

Interview with Sergio Jaramillo Caro*

The Honourable Sergio Jaramillo Caro is the Colombian Vice-Minister of Defence. Mr Jaramillo Caro studied philosophy and philology at Trinity College, University of Toronto, and Corpus Christi College, University of Oxford. He has an M. Phil. in philosophy from Cambridge University and was a doctoral candidate in Greek at the University of Heidelberg in Germany. He has been an adviser to the Ministry of Foreign Affairs, was in charge of diplomacy for peace (2000–1), and was political counsellor at the Colombian embassy in Paris (2001–2). He was also adviser for political and strategic affairs at the Ministry of Defence (2002–3) and drafted the policy of Democratic Security. From 2004 to 2006 he served as director of the Ideas for Peace Foundation in Bogotá.

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Modern armed conflicts are seeing an increasing civilian participation, and more and more civilians are affected directly by conflict.

It is well known that in many armed conflicts of today's world, it is increasingly unlikely that a soldier will be involved in conventional combat and that, on the contrary, he will find himself operating instead, in Rupert Smith's phrase, 'amongst the people'. The challenges of operating in this environment are enormous; they have been seriously underrated by the academic commentators. It is obvious that the civilian population can never be the enemy and that we must do everything to protect it. But where is the line that divides a 'civilian' from a 'combatant'? That is an extremely tricky question, especially when the enemy uses and abuses the civilian population for his own purposes.

How do you view this development's effect on Colombia?

Colombia's experience is in many ways at the forefront of some of the problems in the application of international humanitarian law (IHL) today. Let me give you

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two examples of what I mean. First, it is well known that all conflict situations are dynamic and that people change their behaviour strategically. At one stage, you may think that everything is quite clear, and soon after you find that you're facing a different situation and you no longer know exactly what the rules are. Take the case of the FARC (Fuerzas Armadas Revolucionarias de Colombia). Six or eight years ago, we did not need to think too much about who the FARC were, because it was comparatively easy to identify them. They operated in large formations, they wore uniforms and they carried assault rifles. The curious thing, the paradoxical thing, is that the better you do at improving security, the tougher the problem gets, because they lose their 'markers': they stop wearing uniforms, they hide their weapons and they move in small groups. FARC has actually prohibited their fronts from operating in company-size formations.

At the same time, because they are losing combatants in record numbers owing to desertions (more than 3,000 last year) and captures, they have been forced to make more use of their support militias in a combat role. So the issue of who is part of the 'fighting' organization becomes blurred, and that makes the issue of deciding on 'direct participation' all the more difficult.

The other example is even more challenging. Many armed groups today defy the traditional logic of international humanitarian law. Because drug trafficking, like any criminal enterprise, develops its own protection structures, we have in Colombia a whole range of what we call 'criminal bands', which are in effect armed groups that are trained and financed by the traffickers to protect their labs, routes, etc. Some of these groups go around in large numbers with AKs, recruit people who have military training and seem to have a chain of command. In this situation a country like Colombia, or any country, *de facto* does not have an option but to use military force against them when they overwhelm the capacity of the police. But are you in an armed conflict with them? They certainly defy state sovereignty by trying to control territory in order to protect their trafficking routes, but they have absolutely no ideology and there is no obvious sense in which, in IHL terms, they are a 'party' to anything, except to their own criminal interests. The same thing is going on in northern Mexico, where the situation is even worse. The Mexican cartels have large groups of extremely well-armed and trained men – some are even old hands from the Central American conflicts – which are fighting a vicious war for control over the key smuggling routes into the United States. The Mexican police are helpless, so they had to call in the army.

Would you qualify such situations as an armed conflict?

I think we should worry less about whether we characterize these situations politically as an armed conflict, and more about how the armed groups behave and whether they fulfil certain conditions. Whether they have a certain level of organization, whether they operate with a strength that *de facto* can only be countered by the military, and so forth. And we should worry about making sure that if the military is engaged in offensive operations, the protection of international humanitarian law is extended to the population. It seems to me easier to deal with

the problem if we work on clarifying objective criteria for the application of IHL and we make sure the protection is there, rather than getting tied up in a political discussion about whether X or Y constitutes an armed conflict or not. Of course, we also need safeguards so that countries don't use any excuse to make a liberal use of their armed forces when they simply have a police problem. But at least in the case of Colombia, sometimes the only way we can make sure that we regain our sovereignty in every corner of our territory is with a military operation that creates the security conditions that open the space for the rule of law. Only when there is enough security can the justice system work.

