ability to quickly integrate data from many sources and the ability to take greater risk than could a crewed system, among other things, will greatly enhance their performance. However, such differences, while very important operationally, are somewhat peripheral to the issue of autonomy. UAVs, for example, already allow for a high level of persistence without necessarily exhibiting any capabilities associated with a high level of autonomy and without raising the same legal issues. Such shared capabilities between remotely operated and autonomous systems frequently lead to confusion over the distinction between the two classes of machine, as both are capable of "standing in" for humans in different ways and both evoke images of machines fighting wars without a human presence. It is important for lawyers to keep the distinction in mind, though, as the two raise different legal issues. Today's UAVs and similar devices extend the physical reach and capabilities of human war fighters, as will autonomous systems, but autonomous systems will, in addition, alter the decision processes leading to the activation of a weapon.

Accordingly, legal analysis of proposed autonomous systems must be based on the premise that the novel qualities of the system are likely to be found in the processes leading to activation of a weapon attached to the system. It is not useful to attempt to attribute a particular standard of performance to a system merely on the basis of it being described as having some capacity for autonomous operation; all that one can reliably say on that basis is that the human operator's direct involvement in part or all of the system's OODA loop(s) will be reduced or removed. The mere fact of reassigning a task from a human to a computer does not necessarily alter the performance of that task.

Second, if specified decisions and actions are to be transferred from human operators to autonomous systems, and those decisions and actions are the subject of legal obligations, then it is important to consider how those decisions and actions may be attributed to responsible persons, and whether those responsible persons are those specified in existing legal rules. Where legal obligations are borne by a human operator who is assisted by, or is working alongside, an autonomous system, one must ask whether that operator is still occupying the role contemplated by the law.

Third, it is incorrect to describe autonomous systems as being "independent"<sup>33</sup> machines that operate "without human control";<sup>34</sup> the relationship between human and machine is not severed, it is only modified. Choices made by hardware and software developers in the design stage will shape the behaviour of the systems from then on. Mission planners and others will also impose constraints on each mission; for example, in the case of an autonomous UAV, a flight plan must be filed in advance specifying the area to be covered and the duration of the mission (and the UAV must be made to adhere to that plan), while decisions about how much fuel and which weapons to carry will further guide and restrict what may happen during an operation.<sup>35</sup> In these ways, a human hand always provides some degree of guidance despite a possible lack of direct supervision.

## Autonomous systems will still be machines

Lawyers must avoid falling into the trap of anthropomorphizing autonomous systems. It is uncontentious that today's sophisticated weapon systems are merely machines which execute instructions encoded in software, and it is argued here that future highly autonomous systems envisioned by designers will not be anything more than that. Certainly, they will be more complex and more capable in many ways; they will likely be able to utilize information from sources beyond the reach of today's systems and process that information in the face of more

33 M. Wagner, above note 16, p. 159.

34 Gary E. Marchant *et al.*, "International Governance of Autonomous Military Robots", *Columbia Science and Technology Law Review*, Vol. 12, 2011, p. 273.

35 William Boothby, "How Far Will the Law Allow Unmanned Targeting to Go?" in Dan Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Martinus Nijhoff, Boston, MA, and Leiden, 2013, p. 56.

uncertainty, and will function effectively in more chaotic and demanding environments. Such enhancements will, however, be due to improvements within the system's software and the hardware it controls; they will not fundamentally change the nature of the system such that it should be regarded as something more than a computer-controlled machine. The system's capabilities and limitations will still result, either directly or indirectly, from human decisions and actions.

The software-based controllers in today's automated weapon systems are essentially special-purpose computers running programs which control the weapon in place of a human operator. These controllers, although they may be highly specialized in design and purpose, are nevertheless forms of stored-program computer, a class of devices which also includes common items such as personal computers. The defining characteristic of stored-program computers is that instructions entered by a human programmer are stored in the machine's memory and drawn upon to govern its operation.<sup>36</sup> Barring a major technological shift, tomorrow's autonomous systems will employ essentially the same technology; the systems will still be controlled by software written by human developers.

The fact that even very complex programs are merely sets of predefined instructions is often obscured in discussions about sophisticated weapon systems, and indeed it is not always apparent to an observer that a complex machine is merely executing instructions rather than operating independently. Even systems with only low-level capabilities are often driven by programs with instructions of the form "if <X happens> then <do action A> else <do action B>", and this can make it appear that the system itself is "choosing" between two alternative courses of action, when in fact the choice was made in advance by the person who wrote the program; the expression of that person's will was merely waiting within the system's memory for the previously determined trigger to be detected. For example, if a hypothetical autonomous UAV has cameras and an image recognition program which matches people within its field of view against a database of pictures of known insurgents, an instruction like "if <camera image matches image in database with probability of more than 95%> then <aim and fire> else <keep searching>" would make it appear that the UAV itself is selecting targets, when actually the targets and the conditions under which they would be attacked were selected in advance by the system developers.

This reference to computing technology is included here because it is important that lawyers avoid being misled by references to "intelligent" machines having the capacity for "choice" or "truly autonomous" operation.<sup>37</sup> No computer is able to choose for itself whether or not to run a program stored in its memory, or to exercise discretion about whether or not to execute a particular instruction within a program; any such appearance of "choice" can only be the

36 William Aspray, "The Stored Program Concept", *IEEE Spectrum*, Vol. 27, No. 9, 1990, p. 51.

37 See, e.g., Chantal Grut, "The Challenge of Autonomous Lethal Robotics to International Humanitarian Law", *Journal of Conflict and Security Law*, Vol. 18, No. 1, 2013, p. 5.

result of other instructions embedded in the software. Fundamentally, the only function of a computer is to run whatever software is installed on it.

Where a computer can be shown to be executing low-level express instructions encoded in software by a developer, it is easy to see that the computer is not acting independently in any legally significant way, but this may not be so apparent when a system with more advanced capabilities is “trained” to adopt some desired behaviour that relates to a significant action such as firing a weapon.<sup>38</sup> Similar challenges arise when human operators or commanders provide an autonomous system with only high-level mission goals, leaving the system to formulate a series of low-level subtasks. Of course, artificial intelligence and machine learning are complex fields that extend far beyond the scope of this paper,<sup>39</sup> but for the purpose of a legal analysis it is unnecessary, and even undesirable, to delve into the details of specific algorithms. Instead, lawyers should recognize that development of an artificially intelligent system is in fact just an exercise in software development, no different on the level of human activity from development of a simpler, low-level program. In both cases, the developer conceives of some desired behaviour for the system and writes a program intended to impart that behaviour to the system. The distinction is in the algorithms employed in the program: instead of directly encoding actions of the form “if <target matches these parameters> then <fire>”, as would the developer of a simpler program, the developer of an “intelligent” machine writes a program the function of which is to formulate some optimum set of actions to be performed in response to environmental stimuli encountered during a mission. There is, in a sense, an extra layer of abstraction between the developer and the weapon firing, in that the specific sequence of events leading to discharge of the weapon may not have been in the developer’s mind but may have originated in the data on which the system was trained; nonetheless, the end result of running the program is still a rule telling the system to fire a weapon, just as in a simpler program comprised of fixed rules. This extra layer of abstraction complicates the process of matching specific outcomes to specific commands from a human, but it does not change the fact that the computer is only executing instructions formulated by its developer.

To be clear, it is argued here that references to the ability of “intelligent” systems to make their own “decisions” are misleading. While such systems may not be programmed with precise predetermined responses to every situation they encounter, they are programmed with some system for developing a response and are thereby operating in accordance with their programming regardless of whether or not the specific behaviours they in fact adopt were or could have been

38 Training, in this context, means exposing an artificially intelligent system to sets of example data, representing the tasks it will be faced with and the correct responses, in an effort to induce behaviours which produce optimal outcomes at those tasks. Training is essentially inductive in nature, as the “real” situations encountered by a trained system will inevitably differ in some ways from the examples it was trained on, and is therefore error-prone.

39 For a general overview see, e.g., Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach*, Prentice Hall, Englewood Cliffs, NJ, 2009.

foreseen during development or at the time of deployment. Such a machine is still just an instrument of the will of its developers and those responsible for employing it in some situation; it is not accurately characterized as an independent decision-maker. For example, UAVs with the ability to navigate autonomously may be able to respond to events during flight which are not specifically represented in their software, but they still do so according to programmed rules for responding to unexpected events. The behaviour originates not in the machines themselves, but in the minds of their developers.

## Aspects of military development proposals relevant to a legal analysis

### Autonomy will extend beyond weapon systems

As noted in the introduction, this paper discusses autonomous military systems, not just weapons. Even within an analysis that is focussed specifically on IHL, it is necessary to account for the effects of autonomous capabilities in systems which may not themselves perform any hostile act but may still have some impact on a decision or action that bears legal consequences.

The prime example of such a capability would be seen in an autonomous ISR system which locates, identifies and tracks potential targets. For example, the US Department of Defense recently announced its Autonomy Research Pilot Initiative (ARPI), which “seeks to promote the development of innovative, cross-cutting science and technology for autonomous systems able to meet future DOD system and mission requirements”.<sup>40</sup> The ARPI invitation for proposals identifies ISR as one of its technical challenge areas:

By increasing the level of machine perception, reasoning and intelligence on ISR platforms themselves, a more efficient workload balance can be achieved. This includes the management and closed loop control of ISR assets to adapt to their environments and mission circumstances to collect appropriate and relevant data.<sup>41</sup>

Preliminary moves in this direction are already occurring; in the United States, the Defense Advanced Research Projects Agency (DARPA) is engaged in the Military Imaging and Surveillance Technology (MIST) programme, which aims to “develop a fundamentally new optical ISR capability that can provide high-resolution 3-D images to locate and identify a target at much longer ranges than is possible with existing optical systems”.<sup>42</sup> Systems developed under this

40 Department of Defense, *Autonomy Research Pilot Initiative (ARPI) Invitation for Proposals*, November 2012, p. 1, available at: [www.auvac.org/uploads/publication\\_pdf/Autonomy%20Research%20Pilot%20Initiative.pdf](http://www.auvac.org/uploads/publication_pdf/Autonomy%20Research%20Pilot%20Initiative.pdf).

41 *Ibid.*, p. 4.

42 See: [www.darpa.mil/program/military-imaging-and-surveillance-technology](http://www.darpa.mil/program/military-imaging-and-surveillance-technology).

programme would be able to perform automated identification and recognition of potential targets.<sup>43</sup>

The motivation for pursuing this line of research as part of ARPI is that

[t]oday's battlespace is creating an unprecedented increase in intelligence, surveillance, and reconnaissance (ISR) data. The [processing, exploitation and dissemination] analyst can become overwhelmed in trying to integrate and analyze these various data inputs (imagery, video, communication and human ISR data) while also trying to track targets, infer sources and provide analysis feedback (in real-time or post-analysis).<sup>44</sup>

It may be inferred that the increased "intelligence" of ISR platforms will be used to perform some processing of raw data before communicating the result to a human, thus placing the ISR system in a position of influence over a human operator's perception of the battlespace. Such processing of sensor data has obvious implications for the impact that an advanced ISR system may have on a decision to fire a weapon or perform some other action which carries significant legal consequences.

Somewhat further removed causally from combat operations, but still with some peripheral influence on outcomes, are autonomous vehicles which will carry cargo, supplies and even people. There are many examples of efforts being made to automate resupply operations, such as the US Office of Naval Research's Autonomous Aerial Cargo/Utility System (AACUS) programme.<sup>45</sup> Following on from the success of the K-MAX unmanned cargo resupply helicopter<sup>46</sup> in Afghanistan, the aim of the AACUS programme is "the development of advanced autonomous capabilities to enable rapid cargo delivery by unmanned and potentially optionally-manned Vertical Take Off and Landing (VTOL) systems".<sup>47</sup> The programme will produce a system which can be installed in suitable aircraft to respond to calls from deployed units, autonomously (but under some supervision) planning its route, avoiding obstacles and bad weather and choosing a suitable landing site to deliver supplies and, eventually, evacuate casualties.<sup>48</sup> While vehicles such as those controlled by AACUS-like systems will not carry weapons, they will still be large, fast-moving objects that must operate in proximity to people and other vehicles and may carry hazardous materials or

43 Strategic Technology Office, DARPA, "Military Imaging and Surveillance Technology – Long Range (MIST-LR) Phase 2", Broad Agency Announcement No. DARPA-BAA-13-27, 12 March 2013, p. 6, available at: [www.fbo.gov/index?s=opportunity&mode=form&id=78b0ddb382678fa9ace985380108f89&tab=core&\\_cview=0](http://www.fbo.gov/index?s=opportunity&mode=form&id=78b0ddb382678fa9ace985380108f89&tab=core&_cview=0).

44 Department of Defense, above note 40, p. 4.

45 Office of Naval Research, "Autonomous Aerial Cargo/Utility System Program", 27 September 2013, available at: [www.onr.navy.mil/en/Science-Technology/Departments/Code-35/All-Programs/aerospace-research-351/Autonomous-Aerial-Cargo-Utility-AACUS.aspx](http://www.onr.navy.mil/en/Science-Technology/Departments/Code-35/All-Programs/aerospace-research-351/Autonomous-Aerial-Cargo-Utility-AACUS.aspx).

46 Lockheed Martin Corporation, "K-MAX", available at: [www.lockheedmartin.com/us/products/kmax.html](http://www.lockheedmartin.com/us/products/kmax.html).

47 Mary Cummings and Angelo Collins, *Autonomous Aerial Cargo/Utility System (AACUS): Concept of Operations*, Office of Naval Research, p. 2, available at: [www.onr.navy.mil/~media/Files/Funding-Announcements/BAA/2012/12-004-CONOPS.ashx](http://www.onr.navy.mil/~media/Files/Funding-Announcements/BAA/2012/12-004-CONOPS.ashx).

48 *Ibid.*

present other dangers.<sup>49</sup> They therefore introduce some legal risk, for example, if used to carry wounded soldiers.

The presence of autonomous capabilities in systems ancillary to combat operations will therefore necessitate a broader view of autonomy than simply as a property of a new type of weapon. In addition, as discussed in the next section, the ability of the AACUS and similar systems to negotiate directly with other unmanned systems<sup>50</sup> may complicate the task of even identifying which systems are relevant to a particular investigation.

## Autonomous systems will collaborate with each other

As discussed above, autonomous systems alter the relationship between weapon and operator. Of similar importance is the relationship between nominally separate autonomous systems. Most development roadmaps published by military and government organizations make it clear that autonomous systems must collaborate with each other.<sup>51</sup> This interoperability may take a range of forms.

Many current research projects, both military and civilian, focus on the behaviour of groups of decentralized cooperating robots, colloquially known as “swarms”, which work together as a single system in pursuit of some goal. One example of this is the US Army’s Micro Autonomous Systems and Technology (MAST) programme,<sup>52</sup> which aims to create “systems of diverse autonomous mobility platforms equipped with miniature sensors to quickly, quietly, and reliably explore and find targets”;<sup>53</sup> that is, teams of small air and ground vehicles which will be used by soldiers to explore and map complex environments such as urban settings or caves. The possibility of equipping swarms with weapons has also been raised.<sup>54</sup>

A somewhat different form of collaboration between autonomous systems is employed in development projects such as DARPA’s Hydra programme.<sup>55</sup> The Hydra programme “aims to develop a distributed undersea network of unmanned payloads and platforms”,<sup>56</sup> essentially a system of unmanned submersible platforms which would be used to launch a variety of UAVs and unmanned undersea vehicles (UUVs) close to enemy operations. Although still in its very early stages, this programme envisions a system in which the submersible

49 Anthony Finn and Steve Scheduling, *Developments and Challenges for Autonomous Unmanned Vehicles: A Compendium*, Springer, Berlin, 2010, p. 156.

50 M. Cummings and A. Collins, above note 47, p. 2.

51 See, e.g., US Department of Defense, *Unmanned Systems Integrated Roadmap FY2011-2036*, No. 11-S-3613, 2011, pp. 49–50.

52 US Army Research Laboratory, “Micro Autonomous Systems and Technology (MAST)”, 25 February 2011, available at: [www.arl.army.mil/www/default.cfm?page=332](http://www.arl.army.mil/www/default.cfm?page=332).

53 MAST, “Research Thrusts”, available at: [www.mast-cta.org](http://www.mast-cta.org).

54 Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century*, Penguin Press, New York, 2009, p. 229.

55 Federal Business Opportunities, “Hydra”, 22 August 2013, available at: [www.fbo.gov/index?s=opportunity&mode=form&id=4cc32f06144bd6f3eba18655135d6155&tab=core&cview=1](http://www.fbo.gov/index?s=opportunity&mode=form&id=4cc32f06144bd6f3eba18655135d6155&tab=core&cview=1).

56 DARPA Tactical Technology Office, “Hydra”, available at: [www.darpa.mil/Our\\_Work/TTTO/Programs/Hydra.aspx](http://www.darpa.mil/Our_Work/TTTO/Programs/Hydra.aspx).



“mothership” interacts directly with its UAV and UUV payloads; for example, UUVs would dock with and recharge from the mothership, collect intelligence information for use on their mission, and afterwards transfer information acquired on the mission back to the mothership to be sent on to authorities.<sup>57</sup>

These and similar projects, and the tactics and strategies that will be associated with them, are part of a broad general trend toward more closely interconnecting formerly disparate components of a military force. Perhaps the most widely known expression of this trend is the doctrine of network-centric warfare (NCW),<sup>58</sup> an approach to conducting hostilities which emphasizes the importance of sharing information between force elements in order to best utilize that information and the force’s capabilities. It was originally developed in the United States, but similar approaches to interconnecting military systems are being pursued, or at least have been proposed, by NATO<sup>59</sup> as well as in Australia,<sup>60</sup> the United Kingdom<sup>61</sup> and other countries. One of the expected benefits of such information-sharing is the possibility of a degree of decentralized operation, or “self-synchronization”, wherein two or more entities can interact directly and coordinate their efforts without employing a traditional hierarchical command and control structure.<sup>62</sup> Relevantly, where some of those integrated systems have significant levels of autonomous operation, the sharing of information will not necessarily be conducted or directly supervised by a human, so that, for example, if intelligence gathered by one autonomous system is utilized in an aggressive action by another autonomous system, all the systems involved may become part of a legal investigation.

While concepts such as NCW are not intrinsically linked to development of autonomous capabilities in military systems, they offer visions of the type of environment in which such advanced systems are likely to operate, and of the degree of integration between military systems that may become the norm. Lawyers should be aware that if this trend continues as appears to be planned, it will become increasingly difficult to separate one autonomous system from another in respect of involvement in some incident. Such a development would

57 John Keller, “DARPA Considers Unmanned Submersible Mothership Designed to Deploy UAVs and UUVs”, *Military & Aerospace Electronics*, 23 July 2013, available at: [www.militaryaerospace.com/articles/2013/07/darpa-uuv-mothership.html](http://www.militaryaerospace.com/articles/2013/07/darpa-uuv-mothership.html).

58 See, generally, David S. Alberts, John J. Garstka and Frederick P. Stein, *Network Centric Warfare*, 2nd revised ed., Department of Defense Command and Control Research Program, 1999.

59 NATO, “NATO Network Enabled Capability”, 27 October 2010, available at: [www.nato.int/cps/de/SID-815535E4-57782C82/natolive/topics\\_54644.htm](http://www.nato.int/cps/de/SID-815535E4-57782C82/natolive/topics_54644.htm).

60 M. P. Fewell and Mark G. Hazen, *Network-Centric Warfare: Its Nature and Modelling*, Defence Science and Technology Organisation, September 2003, available at: <http://dspace.dsto.defence.gov.au/dspace/bitstream/1947/3310/1/DSTO-RR-0262%20PR.pdf>.

61 UK Ministry of Defence, *Network Enabled Capability*, JSP 777, 2005, available at: [http://webarchive.nationalarchives.gov.uk/20121026065214/http://www.mod.uk/NR/rdonlyres/E1403E7F-96FA-4550-AE14-4C7FF610FE3E/0/nec\\_jsp777.pdf](http://webarchive.nationalarchives.gov.uk/20121026065214/http://www.mod.uk/NR/rdonlyres/E1403E7F-96FA-4550-AE14-4C7FF610FE3E/0/nec_jsp777.pdf).

62 D. S. Alberts, J. J. Garstka and F. P. Stein, above note 58, p. 175; for a fuller discussion of the status of self-synchronization, see B. J. A. van Bezooijen, P. J. M. D. Essens and A. L. W. Vogelaar, “Military Self-Synchronization: An Exploration of the Concept”, in *Proceedings of the 11th International Command and Control Research and Technology Symposium*, Cambridge, 26–28 September 2006, available at: [www.dodccrp.org/events/11th\\_ICCRTS/html/papers/065.pdf](http://www.dodccrp.org/events/11th_ICCRTS/html/papers/065.pdf).

potentially complicate the processes of reviewing new weapon systems, and of determining liability of persons involved in developing or operating those systems. Indeed, attempts to draw distinctions between separate systems, such as between lethal and non-lethal systems, may become increasingly artificial. Each device that forms part of a “system of systems” will exhibit both individual behaviour as a system in itself and group behaviour as a component in a larger network.

## Autonomy and IHL

### Legal effect of employing autonomous military systems

Despite the scale of the impending changes to the composition of armed forces<sup>63</sup> and the practice of conflict, one may still ask why the prospect of autonomous weapons being used in armed conflicts is of particular legal interest. Innovative machines of widely varying levels of sophistication, many of them far too complex for a non-specialist to understand in detail, have been utilized in combat for millennia, and rarely has there been much difficulty in applying existing principles of law to their use. Indeed, systems, including weapons, with a more limited capacity for autonomous operation are already being used in combat without any serious contention that their use is illegal. So why might a more highly autonomous weapon raise significant legal issues? That is, why might use of an autonomous weapon affect a State’s ability to meet its obligations under IHL, or affect a court’s ability to adjudicate possible violations of that law?

The answer, and the key legal distinction between autonomous systems and other complex military systems, is that machine autonomy affects the process of deciding to perform an action, whereas other complex systems have an effect only after a decision has been made.<sup>64</sup> This does not mean, as has been suggested elsewhere,<sup>65</sup> that sufficiently autonomous systems will themselves make decisions. Rather, the two critical points, explained below, are (i) that certain decisions which are currently made in the course of an armed conflict would be transferred away from traditional decision-makers and would instead be made, in effect, by the people who define the behaviour of the autonomous system and the people responsible for employing it; and (ii) that in so doing, the character of those decisions would be altered.

63 Sharon Gaudin, “U.S. Military May Have 10 Robots per Soldier by 2023”, *Computerworld*, 14 November 2013, available at: [www.computerworld.com/s/article/9244060/U.S.\\_military\\_may\\_have\\_10\\_robots\\_per\\_soldier\\_by\\_2023](http://www.computerworld.com/s/article/9244060/U.S._military_may_have_10_robots_per_soldier_by_2023).

64 It is understood that this point may raise further questions about matters such as what constitutes a “decision” for the purposes of legal analysis, and what conditions are required for a decision to be considered to be within the immediate control of an autonomous system.

65 Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons*, Ashgate, Farnham, 2009, p. 33.

### *Autonomy reassigns operational decisions*

An autonomous machine runs software which approximates the process of deciding to perform an action, or some part of that decision, followed by other software which directs the machine to perform the action. In other words, the person who would otherwise have had to decide whether to perform some act is partly or fully relieved of that decision, or the person who would otherwise have been in a position to initiate or prevent the commission of an act is partly or fully removed from such a position. Instead, some part of the decision is effectively embodied in software written by people who would not normally have meaningfully contributed to the decision to perform the resulting act. Several novel legal questions then arise. For example, must autonomous weapon systems be designed such that those responsible for planning an attack exercise the same control that they could exercise over human soldiers? Is it possible that weapon developers, or other persons who help define the behaviour of an autonomous weapon system, may be criminally liable for violations of IHL? To what extent is it legal to automate a function, such as a proportionality analysis, when the law places responsibility for that function on humans?

When working with systems that currently are operating at lower levels of autonomy, operators are relieved of only low-level decisions that do not carry significant legal consequences in themselves. For example, a “fire and forget” missile which autonomously evades interception en route to its target does not thereby relieve the operator who pressed the “fire” button of any legally significant decision. When a system operates with a greater degree of autonomy, however, there is potential for the machine’s control system to emulate more significant decisions. Where an autonomous ISR system or a targeting system connected to a weapon plays some substantial part in selecting a target or making a recommendation to fire (one example being the Patriot missile system’s ground-based radar),<sup>66</sup> the human weapon operator, if there is someone who can reasonably be considered as such, is no longer performing all parts of the mental process leading to firing on that target and is no longer the sole or even principal decision-maker providing input into a firing decision. The machine itself cannot be considered a decision-maker for legal purposes,<sup>67</sup> so the decision is instead partly or fully attributable to the people responsible for the behaviour of the autonomous system (bearing in mind that identifying those individuals and organizations may be a complex endeavour in itself), and by the people responsible for the decision to employ the weapon.

### *Autonomy changes the character of decisions*

Transferring operational decisions away from the people who have traditionally made them to those who define the behaviour of autonomous systems necessarily alters the character of those decisions in three interrelated ways.

66 Raytheon, “Patriot”, available at: [www.raytheon.com/capabilities/products/patriot/](http://www.raytheon.com/capabilities/products/patriot/).

67 That is, machines are not subjects of IHL and, it is suggested, the possibility that they may become so in the future is remote.

First, the generality of the decisions necessarily increases. When human decisions made “on the spot” in respect of specific situations are replaced with, or supplemented by, programmatic instructions that had been previously provided to a machine, decisions about individual acts in specific situations are replaced with broader policy-like choices applicable to the range of situations that match whatever parameters had been previously provided to the machine.

Second, the timing of the decisions changes. Decisions about whether and how to perform an action via an autonomous system are effectively made at the time the relevant behaviour is programmed into the machine and at the time the decision is made to employ the weapon, rather than at the time the situation arises in a conflict. This is important because, firstly, it may have implications for the temporal scope of application of IHL,<sup>68</sup> and secondly, it requires an assumption that situations in which the machine is deployed in the future will not differ in important respects from those envisioned at the time the machine was developed and tested.

Third, the informational basis on which the decisions are made is altered. Decisions implemented via an autonomous system cannot be based on direct (or even indirect) observation of the situation to which the decision relates; rather, they must be based on whatever information is available through experience and foresight at the time the machine is programmed, and then confirmed when the decision is made to employ the weapon.

One result of these changes is that the causal link between a specific human decision and a specific action (or repeated action) or a specific outcome, such as a particular target being fired upon, may be weakened when the decision is enacted partly or fully via an autonomous system.

The above changes in the character of decisions occur whether actions are explicitly programmed into a machine, or whether technologies of artificial intelligence are employed to allow the machine to adapt its behaviour dynamically; in either case the developers of the machine, or those they answer to, exercise control over the behaviour of the system and exert that control by defining a goal and equipping the system with some means to achieve that goal.

## Identifying legal issues

Such an alteration in military decision-making is important because IHL also operates in relation to decisions. In seeking to “limit the effects of armed conflicts for humanitarian reasons”,<sup>69</sup> the law attempts to guide the decisions and resulting actions of persons individually and parties to conflicts collectively. Legal objections to the use of machine autonomy in armed conflict are most likely to

68 For a discussion of one such question, see Tim McFarland and Tim McCormack, “Mind the Gap: Can Developers of Autonomous Weapons Systems be Liable for War Crimes?”, *U.S. Naval War College International Law Studies*, Vol. 90, 2014, p. 361, available at: [www.usnwc.edu/getattachment/ed8e80ad-b622-4fad-9a36-9bedd71afebe/Mind-the-Gap-Can-Developers-of-Autonomous-Weapons.aspx](http://www.usnwc.edu/getattachment/ed8e80ad-b622-4fad-9a36-9bedd71afebe/Mind-the-Gap-Can-Developers-of-Autonomous-Weapons.aspx).

69 ICRC, “War and International Humanitarian Law”, Geneva, 2010, available at: [www.icrc.org/eng/war-and-law/overview-war-and-law.htm](http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm).

be found where the technologies of autonomy and IHL operate on the same decision; that is, where use of a weapon or other system with a capacity for autonomous operation alters a decision-making process, or a decision outcome, beyond what is permissible under IHL or otherwise hinders the operation of the law. Given the low levels of autonomous capability present in today's weapon systems, such an event is still hypothetical, but plausible scenarios may be postulated: perhaps if an autonomous ISR system were to provide information directly to an autonomous weapon system such that human commanders could not independently verify its accuracy before activating a weapon, it might be seen as a violation of the obligation to take precautions in relation to an attack.

This may seem a vague criterion, but given the expected range of forms and applications of autonomous systems and the current early stage of development, it is perhaps the most that can be reliably said. The following guidelines may, however, be useful in identifying legal issues.

### *Legal decision-makers will continue to be human*

IHL is anthropocentric by nature and design. With one of its primary purposes being “to soften ... the evils of warfare, to suppress its useless hardships and improve the fate of wounded soldiers on the field of battle”,<sup>70</sup> its focus is necessarily on people: those wielding weapons and those subject to the effects of those weapons. Developments in the law are driven by the need to regulate and account for human decisions and actions, and the need to relieve unnecessary human suffering.

This is perhaps a trite reminder, but it is useful in this context. The growth of a new technology, especially one considered by some to herald a “revolution in military affairs”,<sup>71</sup> naturally draws attention to the details of the technology and the possibilities it presents. It is often tempting to treat the technology (or the devices which employ it) as the focal point of law, rather than returning one's attention to people. In some cases that is appropriate; where a technology or device is expected to have a narrow and well-defined set of effects on the conduct of hostilities and on the people involved, it may be expedient to treat that technology or device as embodying a particular effect on the law. Laser weapons intended to permanently blind a person, for example, have a narrow and well-defined effect which can be readily analyzed for compatibility with the laws of armed conflict and can be readily seen to necessarily exceed the bounds of those laws; as such, it is appropriate for lawyers to focus on those devices as representing a certain undesirable effect and to regulate them accordingly.<sup>72</sup> However, that is not the case with autonomous systems.

70 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864 (entered into force 22 June 1865), Preamble.

71 P. W. Singer, above note 54, p. 203.

72 Additional Protocol (IV) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate

The addition of autonomous capabilities to existing and new military systems presents a different challenge. A system's capacity for some degree of autonomous operation does not map directly to a readily determined effect that may be assessed against the requirements of IHL. As discussed above, an autonomous control system directly affects only the relationship between weapon and operator, and thereby the behaviour of the operator, not necessarily the behaviour of the weapon being controlled. Also, given the variability in time and function of what may be classified as machine autonomy, it is difficult to make general statements about an operator's or developer's behaviour (thoughts and actions) in relation to a particular event on the battlefield. The most that can be said is that lawyers must focus their attention on that behaviour in determining where legal issues may arise. Technologies giving rise to a capacity for autonomous machine operation merely inform those determinations.

### *Distinguish between technical and legal issues*

Some of the issues most commonly raised by legal authors are essentially concerns about whether a proposed autonomous system will meet some standard of performance that is deemed necessary to comply with the law. Such concerns have so far most often related to the legal principles of distinction and proportionality.<sup>73</sup>

Regarding distinction, for example, several authors have argued that no existing robotic system can reliably distinguish between a combatant and a civilian, a shortcoming which is variously attributed to limitations in the effectiveness of sensor systems,<sup>74</sup> to the inability of controller software to "understand" context and human behaviour sufficiently well, and to the difficulty of sorting relevant from irrelevant information in complex situations,<sup>75</sup> among other factors. Similar arguments are used to show that robots cannot judge whether a proposed attack would satisfy proportionality requirements, with authors most often pointing to the qualitative and subjective nature of the problem.<sup>76</sup>

Other authors point to more general limitations in the ability of robotic systems to function reliably in conflict. Asaro cites the "highly limited capabilities for learning and adaptation" of autonomous systems as a reason why "it will be difficult or impossible to design systems capable of dealing with the fog and

Effects (Protocol on Blinding Laser Weapons), 1380 UNTS 370, 13 October 1995 (entered into force 30 July 1998).

73 See, e.g., C. Grut, above note 37; Peter Asaro, "On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making", *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 687; M. Wagner, above note 16.

74 See, e.g., Benjamin Kastan, "Autonomous Weapons Systems: A Coming Legal 'Singularity'?", *Journal of Law, Technology and Policy*, No. 1, 2013, p. 60.

75 M. S. Riza, above note 9, pp. 129–132.

76 See, e.g., Noel E. Sharkey, "The Evitability of Autonomous Robot Warfare", *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 789.

friction of war”.<sup>77</sup> Others note the difficulty of reliably predicting the behaviour of complex autonomous systems.<sup>78</sup>

No doubt there is considerable strength in many of these arguments, given the state of the relevant technologies today. However, when an objection to the use of autonomous systems is presented as a statement about the ability of such a system to perform at a standard required by IHL in a given situation, that statement, even if accurate, relates only to a specific set of machine capabilities and so is only valid at a certain point in time; the objection may fall away as technology moves on. Lawyers should therefore be wary of making general statements about the legality of autonomous systems on the basis of arguments of this form. Such an objection would serve as the basis for a legal ruling (perhaps as guidance for a State’s weapons review process) only if it could be expected to endure, such as may be the case if a factor could be identified which appears to positively prevent systems with some capacity for autonomous operation from ever performing in compliance with IHL, or if something inherent in the nature of machine autonomy would violate IHL. Examples from outside the realm of machine autonomy would include the bans on perfidy (due to the nature of the act) and the use of sarin gas (due to its inherently indiscriminate effects). If no such factors can be identified, it would seem more appropriate to state merely that a particular system could or could not be used legally in a specific situation. For this reason it is suggested that investigations into the legality of autonomous systems should include a qualifying question: if the system could, even hypothetically, be made to function in a given situation as effectively as a non-autonomous system (whether human or otherwise), would there be any legal basis for objecting to its use? If the answer is clearly “no”, then the objection is more properly seen as a technical challenge that must be overcome before the system can be legally employed, or perhaps as justification for limiting the situations in which the system can be used until that challenge is overcome. For example, if an autonomous targeting system could be made to distinguish combatants from civilians as reliably as, or more reliably than, human soldiers do unaided, would it be proper to object to its use? It is suggested that objections to the use of autonomous systems that refer to the difficulty of predicting their behaviour in all circumstances, or to the possibility of computer errors and malfunctions occurring after activation, would also fall within this category. The possibility of malfunctions, in particular, is not unique to autonomous systems; it is, rather, a concern that must be addressed in relation to any military system that relies on a computer for some part of its operation.

If, however, the answer is “yes” (that is, regardless of how effective an autonomous system is, its use does not currently fit within the constraints of IHL), then lawyers need to look more closely to determine how development of

<sup>77</sup> P. Asaro, above note 73, p. 692.

<sup>78</sup> A. Finn and S. Scheding, above note 49, p. 36: “As the degree of autonomy increases, so it becomes increasingly difficult to predict the sum state of the system.” Also see the discussion of developer accountability on p. 183.



the autonomous system should be limited, or guided, or how the law should be developed. This may be the case if, for example, it is found that the law requires some degree of direct human control over each individual attack or act of violence; if that is so, it would be impermissible to place an attack entirely under the control of an autonomous system, regardless of how well the system performs.

## **Conclusion**

Even at this early stage of development, it appears likely that the use of sufficiently autonomous military systems may test the limits of IHL in a range of fundamental ways. The novel quality of autonomous systems is that they reassign operational decisions and, in so doing, change the nature of those decisions. In the case of armed conflict, situational decisions made by individual combatants would be replaced with more general choices made by people who define the behaviour of the autonomous systems.

The expected variability of the degree of autonomous operation in proposed systems, the likely range of applications and the possibility of autonomous systems collaborating directly with each other combine to greatly complicate analytical approaches which focus on the behaviour of specific machines in specific situations. Instead, it is recommended that lawyers treat machine capabilities as the result of decisions made by weapon developers, and focus attention on the roles played by those developers and by operational personnel who deploy and work with autonomous systems. In particular, the novel legal consequences of autonomous capabilities relate not to how well a machine performs its function, but only to how its developers and operators, if any, are involved in the outcome.



# The future of warfare: Are we ready?

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## Abstract

*To what extent do the ways in which we anticipate threats, analyze their possible consequences and determine ways to mitigate them explain the causes of warfare in the future? This article – though never attempting to predict – poses plausible causes of future wars that may stem from transformative change over the next two decades. In asking the question “Are we ready?” to deal with such wars, the answer is framed in terms of the interrelationship between the prospect of profound change, emerging tensions, unprecedented violence and organizational capacities to deal with complexity and uncertainty. To be prepared to deal with the prospect of future wars, relevant organizations have to be more anticipatory and adaptive, while at the same time looking for new ways to engage the wider international community. The article concludes with a set of recommendations intended to meet such organizational challenges – with the aspiration that the question “Are we ready?” can be answered more affirmatively in the future.*

**Keywords:** atomized societies, cyberspace, cyber-war, dynamic displacement continuum, outer space, resource conflict, private sector, organizational behaviour, slumscales, transformative change.

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## Introduction

Every age regards itself as unique, driven by factors deemed unprecedented and transformative. The same is true of the first decades of the twenty-first century. Yet despite this historical and possibly comforting perspective, the present era is

and indeed will continue to be profoundly transformative for humankind. It will mark the point at which the very nature of “humanness” will be in the hands of humans to reconstruct, and it will mark the point when human activity will become increasingly based in outer space. The former challenges the very nature of who we are; the latter moves human activity beyond the confines of the planet.

In the context of the future of warfare, the implications of such profound transformations will directly impinge upon the very concept of conflict, its instruments and its location, and in so many ways will reflect radical departures from the past. These transformations will not only determine how wars will be fought, who will be the adversaries, and where future battles will take place, but also may determine the very *raison d'être* of warfare in the future.

One very compelling question remains: namely, are we ready?

In and of itself, the question is intriguing. Are we as human beings ready to adapt to such new forms of conflict? And, in the context of this article, will we – those who represent institutions designed in an earlier era to promote peace – be able to deal with new types, dimensions and dynamics of warfare? In a related vein, will the legal frameworks that over the course of modern history have attempted to put “civilized parameters” around the horrors of conflict be irremediably challenged by its future evolution?

This article will in various ways touch on all these issues. However, before doing so, the first section below, entitled “Transformative Agents and Global Implications”, will establish the context within a 2040 timeframe in which future warfare might take place. It will, for example, consider transformative factors and how such factors might impact upon societies, their perceived interests and their vulnerabilities. It is these issues of interests and vulnerabilities that will lead into the second section, “Plausible Tensions and the Changing Nature of Warfare”. This section suggests seven examples – ranging from competition over cyber control to strains between atomized societies and state structures – that link these sorts of tensions to the prospect of future wars.

States and societies having been pushed to the brink; what might the consequences be when it comes to overt violence, in this case warfare? From conflicts in outer space and virtual and robotic conflicts on the planet to nuclear capacities in the hands of non-State actors and perpetual wars arising from mass displacement, the factors that might trigger warfare in the future are terrifyingly wide, and the second section will also attempt to capture some plausible examples of the sorts of adversaries that will be involved, their locations, their weapons and their possible impacts on humankind.

What might be described as “war scenarios” are, for all their horror, relatively easy to imagine. Far more difficult is to determine the plausible criteria for assessing how ready the global community is to deal with such unprecedented forms of violence. The final section of the article, “Are We Ready?”, ventures into that highly complex zone. It looks at present institutions, legal frameworks and principles as well as at the restraining factors inherent in *Realpolitik* in order to suggest our readiness. Arising out of its conclusions, the section ends with some recommendations which might enhance that state of readiness, whatever it might be.

## Transformative agents and global implications

The transformations that are under way leave few unaffected around the world. While a number of analysts caution over-enthusiastic “futurists” about their single focus on technology, one might argue that in many ways, technology will in this age transform traditional as well as more innovative cultures and societies.<sup>1</sup> When the suggestion that the “Internet of things” will connect everything with everyone was posited, it was initially difficult to appreciate how ubiquitous the concept was. Now, in one way or another, it is generally recognized that the Internet and related technologies spill over into every dimension of human existence. *Sousveillance* and *surveillance* will by 2040 enable “all to know everything about everyone” globally,<sup>2</sup> and tactile communications, the prospect of teleportation and 4-D printing will change human interactions in ways unimaginable in the previous decade.<sup>3</sup> All such transformative innovations will be further developed through “big data” and artificial intelligence revolutions.<sup>4</sup>

Technology offers the promise of economic progress for billions in emerging economies at a speed that would have been unimaginable without the Internet. Twenty years ago, less than 3% of the global population had a mobile phone; now two thirds of the world’s population has one, and one third of all humans are able to communicate on the Internet.<sup>5</sup> This figure could soon rise with the introduction of drone technology that will be able to link mobile

- 1 David Edgerton, *The Shock of the Old*, Profile Books, London, 2006. In the author’s description of “use-based innovation”, he cautions against assuming that innovation is consistently transformational. He suggests that “use” determines the impact of innovation, which in turn is determined by a range of factors, including levels of development, culture and society. In that context, he suggests that the horse had a greater impact on Nazi conquests than did the V2 rocket. *Ibid.*, p. xii.
- 2 Described by David Bollier as “a budding counterpoint to surveillance. Surveillance, of course, is the practice of the powerful monitoring people under their dominion, especially people who are suspects or prisoners – or today, simply citizens. *Sousveillance* – ‘to watch from below’ – has now taken off, fueled by an explosion of miniaturized digital technologies and the far-reaching abuses of the surveillance market/state.” David Bollier, “Sousveillance as a Response to Surveillance”, *News and perspectives on the commons*, 24 November 2013, available at: <http://bollier.org/blog/sousveillance-response-surveillance> (all internet references were accessed in October 2016).
- 3 Interview with Professor Murray Shanahan, Professor in Cognitive Robotics, Faculty of Engineering, Department of Computing, King’s College, London, 15 April 2015. Quantum computing is yet another transformative innovation, as described in an interview with Stephen Phipson, UK Government Trade and Investment, 21 June 2016.
- 4 Interviews with Dr. Stuart Armstrong, James Martin Fellow, Future of Humanity Institute, University of Oxford, specializing in artificial intelligence and assessing expert predictions and systemic risk, 7 April 2015; and Professor Mischa Dohler, Chair, Wireless Communications, Centre for Telecommunications Research, King’s College, London, 8 April 2015.
- 5 This positive statistic has to be balanced against the probability that the “penetration rates” of mobile communications need to reflect the significant differences between urban and rural areas, where the former is significantly larger: e.g., Brazil urban connectivity 83.3%, rural 53.2%; Ghana urban 63.5%, rural 29.6%; India urban 76%, rural 51.2%. Sarah Gustafson, “The Digital Revolution in Agriculture: Progress and Constraints”, Food Security Portal, International Food Policy Research Institute (IFPRI), 27 January 2016, available at: [www.foodsecurityportal.org/digital-revolution-agriculture-progress-and-constraints](http://www.foodsecurityportal.org/digital-revolution-agriculture-progress-and-constraints).

communication systems to a further billion people.<sup>6</sup> These developments will have positive impacts across an ever widening range – from farmers who can use mobile phones to negotiate crop prices with traders well outside their local communities to refugees who can compete for design contracts from their camps, the impact of technology will increasingly leave few unaffected.

At the same time, there is concern that it is not implausible that within the foreseeable future, machines will outsmart human beings. According to Cambridge University's Huw Price and Skype co-founder Jaan Tallinn, "[i]t seems a reasonable prediction that some time in this or the next century intelligence will escape from the constraints of biology".<sup>7</sup> Price adds that as robots and computers become smarter than humans, we could find ourselves at the mercy of "machines that are not malicious, but machines whose interests don't include us".

Hence, the seeming paradox is evident. Clearly technological advance holds out the prospect of exponential progress, while at the same time, "[s]cience and its technological application are positioned as today's greatest source of ruination".<sup>8</sup> Such a position is clearly *in extremis*, and the reality may be a mixture of both – as evidenced in all that is "normal life".<sup>9</sup>

For all its promise and potential hazards, transformative technology raises two fundamental, if not existential, issues. The first concerns who analyzes and monitors the potential implications of technological advance, who understands its consequences and cross-sectoral linkages, and ultimately who controls it. The second issue, of related concern, is the sheer dynamics and speed of technological advance and indeed the world of technology – are they even controllable?

Clearly, technology will have direct implications when it comes to how human beings will earn their living and how economies will function. While there is already emerging evidence that robotics is eating into virtually all aspects of professions, industry and agriculture in developed counties, what is increasingly evident is that employment-related prosperity forecasts for the developing world may also be negatively affected.<sup>10</sup> Agriculture, for example, an issue of increasing concern in a world of 7.5 billion people and counting, is forecast to be dominated by robotic technologies. One outcome of this could be an increasing amount of people seeking employment in urban areas. Alternatively, according to one source in a slightly more positive vein, "[a]pplying new technologies to farming will boost

6 Aviva Rutkin, "First-Time Surfers", *New Scientist*, Vol. 229, No. 3059, 2016, pp. 18–19. See also: Christina Richards, "Will Internet Access Via Drones Ever Fly?", *Wired*, November 2014, available at: [www.wired.com/insights/2014/11/internet-access-drones/](http://www.wired.com/insights/2014/11/internet-access-drones/).

7 Huw Price, Jaan Tallinn and Martin Rees, "Humanity's Last Invention and Our Uncertain Future", University of Cambridge Research News, 25 November 2012, available at: <http://www.cam.ac.uk/research/news/humanitys-last-invention-and-our-uncertain-future>.

8 Steve Matthewman, "Dealing with Disasters: Some Warnings from Science and Technology Studies", *Journal of Integrated Disaster Risk Management*, Vol. 4, No. 1, 2014, p. 2.

9 As with the creation of the locomotive in the nineteenth century – the positive side of this invention in terms of more effective transportation, a plethora of related innovation and new employment opportunities had to be weighed against the negative implications of coal mining for a large swathe of the poor, the expansion of slums in urban areas and deepening social divides.

10 "The Return of the Machinery Question", Special Report, *The Economist*, 25 June 2016; Sumit Paul-Choudhury, "Outsmarted?", *New Scientist*, Vol. 230, No. 3079, 2016, pp. 18 ff.

the appeal of agriculture to younger people and help increase their participation in the sector".<sup>11</sup>

Yet, as is also increasingly evident, the industries that have become the lure for potential city-dwellers in developing countries will also be dominated by robotics and related innovations. A case in point is "offshoring", where a combination of cheap labour and increasingly intelligent algorithms have resulted in the provision of information services in developing countries for developed countries. This had been regarded as a clear case of how new technologies will enhance employment and economic growth around the world, but the emerging reality is that technology is already tending to radically reduce human employment by replacing it with machines. And, as that occurs, analysts anticipate that offshoring will decline in favour of a return to home base – with the irony that home base will choose to use robotics, too, rather than even highly skilled workers in the developed world.

Here, again, is an emerging paradox. To what extent might those transformative factors that result in unemployment be essential for paving the way towards alternative types of employment? And, in a related vein, to what extent might the State acknowledge that it has limited control over the flows of those who create jobs, such as the private sector, and that its capacity to sustain employment and, hence, economic security is very limited? Alternatively, will the State have the resources and commitment to create new types of employment, such as active forms of social engagement,<sup>12</sup> and can it require, for example, even those technology-driven companies to commit themselves to include human workforces in their production schema? Or, might the alternative be that "the advantages of further conciliation pale by comparison with the threat to their already lowered standard of living"? In such a situation, "greater militancy is a normal response.... Such moments also see the intensification of less rational inter-ethnic struggle."<sup>13</sup> Here, the prospect of discontent and ethnic hatred could plausibly trigger conflict reminiscent of the 1940s.

While attention to this issue is considerable and growing, there is little indication that any identifiable pattern dominates the discourse. That said, should the prospect of billions out of work around the world become increasingly plausible, there appear few sustainable, recognizable solutions on the horizon. Over the next two decades, though technology will positively affect the volume and quality of resources, one of its critical effects may be that mass unemployment will in turn result in mass displacement. Analysts warn that an estimated 700 million

11 Takaki Shigemoto, Analyst at JSC Corp., quoted in Aya Takada, "Japan's Next Generation of Farmers Could Be Robots", Bloomberg, 23 April 2016, available at: [www.bloomberg.com/news/articles/2016-04-23/robots-replacing-japan-s-farmers-seen-preserving-food-security](http://www.bloomberg.com/news/articles/2016-04-23/robots-replacing-japan-s-farmers-seen-preserving-food-security).

12 An interesting example in the US context can be found in Lynn A. Karoly and Constantijn W. A. Panis, *The 21<sup>st</sup> Century at Work: Forces Shaping the Workforce in the US*, Rand Corporation, Santa Monica, 2004, p. 119: "There is also speculation that IT may be changing the nature of employer-employee relationships, with firms in the 'new economy' relying more heavily on 'alternative' or 'contingent' workers in place of traditional employees."

13 Immanuel Wallerstein, "The Global Possibilities 1990–2025", in *The Age of Transition: Trajectory of the World System, 1945–2025*, Pluto Press, Leichhardt, 1996, p. 227.



people will become refugees, economic migrants or internally displaced.<sup>14</sup> Many of these will be in or will move to urban areas, where unemployment in what the second section of the article, below, defines as “slumscares” will result in an explosive mix of poverty and isolation, creating triggers for further displacement.<sup>15</sup>

In that context, one analyst has suggested that “the greatest risk is that we could face a ‘perfect storm’ – a situation where technological unemployment and environmental impact unfold roughly in parallel, reinforcing and perhaps even amplifying each other”.<sup>16</sup>

The prospect of mass unemployment and displacement at a time when one can foresee exponentially increasing advances in life-prolonging and life-enhancing health care suggests another irony. A growing number of innovations, such as telemedicine and tactile communications as well as nano-implants, will enable both specialists and “non-specialists” to monitor well-being and determine measures to deal with illness. DNA creation and modification, along with biotechnology and nanotechnology, will result in a radical reduction of illness, both physical and mental. And, over the course of two decades, it will be interesting to see the extent to which manufactured body parts will be able to replace more and more components of the human body.

All these advances – due in part to their “non-specialist” accessibility – should be available to a wide spectrum of people, and while the benefits will most likely not consistently benefit the very poor, even they will be sporadic beneficiaries. Furthermore, while medical advances will result in unquestionable benefits for a large swathe of human beings around the planet, the negative effects of climate change on health may well become “the biggest global health threat of the 21st century”, and will be multifaceted.<sup>17</sup> Climate change will indeed be a major health issue; its consequences will inevitably touch upon all aspects of human existence. In that regard, the United Nations (UN) anticipates that climate change will be “the defining issue of our age”.<sup>18</sup>

Water and agricultural production will be severely affected, positively and negatively, both by climate change and related aspects of transformative innovation. Here, once again, is a tension between the positive and the negative. When it comes to water, there is a well-established belief that increased water supplies due to industrial desalination would effectively free the world from the constraints of

14 United Nations Convention to Combat Desertification, *Desertification: The Invisible Frontline*, Bonn, 2014, p. 5.

15 The World Economic Forum (WEF) has noted that in “many developing countries, migration from rural areas to cities is at least partially driven by the increasing prevalence of extreme weather, such as land degradation and desertification, making agriculture more difficult”. Subsistence farmers and those whose livelihoods depend upon the land will naturally be amongst the worst affected. WEF, *Insight Report: Global Risks 2015*, 10th ed., report, Geneva, 2015, p. 34.

16 Martin Ford, *The Rise of the Robots: Technology and the Threat of Mass Unemployment*, Basic Books, New York, 2015, pp. 283–284.

17 Anthony Castello *et al.*, “Managing the Health Effects of Climate Change”, *The Lancet*, Vol. 373, No. 9676, 2009.

18 Ban Ki-Moon. “Opening Remarks at 2014 Climate Summit”, *UN News Center*, 23 September 2014.

drought and water scarcity.<sup>19</sup> However, a significantly less optimistic picture of water availability is drawn by a number of authors, one of which foresees countless disputes, from Slovakia and Hungary to Namibia and Botswana to the American state of Georgia, which “has threatened to call out the National Guard during a feud with Florida and Alabama over the Chattahooche [river]”.<sup>20</sup> Similarly, there are those experts who foresee a viable though uneven picture of agricultural production around the world.<sup>21</sup> This prospect in the foreseeable future will be due not only to more integrated planning, but also to the extensive use of technology-based innovations such as genetically engineered crops and global positioning systems that enable precise yield and location data to be correlated with soil samples and sensors to adjust fertilizer application.<sup>22</sup>

The much-discussed energy-water nexus is fast becoming the energy-water-food-land-metal nexus, as resources become ever more interdependent. Water is perhaps the most striking example, because with the prospect for limited access in the future, decisions will need to be made about where and how it will be best used. Does one prioritize the use of water for the creation of energy, for the mining of resources, for the production of food, for industry, sanitation or consumption?

Furthermore, in considering the reliance of these activities upon each other (energy, for example, is essential for all of these activities), the challenge becomes graver. With the use of biofuels set to triple by 2040,<sup>23</sup> an interesting battlefield is being staged as the debate rages over the wide-scale use of water and land in the production of this alternative, “renewable” energy source.

It is more than likely that resource efficiency and recycling will increase over the next few decades,<sup>24</sup> facilitating a reduction in the demand on some resources. Additionally, several new technologies will likely be viable by 2030, including fuel cells, solar cells and, as noted earlier, advanced desalination techniques.<sup>25</sup> It is also possible that resources may begin to be retrieved further

19 UK Ministry of Defence, Strategic Trends Programme, *Global Strategic Trends – Out to 2045*, London, 2015, p. 24. Amongst a growing number of innovative approaches to desalinization and water availability is an initiative undertaken by Jordan and Israel, where the former, through captured solar energy, would provide electricity to drive Israel’s desalinization plants on its Mediterranean coastline. “Utilities in the Middle East”, *The Economist*, 16 January 2016, p. 53.

20 Diana Raines Ward, *Water Wars: Drought, Flood, Folly and the Politics of Thirst*, Riverhead Books, New York, 2002, pp. 9 ff.

21 F. W. T. Penning De Vries, H. Van Keulen and R. Rabbinge, “Natural Resources and Limits of Food Production in 2040”, *Systems Approaches for Sustainable Agricultural Development*, Vol. 4, 1995.

22 IFPRI, in its Food Security Portal, states that information and communications technologies can increase access to weather and market information, and help farmers make better informed decisions about when and where to sell crops. Examples include the Tigo Kilimo mobile app in Tanzania and the Connected Farmer mobile programme in East Africa. IFPRI warns, however, that voice messages need to be properly targeted between the farmer and the information source, and too often are not. See S. Gustafson, above note 22.

23 International Energy Agency, *World Energy Outlook 2014*, Paris, 12 November 2014, p. 4.

24 *Ibid.*, p. 43.

25 Richard Dobbs, Jeremy Oppenheim, Fraser Thompson, Marcel Brinkman and Marc Zornes, *Resource Revolution: Meeting the World’s Energy, Materials, Food, and Water Needs*, report, McKinsey Global Institute, New York, 2011, pp. 134–135.

away from home, with investment already being ploughed into the space mining industry.<sup>26</sup> The rewards stand to be enormous, with one asteroid that recently passed Earth offering a \$5 trillion platinum core, worth more than Japan's entire economy.<sup>27</sup>

It is with the spectre of resources beyond the Earth's atmosphere that the transformative consequences of human involvement in outer space becomes an ever more important consideration. There are few aspects of life on Earth that will not be directly affected over the next two decades by human activity in outer space, even including the way that gross domestic product is assessed.<sup>28</sup> The proliferation of satellite communications beyond the Earth's ionosphere means, for example, that agricultural conditions will be monitored to assess ways to maximize agricultural opportunities, which analysts anticipate will significantly increase production levels.<sup>29</sup> Similarly, it is assumed that energy resources taken directly from the sun have the potential to eliminate the need to search for alternative energy sources on the planet.<sup>30</sup>

By the late 2030s, NASA and the European Space Agency forecast that capacities will exist which can anticipate as well as respond to a wide range of possible disaster drivers, including earthquakes, floods and droughts.<sup>31</sup> Similar aspirations also drive the UN's SPIDER project, which already provides satellite-based services for supporting efforts to deal with global challenges such as climate change, global health and human security.<sup>32</sup> And, it is increasingly evident that outer space technologies will in the foreseeable future be able to monitor patterns of conflict in war zones as well as to *anticipate* flows of displaced people around the world.<sup>33</sup>

There is, at the same time, a considerable downside. The UN's Fourth Committee (Special Political and Decolonisation) expressed concern in October

26 According to the *New Scientist*, an asteroid mining firm, Planetary Resources, "has revealed the first object 3-D printed from meteorite ore, a scale model of one of its spacecraft parts. The rock was found on Earth, but in future the company plans to mine and manufacture in space." "60 Seconds", *New Scientist*, Vol. 229, No. 3056, 2016, p. 8.

27 Eric Mack, "'Trillion Dollar Baby' Asteroid Has Wannabe Space Miners Salivating", *Forbes*, 19 July 2015.

28 Vernon Henderson *et al.*, "Measuring Economic Growth from Outer Space", *American Economic Review*, Vol. 102, No. 2, 2012.

29 It is interesting to note in this context that, according to the *New Scientist*, the Ethiopian director of Ethiopia's Entoto Observatory and Research Center, Solomon Belay Tessema, has stated: "A space programme is not a luxury, but a key to securing food, increasing the productivity of agriculture and developing scientific thinking. Space technology is important for many things: satellites, for instance, are used for environmental and water management, and soil assessment. We use them for disaster planning to gather meteorological data and to improve communications." Linda Geddes, "From Ethiopia to the Stars", *New Scientist*, Vol. 229, No. 3057, 2016, p. 27.

30 See, for example, Paul Marks, "Star Power: A Global Contest Is Under Way to Tap the Sun's Energy from Orbit. Is this the Start of a Second Space Race?", *New Scientist*, Vol. 229, No. 3060, 2016, pp. 38 ff.

31 See, for example, Catherine Cheney, "NASA and USAID pioneer the use of space technology for development efforts", *Devex*, 1 July 2016, available at: [www.devex.com/news/nasa-and-usaid-pioneer-the-use-of-space-technologies-for-development-efforts-88365](http://www.devex.com/news/nasa-and-usaid-pioneer-the-use-of-space-technologies-for-development-efforts-88365).

32 UN Office for Outer Space Affairs, *Space Matters*, August 2011.

33 See, for example, Anja Shortland, "Studying Somalia's War Economy from Outer Space", Stockholm International Peace Research Institute (SIPRI), 11 September 2013, available at: [www.sipri.org/commentary/blog/2013/studying-somalias-war-economy-outer-space](http://www.sipri.org/commentary/blog/2013/studying-somalias-war-economy-outer-space).

2014 that a new global hegemony may emerge in the foreseeable future, based upon scientific and technological capacities in outer space. The ability of a relatively few governments and private-sector bodies to dominate essential resources globally may for many result in deep poverty and vulnerability, as has been the case in the past. All too frequently have technological and economic advances in turn resulted in socioeconomic disparities – a fact well known to many analysts, including economic historians and sociologists.<sup>34</sup>

In this context, the interrelationship between outer space and cyberspace may well be in the hands of a relative few,<sup>35</sup> and its consequences clearly global in impact. The more intensely that interrelationship grows, the more likely it is that the disruption of one system, such as a satellite system, will seriously affect an important cyber-system. Debris, for example, from an asteroid or meteorite might collide with a satellite, which could profoundly disrupt a plethora of Earth-based services, including those designed for security purposes. Large swathes of human beings would ultimately find themselves without the most basic resources and means of survival – whatever their socioeconomic status – and, in many ways, without protection.<sup>36</sup>

### Implications for global governance: Challenges to the “State”

With all the negative as well as positive effects of technology and its relationship to human agency, employment and displacement, resources and basic means of survival, the issue of governance becomes a critical – indeed, potentially transformative – factor in the ways in which societies will structure themselves and allocate their resources.

State authority from this perspective will clearly be a key consideration when it comes to addressing the conundrums that may result from transformative factors. In this regard, the State’s ability to keep pace with such factors is clearly an issue of fundamental importance. Some have argued that the sheer speed and flexibility of the private sector and other atomized networks will enable them to outpace and outmanoeuvre governments, except when the former deem the latter to be useful.

34 See, for example, Joseph Stiglitz, *Globalisation and its Discontents*, Allen Lane, London, 2002, pp. 153 ff.

35 As stressed in a 24 January 2013 conference on “Making the Connection: The Future of Cyber and Space”: “the increasing interdependence and interconnectedness between space and cyberspace comprises an important development affecting both fields. On the one hand, space components (including satellites and base stations) have become an integral part of cyberspace. An unprecedented quantity of data is being generated and transmitted by satellites on a daily basis with an accompanying rise in space-enabled services.” Royal Institute of International Affairs, London.

36 The UK government’s National Space Policy notes that “space has become increasingly important to modern Britain. This trend is set to continue as societies in the developed and developing worlds rely increasingly on space based assets as one of the critical infrastructures to meet the needs of an estimated population of 9 billion in 2050. Satellites will assist with better management of scarce resources, offer improved communications and support more efficient use of energy. Our global space assets are rightly recognized as part of our critical national infrastructure, and space weather is included in our national risk assessment, acknowledging the risk it represents to both space and ground-based facilities. Once the domain of only those who understood rocket science, space is now a leveller of society in developed and developing countries.” Government of the United Kingdom, National Space Policy, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/484865/NSP\\_-\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484865/NSP_-_Final.pdf).

A related concern is that States, in their determination to grapple with the consequences of mass unemployment, unparalleled urbanization and an undisciplined private sector, may use their authority to introduce “solutions” that are gross abuses of civil rights. They may well attempt to cut off or at least limit the myriad strands that comprise atomized networks.

With that in mind, the prospects for State-based governance systems and structures to deal effectively with societal transformations remain uncertain. Those who try to grasp the relationship between the possible future of governments and the basis of their authority, accountability and allocative processes will inevitably have to contend with an increasing array of uncertainties. Amongst these, there are a range of issues that need to be addressed when it comes to governance and complex systems.

The definition of “State” is one such issue, and in a 2040 context may require further reconsideration, if not redefinition. While it is generally assumed that the role of the State as the basis of governance will remain central in the global system over the next two decades, the very nature of the State may change. The assumption that fixed boundaries, defined populations and ultimate control over assets and currencies are all fundamental aspects of the State may well be challenged in various ways. The growth of city-to-city collaboration, the mass movements of displaced peoples flowing across borders and the very dynamics of atomization would seem to suggest that State boundaries may be increasingly fluid, if not uncontrollable. The effects of innovations that could include teleportation, tactile communications and 3-D and 4-D printing may further intensify such fluidity.

Increasingly, too, there is a view that transformative factors such as cyber-cash will represent a further challenge to State authority. Cyber-cash, as one example, may well leave the State’s authorities with little control over one of its main instruments of economic management, namely its currency.<sup>37</sup> In a similar vein, the likelihood that outer space exploration and interests might be promoted by the private sector could also find private-sector interests determining those of States. While the “military-industrial complex” is by no means a new phenomenon, the possible dependence of the State upon the self-funded innovations, exploration and resource “mining” of the private sector might significantly reduce the influence that the State has over the private sector, diminishing States’ traditionally perceived “monopoly of power”.

37 Cyber-cash – an expansion of the “bitcoin” concept – reflects an interesting example of the tension between State authority, States’ institutional adaptiveness and the unconstrained independence of alternative networks. A bitcoin, the most basic component of one form of cyber-cash, has been described as nothing more than a unique string of numbers, not tied to any real-world currency. Its strength and value come from the fact that people believe in it and use it. “Anyone can download a bitcoin wallet on to their computer, buy bitcoins with traditional currency from a currency exchange, and use them to buy or sell a growing number of products or services as easily as sending an e-mail. Transactions are secure, fast and free, with no central authority controlling value or supply, and no middleman taking a slice.” Jamie Bartlett, *The Dark Net: Inside the Digital Underworld*, Melville House, Brooklyn, 2015, p. 74.

Faced with these sorts of contending and draining pressures, the State may have to accept that private-sector institutions and social networks – intentionally or inadvertently – will assume many services, such as security and welfare, that are normally deemed to be within the purview of the State. The consequence could well be that those with the means will be prone to opting out of engagement with State structures, be they authoritarian or democratic, leaving those who cannot afford to do so trapped in an ever more financially insecure space. And with such a prospect, many argue that State structures and activities like taxation will be negatively affected, as will the State’s monopoly over the legitimate means of violence.<sup>38</sup> This in turn may result in a deepening divide across societies – and with that divide, new sources of insecurity.<sup>39</sup>

On the other hand, so-called “sovereign States” might embark on collective ways to deal with such complexities and insecurities. With or without inter-governmental organizations, they may attempt to find ways to gain agreement on what might be seen as common issues of survival. “Minilateralism” and the prospect of growing multipolarity are potential alternatives to some.<sup>40</sup> Common interests and common insecurities may at least be responsible for arrangements on functional issues such as “runaway climate change” and pandemics; international crime and seemingly uncontrollable capitalism may prove to be other issues that could stimulate some form of cohesiveness. The requisite State authority for achieving such aims is, however, not regarded as a given.

One possible challenge to the conventional State structure is what has been called “the atomized society”. The atomization process combines “the Internet of things” with universal digital access – the transformative consequences of which may well be far more fluid approaches to authority and governance, based upon networks that are far more creative and responsive than contemporary organizational systems. Atomization, in other words, is a process by which social, political and economic dynamics are determined principally by fluid, self-organizing entities that exist in parallel and normally independently of conventional structures.

Atomization may well, in various ways, challenge States’ assumptions about their capacities to control and regulate economic, social and resource-related activities. In that context, it could also put into question States’ supposed “monopoly of power”. To what extent might the consequences of cyber-cash, private interests in outer space, social networks’ influence over cyberspace and myriad other reflections of power remain within the purview of the State?

38 United States Institute of Peace, “Legitimate State Monopoly Over the Means of Violence”, available at: [www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/6-safe-and-secure-environment/le](http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/6-safe-and-secure-environment/le).

39 National Intelligence Council (NIC), *Global Strategic Trends*, draft, March 2015.

40 “[L]et’s forget about trying to get the planet’s nearly 200 countries to agree. We need to abandon that fool’s errand in favor of a new idea: minilateralism. By minilateralism, I mean a smarter, more targeted approach: We should bring to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem. Think of this as minilateralism’s magic number.” Moises Naim, “Minilateralism: The Magic Number to Get Real International Action”, *Foreign Policy*, 21 June 2009.

A related uncertainty has to do with the extent to which such social divides are controllable, and what measures States might require to deal with these divisions. From the perspective of the World Economic Forum, the options for States as well as for governments and civil society will depend upon new forms of leadership and more collective and holistic solutions to ever mounting problems. If such solutions are not found, the question seems to be answered in terms of what might be regarded as

the “new normal” ... a combination of volatile markets, a lack of political will to deal conclusively with long-term issues, the recurrent mobilization of the general public in social protest and a remarkable ability by leaders to nevertheless continue to push “the next big crisis” to future generations.<sup>41</sup>

This is a prospect that some in the United States – still the wealthiest nation in the world – regard as all too possible.<sup>42</sup>

Such considerations flow naturally into concerns about the very nature of “the organization” in such rapidly transformative times. The majority of organizations, and certainly those found in most governmental bodies, are relatively insensitive to substantive change. As organizations, they are inherently linear, siloed and reductionist in approach when it comes to defining problems and solutions. Many distinguished analysts have sought to reform organizational processes, but it would appear that despite myriad evaluations and subsequent recommendations proffered over the years, “structuralism” remains very much in place. It is reflected in such terms as “top-down” and “best practice”, and in assumptions that “leadership” is vested in decision-makers at the top of hierarchies and that “efficiency” – rather than effectiveness – is an essential element for achieving success. Yet those who look at organizations through the lens of profound changes in technology, societal structures and globalization are increasingly doubtful about the effectiveness and in various ways the utility of the conventional organizational construct.

Reflecting upon the types of transformative factors, their plausible dimensions and consequences, each – individually and collectively – will reflect compatibilities and incompatibilities that will in turn determine and be determined by social constructs, political and economic systems, perceptions of security and organizational dynamics. They will reflect and be reflections of emerging tensions between atomized societies and State structures and between emerging socioeconomic equality or disparities. It is these sorts of tensions that for the purposes of this article may lead one down the path of war in the future.

## Plausible tensions and the changing nature of warfare

There are innumerable causes of tension that could result from such transformative factors, and these causes in turn provide insights into the triggers that suggest

41 WEF, *The Future Role of Civil Society*, World Scenario Series No. 28, 2013.

42 In this context, the president of the United States, Barack Obama, referred to the growing gap between rich and poor in the United States in his January 2016 State of the Union address.



plausible types of warfare in the future. Each of the examples noted below can be seen as a standalone, but each in various ways could inevitably relate to the others. Examples of possible sources of tensions and resulting types of future warfare would include:

- atomized societies, State structures and the dynamics of attrition;
- displacement as a violent continuum;
- cyberspace and outer space;
- uncertain asymmetries;
- resource competition and resource conflict;
- transcendent health threats and conflict triggers;
- organizational paralysis and future sleepwalkers.

It should be noted that the tensions which may emerge need not necessarily lead to conflict. Their possible consequences might result in negotiations and ultimately mutually acceptable arrangements. They, too, might just be tolerated, and an uneasy but not overtly conflictual situation might continue over time. However, this discussion will assume that the tensions in the seven categories listed above will lead to conflict, and each will provide insights into the future of warfare.

In looking at the future of warfare, it would be difficult to ignore conventional state conflicts that have marked so much of history, certainly since the Peace of Westphalia in 1648. One writer with considerable experience in the subject has warned of an emerging “new cold war”, with all the portents that that could mean in terms of State-to-State conflict.<sup>43</sup> Yet, while this dimension may continue to be a reflection of warfare in the foreseeable future as well as the past, this article will generally focus on forms of warfare that will result from what we have called “emerging tensions”.

As these emerging tensions begin to lay the groundwork for future war scenarios, it is important in the first instance to recognize certain crosscutting themes that will most likely be at play in all future conflicts. These would include the use of big data and artificial intelligence for purposes such as surveillance and planning, robotics, drone-related technologies, use of outer space and nano-technological mechanisms and cyber-war. In other words, it is more than likely that warfare in general will witness the application of these features, whatever the types, dimensions and dynamics of forthcoming wars.

An issue that is already rising on the international agenda is the artificial intelligence-related technology that can select its own targets and autonomously decide whether to destroy them. In April 2015, the UN spent five days debating “lethal autonomous weapons systems” – the second such meeting in as many years. While it is assumed that this discussion will continue in 2016, there are few who see measures to control such technologies emerging from these talks. Yet, the fact that they are occurring at all demonstrates the existence of an emerging

43 Edward Lucas, *The New Cold War: How the Kremlin Menaces both Russia and the West*, Bloomsbury, London, 2008.

anxiety and creates an international platform for exploring the autonomy, hackability, accuracy and safety mechanisms of such weapons.<sup>44</sup>

Clearly, robotics is recognized as a significant logistical aid in times of conflict. The potential use of robots for transporting a wide range of material over difficult terrain is already in evidence, but it goes well beyond that. "Something big is going on in war today, and maybe even the history of humanity itself." According to a US Air Force three-star general:

Where we're headed very soon is tens of thousands of robots operating in our conflicts, and these numbers matter, because we're not just talking about tens of thousands of today's robots, but tens of thousands of these prototypes and tomorrow's robots, because of course, one of the things that's operating in technology is Moore's Law, that you can pack in more and more computing power into those robots, and so flash forward around 25 years, if Moore's Law holds true, those robots will be close to a billion times more powerful in their computing than today.<sup>45</sup>

Similar to the rapid emergence of robotics is the related development of drone technology. Both at this stage remain imperfect weapons of war, and the latter's algorithmic capacities have been held responsible for the reported deaths of untold numbers of non-combatants,<sup>46</sup> though they are increasingly part of the arsenals of States such as China, Russia, Iran, Pakistan, the United States and thirty-nine others. Both robotic and drone technologies are relatively inexpensive to develop, and both are readily accessible to non-State as well as State actors. In 2009 it was reported that

during the war between Israel, a state, and Hezbollah, a non-state actor, the non-state actor flew four different drones against Israel. There's already a jihadi website that you can go on and remotely detonate an IED in Iraq while sitting at your home computer.<sup>47</sup>

Outer space applications, too, reflect ubiquitous, crosscutting themes. There are probably very few wars in which outer space technologies will not play a prominent role. In recent discussions on disarmament, the UN's First Committee noted that the outer space environment was becoming increasingly "congested, contested and competitive".<sup>48</sup> And, in a related vein, a senior European intelligence official was quoted as saying: "I don't think that there is a single G7 nation that isn't now looking at space security as one of its highest military priorities and areas of strategic concern."<sup>49</sup>

44 "Who Pulls the Trigger?", *New Scientist*, Vol. 229, No. 3056, 2016, p. 5.

45 This quote is taken from a TED Talk given by P. W. Singer, "Military Robots and the Future of Warfare", February 2009. At the time, Singer was director of the 21st Century Defense Initiative at the Brookings Institution, Washington, DC.

46 Martin Robbins, "Has a Rampaging AI Algorithm Really Killed Thousands in Pakistan?", *The Guardian*, 18 February 2016.

47 P. W. Singer, above note 45.

48 68th General Assembly, First Committee, 17th Meeting, 5 October 2013.

49 A European intelligence official as quoted in Sam Jones, "Satellite Wars: A New Arms Race Threatens Security in Space", *Financial Times*, 21/22 November 2015.

Such security concerns involve weapons in outer space, for example, that can destroy satellites upon which vast numbers of Earth-based cyber-networks depend, or so-called “rods from God”, spaced-based tungsten weapons that could be deployed within minutes, with “almost guaranteed first-strike capability; effectively placing every nation on earth within the targeting scope”.<sup>50</sup>

Outer space, artificial intelligence and big data, related cyber-systems and drone technology all link into another factor that will characterize virtually all warfare in the future: namely, “all-knowing surveillance” capacities. Even in present times, traditional intelligence capacities – the spy networks, the surveillance services, the intelligence headquarters – are all deeply dependent upon cyber-capacities. So, too, in warfare, the ubiquitous, all-seeing ability to monitor enemy movements, types of weapons and the impacts of conflict on civilians as well as the military, and even to predict an enemy’s next moves, are all facets of surveillance in times of future wars.

As one looks to the future of warfare, in various ways it is not merely the means of conflict that will change, but also the *nature* of combatants, and in many ways, the motives that determine and drive conflict. Throughout modern history, it has been the State that has had a “monopoly of power” and generally, whatever the motives, has been the principal source of international conflict. Increasingly, there have been exceptions. However, as one looks to the future, actors who do not necessarily reflect the “State”, *per se*, are combatants in their own right, with motives that do not necessarily reflect State-based interests.

There is a further dimension that must be considered. The costs of war in terms of blood, overt battlefield confrontations and leaders’ “call to arms” may well not be the spectre of future wars, certainly not in their initial stages. Paradoxically, the catastrophes that could ensue from the widening range of future weapons may initially take place in an environment of remoteness, in a distance that separates the reality of cataclysm from the psychological space of “the virtual”. In no sense is this to suggest that the consequences of future warfare could be any less cataclysmic than those of the past; to the contrary, their impact could in so many ways be existential. The horror, however, may be that an understanding and appreciation of conflicts’ consequences could be hidden too long in the minds of decision-makers as well as those of the public. The robotic, drone and AI dimensions of conflict, combined with ubiquitous computer-based war games, may well change the way wars are seen – may make the horrors of weapons of unprecedented impact and their potential consequences all seem less threatening to the body politic until the conflagration begins.

While the causes, instruments and battlefields of wars of the future will change in so many ways, so too will the consequent victims of violence. The exponential increase in the global population, the vast numbers who will occupy urban areas and the potentially global impact of cyber-weapons will inevitably mean that the difference between combatants and those deemed to be killed or

50 Matthew Beard, “Militarising Space: Weapons in Orbit”, in Jai Galliot (ed.), *Commercial Space Exploration: Ethics, Policy and Governance*, Routledge, London, 2015, p. 117.

wounded due to “collateral damage” will be a distinction that is less and less relevant. The future of warfare may well mean that all could be vulnerable. The affected – be they military or civilian – will be the victims of the same sorts of weaponry, and battlefields will know no bounds. Death in one sense might mean the end of any differentiation between the military soldier and the civilian.

Of course, such grim speculation may be offset by the use of robots that may reduce “the kill chain”, for example through pre-emptive technological strikes. Yet, while all such more positive possibilities may be in the offing, the plausible may be significantly less optimistic.

These sorts of broad themes will most likely be reflected in all wars in the future, influencing the ways in which they are fought and the nature of battlefields, combatants and their arsenals. Yet, while such themes may pervade conflicts in the future, there will at the same time be different types of tensions that will result in different types of wars. Below are seven cases in point.

### Atomized societies, State structures and the dynamics of attrition

Tensions between what earlier had been called “atomized” societies and State structures would seem very plausible. One example of such tensions might arise from the inability of either to dominate the other, and efforts to do so may bring, for example, cultural, religious and functional networks into contention with increasingly assertive State systems.

Another example may result from tensions arising from individual States’ differing perceptions and approaches about ways to control the consequences of atomization. As mentioned in the previous section, a case in point could be “cyber-cash”, which might become a driving force in parallel economies throughout the world.<sup>51</sup> Some States may accept such developments because cyber-cash users such as the private sector may well – perhaps paradoxically – be regarded as allies in sustaining government authority. However, since currency control may be perceived by other States as a principal reflection of a State’s *raison d’être*, they may well see the expansion of cyber-currency as a distinct threat to their authority.<sup>52</sup> Atomized societies entail a plethora of actors, including the free-flowing private sector, city-to-city alliances, social networks and non-State actors such as “terrorists”. All in one way or another will be able to confront the authority of the State, and this challenge could well translate into conflict on several levels. In one of its most violent forms, non-State actors will be able to access and operate devastating weapons such as nano-technological and nuclear threats, over which the State has traditionally had control. These sorts of arsenals will result in the prospect of large swathes of citizens being held

51 See above note 37.

52 Humanitarian Futures Programme, *Is Cash Transfer Programming “Fit for the Future”? – Final Report*, January 2014, available at: [www.humanitarianfutures.org/publications/is-cash-transfer-programming-fit-for-the-future-final-report/](http://www.humanitarianfutures.org/publications/is-cash-transfer-programming-fit-for-the-future-final-report/).

hostage to the whims and dictates of a few, unconstrained by even the slimmest form of recognized international principle or obligation.

War of a different order may well also arise, involving the manipulation of products and resources by non-State actors such as the increasingly freewheeling private sector. As one leading analyst has suggested, “[i]n a world where geoeconomics are as important as geopolitics and strategy, we need to worry about the spectrum of vulnerability. It is not just military assets that [are] a problem ... but our entire societies.”<sup>53</sup>

In one sense, this prospect shares many characteristics of Ludendorff’s concept of “total war” in which the complete mobilization of all resources, including policy and social systems, is focused on winning the war.<sup>54</sup> However, there are substantial differences, and they begin with the actors involved in conflict and the means at hand to bring States and societies to their knees. For example, the hold that many companies might have over State authorities could well lead to resource depletions, which *in extremis* could substantially reduce citizens’ access to basic needs and the revenues required by the State to maintain the very functions of State. The State, on the other hand, might try to use whatever remaining hold it may have over the Internet and related technologies to combat the manipulations of the atomized actors.

This sort of warfare might be described as “the violence of strangulation”, where each side tries to choke off the capacities of the other. This theme is closely related to that of “urbicide” and infrastructural warfare, in which both widen “the traditional field of reflection on political violence towards a ‘non anthropocentric humanism’ that includes the material surroundings of community life and heterogeneity as part of targets of violence”.<sup>55</sup>

In a lesser form, the shutdown of Ukraine’s electricity network by still “unidentified” terrorists is an event that could happen on a significantly larger scale. Warfare in this instance is not about flows of blood, but rather about the impoverishing of non-combatants and the erosion of infrastructures. A mix of alliances in which other networks, including non-State actors, could be persuaded of the rightness of each protagonist’s cause, and States seeking similar arrangements or alliances with other States, could further exacerbate extreme violence.

## Displacement as a violent continuum

The world is already becoming used to large flows of people seeking improved and more secure lives. The present, however, cannot be compared to the volume of

53 S. Jones, above note 49.

54 Jan Willem Honig, “The Idea of Total War from Clausewitz to Ludendorff”, in *The Pacific War as Total War: Proceedings of the 2011 International Forum on War History*, National Institute for Defence Studies, Tokyo, 2012.

55 Sara Fregonese, review of Martin Coward’s *Urbicide: The Politics of Urban Destruction*, in *Global Discourse: An Interdisciplinary Journal of Current Affairs and Applied Contemporary Thought*, Vol. 1, No. 2, 2010, p. 196.

migrating peoples that may well be on the move over the next two decades. A possible though not inevitable combination of resource depletion (e.g., water scarcity) and an exponential increase in population may result in mass flows of people, which may in turn severely add to survival stresses. These may result in economic threats and conflict.

While an estimated 66% of the world's population are predicted to be "urban dwellers" by 2050, the reality might be that a significant proportion will reside only sporadically in urban areas. "Urban", for many, will be just part of a displacement continuum. Rather than a fixed entity, the notion of "urban environment" might better be seen as part of a dynamic continuum that makes little distinction between human settlements as exclusively rural or urban. From this spectrum-based approach, the urban environment is but one component of human flows and processes that will see hundreds of millions regularly on the move in search of basic subsistence. From this perspective, the urban space will become a site of constant change and uncertainty, its fluidity made ever more complex by layers of economic, political and social change occurring within and outside of a given urban settlement. Such unsettling dynamics may lead even more governments to continue to do what they have already begun to do – namely, to attempt to keep the displaced out of urban areas,<sup>56</sup> or alternatively, isolate the displaced in slumscares.<sup>57</sup>

This dynamic displacement continuum will see the development of both "slumscares" and "no man's lands", and both will foretell of intractable poverty and vulnerability. The former will reflect around 35% of most urban areas, clustered in isolated communities, where little investment will be made in basic services – e.g., limited access to water and electricity, and lack of attention to infrastructure affecting, amongst other things, access to the Internet<sup>58</sup> – and deep surveillance will limit the movements of those in slumscares to more developed urban areas.

The "no man's land" will reflect large masses of peoples that will settle in areas which States have no will or capacity to control. By definition, these areas will lack water, employment and significant agricultural potential. In all likelihood, those that represent the dynamic continuum of displacement will look, for example, to the water and agricultural resources of others. This search will in turn intensify displacement, as those in slumscares and no man's lands may be forced to move

56 "Among 185 countries with available data in 2013, 80 percent of Governments had policies to lower rural to urban migration, an increase from 38 per cent in 1966 .... In 2013, the proportion of Governments that had policies to lower rural to urban migration was higher in less developed regions (84 per cent) than in more developed regions (67 per cent). Between 1996 and 2013, the proportion of Governments with such policies had increased in both more and less developed regions, as well as across major regions." United Nations Department of Economic and Social Affairs, Population Division, *World Population Policies 2013*.

57 Humanitarian Futures Programme, *Mapping the Way Forward: Urban Futures Project Report*, King's College, London, October 2013, p. 21, available at: [www.humanitarianfutures.org/publications/mapping-the-way-forward/](http://www.humanitarianfutures.org/publications/mapping-the-way-forward/).

58 In the Pew report *Digital Life in 2025*, a director of operations for social network MetaFilter is quoted as saying that "the internet will help the rich get richer and become a tool to further marginalise people who are already living with poverty, mental illness, and other serious challenges". Pew Research Center, *Digital Life in 2025*, 11 March 2014, available at: [www.pewinternet.org/2014/03/11/digital-life-in-2025/](http://www.pewinternet.org/2014/03/11/digital-life-in-2025/).

into increasingly hostile environments, or the slums may indeed become hotbeds of conflict themselves. Not only will this cascade into deepening vulnerability, but the likelihood is that the tensions between efforts to control and efforts to survive will create considerable stress. This pattern in turn will most likely escalate as greater disparities, poverty gaps and States' concerns over uncontrollable boundaries create a potential cauldron of violence.

Not dissimilarly to the dynamics of atomized societies, the displaced will resort to a wide range of networks and aggressive tools and measures to gain the resources they need, and will in turn be confronted by States determined to ensure their authority. Many of these displaced will be trapped in no man's lands, where States may resort to heavy military responses to prevent any substantive migration across contested boundaries. Perhaps a remote but possibly suggestive example of this sort of momentum has been reflected in the increasing number of conflicts between asylum seekers and government authorities in Europe in 2015 and 2016.

The difference, however, between the asylum seekers during this period and those that will appear in two decades' time is that the latter flows of migration will be dramatically larger, possibly analogous to the flows of tribes in north-east Asia in the twelfth century. Similarly to nomadic peoples, displacement will reflect substantial floating populations, moving across continents, testing the boundaries of established States and being resisted with increasing violence. And, unlike the 14 million refugees that moved between Pakistan and India in 1947, the vast numbers that one can foresee in the future will also have access to sophisticated weapons. These could include updated versions of nuclear apparatus such as special atomic demolition weapons, which enable an individual to transport and detonate a nuclear device anywhere. Migrating populations of the future will reflect a complex admix of society in general, including criminal elements and radical opposition groups, and will have access to the sorts of light, portable weaponry that one can well foresee in the future.<sup>59</sup> They too will have the capacities to monitor opposition movements, and may well have links to disaffected, sympathetic individuals within those States resisting the perceived threat of mass displacement.

In some instances, States may form alliances to ensure that such mass displacement does not violate shared boundaries. More realistically, however, States threatened by these sorts of movements will find themselves in contention, seeking to turn neighbouring states into no man's lands. War in this sense may

59 The complex admix of refugee populations in the future has already been suggested by US NATO Commander General Phillip Breedlove, when he noted that "ISIS is spreading like cancer among refugees". Alan Yuhus, "NATO Commander: ISIS 'Spreading like Cancer' Among Refugees", *The Guardian*, 1 March 2016. Certainly, since Rwandan refugees were encamped in Zaire, criminals in refugee camps had become a recognized phenomenon, and criminals as well as radical opposition groups had a wide range of conventional weapons. Ever easier access to more sophisticated and lethal weapons may well mean that radical opposition groups and criminal elements in the refugee camps of the future will also have access to more sophisticated weaponry. See, for example, British Broadcasting Corporation (BBC), "The Terror Trader", documentary, Episode 5 in the series *Nuclear Secrets*, 2007.



involve resistance not only to mass displacement, but also against other States that try to resist it.

## Cyberspace and outer space

“[S]pace systems are now part of cyberspace, and thus ... space doctrine in the future will be heavily dependent upon cyber doctrine. The argument can also be made, however, that cyberspace, in part, exists and rests upon space-based systems.”<sup>60</sup> The interrelationship between outer space and cyberspace is increasingly evident in many operational areas. From a terrestrial point of view, space-based systems may appear to operate in a distant realm, but from a cyber point of view, space systems are no different to terrestrial ones. Certainly this is the case in the area of defence, where cyber-attacks may become critical operations of adversaries. More and more, space power may well determine global power.<sup>61</sup>

As this prospect becomes increasingly plausible, it has to be noted that already an abundance of satellites are demonstrating how outer space will become the operating determinant of Earth-based systems. And with that in mind, the disruption that would result from space debris or particles of a meteorite affecting satellites could be a major threat to systems upon which the globe increasingly depends. It is more and more evident, one analyst suggests, that “reliance on space-based technologies ... means that any large-scale disruption to satellites such as solar superstorms could have significant consequences for electricity distribution, communications, navigation, logistics and weather forecasts”.<sup>62</sup>

The negative consequences of such disruption are, according to the Union of Concerned Scientists, made even more plausible with the considerable increase in the number of satellites, and hence satellite debris, now orbiting the Earth.<sup>63</sup> Today the number is 1,300. The big players to date are the United States with 549 orbiting satellites, Russia with 131, China with 142, the United Kingdom with forty, and India with thirty-three. However, few doubt that those numbers will increase, and that the number of States with orbiting satellites will increase as well.<sup>64</sup>

With such dependence upon satellites and eventually a proliferation of “international space stations”, national self-interests as well as the interests of others such as the private sector may increasingly be defined by their abilities to maintain control over their respective technologies, and conversely may well be defined by their abilities to limit the interference of others. As noted earlier, space

60 Matthew Mather, “How Space and Cyberspace are Merging to Become the Primary Battlefield of the 21st Century”, white paper, originally appearing in *Space Quarterly Magazine*, 15 March 2013.

61 D. R. Ward, above note 20, p. 5. According to the Defense Advanced Research Projects Agency, “The United States is reliant on space for virtually every essential security mission, but US space capacities have not kept up with rapid global changes.”

62 NIC, above note 39.

63 David Wright, “The Current Space Debris Situation”, Orbit Debris Mitigation Workshop, Beijing, 2010, available at: [https://swfound.org/media/99971/wright-space-debris\\_situation.pdf](https://swfound.org/media/99971/wright-space-debris_situation.pdf).

64 S. Jones, above note 49.

power may well determine global power, and to ensure the latter, the former will become an increasingly contested arena.

One way that this plausible perspective could play out as a source of future conflict links cyberspace, outer space and what has been described as space “debris”. The prospect of the debris of one country – intentionally or unintentionally – causing significant damage to the space-based cyber-systems of another could become a *casus belli*. Efforts of one country, for example, to control the source of another country’s debris could result in hostilities in outer space or from outer space to the planet or *vice versa*. These sorts of tensions will in one way or another begin to explain the types of warfare which until recently had been the purview of science fiction.

This possible reality is already presaged by what are known as “ghost satellites”, such as Kosmos 2499. These are intended to approach potentially debris polluting satellites of other countries for purposes of “inspection”, and with the capacity to destroy them.<sup>65</sup> From a planetary perspective, this sort of destruction “would amount to a crippling blow on the function of communities all around the world, including diminishing the ability of military and government agencies to communicate efficiently in times of emergency”.<sup>66</sup>

A second dimension of extra-terrestrial warfare will involve weapons placed in outer space designed to destroy Earth-bound capacities directly. One analyst foresees the aforementioned “rods from God”, where a guidance computer directs a large object such as a tungsten rod from space, using the immense kinetic energy developed as an object falls from space to “take out”, for example, “a rogue nation’s deep underground facilities where illicit nuclear weapons development might be going on”.<sup>67</sup>

In this context, it is all too plausible that the cyber-wars which will occur in outer space and the weapons systems that are launched from outer space to target specific planet-based systems will have consequences that will go well beyond the systems, territory and populations of those regarded as opponents. While the effects will not necessarily result in a “world war”, they may result in “global attrition”, where vast numbers of people will be seriously affected outside “the battle zone” due to the rapid spread, for example, of molecular nano-technology and related factors that could “eat up the biosphere”.<sup>68</sup>

## Uncertain asymmetries

War-making power in the international system has traditionally been reflected in the armouries of States. Power, *per se*, could be distinguished between those

65 *Ibid.*

66 M. Beard, above note 50.

67 John Arquilla, “Rods from God: Imagine a Bundle of Telephone Poles Hurtling through Space at 7,000 mph”, *SF Gate*, 12 March 2006, available at: [www.sfgate.com/opinion/article/RODS-FROM-GOD-Imagine-a-bundle-of-telephone-2539690.php](http://www.sfgate.com/opinion/article/RODS-FROM-GOD-Imagine-a-bundle-of-telephone-2539690.php).

68 Nick Bostrom, “Existential Risks: Analysing Human Extinction Scenarios and Related Hazards”, *Journal of Evolution and Technology*, Vol. 9, No. 1, 2002.

States that had quantitative and qualitative superiority in terms of weaponry and armed forces and those that did not. Yet increasingly, as noted by a number of strategists, there are more and more under-capacitated States attempting to assert their authority in various ways.

States traditionally regarded as “underdeveloped” or impoverished already have access to some of the world’s deadliest weapons, such as nuclear and chemical weapons. As evidenced by the Pakistani nuclear expert A. Q. Khan, global smuggling networks can ensure that even the most seemingly powerless can become unwelcome members of the “nuclear club”.<sup>69</sup> The weapons trade, by no means a new phenomenon, has grown significantly amongst those deemed to be weaker States. North Korea, for example, has had a long history of aggressively buying, marketing and selling arms, especially in developing countries in the Middle East, Africa, South-East Asia and Cuba. Much of that business has been in sales of short- and medium-range missiles. Though ostensibly the market for full missile systems is thought to have dried up in recent years, it is very evident that the trade in missile components continues to flourish.<sup>70</sup>

Hence, as one searches for the sorts of tensions that could eventually lead to conflict, one possibility concerns the challenge to assumptions about the capacities of “super” or “great” powers vis-à-vis those with supposedly less power. The implications of asymmetric power may well become less certain in a world that is more and more atomized and where access to a wide range of armaments is readily available. In an increasingly fragmented world, efforts by traditionally strong States to deal with such “uncertainties” could be relatively fruitless, and attempts to deal with seeming asymmetries may well lead to tensions that in turn could result in conflict.

In warfare, uncertain asymmetries have in many ways become a norm – a norm further reflecting the ability of relatively poor States to sustain their efforts to accumulate high-impact weaponry. In other words, in terms of duration, sustained support through a plethora of social networks and ever increasing sources of a burgeoning range of lethal weapons, a growing number of States – not merely “superpowers” – will be able to inflict existential violence internationally. This uncertain asymmetry will be further complicated by constant flows of equipment via 3-D and 4-D printing, resources via what was earlier described as cyber-cash, and cyber-intelligence and cyber-warfare, as well as biological and nano-technological agents. If one looks at these prospects, one significant difference between the present and the future is that conflict in the future will be able to be sustained even between conventionally perceived strong and weak parties in a variety of ways over hitherto unimagined reaches of time and space.

## Resource competition and resource conflict

For a global population forecast by the United Nations to be approximately 9.7 billion by 2050, the availability of, and access to, a wide range and volume of

69 BBC, above note 59.

70 “North Korea’s Shadowy Arms Trade”, *The Guardian*, 18 July 2013.

resources would seem essential, indeed vital. As noted in the section concerning transformative factors, the potential for finding new ways of capturing and harvesting food, water and minerals is truly revolutionary. On the other hand, the very access to such resources remains uncertain.

While both water and agriculture production will inevitably benefit from new technologies, the critical factor will be access and availability. That appears to be an increasing challenge. When it comes to food, the present situation may also reflect what might happen in the future, for according to the assessment of the US National Intelligence Agency,

[t]he world is likely to continue to produce sufficient food supplies for at least the next 10 years, but food distribution will almost certainly remain uneven because tens of millions of people lack access to arable land or income sources to buy food.<sup>71</sup>

In the case of water, the UN has predicted that supplies of water shared by multiple countries could become an issue in the future, noting, for example, that the Nile alone travels through nine different countries.<sup>72</sup> Furthermore, “there are 215 ‘international’ rivers and more than 300 water basins that are shared by multiple countries, all providing potential conflict zones as water resources are depleted”. A shortage “represents a major political, economic, and human rights issue, threatening to amplify conflict, food insecurity, and poor health and sanitation”,<sup>73</sup> and, as noted earlier, will also be reflected in mass displacement. In this context, the emerging tensions arising out of dam building, for example, along the Brahmaputra and the Mekong delta demonstrate the ecological, energy resource and political challenges faced in trans-boundary water networks.<sup>74</sup> Such tensions do not, according to a variety of sources, suggest that “water wars”, for example between China and India, are imminent or foreseeable in the immediate future.<sup>75</sup> Nevertheless, the effects of climate change and its resource impacts over time may well see today’s commitment to negotiation turn to resource conflicts.

71 Office of the Director of National Intelligence, *Global Food Security*, Intelligence Community Assessment, ICA 2015-4, 22 September 2015.

72 UN Office for the Coordination of Humanitarian Affairs, Policy Development and Studies Branch, *Water Scarcity and Humanitarian Action: Key Emerging Trends and Challenges*, Occasional Policy Brief No. 4, September 2010.

73 *Ibid.*

74 Examples for the challenges of dam building along the Brahmaputra can be found in China Dialogue, Hazard Research Centre, University College London, and Humanitarian Futures Programme, King’s College, London, *The Waters of the Third Pole: Sources of Threats; Sources of Survival*, June 2010, available at: [www.humanitarianfutures.org/publications/the-waters-of-the-third-pole-sources-of-threat-sources-of-survival/](http://www.humanitarianfutures.org/publications/the-waters-of-the-third-pole-sources-of-threat-sources-of-survival/). For the Mekong delta, see “Requiem for a River”, *The Economist*, 13 February 2016, p. 47.

75 The tenor of the debate can be seen from two examples: a more peaceful resolution in Sudha Ramachandrum, “Water Wars: China, India and the Great Dam Rush”, *The Diplomat*, 3 April 2015, available at: <http://thediplomat.com/2015/04/water-wars-china-india-and-the-great-dam-rush/>; and a more pessimistic view in Joel Wuthnow, “This River Could Sink China–India Relations”, *The National Interest*, 19 April 2016, available at: <http://nationalinterest.org/feature/water-war-river-could-sink-china-india-relations-15829>.

Wars over resources will most likely be an ever more prominent feature in future conflicts. The effects that climate change, for example, might have not only on resources such as water and arable land, but on land itself, will inevitably be a “threat multiplier”; according to the US Defense Department’s *2014 Climate Change Adaptation Roadmap*, “[r]ising global temperatures, changing precipitation patterns, climbing sea levels and more extreme weather events will intensify the challenges of global instability, hunger, poverty and conflict.”<sup>76</sup> To that list, sources of energy and myriad forms of raw materials could be added to suggest why rising demands for materials and access to them will be growing factors in anticipating conflicts.

Yet, as one looks to the future, there may well be changes afoot that will transform not only the source and types of many resources, but also their location and access to them. As noted earlier, over the next quarter of a century, the issue of energy could be fundamentally transformed by technologies that would transmit solar energy directly to the planet in sufficient abundance to cover the needs of the planet’s population. Similarly, the desalinization process – fuelled to a significant extent by direct solar transmission – would in principle be adequate to serve the needs of humankind. Mineral mining, too, could be increasingly dependent upon the massive resources found in outer space. All these resources, though seemingly beneficial to those on Earth, may well prove to be the source of resource conflicts in outer space in a generation’s time.

Super-solar, for example, has been seen as an object of contention, because its potential universality would be perceived to be kidnapped and dominated by controllers who will alienate others. When it comes to extra-terrestrial mining, the US Congress passed the Space Act on 18 November 2015, and gave US space firms the rights to own and sell natural resources they mine from bodies in space, including asteroids. Some scientific observers saw this initiative as “the most significant salvo that has been fired in the ideological battle over ownership of the cosmos”.<sup>77</sup>

War, in other words, could well result from efforts to protect the contending interests of “extra-terrestrial haves and have-nots”. As with the efforts of contending forces to control outer space systems – noted earlier in the section “Cyberspace and Outer Space” – the conflict stemming from resource clashes will impact upon communities that go well beyond those directly engaged in war. The fact that such conflicts may take place will in no small part be due to the wealth and power that will accrue to the victors – but also, on a different level, it will be due to the fact that there may well not be any internationally recognized legal constraint on such potential resource monopolies.

## Transcendent health threats and conflict triggers

In 2012, the World Food Programme (WFP) held a workshop in Johannesburg, South Africa, for Southern Africa Development Community governments’

<sup>76</sup> US Department of Defense, *2014 Climate Change Adaptation Road Map*, 13 October 2014.