But legally it could be an armed conflict, as international humanitarian law does not consider the reasons why arms are taken. The non-state actor may fight for communism, capitalism, liberalism, whatever ideology. It could therefore be an armed conflict against drug traffickers or other organized criminals as long as they fulfil those objective criteria.

It may turn out that we are in agreement on a legal characterization that encourages the application of IHL. But one needs to be careful about the political and strategic consequences that may flow from that characterization. So rather than actually saying 'this is an armed conflict', what matters is to be able to say 'this is the kind of force I need to use because these criteria have been met'.

There seem to me to be two reasons for this. First, in this kind of situation, more than facing an enemy, what you are actually doing is trying to re-establish the rule of law. You want to win the battle of governance, you want to show that you are the legitimate authority. And the opposition may be an armed group with some remnants of an ideology, or it may be a bunch of drug traffickers with a military arm or a mixture of both. Increasingly, you will be confronted with the latter. In that sense, it is immaterial whether you call that 'a conflict'; the truth is that in practice your military operations are enablers for law enforcement.

Are you referring to situations where the military is engaged essentially in law enforcement action, and not in a clear battle situation?

No, I think what you have is a continuum, with the use of pure military force at one end and normal law enforcement activities at the other. The military operates where the law enforcement agencies are overwhelmed by the military threat, and that may well include some battle-like situations. At the same time, it is not always easy in practice to draw a distinction. What are the various troops that are chasing Al Qaeda in Afghanistan doing? Are they engaged in law enforcement against terrorists, or are they in a combat function? Is there a difference between the two?

Are criteria other than legal ones equally important?

Yes. The point is that, for obvious political reasons, many countries would be reluctant to call situations such as the one you have described 'an armed conflict'. This may actually create perverse incentives, and that is the second point I wanted to make. If anybody who can raise 300 young men and arm them with assault rifles

becomes de facto a political actor, a 'party' to a conflict, with all the privileges that that entails, then you run a very big risk of creating perverse incentives: certain organized crime organizations will start raising armies so that they can actually gain 'political' status and solve their legal problems through negotiation. This is not just a hypothesis, it is exactly what happened in Colombia in 2005, when the government negotiated with the paramilitary groups their demobilization and the big drug traffickers of the Norte del Valle cartel started raising armies and using unheard-of acronyms in order to get their foot through the negotiation door. In the end, you end up multiplying the problem, instead of reducing it.

Think about the problem also from the perspective of the obligations of the ICRC. Are the ICRC delegates going to start visiting drug traffickers in prison just because they run mercenary armies? That would be a little odd, wouldn't it?

Are there changes in the way that non-state actors operate with regard to civilians?

The case of the FARC that I mentioned is a good example. The traditional structure of the FARC has been to have an armed core of combatants who are grouped in what they call 'fronts'. They have around them two or three different circles of militias who traditionally have had logistic and intelligence-gathering functions. What has happened is that the weaker the centre – the armed core – has become, the more the FARC has been forced to recruit within its own larger structures. They made those who were essentially civilian support militias part of the fighting force, either by 'enlisting' them, or by giving them increasingly military-like functions. To lay minefields as the troops march past, snipe at the army, and that sort of thing. So the border, as I said, has become much less well-defined and the situation has become much greyer, which makes the issue of direct participation in hostilities and who is a legitimate target much more difficult to solve.

There are various layers of civilian participation in hostilities. You mentioned that there are individuals in the inner and outer circles of the FARC. What are their contributions to a conflict situation? Are those of the outer circles considered to be members of the FARC, even if they have a loose relationship? How do you define the grey area between supporters and full-blown combatants in an armed conflict?