<sup>77</sup> Reference to Thomas Homer-Dixon in Michelle Bentley, *Weapons of Mass Destruction and U.S. Foreign Policy: The Strategic Use of a Concept*, Routledge, London, 2014, p. 121.

ministries of planning. The objective was to support planning ministries' efforts to enhance their strategy formulation capacities. In anticipation of the workshop, the ministries and WFP chose to use pandemics as a case study. Participants included a wide range of private-sector participants as well as governmental, international and non-governmental organizations, and leading the process was the United States Africa Command (Africom). The private sector's participation reflected its belief that a pandemic as well as efforts to deal with it would cripple its businesses. As for Africom, representatives explained their participation in terms of "a direct threat to the security of the United States".<sup>78</sup>

The plausible threat of "super-bugs" is regarded as a major global concern, particularly as antibiotics seem unable to keep pace with the rapid growth and transformative speed of viruses. In the United States alone, drug-resistant bacteria infect more than 2 million people annually, and kill 23,000 of those affected, according to the US Center for Disease Control and Prevention. The Ebola crisis was for all intents and purposes contained within six West African countries, and the death toll was officially reported by the World Health Organisation (WHO) to be 11,316. Yet, amongst the lessons learned from this almost two-year episode was that "what began as a health crisis snowballed into a humanitarian, social, economic and security crisis. In a world of radically increased interdependence, the consequences were felt globally."<sup>79</sup>

Similarly, soon after the official end of the Ebola crisis, a new threat emerged, namely the Zika virus. It began to move from Brazil northwards, moving through South America into North America. At the beginning of February 2016, the European Centre for Disease Control announced that the virus was moving into the Pacific, and that it had now become an issue of "international concern".<sup>80</sup>

These events suggest the prospect of emerging "super-bugs". In a rapidly increasingly interconnected world, the issue of how State authorities will deal with the looming threat of such viruses "crossing borders" will become central to States' interests and authority. WHO hopes that States will recognize the importance of transnational cooperation to address the threat at source. However, there is also the prospect – as evidenced in the first stages of the Ebola and Zika viruses – that States may "hide" or downplay such issues for a variety of reasons, including protecting their tourism industry. To what extent would such obfuscation challenge the interests of other States? The closing of borders, the severing of trade links, and demands made on States deemed to be the source of such potential catastrophes could ultimately create an environment which will not meet the aspirations for cooperation that WHO feels to be so essential.

78 This statement was made in response by a member of the Africom Team to this author's question during the Southern Africa Development Community workshop.

79 WHO, "Ebola Response: What Needs to Happen in 2015", January 2015, available at: <http://www.who.int/csr/disease/ebola/one-year-report/response-in-2015/en/>.

80 See European Centre for Disease Prevention and Control, "Zika Virus Infection", available at: [http://ecdc.europa.eu/en/healthtopics/zika\\_virus\\_infection/Pages/index.aspx#sthash.1018ZVNx.dpuf](http://ecdc.europa.eu/en/healthtopics/zika_virus_infection/Pages/index.aspx#sthash.1018ZVNx.dpuf).

It is not irrelevant in this context that a number of military establishments are developing broad capacities for dealing with disease. In this context,

the military is likely to have a greater capacity to identify engineered diseases and potentially devastating natural diseases ... than civilian agencies. The military has prepared its own personnel to face such weapons in a way that civilian agencies have not. Furthermore, it may be the only institution with the necessary technology, resources, and manpower to be able to effectively counter an attack – or a pandemic disaster.<sup>81</sup>

The potential threat of pandemics, be the sources natural or manmade, will inevitably become a major security threat around the world. The emphasis that many States are already giving to protecting their borders from disease and carriers of disease is increasingly evident. When it comes to defining wars of the future, a concomitant issue is the extent to which military engagement outside national borders will be used to eradicate pandemic threats. Or, in a related vein, to what extent might cyber-systems be used to eradicate the sources of such pandemics without the agreement of the States from which the disease stems?

It is very likely that attempts to deal with pandemics in the future will resemble ways that have emerged in recent years to deal with terrorism. Increasingly, efforts to eliminate the latter have resulted in conflicts regarded as “borderless”, unpredictable and prone to extraordinary speed of change. The inherent danger to large portions of a State’s population may lead its government to regard the inaction or inadequate action of “offending States” which fail to address a pandemic as an aggressive act. Intrusive surveillance may be one step in the direction of escalating hostilities, followed by virtual or physical intervention. The military may impose buffer zones between its borders and those of the offending State. More likely, it will restrict a wide range of activities affecting, for example, trade and transport that could well cripple the economic and security viability of the offender.

In and of itself, these acts might well be seen as a violation of the sovereignty of a State. The consequences of such perceived violations may go beyond that immediate target and cascade into the economic and security interests of other States and other groupings. What initially began as protective measures against the source of a particular pandemic, or “natural threat”, could spill over into economic and security threats for a wider range of countries. That larger group may well have no choice between pandemic threats and so-called “synchronous failures”, or crises that can propagate across multiple system boundaries even on a global scale.<sup>82</sup>

81 Laura K. Donohue, “Pandemic Disease, Biological Weapons, and War” in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law and War*, Stanford University Press, Stanford, CA, 2014, p. 8.

82 Brian Walker, *et al.*, “Synchronous Failure: The Emerging Causal Architecture of Global Crisis”, *Ecology and Society*, Vol. 20, No. 3, 2015.



## Organizational paralysis and future sleepwalkers

According to a growing number of analysts, policy planners and decision-makers have all too often “become collectively short-sighted”, succumbing to a kind of “future blindness” in which potential implications of transformative change and complexity are ignored.<sup>83</sup> Today, a considerable number of organizations and certainly those found in most governmental bodies are deemed to be relatively insensitive to substantive change. As organizations, they have been described as inherently linear, siloed and reductionist in approach when it comes to defining problems and solutions.

“Team of teams”, “Teal organizations”<sup>84</sup> and “competitive collaboration” are just a few terms which suggest that the days of secure control of “the product”, the innovation, “the secret” and stove-piped specializations will not endure.<sup>85</sup> Mechanisms will increasingly be needed that are able to integrate information and respond to a fluid external environment beyond the capacities of conventional organizations. Increasingly, the sheer speed of and access to information and the interdependence of the modern environment leave little time for the structuralist construct. For highly complex problems to be solved, “shared consciousness” – i.e., extremely transparent information sharing – and “empowered execution”, pushing decision-making and ownership to the right level for every action, will reverse that construct.

And yet, it seems unlikely that governments will go down that route, either willingly or with any alacrity. There will of course be organizational adjustments on the margins. However, the very nature of the organization may well not adequately adapt – until much too late – to the types and speed of transformative changes that will mark the foreseeable future. Rather than the sorts of sensitive and adaptive capacities required to address new types of situations, the machinery of State may all too often interpret the new through the lens of the old. Here, too, might be a source of significant tension, for organizations as presently configured could quite plausibly misinterpret the nature and intent of threat in a rapidly changing socioeconomic and political environment. All too often, an appreciation of complexity, exploration of alternative measures and efforts to go beyond standard operating procedures fail to go beyond the “comfort zone”.<sup>86</sup>

83 Farhad Manjoo, “Why We Need to Pick Up Alvin Toffler’s Torch”, *New York Times*, 6 July 2016.

84 Teal organizations are based upon the ability of an organization’s staff to self-organize and self-manage in order to achieve the overall purpose of the organization. Rather than a hierarchical “plan and control” structure, the Teal structure consists of small teams that determine how best the team can achieve abiding organizational goals and how best individual team members can do so. It is a structure marked by its fluidity and adaptive capacities. The concept of the Teal organization can be found in Frederick Laloux, *Reinventing Organisations: A Guide to Creating Organisations Inspired by the Next Stage of Human Consciousness*, Nelson Parker Publishers, Brussels, 2014.

85 Stanley McChrystal, *Team of Teams: New Rules of Engagement for a Complex World*, Portfolio/Penguin, New York, 2015.

86 Some of these sorts of concerns were mirrored in the UK’s *Iraq Inquiry* report, referred to as the Chilcot Report, concerning decisions which led to the invasion of Iraq and subsequent post-war action. The report was presented on 6 July 2016. Committee of Privy Counsellors, *The Report of the Iraq Inquiry*, report, HC 264, 6 July 2016.

In explaining the uncertain steps with which Europe bumbled into the First World War, Christopher Clark suggests that “given the inter-relationships across the system, the consequences of any one action depended on the responsive actions of others, which were hard to calculate in advance, because of the opacity of decision-making processes”.<sup>87</sup> In that war as well as in subsequent conflicts, all too often the already narrow focus of institutions about threats and appropriate responses has narrowed even further as tensions increased. Screening out information perceived to be irrelevant intensifies. Secrecy adds to the opacity of decision-making, and “group think” ensures that unpalatable ideas, or deviations from organizational norms, are marginalized.

Organizational repertoires and standard operating procedures could create tensions by appearing to outsiders to be insensitive to changing contexts. As one looks to emerging conflicts, there is also the paradoxical prospect that organizations may attempt to deal with complexity by bringing in ever greater numbers of experts, who may not have the desire or opportunities to integrate their respective expertise. Despite the proliferation of expertise, threats are not viewed in a holistic manner. Rather, they remain in the silo responsible for response, but lacking a full appreciation of context and changed circumstances.<sup>88</sup> It is not irrelevant that in a 2013 analysis of the ways governments use “foresight analysis”, the general conclusion was that

[t]he case of the military foresight programmes in some countries is quite illustrative .... While there is some cooperation between military and civilian foresight projects, military foresight programmes in countries such as the UK, Canada, the US and Norway remain quite separate from work in other government departments. Cooperation is often limited among different sections of the military in these countries.<sup>89</sup>

Modern history is riddled with examples of wars that have ensued because of the limited perspectives that organizations bring to analysis and response. The old adage that “generals always fight the last war” is all too appropriate as one considers not only how wars will be fought, but how they will occur. A former US secretary of defence, deeply concerned about the prospect of nuclear war in the future, noted:

Our chief peril is that the poised nuclear doom ... is too far out of the global public consciousness .... And for many it would seem to be the keeping of faith that nuclear deterrence will hold indefinitely – that leaders will always

87 Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914*, Penguin, London, 2012, p. 555.

88 In this context, Professor Martin Rees quotes the long-time scientific adviser to the UK government, Solly Zuckerman, saying that “the basic reason for the irrationality of the whole process [of the arms race] ... was shaped by technologists, not because they were concerned with any visionary picture of how the world should evolve, but because they were merely doing what they saw to be their job”. Martin Rees, *Our Final Century: Will the Human Race Survive the 21st Century?*, Basic Books, London, 2003, p. 32.

89 Iana Dreyer and Gerald Stang, “Foresight in Governments – Practices and Trends around the World”, *Yearbook of European Security*, 2013.

have accurate enough instantaneous knowledge, know the true context of events, and enjoy the good luck to avoid the most tragic of miscalculations.<sup>90</sup>

## Are we ready?

At the outset of this article, it was suggested that devising future war scenarios was far easier than trying to answer the question, “Are we ready for them?” Readiness has many dimensions in this context. The assumptions underlying *Realpolitik* and power politics suggest that anticipating the future of war will, as in the past, rely on rational choice, or at least “bounded rationality”,<sup>91</sup> and supposedly rational behaviour. Yet, if one looks at assumptions that can safely be made about organizational behaviour (an issue referred to in previous sections) and institutional dynamics, the question about our state of preparedness for dealing with “the future of conflict” becomes far more complex.

In a related vein, the issues of organizational behaviour and institutional dynamics also relate to how the legal parameters that ostensibly are intended to constrain or at least limit the full impact of conflict are developed. In other words, to what extent do the legal frameworks that we have to date need to be adjusted to deal with the future, and to what extent are the organizational and institutional systems in place adequately responsive to transformative change?

An additional way to seek answers to the question about readiness should include the extent to which there is public awareness about such future threats. This poses a very difficult balance between the consequences of public debate and the sorts of fears, concerns or disinterest that it engenders. It reflects the ways that such debates are generated and guided, and these, too, take us into the realm of organizational and institutional behaviour.

## Organizational constraints

Earlier in this analysis, organizational paralysis in various forms was cited as one of seven dimensions of tensions and causes of conflict. Here, organizational dynamics emerges once again as a major feature, only in this context, it is the extent to which such dynamics affect “our readiness”. The challenge for the organization in this context – be it governmental, inter-governmental or non-governmental – revolves around its perspectives, information gathering and decision-making. And while such factors may indeed differ in different organizations, there are themes that have general relevance to most organizations.

90 William J. Perry, *My Journey at the Nuclear Brink*, Stanford Securities Studies, 2016, as quoted in Jerry Brown, “A Stark Nuclear Warning”, *New York Review of Books*, 14 July 2016, p. 11.

91 See Herbert Simon, “Rational Decision-Making in Business Organizations”, *American Economic Review*, Vol. 69, No. 4, 1979. In the article, Simon describes the dimensions of “bounded rationality”, where individuals make rational decisions, though limited by the available information, the tractability of the decision problem, the cognitive limitations of their minds, and the time available to make the decision.

In a recent study entitled *Thinking the Unthinkable*, the authors refer to a comment made by the deputy governor of Russia's Central Bank about "why unthinkables are not thought about". Referring to the prospect of a total collapse of Russia's economy, the deputy governor stated: "I couldn't imagine even a year ago that such a thing would happen even in my worst nightmare."<sup>92</sup> In response to this, the authors note:

This kind of executive astonishment at unexpected events now permeates much of public and corporate life globally. Increasingly it is reasonably labelled by many leaders as shock because of the unexpected scale and nature of what has happened. In what many describe as a "scary new world", they ask if they should have seen the events coming, and if they did not see – then why not?<sup>93</sup>

Capacities to anticipate and adapt to rapidly changing circumstances are crucial for dealing with escalating conflict, but also possibly for ways to mitigate the chances of it occurring in the first place. Organizations, however, saddled with their silos, devices to screen out "unrecognizable information" and standard operating procedures, all too often lack what is needed to sense the tensions that could generate wars. The integrated information and multi-sectoral perspectives that could enhance the ability of an organization to be more anticipatory and adaptive is sacrificed to resistance to change.<sup>94</sup>

Decision-makers and policy planners are all too reluctant to go beyond the immediate, the world described as their "comfort zones". "For public-sector officials, often the challenge isn't lack of vision but short time frames, competing priorities, and flawed delivery."<sup>95</sup> Even for those willing to speculate about the future, there is a reluctance to do so if it might antagonize potential supporters and funders. All too often, innovations and innovative thinking are introduced only as desperate alternatives to failing systems rather than as well-considered and applied transformations. To some extent this explains why even when faced with factors that clearly have transformative potential, incremental adjustments frame the response.<sup>96</sup>

92 Nik Gowing and Chris Langdon, *Thinking the Unthinkable: A New Imperative for Leadership in the Digital Age*, Chartered Institute of Management Accountants, London, 2016, p. 10.

93 *Ibid.*

94 In a 2015 report on *The Future of Global Conflict: Trends and Challenges towards 2040*, it was noted that "large state organisations and the international community have co-opted the language of critique, creativity and innovation without fundamentally altering their organisational logic". Wilton Park Report WP 1374, in association with the UK Ministry of Defence and the Department for International Development, 18 February 2015.

95 Richard Dobbs, James Manyika and Jonathan Woetzel, *No Ordinary Disruption: The Four Global Forces Breaking All the Trends*, Public Affairs Books, New York, 2015.

96 A case in point were the parliamentary debates in the United Kingdom over the period of 2015–2016 concerning the renewal of the submarine-based Trident nuclear system. While the debates in Parliament and throughout much of Whitehall had immediate political and economic interests for various constituencies, it was a debate that nevertheless was about a system that would take twenty years to finalize, and one which in twenty years would be readily surpassed, for example, by extraterrestrial capacities.

As we prepare to deal with the threats of future wars, there is a need to ensure that organizations responsible for assessing threats and appropriate responses have the capacities and incentives to do so that go beyond standard operating procedures. They have to be more anticipatory and adaptive, spurred on by an ethos of thinking in new and more innovative ways. They have to “embrace complexity”; they have to see the present differently by being encouraged to make their assumptions explicit, and in so doing to have a better idea about “the different kinds of futures we use when make decisions”.<sup>97</sup>

Analysts with experience of the public and private sectors see the need to restructure the traditional organization in various ways. It is essential in a world of rapid change and complexity to remove organizational silos, challenge preconceived standard operating procedures and promote more integrated situation analysis and responses at “appropriate levels”, not determined by hierarchical structures.<sup>98</sup> One way of doing this has been suggested by “complexity theorists”, who look at issues through the lens of the “co-evolutionary dynamics” that determine a problem’s key interacting issues. Problems and solutions begin with accepting that a problem, *per se*, consists of many elements, each element continuously influencing the other. It is from an appreciation of this dynamic interchange that one can identify ways – *viz*, an “enabling environment” – that will enable one to understand the root of the problem and ways to address it holistically.<sup>99</sup>

McKinsey & Company, the worldwide consultancy firm, also recognizes the innate hazards of overly structured organizations. It urges global-oriented organizations of the future to be more “process-centric”, to allow business units to tailor their organizations to local conditions, to bring diverse participants into the strategy creation process and to foster peer-to-peer collaboration. In a telling conclusion, one McKinsey analysis notes that “opportunities for organisational innovation will present themselves, and those companies able to recognise and willing to embrace them will gain huge competitive advantage by doing so”.<sup>100</sup>

This conclusion is a lesson to all, and certainly to those who are asking whether they are ready for wars in the future. By no means are more adaptive and anticipatory organizations in and of themselves the answer, but they are one crucial element in sensitizing decision-makers and planners to the changing nature of threats, and proffering more timely analyses and solutions.

97 Riel Miller, “Futures Literacy – Embracing Complexity and Using the Future”, *Ethos*, No. 10, October 2011, p. 25.

98 F. Laloux, above note 84.

99 Eve Mitleton-Kelly, *Complex Systems and Evolutionary Perspectives on Organisations: The Application of Complexity Theory to Organisations*, Pergamon, Advanced Series in Management, London, 2003.

100 Wouter Aghina, Aaron De Smet and Suzanne Haywood, “The Past and the Future of Global Organizations”, *McKinsey Quarterly*, September 2014.

## Institutional rivalries

The former US secretary of defence, Robert Gates, recounts the difficulties he had in 2010 in dealing with the United States' "vulnerability to cyber attacks on the computers so vital to our critical infrastructure". Despite all the efforts which this powerful figure in President Obama's administration had made, there were contending institutional interests that seriously delayed a coherent solution to this major security issue. Disputes arose between the government and the private sector about who should be in charge – for example, the government or business, the Department of Homeland Security or the Defense Department's National Security Agency? Myriad players joined the fray to deal with the issue, but their institutional perspectives hampered any resolution of an issue that was deemed to be so vital to the security of the nation. "I was still waiting for an answer to that question three years later", remarked Gates towards the end of his assignment.<sup>101</sup>

Time and time again, whether it be the 1962 Cuban Missile Crisis or the more recent war in Iraq, institutional interests and perspectives determine not only what responsible institutions see as threats, but the way such threats are handled.<sup>102</sup> While such inter-institutional disputes are understandable, they can nevertheless hamper rational and coherent outputs and all too often result in compromises reflecting the lowest common denominator. In a foreseeable future world where complexity, institutional overlap and speed of change will be an emerging norm, institutional competition may well prove to be another hindrance to anticipating and possibly mitigating the consequences of wars. Clearly this spills over into international organizations, where it has been noted that

collaborations between bureaucracies within a state are notoriously difficult and costly: effective international responses to conflict will require coherence between multiple state bureaucracies that follow divergent cultural, linguistic, and organisational logics. The cost of internationalisation could theoretically be even greater than the cost of individual state action.<sup>103</sup>

There is a well-developed history of efforts to address such inter-institutional behaviour and its consequences. From "ad hococracy"<sup>104</sup> to "mission-focused networks", from "Teal structures" to "team of teams", considerable and continuing efforts are made to get organizations to loosen their institutional protective walls and to recognize the mutuality of their cross-institutional interests. While most in

101 Robert M. Gates, *Duty: Memoirs of a Secretary at War*, W. H. Allen, London, 2014, p. 449.

102 See, for example, Graham Allison and Philip Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd ed., Longman, New York, 1999; and S. McChrystal, above note 85.

103 Wilton Park, above note 94.

104 Robert H. Waterman Jr. defined ad hococracy as "any form of organization that cuts across normal bureaucratic lines to capture opportunities, solve problems, and get results". For Henry Mintzberg, an ad hococracy is a complex and dynamic organizational form. It is different from bureaucracy; like Alvin Toffler in *Future Shock*, Mintzberg considers bureaucracy a thing of the past, and ad hococracy one of the future. Ad hococracy is "very good at problem solving and innovations, and thrives in a changing environment. It requires sophisticated and often automated technical systems to develop and thrive." See the definition of "Ad hococracy" on Wikipedia, available at: <http://en.wikipedia.org/wiki/Adhococracy>.

government would probably recognize the problem, little has been done to ensure on a continuing and consistent basis the sort of interactive information sharing that is fundamental to understanding different types of emerging tensions and their resulting conflicts.

That said, there is a reality that may well transform – for better or for worse – inter-institutional competition. That reality takes the reader back to what earlier in this article was referred to in the heading “Transformative Agents and Global Implications”. Conventional institutional barriers may not be sustainable in a world of surveillance and sousveillance, where all is known about all throughout society. Access to big data and artificial intelligence may enable organizations to gather, analyze and structure information that makes conventional institutional barriers of less relevance. Yet here, too, the reality of such transformations remains unknown, and preparedness for anticipating and dealing with wars of the future may still be constrained by standard patterns of institutional behaviour. Hence, the immediate challenge is to ensure that the right people, those who can offer different understandings and explanations of plausible future tensions and conflicts – whatever their institution or sector – are sitting at the same table.

One step in that direction is emerging from initiatives to promote “competitive collaboration”. Though institutional competition may be seen as a fact of life, the complex, multidisciplinary problems that many organizations attempt to tackle do not have easy fixes. To deal with such problems requires continuous learning and innovation and the use of real-time data to help understand what is and is not working. Organizations faced with this conundrum have, broadly speaking, two choices. They can either guard information closely, blocking out its perceived advantage from others; or alternatively, share the information with others as part of an appreciation that others, in turn, will have to share their information with them. Beyond that, “leaders and organizations are acknowledging that even their best individual efforts can’t stack up against today’s complex and interconnected problems. They are putting aside self-interests and collaborating ... to advance their shared objectives. It’s called collective impact and it’s a growing trend.”<sup>105</sup>

Once again, greater inter-institutional understanding and collaboration are not in and of themselves the answer for testing one’s readiness for what the future might hold. They are, however, ways in which the nature of a problem – in this case, threats – can be better understood, and more cohesive, integrated solutions more effectively devised.

105 Ben Hecht, “Collaboration is the New Competition”, *Harvard Business Review*, 10 January 2013. In a related context, a former chair of the British Standards Institute’s Knowledge Management Statistics Committee, Ron Young, noted in a presentation concerning “Competitive Collaboration in a Global Knowledge Economy” (Abu Dhabi, 15–16 March 2011) that the real purpose of a European Commission-initiated project across European companies was not “the deliverables”, but was rather to set up projects to get organizations in different countries across Europe to collaborate. “We learned so much from this EC project about the power of effective virtual cross functional collaborative team work.”



## Legal gaps

Organizational behaviour and institutional rivalries may also play roles in allowing gaps to emerge in international law – gaps that could ultimately lead to conflict. In no sense is this to ignore the fact that political calculus is ultimately the determining factor when dealing with, *inter alia*, international law. However, both organizational behaviour and institutional rivalries might well explain the short-term perspectives of organizations and their inability to develop consensus on issues of potentially life and death importance. A relevant scenario, as described by Matthew Beard, suggests a series of escalating tensions between Japan and China concerning the ownership of the Senkaku and Diaoyu islands in the East China Sea, where little effort appears to have been made to adjust laws to changing circumstances:

the Chinese position warships in Japanese territorial waters. In response the United States intervenes on the side of Japan, *positioning orbital weapons* above China as a means of encouraging the withdrawal of Chinese warships from Japanese waters. Eventually, Japan asks the United Nations to order sanctions on the Chinese incursion, whilst China requests the United States be sanctioned for violating its sovereignty through the use of military coercion.<sup>106</sup>

A very fundamental issue which this scenario points to is that any object, under present international law, is free to move unimpeded around the Earth or anywhere else. “The fact that states cannot claim sovereignty over a particular region means that states can permissibly station weapons within immediate striking distance of other states without violating the letter of the law with regard to state sovereignty.”<sup>107</sup> The extent to which that legal loophole could lead to tensions which in turn might lead to war is clearly an open question. Yet, the point here is the extent to which legal frameworks keep pace with the changing dimensions and dynamics of plausible sources of conflict. In a related vein, another relevant example concerns the use of drones for military purposes. As is becoming increasingly evident, some of the major implications of that technology were not adequately identified or considered in the context of some of the most basic provisions of international humanitarian law. To what extent do drones change the very nature of the field of battle, to what extent do they complicate the issue of targeting military objects, and what are the legal responsibilities of drone “pilots” operating many thousands of miles away from their targets?<sup>108</sup>

All this would seem to confirm the remark of an astute observer who had served at senior levels within the British government: “On more traditional issues the world has been sluggish when it comes to translating intentions into

<sup>106</sup> M. Beard, above note 50. Emphasis added.

<sup>107</sup> *Ibid.*

<sup>108</sup> See “Extrajudicial Killing and Drones” in ‘Drone Strikes and International Law: Fallout Reaches the Ivory Tower’, *The Economist*, 22 April 2015. See also Peter Maurer interview, “The Use of Armed Drones Must Comply with Laws”, ICRC, 10 May 2013, available at: [www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm](http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm).

actions.”<sup>109</sup> This appears to be clearly the case for the international community to date, and in an agenda intended to prepare for future wars by eliminating or at least reducing their impacts, greater efforts need to be made to identify what legal gaps need to be filled. That said, in the words of an expert concerned with the interface between bureaucratic and institutional behaviour and international law, “Government bureaucracies are notably status-quo oriented organisations, wherein caution and conservative approaches tend to overshadow creativity and adventurism in policy-making.”<sup>110</sup>

As the international community finds itself in a world facing ever increasing and ever more complex potential conflict drivers, it is more than likely that the framework of international law needs to be both more anticipatory and more integrated. For the former, much greater attention has to be given to the ways in which potential legal requirements are anticipated, and this would require far more active interaction between the sciences and between governments, including the military and international governmental and non-governmental organizations. As for the latter, greater integrated international legal frameworks, far greater attention has to be given to the complexities, what has been described as “the messes”,<sup>111</sup> that spill over into related issues. There needs to be a far more active and overt commitment to making international law more sensitive to emerging threats. This is not to argue the case that international law, *per se*, is the ultimate solution for being ready to deal with plausible wars of the future. Rather, it is to stress the importance of engaging in a process that awakens decision-makers and policy planners to ways of anticipating and framing future challenges such as the threat of war.

## Public awareness and the essential debates

“The public narrative [about conflict] requires constant attention and must be authentic and at least somewhat rational”, stressed participants at a February 2015 conference that included senior military experts as well as government policy-makers.

For example, why are some states trying to convince the public to increase defence spending while simultaneously arguing that there are few military answers to international problems ...? But even while recognising the inherent tensions, contradictions and complexities of responding to global conflict, organisations such as the United Nations and European Union

109 Geoff Mulgan, *The Art of Public Strategy: Mobilizing Power and Knowledge for the Common Good*, Oxford University Press, Oxford, 2009, p. 56.

110 Christopher Joyner, *International Law in the 21st Century: Rules for Global Governance*, Rowman & Littlefield, New York, 2005, p. 119.

111 “A mess is a system or complex and dynamically interacting web of ill-defined or wicked problems, conundrums, paradoxes, puzzles, crises and their solutions, as well as the stated and understated, conscious and unconscious assumptions, beliefs, emotions and values that underlie these problems and solutions.” Can M. Alpaslan and Ian I. Mitroff, *Swans, Swine, and Swindlers: Coping with the Growing Threat of Mega-crises and Mega-messes*, Stanford University Press, Stanford, 2008, p. 169.

should resurrect some transformative zeal. International organisations need to restart the magnetic power of globalised norms and be confident.<sup>112</sup>

When considering plausible tensions that could result in conflict, one theme that emerged was the paradox between the remoteness of instruments of war and their potential all-encompassing impacts. In one sense, both are reflected in the emerging poison gas capacities of States towards the end of the nineteenth century. As opposed to conventional armaments, poison gas and its implications were not fully appreciated by the public at large, though its potential impact made little distinction between civilian and military.<sup>113</sup> A second and related theme that is also of considerable importance when considering public awareness is that violence has become so remote. Though the impact of conflict could be of existential consequence, virtual games and the remoteness of instruments of violence, such as drones and orbital weapons, are indicative of the gap between public perception and reality. A lack of appreciation of the causes and possible consequences of conflict needs to be overcome by more effective public narrative. There is little sign that governmental, inter-governmental and non-governmental organizations have been inclined to do so. There is a narrative lacking, and yet, the sheer complexity of war as well as existential threats needs to be understood globally.

In looking for ways to promote public awareness about the nature of future wars and their consequences, one automatically confronts the contradictions inherent in raising awareness – the tension in this case between increasing defence capacities and expenditures while underscoring the point that there are no military answers to international problems. And the call to “resurrect some transformative zeal” opens up yet another contradiction: in a world in which the volume and speed of information is unprecedented and will probably increase exponentially and be accessible to all, information disrupters – the multiplicity of networks – may generate more confusion than coherence.

In no sense, however, should this spectre diminish the importance of generating that narrative. This article will not attempt to suggest how that narrative could be developed and promoted. It will, however, stress three issues: the source of ideas that could lead to that narrative, emerging focal points to generate that narrative, and the message itself.

Despite the potential problems posed by information disrupters, one also has to recognize that new ideas, social concepts and political philosophies diffuse very rapidly without regard for physical distance, or even the social circumstances where they arise or are received. In this sense, what has been called the “global village” is open to all ideas. Perhaps over-optimistically, one could say that only their intrinsic power as ideas now matters.<sup>114</sup> This hope would seem to be

112 Wilton Park, above note 94.

113 See, for example, Peter Sloterdijk, *Terror from the Air*, trans. Amy Patton and Steve Corcoran, MIT Press, Cambridge, 2009.

114 David Mercer, *Future Revolutions: A Comprehensive Guide to Life and Work in the Next Millennium*, Orion Business Books, London, 1998, pp. 172 ff.

reflected in the perspectives of two senior Google executives who assume that “digital empowerment will be for some the first experience of empowerment in their lives .... As a result, authoritarian governments will find their newly connected populations more difficult to control, repress and influence.”<sup>115</sup>

The prospect of being able to propagate new ideas that transcend traditional institutional and political screening devices raises the likelihood that the promoters of new ideas will change. The atomized society may on the one hand generate fragmentation, but on the other serve as a channel for stimulating, alerting and persuading a much wider range of potentially interested parties than ever before about new ideas. In this context, even as early as the first Rio conference on the environment in 1992, a number of observers felt that “Greenpeace carries more weight than most nations!”<sup>116</sup> Now the reach of social networks and new forms of education through cyber-systems, for example, will become not only the conduits but also the creators of new ideas.<sup>117</sup>

With all the plethora of communications systems and sources for compelling narratives, what actually is “the message”? The message has to be framed around the fundamental change in the future of warfare, namely, that its effects can no longer be regarded as isolated phenomena, restricted within particular demographic and socioeconomic boundaries. Whether conflicts will be those described in the third section of the article, above, or others, the emerging reality is that warfare of the future will be bound neither by time nor space. It will spill over from its initial sources and will always be global in impact and consequences. The proposed narrative has to be underpinned by the emerging reality that the threats arising from future warfare will have no winners or losers, but only the latter. Mutual self-interest is the message.

## Conclusion

Looking to the future of warfare from a two decades perspective, one cannot help but emphasize the transformative impact of technologies – known knowns and unknown unknowns. These will in so many ways define the sources of conflict as well as the means to pursue it. This is not to suggest that psychological, social psychological, cultural and societal factors will not also be determinants of wars in the future, but even those factors will ultimately be affected by the capacities provided by emerging technologies.

Despite the grim scenarios of the causes and consequences of future warfare proposed in this article, the prospects of them occurring are not inevitable. Certainly, elements of such portraits seem plausible; and, as descriptions of the future of warfare, all the relevant transformative elements that have been

115 Eric Schmidt and Jared Cohen, *The New Digital Age: Reshaping the Future of People, Nations and Business*, John Murray, London, 2013, p. 7.

116 D. Mercer, above note 114.

117 Additional examples can be found in Roger Bourke White Jr, *Visions of 2050: Rise of the Cyber Muses*, Author House, Bloomington, 2015.

discussed are clear possibilities. However, as this article also concludes, there are some very practical ways to possibly mitigate some of the worst aspects of these scenarios. They by no means cover the full and very wide spectrum of ways to prepare to deal with warfare of the future. On the other hand, they do focus on a few issues that always seem to arise in various ways when reflecting on the history of warfare.

One begins with the importance of decision-makers, policy planners and their organizations becoming more anticipatory – bringing together a wide range of specializations to analyze and anticipate the sorts of complexity that clearly will underpin warfare in the future. They need to look for ways to reduce institutional rivalries that have in the past triggered the wrong reactions for the wrong reasons, and may well do so in the future. As a reflection of the need for greater anticipation and reduction of institutional rivalries, more effective international legal frameworks could well be a test of both. Ultimately, however, it is greater global awareness of the prospects and consequences of warfare in the future that this article suggests might prove to be the saving grace.

These suggestions, though few, are posited to ask not only if we are prepared, but also if we want to be so.

## REPORTS AND DOCUMENTS

# 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015

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# 32nd International Conference of the Red Cross and Red Crescent



## Interview with Balthasar Staehelin

Deputy Director-General,  
International Committee of the Red  
Cross\*

*The 32nd International Conference of the Red Cross and Red Crescent convened in Geneva on 8–10 December 2015. The first International Conference was held in 1867, and the States Parties to the Geneva Conventions and the components of the International Red Cross and Red Crescent Movement now meet regularly in this format every four years. While built on this strong tradition, the 32nd International Conference was in many ways a new event. In this interview Balthasar Staehelin, Deputy Director-General of the International Committee of the Red Cross (ICRC) who oversees the organization of the Conference for the ICRC, tells us what was different about the Conference in 2015 and the progress achieved on the humanitarian issues addressed.*

*Balthasar Staehelin joined the ICRC in 1993 and has served in the Middle East, Africa and the Balkans, and at Headquarters. From 2002 to 2006, he was Delegate-General for the Middle East and North Africa, overseeing all ICRC work in that region, including the operation in Iraq. He served as Deputy Director of Operations for Policy and Global Affairs from 2006 to 2008. In 2008, he left the ICRC to join the local government in Geneva, where he ran the department in charge of providing social welfare, housing, health and integration programmes for asylum-seekers and refugees. He returned to the ICRC in August 2012 to take up his current position. Mr Staehelin holds a master's degree in history, English literature and constitutional law from the University of Basel, Switzerland.*

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\* This interview was conducted in Geneva on 5 May 2016 by Elyse Mosquini, ICRC.



***Many participants are describing the 32nd International Conference as different. What made it so different?***

First and foremost, we saw an unprecedented level of engagement. Participation set new records, with representatives of 169 States, 183 National Societies, the ICRC and the International Federation [of Red Cross and Red Crescent Societies]. More than 100 organizations attended in an observer capacity, including our corporate partners, who attended for the first time. The level of participants was also higher than in recent years, and participants tended to stay through the three days. And perhaps just as important – the high engagement was sustained over many months of preparations. There were also many innovations in the format, which contributed to making this a more open and lively Conference than past editions.

***What do you think drove the greater interest?***

The high interest was without a doubt generated primarily by the density of relevant, high-stakes content. This included not only a crucial resolution seeking a concrete step toward the establishment of a meeting of States on compliance with international humanitarian law [IHL], but also timely resolutions on Health Care in Danger,<sup>1</sup> sexual and gender-based violence, the protection of persons deprived of their liberty, and the safety and security of humanitarian volunteers. Interest extended beyond the Conference members to the wider humanitarian community, with many organizations attending for the first time.

The early and intensive outreach by the organizers – the ICRC and the International Federation – also helped sustain the interest. Members were able to contribute to shaping the agenda more than a year before the Conference opening, when the first concept note was circulated. The close dialogue continued across multiple platforms over the ensuing months – from meetings of Geneva-based ambassadors and officials in capitals, to meetings and web-based sessions with National Societies, to a completely revamped website.

***You mentioned innovations in the format of this 32nd International Conference – what were these, and how did they impact the atmosphere at the Conference?***

The Standing Commission, which acts as trustee between Conferences, the International Federation and the ICRC as co-organizers and the Conference Commissioner, seconded early on by the government of Switzerland, shared a conviction and determination that this edition of the International Conference

1 Editor's note: The Health Care in Danger project is an initiative of the International Red Cross and Red Crescent Movement aimed at addressing the issue of violence against patients and health-care workers, facilities and vehicles, and ensuring safe access to and delivery of health care in armed conflicts and other emergencies; see: <http://healthcareindanger.org/hcid-project/> (accessed in May 2016).

should be reinvigorated. At the Conference, this translated concretely into a more dynamic programme, with sessions running in parallel in a number of different formats. Participants could choose among a number of events on different topics happening simultaneously under the single roof of the conference centre.

For example, at one time a participant could choose to participate in a commission on contemporary challenges to IHL or another on the Fundamental Principles, to listen to official statements delivered in the general debate, or to participate in the negotiation of the resolutions. As a new addition we also introduced a series of loosely structured collaborative dialogues on current humanitarian concerns aimed at providing a space for Conference participants to exchange ideas and brainstorm new approaches and solutions. These “Humanitarian Dialogues”, and the “Vision Lab” where they all came together, were fed by voices and perspectives from local communities gathered through a new initiative called Voices to Action that was launched for this Conference. This initiative was also an appreciated vector for National Societies to boost engagement with local communities in the lead-up to the Conference.

In the margins of the official segments, participants hosted thirty-five side events on topics spanning children in detention, nuclear weapons, humanitarian financing, food security and the psychological effects of armed conflict and violence – to name just a handful. Many of these events were draws on their own, and they added tremendously to the energy and the sense of the Conference serving as a major platform for humanitarian debate.

It was a logistical feat to pull this off. And while we recognize the difficulty for the smallest delegations to participate in all discussions, we feel that the choice and diversity on offer at this Conference contributed enormously to the richness of the event.

### ***How do you balance this push for modernization with the long history of the International Conference?***

You might think of this as a balance, but the two interests are very much interrelated. The Conference is a unique forum. It is the only gathering I know in which the global community of States, in their capacity as High Contracting Parties to the Geneva Conventions, comes together with other actors to take decisions on matters of common concern – strikingly in the case of the Conference at the formal level, with equal voting rights, whether a major global power or the smallest National Society.

As co-organizer with the International Federation, we are enormously privileged to convene the International Conference. We consider it our responsibility to keep the Conference relevant as an important forum contributing to respect for and the development of IHL, as per the Statutes of the International Red Cross and Red Crescent Movement [the Movement]. The Conference has historically been at the forefront of major developments, including for example adopting four draft conventions at the 17th International Conference in 1948 that

are today the four Geneva Conventions of 1949. More recently, the 26th International Conference in 1995 was an important stepping stone to the adoption of the Ottawa Convention on the prohibition of anti-personnel mines.

It is my hope that the Conference will continue to play this role, paving the way for better and more effective protection for victims of armed conflict as well as natural disasters and other emergencies. To do this we have to keep the event fresh, keep critical issues on the agenda, and keep drawing the high interest we saw at the Conference in December.

***The months prior to and following this Conference held a very crowded calendar of major global events, from the Global Conference on Disaster Risk Reduction in Sendai to the Paris Climate Conference and the World Humanitarian Summit in Istanbul. How does the International Conference compete in this space?***

We were very conscious of the crowded calendar throughout the preparatory process. I can admit that, especially early in the process, we were concerned the International Conference would be overshadowed. We came to realize, though, that the number of events vying for global attention provided a positive impetus for us both to profile the International Conference and to ensure the complementarity of its debates and decisions with those in other fora.

Looking back now, and in particular after having attended the World Humanitarian Summit, I believe the International Conference was reinforced in 2015. The Movement and, I think, States as well have renewed appreciation for the specific and distinct value that the Conference represents. Its composition and long history, as mentioned before, are two important features. And the character of the Conference as a non-political forum with clear rules in which all debates must be conducted in respect of the Fundamental Principles should not be understated. Many of the more historic decisions taken by the Conference can be credited to this special character – as can the fact that all ten resolutions adopted by this Conference were adopted by consensus.

***The outcomes of the 32nd International Conference include the ten resolutions and 215 pledges registered by participants as their individual commitments to action. You mentioned that one resolution which drew great interest by participants was the one on strengthening compliance with IHL. Why has this resolution been so important?***

This resolution has been particularly important for at least two reasons. First, I think it is fairly obvious that ensuring better respect for IHL is one of the key issues we need to tackle to achieve better protection for victims of armed conflicts. As a result of the

ICRC's operational presence on the ground, we are all too acutely aware, on a daily basis, of the urgent need to ensure better respect for the rules of this body of law.

The second reason why this resolution drew a lot of interest is because negotiations considered concrete steps towards the possible establishment of a regular Meeting of States on IHL. It should be remembered that the Geneva Conventions, although universally ratified, lack a venue in which States come together to examine how to improve respect for IHL. The 32nd International Conference was the culmination of a consultation process on the subject facilitated by the ICRC and the government of Switzerland. Since the 31st International Conference in 2011, over 140 States participated in consultations aimed at identifying ways to strengthen the effectiveness of IHL compliance mechanisms. I think it is fair to say that the process was unprecedented not only in terms of the numbers, but also regarding the scope and depth of the discussions held.

***What has been the outcome of this process? Are you satisfied with the resolution adopted by the Conference?***

To be honest, Resolution 2 on “Strengthening Compliance with International Humanitarian Law” adopted by the 32nd International Conference was not what we had hoped for. Members of the Conference were unable to reach agreement on the specific proposals included by consensus. Importantly, however, the resolution recognizes the “imperative need to improve compliance with IHL” and recommends a continuation of the process, which may now be said to be in a new phase. In accordance with Resolution 2, it will be a State-driven, intergovernmental process based on a number of agreed principles. It is probably the best that could be obtained under the circumstances.

This means that States now have a far greater responsibility for the work ahead and must take ownership of it going forward. It is crucial that States be genuinely involved in the process, being conscious of their collective responsibility to find credible answers to the important challenges that we need to address. Needless to say, both Switzerland and the ICRC will continue to facilitate the discussions and contribute to the best of their abilities to a meaningful outcome.

***A second resolution aimed at protecting victims of armed conflicts focuses on strengthening IHL protecting persons deprived of their liberty. What were the key challenges and achievements in negotiating this resolution?***

As with Resolution 2 on strengthening compliance with IHL, Resolution 1 on strengthening protection of persons deprived of their liberty marks a significant milestone in a multi-year process. Since 2012, the ICRC has pursued research and

facilitated consultation and discussion among States and other actors on how to strengthen the protection of persons deprived of their liberty in relation to non-international armed conflicts. These consultations included four regional meetings – held in Costa Rica, Malaysia, South Africa and Switzerland – that identified the main protection issues to focus on, two thematic consultations that sought to pinpoint the humanitarian challenges and possible solutions on detention in relation to non-international armed conflicts, and one meeting of all States to consolidate the knowledge gained and discuss the way forward. The reason for leading such a broad consultation process is the great protection need of persons deprived of their liberty: between 2011 and 2015, the number of detainees that the ICRC visited rose from 540,000 to over 900,000, and every case comes with an inherent human cost and creates vulnerability. At the same time, IHL norms to protect those deprived of their liberty in relation to non-international armed conflict are rather sparse.

Resolution 1 changes the character of the process from ICRC-facilitated consultations towards State-led work with the goal of producing “one or more concrete and implementable outcomes”. As you see from this language, States have not yet agreed on the exact form a potential outcome shall take. What is clear, however, is that it will not be a new treaty; our work going forward will focus on the development of a non-binding outcome to strengthen protection of persons detained in relation to non-international armed conflict. It will now be primarily upon States to determine more concretely what sort of outcome they aim at.

Beforehand, States will have to agree by consensus on the modalities according to which they want to proceed. The ICRC has maintained its mandate to facilitate the work of States on this process, and is willing to continue performing this role. Moreover, the International Conference invited the ICRC to contribute its humanitarian and legal expertise to the process, which provides us with the opportunity to stress, time and again, the humanitarian needs at stake.

***Health Care in Danger is another topic that we’ve seen develop from its first appearance at the 31st International Conference in 2011. Why was it brought back to the Conference and what were the achievements this time around?***

The 31st International Conference effectively launched the Health Care in Danger project, placing the issue – the need to protect the delivery of health care and stop attacks – on the global agenda. That Conference also mandated the ICRC to initiate consultations on practical recommendations and to report back to the 32nd International Conference.

Thanks to the solid work that took place in the intervening years, we saw a constructive and positive engagement on this topic by States, the Movement and observers – including members of the health-care community with whom we have worked closely during these years.

The resolution adopted by the 32nd International Conference is robust and constitutes a strong basis for continued cooperation among a wide range of stakeholders to address the humanitarian consequences of violence against health-care facilities, patients, personnel and transports. Key recommendations from the expert consultations over the previous few years were confirmed as the basis for further work to promote preparedness to address violence against the delivery of health care.

Strikingly, the resolution was strengthened through the negotiation process in the drafting committee, which added new language reinforcing the key elements. This included, for example, language calling on the Movement to continue supporting and strengthening the capacity of local health-care facilities and personnel, thus reinforcing the fact that local health-care providers are too often affected by violence against the delivery of health care.

***You described the International Conference as having placed the issue of attacks on health care on the global agenda. Four years later, what progress can we expect on this critical humanitarian issue?***

Among the most notable features of this topic is how much traction it has gained among such a wide community of stakeholders in such a short time. There is important complementarity between our efforts at the International Conference, with the national-level focus we took there and the resolutions adopted in other fora – including the World Health Assembly and more recently the resolution of the United National Security Council [UNSC Res. 2286].

The downside is of course that this global attention is due largely to the dreadful reality of just how common attacks on health care are today. But I am hopeful that as a result of the commitments made at the International Conference, including the seventy-five individual pledges by States, by the Movement, and by more observer organizations than ever before on any other topic, we will see improved respect for medical facilities and personnel and for the international law that protects them from attack.

***Is there one more resolution that stands out for you as a major achievement?***

The resolution on sexual and gender-based violence certainly represents a major achievement – both on the level of substantive content and for the symbolism of a resolution jointly tabled by the International Federation and the ICRC. The text was challenging in both drafting and negotiation, but it is highly significant that it condemns sexual and gender-based violence in all circumstances, including in armed conflict, disasters and other emergencies.

***A lot has already been done on sexual violence in armed conflicts in other fora. What did the ICRC aim to achieve in seeking a resolution on this issue by the International Conference?***

Indeed. Fortunately, much has been done in the past years – by the UN, regional organizations, international courts and tribunals, individual States and others – to put sexual and gender-based violence [SGBV] on the international agenda. Aspects were addressed at previous International Conferences as well.

However, sexual violence in situations such as armed conflicts remains an appalling reality, and there is increasing evidence of SGBV in disasters and other emergencies. The ICRC and the International Federation therefore thought it timely to submit a draft resolution specifically dedicated to SGBV to the 32nd International Conference, making use of the unique forum of the International Conference and the respective responsibilities, mandates and experiences of the Conference members.

***Sexual violence in armed conflict is also an ICRC institutional priority. How will the resolution aid in the ICRC's work – and that of the Movement more broadly – on this issue?***

The prevalence of sexual violence in armed conflict is alarming. It therefore cannot be underlined enough how important it is that the resolution recalls existing provisions of IHL that prohibit acts of sexual violence in armed conflict, that it underlines the need for States to comply with their relevant obligations to put an end to impunity, and that it calls upon States, again pursuant to legal obligations, to make every effort to fully integrate the prohibitions in the activities of their armed and security forces and detention authorities. The multidisciplinary response required to effectively address SGBV is also recognized in the resolution; for example, in underlining the need for unimpeded and ongoing access to non-discriminatory, confidential and comprehensive care – health, physical rehabilitation, psychological and psychosocial support, legal assistance, socio-economic support and spiritual services – in order to ensure the dignity and safety of victims/survivors.

As such, the resolution will be an important reference for the ICRC as we continue our efforts to better prevent and respond to sexual violence in the situations falling under our mandate in a multidisciplinary way. We also stand ready to support States, especially in integrating and implementing the prohibitions existing in IHL. For its part, the International Federation will soon undertake new research on how SGBV is addressed by disaster risk management law and policy. National Societies can also play an important role in addressing SGBV through their close links to communities. The Movement is well placed to engage on this issue at a local level and support the development of activities through a community-based approach, including working to address the primary



prevention of SGBV. National Societies' recognized role as auxiliaries to the public authorities in the humanitarian field means that they can be key agents of change in advocating for SGBV to be addressed and supporting authorities in doing so.

The Movement's global network also fosters strong partnerships, and there is the potential to generate closer ties within the Movement in this regard in order to provide enhanced technical support and capacity-building, and to share expertise, knowledge and resources.

***You mentioned next steps on some key resolutions. What else should we be watching as we look ahead to the next International Conference in 2019?***

In addition to the specific processes already in motion on the resolutions adopted by the 32nd International Conference, participants registered more than 200 pledges representing their voluntary commitments to action in the coming years. We will surely be working over the coming years to see that these outcomes result in tangible impact on the ground – mobilizing our own efforts as a Movement, together with States and other humanitarian partners.

Very much in complement to this, we will also build on what we achieved in 2015 in positioning the International Conference as an important forum for exchange on humanitarian issues and critical concerns. From the richness of the agenda to the diversity of the programme formats, the next International Conference will offer an array of opportunities for meaningful engagement among Conference members and the wider audience of participants.

One feature that won't change is that the Conference will continue to be anchored by the practical work carried out by National Society staff and volunteers, and the broader Movement around the world, every day. Rather, by strengthening the link between the conference hall and the field, as well as boosting the opportunities for connection and exchange among participants, we aim for real improvement in the humanitarian situation on the ground.

# Resolutions\*

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## Resolutions of the 32nd International Conference of the Red Cross and Red Crescent:

- Resolution 1** Strengthening international humanitarian law protecting persons deprived of their liberty
- Resolution 2** Strengthening compliance with international humanitarian law
- Resolution 3** Sexual and gender-based violence: Joint action on prevention and response
- Resolution 4** Health Care in Danger: Continuing to protect the delivery of health care together
- Resolution 5** The safety and security of humanitarian volunteers
- Resolution 6** Strengthening legal frameworks for disaster response, risk reduction and first aid
- Resolution 7** Strengthening the International Red Cross and Red Crescent Movement response to growing humanitarian needs
- Resolution 8** Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements dated 28 November 2005 between the Palestine Red Crescent Society and Magen David Adom in Israel
- Resolution 9** Dissolution of the Augusta Fund and allocation of the capital to the Florence Nightingale Medal Fund. Revision of the Regulations for the Florence Nightingale Medal
- Resolution 10** Power of Humanity

\* All documents related to the 32nd International Conference of the Red Cross and Red Crescent are available on its website at: [www.rccconference.org](http://www.rccconference.org).

## **Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent**

### **STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY**

The 32nd International Conference of the Red Cross and Red Crescent (International Conference),

*mindful* that deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, in all forms of armed conflict, both the power to detain, and the obligation to provide protection and to respect applicable legal safeguards, including against unlawful detention for all persons deprived of their liberty, and in this regard,

*deeply concerned* that persons deprived of their liberty in relation to armed conflict are vulnerable to murder, forced disappearance, the taking of hostages, torture, cruel or inhumane treatment, rape and other forms of sexual violence, summary executions and disregard for their basic needs, and *condemning* any such acts,

*recognizing* that this Resolution does not give rise to new legal obligations under international law,

*also recognizing* that this Resolution does not modify the mandates, roles and responsibilities of the components of the International Red Cross and Red Crescent Movement (Movement) as prescribed in the Statutes of the Movement.

*recalling* the universal ratification of the 1949 Geneva Conventions,

*reiterating* that international humanitarian law – in particular the four Geneva Conventions and their Additional Protocols, as applicable to State parties thereto, and customary international law – remains as relevant today as ever in international armed conflict (IAC) and non-international armed conflict (NIAC) and continues to provide protection for all persons deprived of their liberty in relation to such conflicts,

*stressing* that greater respect for and implementation of international humanitarian law, by all parties to an armed conflict, is an indispensable prerequisite for improving the situation of persons deprived of their liberty in relation to armed conflict,

*mindful* of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of victims of armed conflict,

*also mindful* of the need to strengthen international humanitarian law in relation to the deprivation of liberty related to armed conflicts, in particular in NIAC,

*recalling* the important roles of the International Committee of the Red Cross (ICRC), the National Red Cross and Red Crescent Societies (National

Societies) and the International Conference with respect to strengthening international humanitarian law, as set forth in the Statutes of the Movement,

*recalling* that Resolution 1 of the 31st International Conference recognized the importance of analysing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention (taking into account age, gender, disabilities and other factors that can increase vulnerability), and the requisite procedural and legal safeguards for persons deprived of their liberty, interned or transferred in relation to armed conflict,

*recalling* that Resolution 1 of the 31st International Conference invited the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict,

*noting* the consultative process facilitated by the ICRC, which included four regional consultations, two thematic consultations and one meeting open to all States, and the ICRC's respective reports and chair's conclusions summarizing those discussions, with a view to providing States with a relevant basis for discussions, and *expressing appreciation* to all stakeholders who contributed to the consultation process,

*acknowledging with appreciation* the close cooperation of States throughout the consultation process, and *thanking* in particular those States that hosted consultations,

1. *commends* the ICRC for facilitating consultations on strengthening international humanitarian law protecting persons deprived of their liberty, which included notably an initial exchange of ideas on areas of humanitarian concern and related legal protections that should be considered for strengthening;
2. *thanks* the ICRC, and *takes note* of its concluding report submitted to the 32nd International Conference, the consultations held and the issues discussed, and the divergence of views expressed, based on the understanding that this concluding report is the sole responsibility of the facilitators and does not necessarily express the agreed views of States;
3. *thanks* States that participated in the consultation process for their constructive engagement on strengthening international humanitarian law protecting persons deprived of their liberty in relation to armed conflict and for their willingness to share their operational knowledge and experience;
4. *recommends* that States engage in further work on strengthening international humanitarian law protecting persons deprived of their liberty, in close cooperation with the ICRC, taking into account the discussions during the 2012–2015 consultation process and other recent work done by States;
5. *acknowledges* that strengthening the IHL protection for persons deprived of their liberty by any party to an armed conflict is a priority;

6. *reaffirms* the paramount importance and continued relevance of treaty-based and customary international humanitarian law in protecting persons deprived of their liberty in relation to armed conflict, and *emphasizes* that any future efforts towards strengthening international humanitarian law protecting persons deprived of their liberty in relation to armed conflict take into account these and other relevant bodies of law, within their scope of application;
7. *takes note* that the areas identified for analysis by Resolution 1 of the 31st International Conference – ensuring humane treatment and adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict – provide a basis for continued discussions;
8. *recommends* the pursuit of further in-depth work, in accordance with this Resolution, with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC;
9. *welcomes* the readiness of States and the ICRC to collaborate in determining, at the outset of their further work and with the consensus of the participating States, the modalities of further work in order to ensure its State-led, collaborative and non-politicized nature in accordance with this Resolution;
10. *invites* the ICRC to facilitate the work of States and to contribute its humanitarian and legal expertise in accordance with this Resolution and the Statutes of the Movement;
11. *also invites* States and the ICRC to consult with National Societies and other relevant actors, including international and regional organizations, to enrich the discussions where appropriate;
12. *stresses* that this Resolution and any outcomes should neither affect the legal status of parties to armed conflict, nor be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means complying with IHL, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State;
13. *invites* the ICRC to present a report on the work done pursuant to this Resolution to the 33rd International Conference.

## Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent

### STRENGTHENING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

The 32nd International Conference of the Red Cross and Red Crescent (International Conference),

*stressing* the importance and continued relevance of international humanitarian law (IHL) for regulating the conduct of parties to armed conflicts, both international and non-international, and providing protection and assistance for the victims of armed conflicts,

*recalling* the universal ratification of the 1949 Geneva Conventions, and *emphasizing* the primary responsibility of States in the development of IHL,

*recalling* Resolution 1 of the 31st International Conference, and *taking note* of the *Concluding Report* prepared by the ICRC and Switzerland on the consultations held in implementing the relevant provisions of this resolution,

*stressing* that the imperative need to improve compliance with IHL was recognized by all States in the consultation process facilitated by the ICRC and Switzerland as a key ongoing challenge, and that more can be done to address the current weaknesses and gaps in the implementation of IHL, including by non-State parties to armed conflict,

1. *thinks* Switzerland and the ICRC for facilitating the consultation process with States and other actors pursuant to the relevant provisions of Resolution 1 of the 31st International Conference, and *recalls* the guiding principles of the consultation process:
  - the State-driven and consensus-based character of the process and the need for the consultations to be based on applicable principles of international law
  - the importance of avoiding politicization, including by ensuring that States address the implementation of IHL only within their own sphere of competence and responsibility
  - the need for an IHL compliance system to be effective
  - the avoidance of unnecessary duplication with other compliance systems
  - the requirement to take resource considerations into account
  - the need to find appropriate ways to ensure that the discussions address all types of armed conflicts, as defined in the Geneva Conventions of 1949 and their Additional Protocols (for the latter as may be applicable), and the parties to them
  - the need for the process to ensure universality, humanity, impartiality and non-selectivity
  - the need for the process to be based on dialogue and cooperation

- the voluntary, i.e. non-legally binding, nature of the consultation process, as well as of its eventual outcome
  - the need for the process and the mechanism to be non-contextualized.
2. *recommends* the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference and in line with the guiding principles enumerated in operative paragraph 1 to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference.



## Resolution 3 of the 32nd International Conference of the Red Cross and Red Crescent

### SEXUAL AND GENDER-BASED VIOLENCE: JOINT ACTION ON PREVENTION AND RESPONSE

The 32nd International Conference of the Red Cross and Red Crescent (International Conference),

*condemning* in the strongest possible terms sexual and gender-based violence, in all circumstances, particularly in armed conflict, disasters and other emergencies and *deeply deploring* the suffering of all victims/survivors of such violence,

*noting with particular alarm* the persistent prevalence and the growing evidence of sexual and gender-based violence in armed conflict, disasters and other emergencies,

*stressing* that this Resolution does not give rise to new obligations under international law,

*also stressing* that this Resolution does not expand or modify the mandates, roles and responsibilities of the components of the International Red Cross and Red Crescent Movement (Movement) as prescribed in the Statutes of the Movement,

*recalling* the obligations to protect and assist victims/survivors of sexual and gender-based violence in armed conflict, disasters and other emergencies in accordance with the applicable legal framework,

*bearing in mind* that international humanitarian law applies only to situations of armed conflict,

*recognizing* that factors such as the weakening of community and institutional protection mechanisms, disruption of services and community life, destruction of infrastructure, separation of families, displacement, and limited access to justice and health services, among others, in addition to structural gender inequalities, may contribute to an increased risk and impact of sexual and gender-based violence,

*recognizing also* that while women and girls are disproportionately affected, men and boys can also be victims/survivors of sexual and gender-based violence, and that factors such as age, disability, deprivation of liberty, displacement, religion, ethnicity, race and nationality, among others, may increase the risk,

*affirming* that women's political, social and economic empowerment; gender equality; and the engagement of men and boys in the effort to combat all forms of violence against women are essential to long-term efforts to prevent sexual and gender-based violence in armed conflict, disasters and other emergencies,

*affirming also* that, in order to adequately address this humanitarian concern, approaches are required that effectively prevent sexual and gender-based violence, end impunity, protect victims/survivors and respond to their respective needs in a comprehensive and multidisciplinary manner in all phases of an emergency,

*stressing* the need to understand and address the root causes of sexual and gender-based violence in order to prevent and respond to such violence effectively, *recognizing* that, despite their prevalence, incidents of sexual and gender-based violence are often invisible, as taboos, stigma, feelings of guilt or shame, fear of retribution, and the unavailability of support or lack of information about available support often prevent victims/survivors from coming forward, and as injuries, both physical and psychological, may be less obvious than those caused by other forms of violence,

*underlining* that it is therefore important to work towards the prevention and elimination of such violence and to prepare appropriate responses to the needs of potential victims/survivors before specific incidents arise, and *noting* that such action can be life-saving for victims/survivors of sexual and gender-based violence,

*noting with concern* the findings of a growing number of studies from around the world, including the recently published report of the International Federation of Red Cross and Red Crescent Societies (International Federation),<sup>1</sup> describing increased risks of sexual and gender-based violence in disasters and other emergencies,

*deeply concerned* that there have been instances of national and international humanitarian workers and other representatives of the international community committing acts of sexual exploitation and abuse, *condemning* such acts in the strongest possible terms, and *calling on* States and relevant organizations to make all possible efforts to prevent, detect, investigate, and liaise with the appropriate authorities concerning cases of suspected sexual exploitation and abuse, for ensuring accountability,

*recalling* the basic mission of the Movement to prevent and alleviate human suffering wherever it may be found, protect life and health and ensure respect for the human being, and *expressing appreciation* for the work and efforts of the components of the Movement so far in addressing sexual and gender-based violence, in accordance with their respective mandates and institutional focuses,

*expressing appreciation* of existing relevant work and initiatives by the United Nations (UN), regional organizations, States, judicial bodies, humanitarian organizations and other actors in relation to sexual and gender-based violence, and *underlining* the complementary character of the work of the Movement and the International Conference with such work and initiatives,

*recalling all* relevant resolutions adopted by the UN and by the International Conference,

1 International Federation of Red Cross and Red Crescent Societies, “Unseen, unheard: Gender-based violence in disasters, global study,” 2015.

## I. Sexual violence in armed conflicts

### Legal and policy frameworks

1. *strongly urges* all parties to armed conflict to immediately cease all acts of sexual violence forthwith;
2. *recalls* all existing provisions of international humanitarian law that prohibit acts of sexual violence in armed conflict, which are binding upon both State and non-State parties to armed conflict, and *notes* that acts of sexual violence are also addressed in other legal frameworks, as applicable;
3. *recalls also* that sexual violence can constitute a crime against humanity or a constitutive act with respect to genocide, when it is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group and that rape and other forms of sexual violence in armed conflict can constitute war crimes, that acts of sexual violence can amount to torture and that in international armed conflicts acts of sexual violence can constitute grave breaches as listed in the 1949 Geneva Conventions;
4. *underlines* the need for States to comply with their relevant obligations to put an end to impunity and to effectively use all appropriate means to thoroughly investigate and prosecute those subject to their jurisdiction that are alleged to have committed such crimes;
5. *stresses* the important contribution of international criminal tribunals and courts to end impunity for crimes of sexual violence;
6. *urges* all States to consider ratifying or acceding to international humanitarian law treaties to which they are not yet party and whose provisions prohibit acts of sexual violence;
7. *calls upon* States to criminalize acts of sexual violence if they have not done so and encourages States to review, as appropriate, their domestic legal frameworks to determine whether they fully implement applicable obligations with respect to sexual violence, provide for investigation and prosecution, and offer protection and other necessary responses to the needs of victims/survivors;
8. *encourages* States to make every feasible effort to ensure that their authorities at all levels, including military and civilian commanders and superiors, adopt and enforce a zero-tolerance policy towards sexual violence;

### Prevention

9. *calls upon* States, in times of peace as in times of armed conflict, pursuant to legal obligations, to disseminate international humanitarian law, including its existing provisions that prohibit sexual violence in armed conflict, as widely as possible in their respective countries and, in particular, in their programmes of military and, if possible, civil instruction, and also calls upon States to make every effort to fully integrate those prohibitions of sexual violence into all activities of their armed and security forces and their detaining authorities, with the support of the components of the Movement as appropriate and in accordance with their respective mandates;

10. *underlines* the important role that, for example, local leaders and civil society, including women's and youth organizations, as well as the engagement of men and boys, can play in raising awareness among the wider population of the prohibition of sexual violence, of the need to prevent such violence and of the need to assist and protect victims/survivors, including against further victimization and stigmatization, and the avenues for obtaining redress, and *encourages* States to support their activities, to the degree practicable;
11. *further calls upon* States to make every feasible effort to ensure that their armed and security forces and their detaining authorities have in place appropriate internal systems for monitoring, and responding to sexual violence that are sensitive to the needs of victims/survivors;
12. *encourages* States to exchange experiences and good practices concerning prevention of sexual violence;

### Protection and access to justice

13. *underlines* the need for States to make every feasible effort to increase individuals' protection from sexual violence by addressing security and safety concerns in a victim/survivor-oriented and gender-sensitive manner;
14. *calls upon* States to make every feasible effort to give victims/survivors access to justice, including by creating, in a culturally-sensitive, gender-sensitive and victim/survivor-oriented manner, an environment where victims/survivors can easily report incidents of sexual violence within the framework of applicable national and international law;
15. *recognizes* that protection and access to justice are also understood as a prevention measure and *calls upon* States to make every feasible effort to put in place specific training for the personnel of all their institutions who may need to respond to instances of sexual violence in armed conflict;
16. *stresses* the need to avoid any kind of discrimination in the efforts to prevent the occurrence of sexual violence, respond to and protect the needs of victims/survivors and punish the perpetrators;

### Investigating and prosecuting

17. *underlines also* that the effective investigation and ethical documentation of sexual violence can be instrumental in ensuring access to justice for victims/survivors and in bringing alleged perpetrators to justice and in this regard recognizes the utility of internationally recognized tools;
18. *also calls upon* States to put in place, to the degree practicable, specific training for their police, prosecutors, judiciary and relevant supporting personnel to enable them to investigate, prosecute and try acts of sexual violence in an effective, impartial and appropriate manner that, while guaranteeing the rights of alleged perpetrators, also fully respects the rights and needs of victims/survivors;

19. *encourages* States, particularly in situations of post-conflict, to consider addressing sexual violence in truth and reconciliation processes;

### Support for victims/survivors

20. *calls* upon States and National Red Cross and Red Crescent Societies (National Societies) to make every feasible effort to ensure, insofar as possible, that victims/survivors of sexual violence and, where appropriate, gender-based violence, have unimpeded and ongoing access to non-discriminatory and comprehensive health care, including sexual and reproductive health-care services, according to national law, physical rehabilitation, psychological and psychosocial support, legal assistance and socio-economic support and spiritual services, as required, always keeping in mind the need to ensure the dignity and safety of victims/survivors, and the importance of confidentiality and privacy, including addressing issues such as social stigmatization of victims/survivors;

## II. Sexual and gender-based violence in disasters and other emergencies

### Legal and policy frameworks

21. *reaffirms* States' obligations under applicable international human rights law to prohibit acts of sexual and gender-based violence;
22. *calls* upon States to review and strengthen, if necessary, their domestic legal frameworks, to fully implement applicable international obligations related to sexual and gender-based violence, and to assess, as relevant, whether domestic procedures, policies and contingency and preparedness plans related to disasters and other emergencies in their territory ensure that adequate attention is paid to sexual and gender-based violence;

### Prevention, information and training

23. *encourages* States, with the support of their National Societies and other civil-society actors, including women's and youth organizations, as well as engagement with men and boys, to make every effort before, during and after disasters and other emergencies to make the prohibition of sexual and gender-based violence, and all services, facilities, mechanisms and support services available to address it, known as widely as possible among their populations;
24. *also encourages* States to gather, analyse and disseminate relevant disaggregated data and information relating to sexual and gender-based violence in disasters and other emergencies in their territory, with support, as appropriate, from their National Societies and the International Federation;
25. *calls* upon States, National Societies, the International Federation and other relevant humanitarian and development stakeholders to ensure that their

disaster- and emergency-management plans and activities include measures to prevent and respond to sexual and gender-based violence in accordance with their respective mandates, such as putting in place specific training for relevant emergency- and disaster-response personnel, including the participation of women in disaster- and emergency-response teams, and engaging community members, in particular women, in decision-making about disaster risk management;

26. *encourages* States to ensure that their law enforcement and justice systems are equipped to effectively address sexual and gender-based violence in disasters and other emergencies, including by undertaking specific gender-sensitive training, striving for a gender balance in their personnel, and assisting victims/survivors to easily and safely report incidents to competent domestic authorities;
27. *invites* international humanitarian organizations, including representatives of relevant sectors and clusters, to share good practices, guidelines and experiences related to addressing sexual and gender-based violence in disasters and other emergencies with relevant actors;

### Preparedness and response

28. *calls* upon States, with support, as appropriate, from National Societies and other partners to make every effort to ensure that persons affected by sexual and gender-based violence in disasters and emergencies have unimpeded and ongoing access to non-discriminatory and comprehensive health care, including sexual and reproductive health-care services, according to national law, physical rehabilitation, psychological and psychosocial support, legal assistance, and socio-economic support, spiritual services as required, always keeping in mind the need to ensure their dignity and safety, and the importance of confidentiality and privacy, in order to reduce the likelihood of them not seeking help and to avoid re-victimization;

## III. Movement implementation, cooperation and partnerships

29. *encourages* the International Committee of the Red Cross (ICRC) to intensify its efforts to prevent sexual violence, alongside its efforts to protect and assist the victims/survivors thereof, in line with its mandate as laid down in the Statutes of the Movement, including research and analysis, and to cooperate with other components of the Movement, in accordance with their respective mandates, as appropriate;
30. *also encourages* the International Federation, in collaboration with National Societies and other relevant partners, to continue its research and consultations with a view to formulating relevant recommendations to prevent and respond to sexual and gender-based violence in disasters and other emergencies;

31. *calls upon* the components of the Movement, in accordance with their respective mandates and institutional focuses, to make every possible effort to make capacity-building on preventing and responding to sexual and gender-based violence one of their priorities, including by specifically training their relevant staff and volunteers at all levels, coordinating and cooperating with each other in line with their respective mandates and roles within the Movement, and exchanging experiences and good practices as appropriate;
32. *also calls upon* all components of the Movement to adopt and enforce zero-tolerance policies on sexual exploitation and abuse of beneficiaries by their staff and volunteers, and subject these individuals to sanctions for their actions;
33. *further calls upon* the components of the Movement, in accordance with their respective mandates, to make every effort to support, where and when appropriate, the development and strengthening of the capacity of national institutions to prevent and respond to sexual and gender-based violence, and to invest in training and strengthening local expertise and in community-based initiatives;
34. *further calls upon* the components of the Movement, in accordance with their respective mandates, to make every effort to coordinate and cooperate as appropriate with other relevant stakeholders working on preventing and responding to sexual and gender-based violence, such as the UN, regional organizations and humanitarian organizations, including, as appropriate, by exchanging experiences and good practices;
35. *requests* the ICRC and the International Federation to report to the 33rd International Conference on progress they have made and on any information provided for this purpose by members of the International Conference about their respective efforts.



## **Resolution 4 of the 32nd International Conference of the Red Cross and Red Crescent**

### **HEALTH CARE IN DANGER: CONTINUING TO PROTECT THE DELIVERY OF HEALTH CARE TOGETHER**

The 32nd International Conference of the Red Cross and Red Crescent (International Conference),

*deeply concerned* about attacks, threats and obstructions affecting the wounded and sick, health-care personnel and facilities, and medical transports as well as the misuse of health-care facilities, medical transports or the distinctive emblems and other impediments to the delivery of health care in times of armed conflict or other emergencies, and *deploring* the fact that such acts lead to serious humanitarian consequences, including loss of life and widespread suffering, and to the weakening of the capacity of health systems on a national and regional level to provide health care to affected populations,

*recalling* Resolution 5 of the 31st International Conference entitled “Health care in danger: Respecting and protecting health care,” including its call upon the International Committee of the Red Cross (ICRC) in operative paragraph 14 “to initiate consultations with experts from States, the International Federation, National Societies and other actors in the health-care sector, with a view to formulating practical recommendations for making the delivery of health care safer” in armed conflicts or other emergencies, in accordance with the applicable legal frameworks, “and to report to the 32nd International Conference in 2015 on the progress made,”

*welcoming* the expert consultations held between 2012 and 2014 and *taking note with appreciation* of the practical recommendations resulting therefrom, as well as the progress report submitted by the ICRC pursuant to operative paragraph 14 of Resolution 5 of the 31st International Conference,

*expressing* its appreciation for the specific role played by States, National Red Cross and Red Crescent Societies (National Societies) and health-care professional associations in hosting expert consultations,

*welcoming* the ongoing efforts made by States, the International Red Cross and Red Crescent Movement (Movement) and other actors in the health-care sector to improve the protection of the delivery of health care, in accordance with the applicable international and domestic legal frameworks, and efforts to implement relevant practical recommendations as well as to follow good practices in this regard,

*bearing in mind* that international humanitarian law applies only to situations of armed conflict and *recognizing* that international humanitarian law and applicable international human rights law provide a framework for protecting health care,

*stressing* that this Resolution does not give rise to new obligations under international law,

*also stressing* that this Resolution does not expand or modify the mandates, roles and responsibilities of the components of the Movement as prescribed in the Statutes of the Movement,

*recalling* the obligations to respect and protect the wounded and sick, health-care personnel and facilities, as well as medical transports, and to take all reasonable measures to ensure safe and prompt access to health care for the wounded and sick, in times of armed conflict or other emergencies, in accordance with the applicable legal frameworks,

*calling for* all States and all stakeholders to respect the integrity of medical and health-care personnel in carrying out their duties in line with their respective professional codes of ethics and scope of practice,

*bearing in mind* the specific health-care needs of certain categories of the wounded and sick, including children, women, persons with disabilities and the elderly,

*stressing* that identification of health-care personnel, facilities, and medical transports as such may enhance their protection, and in this regard *recalling* international legal obligations pertaining to the use and the protection of the distinctive emblems under the 1949 Geneva Conventions, and where applicable, their Additional Protocols,

*recalling* the Statutes of the Movement, in particular the mission of the components of the Movement as stated in the preamble of these Statutes, which guide the work of the Movement to make the delivery of health care safer in armed conflict or other emergencies,

*stressing*, in particular, the importance of the Fundamental Principles of the Movement and *recalling* that “States shall at all times respect the adherence by all components of the Movement to the Fundamental Principles,” as laid down in the Statutes of the Movement,

*emphasizing*, in this context, the principle of humanity, whereby human suffering shall be prevented and alleviated wherever it may be found, and the principle of impartiality, whereby no discrimination on grounds of nationality, race, religious beliefs, class, political opinions or gender shall be made between individuals whose suffering is to be relieved, being guided solely by their needs and giving priority to the most urgent cases of distress,

*recalling* the importance of health-care personnel having sufficient practical knowledge of their rights and responsibilities, in accordance with the applicable legal frameworks and with their professional codes of ethics and scope of practice, and *stressing* that health-care personnel should be able to offer their services without obstruction, threat or physical attack,

*stressing* the need for continued and, where relevant and appropriate, strengthened cooperation between States, the Movement, international and national health-care professional associations and other health-care providers, international and regional organizations, civil society, religious and community leaders, affected communities and other relevant stakeholders to raise awareness, promote preparedness to address and address violence against the wounded and

sick, health-care personnel and facilities, and medical transports, especially at a national level, bearing in mind existing roles, mandates and capacities,

1. *urges* full respect by all parties to armed conflicts for their obligations under international humanitarian law and by States for their obligations under international human rights law, as applicable and relevant for the protection of the wounded and sick and health-care personnel, facilities, and medical transports exclusively engaged in medical duties;
2. *recalls*, in this regard, the prohibitions against attacking the wounded and sick, health-care personnel and facilities, and medical transports, against arbitrarily denying or limiting access for the wounded and sick to health-care services, and against harassing, threatening or punishing health-care personnel for carrying out their duties, in accordance with the applicable legal frameworks;
3. *notes* that attacking, threatening or otherwise preventing health-care personnel from fulfilling their medical duties undermines their physical safety and the integrity of their professional codes of ethics;
4. *expresses* its deep concern about attacks against health-care personnel and facilities, and reaffirms the commitment of all components of the Movement to the protection of health-care personnel, facilities and medical transports as afforded by international humanitarian law, and calls upon States, as are required, to conduct full, prompt and independent investigations with a view to reinforcing preventive measures, ensuring accountability and addressing the grievances of victims;
5. *calls upon* States, where relevant and appropriate, to adopt and effectively implement the required domestic measures, including legislative, regulatory and practical ones, to ensure respect for their international legal obligations pertaining to the protection of the wounded and sick and health-care personnel, facilities, and medical transports, and the protection and use of the distinctive emblems by authorized medical personnel, facilities and transports;
6. *calls upon* States to ensure that their armed forces and security forces, within their respective competencies under domestic law, make or, where relevant, continue their efforts to integrate practical measures for the protection of the wounded and sick and health-care services into the planning and conduct of their operations;
7. *calls upon* States, where relevant, also to contribute to the integration of such practical measures by armed forces and security forces in the operational practices and procedures of regional or international organizations;
8. *calls upon* States, in cooperation with the Movement, the health-care community and other relevant stakeholders, as appropriate, to enhance their understanding of the nature of violence affecting the delivery of health-care services with a view to developing and effectively implementing domestic legal, regulatory and practical measures for preventing and addressing such violence, where relevant, and to this end, *encourages* States and the Movement, in cooperation with the health-care community and other

- relevant stakeholders, to regularly share challenges and good practices in this regard;
9. *calls upon* States and the Movement, in cooperation with the health-care community and academia, as appropriate, to continue making use of or otherwise support existing training tools or, where relevant, developing new tools to enhance the understanding by health-care personnel of their rights and responsibilities resulting from applicable law and their professional codes of ethics, as well as understanding of national and local customs and traditions, in accordance with the applicable legal frameworks, and of dilemmas in the discharge of their legal and ethical responsibilities and stresses that this may contribute to behaviour that could increase their acceptance with local communities and thereby to their safety and security;
  10. *calls upon* States and the Movement, in cooperation with the health-care community and academia, as appropriate, to intensify or otherwise support efforts to make instruction on the rights and responsibilities of health-care personnel part of the curricula of relevant university faculties, including but not limited to medical faculties, and of training institutions for health-care personnel;
  11. *calls upon* National Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies to continue supporting and strengthening the capacity of local health-care facilities and personnel around the world and to continue providing training and instruction for health-care staff and volunteers by developing appropriate tools on the rights and obligations of health-care personnel and on protection for and the safety of health-care delivery, to the extent possible;
  12. *calls upon* States and the Movement, where relevant, and in cooperation with affected local communities and their leaders, to enhance the secure functioning of health-care facilities through preparatory and practical measures;
  13. *calls upon* States and National Societies, where relevant, to engage or continue to engage with each other, with a view to strengthening domestic law, regulations and practice regarding the auxiliary role of National Societies to the public authorities in the humanitarian field for the safer delivery of health care, including the effective coordination of their respective health-care services, and *calls upon* National Societies, in the fulfilment of that auxiliary role, to promote and support the implementation of States' international legal obligations and dissemination efforts in this regard;
  14. *calls upon* National Societies to intensify their commitment and efforts to increase their acceptance, safety and security in order to access persons in communities where they deliver health-care services, including by providing training or other support to their staff and volunteers to ensure that they operate in accordance with the Fundamental Principles of the Movement, by applying existing operational approaches and approaches designed to enhance the organizational development of National Societies, such as the

Safer Access Framework, and by continuing to work, where relevant, on specific procedures, protocols and capacities to enhance risk management and the overall security of their ambulance and emergency health-care services, and *encourages* other National Societies, the ICRC and the International Federation, as appropriate, to support them in these efforts.

## Resolution 5 of the 32nd International Conference of the Red Cross and Red Crescent

### THE SAFETY AND SECURITY OF HUMANITARIAN VOLUNTEERS

The 32nd International Conference of the Red Cross and Red Crescent,

*noting* that the purpose of this resolution, among others, is to raise awareness and promote the safety and security of humanitarian volunteers,

*recognizing* with gratitude the enormous contribution of humanitarian volunteers and other humanitarian personnel, including the 17 million volunteers working with National Red Cross and Red Crescent Societies (National Societies), to the well-being of their communities,

*highlighting* in particular, the service of the 7,000 Red Cross and Red Crescent volunteers who worked in Ebola-affected countries in 2014–15 and the 1 million Red Cross and Red Crescent volunteers who live and work in countries exposed to armed conflict,

*noting* with grave concern the highly elevated risks that volunteers and other humanitarian personnel face in armed conflicts, which include but are not limited to physical attack, psychological trauma, social stigma and accidental injury, and which may be affected by gender,

*acknowledging* that humanitarian volunteers and other personnel can also face these and other risks in other circumstances, such as disasters, health emergencies and even in daily support to their communities,

*noting* with dismay that nearly 100 Red Cross and Red Crescent volunteers lost their lives in the course of their duties since the 31st International Conference of the Red Cross and Red Crescent (International Conference) in 2011, *expressing* its sympathy for their families and communities, as well as its solidarity with volunteers who have been injured, traumatized or otherwise harmed,

*recalling* that, under international humanitarian law, humanitarian relief personnel, as civilians, must be respected and protected and that international human rights law also provides a framework for protecting persons;

*acknowledging* that protecting humanitarian volunteers is both a moral and humanitarian imperative, in light of their humanity and their service, and a practical necessity, in light of their indispensable role in humanitarian action and the impacts that insecurity can have on their recruitment and retention,

*recognizing* that while the safety and security of all humanitarian personnel is extremely important, research recently completed by the International Federation of Red Cross and Red Crescent Societies (International Federation) has shown that the situation of volunteers has often received far less attention,

*affirming* our determination to cooperate in preventing and mitigating risks to volunteers to the degree feasible, to collaboratively implement initiatives that will promote a safer environment for them, and to strengthen our efforts to meet the

needs of injured or traumatized volunteers and of the families of volunteers killed or injured in the line of duty,

*stressing* the importance of strong data, research and learning to understand and reduce risks to humanitarian volunteers and other humanitarian personnel, including gender-related risks,

*recalling* relevant resolutions of the International Conference, including Resolution 4 of the 31st International Conference, which called on States and National Societies to create and maintain an enabling environment for volunteering, including through the promotion of supportive legislation and policy,

*recognizing* the complementarity of the present resolution with Resolution 4 of the present International Conference entitled “Health care in danger: continuing to protect the delivery of health care together,” as regards the safety and security of Red Cross and Red Crescent personnel,

*recalling* that United Nations General Assembly Resolution 67/138 of 2012 requested States and the UN to work together with other volunteer-involving organizations to support efforts to enhance the security and protection of volunteers,

*reaffirming* that the work of humanitarian volunteers will be critical to success in meeting international goals related to community resilience, as set out in the Sendai Framework for Disaster Risk Reduction 2015–2030 and the 2030 Agenda for Sustainable Development,

## Determination to protect

1. *calls* on National Societies, and all other actors deploying humanitarian volunteers, to make every effort to provide their volunteers in a timely manner with the best safety-related information, guidance, training, protective equipment, psychological support and insurance within their means;
2. *urges* National Societies, and all actors deploying humanitarian volunteers, to continuously review potential threats to their volunteers, including but not limited to those related to gender, and to ensure that their plans and programmes include measures to reduce and mitigate these risks;
3. *invites* States and other relevant stakeholders to support National Societies and other actors deploying humanitarian volunteers in these endeavours, including, as appropriate, through training, expertise and resources;
4. *calls on* States to promote the safest environment feasible for humanitarian volunteers, bearing in mind the inherent risks in some of their activities, including, in accordance with national practice, measures to promote public understanding and acceptance of the role of humanitarian volunteers, the integration of measures to protect volunteer safety and security in national laws, policies, plans and programmes for emergency management, and measures to hold perpetrators of crimes against humanitarian volunteers accountable;



## Enhancing knowledge

5. *encourages* States, in cooperation, as appropriate, with National Societies and other relevant stakeholders, to develop and/or maintain national systems for the collection and dissemination of comprehensive data, including sex and age disaggregated data, relevant to the safety and security of humanitarian volunteers in a manner consistent with applicable national law and calls for international data collection efforts on humanitarian safety to also include information about volunteers;
6. *encourages* States, National Societies, and all other relevant stakeholders to regularly share challenges and good practices with regard to improving the safety and security of humanitarian volunteers;
7. *invites* the academic community to increase its research into problems concerning humanitarian volunteers and potential solutions to those problems and encourages States to consider increasing their financial support for such research;

## Enhancing understanding

8. *stresses* the importance of ensuring that humanitarian volunteers are aware and respectful of national and local customs and traditions and communicate clearly their purpose and objectives within communities in order to enhance their acceptance, thereby contributing to their safety and security, and in this regard to ensure that humanitarian action is guided by humanitarian principles;
9. *encourages* National Societies to ensure that their volunteers are fully trained in applicable safety procedures and protocols, including the use of any necessary protective equipment, in the application of the Fundamental Principles of the International Red Cross and Red Crescent Movement, and are familiar with the use of global tools such as the International Committee of the Red Cross Safer Access Framework and the International Federation's "Stay Safe" toolkit;

## Promoting insurance or equivalent protection

10. *urges* National Societies and all actors deploying humanitarian volunteers to make every effort, within their means, to ensure that their volunteers have adequate insurance or equivalent "safety net" assistance with regard to death, injury, sickness or trauma they may endure while carrying out their duties;
11. *commends* those States that have provided direct or indirect support for the insurance or equivalent "safety net" assistance for volunteers of National Societies and other actors deploying humanitarian volunteers within their territories and *urges* others to consider doing so, to the maximum extent feasible;

12. *urges* States and other relevant stakeholders to also consider providing such support in other countries, as donors, in accordance with national legislation and the humanitarian principles;
13. *encourages* the International Federation to continue to support National Societies in identifying cost-effective means to insure or otherwise respond to the needs of their volunteers;

## **Implementation and support**

14. *invites* the International Federation and the International Committee of the Red Cross (ICRC) to offer their support to National Societies and States in carrying out the implementation of this resolution and also encourages National Societies to support each other with the sharing of best practices and challenges;
15. *encourages* the International Federation, ICRC and National Societies to continue to strengthen partnerships with other stakeholders, including the UN, in promoting the safety and security of volunteers;
16. *requests* operational partners to National Societies to cooperate with them, with support, as appropriate, from the International Federation and/or the ICRC, to ensure that any joint projects do not pose unnecessary risks to volunteers;
17. *requests* the International Federation to submit a report on progress with this resolution at the 33rd International Conference.

## Resolution 6 of the 32nd International Conference of the Red Cross and Red Crescent

### STRENGTHENING LEGAL FRAMEWORKS FOR DISASTER RESPONSE, RISK REDUCTION AND FIRST AID

The 32nd International Conference of the Red Cross and Red Crescent,

*recalling* Final Goal 3.2 of the 28th International Conference, Resolution 4 of the 30th International Conference and Resolution 7 of the 31st International Conference of the Red Cross and Red Crescent,

*recalling* relevant resolutions of the United Nations, which encouraged States to strengthen their regulatory frameworks for international disaster assistance, taking the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (“IDRL Guidelines”) into account,

*noting* the completion of the final “Model Act on the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance” by the International Federation of Red Cross and Red Crescent Societies (International Federation), the United Nations Office of Humanitarian Affairs (OCHA) and the Inter-Parliamentary Union in 2013 and the initiative of the International Federation and OCHA to develop a “Model Emergency Degree on the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance”,

*noting with satisfaction* that some 23 States have adopted new laws, rules or procedures drawing on the IDRL Guidelines since 2007 and that a significant number of regional organizations and initiatives have increased their support to their member States in preventing or resolving regulatory issues in international disaster response operations,

*noting with concern* the findings of the background report by the International Federation that regulatory problems nevertheless continue to impact the timeliness and effectiveness of international disaster response operations and that there are still many States that lack comprehensive laws, rules or procedures for managing international disaster assistance,

*noting* that the International Law Commission has completed the first reading of its “Draft articles on the protection of persons in the event of disaster” and has requested States and some organizations, including the International Federation and the International Committee of the Red Cross, to provide their comments by 1 January 2016,

*recalling* the critical roles played by the Yokohama Strategy and Plan of Action for a Safer World in 1994, the Hyogo Framework for Action in 2005 and the Sendai Framework for Disaster Risk Reduction in 2015 (Sendai Framework) in mainstreaming disaster risk reduction, which was made possible with the

facilitating role of the United Nations International Strategy for Disaster Reduction (UNISDR),

*welcoming* the Sendai Framework, which encourages States, *inter alia*, to strengthen the content and implementation of their laws, regulations and policies related to disaster risk reduction, underlines that a gender, age, disability and cultural perspective should be integrated in all risk reduction policies and practices and that women's and youth leadership should be promoted, and recognizes the importance of reviewing national laws and procedures in light of the IDRL Guidelines,

*taking note* of the progress made at the first meeting of the Open Ended Intergovernmental Expert Working Group on Indicators and Terminology, as a practical step to implement the Sendai Framework,

*welcoming* the 2030 Agenda for Sustainable Development, which calls for commitment, *inter alia*, to build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and disasters and other economic, social and environmental shocks,

*noting* the initiative of the International Federation and the United Nations Development Programme (UNDP) to undertake comparative research on best practices and common gap areas in domestic law related to disaster risk reduction, as described in the report entitled "Effective law and regulation for disaster risk reduction: a multi-country report" published in 2014, and *noting* their findings that there has been encouraging progress in the strengthening of legislation for disaster risk management in recent years, but gaps still remain in many countries, particularly with regard to addressing financing, capacity building, community participation, implementation, and accountability for disaster risk reduction,

*noting* the consultation and pilot process conducted by International Federation and UNDP from 2012 to 2015 on the "Checklist on Law and Disaster Risk Reduction," which sought feedback and contributions from a broad range of governmental and non-governmental practitioners,

*acknowledging* that widespread training and individual practice of first aid is a cost-effective way to ensure that life-saving help is close at hand in the first moments of a sudden health crisis,

*welcoming* the strong contribution provided by National Red Cross and Red Crescent Societies in promoting first aid,

*noting* the findings of the International Federation background report that targeted mandates for first aid training can increase the chance that a person with appropriate skills will be available in a situation of crisis, but that there is substantial variability among States in the degree to which such mandates are imposed,

*noting further* the finding that many States lack minimum standards for the quality and content of first aid training and *welcoming* in this respect the International First Aid and Resuscitation Guidelines developed by the International Federation in 2011, as an important reference tool,

*noting further* the finding that even trained volunteers are hesitating to provide first aid out of fear of potential liability in the event that their good faith

efforts are unsuccessful and that there are, in fact, no special legal protections for them in many States' laws,

*recognizing* that women and their participation are critical to effectively managing disaster risk and building resilience,

*emphasizing* that the affected state has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters,

### **Accelerating progress in the facilitation and regulation of international disaster response**

1. *commends* those States that have adopted comprehensive laws, policies, rules and procedures for facilitating and regulating international disaster assistance and *encourages* them to share their experiences with others;
2. *calls on* those States that have not yet adopted appropriate laws, policies, rules and procedures to do so at national and subnational level in order to avoid being caught unprepared in the event of a future disaster and *encourages* them to consider developing their own institutional measures to ensure adequate discussion and planning relating to the management of international disaster assistance;
3. *welcomes* the support that National Societies and the International Federation have provided to interested States to make use of the IDRL Guidelines and *encourages* them to continue their efforts, including integration with their national plans, in collaboration with relevant partners, including the United Nations and relevant regional organizations;
4. *invites* National Societies and States to collaborate in disseminating information to the public about the most appropriate donations of goods in the wake of a major disaster and to discourage the shipment of unnecessary and unsolicited items;
5. *welcomes* the International Federation's initiative to foster dialogue on further options to accelerate progress in resolving regulatory problems in international disaster response operations, including country-level efforts as well as the potential for further strengthening global and/or regional legal frameworks, and *invites* it to continue to lead consultations with States and other stakeholders in this regard;

### **Strengthening cooperation and laws for disaster risk reduction**

6. *recognizes* that National Societies, as auxiliaries to the public authorities in the humanitarian field, have an important role to play in supporting their States to achieve a number of the goals, targets and priorities set out in the context of the

- Sendai Framework, the 2030 Agenda for Sustainable Development and outcomes of the Conference of the Parties of the United Nations Framework Convention on Climate Change, including those related to building community resilience, reducing disaster risks and adapting to climate change;
7. *encourages* National Societies and States to consider ways to enhance their cooperation to achieve these goals, targets and priorities, including cooperation to address urban risks and to promote strong and well-implemented domestic legal frameworks;
  8. *commits* to work together to strengthen community-driven, holistic resilience efforts, including by encouraging partnerships and alliances and, in this respect, welcomes the One Billion Coalition for Resilience;
  9. *recognizes* the Checklist on Law and Disaster Risk Reduction as a useful and non-binding assessment tool to help states, when applicable, to review domestic legal frameworks for disaster risk reduction at the national, provincial and local levels and *notes* its utility to States in carrying out related commitments set out in the Sendai Framework;
  10. *invites* States to use the Checklist to evaluate and, as needed, improve the content and implementation of their laws, regulations and public policies related to disaster risk reduction, with support from National Societies, the International Federation, the United Nations System, local civil society, the private sector, academia and other partners;
  11. *encourages* National Societies and States to cooperate in generating greater public awareness about disaster risk reduction and related rights and responsibilities of relevant actors under national and international law;

## **Providing supportive legal frameworks for saving lives through first aid**

12. *encourages* States to promote regularly refreshed first aid education across the life-span of their citizens, in particular, to the degree capacity and national systems allow, through mandatory training for school children and teachers and driver's licence applicants and to ensure equal participation of women, girls, men and boys in first aid training;
13. *further encourages* States to adopt and regularly update official guidelines as to the minimum content of first aid education programmes, taking into account standards already in use, including the International Federation's International First Aid and Resuscitation Guidelines, as well as the results of impact assessments;
14. *further encourages* States to consider all necessary steps to encourage the provision of first aid by laypersons with appropriate training, including, where appropriate, establishing protection from liability for their good faith efforts and ensuring that they are aware of this protection;
15. *invites* States to exchange good practices in this area, including the use of digital communication, and *requests* National Societies and the International

Federation to support interested States in assessing and, as needed and requested, strengthening their existing legal frameworks related to first aid;

### **Extending support and partnerships**

16. *encourages* National Societies, as auxiliaries to their public authorities in the humanitarian field, to continue to provide advice and support to their governments in the development and implementation of effective legal and policy frameworks relevant to disaster and emergency management at all levels, in particular with respect to the areas of concern mentioned in this resolution;
17. *requests* the International Federation to continue to support National Societies and States in the field of disaster law, including with respect to the areas of concern mentioned in this resolution, through technical assistance, capacity building, the development of tools, models and guidelines, advocacy and ongoing research and promoting the sharing of experiences and best practices between countries;
18. *welcomes* the increasing cooperation of the International Federation and National Societies with other partners, in accordance with their respective mandates, in providing support to interested States in this area, in particular with the United Nations, regional organizations, civil society, including national NGOs, the private sector, and academia and *encourages* them to continue to develop new partnerships;

### **Ensuring dissemination and review**

19. *reaffirms* the role of the International Conference of the Red Cross and Red Crescent as one of the key international fora for continued dialogue about disaster laws and on recovery action in synergy with actions conducted by States and international organisations;
20. *invites* States, the International Federation, and National Societies to disseminate this resolution to appropriate stakeholders, including by bringing it to the attention of relevant international and regional organizations;
21. *requests* the International Federation, in consultation with National Societies, to submit a progress report on the implementation of this resolution to the 33rd International Conference of the Red Cross and Red Crescent.



## **Resolution 7 of the 32nd International Conference of the Red Cross and Red Crescent**

### **STRENGTHENING THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT RESPONSE TO GROWING HUMANITARIAN NEEDS**

The 32nd International Conference of the Red Cross and Red Crescent, *expressing deep concern* at the growing humanitarian needs, *stressing* the importance of the components of the International Red Cross and Red Crescent Movement (Movement) to continually strengthen and improve their ability to respond to humanitarian needs through efficient collective action and coordination,

*reaffirming* the significant ethical and operational value of the seven Fundamental Principles of the Movement for all the components of the Movement in the accomplishment of their humanitarian mission,

*recalling* the commitments made by States to facilitating the activities and the safe access of the Movement's components and respecting at all times their adherence to the Fundamental Principles,

*stressing* in particular the importance of a constant dialogue in this regard between States and components of the Movement in order to ensure that States implement relevant commitments set out in international humanitarian law and reflected in the Statutes of the Movement,

*encouraging* the continuous efforts of the Movement to ensure an efficient, coherent and complementary and principled response to growing humanitarian needs, in accordance with respective mandates, by strengthening internal processes and the culture of cooperation and coordination before, during and after emergencies,

*acknowledging* the need for the Movement, in pursuing its collective ambition, to have a coherent approach to branding and visual representation for global communication, promotion and fundraising purposes,

*affirming* the importance of the distinctive emblems recognized under the 1949 Geneva Conventions and their Additional Protocols and the primary function of the emblems as a protective device in times of armed conflict, and *emphasizing* the need to preserve and ensure respect for the emblems at all times in accordance with the Geneva Conventions and with the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies (Emblem Regulations), as adopted by the International Conference of the Red Cross and Red Crescent (International Conference) in 1965 and revised by the Council of Delegates in 1991, with subsequent endorsement by the States parties to the Geneva Conventions

*also affirming* the responsibility of States, in cooperation with their National Societies, to protect the integrity of the distinctive emblems, as set out in the Statutes of the Movement,

*taking note* of the decision of the 19th Session of the General Assembly of the International Federation of Red Cross and Red Crescent Societies (International Federation) endorsing the “Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance,” and requesting that they be presented to the International Conference,

*recalling and reaffirming* the past commitments adopted by the International Conference of the Red Cross and Red Crescent, and in particular Resolution 1 and its annexed Declaration “Together for Humanity” as adopted by the 30th International Conference, and Resolution 3 “Migration: ensuring access, dignity, respect for diversity and social inclusion” as adopted by the 31st International Conference,

*noting* the adoption by the 2015 Council of Delegates of the Movement statement “Ensuring collective action to protect and respond to the needs and vulnerabilities of migrants”,

1. *notes* the adoption by the 2015 Council of Delegates of the International Red Cross and Red Crescent Movement of the “Vision for the International Red Cross and Red Crescent Movement,” *strives* to support the components of the Movement in living up to this vision, and *calls upon* States to support and facilitate the Movement in achieving this aim;
2. *recalls* States’ commitment to respect at all times the adherence by all the components of the Movement to the Fundamental Principles, and *urges* States and National Societies to maintain a constant dialogue regarding respect for and adherence to the Principles, to ensure that every country has the full benefit of a neutral and impartial auxiliary to the public authorities in the humanitarian field, and one which remains autonomous in carrying out its humanitarian activities for the most vulnerable;
3. *welcomes* the commitments made during the 2013 and 2015 Councils of Delegates to “strengthening Movement coordination and cooperation,” aimed at increasing operational coordination and cooperation in both preparedness and response, and *urges* the Movement components to continue their efforts to serve affected populations in the most effective and inclusive manner possible;
4. *takes note* of the initiative of the Movement components adopting a Movement logo for exceptional use in representation, communication, global fundraising and promotional activities, and *stresses* the commitment of Movement components to only display the Movement logo in accordance with the conditions and rules governing its use in order to ensure that it is coherent with existing regulations and is complementary to the existing logos of individual Movement components;
5. *encourages* States to recognize as appropriate the Movement logo and facilitate its use on their territory, in compliance with applicable national and international law and in conformity with the 1991 Emblem Regulations;
6. *endorses* the “Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance” as revised by the General Assembly of the

International Federation in 2013, which govern National Societies and their International Federation in international humanitarian assistance (excluding armed conflict, internal strife and their direct results); *requests* States to facilitate and support the implementation of these Principles and Rules; and *recalls* the auxiliary role of National Societies to their public authorities in the humanitarian field;

7. *welcomes* the initiative of the Movement to share its unique perspective and experience with the World Humanitarian Summit, thereby complementing the efforts of other humanitarian actors to address the most pressing humanitarian challenges.