Let me make a few points. The first general point is that in the case of a difficult internal security situation such as we have had, it is obvious that those who are organized into clearly distinguished fighting units are the least problematic. But even here there are still some problems, as these groups do not always follow what you might call a classic military logic when facing an attacking enemy. We have groups like the ELN (Ejército de Liberación Nacional), who pretend to have an ideology, are organized and clearly have a chain of command, but who do everything possible to avoid confronting the army. They are these days much busier with the drug trafficking business and making sure that those small remote parts of the country where they have a presence remain under their control.

A typical situation in Colombia will be for an army unit to arrive at point A, in a rather unpopulated part of the country. Let's say they will try and move by land to point C, where they have information that there is a FARC camp, in the mountains. This corresponds to a more or less real example. To get to point C, they have to pass point B, a valley where there are a few small villages and hamlets, and where the FARC have a large number of militias who operate as a kind of early warning intelligence net. The FARC will get those militias to launch the first attack against those army units. They will get them to put minefields along the way, and they will get them to snipe at them. In fact, they put them into a combat role, and that causes us serious legal problems.

Would you consider them members of the FARC, and could they be a lawful target of attack?

They could reasonably be considered members of the FARC. But the issue is not just one of membership or organization. The militias are organized and they know who they are. Let's imagine that the issue of membership is resolved, and that we can determine with certainty that these people are FARC members. It may still not be in our interest to try to find and kill those people. And there we get to the delicate question of how to regulate the use of force, and what your use of force should be vis-à-vis the group that is attacking you.

I would take a step back and ask a more basic question: what is it all about? If I may repeat myself, the whole issue for us is about re-establishing the rule of law. Accordingly, the use of force has to match that goal. You want first to find ways in which you can possibly capture them, given the area where they are and the weapons they have. An example I often use is if you have some FARC members going through the middle of a national park where they are conducting military operations against you, you may lay an ambush and get them. Legally, that seems to us unproblematic if the basic principles of IHL are observed. However, if those same four members walked into a village to do an intelligence operation, intuitively it clearly would be unacceptable to send a military unit in to just shoot them. If you can capture them, do.

In the end, it seems to us that what you have to do is to modulate the principle of military necessity of IHL by including a human rights element.

Basically, what you're saying is that humanitarian law – or the law of armed conflict – would allow you to go further than a well-understood rule of law? Exactly.

But even the principles inherent in international humanitarian law – namely military necessity and proportionality – require modulating behaviour during hostilities.

Yes, but as is well-known, proportionality means something quite different in IHL and in human rights law. And it is an issue of not just subtle but key differences in the basic human rights and IHL concepts; it is a question of *the logic* from which you are operating. Here we come to the issue of the relationship between the IHL

regime and the human rights regime. It is easy to make mistakes here and to get things in the wrong order. The official position, that we have assumed publicly in the *Comprehensive Human Rights and IHL Policy* of the Ministry of Defence (MoD), is that we regard IHL as *lex specialis* to human rights law in those situations where, mainly because of the level and organization of the violence, you have to conduct offensive military operations. However, we have also said that we fully recognize that human rights obligations remain in force. That is the standard interpretation of what IHL as *lex specialis* means, even if not all countries follow it.

But it can be taken one step further. When applying IHL in such contexts, I actually want to use the human rights principle – if it is practical and possible – of making sure that I capture instead of killing or wounding, because that furthers my goal of consolidating the rule of law. In the example I gave you about the FARC members walking into the village, you might say that the IHL principle of humanity would prevent you just as well from simply shooting those people up. Certainly, but the more basic point is that the logic guiding my efforts is a human rights logic.

The European and Inter-American Court are aiming in the same direction when applying human rights to conflict situations.

Not quite. The application by the European Court of Human Rights of human rights standards to conflict situations, irrespective of what the conditions are, seems to me more than a little wrong-headed. You cannot pretend in the middle of battle-like situations to treat the problem as you do in times of normality and measure everything by human rights standards: where the bomb was dropped, where the troops were, and so forth. You end up deforming and in the long run actually *weakening* the whole human rights framework. It is not just impractical; it is dangerous for the protection of human rights. That is why I think you have to get things in the right order and apply IHL where the violence reaches certain levels of intensity and those engaged have a military-like organization.