## **Resolution 8 of the 32nd International Conference of the Red Cross and Red Crescent**

### **IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS DATED 28 NOVEMBER 2005 BETWEEN THE PALESTINE RED CRESCENT SOCIETY AND MAGEN DAVID ADOM IN ISRAEL**

The 32nd International Conference of the Red Cross and Red Crescent,

1. *notes* the adoption of Resolution 10 of the Council of Delegates on 7 December 2015 on the implementation of the Memorandum of Understanding and Agreement on Operational Agreements dated 28 November 2005 between the Palestine Red Crescent Society and Magen David Adom in Israel (see annex for the text of the Resolution);
2. *endorses* this Resolution.

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### **Annex: Resolution 10 of the 2015 Council of Delegates**

#### **IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS DATED 28 NOVEMBER 2005 BETWEEN THE PALESTINE RED CRESCENT SOCIETY AND MAGEN DAVID ADOM IN ISRAEL**

The Council of Delegates,

*recalling* the Memorandum of Understanding (MoU) signed by the Palestine Red Crescent Society (PRCS) and Magen David Adom in Israel (MDA) on 28 November 2005, in particular the following provisions:

1. MDA and PRCS will operate in conformity with the legal framework applicable to the Palestinian territory occupied by Israel in 1967, including the Fourth Geneva Convention of 1949 on the Protection of Civilians in Time of War.
2. MDA and PRCS recognize that PRCS is the authorized National Society in the Palestinian territory and that this territory is within the geographical scope of the operational activities and of the competences of PRCS. MDA and PRCS

will respect each other's jurisdiction and will operate in accordance with the Statutes and Rules of the Movement.

3. After the Third Additional Protocol is adopted and by the time MDA is admitted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies:
  - a. MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel.
  - b. Operational activities of one society within the jurisdiction of the other society will be conducted in accordance with the consent provision of resolution 11 of the 1921 international conference.
- (...)
4. MDA and PRCS will work together and separately within their jurisdictions to end any misuse of the emblem and will work with their respective authorities to ensure respect for their humanitarian mandate and for international humanitarian law.
5. (...)
6. MDA and PRCS will cooperate in the implementation of this Memorandum of Understanding (...).

*taking note* of the report of November 2015 on the implementation of the MoU prepared by the Standing Commission of the Red Cross and Red Crescent (Standing Commission),

*recalling* Resolution 5 adopted by the Council of Delegates on 17 November 2013 concerning the implementation of the MoU and AOA between MDA and the PRCS,

*reaffirming* the importance for all of the components of the International Red Cross and Red Crescent Movement (Movement) to operate at all times in accordance with international humanitarian law as well as the Fundamental Principles, the Statutes and the rules and policies of the Movement,

*noting* that National Societies have an obligation to operate in compliance with the Constitution of the International Federation of Red Cross and Red Crescent Societies (International Federation) and the existing policy "on the protection of integrity of National Societies and bodies of the International Federation" adopted in November 2009,

*recalling* both the dispute resolution mechanism set out in Resolution 11 of the 1921 International Conference as well as the Compliance and Mediation Committee of the International Federation, and recognizing the rights of National Societies thereunder,

*while noting* the humanitarian and political environment, *expresses* disappointment that after 10 years the MoU is not yet fully implemented and *reaffirms* our collective determination to support its full implementation,

*taking note* of the letter of 15 November 2015 from the Ministry of Foreign Affairs of the State of Israel in which the Israeli Government stated that "it is ready to support the MDA to ensure the full implementation of its commitments [under the MoU],"

*reaffirming* the necessity for effective and positive coordination between all components of the Movement in support of the full implementation of the MoU between the PRCS and MDA,

1. *while noting* with full appreciation the progress made and acknowledging the steps taken by both the PRCS and MDA over the last decade to fulfil the MoU/ AOA, *notes* however and with deep regret the Standing Commission's conclusion "that no additional steps since 2013 have been reported as having been taken in regard to the geographical scope provisions of the MoU";
2. *strongly urges* MDA to comply with its obligations with respect to the geographic scope provisions of the MoU and take appropriate actions to end non-compliance;
3. *requests* MDA and other concerned parties, in Israel and beyond, to undertake further concrete measures to stop misuse of the MDA logo in the territory considered within the geographic scope of the PRCS;
4. *calls on* the State of Israel to continue to support MDA to ensure the full implementation of its commitments under the MoU;
5. *requests* the International Committee of the Red Cross (ICRC) and the International Federation to facilitate the full implementation of the MoU by proposing, for endorsement by the Standing Commission, the appointment of an independent monitor by 31 March 2016;
6. *urges* the ICRC and the International Federation to define the terms of reference for the monitoring process within 45 days of the adoption of this resolution, to include, but not be limited to, the following main functions:
  - a) undertake regular monitoring and report twice annually to the Movement and to the 2017 Council of Delegates;
  - b) validate the information provided by the two National Societies regarding the implementation of the MoU;
  - c) explore constructive options within the Movement to address issues identified in the reports;
7. *recognizes* that the independent monitor may wish to call upon assistance from National Societies and eminent individuals from within or outside the Movement to reach full implementation of the MoU;
8. *urges* MDA and the PRCS to enhance their cooperation in fulfilling their humanitarian mandates and commitments, including through regular meetings;
9. *requests* the ICRC and the International Federation to provide logistical and technical support to the monitoring process and to ensure the provision of a report on implementation of the MoU to the next Council of Delegates and through it to the 33rd International Conference;
10. *expresses* the sincere desire that full implementation of the MoU will be achieved and validated prior to the 2017 Council of Delegates.

## **Resolution 9 of the 32nd International Conference of the Red Cross and Red Crescent**

### **DISSOLUTION OF THE AUGUSTA FUND AND ALLOCATION OF THE CAPITAL TO THE FLORENCE NIGHTINGALE MEDAL FUND REVISION OF THE REGULATIONS FOR THE FLORENCE NIGHTINGALE MEDAL**

The 32nd International Conference of the Red Cross and Red Crescent (International Conference),

*taking note* of the report on the Augusta Fund submitted by the International Committee of the Red Cross (ICRC),

*also taking note* of the lack of sustainability of the Augusta Fund,

*further taking note* of the ICRC's proposals concerning the Regulations for the Florence Nightingale Medal,

*recalling* the purposes of the Augusta Fund and the Florence Nightingale Medal Fund,

1. *requests* the ICRC to make arrangements for the dissolution of the Augusta Fund and the transfer of its capital to the Florence Nightingale Medal Fund;
2. *approves* the new Regulations for the Florence Nightingale Medal, which read as follows:

#### **Regulations for the Florence Nightingale Medal**

Amended text adopted by the 32nd International Conference of the Red Cross and Red Crescent  
(Geneva, 2015)

#### **Article 1**

In accordance with the recommendation of the 8th International Conference of the Red Cross held in London in 1907, and the decision of the 9th International Conference held in Washington in 1912, a Fund was established by contributions from National Red Cross Societies in memory of the great and distinguished services of Florence Nightingale for the improvement of the care of the wounded and the sick.

The income from the Fund shall be used for the distribution of a Medal, to be called the "Florence Nightingale Medal," to honour the spirit which marked the whole life and work of Florence Nightingale.

#### **Article 2**

The Florence Nightingale Medal may be awarded to qualified male or female nurses and also to male or female voluntary nursing aides, active members or regular



helpers of a National Red Cross or Red Crescent Society or of an affiliated medical or nursing institution.

The Medal may be awarded to those of the above-mentioned persons who have distinguished themselves in time of peace or war by:

- exceptional courage and devotion to the wounded, sick or disabled or to civilian victims of a conflict or disaster;
- exemplary services or a creative and pioneering spirit in the areas of prevention, public health or nursing education.

The Medal may be awarded posthumously if the prospective recipient has fallen on active service.

### **Article 3**

The Medal shall be awarded by the International Committee of the Red Cross (ICRC) on proposals made to it by National Societies.

### **Article 4**

The Medal shall be in silver-gilt with a portrait on the obverse of Florence Nightingale with the words “Ad memoriam Florence Nightingale 1820–1910.” On the reverse it shall bear the inscription on the circumference “Pro vera misericordia et cara humanitate perennis decor universalis.” The name of the holder and the date of the award of the Medal shall be engraved in the centre.

The Medal shall be attached by a red and white ribbon to a laurel crown surrounding a red cross.

The Medal shall be accompanied by a diploma on parchment.

### **Article 5**

The Medal shall be presented in each country either by the Head of the State, or by the President of the Central Committee of the National Society directly or by their substitutes.

The ceremony shall take place with a solemnity consistent with the distinction of the honour conferred.

### **Article 6**

The distribution of the Florence Nightingale Medal shall take place every two years.

Not more than 50 Medals may be issued at any one distribution.

If by reason of exceptional circumstances due to a widespread state of war it has been impossible for one or more distributions to take place, the number of Medals awarded at subsequent distributions may exceed the figure of 50 but may not exceed the total number which would normally have been attained, if the preceding distributions had been able to take place.

## **Article 7**

From the beginning of September of the year preceding the year in which the Medal is awarded, the ICRC shall invite the Central Committees of the National Societies by means of a circular and application forms to submit the names of the candidates they consider qualified to be awarded a Medal, in accordance with the conditions mentioned in Article 2.

## **Article 8**

The Central Committees of the National Societies, having taken all requisite advice, shall submit to the ICRC the names and qualifications of the candidates they propose.

To enable the ICRC to operate a fair selection, the candidates' names shall be accompanied by all relevant information justifying an award of the Medal, in accordance with the criteria mentioned in Article 2.

All applications submitted must come from the Central Committee of a National Society.

The Central Committees may submit one or more applications, but are not bound to submit applications for each distribution.

## **Article 9**

The applications with the reasons in support of them must reach the ICRC by 1 February of the year in which the award of the Medal is to take place.

Applications reaching the International Committee after that date cannot be considered except in connection with a subsequent award.

## **Article 10**

The ICRC retains complete freedom of choice. It may refrain from awarding the total number of Medals contemplated, if the qualifications of the applicants submitted do not appear to merit this distinguished honour.

## Article 11

The ICRC shall issue on the anniversary of the birth of Florence Nightingale, namely on 12 May, a circular informing the Central Committees of the National Societies of the names of those to whom the Medal has been awarded.

## Article 12

The Council of Delegates of the International Red Cross and Red Crescent Movement shall be empowered to study and decide on any change to the Regulations for the Florence Nightingale Medal.

The present Regulations, adopted by the 32nd International Conference of the Red Cross and Red Crescent in Geneva in 2015, supersede all previous rules relating to the Florence Nightingale Medal, in particular those of the 9th International Conference (Washington, 1912), the Regulations of 24 December 1913 and the amendments thereto by the 10th International Conference (Geneva, 1921), the 13th International Conference (The Hague, 1928), the 15th International Conference (Tokyo, 1934), the 18th International Conference (Toronto, 1952), the 24th International Conference (Manila, 1981) and the Council of Delegates (Budapest, 1991).<sup>1</sup>

1 Following the postponement of the 26th International Conference, the ICRC submitted these Regulations for the approval of the States party to the Geneva Conventions, which had six months in which to voice any objections. Since no objection was raised by that deadline, the Regulations were considered as adopted and came into force on 30 June 1992.

## Resolution 10 of the 32nd International Conference of the Red Cross and Red Crescent

### POWER OF HUMANITY

The 32nd International Conference of the Red Cross and Red Crescent, *commemorating* the 50th anniversary of the adoption of the Fundamental Principles of the International Red Cross and Red Crescent Movement, the theme of the 32nd International Conference of the Red Cross and Red Crescent (International Conference), and recognizing the continuing relevance of these principles, *taking account* of the views expressed during the International Conference on its three aspirations – *prevent and respond to violence, safeguard safety and access to humanitarian assistance and services, and reduce disaster risk and strengthen resilience*, *welcoming* the numerous pledges made by members and observers of the International Conference in pursuit of these three aspirations, *taking note* with appreciation of the measures taken by States and the components of the International Red Cross and Red Crescent Movement to implement the resolutions of the 31st International Conference as well as the associated pledges as requested in Resolution 9 of the 31st International Conference, and *welcoming* the follow-up report prepared by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) on the progress made, *noting* with appreciation the outcomes of the “Humanitarian Dialogue: a Vision Lab,”

1. *urges* all members of the International Conference to include the resolutions adopted and their pledges made at the International Conference in their efforts to optimize interaction and partnerships among themselves;
2. *invites* all members of the International Conference to review in 2017 progress made with respect to the implementation of the resolutions of the International Conference, as well as of their pledges, and to report on the implementation thereof to the 33rd International Conference in 2019;
3. *requests* the ICRC and the International Federation to report to the 33rd International Conference on the follow-up by International Conference members on the resolutions and pledges of the 32nd International Conference;
4. *encourages* all members of the International Conference and the Standing Commission of the Red Cross and Red Crescent (Standing Commission) to make use of the “Idea Chart” from the “Humanitarian Dialogue: a Vision Lab” as a living source of inspiration for even more effective work at local and global level;
5. *decides* to hold an International Conference in 2019, the date and place of which is to be determined by the Standing Commission.

# International humanitarian law and the challenges of contemporary armed conflicts

**Document prepared by the International Committee of the Red Cross for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8–10 December 2015**

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## **Executive summary**

This is the fourth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). The first three reports were submitted to the International Conferences held in 2003, 2007 and 2011. These reports aim to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action, positions and interest.

This report, like the preceding ones, addresses only a selection of the ongoing challenges to IHL. It outlines a number of issues that are the focus of increased interest among States and other actors, as well as the ICRC. These include some topics that were not addressed in previous reports, such as the end of IHL applicability, the protection of medical personnel and objects, and nuclear weapons. The report also seeks to provide an update on some of the issues that were addressed in previous reports and remain high on the international agenda. These include: the geographic reach of this body of norms, the use of force under IHL and international human rights law (IHRL), the use of explosive weapons in populated areas and new technologies of warfare.

Two other reports on IHL issues are being submitted to the 32nd International Conference for its consideration and appropriate action.<sup>1</sup> Both were prepared in follow-up to Resolution 1 of the 31st International Conference, which was entitled “Strengthening legal protection for victims of armed conflicts.” The first report summarizes the results of a consultation process undertaken with the aim of strengthening legal protection for persons deprived of their liberty in relation with armed conflict, and sets out options and the ICRC’s

recommendations for the way forward. The second report outlines the results of a consultation process undertaken by the ICRC and the Government of Switzerland that examined ways of enhancing the effectiveness of mechanisms of compliance with IHL. This report also includes options and the facilitators' recommendations.

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The introduction to this report provides a brief overview of current armed conflicts and of their humanitarian consequences, as well as of the operational realities in which challenges to IHL arise.

Chapter II focuses on a few issues related to the applicability of IHL that have generated legal debate over the past few years. The first issue is how to determine the beginning and end of IHL applicability, whether in international or non-international armed conflicts: a question of obvious legal and practical significance. The second is the geographic reach of IHL, particularly in light of the extraterritorial use of force against individuals. The relationship between IHL and the legal regime governing acts of terrorism is also addressed to *inter alia* reiterate the need to differentiate between them, and to recall the aspects of IHL that are relevant to the "foreign fighters" phenomenon.

Chapter III is devoted to IHL and multinational forces, an increasing number of which are being deployed in conflict environments or are given mandates likely to involve them in ongoing armed conflicts. Among other things, this chapter outlines a legal test for determining when multinational forces become a party to an armed conflict. It also attempts to delineate who among the participants in a multinational operation may be deemed to be a party to an armed conflict, and discusses the personal scope of applicability of IHL in the context of multinational operations.

As noted in the introduction, the incapacity of the international system to maintain peace and security has, among other things, had the effect of shifting the focus of international engagement from conflict resolution to humanitarian activities. The first section of chapter IV thus seeks to outline a range of legal issues related to humanitarian activities with a view to providing an IHL-based reading of some of the debated questions. The second section focuses on the specific protection of medical personnel and objects. It focuses, in particular, on the application of the IHL principles of proportionality and precautions in attack to military medical personnel and objects, as well as on the scope of the notion of "acts harmful to the enemy" in the context of the specific protection owed to medical personnel, facilities and transports.

1 *Strengthening international humanitarian law protecting persons deprived of their liberty: Concluding Report, and Concluding Report: Strengthening Compliance with International Humanitarian Law*, available at: <http://rcrcconference.org/international-conference/documents/>.

In many contemporary armed conflicts, armed forces are increasingly expected to conduct not only combat operations against the enemy, but also law enforcement operations for the purpose of maintaining or restoring public security, law and order. Chapter V addresses the interplay of the conduct of hostilities and law enforcement paradigms in situations of armed conflict. A few factual, albeit hypothetical, scenarios serve as a backdrop to the delineation/application of the two frameworks and the ensuing range of legal and practical challenges.

Chapter VI essentially draws attention to the ICRC's work on detention, i.e. to the consultation process undertaken with States that is the subject of one of the two reports mentioned above – *Strengthening international humanitarian law protecting persons deprived of their liberty* – which has been submitted to the 32nd International Conference for its consideration and appropriate action.

Chapter VII examines a range of issues related to means and methods of warfare. As rapid advances continue to be made in new and emerging technologies of warfare, particularly those relying on information technology and robotics, it is important to ensure informed discussions of the many and often complex challenges raised by these developments. This chapter thus addresses a number of legal questions being posed in the context of the development of military cyber capabilities and their potential use in armed conflict, as well as those posed with regard to compliance of autonomous weapon systems with IHL. It also examines the use of explosive weapons in populated areas and discusses responsible arms transfers. The last section is devoted to a brief overview of IHL rules regulating the conduct of hostilities and nuclear weapons.

Chapter VIII of the report outlines the progress made and the challenges that still remain in order to implement and broaden support for the 2008 Montreux Document, the main purpose of which was to define how international law applies to the activities of private military and security companies present in theatres of armed conflict.

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## I. Introduction

This is the fourth report on international humanitarian law (IHL) and the challenges of contemporary armed conflicts prepared by the International Committee of the Red Cross (ICRC) for the International Conference of the Red Cross and Red Crescent (International Conference). The first three reports were submitted to the previous conferences held in 2003, 2007 and 2011. These reports aim to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action, positions and interest. The goal of this introductory section is to briefly outline the operational realities in which those challenges arise.



Since the last report in 2011, the spiral of armed conflict and violence has continued in most parts of the world. Political, ethnic, national or religious grievances and the struggle for access to critical resources remained at the source of many ongoing cycles of armed conflict, and have sparked recent outbreaks of hostilities. A number of conflict trends have become even more acute in the last few years, such as the growing complexity of armed conflicts linked to the fragmentation of armed groups and asymmetric warfare; the regionalization of conflicts; the challenges of decades-long wars; the absence of effective international conflict resolution; and the collapse of national systems. With few exceptions, almost all of the armed conflicts that have occurred in the past few years are the result of the “conflict trap”: conflicts engendering conflicts, parties to armed conflict fracturing and multiplying, and new parties intervening in ongoing conflicts. Unresolved tensions that have lasted for years and decades continue to deplete resources and severely erode the social fabric and the means of resilience of affected populations.

The turmoil that escalated in parts of the Middle East during the so-called Arab Spring in 2011 – which degenerated into devastating armed conflicts in Syria, Iraq and Yemen in particular – was also felt far beyond the region by countries that began to support the many parties to those conflicts in various ways. Basic means of survival are becoming increasingly limited for people already struggling to cope with the effects of recurrent upheaval, drought and chronic impoverishment. Countries like Afghanistan, South Sudan, the Central African Republic, Somalia, Libya and the Democratic Republic of the Congo continue to be mired in protracted armed conflicts, causing immeasurable suffering for entire populations. In eastern Ukraine, the outbreak of a new armed conflict has already caused the death of thousands of people, many of whom are civilians, as well as massive destruction, and the displacement of over a million people.

In most armed conflicts, civilians continue to bear the brunt of the hostilities, especially when fighting takes place in densely populated areas or when civilians are deliberately targeted. Thousands of people are being detained, often outside any legal framework and often subject to ill treatment or inhuman conditions of detention. The number of persons going missing as a result of armed conflict is dramatic. The devastation caused by violence has prompted increasing numbers of people to flee their communities, leaving their homes and livelihoods behind and facing the prospect of long-term displacement and exile. The number of internally displaced persons (IDPs), refugees and asylum seekers uprooted by ongoing armed conflicts and violence worldwide has soared in the past two years. In 2013, for the first time since the Second World War, their total number exceeded 50 million people, over half of whom were IDPs. This negative trend continued in 2014, as conflict situations deteriorated.

The international humanitarian sector is at risk of reaching breaking point. The ICRC and other impartial humanitarian organizations are facing humanitarian needs on an epic scale, in an unprecedented number of concurrent crises around the world. The gap between those needs and the ability of humanitarian actors to meet them is impossible to bridge.

The incapacity of the international system to maintain peace and security has, among other things, had the effect of shifting the focus of international engagement from conflict resolution to humanitarian activities. Thus, much energy has been spent on negotiations about humanitarian access, humanitarian pauses, local ceasefires, evacuations of civilians, humanitarian corridors or freezes, etc. While achieving consensus about humanitarian access and the provision of assistance to those in need is to be welcomed, the political antagonisms that often accompany such debates carry the risk of tarnishing the very notion of impartial humanitarian action and run counter to its object and purpose.

As a background to this report on legal challenges related to armed conflicts, some salient trends of contemporary armed conflicts should be highlighted, since many of the challenges arise as a consequence of new conflict patterns.

The ever increasing complexity arising from the multitude of parties and their conflictual relations is a noticeable feature of contemporary armed conflicts. On the State side, the number of foreign interventions in many ongoing armed conflicts contributes substantially to the multiplication of actors involved. In many situations, third States and/or international organizations, such as the United Nations (UN) or the African Union (AU), intervene, sometimes themselves becoming parties to the conflict. This intervention – in support of States or of non-State armed groups – poses extremely complex questions concerning conflict classification. These often arise because of a lack of precise information about the nature of the involvement of third parties but also when third parties do not acknowledge their participation in the hostilities at all. Regardless, it will be important for the ICRC to continue to engage with States in the months and years to come on the humanitarian and legal consequences of the support they provide to parties to armed conflicts.

On the non-State side, a myriad of fluid, multiplying and fragmenting armed groups frequently take part in the fighting. Often, their structure is difficult to understand. The multiplication of such groups poses a number of risks for the civilian population, the first being that it necessarily entails an increase of the front lines with the ensuing risk that civilians will be caught in the fighting. The multiplication of non-State armed groups also signifies a greater strain on resources, especially natural and financial, as every new party needs to sustain itself. Also, although this is difficult to quantify, as parties multiply and split societies become fractured. Communities and families come under pressure and are divided over their allegiance to different armed groups, people are at higher risk of being associated with one of the many parties, and thus at higher risk of reprisals. As far as humanitarian action is concerned, the opacity or lack of the chain of command or control of some groups poses a challenge not only in terms of security but also for engaging such groups on issues of protection and compliance with IHL.

In terms of the territorial span, the spillover of conflicts into neighbouring countries, their geographical expanse and their regionalization also appear to have become a distinctive feature of many contemporary armed conflicts – partly as a

consequence of the above-mentioned foreign involvements. This is the case especially in today's Middle East but also in North and West Africa. In Syria, the split within the armed opposition, the spillover of the armed conflict into neighbouring countries, some of which were already burdened by their own conflicts, and the multiplication of intervening foreign States and armed groups is leading to a regional situation in which some of the conflictual relations are barely comprehensible. In the Sahel region, elusive and highly mobile armed groups are fighting each other as well as a number of governments, affecting already vulnerable populations. Another example of the territorial span is the armed conflict against Boko Haram, which already involves at least four States.

For the ICRC, the brutality and mercilessness of many contemporary armed conflicts is a cause for deep alarm. Egregious violations of IHL are being committed every day, by both States and non-State parties. In many situations, this is linked to a denial of the applicability or relevance of IHL. On the part of non-State armed groups, there is sometimes a rejection of IHL, which some parties do not feel bound by. In addition to this, recent armed conflicts have seen a rise in the deliberate commission of violations of IHL by some non-State armed groups and their use of media to publicize those violations. The ultimate aim of this may be to benefit from the significant negative impression conveyed by the media coverage in order to rally support, as well as to undermine support for the adversary. On the part of States, it is often, though not always, the result of counterterrorism measures and discourses, which the ICRC has recently observed to be hardening. It remains the case that some States deny the existence of armed conflicts, rendering dialogue difficult on the humanitarian consequences of the conflict and the protection of those affected by it.

To deny the basic protections of IHL to combatants and civilians is to deny IHL's core aims of protecting human life, physical integrity and dignity. As has been repeated in all previous ICRC reports on IHL and the challenges of contemporary armed conflicts, the single most important challenge to IHL continues to be that it should be better respected. It remains the ICRC's firm belief that in spite of the inevitable suffering that armed conflicts entail, the sorrow and pain of victims of armed conflicts would be lessened if the parties to armed conflicts respected the letter and spirit of IHL.<sup>2</sup>

2 This challenge has been the focus of the ICRC/Swiss initiative on strengthening compliance with IHL, pursuant to Resolution 1 of the 31st International Conference. This initiative has involved a major research and consultation process with States and other relevant actors on possible ways to enhance and ensure the effectiveness of mechanisms of compliance with IHL. For further information see "Strengthening compliance with international humanitarian law (IHL): The work of the ICRC and the Swiss government," available at: [www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm](http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm) and the concluding report on strengthening compliance with IHL, available at: <http://rcrcconference.org/international-conference/documents/>.

## II. Applicability of IHL: Selected issues

A legal issue that may be said to have (re)emerged as a result of the complexity of current armed conflicts is the applicability of IHL to particular situations of violence. There are several aspects to this issue; those examined below are:

- 1) the beginning and end of IHL applicability;
- 2) the geographic reach of IHL applicability; and
- 3) the applicability of IHL to terrorism and counterterrorism.

### 1) The beginning and end of IHL applicability

The applicability of IHL is triggered by the existence of an armed conflict, the determination of which depends solely on an assessment of the facts on the ground. This view, shared by the ICRC, is reflected in decisions of international judicial bodies, in military manuals, and is widely supported in the academic literature. Whether an armed conflict exists, and whether by extension IHL is applicable, is assessed based on the fulfilment of the criteria for armed conflict found in the relevant provisions of IHL, notably Articles 2 and 3 common to the 1949 Geneva Conventions.

Under IHL, an international armed conflict (IAC) exists whenever there is recourse to armed force between two or more States. The threshold for determining the existence of an IAC is therefore fairly low, and factors such as duration and intensity are generally not considered to enter the equation. For instance, the mere capture of a soldier or minor skirmishes between the armed forces of two or more States may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts may be taken as evidence of genuine belligerent intent.<sup>3</sup> In this context, it is important to bear in mind that an armed conflict can arise where a State uses unilateral force against another State even if the latter does not or cannot respond with military means. The attacking State's

3 Belligerent intent may be identified when a situation objectively shows that a State is effectively involved in military operations or other hostile action against another State. This involvement is aimed at neutralizing enemy military personnel and assets, hampering its military operations, or using/controlling its territory, be it to subdue or defeat the adversary, to induce it to change its behaviour, or to gain a military advantage. Belligerent intent must therefore be deduced from the facts. Reference to belligerent intent for the purposes of determining the existence of an armed conflict must not be confused with the notion of *animus belligerendi* intrinsic to the notion of war. While *animus belligerendi* is a pre-requisite for a state of war to exist – denoting the purely subjective dimension of the notion of war – the concept of belligerent intent has only an evidentiary value and cannot be interpreted as challenging the objective dimension of the concept of armed conflict under the 1949 Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 31 (hereafter First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 85 (hereafter Second Geneva Convention); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135 (hereafter Third Geneva Convention); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287 (hereafter Fourth Geneva Convention)).

resort to force need not actually be directed against the armed forces of another State. IACs are fought between States. The government is only one of the constitutive elements of a State, while the territory and the population are others. It is the resort to force against the territory, infrastructure or persons in the State that determines the existence of an IAC and therefore triggers the applicability of IHL.

The classification of a non-international armed conflict (NIAC) under IHL is usually a more complex endeavour. Despite the absence of a clear definition of NIAC in Article 3 common to the Geneva Conventions, it is widely accepted that two conditions must be fulfilled before it can be said that, for the purposes of IHL applicability, such a conflict exists: (1) the fighting must occur between governmental armed forces and the forces of one or more non-State armed groups having a certain level of organization, or between such armed groups; and (2) the armed confrontation must have reached a certain threshold of intensity.

The determination of the beginning of an armed conflict, whether an IAC or a NIAC, has been the subject of considerable examination in legal and scholarly circles, and was addressed in the ICRC challenges report to the 31st International Conference. However, it would appear that less attention has been paid so far to the end of IHL applicability. Given the important legal consequences involved, this issue deserves a more detailed examination.

### *End of an international armed conflict*

Evaluating whether an armed conflict has come to an end may be a difficult undertaking. This is mainly due to the lack of detailed guidance in the 1949 Geneva Conventions on the subject but also to the fact that peace treaties are a less and less common State practice.

In the view of the ICRC, the starting point – based on the wording of the 1949 Geneva Conventions and Additional Protocol I, as well as international jurisprudence – is that, in international armed conflict, IHL ceases to apply on the general close of military operations, except for persons whose final release, repatriation or re-establishment takes place thereafter.<sup>4</sup> The general close of military operations, however, is not always easily determined, especially in the absence of ongoing hostilities.

International armed conflicts hardly ever give rise to the conclusion of peace treaties nowadays. Their waning days are more often characterized by unstable ceasefires, a slow but progressive decrease in the intensity of confrontations, or the involvement of peacekeepers. In a number of cases, there is also a significant risk that hostilities may resume. In addition to these and other features, it may be observed that the distinction between agreements aimed at suspending the hostilities and peace treaties is also becoming blurred. Ceasefire agreements may in fact have

<sup>4</sup> See Article 6(2) of the Third Geneva Convention, Article 6(4) of the Fourth Geneva Convention, and Article 3(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3 (hereafter Additional Protocol I).

the effect of permanently terminating hostilities. Where this is the case, the precise labelling of a particular agreement may be of limited relevance for the purposes of IHL applicability. It is rather the resulting *de facto* situation that will define the real import of the agreement and its ability to objectively put an end to the armed conflict.

International case law has so far not proven to be sufficiently helpful on the issue of how to determine whether an IAC has ended. By way of example, in the *Tadić* case, the ICTY opined that in situations of international armed conflict IHL continues to apply “until a general conclusion of peace [has been] reached.” This, it may be pointed out, is a rather vague and impractical criterion.

As regards academic writing, the general view revolves around the following basic proposition: IHL applicability ceases once the conditions that initially triggered its application no longer exist. This means that an IAC ends when the belligerent States are no longer involved in an armed confrontation. The application of this proposition would be fairly straightforward in situations in which, for instance, a conflict is triggered by the capture of soldiers or by the sporadic and temporary military incursion of one State into an enemy State’s territory. In these cases, the release of the soldiers or the end of the incursion would suffice to put an end to the armed conflict.

However, determining that an IAC has ended is likely to be far more complex where it was the result of active hostilities between the armed forces of two or more States. The proposition mentioned above would appear to be of limited utility in the face of a mere lull or cessation of hostilities. It would also seem to be of little use if, despite the end of active hostilities, the belligerent States continue to deploy troops on each other’s borders, undertake military movements on their own territory for defensive or offensive purposes, or maintain a state of alert and mobilization of their troops.

Bearing in mind that the threshold for the existence of an IAC is fairly low, and that it would be impractical to treat every lull in the fighting as the end of it and each resumption as the start of a new one, the ICRC is of the opinion that hostilities must end with a degree of stability and permanence for an IAC to be deemed terminated. Thus, military operations short of active hostilities pitting one belligerent against another would still justify the continued existence of an IAC provided it can reasonably be considered that the hostilities are likely to resume in the near future due to ongoing military movements by the belligerents. Indeed, such a scenario would be insufficient to conclude that there is a general close of military operations. The notion “a general close of military operations” goes beyond the mere cessation of active hostilities, given that military operations of a belligerent nature do not necessarily imply the use of armed violence and that these may persist despite the absence of hostilities. In other words, it can be inferred that a general close of military operations includes not only the end of active hostilities but also the end of military movements of a bellicose nature, including those to reform, reorganize, or reconstitute. With the end of these movements, the likelihood of a resumption of hostilities can reasonably be ruled out.

## *End of a non-international armed conflict*

As was discussed in the 2011 report on IHL and the challenges of contemporary armed conflicts, which was submitted to the 31st International Conference,<sup>5</sup> the factual scenarios of non-international armed conflicts are evolving and have become increasingly complex. In consequence, determining the end of IHL applicability to such conflicts has also become more difficult.

As is the case with IACs, international case law has not precisely identified when a situation of NIAC may be deemed to have come to an end. In the already mentioned seminal *Tadić* decision, the ICTY stated that, for the purposes of IHL applicability, a NIAC ceases when a “peaceful settlement” is reached.<sup>6</sup> As may be observed, this criterion does not provide sufficient practical guidance, and may even be interpreted as introducing a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground. As a result, it is submitted that the notion “peaceful settlement” should be interpreted as a situation where a factual and lasting pacification of the NIAC has been achieved.

The requisite threshold of intensity will, admittedly, make the determination of the end of a NIAC even less straightforward than in an IAC scenario. There are, broadly speaking, two views on how to address this. One view is to rely on the intensity threshold required for NIACs (which is higher than that required for IACs, as explained above). Under this approach, it would be sufficient for the hostilities to fall below the threshold of “protracted armed violence” with a certain degree of permanence and stability. In other words, the legally relevant question would then be whether the threshold continues to be met. According to a second view, a NIAC only ceases to exist, and the applicability of IHL therefore comes to an end, when at least one of the opposing parties to the conflict has disappeared or no longer meets the level of organization required by IHL. A NIAC would also come to an end when the hostilities have ceased and there is no real risk of their resumption even though the level of organization of the parties is still met.

When considering these options, an important feature of NIACs should, however, be kept in mind. Such conflicts are often of a fluctuating nature, typified by temporary lulls in the armed violence or instability in the level of organization of the non-State party to the conflict. If these factors are automatically considered as signalling the end of a NIAC, this could lead to a premature conclusion as regards the end of applicability of IHL.

5 *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf).

6 It should be noted that persons who have been deprived of their liberty or whose liberty continues to be restricted for reasons related to a NIAC continue to enjoy the protections of IHL until the end of such deprivation or restriction of their liberty, see Article 2(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (hereafter Additional Protocol II).



Taking this feature of NIACs into account, the closest one may come to the requirement of “a peaceful settlement” suggested by the relevant international case law is by waiting for the complete cessation of all hostilities – without real risk of resumption – before assuming that a NIAC has come to an end.<sup>7</sup>

In the ICRC’s practical experience, the cessation of all hostilities between the parties to the conflict and the absence of a real risk of their resumption – based on an overall assessment of the surrounding factual circumstances – have proven to provide the strongest and most reliable indicators that a NIAC has ended. The ICRC’s practice has thus been to wait for the complete cessation of hostilities between the parties to a NIAC before assessing, based on the surrounding factual circumstances, whether there is a real risk of resumption of hostilities. If there is no such risk, the conclusion is drawn that the NIAC at issue has come to an end. The “risk of resumption” test helps ensure that the determination of the end of a NIAC is based not solely on the cessation of hostilities, which may be short-lived, but on an evaluation that related military operations of a hostile nature have also ended. In this way, the likelihood of a resumption of hostilities can reasonably be ruled out.

### *Beginning and end of occupation*

A range of legal challenges raised by contemporary forms of occupation were at the core of an exploratory process undertaken by the ICRC on occupation and other forms of administration of foreign territory, which began in 2007 and concluded in 2012 with the publication of an ICRC report.<sup>8</sup> The purpose of this initiative was to analyse whether and to what extent the rules of occupation law are adequate to deal with the humanitarian and legal challenges arising in contemporary occupations, and whether they might need to be reinforced or clarified. The delineation of the notion of “occupation,” in particular its beginning and end, was one of the main issues addressed within this process.

Determining the existence of an occupation – which is a type of IAC – is complex given that the 1949 Geneva Conventions do not define the notion of occupation. It is, however, outlined in Article 42 of the Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 1907 (hereafter 1907 Hague Regulations). Subsequent treaties, including the 1949 Geneva Conventions, have not altered this definition, which reads: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

7 See ICTY in the *Haradinaj* case, where it underlined that the “peaceful settlement” of a NIAC is the decisive criterion for determining the end of the conflict and stated that exploring the oscillating intensity of a conflict is not a valid option for determining its cessation. ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. T-04-84bis-T, Judgment, 29 November 2012, para. 396, available at: [www.icty.org/x/cases/haradinaj/tjug/en/121129\\_judgement\\_en.pdf](http://www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf).

8 ICRC, *Expert meeting: Occupation and other forms of administration of foreign territory*, ICRC, Geneva, March 2012, available at: [www.icrc.org/fre/assets/files/publications/icrc-002-4094.pdf](http://www.icrc.org/fre/assets/files/publications/icrc-002-4094.pdf).

Apart from the need to determine the existence of an occupation based solely on the prevailing facts, the notion of occupation also requires an examination of the concept of “effective control,” which is at its core. While this concept is often used to characterize the notion of occupation, it should be noted that neither the 1949 Geneva Conventions nor the 1907 Hague Regulations contain a reference to it. In relation to occupation, “effective control” was developed in the legal discourse primarily to describe the circumstances and conditions for determining its existence.

It is self-evident that an occupation implies some degree of control by hostile troops over a foreign territory, or parts thereof, instead of by the territorial sovereign. Under IHL, it is the effectiveness of the control by foreign troops that triggers the application of the law of occupation. They will only be able to enforce their rights and duties under the law of occupation if they exercise effective control. In this regard, effective control is an essential concept, as it substantiates and specifies the notion of “authority,” which is at the core of the definition of occupation in Article 42 of the 1907 Hague Regulations.

On the basis of the 1907 Hague Regulations and their *travaux préparatoires*, scholarly literature, military manuals and judicial decisions, the ICRC has devised the following three conditions that need to be cumulatively met in order to establish a state of occupation within the meaning of IHL:

- 1) The armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion.
- 2) The effective local government in place at the time of the invasion has been or can be rendered, substantially or completely, incapable of exerting its powers by virtue of the foreign forces’ unconsented presence.
- 3) The foreign forces are in a position to exercise authority instead of the local government over the concerned territory (or parts thereof).

Taken together, these constitute the so-called “effective-control test” which is used to determine whether a situation qualifies as an occupation for the purposes of IHL.

The end of an occupation may also be difficult to assess from a legal perspective. The legal classification of a given situation and the determination of when an occupation may be said to have ended can be complicated by several factors, such as progressive phase-out, partial withdrawal, retention of certain competences over previously occupied areas, or the maintenance of military presence based on questionable consent.

In principle, the effective-control test is equally applicable when establishing the end of occupation, meaning that the criteria to be met should generally mirror those used to determine the beginning of occupation, only in reverse. Thus, if any of the three conditions listed above ceases to exist, an occupation should be considered to have ended.

The ICRC considers, however, that in some specific and rather exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) but retain key elements of authority or other important governmental

functions usually performed by an occupying power – the law of occupation may continue to apply within the territorial and functional limits of such competences. Indeed, despite the lack of the physical presence of foreign forces in the territory concerned, the retained authority may amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions of this body of norms. This is referred to as the “functional approach” to the application of occupation law. This test will apply to the extent that the foreign forces still exercise, within all or part of the territory, governmental functions acquired when the occupation was undoubtedly established and ongoing.

The functional approach described above permits a more precise delineation of the legal framework applicable to situations in which it is difficult to determine, with certainty, whether an occupation has ended or not.

It may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area. In such situations, it is important to take into account the extent of authority retained by the foreign forces rather than to focus exclusively on the means by which it is actually exercised. It should also be recognized that, in these circumstances, the geographical contiguity between belligerent States could facilitate the remote exercise of effective control. For instance, it may permit an occupying power that has relocated its troops outside the territory to reassert its full authority in a reasonably short period of time. The continued application of the relevant provisions of the law of occupation is all the more important in this scenario as these were specifically designed to regulate the sharing of authority – and the resulting assignment of responsibilities – between the belligerent States concerned.

## 2) The geographic reach of IHL applicability

The territorial scope of armed conflict – and therefore of IHL – is an issue that has attracted a great deal of attention over the past few years due, mainly, to the extraterritorial use of force by means of armed drones. This issue arises largely as a result of the fact that IHL does not contain an overall explicit provision on its scope of territorial applicability. The questions that are most often asked are: does IHL apply to the entire territories of the parties to an armed conflict or is it restricted to the “battlefield” within such territories? Does it apply outside the territories of the parties, i.e. in the territory of neutral or non-belligerent States? The views offered below are of a “framework” nature only, as the reality is complex and constantly evolving.

As regards IAC, it is generally accepted that IHL applies to the entire territories of the States involved in such a conflict, as well as to the high seas and the exclusive economic zones (the “area” or “region” of war). A State’s territory includes not only its land surface but also rivers and landlocked lakes, the territorial sea, and the national airspace above this territory. There is no indication either in the 1949 Geneva Conventions and their Additional Protocols,

or in doctrine and jurisprudence, that IHL applicability is limited to the “battlefield,” “zone of active hostilities” or “zone of combat,” which are generic terms used to denote the space in which hostilities are taking place. In addition, it is widely agreed that military operations cannot be carried out beyond the area or region of war as defined above, meaning that they may not be extended to the territory of neutral States.

It may likewise be argued that IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of its territorial scope of applicability by specifying certain acts as prohibited “at any time and in any place whatsoever.”<sup>9</sup> International jurisprudence has, in this vein, explicitly confirmed that “there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.”<sup>10</sup>

It is important to stress, however, that the applicability of IHL to the territories of the parties to a conflict does not mean that there are no legal restraints, apart from those related to the prohibition of specific means and methods of warfare, on the use of lethal force against persons who may be lawfully targeted under IHL (i.e. members of State armed forces or of organized armed groups, as well as individual civilians taking a direct part in hostilities), particularly outside the “battlefield” or “zone of active hostilities/combat.” As explained in the commentary on Recommendation IX of the ICRC’s 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,<sup>11</sup> IHL does not expressly regulate the kind and degree of force that is permissible against legitimate targets. This does not imply a legal entitlement to use lethal force against such persons in all circumstances without further considerations. Based on the interplay of the principles of military necessity and humanity, the *Guidance* determines that: “[T]he kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>12</sup> It is recognized that this will involve a complex assessment that will be dependent on a wide range of operational and contextual factors. In some instances, this assessment

9 Common Article 3(1).

10 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Judgment, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 57, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf). See also ICTR, *The Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, 15 May 2003, para. 367, available at: [www.refworld.org/docid/48abd5a30.html](http://www.refworld.org/docid/48abd5a30.html).

11 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, available at: [www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf).

12 Recommendation IX, which was formulated without prejudice to further restrictions that may arise under other applicable branches of international law.

should lead to the conclusion that means short of lethal force will be sufficient to achieve the aims of a given military operation.

In the context of a NIAC with an extraterritorial element, the question of IHL applicability to the territories of the parties to this conflict may be posed. This scenario is one in which the armed forces of one or more States (the “assisting” States) fight alongside the armed forces of a “host” State in its territory against one or more organized armed groups. It should be noted that at present official pronouncements by States on this specific issue are scarce, and the few publicly expressed expert views differ. According to some, IHL applies in principle only to the territory of the State in which the conflict is taking place. Others have posited that IHL also applies throughout the territories of States involved in a NIAC extraterritorially, even though hostilities related to that conflict may not be taking place on their own soil.

There are cogent legal reasons to consider that IHL applies to the territories of the assisting States in the scenario posited above. It may be argued that assisting States involved in an extraterritorial NIAC should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders. This would be contrary to the IHL aim of laying down the same rights – and, of course, obligations – for all parties to a conflict.

Thus, while acts potentially carried out by a non-State party on an assisting State’s territory as part of the hostilities would certainly be penalized under the domestic law of that State (and probably qualified as “terrorist”), they may under some circumstances be lawful under IHL. This would be the case, for example, if an attack by the non-State party concerned were directed at a military objective in the assisting State’s territory. If the attack were directed at civilians or civilian objects, it would also be criminal and prosecutable under IHL as a war crime. As regards the use of lethal force by an assisting State on its own territory against the non-State side, it would be governed by the standard included in Recommendation IX of the ICRC’s *Guidance* outlined above, as well as by the State’s domestic law and its international and/or regional human rights obligations.

As just explained, IHL is believed to apply in the entire territories of the parties to an armed conflict. However, there are a range of views among practitioners, legal scholars and others, and significant disagreement regarding the applicability of IHL to the territory of a non-belligerent State. Leaving aside situations of IAC, in which the law of neutrality will come into play, the scenario now being debated may be summarized as follows: a person who would constitute a lawful target under IHL moves from a State in which there is an ongoing NIAC into the territory of a non-neighbouring non-belligerent State, and continues his or her activities in relation to the conflict from there. Can such a person be targeted under the rules of IHL by a third State in the territory of the non-belligerent State?

Two basic positions have been enunciated on this question. Pursuant to the first view, there is no territorial limitation to IHL applicability as such (whether in IAC or NIAC). Under this approach, what is decisive is not where hostile acts occur

but whether, because of their nexus to an armed conflict, they actually represent “acts of war.” Therefore, any extraterritorial use of force for reasons related to an armed conflict is necessarily governed by IHL, regardless of territorial considerations. It is also posited in this approach that the norms of other bodies of international law may restrict or prohibit hostile acts between the belligerent parties even when they are permissible under IHL. This could be the *ius ad bellum* under the UN Charter.

It is submitted that a different reading of the above scenario is possible – and preferable – based on reasons of law and policy. At the outset, it must be acknowledged that common Article 3 contains explicit provisions on its applicability to the “territory” of a State in which a NIAC takes place. Traditionally, this has been understood to cover only the fighting between the relevant government’s armed forces and one or more organized non-State armed groups on its soil. However, as the factual scenarios of NIAC have evolved, so has the legal interpretation of the geographic scope of applicability of common Article 3. There have been numerous instances in which assisting States, which are fighting in the territory of a non-neighbouring host State alongside its armed forces against one or more organized armed groups, have accepted the applicability of common Article 3 and of other relevant provisions of IHL to this type of conflict.<sup>13</sup> As already noted above, there are reasons to believe that, in this case, IHL also applies to the territories of the assisting States.

However, it is of a different legal magnitude to suggest that “territory” may be understood to mean that IHL – and its rules on the conduct of hostilities – will automatically extend to the use of lethal force against a person located outside the territory of the parties involved in an ongoing NIAC, i.e. to the territory of a non-belligerent State. This reading would lead to an acceptance of the legal concept of a “global battlefield.” This, however, does not appear to be supported by the essentially territorial focus of IHL, which on the face of it seems to limit IHL applicability to the territories of the States involved in an armed conflict. A territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities would be deemed to automatically “carry” the “original” NIAC wherever they go when moving around the world. Thus, based on IHL, they would remain targetable within a

13 The scenario of a “spillover” NIAC, which is another type of extraterritorial NIAC, should be mentioned in the context of this discussion. This is an armed conflict originating within the territory of a State that is waged between government armed forces and one or more organized armed groups, which spills over into the territory of one or more neighbouring States. While common Article 3 does not expressly envisage this occurrence, there seems to be increasing acknowledgment by States and scholarly opinion that the applicability of IHL to the parties may be extended to hostilities that spill over into the territory of the adjacent non-belligerent State (or States) on an exceptional and *sui generis* basis. In line with the above cited ICTY case law (see footnote 7 above), there are cogent reasons to link the geographical extension of IHL to the neighbouring country depending on the extent of control that a party to a NIAC has over the territory of the neighbouring country or over the places where hostilities are taking place in such a country. However, as will be noted further below, prevailing State practice and *opinio iuris* do not currently allow for a similar conclusion to be reached with respect to the extension of the applicability of IHL to the parties to a NIAC when the territory of a non-adjacent non-belligerent State is involved.

potentially geographically unlimited space. With very few exceptions, State practice and *opinio iuris* do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a “global battlefield.” In addition, in practical terms it is disturbing to envisage the potential ramifications of the territorially unlimited applicability of IHL if all States involved in a NIAC around the world were to rely on the concept of a “global battlefield.”

The ICRC is of the view that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL. Rather, the threat he or she poses should be dealt with under the rules governing the use of force in law enforcement. These rules, which are part of international human rights law (IHL) – and which are, of course, also applicable to the potential use of lethal force outside situations of armed conflict – would merit a separate examination. Given that such an analysis is outside the scope of this section, only the most basic provisions will be noted here.

IHL does not prohibit the use of lethal force in law enforcement but provides that it may be employed only as a last resort, when other means are ineffective or without promise of achieving the intended aim of a law enforcement operation. Lethal force is thus allowed if it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life. The use of lethal force is also subject to the human rights requirement of proportionality, which differs from the principle of proportionality applicable to the conduct of hostilities under IHL. In effect, the application of the relevant rules on the use of force in law enforcement circumscribes both the circumstances in which lethal force can lawfully be used, and the way in which it has to be planned and carried out. The use of force in the territory of a non-belligerent State would thus be legally justifiable only in very exceptional circumstances.

It is submitted that reliance on the rules governing the use of force in law enforcement in the scenario being examined is also more appropriate as a matter of policy. A non-belligerent State is by definition one that does not take part in an armed conflict being waged among others. As a result, the rules of IHL should not be those governing the potential use of lethal force in its territory by a third State pursuing a person in relation to a territorially removed NIAC. In those circumstances, the application of law enforcement rules would be more protective of the general population than IHL norms on the conduct of hostilities (designed for the specific reality of armed conflict), as there is no armed conflict in the non-belligerent State. The employment of IHL conduct-of-hostilities rules in this scenario could lawfully entail consequences in terms of harm to civilians and civilian objects in the non-belligerent State, i.e. allow for “collateral damage,” which would not be the case if the rules on law enforcement are relied on.

Reliance on other bodies of international law, essentially to “counterbalance” the effects of a territorially expansive view of IHL applicability



in a non-belligerent State – emphasized by proponents of the geographically unrestricted approach to IHL applicability – may be of limited utility. The law of neutrality does not apply to the NIAC scenario posited above. As regards the possibly constraining effect of *ius ad bellum*, it would appear that this body of norms is increasingly being interpreted by some States and experts in ways that make it easier for third States to use force extraterritorially, particularly against non-State actors. As for the restraining influence of the law on State responsibility, its purpose is not to directly prevent a particular conduct but rather to establish, potentially, that it was unlawful after the fact.

The above should not, however, be understood to mean that IHL applicability can never be extended to the territory of a non-belligerent State. The ICRC considers that IHL would begin to apply in the territory of such a State if and when the conditions necessary to establish the factual existence of a separate NIAC in its territory have been fulfilled. In other words, if persons located in a non-belligerent State acquire the requisite level of organization to constitute a non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, that situation could be classified as a NIAC. Thus, IHL rules on the conduct of hostilities would come into effect between the parties. The relationship under IHL of the two States would also need to be determined in this case, based on the relevant rules on the classification of armed conflicts between States.

The scenarios related to the possible extension of IHL applicability to the territory of non-belligerent States explored above are not the only ones that could be envisaged.<sup>14</sup> They have been provided, as already mentioned, to serve as a backdrop to the provision of guidance on some salient points of the law. In this context, the legal interpretation of any particular scenario will not only be heavily fact-specific, but will also inevitably mean dealing with a very complex set of facts.

### 3) The applicability of IHL to terrorism and counterterrorism

Recent years have again seen the rise of non-State armed groups resorting to acts of terrorism, and the subsequent rallying of a number of other non-State armed groups around them. States – and the United Nations – have reacted to these developments by tightening existing counterterrorism measures and/or legislation and by introducing new ones. There is no doubt that it is legitimate to take responsive action to ensure State security. However, in doing so, it is indispensable to

<sup>14</sup> Two specific issues may be flagged in this regard. The first is the legal regime that would be applicable to any use of force against bases established in the territory of a non-belligerent State by a non-State armed group for training and logistical purposes in relation to an ongoing NIAC. It is submitted that the same question should be posed with respect to the legal regime that would apply to the targeting of the military bases of States located in non-belligerent territories from which military operations are conducted in relation to an ongoing NIAC. The second issue is the legal regime that would be applicable to cyber attacks launched by, and against, non-State armed groups from and through non-belligerent territories. Both questions will clearly require further examination as State practice evolves.

maintain the safeguards protecting human life and dignity laid down in IHL and IHRL.

Counterterrorism responses, combined with a robust counterterrorism discourse in both domestic and international fora, have significantly contributed to a blurring of the lines between armed conflict and terrorism, with potentially adverse effects on IHL. There appears to be a growing tendency among States to consider any act of violence carried out by a non-State armed group in armed conflict as being “terrorist” by definition, even when such acts are in fact lawful under IHL. This is in parallel to the longstanding concern of some States that recognizing the existence of an armed conflict in their territory would “legitimize” the non-State armed groups involved. The overall result is a denial that such groups, designated as “terrorist,” may be a party to a NIAC within the meaning of IHL. The above-mentioned developments have put the issue of the relationship between the legal frameworks governing IHL and terrorism back into the spotlight.

### *The continued need to distinguish between the legal frameworks governing IHL and terrorism*

The ICRC outlined its position on this issue in the preceding report on IHL and the challenges of contemporary armed conflicts submitted to the 31st International Conference. Given the current trends in counterterrorism, some aspects are worth recalling. This section aims to provide a brief reminder of the reasons for which, in the ICRC’s view, the normative regimes governing armed conflict and terrorism should not be confused.

While the legal frameworks governing terrorism and IHL may have some common ground – IHL expressly prohibits most acts that are criminalized as “terrorist” in domestic legislation and international conventions dealing with terrorism – these two legal regimes remain fundamentally different. They have distinct rationales, objectives and structures.

A crucial difference is that, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while *any* act of violence designated as “terrorist” is always unlawful. The ultimate aim of an armed conflict is to prevail over the enemy’s armed forces. For this reason, the parties to a conflict are permitted, or at least are not prohibited from, attacking each other’s military objectives or individuals not entitled to protection against direct attacks. Violence directed at those targets is not prohibited as a matter of IHL, regardless of whether it is inflicted by a State or a non-State party. Acts of violence directed against civilians and civilian objects are, by contrast, unlawful, as one of the main purposes of IHL is to spare them from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence.

There is no such dichotomy in the norms governing acts of terrorism. The defining feature of any act that is legally classified as “terrorist,” whether under domestic or international law, is that it is always penalized as criminal. Thus, no

act of violence legally designated as “terrorist” is, or can be, exempt from prosecution.

Another main difference between these legal frameworks is the principle of equality of belligerents, pursuant to which the parties to an armed conflict have the same rights and obligations under IHL (even if this is not the case under domestic law). This principle reflects the fact that IHL does not aim to determine the legitimacy of the cause pursued by the belligerents. Its goal, instead, is to ensure the equal protection of persons and objects affected by an armed conflict, irrespective of the lawfulness of the first resort to force. The legal framework governing acts of terrorism obviously does not contain a similar principle. In this context it is important to recall that, while IHL does foresee equal rights and obligations of belligerents in the conduct of hostilities and in the treatment of persons in their power, it does not confer legitimacy on non-State armed groups that are a party to a NIAC. Common Article 3 explicitly states that when parties to the conflict apply its provisions this “shall not affect the legal status of the Parties to the conflict.” Additional Protocol II contains a similar provision guaranteeing the sovereignty of States and their responsibility to maintain law and order, national unity and territorial integrity by all legitimate means (Article 3 of Additional Protocol II).

The above does not mean that some overlap cannot be created between the legal regimes governing IHL and terrorism. IHL prohibits both specific acts of terrorism committed in armed conflict and, as war crimes, a range of other acts of violence when committed against civilians or civilian objects. If States choose to additionally designate such acts as “terrorist” under international or domestic law, this will in effect duplicate their criminalization.

However, acts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled “terrorist” at the international or domestic levels (although they remain subject to ordinary domestic criminalization where a NIAC is involved). Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as “terrorist” under another regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets.

Adding another layer of incrimination by designating acts that are not unlawful under IHL as “terrorist” may also discourage IHL compliance by non-State armed groups party to a NIAC. Any motivation they may have to fight in accordance with IHL would likely erode if, irrespective of the efforts they may undertake to comply with it, all of their actions are deemed unlawful. Furthermore, labelling acts that are lawful under IHL as “terrorist” is likely to render the implementation of Article 6(5) of Additional Protocol II – whose objective is to grant the broadest possible amnesty to persons having participated in the hostilities without having committed serious violations of IHL – more difficult. For obvious reasons, the prospect of an amnesty is diminished where

even lawful acts of war have been qualified as acts of terrorism. This can ultimately prove to be an obstacle to peace negotiations and reconciliation efforts.

### *IHL, the so-called “war against terrorism” and the geographic scope of armed conflicts*

As repeatedly asserted, the ICRC considers that, from a legal perspective, there is no such thing as a “war against terrorism.” With respect to the various armed conflicts and the numerous counterterrorism measures at the domestic and international levels, the ICRC adopts a case-by-case approach in order to analyse and legally classify the various situations of violence. In this sense, the fight against terrorism involves, apart from the use of force in certain instances, the use of other measures, such as intelligence gathering, financial sanctions and judicial cooperation.

When armed force is used, only the facts on the ground are relevant for determining the legal classification of a situation of violence. Some situations may be classified as an IAC, others as a NIAC, while various acts of violence may fall outside any armed conflict due to a lack of the requisite nexus.

With respect to the phenomenon of armed groups that are perceived as having a global reach, such as al-Qaeda or the Islamic State group, the ICRC does not share the view that an armed conflict of global dimensions is, or has been, taking place. This would require, in the first place, the existence of a “unitary” non-State party opposing one or more States. Based on available facts, there are not sufficient elements to consider the al-Qaeda “core” and its associated groups in other parts of the world as one and the same party within the meaning of IHL. The same reasoning also applies, for the time being, to the Islamic State group and affiliated groups.

In addition, as stated previously,<sup>15</sup> the ICRC does not share the view that the applicability of IHL spreads beyond the territory of the parties to the conflict in a way that would allow the targeting of individuals associated with armed groups around the world. The ICRC’s position is that NIACs are confined to the territory of each party to an armed conflict. While such NIACs can spill over into neighbouring countries because of the continuity of hostilities, they cannot spread to third countries. The ICRC is of the view that the IHL criteria of intensity and organization required to constitute a NIAC would need to be fulfilled in the territory of each individual third State for the applicability of IHL to be triggered.

### *IHL and “foreign fighters”*

The phenomenon of the so-called “foreign fighters” – nationals of one country who travel abroad to fight alongside a non-State armed group in the territory of another State – has increased exponentially over the past few years. In order to quell the threats emanating from foreign fighters, States – in particular within the

15 See section II.2 above on The geographic reach of IHL applicability.

framework of the UN Security Council – have taken a variety of measures, including the use of force, detention (on terrorism charges, among others), and travel bans.

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

The concept of “foreign fighter” is not a term of art of IHL. The applicability of IHL to a situation of violence in which such fighters may be engaged depends on the facts on the ground and on the fulfilment of certain legal conditions stemming from the relevant norms of IHL, in particular common Articles 2 and 3. In other words, IHL will govern the actions of foreign fighters, as well as any measures taken in relation to them, when they have a nexus to an ongoing armed conflict.

Relevant IHL norms on the conduct of hostilities will govern the behaviour of foreign fighters, regardless of their nationality, in both IAC and NIAC. Foreign fighters are thus subject to the same IHL principles and rules that are binding on any other belligerent.

As far as detention is concerned, nationality will have an impact on the status of “protected persons” in IAC but not in NIAC. Under the Third Geneva Convention, nationality is irrelevant for determining whether a person qualifies as a combatant in an IAC, but may be important for determining whether a State will grant prisoner of war (POW) status to its own nationals captured fighting for a foreign army (State practice on this issue differs).

Nationality is a decisive criterion for determining whether a detained person will benefit from “protected person” status under the Fourth Geneva Convention. This treaty, by its express terms (Article 4), does not apply to persons of the nationality of the detaining State or to the nationals of neutral or co-belligerent States, except where there is no “normal” diplomatic representation between such States and the detaining State. In a situation of occupation, the nationals of neutral States, as well as the nationals of co-belligerent States, must be granted protected-person status, unless there is normal diplomatic representation between the co-belligerent State and the occupying power. In any case, if a foreign fighter is not granted POW or protected-person status under the Third or Fourth Geneva Convention, namely for reasons of nationality, he or she will still enjoy the “safety net” protections provided by Article 75 of Additional Protocol I, as a matter of treaty and/or customary law.

Nationality has no bearing on the status of foreign fighters in NIAC (as there is no POW or protected-person status as such in this type of armed conflict) or on the legal protections they will be owed upon capture. *Hors de combat* foreign fighters will thus be entitled to the guarantees of common Article 3 and of Additional Protocol II, when applicable, as well as to the safeguards of customary law norms.

Finally, foreign fighters are often assimilated to mercenaries. Under IHL, the notion of “mercenary” only exists in IAC and its only consequence is the loss

of POW status.<sup>16</sup> This being said, foreign fighters may fulfil “mercenary” definitions contained in national legislations prohibiting mercenarism.

The ICRC’s role in relation to foreign fighters is similar to that played with respect to any other persons captured and detained in relation to an armed conflict. If foreign fighters are detained in an IAC and fulfil the conditions for POW or protected-person status under the Third or Fourth Geneva Conventions, the ICRC must be granted access to them. If foreign fighters are detained within the framework of a NIAC, the ICRC can offer its humanitarian services to the detaining party and visit them upon the agreement of the relevant authorities.

### *Potential criminalization of humanitarian action*

The potential criminalization of humanitarian action, as already described in further detail in the 2011 challenges report, remains an issue of concern for the ICRC and is therefore briefly reiterated here. The designation of a non-State armed group party to a NIAC as “terrorist” means that it is likely to be included in lists of proscribed terrorist organizations maintained by the UN, regional organizations and States. This may, in practice, have a chilling effect on the activities of humanitarian and other organizations carrying out assistance, protection and other activities in war zones. It has the potential to criminalize a range of humanitarian actors and their personnel, and may create obstacles to the funding of humanitarian activities. The prohibition of unqualified acts of “material support,” “services” and “assistance to” or “association with” terrorist organizations found in certain criminal laws could, in practice, result in the criminalization of the core activities of humanitarian organizations and their personnel that are endeavouring to meet the needs of victims of armed conflicts or situations of violence below the threshold of armed conflict. These activities could include: visits and material assistance to detainees suspected of, or condemned for, being members of a terrorist organization; facilitation of family visits to such detainees; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; aid to meet the basic needs of the civilian population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities for IDPs, where individuals associated with terrorism may be among the beneficiaries.

The potential criminalization of humanitarian engagement with non-State armed groups designated as “terrorist organizations” may be said to reflect a non-acceptance of the notion of neutral, independent and impartial humanitarian action, an approach which the ICRC strives to promote in its operational work in the field.

16 In this context, it should be recalled that the criteria that must be fulfilled for a person to be deemed a mercenary under Additional Protocol I (Article 47) have rarely been proven to be met in practice. It should also be recalled that the scope of application, the definition and the obligations enunciated in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001), 2163 UNTS 75, and the Convention on the Elimination of Mercenarism in Africa (adopted 3 July 1977, entered into force 22 April 1985), OAU Doc. CM/433/Rev. L. Annex 1 (1972), are wider for States parties thereto.

The ICRC is permitted, and must in practice be free, to offer its services for the benefit of civilians and other persons affected by an armed conflict who find themselves in the power of, or in the area of control of, a non-State party.

In its 2011 report, the ICRC expressed the need for greater awareness by States of the need to harmonize policies and legal obligations in the humanitarian and counterterrorism realms in order to properly achieve the desired aim of both these realms. Its recommendations in this regard remain pertinent today. It therefore reiterates the following points:

- Measures adopted by governments, whether internationally or nationally, aimed at criminally repressing acts of terrorism should be crafted so as to not impede humanitarian action. In particular, legislation creating criminal offences of “material support,” “services” and “assistance” to or “association” with persons or entities involved in terrorism should exclude from the ambit of such offences activities that are exclusively humanitarian and impartial in character, and are conducted without adverse distinction.
- In respect of the ICRC in particular, it should be recognized that humanitarian engagement with non-State armed groups party to a NIAC is a task foreseen and expected from the ICRC under common Article 3, which allows the ICRC to offer its services to the parties to NIACs. Criminalization of humanitarian action would thus run counter to the letter and spirit of the 1949 Geneva Conventions. In other words, broad language prohibiting “services” or “support” to terrorism could make it impossible for the ICRC to fulfil its treaty-based (and statutory) mandate in contexts where non-State armed groups party to a NIAC are designated “terrorist organizations.”

### III. IHL and multinational forces

Recent years have seen an increase in the number of peace operations involving multinational forces.<sup>17</sup> United Nations operations in the Democratic Republic of the Congo, the Central African Republic and Mali, NATO operations in Libya and Afghanistan, and the African Union operation in Somalia are cases in point. The combination of the “robustness” of mandates that are on occasion assigned by the international community to multinational forces and the violent

<sup>17</sup> There is no clear-cut definition of peace operations in public international law. The terms “peace operations,” “peace-support operations,” “peacekeeping operations” and “peace enforcement operations” do not appear in the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (hereafter UN Charter). They may be interpreted in various ways and are sometimes used interchangeably. For the purposes of this section, the term “peace operations” covers both peacekeeping and peace enforcement operations conducted by international organizations, regional organizations or coalitions of States acting on behalf of the international community in pursuance of a UN Security Council resolution adopted under Chapters VI, VII or VIII of the UN Charter. Although the majority of peace operations take place under the command and control of the UN or NATO, this section also bears in mind the growing role played by other international organizations such as the AU or the EU. The term “multinational forces” describes the armed forces put by troop-contributing countries at the disposal of a peace operation.



environments in which these are deployed elevate the likelihood of their being called upon to use military force, raising the question of when and how IHL applies to their actions.

### *The conditions for IHL applicability to multinational forces*

Whether multinational forces can, as such, become a party to an armed conflict is a matter of much discussion. Recent peace operations have seen the development of legal constructs suggesting that the conditions triggering IHL applicability may differ when certain multinational forces intervene.<sup>18</sup> According to these views, IHL would not apply, would apply differently, or would apply only as a matter of policy to such forces.

In response to these views, it is to be noted that IHL does not preclude multinational forces from becoming a party to an armed conflict if the conditions for the applicability of its norms are met. The above views also ignore or do away with the longstanding distinction established in international law between *ius in bello* and *ius ad bellum*, which is firmly anchored in treaty law, as well as in domestic and international case law. By virtue of this distinction, the applicability of IHL to multinational forces, like to any other actors, depends exclusively on the circumstances prevailing on the ground, irrespective of the international mandate that may have been assigned to such forces or the term used to designate the party (or parties) potentially opposing them.

Given that multinational forces are more often than not deployed in conflict zones, it is essential to determine when they may be deemed to have become belligerents for the purposes of IHL. In this regard, some legal debates on IHL applicability to multinational forces have been characterized by recurrent attempts to raise the bar for the threshold of its applicability. It has been contended, in particular, that when multinational forces (in particular UN forces) are involved, a higher degree of intensity of violence should be required before an armed conflict may be said to exist.

The ICRC's view, which has been stated on various occasions, is that the criteria for determining whether multinational forces are involved in armed conflict are identical to those that will apply in any other similar situation, whether IACs or NIACs. Alternative positions would appear to lack a legal basis under IHL, as the "higher threshold approach" cannot be found in treaty law, and does not rest on general practice. Thus, the determination of IHL applicability to multinational forces should be based solely on the regular criteria for armed conflicts, stemming from the relevant norms of IHL, in particular common Articles 2 and 3.

Contemporary peace operations show that multinational forces often intervene in a pre-existing NIAC by providing support to the armed forces of a

<sup>18</sup> These legal constructs were often based on the fact that multinational forces operate on behalf of the international community and under a UN Security Council mandate.

State in whose territory the conflict is occurring. This assistance has not often taken the form of full-fledged kinetic operations against a clearly identified enemy, but rather of sporadic use of force, logistical support, intelligence activities for the benefit of the territorial State or participation in the planning and coordination of military operations carried out by the armed forces of the territorial State.

This trend raises important legal questions: What is the legal status under IHL of multinational forces providing such support? Does IHL apply to them in this scenario? The complexity of the questions posed lies mainly in the fact that, in some cases, the support given by multinational forces does not by itself meet the threshold of intensity required for NIACs.

This situation has led to an examination of whether, even if the involvement of multinational forces does not *per se* meet the criterion of intensity required for NIACs, the nature of their engagement in a pre-existing NIAC could make them a party to that conflict.

The ICRC is of the view that it is not necessary to assess whether, on their own, the actions of multinational forces (or, generally, of individual States) fulfil the criteria for determining the existence of a NIAC, as these will have already been fulfilled by the pre-existing NIAC. Whether IHL will govern their operations in such a situation should only be determined by the nature of the support functions performed by the multinational forces. Therefore, a “support-based approach” consists in linking to IHL the actions of multinational forces that objectively form an integral part of the pre-existing NIAC.

Under such a support-based approach, not all forms of support will turn multinational forces into a party to a pre-existing NIAC. The decisive element would be the contribution made by such forces to the collective conduct of hostilities. A support-based approach clearly distinguishes between the provision of support that has a direct impact on the opposing party’s ability to carry out military operations and more indirect forms of support, which would allow the beneficiary to build up its military capabilities. Only the former type of support would turn multinational forces into a party to a pre-existing NIAC.

According to a support-based approach, IHL would apply to multinational forces when the following conditions have been cumulatively met: (1) there is a pre-existing NIAC taking place on the territory in which multinational forces are called on to intervene; (2) actions related to the conduct of hostilities are undertaken by multinational forces in the context of the pre-existing conflict; (3) the military operations of multinational forces are carried out in support (as described above) of a party to the pre-existing conflict; and (4) the action in question is undertaken pursuant to an official decision by the troop-contributing country or the relevant organization to support a party involved in the pre-existing conflict.

The fulfilment of the above criteria should permit a clear determination of the existence of a genuine belligerent intent<sup>19</sup> on the part of multinational forces. The resulting situation would demonstrate that they are effectively involved in military operations or other hostile actions aimed at neutralizing the enemy’s

19 On the notion of belligerent intent, see footnote 3 above.

military personnel and assets, hampering its military operations or controlling parts of its territory.

In the ICRC's opinion the support-based approach helps clarify the contours of the notion of NIAC. It provides insight into how to interpret this notion in keeping with the logic of IHL, and in line with the imperative of not blurring the combatant/civilian distinction and of maintaining the principle of equality of belligerents.

### *Determining who is a party to an armed conflict*

Once multinational forces have become involved in an armed conflict, it is important to identify who among the participants in a multinational operation should be considered a party to the conflict: the troop-contributing countries (TCCs)? The relevant international/regional organization (IO) under whose command and control the multinational forces operate? Or both? Little attention has been paid to these questions so far. They are nonetheless essential given the legal consequences involved.

IOs involved in peace operations all share one characteristic: they do not have armed forces of their own. In order to carry out such operations, IOs must rely on member States to place armed forces at their disposal. When they put troops at an IO's disposal, TCCs always retain some form of authority and control over their forces so that, even when they operate on behalf of the IO, they continue to simultaneously act as organs of their respective States. The dual status of armed forces involved in multinational operations conducted under the auspices of an IO – as organs of both the TCCs and the IO – considerably complicates the determination of who should be considered a party to the armed conflict.

In order to identify the parties, it is necessary to determine the entity – the IO and/or the TCCs – to which the acts of war carried out by multinational forces can be attributed. IHL is silent on the issue of attribution. It does not contain any specific criteria to attribute actions by multinational forces to a particular holder of international obligations. In the absence of such criteria in IHL, the general rules of international law on attribution will govern.

Under this body of international norms, the notion of control is key.<sup>20</sup> In other words, determining who is a party to an armed conflict in the context of multinational operations requires an examination of the level of control exerted by the IO over the troops put at its disposal.

In order to answer this complex question, the command and control arrangements ("C2" in military parlance), and the corresponding levels of authority in force in multinational operations, must be analysed. There is no "one-size-fits-all" approach. The C2 structure varies from one operation to another and from one IO to another. It is undisputed, however, that TCCs do not

20 There are ongoing debates, based in particular on diverging international case law, on whether to apply an "effective control" or an "overall control" test.

delegate “full command” to the IOs involved, rather they generally only transfer “operational command” or “operational control.” Legally speaking, this means that an IO under whose auspices a multinational operation is conducted will usually have the requisite control – within the meaning of these terms under international law – over military operations conducted by the troops put at its disposal.

As regards multinational operations conducted under UN command and control, an analysis of relevant UN doctrine combined with a review of its practical application in various contexts shows that, despite the multiple caveats placed by TCCs and their potential interference in the UN chain of command, the UN generally exerts the requisite control over its military operations. Therefore, in multinational operations under UN C2, there is a presumption that only the UN mission, and not the TCCs (and even less the member States of the UN), should be considered a party to an armed conflict when UN forces are drawn into hostilities that may be classified as such.

The situation as regards multinational operations conducted by NATO is more complex. Owing to the very intricate and specific nature of the C2 architecture of NATO operations, it is submitted that, in principle, when NATO troops are engaged in armed conflict, it is not only the organization which is a party thereto. NATO C2 arrangements – as implemented for instance in Afghanistan or Libya – reveal that the involvement of TCCs at the strategic, operational and tactical levels is such that the relevant States clearly have the power and the capacity to influence and intervene at all levels and stages of NATO military operations. TCCs are so closely associated with the NATO C2 structure that it is almost impossible to discern whether it is NATO itself or the TCCs that have overall or effective control over military operations. In light of this, NATO operations should usually be attributed to the IO and the TCCs simultaneously. The logical legal consequence of this in terms of IHL is that both NATO and the TCCs (but not all NATO member States) should be considered parties to the armed conflict. In addition, since it is difficult in practice and in law to draw distinctions on the legal status under IHL of the States participating in such operations, the ICRC is of the view that carrying out military activities within a NATO operation, in particular if these form an integral part of the collective conduct of hostilities, confers the status of belligerent on the TCCs. In these circumstances, a presumption, albeit rebuttable, exists that States participating in a NATO operation that reaches the threshold of an armed conflict have – alongside NATO itself – the status of parties to the armed conflict.

### *The personal scope of IHL applicability in the context of multinational operations*

The issue of the personal scope of IHL applicability is particularly important in the case of “multidimensional” or “integrated” multinational operations. The tasks of these operations may include not only military operations against designated enemies but also engagement in economic governance, civil administration, the

rule of law, disarmament-demobilization-reintegration (DDR) efforts, political processes, the promotion/protection of human rights, and humanitarian assistance. In order to perform these tasks, “integrated” multinational operations employ a mix of military, police and civilian personnel. The implementation of the various objectives of a multinational mission that has become a party to an armed conflict will inevitably raise questions concerning the legal status under IHL of their various staff members.

The personnel of a multinational operation must be divided into different categories in order to evaluate the extent of IHL protection accorded to each. To this end, the situation of military, civilian and police personnel should be analysed separately.

Members of the military component of a multinational operation involved in an armed conflict must be distinguished from the rest of the mission’s personnel. Once the military personnel become engaged in an armed conflict, they become “combatants” for the purpose of the principle of distinction. Thus, irrespective of their function within the military component, they lose their protection from attack as long as the multinational operation is a party to the armed conflict. Their status as lawful targets under IHL applies to the entire military contingent, even if the operation’s forces are made up of units sent by different TCCs and even if they have different tasks within the mission. Their status under IHL is determined based on the classification of the situation, and in accordance with the corresponding norms of IHL.

Civilian personnel involved in economic/political governance, the promotion/protection of human rights or humanitarian assistance must be regarded as civilians for the purpose of IHL, irrespective of the fact that the multinational operation qualifies as a party to the armed conflict. The civilian component of a multinational operation must be distinguished from its military component. Civilian personnel will therefore remain protected from direct attack and benefit from the protection which IHL confers on civilians, unless and for such time as they directly participate in hostilities.

The situation with regard to the police component of a multinational operation may vary depending on its use by the operation’s command. In the vast majority of cases, their tasks are confined to habitual law enforcement activities and have no direct connection with military operations that may be undertaken by the military component. As long as they are performing law enforcement tasks, police personnel must be regarded as civilians for the purpose of IHL. They will thus also benefit from the protection afforded to civilians, unless and for such time as they directly participate in hostilities.

In exceptional circumstances, the police personnel of a multinational operation (or more likely parts thereof) may be required – through either a formal or informal decision of an operation’s command – to provide military support to the military component in operations against a non-State armed group party to a NIAC. Members of police units thus engaged would thereby effectively assume the functions of armed forces under the command of a party to the armed conflict. As a result, the police personnel of units that have been instructed

to undertake combat action (but only such personnel) would lose their immunity against direct attack, until they leave their unit or are lastingly discharged from military operations undertaken by the military component.

Lastly, recent practice has shown that private military and security companies (PMSCs) may be hired to carry out tasks on behalf of TCCs or IOs involved in multinational operations. In this regard, an approach similar to that adopted with respect to the police component should be applied. If incorporated into multinational forces by being assigned a continuous combat function, PMSC personnel will no longer qualify as civilians and will become lawful targets under IHL for the duration of such an assignment.

### *Multinational forces and the obligation to respect and ensure respect for IHL*

As mentioned above, contemporary multinational operations are often conducted in support of the armed forces of a “host” State fighting against a (or several) non-State armed group(s). Combined with the fact that they are conducted either by a coalition of States or by States that have put their troops at the disposal of an IO, multinational operations are situations in which the obligation to respect and ensure respect for IHL becomes all the more relevant. In the ICRC’s view, this obligation is binding upon States involved in multinational operations, as well as on the IOs under whose auspices multinational operations are undertaken.

Participation in a multinational operation does not release States from their obligation under Article 1 common to the 1949 Geneva Conventions to respect and ensure respect for IHL. To the extent that they always retain some authority over their national contingents, troop-contributing countries must continue to ensure that their national contingents respect IHL. They may fulfil the “internal” prong of the obligation to ensure respect, in particular, by seeing to it that their troops are adequately trained, equipped and instructed, and by exercising disciplinary and judiciary powers over them.

Furthermore, the complexity of multinational operations does not diminish the validity of the other, “external” prong of the obligation contained in common Article 1. According to this obligation, States must ensure that IHL is respected by others – be they States, IOs or non-State armed groups – involved in an armed conflict. This obligation requires that States not only refrain from encouraging, aiding or assisting violations of IHL (which may require opting out of a specific operation if there is an expectation that it may violate IHL), but also exert their influence to the degree possible to induce belligerents to comply with IHL. It is, however, acknowledged that this prong of the obligation to ensure respect for IHL, i.e. to exert their influence, is an obligation of means to be exercised with due diligence. The exact scope of this obligation will depend on the prevailing circumstances of each case and on the resources available to the bearer of the obligation, in particular its capacity to influence the (other) belligerents.

It is likewise submitted that the “special relationship” and the close military ties that exist between States and IOs involved in a multinational operation place

them in a unique position to influence coalition partners and/or the supported party in order to persuade the latter to better respect IHL.

Multinational operations may be said to constitute a platform facilitating the implementation of the obligation to ensure respect for IHL by others. The ICRC has often insisted on the importance of ensuring respect for IHL in the context of multinational operations and has regularly reminded – confidentially or publicly, individually or collectively – TCCs and IOs of their obligation under common Article 1 or equivalent customary international law.

## **IV. The protective scope of IHL: Selected issues**

### **1) Humanitarian access and assistance**

Armed conflicts, whether international or non-international, always bring disruptions to the lives of civilians. When, due to the devastation and deprivation caused by war, the civilian population is deprived of essential goods and services, IHL envisages that humanitarian assistance will be needed and regulates its provision.

In practice, apart from measures that the belligerents may take to help the population under their control, humanitarian action by impartial humanitarian organizations, including the ICRC, remains essential in order to reduce vulnerabilities and alleviate the needs of persons affected by an armed conflict. The effectiveness and efficiency of humanitarian action will, however, depend on the possibility of rapid and unimpeded access to persons in need.

Access remains a significant challenge for many humanitarian organizations. The difficulties may be due to a lack of acceptance or an outright denial of access, security risks, logistical problems, and cumbersome administrative requirements, among others. In addition, as evidenced by some recent armed conflicts, the issue of humanitarian aid is becoming more and more politicized at the international level, raising doubts among some belligerents about whether neutral, impartial and independent humanitarian action is in fact possible.

IHL treaties and customary rules provide a fairly detailed framework for regulating access to persons in need of humanitarian assistance and of protection in situations of armed conflict.

Although the relevant rules vary slightly depending on the nature of the conflict (IAC other than occupation, occupation, NIAC), the IHL framework governing humanitarian access may be said to be generally constituted of four interdependent “layers.” Pursuant to the first, each party to an armed conflict bears the primary obligation to meet the basic needs of the population under its control. The second provides that impartial humanitarian organizations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by an armed conflict are not fulfilled. The third posits that impartial humanitarian activities undertaken in



situations of armed conflict are generally subject to the consent of the parties to the conflict concerned. According to the fourth, once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as all States that are not a party thereto, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control. The ICRC considers that these layers apply to all forms of humanitarian relief operations, including “cross-line” or “cross-border” operations.<sup>21</sup>

This section cannot suffice to provide a detailed analysis of the layers listed above; only a few essential legal aspects are further highlighted below.

Actions carried out by impartial humanitarian organizations are complementary, and in no way diminish the primary obligation of belligerents to meet the basic needs of those under their control. While this obligation is clearly expressed in the relevant IHL rules on occupation, IHL provisions on IAC (other than occupation) and NIAC do not expressly contain a similar rule. The ICRC is of the view, however, that in such situations the obligation of the parties to an armed conflict to meet the basic needs of the population under their control can be inferred from the object and purpose of IHL.

Articles 9/9/9/10 and 3 common to the 1949 Geneva Conventions establish a right of humanitarian initiative, whereby States expressly recognized that impartial humanitarian organizations, such as the ICRC, have an important role to play in addressing humanitarian needs generated in both IACs and NIACs. Concretely, this gives impartial humanitarian organizations the right to offer their services and to perform humanitarian activities without States regarding this as unlawful interference in their domestic affairs or as unfriendly acts. In this context, it is essential not to confuse offers of services under IHL, and the subsequent humanitarian relief operations undertaken, with the “right to humanitarian intervention” or the “responsibility to protect.” The latter are notions that are distinct from the strictly humanitarian activities carried out by impartial humanitarian organizations within the parameters of IHL.

Under IHL, only organizations qualifying as impartial and humanitarian in nature are explicitly entitled to offer their services to the parties to an armed conflict – whether IAC or NIAC. While this body of law does not prevent other actors, such as States or intergovernmental organizations, from making similar proposals, their offers of services are not regulated by IHL *per se* and they cannot claim that these are based on a corresponding IHL-grounded right of initiative.

Nothing in the relevant IHL provisions may be interpreted as restraining the right of impartial humanitarian organizations to offer their services. It has been argued by some that such offers may only be made when the civilian population concerned is not adequately provided with the supplies essential for its survival. It is submitted that subjecting offers of services to such a precondition would clearly run counter to the letter and spirit of IHL.

21 It should be noted that despite recent frequent references to “cross-line” or “cross-border” operations, these are not terms of IHL. These operations are regulated by the IHL rules applicable to any other type of humanitarian relief operation.

In terms of scope, offers of services made by impartial humanitarian organizations should be interpreted to encompass humanitarian activities writ large. While IHL does not specifically define the notion of humanitarian activities, these clearly have both an assistance and a protection dimension. Humanitarian activities are therefore all those aimed at preserving life and security or seeking to restore or maintain the mental and physical well-being of victims of armed conflict. Furthermore, humanitarian activities must benefit all persons who may be in need of assistance and/or protection as a result of an armed conflict. This means that States cannot limit activities to civilians alone; activities may also benefit wounded and sick fighters, POWs, persons otherwise deprived of their liberty in relation to the armed conflict, and others.

While IHL grants impartial humanitarian organizations the right to offer their humanitarian services, this should not be interpreted as constituting an unfettered right of humanitarian access (i.e. a right to be able to undertake the proposed humanitarian activities in practice). Whether impartial humanitarian organizations will be able to effectively provide their services in areas of armed conflict will depend on them receiving the “consent” of the parties concerned. The notion of “consent” for the purpose of humanitarian access has been at the forefront of legal debates related to recent armed conflict situations. The ICRC’s views on this issue were shared in an *ICRC Q&A and lexicon on humanitarian access* published in 2014.<sup>22</sup>

IHL rules governing consent vary in wording and scope. What is clear, however, is that regardless of the type of conflict involved (IAC other than occupation, occupation, NIAC), the consent of the parties to the conflict must be sought and obtained before impartial humanitarian organizations can operate and undertake humanitarian activities in the territories under the parties’ jurisdiction/control.

In IACs, the relevant IHL provisions specify that consent only needs to be obtained from the States that are a party to the conflict and are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory. It is understood that the opposing party does not need to be asked to consent to relief operations that take place in the adversary’s territory or in territory controlled by the adversary.

Common Article 3 is silent on who should consent to humanitarian relief operations in NIACs. It has been argued – in relation to some recent NIACs – that humanitarian action undertaken in areas controlled by non-State armed groups requires only their consent, and not that of the government of the State in whose territory that action is to take place. However, the ICRC considers that the question of whose consent is necessary in NIACs governed by common Article 3 should be answered based on the guidance provided in Article 18(2) of Additional Protocol II, which expressly requires the consent of the High

22 *ICRC Q&A and lexicon on humanitarian access*, June 2014, available at: [www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf](http://www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf).

Contracting Party concerned.<sup>23</sup> Thus, consent should be sought from the State in whose territory a NIAC is taking place, including for relief activities to be undertaken in areas over which the State has lost control. In any case, for practical reasons, the ICRC would also seek the consent of all parties to the NIAC concerned (including non-State armed groups party to it) before carrying out its humanitarian activities.

While access for, and the implementation of, humanitarian activities depends on the consent of the parties to an armed conflict, their decision to consent to relief operations is not discretionary. As always, IHL strikes a careful balance between parties' interests and humanitarian imperatives, and is not entirely deferential to State sovereignty when it comes to relief operations.

The question of whether a party to an armed conflict can lawfully turn down an offer of humanitarian services is intrinsically linked to its ability to fulfil its primary obligation to meet the basic needs of the population under its control. When the relevant party is unable or unwilling to fulfil this obligation and when an offer of services has been made by an impartial humanitarian organization, there would appear to be no valid/lawful grounds for withholding or denying consent. There may thus be circumstances under which, as a matter of IHL, a party to a conflict may be considered to be obliged to accept an offer of services (see for example Article 59 of the Fourth Geneva Convention: "... the Occupying Power shall agree ...").

Under IHL, imperative military necessity is not lawful grounds to turn down valid offers of services. Imperative military necessity may only be invoked to geographically and temporarily limit activities or to restrict the movement of relief personnel in situations where relief operations have been approved (see below). An offer of services may be declined when there are no needs to be met and/or when the activities proposed in the offer of services are not humanitarian in nature or the offer does not emanate from an organization that is impartial and humanitarian in character. IHL does not provide for other grounds that would justify a refusal of consent to relief operations as such.

Recently, the expression "arbitrary denial/withholding of consent to relief operations" has been used to describe a situation in which a party to an armed conflict unlawfully rejects a valid offer of humanitarian services. The expression "arbitrary denial/withholding of consent" is not found in any IHL treaty. It may, however, be argued that a refusal to grant consent resulting in a violation of the party's own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case, for instance, when a party's refusal results in the starvation of civilians as prohibited by Article 54 of Additional Protocol I or when the party is incapable of providing humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL.

23 The ICRC commentary on Article 18(2) mentions that: "In principle the 'High Contracting Party concerned' means the government in power. In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay" (para. 4884).

IHL does not regulate the consequences of a denial of consent and does not spell out a general right of access that can be derived from an “arbitrary denial/withholding of consent.” Thus, the argument according to which an arbitrary denial/withholding of consent could justify unconsented cross-line/border operations as a matter of IHL does not reflect current IHL.<sup>24</sup>

It is important to underline the distinction made in IHL between the requirement to obtain consent from a party to a conflict following an offer of services on the one hand, and the obligation to allow and facilitate relief schemes, which serves to implement the acceptance of the offer, on the other hand.

Once relief actions are accepted in principle, the States/parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate humanitarian operations. The parties must facilitate the tasks of relief personnel. This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly privileges and immunities necessary for the organization’s work. In short, the parties must enable “all facilities” needed for an organization to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time, cost, safety, appropriateness).

Under IHL governing IACs, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States concerned. This means that States not party to the conflict through whose territory impartial humanitarian organizations may need to pass in order to reach conflict zones must authorize such transit.

IHL governing NIACs does not expressly contain a similar obligation for third States. There is, nevertheless, an expectation that States not party to the NIAC will not oppose transit through their territory of impartial humanitarian organizations seeking to reach the victims of a NIAC. The humanitarian spirit underpinning IHL should encourage non-belligerent States to facilitate humanitarian action that has already been accepted by the parties to a NIAC.

Finally, under IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or, as mentioned above, limiting/restricting the activities of relief personnel in case of imperative military necessity.

## 2) The specific protection of medical personnel and objects

Armed conflicts, whether IACs or NIACs, will invariably give rise to the need to provide health care that is both immediate and additional to that which is available in peacetime. This will occur, *inter alia*, because persons directly

24 This is without prejudice to arguments along those lines that may be derived from other bodies of international law.

participating in hostilities may be wounded, while others may be directly attacked or incidentally injured in the conduct of military operations.

Ensuring care for wounded and sick combatants of armed forces in the field and the protection of persons and objects devoted to this task was the main reason for the drafting of the very first Geneva Convention of 1864. Ever since then, the issue of the provision of health care in armed conflict has been a significant focus of IHL. Specific rules have been developed to deal with the maintenance of adequate military and, later, civilian health-care services for the wounded and sick in armed conflict. Accordingly, IHL aims to protect specific categories of military and civilian persons and objects that are exclusively assigned by a competent authority to the performance of medical duties. As a result of the exclusivity of this function, they enjoy specific protection from attack, harm or other interference with their tasks during the conduct of hostilities. The privilege of bearing one of the distinctive emblems – the red cross, red crescent or red crystal<sup>25</sup> – is a visible sign that specific protection has been accorded.<sup>26</sup> As is well known, this specific protection rests on the assumption that medical personnel and objects are exclusively engaged in medical tasks and that involvement in military operations amounting to acts harmful to the enemy, outside their humanitarian function, will entail a loss of their specific protection.

Despite the specific protective regime, violence, interference and threats against medical personnel, facilities and transports are widespread in contemporary armed conflicts and have a major impact on access of the wounded and sick to medical care. For instance, the Health Care in Danger project of the International Red Cross and Red Crescent Movement (Movement) – which is more broadly aimed at making the delivery of health care safer in both armed conflicts and other emergencies – has collected information about incidents in various countries where the wounded and sick, as well as medical personnel and objects, have been directly attacked or incidentally harmed in the conduct of hostilities.<sup>27</sup> Medical facilities and transports have also been used for military purposes to launch attacks, store and transport weapons or to establish military command and control centres, thus undermining trust in their medical nature and putting them at risk of attack(s) by the opposing party.

The fundamental challenge posed by such incidents is not due to the inadequacy of the relevant rules of IHL, but to their inadequate implementation.

25 The red lion and sun, mentioned in the 1949 Geneva Conventions and their Additional Protocols as an emblem with an equal status, is currently not used by any High Contracting Party.

26 In addition to regulating medical care provided to the wounded and sick by the medical service of a party to an armed conflict, IHL allows impartial humanitarian organizations (such as the ICRC, along with National Red Cross and Red Crescent Societies) to offer their services for the delivery of such care. Further, IHL also envisions that civilians may play a role in this regard. While IHL only allows some of these persons (and the objects they use to accomplish their mission) to display the distinctive emblem as a protective device, it must be kept in mind that those who are not entitled to display the latter will enjoy the general IHL protection to which civilians and civilian objects are entitled.

27 See, for example, ICRC, *Health Care in Danger: Violent incidents affecting the delivery of health care, January 2012 to December 2014*, ICRC, Geneva, 2015, available at: [www.icrc.org/eng/resources/documents/publication/p4237-violent-incidents.htm](http://www.icrc.org/eng/resources/documents/publication/p4237-violent-incidents.htm).

The nature of contemporary warfare, which is increasingly being waged in urban settings and is often characterized by asymmetry between the parties, has, nevertheless, demonstrated the importance of clarifying and/or interpreting the scope of the specific protective regime devoted to medical personnel, facilities and transports. Two particular legal issues deserve examination. The first is whether military medical personnel and objects are to be taken into account in a proportionality assessment under IHL rules on the conduct of hostilities. The second relates to the scope of the notion of “acts harmful to the enemy” that entail a loss of their specific protection, namely their entitlement to be respected and protected.

*The application of the rules of proportionality in attack and precautions to military medical personnel and objects*

Military medical personnel often have to work, and military medical objects must often be located, in the vicinity of the fighting, especially when providing emergency medical care, including first aid. There is evidently a particular need to ensure the protection of military medical personnel and objects against incidental harm (which is likely to be heightened in situations of urban warfare). A controversy nevertheless exists over whether such protection must be ensured in attacks against military objectives located in the proximity of military medical personnel and objects or when their movements bring them in proximity of military objectives.

Some have argued that military wounded and sick, as well as military medical personnel and objects, are not protected by the rules of proportionality in attack and precautions because the relevant customary rules, as reflected in Additional Protocol I, only refer to incidental *civilian* harm. Pursuant to this view, *military* wounded and sick, and *military* medical personnel and objects are excluded from the protective ambit that the relevant norms aim to provide, as they are not of a civilian nature.

It is submitted that this position is untenable. In practice, this could result in a decrease in the emergency medical care that is provided in proximity to military objectives, as military medical personnel and objects would not only *de facto* run the risk of being incidentally harmed but would also not enjoy any legal protection from such risk.

As a matter of law, this proposition is, first, incompatible with the stringent nature of the obligation to respect and protect military medical personnel and objects, as well as with the object and purpose of their specific protection. This obligation, which applies in all circumstances (unless military medical personnel and objects commit, or are used to commit, acts harmful to the enemy), means that they must not be attacked or harmed in any way, and that everything feasible must be done to spare them in the conduct of hostilities. Moreover, the very concept of specific protection implies a protection that is elevated in relation to that which is generally guaranteed to civilians and civilian objects. This is evidenced by the right to use the protective red cross, red crescent or red crystal

emblem. To suggest a lesser protection for military medical personnel and objects than that accorded to civilians and civilian objects would thus run counter to the very concept of specific protection.

Second, a careful reading of the definition of military objectives suggests that military medical objects are to be considered civilian objects under the rules on the conduct of hostilities. This is because military objectives are limited to those that make an effective contribution to military action and whose destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Military medical facilities and transports do not fulfil these cumulative conditions (at least as long as they are not used to commit acts harmful to the enemy, outside of their humanitarian function). Given that under IHL civilian objects are all those that are not military objectives, military medical objects must be considered to be civilian objects.

Third, the proposition that military medical personnel and objects do not enjoy protection under the rules of proportionality in attack and precautions, while civilian medical personnel and objects do, runs counter to the fundamental purpose of the relevant rules of Additional Protocols I and II, which specifically envisage uniform protections for these categories of persons and objects.

Finally, the military manuals of a number of States support the inclusion of protected persons and objects, other than civilians and civilian objects, in the assessment of incidental harm that must be undertaken pursuant to the rules of proportionality in attack and precautions.

### *The scope of the notion of “acts harmful to the enemy”*

Under IHL, medical personnel, facilities and transports will lose their specific protection upon the commission of an “act harmful to the enemy, outside their humanitarian function.” This may obviously have serious consequences for the continued delivery of medical care to the wounded and sick, as well as for the security of medical personnel and objects that were not involved in the act(s) at issue. Confidence may be lost in the exclusively medical nature of medical personnel and objects as such, and lead, overall, to less of a willingness to accord them respect and protection. Despite these ramifications, IHL does not define the concept of “acts harmful to the enemy,” nor the precise consequences of a loss of specific protection or how long this lasts.

IHL treaties do not list “acts harmful to the enemy” but they enumerate certain factual scenarios that do not constitute this type of acts, including when medical personnel are equipped with light individual weapons for their own defence or that of the wounded and sick in their charge.<sup>28</sup> Examples of acts that would generally be recognized as “harmful to the enemy” under customary IHL are the use of medical facilities for sheltering persons directly participating in hostilities or for storing arms and ammunition (other than small arms and ammunition temporarily found and taken from the wounded and sick, and not

28 See, for example, Article 22(1) of the First Geneva Convention and Article 13(2)(a) of Additional Protocol I.



yet handed over to the competent authorities). Other instances would be: the use of medical facilities as military observation posts or to physically shield military action; and the use of medical transports for conveying healthy troops, arms or munitions, or for the collection and transmission of information of military value.

When medical objects are being used for the commission of “acts harmful to the enemy, outside their humanitarian function,” this may have an impact both on their entitlement to be respected on the one hand and, separately, on their entitlement to be protected on the other hand. When it comes to their entitlement to the latter, their being used for the commission of such an act may dispense the enemy from the obligation, otherwise applicable to it, to make sure that third parties respect medical objects. When it comes to the loss of their entitlement to be respected, a question that may be posed is whether the fact that they are used for the commission of “acts harmful to the enemy” automatically turns them into military objectives (meaning that they lose protection against direct attack) or whether there are “acts harmful to the enemy” that would not necessarily turn medical objects into military objectives. In such cases, loss of protection does not permit a direct attack. It is submitted that not all forms of “acts harmful to the enemy” would make an effective contribution to military action and an attack directed against them would not, in the circumstances ruling at the time, offer a definite military advantage. The failure to fulfil either of these requirements implies that such medical objects may not be considered to have become military objectives (see Article 52(2) of Additional Protocol I and its customary equivalent). In such cases, responses to such harmful acts would have to be through measures short of attack, such as seizure (which, when exercised vis-à-vis medical objects, is regulated by IHL to ensure the continued care of the wounded and sick who will be affected by this measure). In most cases, however, it would be hard to conceive of circumstances in which the commission of an “act harmful to the enemy” outside its humanitarian function would not transform a medical object into a military objective.

It should, nevertheless, be observed that in consultations with military experts as part of the Health Care in Danger project mentioned above, a recommendation was made, not necessarily based on legal considerations, that kinetic strikes against a medical facility that has lost protection should be considered a last resort, and that options other than launching a direct attack on such a facility should be contemplated.

In terms of medical personnel, controversy has arisen as to whether “acts harmful to the enemy” are the same as, or broader in material scope than, “direct participation in hostilities” by civilians. Some, including the ICRC, support the view that the notion of “acts harmful to the enemy” is broader because certain acts that are generally considered to be “harmful to the enemy” may not amount to “direct participation in hostilities.” If the “acts harmful to the enemy” do not amount to direct participation in hostilities, the medical personnel may lose their entitlement to be protected. When it comes to the implications this has for their entitlement to be respected, such acts do not necessarily render the personnel

liable to direct attack. This would only be the case if these acts equally qualify as acts of “direct participation in hostilities.”