Also, in a situation which has reached a certain level of hostilities you will necessarily have a corresponding level of indeterminacy, so you have to measure things with the right standard, which again is IHL. The really difficult question for us is not what to do in what you might call clearly IHL contexts or in human rights contexts, but in the grey area between the two. We have called our security policy the policy of consolidation, and that means that we want progressively to reduce the application of IHL as we continue to make headway in the extension and consolidation of the rule of law.

But along the way, you run into situations such as the ones I described with the sniping or scouting militias, which are a challenge. Again, the solution we have found is not just to sort out the difficult question of direct participation in hostilities by determining membership, but to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort. And this is not just theory. It is a standing order of December 2007 of the General Commander of the Armed Forces.

Some individuals do not necessarily voluntarily participate and are forced to fight; others only morally support the enemy. Can we say that the involuntary participant or the wife who supports her husband and cooks for him when he goes in the evening to fight is directly participating in the hostilities? What about moral support?

You have to go on a case-by-case basis. And again, the question is, what are you trying to do? In our case, in our country, we want to strengthen the rule of law. And we have an extremely active and rigorous Prosecutor General's office that mostly sees the situation through the lens of a human rights framework and the ordinary national justice system. In Colombia, it would be out of the question to regard somebody as a bona fide target simply because they're someone's cook. Even targeting someone because they are providing logistic support would be difficult. This is because the space for IHL in Colombia, with the success of the security policy, is becoming ever smaller. And that is as it should be.

How do you involve the judiciary in this distinction process?

What you want to do is really to seriously improve your co-ordination with the justice system, and make sure that you have prosecutors at your side working with you. In Colombia, this is not easy because of the size of the country, and the remote areas in which the army operates. Still, that support is key for us and in the end is the easiest way of guaranteeing that you don't make mistakes. Imagine the Colombian army is operating in a very remote area, and let's say that the army has very good intelligence that there are a number of people who live in a village who belong to the FARC militias. Instead of banging our heads and wondering whether these people should be a military target or not, a much better solution is to co-ordinate with our judiciary. You pass on the information to the judiciary for them to investigate, and you arrest them. This is actually what we are doing, and are trying to expand.

In a country like Afghanistan, where there is hardly a functioning judiciary, what do you do with those people you cannot prosecute? How do you balance the involvement of the judiciary in this situation, given that these are tense situations typically led by the executive?

It is true that co-ordination with the judiciary in a place like Afghanistan is a very different proposition, but you want to use the pressure of the security situation precisely to get some form of judiciary up and running. Otherwise, there is no way out, unless the United States and the NATO troops want to stay there for the next few decades.

A working judiciary is especially urgent because there's always a direct relationship between the effectiveness of the judiciary and human rights violations. When the troops and the police see that the justice system works, they are less tempted to take justice into their own hands.

Still, solving the practical problems of coordination is not always easy. Armies operate 24/7, as the Americans would say, while prosecutors tend to be civil

servants who naturally tend to be risk-averse and want to spend the weekend with their families. To solve those problems, we've created what we have called 'Support Structures', which are special units of the Prosecutor General's Office which are lodged within army compounds in areas that you might still call 'red'. The army gives the prosecutors protection and provides a security perimeter when the judicial police goes out to the field to investigate, but the prosecutor retains full autonomy. It is always the prosecutors who conduct investigations, never the military. This has actually worked very well.

Let me give you a concrete example. In the north-east of the country, on the border with Venezuela, is a department called Arauca, through which a very important pipeline runs. In the year 2001, the ELN and the FARC managed to bomb the pipeline 170 times between them. They brought production to a stand-still, which meant huge losses in income, especially for Arauca, much of whose budget depends on oil royalties. Now, you might say: that's a very hostile area to have a pipeline, what shall I do? You could have troops going up and down the pipeline shooting up anybody that gets anywhere near. That is one solution. Or you can do what we did, and create a Support Structures-type special unit of the judiciary. You bring them into the field, to areas where they would not be able to operate normally because it is too dangerous. With this protection, these prosecutors can actually start understanding the *modus operandi* of the terrorists and bringing them to justice. When they start arresting and prosecuting people, it actually becomes a much more powerful threat than anything the military can do. As a result, if I remember correctly, after a year of this Support Structure unit working, the attacks went from 170 to about thirty. So there are practical tools that can help you solve the problem.