## V. Use of force under IHL and IHRL

In many contemporary armed conflicts, armed forces are increasingly expected to conduct not only combat operations against the enemy but also law enforcement operations to maintain or restore public security, law and order. This is particularly the case in situations of occupation,<sup>29</sup> and in NIACs, including those in which the forces of a third State (or States) assist a “host” State on its territory with its consent.

As is well known, the conduct of hostilities paradigm, namely the rules and principles regulating the employment of means and methods of warfare in armed conflict, belongs exclusively to IHL. The law enforcement paradigm may be described as rules mainly derived from IHRL, and more specifically from the prohibition of arbitrary deprivation of life which regulates the use of force by State authorities to maintain or restore public security, law and order. In this context, it should be noted that IHL also contains a limited number of rules relating to law enforcement operations, such as the obligation of an occupying power to maintain public order and safety, or the authority of a detaining State to use force as a last resort against POWs attempting to escape.<sup>30</sup> The law of naval warfare also contains rules and principles pertaining to the use of force in situations that might be considered akin to law enforcement, notably for enforcing blockades.<sup>31</sup>

There are important differences between the conduct of hostilities and law enforcement paradigms. Principles of necessity, proportionality and precautions exist in both, but have distinct meanings and operate differently. While the conduct of hostilities paradigm allows lethal force to be directed against lawful targets as a first resort, the use of lethal force in law enforcement operations may be employed only as a last resort, subject to strict or absolute necessity. Persons posing a threat must be captured rather than killed, unless it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life, and this objective cannot be addressed through means less harmful than the use of lethal force. Furthermore, in law enforcement, the proportionality principle requires a balancing of the risks posed by an individual with the potential harm to him/herself, as well as to bystanders. For its part, the IHL principle of proportionality balances the direct and concrete military advantage anticipated from an attack against a military objective with the expected

29 See footnote 8 above.

30 See Article 43 of the 1907 Hague Regulations and Article 42 of the Third Geneva Convention.

31 See *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, June 1994, para. 98, available at: [www.icrc.org/ihl/INTRO/560?OpenDocument](http://www.icrc.org/ihl/INTRO/560?OpenDocument).

incidental harm to protected persons and objects (i.e. bystanders only). The determination of the rules applicable in a particular situation is therefore crucial.

In certain situations that arise in armed conflict it may not, however, be entirely clear whether IHL rules on the conduct of hostilities or rules on the use of force in law enforcement should govern. It is also sometimes difficult to draw a line between these situations in practice.

The ICRC's views on the interplay between IHL and IHRL with regard to the use of force were outlined in its 2011 report on IHL and the challenges of contemporary armed conflicts. The ICRC submitted that IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets in an IAC. It noted that the interplay of IHL rules and international human rights standards on the use of force was less clear in NIAC, and that the use of lethal force by States in NIAC required a fact-specific analysis of the interplay between the relevant rules. The report concluded that there was a need to explore the matter further.

To shed light on this issue, in 2012 the ICRC organized an expert meeting on "The use of force in armed conflicts, Interplay between the conduct of hostilities and law enforcement paradigms." The meeting sought to identify the line dividing the conduct of hostilities and law enforcement paradigms in situations of armed conflict. It paid special attention to NIACs, during which the issue of the interplay between the two paradigms is of particular significance. The meeting report subsequently published by the ICRC provided an account of the debates that took place,<sup>32</sup> but did not necessarily reflect the organization's views.

Five case studies related to the use of force were discussed:

1. the use of force against lawful targets in armed conflict
2. riots (in which civilians and fighters are blended)
3. the fight against criminality
4. escape attempts and riots in detention
5. lack of respect for military orders (the example of checkpoints).

Provided below is an outline of the ICRC's thinking on some of the legal issues raised by the scenarios listed above.

The defining criterion for determining the rules governing the use of force against a particular individual under IHL is whether such a person is a lawful target under its norms on the conduct of hostilities. This could be the case because of a person's status (he or she is a member of regular State armed forces, as generally defined by domestic law), function (he or she is a member of irregular State forces or of a non-State armed group, by virtue of the continuous combat function performed), or conduct (he or she is a civilian directly participating in hostilities).

32 ICRC, *Expert Meeting: The use of force in armed conflicts, Interplay between the conduct of hostilities and law enforcement paradigms*, ICRC, Geneva, November 2013, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf).

In the ICRC's view, IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets in IAC. The ICRC considers that this holds true within the entire geographical scope of application of IHL in IACs.

As mentioned above, the situation is less clear in NIACs, which will require a fact-specific analysis. The ICRC submits that in NIACs, the parties to the conflict are permitted under IHL – or are not legally barred from – using force against lawful targets under the rules governing the conduct of hostilities in situations of actual hostilities (defined as the collective resort to means and methods of warfare against the enemy).

However, the situation is less clear with regard to the use of force against isolated individuals who are lawful targets under IHL but are located in regions under a State's firm and stable control, where no hostilities are taking place and it is not reasonably foreseeable that the adversary could readily receive reinforcement. Three positions may be said to currently exist. Under the first, IHL rules on the conduct of hostilities will govern, without restraints other than those found in specific IHL rules.<sup>33</sup> Under the second, the possible use of force in the scenario above should be governed by Recommendation IX of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.<sup>34</sup> Pursuant to the third view, the use of force would remain governed by the rules on law enforcement. It may be observed that the application of either of the latter two approaches may in certain limited circumstances be likely to lead to similar results in practice.

In both IAC and NIAC, the degree of control over a specific area or circumstances, and the intensity of the hostilities at the time and place of a particular operation, constitute relevant factors, among others, to assess what is "feasible" in terms of the application of the IHL rules on precautions in attack (Article 57 of Additional Protocol I). These factors are also relevant in the ICRC's view for determining whether – by operation of the IHL principles of military necessity and humanity – lethal force may be used as a first resort against a lawful target or whether Recommendation IX mentioned above should come into play.

As previously noted, parties to an armed conflict may find themselves in situations in which they are faced with both lawful targets and civilians protected

33 Under this view, while the principles of military necessity and humanity inform the entire body of IHL, they do not create obligations above and beyond specific IHL rules.

34 According to Recommendation IX: "In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances." Under this view, the fundamental principles of military necessity and humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 77ff, available at: [www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf).

against direct attack. A scenario of civilian unrest may be envisaged, or one in which criminal groups operate in areas in which hostilities against a non-State party to a NIAC are also taking place. It is submitted that, in the case of the concurrent presence of fighters and/or civilians directly participating in hostilities, as well as civilians who have not lost their protection against direct attack, a “parallel approach” should be adopted. This means that IHL rules on the conduct of hostilities would govern the use of force against lawful targets, i.e. the fighters and civilians directly participating in hostilities, bearing in mind that the principles of proportionality and precautions may prevent a direct attack if the expected incidental civilian damage would be excessive in relation to the concrete and direct military advantage anticipated. Any concomitant use of force against persons protected against direct attack would remain governed by the more restrictive rules on the use of force in law enforcement operations.<sup>35</sup>

Thus, for example, if a civilian demonstration against the authorities in a situation of armed conflict were to turn violent, a resort to force in response to this would be governed by law enforcement rules. If enemy fighters were located in the crowd of rioting civilians, they could be directly targeted under IHL rules on the conduct of hostilities. However, their mere presence, or the fact that the fighters launched attacks from the crowd, would not turn the rioting civilians into direct participants in the hostilities. Thus, all precautions provided for under IHL would need to be taken to spare the civilians in case of attacks against the fighters. If it were to prove too difficult to distinguish the rioting civilians from the fighters, it might be appropriate to deal with the entire situation under law enforcement, and apply an escalation of force procedure with respect to all persons posing a threat.

A law enforcement approach would also govern the use of force in an operation to arrest a member of a criminal group that is not party to the conflict, as long as the violence perpetrated by that member cannot be deemed to constitute a direct participation in hostilities. The fact that a criminal group operates in territory controlled by the enemy, pays “taxes” to it or benefits from its protection does not mean that all violence committed by its members will constitute a direct participation in hostilities. This would hold true even if an arrest operation against a member of a criminal group not party to the conflict were to lead to concomitant hostilities against enemy fighters controlling the area in which the operation took place. Depending on the circumstances, however, the use of force by members of a criminal group alongside fighters in this scenario could be an indication of the existence of a belligerent nexus.

The use of force against rioting detainees would also be governed by the rules on law enforcement, as persons deprived of their liberty are clearly *hors de combat*, regardless of the fact that they may have been lawful targets before their capture or arrest. This will also be the case if they attempt to escape, as explicitly provided for in the Third Geneva Convention with respect to POWs.<sup>36</sup> It is only

35 See Article 50(3) of Additional Protocol I.

36 See Article 42 of the Third Geneva Convention.

if POWs or fighters successfully escape that they again become targetable under IHL rules on the conduct of hostilities.

Another difficult situation that may arise is one in which the status, function or conduct of a person appearing to pose a threat or disrespecting a military order is not immediately evident, for example when a person approaches a checkpoint, a military installation or an area restricted for military reasons. It is submitted that lack of respect for a military order alone is not sufficient to permit the use of lethal or potentially lethal force. In case of doubt as to whether such a person is a lawful target, the ICRC considers that he/she must be presumed to be protected against attack. An escalation of force procedure must thus be applied, the legal source of which would be the principle of necessity under IHRL. It should be noted, however, that application of the IHL requirement to take all feasible precautions to verify that a target is a military objective would lead to a similar need for an escalation in measures until the status of the target has been ascertained.

Finally, whether State officials who use force are members of the armed forces or of the police is not relevant under international law, even though this may be important under domestic law. In practice, if armed forces use force against persons protected against direct attack – e.g. civilians in armed conflict – the rules on the use of force in law enforcement operations will govern.<sup>37</sup> Conversely, if police forces take a direct part in hostilities against lawful targets under IHL, they must respect the IHL rules on the conduct of hostilities.

It follows from the above that when it can be reasonably expected that armed forces will have to conduct law enforcement operations or be in a situation where they will have to use force against protected civilians, they must be equipped and trained to do so in accordance with the rules governing the use of force in law enforcement operations. This will, *inter alia*, require that means less lethal than firearms are available, and that troops are adequately instructed on their use. Conversely, police forces that may be called on to take a direct part in hostilities in situations of armed conflict must be adequately equipped, and trained in IHL.<sup>38</sup>

## VI. Detention in armed conflict

Legal and practical issues related to the deprivation of liberty in armed conflict remain a major focus of examination and debate among governments, legal

37 It should be noted that further restrictions may be imposed by rules of engagement which could, for example, limit the use of force based on a more narrowly conceived notion (or notions) of self-defence.

38 Training would need to cover in particular the rules governing means and methods of warfare and how they differ from the rules governing the use of force in law enforcement operations, including notably that IHL prohibits using riot control agents as a method of warfare (see Article I(5) of the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (opened for signature from 13 January to 15 January 1993; entered into force 29 April 1997), 1974 UNTS 45; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (hereafter ICRC Customary IHL Study), Cambridge University Press, 2005, Rule 75).

experts, practitioners, scholars and others. Domestic and international courts, as well as other bodies, have increasingly weighed in on the application of IHL rules governing detention in both IAC and NIAC, and on the interplay of this body of law with other branches of international law. The ICRC continues to closely follow and contribute to the ongoing discussions, most recently through an opinion paper in November 2014 devoted to “Internment in Armed Conflict: Basic Rules and Challenges.”<sup>39</sup>

As is well known, the deprivation of liberty in IAC is subject to an extensive treaty regime. The 1949 Geneva Conventions are universally ratified and contain more than 175 provisions regulating detention in this type of armed conflict in all its aspects. Taking into account the widespread ratification of Additional Protocol I and customary law applicable to IAC, the ICRC is of the view that IHL for the time being adequately addresses the legal protection of detainees in relation to IAC.

The IHL framework applicable to NIAC-related detention is far less developed. Common Article 3 and Additional Protocol II do provide for essential protections for detainees, but they are limited in both scope and specificity compared to those provided for in IAC by the 1949 Geneva Conventions and Additional Protocol I. Debate and disagreement persist over a range of legal and practical issues, the complexity of which has only increased in the more recent situations of extraterritorial NIAC, including of the type outlined in section III above.

The ICRC called attention to the issue of the paucity of rules governing detention in NIAC in a report to the 31st International Conference, in which it identified four specific areas of humanitarian concern that it believed any strengthening of the law applicable in NIAC should address. These are: (1) conditions of detention; (2) particularly vulnerable detainees; (3) grounds and procedures for internment; and (4) detainee transfers.

Based on Resolution 1 of the 31st International Conference, the ICRC has been undertaking a process of research, consultation and discussion with States and, where appropriate, other relevant actors, with a view to providing the 32nd International Conference with a report containing options and its recommendations on ways of strengthening the legal protection of persons deprived of their liberty. The process has included four regional consultations of government experts held throughout 2012 and 2013, two thematic consultations of government experts in 2014, and a consultation meeting for all States in 2015.

A description of the course of the consultation process and the background documents and reports prepared for each of the meetings are available on the ICRC’s website.<sup>40</sup> As already mentioned, the final report, entitled *Strengthening international humanitarian law protecting persons deprived of their liberty*, is

39 ICRC, Opinion Paper, “Internment in Armed Conflict: Basic Rules and Challenges,” November 2014, available at: [www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges](http://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges).

40 Available at: [www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0](http://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0).



among the official documents submitted to members of the 32nd International Conference for their consideration and appropriate action. Given the comprehensive nature of the research conducted and of the issues identified, as well as the options and recommendations included in the above-mentioned report, the present section will not deal further with the legal and practical challenges arising in relation to detention in armed conflict.

## VII. Means and methods of warfare

### 1) New technologies of warfare

As rapid advances continue to be made in new and emerging technologies of warfare, notably those relying on information technology and robotics, it is important to ensure informed discussions of the many and often complex challenges raised by these new developments.

Although new technologies of warfare are not specifically regulated by IHL treaties, their development and employment in armed conflict does not occur in a legal vacuum. As with all weapon systems, they must be capable of being used in compliance with IHL, and in particular its rules on the conduct of hostilities. The responsibility for ensuring this rests, first and foremost, with each State that is developing these new technologies of warfare.

In accordance with Article 36 of Additional Protocol I, each State Party is required to determine whether the employment of a new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. Legal reviews of new weapons, including new technologies of warfare, are a critical measure for States to ensure respect for IHL. More specifically, they are a way to ensure that a State's armed forces are capable of conducting hostilities in accordance with its international obligations, and that new weapons are not employed prematurely under conditions in which respect for IHL cannot be guaranteed. However, despite this legal requirement and the large number of States that develop or acquire new weapon systems every year, only a small number are known to have procedures in place to carry out legal reviews of new weapons.<sup>41</sup>

Although it is undisputed that new weapons must be capable of being used in accordance with IHL's rules governing the conduct of hostilities, difficulties in interpreting and applying these rules to new technologies of warfare may arise in view of their unique characteristics, the intended and expected circumstances of their use, and their foreseeable humanitarian consequences. Ultimately, these challenges may raise the question of whether existing law is sufficiently clear or whether there is a need to clarify IHL or develop new rules to deal with these challenges.

41 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, Geneva, January 2006, available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0902.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf).

Cyber warfare and autonomous weapon systems are but two of the new technologies of warfare that raise a range of legal, ethical and humanitarian issues, only some of which are briefly mentioned below.

### i) Cyber warfare

Cyberspace is a virtual space that provides worldwide interconnectivity. This feature is generally considered of great utility in peacetime, in particular in the economic, social, information and communication realms.

However, it also entails new risks and new vulnerabilities. Thus, the hostile use of cyberspace has been increasingly at the forefront of security concerns for governments, individuals, businesses and the media. While most operations referred to as “cyber attacks” do not have anything to do with armed conflict, the development of military cyber capabilities and their possible use in armed conflict has contributed to a growing sense of insecurity among States and other actors.

The ICRC understands “cyber warfare” as operations against a computer or a computer system through a data stream, when used as means and methods of warfare in the context of an armed conflict, as defined under IHL. Cyber warfare can be resorted to as part of an armed conflict that is otherwise waged through kinetic operations. The notion of cyber warfare might also encompass the employment of cyber means in the absence of kinetic operations when their use amounts to an armed conflict, although no State is known to have publicly qualified an actual hostile cyber operation as such.

Cyber warfare has fortunately not led to dramatic humanitarian consequences to date. While the military potential of cyberspace is not yet fully understood, it nevertheless appears that cyber attacks against transportation systems, electricity networks, dams, and chemical or nuclear plants are technically possible. Such attacks could have wide-reaching consequences, resulting in high numbers of civilian casualties and significant civilian damage. Perhaps more likely, cyber operations could be used to manipulate civilian infrastructure or services, leading to malfunctions or disruptions not necessarily causing immediate death or injury. The effects of such “bloodless” attacks could obviously be severe – for instance, if power or water supplies were to be interrupted or if a banking system were to be taken down.

Despite the fact that it is relatively new and fast developing, cyber technology, as already noted, does not occur in a legal vacuum. The ICRC welcomes the fact that the 2013 and 2015 Reports of the United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security confirmed that “[i]nternational law, and in particular the Charter of the United Nations, is applicable ...”<sup>42</sup> and noted “the established international legal principles, including, where applicable, the principles of humanity, necessity, proportionality

42 See *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, A/68/98, 24 June 2013, available at: [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/68/98](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/98), para. 19.

and distinction.”<sup>43</sup> An increasing number of States and international organizations have publicly asserted that IHL applies to cyber warfare.

Already in 2011 the ICRC stated that the employment of cyber capabilities in armed conflict must comply with all the principles and rules of IHL, as is the case with any other weapon, means or method of warfare, new or old. It makes no difference whether cyberspace should be considered: a new war-fighting domain similar to air, land, sea and outer space; a different type of domain because it is man-made while the former are natural; or not a domain as such. Customary IHL rules on the conduct of hostilities apply to all means and methods of warfare, wherever they are used. In its Advisory Opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice recalled that the established principles and rules of humanitarian law applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons,” including “those of the future” (paragraph 86).<sup>44</sup> This is also made clear in Article 36 of Additional Protocol I. Furthermore, Article 49(3) of Additional Protocol I shows that the Protocol’s rules were meant to apply to land warfare and to all other types of warfare which may affect civilians on land. In this sense, there is little doubt that cyber warfare will be waged at least partly from infrastructure located on land against targets on land and that it risks affecting civilians on land.

It must be underlined that asserting that IHL applies to cyber warfare is not an encouragement to militarize cyberspace and should not, in any way, be understood as legitimizing cyber warfare. Indeed, any resort to force by States, whether cyber or kinetic in nature, always remains governed by the UN Charter and *ius ad bellum*, as recalled in the preamble of Additional Protocol I (paragraph 2). On the contrary, asserting that IHL applies reaffirms that, despite the fact that cyber warfare is not expressly prohibited or regulated by existing treaties, limits exist under international law if and when States and/or non-State armed groups resort to cyber operations during armed conflict.

Asserting that IHL applies to cyber warfare is, however, only a first step, because cyber warfare raises a number of challenges for the interpretation and application of IHL, as highlighted in the 2011 report on IHL and the challenges of contemporary armed conflicts. Challenges include: the difficulties created by the anonymity on which cyberspace is built; the lack of clarity with regard to the application of IHL to cyber operations in the absence of kinetic operations; the debate pertaining to the notion of “attack” under IHL rules governing the conduct of hostilities; and challenges in applying these rules to cyber warfare, in particular the prohibition of indiscriminate attacks and the rules on precautions in attacks.

Over the last four years, the ICRC has engaged in a bilateral, confidential dialogue with a number of States on the potential human cost of cyber warfare

43 See *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, A/70/174, 22 July 2015, available at: [www.un.org/ga/search/view\\_doc.asp?symbol=A/70/174](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/174), para. 28.

44 ICJ, *Legality of the threat or the use of nuclear weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 226, 1996.

and on the above-mentioned challenges, as well as in debates in academic and other public fora.<sup>45</sup>

### *Challenges in safeguarding essential civilian infrastructure against cyber attacks*

There has been increasing concern in recent years about safeguarding essential civilian infrastructure against cyber attacks, and calls to protect it from hostile cyber operations, including through the development of norms of acceptable behaviour in cyberspace. In this context, it should be noted that cyber operations amounting to an attack under IHL<sup>46</sup> and directed at essential civilian infrastructure in armed conflict already constitute violations of IHL, unless such infrastructure is simultaneously used for military purposes in a way that turns it into a military objective. For example, drinking water and electricity networks that serve the civilian population, public health infrastructure and banks are first and foremost civilian objects. Furthermore, water systems, in particular, enjoy special protection as objects indispensable to the survival of the population. Similarly, dams and nuclear electricity plants are usually protected against direct attack because they do not constitute military objectives. Even if they were to become military objectives in particular circumstances, IHL prohibits their attack or at least requires that particular care be taken to avoid the release of dangerous forces and consequent severe losses among the civilian population. This is not to deny that new norms might be useful or even needed, but rather to stress that if they are developed they should build upon and strengthen what already exists.

The extent of protection based on the general rules on the conduct of hostilities, as contained in treaty or customary IHL, will depend on how certain notions and concepts are interpreted by States.

By way of example, the manner in which the notion of cyber “attack” is defined under the rules governing the conduct of hostilities (see Article 49 of Additional Protocol I) will greatly influence the protection that IHL affords to essential civilian infrastructure. The debate centres around the notion of loss of functionality of an object, given that in cyberspace it is possible to render objects dysfunctional without physically damaging them.

One view is to consider that cyber attacks are only those operations that cause violence to persons or physical damage to objects. A second approach is to make the analysis dependent on the action necessary to restore the functionality of the object, network or system. A third approach is to focus on the effects that the operation has on the functionality of the object.

45 By way of example, the ICRC contributed as an observer to the group of experts that drafted the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, published in 2013. For more information on the ICRC’s involvement and its views see “What limits does the law of war impose on cyber attacks? Questions and answers,” 28 June 2013, available at: [www.icrc.org/eng/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm](http://www.icrc.org/eng/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm).

46 According to Article 49(1) of Additional Protocol I, “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.”

It is submitted that all operations expected to cause death, injury or physical damage constitute attacks, including when such harm is due to the foreseeable indirect or reverberating effects of an attack, such as the death of patients in intensive-care units caused by a cyber attack against the electricity network that then cuts the hospital electricity supply.

The ICRC also considers that an operation designed to disable an object – for example a computer or a computer network – constitutes an attack under the rules on the conduct of hostilities, whether or not the object is disabled through kinetic or cyber means.<sup>47</sup> Indeed, the reference to “neutralization” in the definition of military objective (Article 52 of Additional Protocol I) would be superfluous if an operation aimed at impairing the functionality of an object (i.e. its neutralization) would not constitute an attack. Furthermore, an overly restrictive understanding of the notion of attack would be difficult to reconcile with the object and purpose of the rules on the conduct of hostilities, which is to ensure the protection of the civilian population and civilian objects against the effects of hostilities. Indeed, under such a restrictive understanding, a cyber operation that is directed at making a civilian network (electricity, banking, communications or other network) dysfunctional, or risks causing this incidentally, might not be covered by the IHL prohibition of directing attacks against civilian objects, the prohibitions of indiscriminate or disproportionate attacks and the principle of precautions in attack, despite the potentially severe consequences of such operations for the civilian population.

Based on the current understanding of the IHL notion of “attack” in kinetic operations, it is, however, evident that not all cyber operations would constitute attacks. First, the concept of attack does not include espionage.<sup>48</sup> Second, the rules on the conduct of hostilities do not prohibit all operations that interfere with civilian communication systems. For instance, the jamming of radio communications or television broadcasts has not traditionally been considered an attack in the sense of IHL.<sup>49</sup>

More generally, in order to differentiate between operations that amount to attacks and those that do not, it has been suggested that the criterion of “inconvenience” should be relied upon when it comes to the effects of a particular operation. However, what is covered by “inconvenience” is not defined and this terminology is not used in IHL.

Even cyber operations that would constitute “military operations” without amounting to “attacks” *per se* are governed by the principle of distinction. According to this principle, there is an obligation to distinguish at all times

47 See *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011 (see footnote 5 above).

48 Admittedly, it might be more difficult for the one subject to such acts to distinguish between espionage and cyber attacks in cyberspace (as opposed to in kinetic operations), as most cyber operations are based on obtaining access to a computer system. Once such access is obtained, it may be used to gather data (espionage), or to manipulate or destroy data or to direct the system in ways to cause damage or to destroy physical objects, either directly or indirectly.

49 The distinction between attacks and interferences with communications that do not amount to an attack is probably less clear in cyber operations than in more traditional kinetic or electromagnetic operations.

between civilians and civilian objects on the one hand, and military objectives on the other, and to take constant care in the conduct of military operations to spare the former.<sup>50</sup>

*Challenges in protecting cyber infrastructure on which essential civilian infrastructure relies*

In order to protect essential civilian infrastructure that relies on cyberspace, it is also crucial to protect the infrastructure of cyberspace itself. The challenge lies, however, in the interconnectedness of civilian and military networks. Most military networks rely on civilian cyber infrastructure, such as undersea fibre-optic cables, satellites, routers or nodes. Conversely, civilian vehicles, shipping, and air traffic controls are increasingly equipped with navigation systems that rely on global positioning system (GPS) satellites, which are also used by the military. Civilian logistical supply chains (for food and medical supplies) and other businesses use the same web and communication networks through which some military communications pass. Thus, it is to a large extent impossible to differentiate between purely civilian and purely military cyber infrastructures.

The traditional understanding of the notion of military objective is that when a particular object is used for both civilian and military purposes (so-called “dual-use objects”), it becomes a military objective (except for the separable parts thereof). A strict application of this understanding could lead to the conclusion that many objects forming part of the cyberspace infrastructure would constitute military objectives and would not be protected against attack, whether cyber or kinetic. This would be a matter of serious concern because of the ensuing impact that such a loss of protection could have in terms of disruption of the ever-increasing concomitant civilian usage of cyber space. However, because cyberspace is designed with a high level of redundancy, one of its characteristics is the ability to immediately reroute data traffic. This inbuilt resilience needs to be taken into account when assessing whether the target’s destruction or neutralization would actually offer a definite military advantage in the circumstances ruling at the time, as required by the second prong of the definition of a military objective.

Even if certain parts of the cyberspace infrastructure on which essential civilian functions rely were to become lawful targets, any attack would remain governed by the prohibition of indiscriminate attacks and the rules of proportionality and precautions in attack. Assessing the expected incidental harm of any planned operation is of critical importance for the application of both principles. Precisely because civilian and military networks are so interconnected, incidental civilian harm must be expected in most cases, and all reasonably foreseeable harm must be taken into account, including incidental harm indirectly caused by the reverberating effects of the attack. For example, attacks against root servers or undersea cables would raise concerns under the

50 Articles 48 and 57(1) of Additional Protocol I; ICRC Customary IHL Study, Rules 1 and 15.

prohibition of indiscriminate attacks because of the difficulty of limiting the effects of such attacks, as required by IHL. In this context, the protection afforded by the law of neutrality would also need to be considered.

### *Challenges in protecting essential civilian data*

There is also increasing concern about safeguarding essential civilian data. With regard to data belonging to certain categories of objects that enjoy specific protection under IHL, the protective rules are comprehensive. For example, the obligation to respect and protect medical facilities must be understood as extending to medical data belonging to those facilities. However, it would be important to clarify the extent to which civilian data that does not benefit from such specific protection, such as social security data, tax records, bank accounts, companies' client files or election lists or records, is already protected by the existing general rules on the conduct of hostilities. Deleting or tampering with such data could quickly bring government services and private businesses to a complete standstill, and could cause more harm to civilians than the destruction of physical objects. The conclusion that this type of operation would not be prohibited by IHL in today's ever more cyber-reliant world – either because deleting or tampering with such data would not constitute an attack in the sense of IHL or because such data would not be seen as an object that would bring into operation the prohibition of attacks on civilian objects – seems difficult to reconcile with the object and purpose of this body of norms.

### *The importance of feasible measures to protect civilians and civilian objects against the effects of hostilities*

IHL also requires that the parties to a conflict take all feasible measures to protect civilians and civilian objects under their control against the effects of hostilities. This obligation has to be implemented already in peacetime, especially with regard to fixed installations. While cyberspace is a virtual global domain, it would appear that the obligation to take precautions against the effects of attacks extends at least to the physical infrastructure of cyberspace (and to objects whose functioning depends on that infrastructure) located in a State's territory, or in any territory that may be occupied by a party to the conflict.

This raises the question of the measures that States must take to protect the civilian population under their control from the danger of cyber operations, including in the case of a cyber operation against the State's essential infrastructure. Measures that could be considered include: segregating military from civilian cyber infrastructure and networks; segregating computer systems on which essential civilian infrastructure depends from the internet; backing up important civilian data; using antivirus measures; and making advance arrangements to ensure the timely repair of important computer systems against foreseeable kinds of cyber attacks. Other avenues that could be explored – requiring international cooperation and, probably, innovative solutions to



technical problems – would be to work on the identification in cyberspace of the cyber infrastructure and networks serving specially protected objects like hospitals, or to draw inspiration from the protection attached to demilitarized or protected zones and to assess whether such an approach could usefully be transposed into the cyber realm.

### *The importance of the legal review of cyber capabilities*

These and other issues underscore why it is important that States that may develop or acquire cyber-warfare capacities, whether for offensive or defensive purposes, assess their lawfulness under IHL. Legal review, as specifically required by Article 36 of Additional Protocol I, is essential to ensuring that armed forces and other government agencies that may potentially resort to cyber operations in an armed conflict are able to abide by their obligations under international law. However, the legal review of cyber weapons, means and methods of warfare may present a number of challenges. Military cyber capabilities might be less standardized than kinetic weapons, especially if designed for a specific operation; furthermore, they are likely to be subject to constant adaptation, including to respond to the software security upgrades that a potential target will undergo.

In sum, the ICRC believes that clarifying how IHL applies to cyber warfare would help shed light on whether its rules are sufficiently clear in view of the specific characteristics and foreseeable humanitarian impact of cyber warfare. Given that this type of warfare poses novel questions, there may also be a need to develop IHL as technologies evolve or as the human cost of cyber warfare becomes better understood.

### ii) Autonomous weapon systems

During the past 15 years, there has been a dramatic increase in the development and use of robotic systems by armed forces, in particular various armed unmanned systems that operate in the air, on land, and in water, including the high seas. The gradual increase in the sophistication of military machinery and in the physical distance of soldiers from the battlefield is a process as old as war itself. However, recent developments in robotics and computing, combined with military operational demands, raise the prospect of reducing, or removing altogether, direct human control over weapon systems and the use of force. This paradigm shift is not a sudden development, but is the result of the incremental increase over time of autonomy in weapon systems, specifically in the “critical functions” of selecting and attacking targets.

Debates on autonomous weapon systems have expanded dramatically in recent years in diplomatic, military, scientific, academic and public fora. These have included expert discussions in the framework of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (Convention on Certain Conventional Weapons

or CCW) in 2014 and 2015, and expert discussions convened by the ICRC in 2014. Views on this complex subject, including those of the ICRC, continue to evolve as a better understanding is gained of current and potential technological capabilities, the military purpose of autonomy in weapons, and the resulting issues regarding compliance with IHL and ethical acceptability.

## *Definitions*

There is no internationally agreed definition of autonomous weapon systems,<sup>51</sup> but common to various proposed definitions is the notion of a weapon system that can independently select and attack targets. On this basis, the ICRC has proposed that “autonomous weapon systems” is an umbrella term that would encompass any type of weapon systems, whether operating in the air, on land or at sea, with autonomy in its “critical functions,” meaning a weapon that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention. After initial activation, it is the weapon system itself – using its sensors, programming and weapon(s) – that takes on the targeting processes and actions that are ordinarily controlled directly by humans.

At a fundamental level, it is autonomy in the critical functions that distinguishes autonomous weapon systems from all other weapon systems, including armed drones in which critical functions are controlled remotely by a human operator.

Some weapon systems in use today have autonomy in their critical functions. These include air and missile defence weapon systems, ground vehicle “active protection” weapon systems, and border or perimeter weapon systems (sometimes called “sentry guns”), as well as loitering munitions and armed underwater vehicles. Many of these weapon systems have autonomous “modes,” meaning they can be “switched on” to operate autonomously for fixed periods of time. Most tend to be highly constrained in the tasks they are used for (e.g. defensive rather than offensive operations), the types of targets they attack (vehicles and other objects rather than personnel), and the circumstances in which they are used (in simple, relatively predictable and constrained environments rather than complex, unpredictable environments). Importantly, it seems that most of these existing weapons are overseen in real time by a human operator.

However, future autonomous weapon systems might be given more freedom of action to determine their targets, to operate outside tightly constrained spatial and temporal limits, and to react to rapidly changing circumstances. The current pace of technological developments lends urgency to the consideration of the legal, humanitarian and ethical implications of these weapons.

<sup>51</sup> Various terminology used to describe such systems includes “lethal autonomous weapon systems (LAWS),” “lethal autonomous robots (LARS)” and “killer robots.”

## *Compliance of autonomous weapon systems with IHL*

Based on the state of current and foreseeable robotics technology, ensuring that autonomous weapon systems can be used in compliance with IHL will pose a formidable technological challenge as these weapons are assigned more complex tasks and deployed in more dynamic environments than has been the case until now.

Key challenges include whether the weapon system would be capable of autonomously distinguishing military objectives from civilian objects, combatants from civilians, and active combatants from persons *hors de combat*. Another key challenge is whether a weapon could be programmed to sense and weigh up the many contextual factors and variables required to determine whether the attack may be expected to cause incidental civilian casualties and damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, as required by the rule of proportionality. Likewise, the ability to programme a weapon to cancel or suspend an attack if it becomes apparent that the target is not a military objective or is subject to special protection, or that the attack may be expected to violate the rule of proportionality, as required by the rules on precautions in attack, appears a formidable challenge.

Thus, for autonomous weapon systems intended for use in contexts where they are likely to encounter protected persons or objects, there are serious doubts as to whether it is technically possible to programme them to carry out the complex, context-dependent assessments required by the IHL rules of distinction, proportionality and precautions in attack. These are inherently qualitative assessments in which unique human reasoning and judgement will continue to be required.

In view of these challenges, there are serious doubts about the capability of developing and using autonomous weapon systems that would comply with IHL in all but the narrowest of scenarios and the simplest of environments, at least for the foreseeable future. In this respect, it seems evident that overall human control or oversight over the selection and attack of targets will continue to be required to ensure respect for IHL. The kind and degree of human control or oversight required to ensure compliance of an autonomous weapon system with IHL will depend on the type of autonomous weapon system, the tasks it is designed to carry out, the environment in which it is intended to be used, and the types of targets it is programmed to attack, among other factors.

## *Legal review of autonomous weapon systems*

The above challenges will need to be carefully considered by States when carrying out legal reviews of any autonomous weapon system they develop or acquire, as required by IHL. As with all weapons, the lawfulness of a weapon with autonomy in its critical functions depends on its specific characteristics, and whether, given

those characteristics, it can be employed in conformity with the rules of IHL in all of the circumstances in which it is intended and expected to be used. The ability to carry out such a review entails fully understanding the weapon's capabilities and foreseeing its effects, notably through testing. Yet foreseeing such effects will become increasingly difficult if autonomous weapon systems are increasingly able to determine their own actions in complex environments.

Predictability about the actions of an autonomous weapon system in the context in which it is to be deployed must be sufficiently high to allow an accurate legal review. Indeed, deploying a weapon system whose effects are wholly or partially unpredictable would create a significant risk that IHL will not be respected. In this regard, a key question for the reviewer is how to evaluate and mitigate the risks of using the weapon if its performance is unpredictable. The risks may be too high to allow the weapon's use; otherwise, mitigating the risks may require appropriate levels of human control over the critical functions of the weapon system, consequently limiting or even obviating the weapon's autonomy.

An additional challenge for reviewing the legality of an autonomous weapon system is the absence of standard methods and protocols for testing these weapons. This too may affect the accuracy of the legal review.

### *Accountability for the use of autonomous weapon systems*

Some have raised concerns that the loss of human control over autonomous weapon systems may lead to an "accountability gap" in case of violations of IHL. Others are of the view that no such gap would ever exist as there will always be a human involved in the decision to deploy the weapon to whom responsibility could be attributed. Still, it is unclear how responsibility could be attributed in relation to unpredictable "acts" of autonomous weapons.

For instance, under IHL and international criminal law, the lack of control over, or the unpredictability of, an autonomous weapon system could make it difficult to find individuals involved in the programming and deployment of the weapon liable for serious violations of IHL. They may not have the knowledge or intent required for such a finding, owing to the fact that the machine takes the targeting decisions. Moreover, programmers might not have knowledge of the concrete situations in which at a later stage the weapon would be deployed and in which IHL violations would occur. On the other hand, a programmer who intentionally programmes an autonomous weapon to commit war crimes would certainly be criminally liable. Likewise, a commander would be liable for deciding to use autonomous weapon systems in an unlawful manner, for example deploying in a populated area an anti-personnel autonomous weapon that is incapable of distinguishing civilians from combatants. In addition, a commander who knowingly decides to deploy an autonomous weapon whose performance and effects he/she cannot predict may be held criminally responsible for any serious violations of IHL that ensue, to the extent that his/her decision to deploy the weapon is deemed reckless under the circumstances.

Under the law of State responsibility, in addition to accountability for violations of IHL committed by its armed forces, a State could be held liable for violations of IHL caused by an autonomous weapon system that it has not, or has inadequately, tested or reviewed prior to deployment. Under the laws of product liability, manufacturers and programmers could also be held accountable for errors in programming or for the malfunction of an autonomous weapon system.

### *Autonomous weapon systems under the dictates of public conscience*

As autonomy increases in the critical functions of weapon systems, a point is reached where humans are so far removed in time and space from the selection and attack of targets that human decision-making regarding the use of force is substituted with machine decision-making. This raises profound moral and societal questions about the role and responsibility of humans in the use of force and the taking of human life.

The fundamental question at the heart of concerns about autonomous weapon systems, irrespective of their compliance with IHL, is whether the principles of humanity and the dictates of public conscience<sup>52</sup> would allow machines to make life-and-death decisions in armed conflict without human involvement. The debates of recent years among States, experts, civil society and the public have shown that there is a sense of deep discomfort with the idea of any weapon system that places the use of force beyond human control.

### *The way forward: Meaningful human control over the use of force in armed conflict*

Discussions among government experts in the CCW in 2014 and 2015 have shown that there is broad agreement that meaningful, appropriate or effective human control over the critical functions of weapon systems must be retained, whether for legal, ethical and/or policy reasons. In view of the rapid advances in military robotics, there is now a need for States to take concrete steps to prevent the loss of human control over the use of force in armed conflict.

Experience with existing autonomous weapon systems can provide guidance on where the limits of autonomy in the critical functions of weapon systems should lie. In this respect, the ICRC encourages States that have deployed, or are currently developing, autonomous weapon systems to share their experience of how they are ensuring that these can be used in compliance with IHL, and of the limits and conditions they are fixing on the use of these weapons,

52 The “principles of humanity and the dictates of public conscience” are mentioned notably in Article 1(2) of Additional Protocol I and in the preamble of Additional Protocol II, referred to as the Martens Clause. In its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons (see footnote 44 above), the ICJ has affirmed that the applicability of the Martens Clause “is not to be doubted” (para. 87) and that it has “proved to be an effective means of addressing the rapid evolution of military technology” (para. 78).

including the required level of human control, be it for legal, ethical and/or policy reasons.

## 2) The use of explosive weapons in populated areas

### *A pattern of increasing harm in contemporary armed conflicts*

Hostilities are increasingly being conducted in population centres, thereby exposing civilians to heightened risks of harm. This trend of contemporary armed conflicts is only likely to continue with growing urbanization. It is compounded by the fact that belligerents often avoid facing their enemy in the open, intermingling instead with the civilian population. Yet, armed conflicts often continue to be waged with weapon systems originally designed for use in open battlefields. There is generally no cause for concern when such weapons are used in open battlefields, but when they are used against military objectives located in populated areas they are prone to indiscriminate effects, often with devastating consequences for the civilian population.

Indeed, warfare in populated areas using explosive weapons that have a wide impact area exacts a terrible toll on civilians. Recent armed conflicts have confirmed that the use of such weapons is a major cause of civilian death and injury and destruction and damage of civilian residences and critical civilian infrastructure, with consequent disruption to essential services, such as health care and water distribution, and displacement of the civilian population. In terms of effects on people's health, these are not limited to death, physical injury and long-term disability, but also include the long-term impact on mental well-being. The use of explosive weapons in populated areas also affects the ability of health-care facilities and services to operate, to cope with the influx of numerous wounded people and the particular injuries they present, and to provide adequate care. The foregoing effects are accentuated in contexts where the use of explosive weapons is protracted, with the consequent decline of essential services over time and serious risks for public health.

The ICRC continues to witness these effects first-hand as it assists the victims of armed conflicts involving the use of explosive weapons in populated areas. The ICRC has raised its concerns with the parties to such armed conflicts as part of its bilateral and confidential dialogue on the conduct of hostilities. Since 2009, it has also been publicly expressing its concerns regarding explosive weapons in populated areas.

In its report submitted to the 31st International Conference in 2011, the ICRC stated that “due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition for specific types of weapons, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas.”<sup>53</sup>

53 See *International Humanitarian Law and the challenges of contemporary armed conflicts: Report*, October 2011, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf), p. 42.

In 2013, the Movement as a whole called upon States to “strengthen the protection of civilians from the indiscriminate use and effects of explosive weapons, including through the rigorous application of existing rules of international humanitarian law, and to avoid using explosive weapons with a wide impact area in densely populated areas.”<sup>54</sup>

In parallel, the UN secretary-general has, consistently since 2009, drawn the attention of UN member States to the need to strengthen the protection of civilians in view of the humanitarian impact of the use of explosive weapons in populated areas, as have UN agencies and non-governmental organizations. A growing number of States are also acknowledging the humanitarian concerns raised by this phenomenon.

The ICRC continues to document the impact on civilians of the use of these weapons in a range of armed conflicts. It has also been looking more closely at the technical characteristics of certain types of explosive weapons that may foreseeably have wide-area effects when used in populated areas. It has been engaging in dialogue with selected armed forces to gain a better understanding of existing military policy and practice relevant to the choice and use of explosive weapons in populated areas. It has also deepened its analysis of the IHL rules that frame the use of explosive weapons in populated areas. To help shape debates and its own views on these issues, the ICRC convened a meeting of government and independent experts in February 2015.<sup>55</sup> The ICRC’s current observations and views are outlined below.

### *Framing the issue: The use of “explosive weapons” with a “wide impact area” in “densely populated areas”*

Explosive weapons, that is weapons that injure or damage by means of explosive force,<sup>56</sup> may have a “wide impact area” – or “wide-area effects” – when used in populated areas due to:

- the large destructive radius of the individual munition used, i.e. its large blast and fragmentation range or effect (such as large bombs, large-calibre mortars and rockets, large guided missiles, and heavy artillery projectiles);
- the lack of accuracy of the delivery system (typically indirect fire weapons, such as mortars, rockets, and artillery (especially when using unguided munitions) and unguided air-delivered bombs); or
- the weapon system being designed to deliver multiple munitions over a wide area (such as multiple rocket-launcher systems).

54 Resolution 7 of the 2013 Council of Delegates, “Weapons and international humanitarian law” (CD/13/R7), para. 4.

55 ICRC, *Expert meeting – Explosive weapons in populated areas: Humanitarian, legal, technical and military aspects*, ICRC, Geneva, June 2015.

56 An “explosive weapon” is defined as a weapon activated by the detonation of a high explosive substance creating a blast and fragmentation effect.



In this respect, the issue of explosive weapons in populated areas concerns not one single weapon, but a range of different conventional weapon systems, and consideration of the circumstances of their use, including the typical vulnerabilities of civilians living in populated areas, is needed.

Insofar as improvised explosive devices (IEDs) may fall into one of the above three general categories of explosive weapons, they are also a cause for concern when used in populated areas.

The terms “densely populated areas” and “populated areas” should be understood as synonymous with “concentration of civilians,” the latter being the only of these terms defined by IHL treaties, as in “a city, town, village or other area containing a similar concentration of civilians or civilian objects.”<sup>57</sup>

Direct attacks against civilians or civilian objects are beyond the focus of the present discussion on explosive weapons in populated areas, as such attacks are clearly unlawful under IHL regardless of the types of weapons used.

In sum, the challenges relating to “explosive weapons in populated areas” discussed here refer to the use of explosive weapons that, due to their wide-area effects, may foreseeably cause significant civilian casualties and/or damage to civilian objects, as well as long-term harm to the civilian population, when used against a military objective located in a concentration of civilians.

### *A significant likelihood of indiscriminate effects*

In view of the humanitarian consequences outlined above, and as previously stated, the ICRC is of the view that explosive weapons with a wide impact area should not be used in densely populated areas due to the significant likelihood of indiscriminate effects, meaning that their use against military objectives located in populated areas is likely to fall foul of the IHL rules prohibiting indiscriminate and disproportionate attacks.

Indiscriminate attacks are those of a nature to strike military objectives and civilians or civilian objects without distinction, notably because they employ means or methods of warfare that cannot be directed at a specific military objective or the effects of which cannot be limited as required by IHL.<sup>58</sup> Disproportionate attacks and area bombardment are treated as particular forms of indiscriminate attacks.

<sup>57</sup> The term “concentration of civilians” appears in the rule prohibiting area bombardment, which is a type of indiscriminate attack specified in Article 51(5)(a) of Additional Protocol I and Articles 3(9) and 7(3) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (adopted 3 May 1996; entered into force 3 December 1998), 2048 UNTS 93 (hereafter Protocol II to the CCW as amended). The term “concentration of civilians” appears, and is defined, in Article 1(2) of the Protocol on Prohibitions or Restrictions of the Use of Incendiary Weapons (hereafter Protocol III) of the CCW (adopted 10 October 1980; entered into force 2 December 1983), 1342 UNTS 137, as “any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.” The term “densely populated areas,” which appears in the rule requiring precautions against the effects of attack in Article 58(b) of Additional Protocol I, is not defined in the Protocol or other IHL treaties.

<sup>58</sup> Article 51(4) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

The rule of proportionality prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>59</sup> Area bombardment is defined as “an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.”<sup>60</sup> The foregoing rules must be respected by the parties to an armed conflict in all circumstances,<sup>61</sup> even if alternative, more discriminate weapons or tactics are not available to them.

In addition to these obligations, the IHL rule of precautions in attack requires the parties to an armed conflict, in the conduct of their military operations, to take constant care to spare the civilian population, individual civilians and civilian objects.<sup>62</sup> This rule notably requires “those who plan or decide upon an attack” to take “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>63</sup> When conducting hostilities in populated areas, the rule of precautions may require the parties to choose the most precise weapon available, or consider alternative weapons and/or tactics.

The assessment of whether an attack is indiscriminate or disproportionate, and whether all feasible precautions have been taken, must not be based on hindsight but on the perspective of the commander based on the information available to him/her at the time of the attack. Such information includes the foreseeable effects of the weapons at his/her disposal in view of their inherent characteristics, as well as the circumstances of their use, including the physical environment in which the military objective is located and the vulnerability of the surrounding civilian population and civilian objects. Of these factors, the choice of weapon and the manner in which it will be used are those over which the commander has the greatest control. In this regard, the variables related to the choice and use of weapon that the commander can manipulate to respect the above-mentioned IHL rules include: the type and size of the warhead (munition), the type of fuse, the delivery system, and the distance from which the weapon is launched, as well as the angle and timing of the attack. The technical skills of the armed forces in the selection and use of weapons are also critical factors that will

59 Article 51(5)(b) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

60 Article 51(5)(a) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

61 See Article 51(1) of Additional Protocol I.

62 Article 57(1) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts.

63 Article 57(2)(a)(ii) of Additional Protocol I. This is a rule of customary IHL in both international and non-international armed conflicts. Feasible precautions are described in Article 3(10) of Protocol II to the CCW as amended as those that are “practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

influence the outcome of an attack.<sup>64</sup> Nonetheless, even after taking all such measures and precautions, certain explosive weapons may be prone to causing significant incidental effects on civilians and civilian objects when used in populated areas.

Although there is no dispute that any use of explosive weapons in populated areas must comply with the above IHL rules, there are divergent views on whether these rules sufficiently regulate the use of such weapons, or whether there is a need to clarify their interpretation or to develop new standards or rules. Based on the effects of explosive weapons in populated areas being witnessed today, there are serious questions regarding how the parties using such weapons are interpreting and applying IHL. Divergent practice of militaries, and contrasting views among experts and in the case law of international criminal tribunals regarding what is or is not legally acceptable, may point to ambiguities in IHL and the need for States to clarify their interpretation of the relevant IHL rules or to develop clearer standards to effectively protect civilians.

In any respect, the prohibition of indiscriminate attacks and the rules of proportionality and precautions in attack, each of which strikes a careful balance between considerations of military necessity and of humanity, were developed by States with the overarching objective of protecting civilians and civilian objects against the effects of hostilities. Any challenges that may arise in their interpretation and application to the use of explosive weapons in populated areas must be resolved with this overarching objective in mind. A number of these challenges are outlined below.

### *The use of explosive weapons in populated areas and the prohibition of indiscriminate attacks*

The prohibition of indiscriminate attacks takes into account the fact that means and methods of warfare that can be used perfectly legitimately in some situations could, in other circumstances (including due to the manner in which they are used), be of a nature to strike military objectives and civilians and civilian objects without distinction.<sup>65</sup> Warfare in populated areas is certainly a situation that may render indiscriminate explosive weapons that could be lawfully used in other circumstances, such as an open battlefield.

The prohibition of indiscriminate attacks includes those that employ a method or means of delivery that cannot be directed at a specific military objective.<sup>66</sup> It is unclear what States consider to be the degree or standard of

64 For the range of factors regarding weapons selection and use, see ICRC, *Expert meeting – Explosive weapons in populated areas: Humanitarian, legal, technical and military aspects*, ICRC, Geneva, June 2015, pp. 5–6 and 24–30. See also Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereafter *Commentary on the Additional Protocols*), ICRC, Martinus Nijhoff Publishers, Geneva, 1987, para. 2212.