On the government side, it is also a difficult task to distinguish between combating forces, or those who are directly participating in hostilities, and those who are also part of the army who are not in a combat function. Increasingly, there is also a sort of privatization of armed conflict from this side. In the war in Iraq, for example, the Alliance privatized some combat functions that are no longer exercised by the military, but by private military companies instead. Thus, without being combatants in the legal sense, they can also directly participate in hostilities. Do you see a trend towards making the army narrower and, at the same time, giving more combat functions to civilians?

No, certainly not in the case of Colombia. We do not outsource anything that has to do with combat operations, and even protection functions are carried out by the army. So on the government side, the structure has remained stable.

But there are also paramilitaries who are directly participating in conflict situations.

Historically, the situation in Colombia with the paramilitaries, who have now demobilized, had two sides. It had what you might call a counter-insurgent, self-defence side with private militias offering protection against guerrilla kidnapping

in rural areas – which quickly turned into a kind of protection racket itself – and it had a purely criminal drug-trafficking side. The trend was, as always happens, for the drug-trafficking criminal side to get the upper hand.

You can draw a good parallel between the paramilitary situation in Colombia and what the United Kingdom faced in Northern Ireland, although the scale of the problem was obviously different: the British army tried to bring the IRA (Irish Republican Army) under control, and, at the same time, the loyalist militias were also combating the IRA, causing the army not a few problems. This kind of tripartite structure is also what we had in Colombia. Of course, whatever you do, you're open to accusations of links between the army and paramilitary militias, because some will claim that the two fight side by side. But we negotiated their demobilization, which was not at all easy: they had turned into veritable warlords in their regions and they had the most appalling record of atrocities. I think we have enough evidence from the last six years, of combat deaths and captures of paramilitaries, to show that they were seriously chased down by the army.

The goal of any government is to have a monopoly on power . . .

Absolutely. Basically what you're trying to do is to enforce the right to protection of all your citizens. The government's Democratic Security policy, which has set our guidelines, has at its centre the protection of the population and the strengthening of the rule of law as the most effective instrument to guarantee that protection. Constitutional theorists will quite rightly tell you that if you cannot even guarantee the right to life, you have no basis on which to build an adequate system of protection of rights. The key in any case is for the state to show its citizens that it can deliver, that it will protect them and that they in turn will owe it allegiance.

In situations where the state is basically non-existent, such as in Somalia, the militias take on state functions. The weaker the state is, the stronger the militias are?

Definitely, you could say there is a direct relationship between the two. In the end, everything is about protection. On the one hand, you have people claiming for themselves the right of protection with the argument that they are not being protected by the state. So, you have to show the people that you can protect them. On the other hand, there is what you might call the 'third vector', which involves a criminal element – certain forms of organized crime, including drug trafficking – which requires its own protection to be successful. These criminal organizations must develop their own protection mechanisms to, amongst other things, keep others from taking over their illegal business. Unless the state has a monopoly on the use of force and enforces the rule of law in countries that are threatened by these kinds of organized crime structures, there is a very serious risk of all kinds of militias turning up who either claim for themselves the right to protection and/or are protecting criminal organizations. If you leave a security vacuum, others will fill it.

How useful could a product providing guidance on civilian/participant distinction be for operational forces? Do you see a potential interest for the armed forces to have something that can be incorporated in rules of engagement and manuals?

The greyer the situation gets, the more help the military needs. At the MoD we did a review, following on the security successes of the last five to six years, of all our IHL and human rights training, to make sure it matched the new situation on the ground. Under the guidance of Minister Santos, we produced a new policy to accommodate our use of force to those particular grey situations. And we will soon publish a new operational law manual, a first in Colombia, to help our commanders and legal advisers in the field steer their way through the jungle that is the Colombian legal system.

A commander or a soldier on the ground needs as much help as he can get because things really are often not very clear. It's very unfair to those people who are made to make the difficult calls, and who sometimes make mistakes. They're the ones who pay for it, not the commanders further up or those politically responsible. So I think it is extremely important to develop adequate tools. The challenge is whether the tools we develop match the situations on the ground. And that's where I have some doubts, because the things we are seeing now on the ground in Colombia really seem to stretch the framework of IHL to the limit. There is a mismatch between the concepts, 'party to a conflict' and so forth, and the reality on the ground of criminal organizations with military strength that cannot be dealt with simply with law enforcement tools.

This interpretive guidance, however, is clearly designed for this framework and should apply in situations of armed conflict. It cannot address all questions and it is not designed to address law enforcement questions.

Certainly, but if IHL doesn't renew itself on the basis of the objective changes on the ground, it risks becoming irrelevant because it will no longer offer adequate guidance. I think it is very important to engage in this kind of exercise so that IHL remains relevant. Different countries, not just us, are compelled to use military force when they face certain kinds of military threats. But, again, that military character does not necessarily match the traditional IHL description in all situations. And if the interpretative guidance is out of step with reality, what use is it?

I think there is something very unfair in the modern world about the way the military is used. They're put into situations for which they were not made. Historically a soldier has been trained just to kill his opponent. What they find now are situations which are much greyer, and they're made to carry all the weight of those decisions. And if mistakes are made, it is their heads that will roll.

Certainly, there are things you can do: improve the training and adapt it to life-like situations, introduce adequate rules of engagement, etc. And we insist on the strategic value of restraining and controlling adequately the use of force, especially lethal force, so that it does not operate against the very objectives of the reinstatement of the rule of law. But you need a very mature military to have that

sink in to the last man, when every day you are confronted with extremely tense and dangerous situations. Look at what is going on with civilian deaths in Afghanistan – the United States and NATO seem to be heading for strategic defeat if they don't change their ways. But changing the behaviour of their soldiers is not going to be easy.

In any case, I think the soldiers need all the help they can get. We must make sure that guidelines and training are actually and sufficiently linked to the reality on the ground, that they are of relevance to the situations that the soldiers face every day. That seems to me to be the key.

The civilianization of armed conflict: trends and implications

Andreas Wenger and Simon J. A. Mason*

Andreas Wenger is Professor of International and Swiss Security Policy and Director of the Center for Security Studies at ETH Zurich. Dr Simon J. A. Mason is a senior researcher working at the Center for Security Studies at ETH Zurich.

Abstract

Civilians play an increasingly important and complex role in armed conflicts, both as victims and as perpetrators. While this overall trend towards 'civilianization' encompasses all types of present-day conflicts, it is twofold: it takes on a very different nature in high-technology warfare than in the context of low-technology combats that are typical of many civil wars. This article explores these two trends, shows how they merge in asymmetric warfare and outlines key implications for international stabilization and state-building efforts. The present-day conflict landscape is presented from a security policy point of view, placing the ongoing debates on the civilian participation in hostilities in a broader strategic context.

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The principle of the state monopoly on the legitimate use of force, widely accepted in the West, goes back to state-building processes that took place in Europe over a period of centuries. The state had a monopoly over war, resulting in a specific, official 'state of war' during which certain rules of war applied and there was a clear delineation between civilians and uniformed soldiers. Under this societal contract, civilians were protected against armed violence through norms and practices that

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were later formalized in international humanitarian law. Partly as a result, during the first half of the twentieth century deaths of soldiers accounted for a large number of those resulting directly from hostilities. At the beginning of the twenty-first century, however, the number of battle deaths due to actual military engagement decreased, yet the total number of war deaths – which includes both battle and non-battle deaths – remained high.¹ In the Democratic Republic of Congo, for example, there were 2.5 million war deaths between 1998 and 2001, yet only 350,000 of those people were killed in actual battle.²

Other regions did not go through this process in the same way, nor did they necessarily agree on a societal pact as did Europe in the case of the Westphalian order. In such countries the state monopoly on the use of force was not, and still is not, necessarily accepted or legitimized by the wider population. On the contrary, the state is often equated with oppression and violence towards its own people, and resistance by non-state entities is therefore viewed as legitimate and just.³ The changing nature of conflict on a global scale is thus also a reflection of the relative stability of the West and of a dominance of intra-state conflicts in regions where the state monopoly on the use of force neither exists nor is widely accepted.