65 See *Commentary on the Additional Protocols*, para. 1962.

66 See Article 51(4)(b) of Additional Protocol I. Article 3(8) of Protocol II to the CCW as amended includes, in its definition of “indiscriminate use” of mines, booby-traps and other devices, any placement of such

accuracy of a weapon that would be acceptable under this rule, generally or in a given operational situation. At any rate, any such standard of accuracy must be consistent with the general aim of protecting civilians from the effects of hostilities.

Still, the inherent inaccuracies of certain types of explosive weapon systems – such as many of the artillery, mortar and multiple rocket-launcher systems in use today, especially when using unguided munitions, as well as unguided air-delivered bombs – raise serious concerns under the prohibition of indiscriminate attacks when used in populated areas. While increasing the accuracy of delivery systems would help reduce the weapons' wide-area effects in populated areas, accuracy could be obviated by the use of large-calibre munitions – i.e. munitions that have a large destructive radius relative to the size of the military objective – which might still be in violation of IHL.

The interpretation of the prohibition of indiscriminate attacks may become more demanding with the development of new means and methods of warfare, notably with advances in precision weaponry. For example, the meaning of “clearly separate and distinct” military objectives in the prohibition of area bombardment is understood to mean a distance at least sufficiently large to permit the individual military objectives to be attacked separately.<sup>67</sup> This understanding implies that the practical application of the prohibition of area bombardment, and by extension of the prohibition of indiscriminate attacks, could evolve based on the development of new weapons capabilities.

### *Reverberating effects of the use of explosive weapons in populated areas and the rules of proportionality and precautions in attack*

The most visible effects of an attack using explosive weapons in populated areas are the immediate (or “direct”) civilian deaths and injuries and damage to civilian objects caused by the weapons' blast and fragmentation effects. Less visible, but equally devastating, are the reverberating effects (also referred to as the “indirect,” “knock-on” or “long-term” effects) of the attack, as consequences of incidental damage to certain civilian objects. For example, incidental damage to civilian homes is likely to cause the displacement of civilians, while incidental damage to hospitals is likely to cause the disruption of medical services, which in turn is likely to lead to the death of patients. Critical civilian infrastructure, such as vital water and electrical facilities and supply networks, is particularly fragile and vulnerable to the incidental effects of explosive weapons. The interconnectedness of the essential services that depend on critical infrastructure is such that disruption to one service will have knock-on effects on the other services. Thus, incidental damage to critical infrastructure can cause severe

weapons “which employs a method or means of delivery which cannot be directed at a specific military objective” (emphasis added).

67 See Commentary on the Additional Protocols, para. 1975: “When the distance separating two military objectives is sufficient for them to be attacked separately, taking into account the means available, the rule should be fully applied. However, even if the distance is insufficient, excessive losses that might result from the attack should be taken into account.”

disruption to essential services on which the civilian population depends for its survival, such as health care, energy and water supplies and waste management, leading to the spread of disease and further deaths. These effects are multiplied in situations of protracted hostilities, where explosive weapons are used in populated areas over a prolonged period of time.

The question that arises is whether the reverberating effects of an attack using explosive weapons in populated areas must be taken into account by the attacker in assessing the expected incidental civilian casualties and damage to civilian objects as required under the IHL rules of proportionality and precautions in attack, recalled above. While acknowledging that it is both impractical and impossible for commanders to consider all possible effects of an attack, the ICRC considers that those reverberating effects that are foreseeable in the circumstances must be taken into account.

While there is support for this view, there remains uncertainty regarding which reverberating effects of an attack are “foreseeable.” Although, as explained above, this assessment is context-specific, the ICRC submits that it is framed in an objectivized way by what is foreseeable based on the standard of a “reasonably well-informed person in the circumstances [of the attacker], making reasonable use of the information available to him or her.”<sup>68</sup> In this respect, it is submitted that those who plan and decide upon an attack have an obligation to do everything feasible to obtain information that will allow for a meaningful assessment of the foreseeable incidental effects on civilians and civilian objects. Moreover, what is objectively foreseeable by a commander in a given case must be informed by past experiences and lessons learned from his/her country’s armed forces. It should also take into account the ever-growing experience of other armed forces in urban warfare, when available. In other words, as the understanding of the reverberating effects of the use of explosive weapons in populated areas increases, this knowledge informs future assessments and decisions under the rules of proportionality and precautions in attack.

It is unclear how armed forces integrate the obligation to take into account the foreseeable reverberating incidental effects on civilians and civilian objects into their military policies and practice, for example in collateral damage estimates. Based on the effects of explosive weapons in populated areas, namely the extensive civilian harm being witnessed today, there is significant doubt that reverberating effects are sufficiently factored in as required by the rules of proportionality and precautions in attack.

### *Towards a better understanding of States’ positions, policies and practices*

Warfare in densely populated areas, where military objectives are intermingled with protected persons and objects, represents an important operational challenge for armed forces. A military commander has the responsibility to minimize the

68 ICTY, *The Prosecutor v. Galić*, Case No. IT-98-29, Judgment, 5 December 2003, para. 58.

incidental effects on civilians of an attack, and such a responsibility is heightened in an environment where civilians and civilian infrastructure are the main features of the theatre of operations. This holds equally true when the opposing party deliberately intermingles with civilians in order to shield its military activities – unlawful behaviour that nonetheless does not relieve the attacking party of its own obligations under IHL. Urban warfare thus entails a more demanding analytical process during the planning phase, as well as complex decision-making in real-time situations. As seen above, the military commander has a larger number of factors to take into account than when conducting hostilities in open areas.

Even more so than in open areas, an attacking party's ability to respect IHL in populated areas depends on the means and methods of warfare that it chooses to use, or not to use, taking into account their foreseeable effects in such environments, including their reverberating effects. Though some military practice, such as "collateral damage estimation" methodologies and "minimum safe distances," as well as lessons learned from post-attack "battle damage assessments" and "after action reviews," may help to minimize incidental harm to civilians, it remains unclear how these integrate the requirements of the rules of IHL discussed above.

What seems certain is that thorough training of armed forces in the selection and use of means and methods of warfare in populated areas, including on the technical capabilities of the weapons at their disposal, is critical to avoiding or minimizing incidental harm to civilians in this environment. Moreover, specific targeting directives applicable to the use of certain explosive weapons in populated areas may be required to ensure compliance with IHL.

Yet only a few armed forces are known to train specifically in urban warfare, or to otherwise apply specific limitations on the choice and use of explosive weapons in populated areas for the purpose of avoiding or minimizing incidental civilian harm. A better knowledge of existing military policy and practice, and more clarity on how States interpret and apply the relevant rules of IHL to the use of explosive weapons in populated areas, would help to inform debates about this important humanitarian issue, foster a possible convergence of views, and assist parties to armed conflicts who endeavour in good faith to comply with the law. Ultimately, this will lead to better protection of civilians in populated areas.

### 3) Responsible arms transfers

The ICRC, the Movement and the International Conference have long expressed concerns about the human suffering resulting from the poorly controlled availability and misuse of conventional arms. The ICRC's 1999 study *Arms Availability and the Situation of Civilians in Armed Conflict*, which was commissioned by the 26th International Conference, found that the uncontrolled proliferation of arms and ammunition *inter alia* facilitates violations of IHL, leads to high levels of insecurity that hamper humanitarian assistance, and contributes to prolonging the duration of armed conflicts. Based notably on these findings,

which were endorsed by the Movement, the 27th, 28th, and 31st International Conferences in turn committed States to enhancing the protection of civilians by strengthening controls on the availability of arms and ammunition at the national, regional and international levels. Crucially, as reiterated by the 31st International Conference, States recalled their obligation to respect and ensure respect for IHL. On this basis, they committed to making respect for IHL one of the important criteria on which arms transfer decisions are assessed, so that arms and ammunition do not end up in the hands of those who may be expected to use them to violate IHL.<sup>69</sup>

Considerable progress has been made in fulfilling these commitments in recent years. Several regional arms transfer instruments adopted over the last decade<sup>70</sup> include respect for IHL among their transfer criteria. But these instruments apply to limited groups of States, and differ in the scope of weapons they cover and in the level of risk that would prevent arms transfers.<sup>71</sup> With the Arms Trade Treaty (ATT), which was adopted in April 2013 and entered into force in December 2014, States have set common international standards for the transfer of conventional arms, their parts and components, and ammunition, with the express purpose of reducing human suffering. A key “principle” underpinning these standards and explicitly recalled in the ATT’s preamble is the obligation of each State to respect and ensure respect for IHL.

Today, as weapons continue to flow to armed conflicts in which serious violations of IHL are reportedly occurring, the ATT, regional arms transfer instruments, and the obligation of each State to respect and ensure respect for IHL provide a solid legal framework for responsible arms transfers. Faithfully interpreted and applied, these will help to strengthen the protection of civilians in armed conflicts. This framework will become more effective as more States join the ATT.

69 Resolution 2 of the 31st International Conference, “4-year action plan for the implementation of international humanitarian law,” Objective 5.

70 See the following legally binding regional instruments: EU Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (2008), Criterion 2 (c); ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials (2006), Article 6(3); Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (Kinshasa Convention, 2010 – not yet in force), Article 5(5)(a). See also regional guidelines or codes of conduct, such as: Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material (2005), Article 1(1); Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition (2004), Article 5(1); Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons (2005), section 2.2.3(b).

71 For example, looking only at the three legally binding regional instruments: the EU Common Position provides that arms export licences shall be denied if there is a “clear risk” that the weapons “might” be used in the commission of serious violations of IHL; the ECOWAS Convention prohibits arms transfers where the weapons are “destined to be used” for the commission of such violations; and the Kinshasa Convention prohibits such transfers where there is “a possibility” that the weapons “might be used” to commit war crimes.



It is important to stress that arms transfers by States that are not party to the ATT nor to regional instruments do not occur in a legal vacuum. At the very least, with regard to any form of support they provide to parties to armed conflicts, including the supply of weapons, all States must “ensure respect” for IHL “in all circumstances,” as required by common Article 1. This obligation is interpreted as also conferring on States not involved in an armed conflict a duty to ensure respect for IHL by the parties to the conflict, comprising both a negative and a positive obligation.<sup>72</sup>

Under the negative obligation, a State must refrain from encouraging a party to violate IHL through the transfer of weapons and ammunitions and must not take action that would aid or assist in such violations.<sup>73</sup> It is submitted that the obligation stemming from common Article 1 is not limited to action amounting to knowingly “aiding or assisting” in the commission of the violation as required under Article 16 of the Articles on Responsibility of States.<sup>74</sup> To prevent action that would encourage, aid or assist in the commission of violations, a State would have to assess whether the State or party to the conflict to whom the weapons or ammunitions would be transferred is likely to use them to violate IHL. If – based on this risk assessment – there is a substantial or clear risk that the weapons could be used in that manner, the State must refrain from transferring them.

Beyond this negative duty, the obligation to ensure respect for IHL requires a State to take positive steps to prevent IHL violations where there is a certain degree of predictability that they will be committed, and to prevent further violations in case they have already occurred. Here, a State’s duty to ensure respect is one of due diligence, the content of which varies depending on the circumstances, the degree of influence that can be exercised on those responsible for the violations, and the gravity of the violation. A State that has previously engaged in arms transfers with another State or party to the conflict would be in a position to influence the recipient’s behaviour and thus to ensure respect for IHL. In this case, the State should do everything reasonably in its power to implement this duty and has a variety of ways to do so, including in the context of decisions on arms transfer.

These limits on arms transfers stemming, as submitted, from the common Article 1 obligation to ensure respect for IHL, are complemented by the provisions of the ATT and of regional arms transfer instruments restricting arms transfers on the basis of respect for IHL and IHRL.

72 The obligation to ensure respect for IHL in both its negative and positive aspects is a rule of customary IHL in both international and non-international armed conflicts: “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.” Rule 144 of the ICRC Customary IHL Study.

73 This “negative obligation” to ensure respect for IHL was recognized by the ICJ in the *Nicaragua* case. ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment (Merits), 27 June 1986, para. 220.

74 Articles on Responsibility of States for Internationally Wrongful Acts, adopted by virtue of UN General Assembly Resolution 56/83, A/RES/56/83, 28 January 2002.

One of the most commendable advances of the newly adopted ATT is the absolute prohibition of arms transfers (Article 6) and the export assessment requirement (Article 7) that link the decision to transfer arms to the likelihood of serious violations of IHL or IHRL.<sup>75</sup> Article 6(3) in particular provides an absolute prohibition on transferring arms, ammunition, and parts and components if a State Party has knowledge at the time of authorization that the arms or items would be used in the commission of, among other crimes, “grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.” The scope of war crimes is based on a variable set of norms depending on the treaties to which the transferring State is a party. A number of States Parties have declared upon ratification their understanding that Article 6(3) encompasses a wide range of war crimes in all types of armed conflict, including serious violations of Article 3 common to the 1949 Geneva Conventions. The ICRC recommends, also bearing in mind the distinct requirements of common Article 1, that States adopt a broad scope of war crimes in any implementing legislation.

If an export of arms or related items is not prohibited under Article 6 of the ATT, a State party is further required under Article 7 to assess “in an objective and non-discriminatory manner” the “potential” that the arms or items “would contribute to or undermine peace and security” and whether they “could be used to ... commit or facilitate a serious violation of IHL,” among other possible negative consequences. This risk assessment must also take into consideration whether there are “measures that could be undertaken to mitigate the risks” of such negative consequences.

The State Party must deny the export authorization if, after conducting this assessment, it “determines that there is an overriding risk” of such negative consequences. This would appear to suggest a balancing of the interests listed in Article 7. A number of States Parties have declared upon ratification that they will interpret the term “overriding” as “substantial” or “clear.” Meanwhile, others have stated their understanding that an “overriding risk” would exist whenever any of the negative consequences listed in the provision are more likely to materialize than not, even after consideration of mitigation measures. In the view of the ICRC, such interpretations are consistent with the obligation to ensure respect for IHL, to the extent that they would prevent arms transfers under Article 7 in the face of clear risks that serious violations of IHL could be committed or facilitated.

As for the factors that States should take into account in their risk assessments in arms transfer decisions, the ICRC has proposed a range of indicators, including: the recipient’s past and present record of respect for IHL; its formal commitments to respect IHL; the measures it is taking to ensure respect for IHL by its armed forces; whether it has in place the necessary legal, judicial and administrative measures to repress serious violations of IHL; and

75 See generally ICRC, *The Arms Trade Treaty from a humanitarian perspective*, forthcoming.

whether it has in place measures to prevent the diversion of arms from the intended recipient, such as the adequacy of stockpile management and of security and border controls in the recipient State.<sup>76</sup>

In light of the common Article 1 obligation to ensure respect for IHL and the fact that a growing number of States have specifically committed themselves, either through the ATT or through regional instruments, to take into account respect for IHL in their arms transfer decisions, the challenge is now to ensure that these requirements are effectively and consistently applied in practice. Indeed, there is an urgent need to close the gap that subsists between the duty to ensure respect for IHL in arms transfer decisions and the actual transfer practices of too many States. This will go a long way in controlling the availability of conventional weapons, preventing them falling into the hands of those likely to use them to commit serious violations of IHL, and ultimately strengthening the protection of civilians in armed conflict and post-conflict situations.

#### 4) Nuclear weapons

Since 1945, the Movement has repeatedly voiced its concern about the devastating humanitarian consequences of nuclear weapons and has called on States to prohibit these weapons. The most recent appeal, adopted by the 2011 Council of Delegates, calls on States to ensure that nuclear weapons are never again used and to urgently negotiate and conclude a legally binding international agreement to prohibit the use of, and completely eliminate, these weapons, in accordance with existing commitments and international obligations.<sup>77</sup>

The Movement's concerns about nuclear weapons are based on the first-hand experience of the Japanese Red Cross Society and the ICRC in their efforts to assist the victims of the nuclear bombs dropped on Hiroshima and Nagasaki in 1945, and the Japanese Red Cross's treatment of the tens of thousands of survivors who suffered from the long-term health effects of exposure to nuclear radiation, which still continues today. They are also based on in-depth assessments carried out by the ICRC<sup>78</sup> and other organizations.<sup>79</sup> These concluded that an effective means of assisting a substantial portion of survivors of

76 See ICRC, *Arms transfer decisions: Applying international humanitarian law criteria, Practical guide*, ICRC, Geneva, 2007 (2nd edition forthcoming). Similar indicators appear in the 2015 updated *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, Council of the European Union, Brussels, 2015.

77 Resolution 1 of the 2013 Council of Delegates, "Working towards the elimination of nuclear weapons," available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r1-nuclear-weapons-cd13r1-eng.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r1-nuclear-weapons-cd13r1-eng.pdf).

78 Dominique Loye and Robin Coupland, "Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?" *International Review of the Red Cross*, Vol. 866, June 2007, pp. 329–344; Dominique Loye and Robin Coupland, "International assistance for victims of use of nuclear, radiological, biological and chemical weapons: time for a reality check?" *International Review of the Red Cross*, Vol. 874, June 2009, pp. 329–340.

79 See, for example, John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for United Nations Humanitarian Coordination and Response* (UNIDIR/2014/6), UNIDIR, 2014, available at: <http://www.unidir.org/illusionofsafety>.

a nuclear detonation, while adequately protecting those delivering assistance, is not currently available at the national level and not feasible at the international level.

Knowledge of the humanitarian impact of nuclear weapons has also been informed by three international conferences hosted by the Governments of Norway (Oslo, March 2013), Mexico (Nayarit, February 2014) and Austria (Vienna, December 2014). Discussions there reinforced what is known about the effects of nuclear weapons and also highlighted new concerns, such as the potential impact of a limited nuclear exchange on the global climate and food production.

The effects of the atomic bombings in Hiroshima and Nagasaki and subsequent studies have shown that nuclear weapons have severe immediate and long-term consequences due to the heat, blast and radiation generated by the explosion and the distances over which these forces are likely to be spread. The unique characteristics of nuclear weapons were recognized by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons.<sup>80</sup> The ICJ also observed that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.” Indeed, in the view of the ICRC, the sheer scale of civilian casualties and destruction that would result from the use of a nuclear weapon in or near a populated area, and its long-term effects on human health and the environment, raise serious questions about the compatibility of this weapon with IHL.

### *IHL rules regulating the conduct of hostilities and nuclear weapons*

While IHL does not specifically prohibit nuclear weapons, their use is restricted by IHL’s general rules regulating the conduct of hostilities, which apply to the use of all weapons in armed conflict.<sup>81</sup> Outlined below are the primary issues and concerns that arise when the use of nuclear weapons is considered under some of these key rules.

*The prohibition of indiscriminate attacks:* This rule prohibits attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction. Such attacks include the use of weapons that cannot be directed at a specific military objective or that have effects that cannot be limited as required by IHL.

There are serious doubts as to whether nuclear weapons can be used in accordance with this rule. Nuclear weapons are designed to disperse heat, blast effects and radiation, and in most scenarios this will occur over very wide areas. For example, the use of a single 10 to 20 kiloton bomb (the yield of the bombs used in Hiroshima and Nagasaki, which are small bombs by today’s standards) in or near a populated area will likely cause a very high number of civilian casualties, although the specific effects in a given case will depend on a variety of

<sup>80</sup> See footnote 44 above.

<sup>81</sup> *Ibid.* on the application of the general rules of IHL to nuclear weapons as recognized by the ICJ.

factors. The heat generated by the explosion can be expected to cause severe burns to exposed skin up to three kilometres from the epicentre, and massive destruction of buildings and infrastructure within several kilometres. Such effects would indicate an attack striking military objectives and civilians and civilian objects without distinction.

There is also a serious risk that the effects of such an explosion would not be limited in space and time, as required by IHL. This is particularly true for the intense fires, and possibly firestorms, that can result from the heat generated by a nuclear explosion. The same concern applies to radioactive fallout. While it is certain that radioactive particles will fall in the immediate area affected by the explosion, they can also disperse far from it, and even into other countries, carried by wind and other weather conditions.

*Proportionality in attack:* The nature of the effects produced by a nuclear weapon also raise doubts that an attack using such a weapon in or near a populated area could respect the rule of proportionality in attack. This requires that, for an attack against a military objective to proceed, the expected incidental civilian casualties and/or damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated.

In the view of the ICRC, a party intending to use a nuclear weapon would be required to take into account, as part of the proportionality assessment, not only the immediate civilian deaths and injuries and damage to civilian objects (such as civilian homes, buildings and infrastructure) expected to result from the attack, but also the foreseeable reverberating effects of the attack.<sup>82</sup> These include those caused by damaged or destroyed water and electrical supply systems and other critical infrastructure supporting services essential for the civilian population, including health services. Foreseeable reverberating effects also include the long-term effects of exposure to radiation, in particular resulting illnesses and cancers in the civilian population. Such consequences can clearly be anticipated given what is now known about nuclear weapons.

*Protection of the natural environment:* Under this customary IHL rule, which slightly differs from that of Additional Protocol I, all means and methods of warfare must be employed with due regard to the protection and preservation of the natural environment and all feasible precautions must be taken to avoid, and in any event minimize, incidental damage to the environment. Thus, any decision to use nuclear weapons must take into account the potential impact on, and damage to, the environment, including foreseeable long-term effects. The use of even a single nuclear weapon may have significant effects on the natural environment due to the impact of dust, soot and radioactive particles on the atmosphere, soil, plants and animals.

82 On this point, see section VII.2 above on the use of explosive weapons in populated areas.

*Unnecessary suffering to combatants:* Although combatants may be lawfully attacked in an armed conflict, IHL prohibits the use of weapons of a nature to cause them superfluous injury or unnecessary suffering, meaning injury or suffering that is out of proportion to the military advantage sought. The detonation of a nuclear weapon generates significant, and often fatal, levels of radiation with devastating immediate and long-term consequences to the health of exposed individuals. Effects include damage to the central nervous system and to the gastrointestinal tract and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer. The short- and long-term illnesses, permanent disability and suffering caused by radiation exposure raise serious questions about the compatibility of nuclear weapons with this rule.

### *Difficulty envisaging compatibility of use of nuclear weapons with IHL*

It has been argued by some States and commentators that low-yield nuclear weapons could be compatible with the rules of IHL.<sup>83</sup> While the use of low-yield nuclear weapons in a remote area, such as against troops in a desert or against a fleet at sea, may not have immediate effects on civilians, there would remain significant concerns about the impact of radiation on combatants, the radiological contamination of the environment, and the eventual spread of radiation to civilian areas. Equally unsettling is the serious risk of nuclear weapons being used in response to such an attack, likely resulting in further escalation involving even greater use of nuclear weapons by both parties, with catastrophic humanitarian consequences.

In its 1996 Advisory Opinion, the ICJ concluded that the use of nuclear weapons “would generally be contrary to” the principles and rules of IHL. However, the ICJ was unable to decide whether such use would be lawful or unlawful, “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” In this respect, the ICJ did not conclude that the use of nuclear weapons would be allowed in an extreme case of self-defence. Rather, it indicated that the state of international law and the facts at its disposal at the time did not allow it to reach a definitive conclusion.

The ICRC considers that the exercise of the right of self-defence – even in an extreme situation where the very survival of a State is at stake – can on no account release that State from its obligations under IHL. Self-defence must be exercised with due regard for IHL, whatever the circumstances, and not in violation of the very rules intended to mitigate the suffering caused by armed conflict.

83 In 1996, after examining the issue, the ICJ stated that none of the States claiming the legality of nuclear weapons under such circumstances had presented precise scenarios in which these weapons would be used, or had addressed the associated risk of escalation to a more devastating nuclear war (see footnote 52 above, para. 94).

The above concerns under IHL led the Movement to conclude in 2011 that “it is difficult to envisage how any use of nuclear weapons could be compatible with the requirements of international humanitarian law.” In the view of the ICRC, the new evidence and information that has emerged in recent years, including in international conferences on the humanitarian impact of nuclear weapons, cast further doubt on whether nuclear weapons could ever be used in accordance with the above-mentioned rules of IHL.

Preventing the use of nuclear weapons requires States to fulfil their existing obligations and commitments to pursue negotiations aimed at prohibiting their use and completely eliminating them through a legally binding international agreement. The ICRC has appealed to States to establish a time-bound framework to do so. It has also called on States that possess nuclear weapons to, in the meantime, diminish the risks of intentional or accidental nuclear detonations by reducing the role of nuclear weapons in their military doctrine and reducing the number of nuclear weapons on high alert, in accordance with existing commitments.

## **VIII. Private military and security companies**

The use of private military and security companies (PMSCs) in armed conflicts rose substantially some 10 years ago, causing concern about the possible implications for the protection of the civilian population.<sup>84</sup> Recognizing the humanitarian challenges, Switzerland and the ICRC launched a joint initiative that led to the adoption in 2008 of the Montreux Document, which aimed to define how international law applies to the activities of PMSCs present in theatres of armed conflict. The text reaffirmed the existing international obligations of States and outlined examples of good practices to assist them in promoting respect for international law by PMSCs.

While reliance on PMSCs to provide services that bring them close to combat activities has arguably decreased, private contractors continue to operate in situations of armed conflict, to evolve, and to diversify. There is thus a continued need to work on the implementation of the rules and good practices contained in the Montreux Document. Challenges can also arise due to the involvement of PMSCs in post-conflict and in other, comparable situations. In these and other contexts, the use of force by PMSCs, to give just one salient example, must be strictly regulated in order to prevent abuses.

### *Regulating PMSCs: Complementary international initiatives*

The Montreux Document constitutes an important building block of broader efforts to clarify, reaffirm and/or develop international legal standards aimed at achieving greater respect for international norms in situations where PMSCs operate. Several

<sup>84</sup> These concerns were addressed in some detail in the previous two reports on IHL and the challenges of contemporary armed conflicts, submitted, respectively, to the 30th and 31st International Conferences.



other international initiatives have also been launched in the past several years to regulate the activities of private contractors. For instance, discussions are taking place within the UN context on the possibility of elaborating an international convention to regulate PMSCs. Such an instrument would lay down new obligations binding on States, and could thus go beyond the Montreux Document, which primarily restated the already existing international obligations of States related to PMSCs. In this context, it should be recalled that the Montreux Document is not – and was not meant to be – the definitive and sole text capable of addressing legal issues relating to PMSCs.

Although other initiatives are distinct from, and take a different approach to, that of the Montreux Document, the ICRC is of the view that they should be considered as being complementary. The common goal of each is to promote respect for international law. Such initiatives also have an important role to play in ensuring that PMSCs do not commit acts that would be contrary to international law. What is ultimately important is that the different initiatives make up a mutually reinforcing network of obligations, standards and good practices that should serve to improve the protection of persons affected by armed conflict (or of those who find themselves in situations that fall below that threshold).

### *Montreux +5 Conference: Progress and challenges*

Recognizing the potential humanitarian consequences arising from the activities of PMSCs, the ICRC's exclusively humanitarian goal is to promote respect for IHL and IHRL in situations of armed conflict in which such companies are present. It is with this aim that the ICRC continues to work for the full and effective implementation of the existing obligations of States under international law, as reflected in the Montreux Document.

In December 2013, Switzerland and the ICRC hosted the Montreux +5 Conference to mark the fifth anniversary of the finalization of the Document and to take stock of progress achieved. From an initial 17 States, the number of signatories has grown to 52, with the text also having been accepted by three international organizations. In addition to the increase in the number of endorsements, the humanitarian objectives underlying the Montreux Document may be said to have been significantly advanced since its adoption seven years ago. The Document has been instrumental in making it clear that international obligations apply to the activities of PMSCs. It has also helped raise awareness of States' obligations with respect to the operation of PMSCs, and of the importance of adopting and implementing adequate domestic legislation. Despite these results, much remains to be done going forward in order to adequately regulate the activities of PMSCs in national law and practice with a view to ensuring better respect for international law.

While several States have enacted domestic legislation on PMSCs, more States need to do so, and the relevant national laws and corresponding regulatory frameworks need to be clearer and more robust. States need to take action to clearly delimit the services that may or may not be contracted out to PMSCs. In this respect, whether a particular service could cause PMSC personnel to directly

participate in hostilities should be given particular attention.<sup>85</sup> Another area requiring further work is ensuring the accountability of and oversight over PMSCs and their personnel as regards violations of international and national law. A major challenge in this regard is the multinational nature of a large part of the industry. Given that several States can have a bearing on, or be impacted by, the operations of PMSCs, cooperation among States is essential. Put differently, States must take the necessary legislative and administrative measures in a concerted manner if respect for international law and accountability for violations involving PMSCs are to be ensured.

Another area of concern is the reliance of some States on PMSCs to train members of their security and military forces in IHL and IHRL. Given that adequate training is a key element in preventing violations of IHL, the provision of training services by PMSCs requires appropriate regulation and regular oversight by the States concerned. It must constantly be recalled that States remain accountable for supervising and enforcing respect for international law by PMSC personnel.

### *Montreux Document Forum: Taking the Montreux Document forward*

The need to take the Montreux Document forward was at the centre of discussions at the Montreux +5 Conference, with participants strongly supporting the idea of institutionalizing a regular dialogue on the challenges faced in the implementation and promotion of the Document. To follow up on this proposal, Switzerland and the ICRC convened a series of preparatory meetings among Montreux Document participants during the course of 2014 to discuss the tasks and structure of the Montreux Document Forum (MDF). This led to the formal establishment of the Forum during a Constitutional Meeting held on 16 December 2014 in Geneva, which brought together over 50 States and three international organizations.

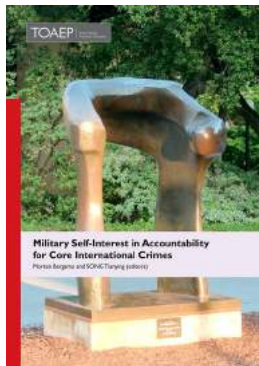
The objective of the MDF is to provide an informal platform for signatories to discuss and exchange information on challenges faced in the regulation of PMSCs. The Forum will aim to support national implementation of the rules and good practices contained in the Montreux Document and the development of practical implementation tools. It will further seek to facilitate the exchange of experiences on lessons learned, good practices and challenges related to the implementation of the text. It will likewise work to expand support for the Document among other

85 The presence of private contractors carrying out military tasks among the civilian population diversifies and swells the ranks of weapon bearers who could pose a threat to civilians. It also contributes to the blurring of the essential line between civilians and combatants. The tasks that PMSC personnel perform, the equipment they use and wear, and the weapons they carry may easily lead them to be mistaken for combatants. In addition, it is difficult to ensure compliance with IHL when contractors act outside the military chain of command, as they most often do. This leads the ICRC to believe that PMSC personnel should not be contracted to take a direct part in hostilities, even if IHL does not explicitly prohibit it.

States and international organizations; although the number of signatories has tripled in the last seven years, there is still a need to increase participation from States in all regions of the world and among international organizations.

The ICRC supports the establishment of the MDF and is committed to contributing to its future activities, in cooperation with Switzerland. It is anticipated that, by working on the implementation and promotion of the Document, the MDF will play an important role in ensuring greater respect for international law and thus enable greater protection for persons affected by PMSC operations. The ICRC encourages States and international organizations that have not yet done so to consider endorsing the Montreux Document. It also encourages Montreux Document participants to actively engage with and support the work of the MDF in order to ensure the necessary regulation of PMSCs.

## BOOK REVIEW



# Military Self-Interest in Accountability for Core International Crimes

**Morten Bergsmo and Tianying Song (eds)\***

**Book review by William J. Fenrick**, a Canadian military lawyer and former Senior Legal Adviser for the International Criminal Tribunal for the former Yugoslavia.

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The book under review, edited by Morten Bergsmo and Tianying Song, contains papers linked to a conference of the same name given at Stanford University in 2012. It opens a debate on a topic that is extremely important but has not been adequately addressed in the past. Reasons for this lack of prior discussion include the perception by most lawyers and legal scholars directly involved with international humanitarian law (IHL) that their task is one primarily of prevention rather than enforcement and, unfortunately, the relative dearth of court cases when compared with the large number of offences allegedly committed.

The core international crimes are genocide, crimes against humanity, war crimes and aggression. All members of the armed forces are, obviously, obligated to comply with applicable national and international criminal law, including an obligation not to commit any of the core international crimes. The most effective way to ensure such compliance is to adopt a preventive law approach. All members of the armed forces must receive sufficient training in the law to enable them to comply with its constraints in relatively straightforward situations. At lower levels in military organizations, this training will normally aim at teaching

\* Published by Torkel Opsahl Academic EPublisher, Brussels, 2015. The reviewer contributed a foreword to the book under review but was not involved in the 2012 conference and did not see the book or any of the papers until after publication.

individual soldiers to comply with the basic principles of the law as embodied in codes of conduct or rules of engagement. At higher levels, officers may require a degree of formal training in the relevant law and also access to legal specialists who have both a degree of expertise in the law and an awareness of the realities of military operations. At all levels, both trainers and legal advisers must and do advise that compliance with the law should also comply with the principles of war, which mandate such things as focusing on the aim of the military operation and economizing on the resources used in particular operations to ensure adequate resources are available for other tasks. If the law is not to be merely hortatory, it must be enforced when breaches occur. Although the military should have a substantial self-interest in accountability for core international crimes, those who commit such offences may not always be subject to trial before military courts either because of limitations in the jurisdiction of such courts or because, for some core crimes such as genocide and crimes against humanity, the degree of involvement of higher-level persons may render military prosecution unrealistic.

The main text of the book consists of sixteen papers by sixteen authors (one of the editors both contributed a paper and co-wrote a second with the other editor). Of the authors, three appear to be former or presently serving US military lawyers, four appear to have had close involvement with their national military legal systems (Norway, the UK, Israel and Switzerland) and one is a thoughtful Indonesian general with a great deal of military experience. The other authors do not appear to have had direct involvement with their national military forces or their national military legal systems. By and large, the papers of those authors who have not had such direct involvement tend to adopt a more abstract and theoretical approach, while those who have had such involvement tend to be more concrete. This is not a rigid rule, however, as some of the papers by authors who have no apparent military background – notably the case study on comfort women by Kiki Anastasia Japutra and that by Róisín Burke on the impact of the rule of law on troop discipline and mission operational effectiveness in conflict-afflicted States – are admirably down-to-earth. Further, both theoretical papers and detailed case studies have their places in the developing dialogue on this subject.

The opening paper by Morten Bergsmo and Tianying Song, entitled “Ensuring Accountability for Core International Crimes in Armed Forces: Obligations and Self-Interest”, is a thoughtful overview of the general issue and of the other papers in the book. It includes an extremely helpful but not exhaustive list of self-interests in ensuring accountability derived from the other papers and from the reflections of the two authors: ensuring accountability upholds the core values, both legal and moral, of the armed forces and of their State; it also enhances the domestic legitimacy of the armed forces, whereas a failure to ensure accountability may result in a loss of domestic support for a conflict; it fosters the accomplishment of counter-insurgency, peace-building and other missions by gaining support from the local population; it enhances military professionalism; it enhances discipline and control over the armed forces and fosters operational efficiency; at the national level, it pre-empts international judicial scrutiny; it

fosters the development of national or military judicial capacity; it contributes to the preservation of the morale and self-respect of individual soldiers; and it minimizes the risk of military commanders being held liable on the basis of the doctrine of superior responsibility. All of these self-interests are important.

The second paper, by Arne Willi Dahl, the long-serving and recently retired Judge Advocate General of the Norwegian Armed Forces, addresses the relationship between the trend toward the civilianization of military justice in many countries, which may be perceived to produce fairer trials, and the continuing need to ensure that adequate heed is paid to relevant military factors. This relationship is complicated, as the rights of the accused, the rights of victims and the brutal realities of combat must all be given due regard.

Marlene Mazel of the Israeli Ministry of Justice contributes a paper addressing the Israeli perspective on compliance with the law. She reviews the preventive measures taken by the Israeli Defence Forces to ensure compliance, and then goes on to review Israeli jurisprudence related to the enforcement of the law, a body of case law with which IHL experts outside of Israel are insufficiently familiar.

Three papers in the book address the experience of the US Armed Forces. The first of these, by Elizabeth L. Hilman, discusses accountability in the nineteenth-century US Army and focuses on US military experience during the Mexican War and the Civil War.

Christopher Jenks contributes an extremely helpful paper addressing how the United States charges its service members for violating the laws of war. He notes that the US approach is to charge its service members with analogous violations of the Uniform Code of Military Justice instead of with war crimes. There may be a variety of reasons for this approach, including a desire to minimize the optics of the case. Jenks is of the view that a war crime is a war crime and should be charged as such, whether the accused is a service member or a detainee. There is much to be said for Jenks' perspective, but one must also observe that if offences are charged as war crimes or as crimes against humanity, it may be necessary for the prosecution to prove several additional elements, such as the classification of the conflict or the context for commission of the offence, which have nothing to do with the alleged moral culpability of the accused but which may take up an inordinate amount of court time.

Franklin Rosenblatt provides an extremely concrete and practical analysis of how US military justice has been applied in Afghanistan and Iraq. He addresses all military justice issues and does not confine his paper to the prosecution of core international crimes. He does point out, however, that military commanders tend to be reluctant to have courts martial conducted in an operational theatre and they tend either to send the accused back to the United States for prosecution or to reclassify the alleged offence as one of lesser severity which can be handled summarily without recourse to the military judicial system. The general rationale for these tendencies is that the armed forces in theatre are too busy fighting a war, and this approach is not completely unreasonable. On the other hand, where crimes have allegedly been committed against civilians in

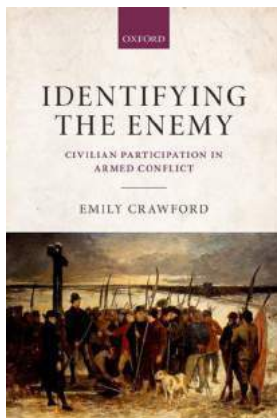
theatre or against enemy personnel, removal of the accused for trial at home gives local people the impression that US soldiers may commit offences against them with impunity, even when that perception is inaccurate.

As a former military lawyer, a former legal adviser at the International Criminal Tribunal for the former Yugoslavia, an amateur historian and a person very interested in concrete examples, the reviewer does have a few observations about additional avenues which might be explored to elaborate upon this extremely important subject. First, Germany is the country which, because of its history during the Second World War, has done most to have its soldiers internalize the need to comply with IHL. Reflections by German historians, military and academic lawyers and military officers on military self-interest in accountability might substantially enrich the discussion. Second, case studies related to particular incidents (such as the My Lai massacre), their treatment in the justice system, and their impact on the military and on the general population might also be helpful.

This volume should be of interest to all persons professionally involved with IHL, with international human rights law or with international criminal law because of the importance of the topic and the high quality of the papers. The armed forces do have a substantial self-interest in accountability for core international crimes, primarily because such accountability will contribute to individual and general deterrence. A second reason supporting accountability is that reported trials will help to flesh out the law in a manner which should contribute both to recognizing military realities and to furthering the fundamental purpose of IHL – that is, limiting human suffering in armed conflict. To use a domestic example, the general concept of negligence in motor vehicle cases is well established and elaborated upon in national legal cases. There is no such elaboration of the concept of proportionality in IHL cases, with the result that the application of the concept is far too subjective.



## BOOK REVIEW



# Identifying the Enemy: Civilian Participation in Armed Conflict

Emily Crawford\*

Book review by Ellen Policinski, JD, LLM, Thematic Editor,  
*International Review of the Red Cross*.

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Emily Crawford's 2015 book, *Identifying the Enemy: Civilian Participation in Armed Conflict*, is an examination of civilian involvement in armed conflict, with a focus on the development of international humanitarian law (IHL) relating to civilians' direct participation in conflict. It puts the evolution of the law in the broader historical context from the birth of modern IHL to drone targeting and cyber-warfare.

Dr Emily Crawford, of University of Sydney Law School, wrote her doctoral thesis on the disparate treatment of participants in armed conflict.<sup>1</sup> *Identifying the Enemy* grew out of a post-doctoral fellowship at the University of Sydney aimed at exploring the way in which civilian participation in twenty-first-century armed conflict has created challenges for the traditional conceptualization of civilians and belligerents.<sup>2</sup> From the level of technical detail and the historical depth of the volume, it is clear that its intended audience are scholars who are interested in tracing major developments in the distinction between civilians and belligerents under international law, with a view to clarifying what constitutes "direct participation in hostilities" (DPH) by civilians.

*Identifying the Enemy* is successful in its meticulously researched framing of the modern concept of DPH within its historical evolution, making a valuable

\* Published by Oxford University Press, Oxford, 2015.

contribution to the literature concerning civilian participation in hostilities (direct or otherwise) and examining how civilians taking part in the fight are perceived and identified by armed actors. Crawford's field of view in this discussion expands on the traditional understanding of civilians who engage in DPH to discuss how the international community has dealt with civilians who participate in hostilities, who she terms "irregular combatants" or "irregulars". She aims to contextualize the contemporary understanding of which conduct results in a loss of civilians' legal protection from attack by framing the question in light of legal developments over the course of modern history, reaching back to the 1800s and following the law's evolution up to today.

The book is divided into three main parts, entitled "The Development of the Law relating to Civilians and Armed Conflicts", "Current Challenges to the Law on Civilians and Armed Conflict" and "Civilian Participation in Armed Conflict and the Law in the Twenty-First Century". Although it is sometimes easy to lose sight of the DPH "forest" through the trees of Crawford's in-depth analysis and rich historical references, overall the reader will find the book is structured in an accessible way.

In outlining the development of the law, Crawford begins with the principle of distinction, a touchstone she comes back to time and again to remind the reader of its importance in regulating warfare.<sup>3</sup> Also threaded throughout the book are the historical sources Crawford cites, such as the 1868 St Petersburg declaration,<sup>4</sup> Grotius's seminal 1625 work *The Law of War and Peace*,<sup>5</sup> and Rousseau's *The Social Contract*.<sup>6</sup> Crawford is not unique in turning to historical and contemporary examples in examining the issue of civilian participation in hostilities,<sup>7</sup> but the breadth of her research is impressive. Putting the discussion in historical context gives an important sense of the evolution of thinking around civilians participating in conflict, and grounds Crawford's analysis solidly in the wealth of scholarly thought that has taken place on this topic.

Crawford's first chapters use this deep historical analysis to examine how perceptions of civilian immunity from attack have evolved over time, finding patterns in an individual's ability to cause harm triggering their susceptibility to lawful attack and looking at the types of individuals that are protected from attack under different religious traditions.<sup>8</sup> She traces the international community's legislative responses to civilian participation in hostilities, as most

1 Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010.

2 See Sydney Law School, "Meet Our Expert – Dr Emily Crawford", available at: [http://sydney.edu.au/law/research/our\\_experts/emily\\_crawford.shtml](http://sydney.edu.au/law/research/our_experts/emily_crawford.shtml) (all internet references were accessed in December 2015).

3 *Identifying the Enemy*, p. 12.

4 *Ibid.*, p. 13.

5 *Ibid.*, p. 20.

6 *Ibid.*, pp. 21–22.

7 See, e.g., Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, C. Hurst & Co., London, 2007; Nicolette Boehland, *The People's Perspectives: Civilian Involvement in Armed Conflict*, Report, Center for Civilians in Conflict, Washington, DC, 2015, available at: [http://civiliansinconflict.org/uploads/files/Peoples\\_Perspectives\\_WebFinal.pdf](http://civiliansinconflict.org/uploads/files/Peoples_Perspectives_WebFinal.pdf).

8 *Identifying the Enemy*, pp. 21–22.

IHL scholars do, back to the 1874 Lieber Code,<sup>9</sup> also discussing the 1874 Brussels Declaration<sup>10</sup> and the 1880 response by the Institute of International Law in the form of the *Oxford Manual on the Laws of War on Land*,<sup>11</sup> and the 1899 and 1907 Hague Regulations,<sup>12</sup> before reaching the 1949 Geneva Conventions and their Additional Protocols.<sup>13</sup> She looks at historical developments in treaty law, scholarly literature, State practice (via military manuals, codes of conduct, domestic laws and regulations etc.), the practice of international organizations and international tribunals, and soft-law instruments. Crawford's book does not include mention of the 2015 US *Law of War Manual*, which was published in the same year.<sup>14</sup>

Since 2009, the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Interpretive Guidance) has been the principal text referenced in scholarly discussions of civilian participation in hostilities.<sup>15</sup> Crawford has included much discussion of this text in her book, but does not rely solely upon it, also looking to other sources such as State practice, international and national jurisprudence, and other interpretations of the law. She includes the most well-known criticisms of the Interpretive Guidance, notably the criticisms of Section IX on "Restraints on the Use of Force in Direct Attack", as well as her own critical analysis of the text. She sees the Interpretive Guidance as "the 'outer marker' of a more narrow and restrictive approach to targeting persons directly participating in hostilities".<sup>16</sup>

In determining whether a consensus on the definition of DPH can be found after examining these historical and modern-day interpretations of the concept, Crawford reaches a definition to be evaluated on a case-by-case basis:

[I]f in light of circumstances ruling at the time, a person appears to be taking a direct part in hostilities, and that their actions are more than indirect (i.e., political support, provision of basic sustenance such as food or water) but are likely to cause actual harm to an enemy, one could feasibly maintain a charge of DPH.<sup>17</sup>

Having established consensus only on this vague and exceedingly broad definition of the conduct that makes a civilian subject to lawful attack, in the second part of the book Crawford discusses how this lack of clarity plays out in light of several features of modern armed conflict: targeted killing, remote warfare (drones and cyberwarfare), private military and security contractors, and criminal activities in

9 *Ibid.*, pp. 27 ff.

10 *Ibid.*, pp. 30 ff.

11 *Ibid.*, pp. 31 ff.

12 *Ibid.*, pp. 32 ff.

13 *Ibid.*, pp. 35 ff.

14 US Department of Defense, *Law of War Manual*, Office of General Counsel, Washington, DC, 12 June 2015, available at: [www.dod.mil/dodgc/images/law\\_war\\_manual15.pdf](http://www.dod.mil/dodgc/images/law_war_manual15.pdf).

15 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

16 *Identifying the Enemy*, p. 88.

17 *Ibid.*, p. 91.

armed conflict. A substantive critique that can be made here is that while these topics may be “sexy” at the moment, it is important to note that such “new” phenomena can be analyzed within the existing IHL framework to create consistency and predictability in the law. For example, targeted killing is not a new phenomenon, regardless of the relatively recent debate on drones as a weapons platform.

The third and final part of the book argues that the way forward in dealing with increased civilian participation in armed conflict is through the development of soft-law instruments.<sup>18</sup> Crawford defines “soft law” broadly, as “any non-binding instrument or set of instructions designed to either restate, affirm, develop, and/or clarify the binding norms that regulate conduct in a particular area”.<sup>19</sup> She cites numerous benefits of soft-law instruments in armed conflict, especially in non-international armed conflict.<sup>20</sup>

Crawford points out that it is unclear whether soft law truly affects the behaviour of belligerents without more details and concrete data in this area.<sup>21</sup> She also acknowledges some of the drawbacks of soft law. She uses the ICRC’s Interpretive Guidance as an example here, stating that it is “a document issued by a well-respected and undoubted leader in IHL affairs, but one that came out of a process which was marked by dissent and disavowal by some of the participants”.<sup>22</sup> Tainted, in Crawford’s view, by disagreements among experts during the consultation process, the Interpretive Guidance suffers from the fact that “any potential norm-influencing power that international law instruments may have will be limited by the degree to which the instruments are accepted by States, and incorporated into State practice”.<sup>23</sup> One potential danger behind the author’s call for further regulation of DPH through new soft-law instruments is the risk of opening up the protection offered to the civilian population to erosion by those who would seek to expand the interpretation of DPH.

According to Crawford, “the question of DPH might be best addressed through unconventional means, such as soft law instruments”.<sup>24</sup> Given the dearth of new binding legal instruments at the international level, soft law certainly does seem an attractive option. However, the controversy that greeted the 2009 Interpretive Guidance, a key example of such soft law, shows that this solution may have its flaws. Crawford interestingly points to the possibility that such soft law could be “a number of smaller, shorter, more specific documents on specific areas”, rather than addressing DPH as a whole in the vein of the ICRC’s Interpretive Guidance.<sup>25</sup> This may solve some of the controversies, although the

18 *Ibid.*, p. 206.

19 *Ibid.*, p. 212, citation omitted.

20 *Ibid.*, pp. 212–216.

21 *Ibid.*, pp. 217–225.

22 *Ibid.*, pp. 226–227, citations omitted.

23 *Ibid.*, pp. 227–228.

24 *Ibid.*, p. 7.

25 *Ibid.*, p. 229.

specific areas where States are likely to agree to such soft-law instruments may be those that are already accepted as norms.

Crawford presents a strong case that it is worth considering how to better regulate the varied forms of civilian participation in hostilities under international law. In light of the deep and informative historical examination that underlies her analysis, this book presents a valuable perspective and is an interesting contribution to the literature on the topic. Given that the consequences for civilians who are directly participating or who are perceived as directly participating in hostilities can be lethal, one can only hope that there will be continued discussion leading to more consensus on when civilians lose their protection from direct attack.



## BOOKS AND ARTICLES

# New publications in humanitarian action and the law

This selection is based on the new acquisitions of the ICRC's Library and Research Services

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Daniel R. Brunstetter and Arturo Jimenez-Bacardi, "Clashing over Drones: The Legal and Normative Gap between the United States and the Human Rights

### ICRC Library and Research Services

The ICRC's Library and Research Services is a public resource presently offering more than 25,000 books and articles, as well as 300 journals. The collection focuses on international humanitarian law, the work of the ICRC and the International Red Cross and Red Crescent Movement, the challenges of humanitarian work and issues of humanitarian concern in war, and the history and development of armed conflict. Other topics include international criminal law, human rights, weapons, detention, and refugees and displaced persons. The ICRC has acquired publications and periodicals since 1863, and holds specific collections, including rare documents dating back to the foundation of the organization.



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