The nature of war has now clearly changed, and the role of civilians is central to this change. The terms ‘civilians’ and ‘soldiers’ are consequently no longer adequate and a plethora of new and more differentiated terms have been proposed, such as ‘part-time terrorists’, ‘refugee warriors’, or ‘civilian augmentees’. The ambiguity of human intent and conduct and the ad hoc character of many organized groups using violence are illustrated, for example, by the owner of a tea shop in Sarajevo: ‘Oh yes, I’ll sit and sip tea with “them” in the daytime and take their money, but I may go out tonight to shoot them.’⁴

Efforts to clarify the notion of ‘direct participation in hostilities’ (DPH) are part of the necessary legal process of adapting to the changing nature of armed

1 For an overview of figures, see *The Global Burden of Armed Violence*, Geneva Declaration Secretariat, Geneva, 2008, available at www.genevadeclaration.org/pdfs/Global-Burden-of-Armed-Violence.pdf (last visited 6 March 2009).

2 The term ‘combatant deaths’ refers to soldiers killed in battle. ‘Battle deaths’ or ‘combat deaths’ refers to combatants and civilians killed during hostilities. The term ‘war deaths’ covers both battle and non-battle deaths, i.e. also people killed indirectly through war-related famine, disease, etc. See Bethany Ann Lacina and Nils Petter Gleditsch, ‘Monitoring trends in global combat: a new dataset of battle deaths’, *European Journal of Population*, Vol. 21 (2/3) (2005), pp. 145–66, available at www.springerlink.com/content/l826g1412943w55w/ (last visited 6 March 2009). See also Edmund Cairns, *A Safer Future: Reducing the Human Cost of War*, Oxfam Publications, Oxford, 1997; Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order, 1648–1989*, Cambridge University Press, Cambridge, 1991; Herfried Münkler, *Die neuen Kriege*, Rowohlt, Reinbek, 2003.

3 Alastair Crooke, *From Rebel Movement to Political Party: The Case of the Islamic Resistance Movement*, Conflicts Forum Briefing Paper No. 3, 2007, p. 12, available at <http://conflictsforum.org/briefings/Hamas-From-rebel-movement-to-political-party.pdf> (last visited 6 March 2009). See also Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument*, African Issues series, James Currey, Oxford, 1999.

4 Mary B. Anderson, *Do No Harm: How Aid Can Support Peace or War*, Lynne Rienner Publishers, Boulder/London, 1999, p. 25.

conflict.⁵ Nevertheless, its meaning remains ambiguous, and no comprehensive definition has been achieved to date. Understanding the civilianization of conflict from a security policy point of view can help to put that notion into context – which is the aim of this article.

From a strategic point of view, the growing involvement of civilians in the conduct of international and non-international armed conflicts is linked to at least two trends:

1. the decline of inter-state wars, the revolution in military affairs, and the growing role of civilians in high-technology warfare; and
2. the growing relevance of intra-state armed conflict, the pervasiveness of civilian agency in such conflicts, and the blurring of lines between civilians and combatants.

After outlining these trends, we discuss how they merge in today's asymmetric conflicts. We then examine some of the implications for the ongoing discussion on 'direct participation in hostilities'. It seems useful to focus on 'conduct', rather than on 'membership' of an organized group, as the key criterion for differentiating between civilians and combatants. However, fine-tuning the legal concept alone will not solve the problem of insufficient differentiation between civilians and combatants. Various policy recommendations aimed at minimizing the blurring of lines between the civilian and the military domain on a more causal level are therefore also outlined.

One recommendation in particular is that governments must avoid outsourcing key security tasks to private security companies, especially in a state-building environment. They should use the double-edged sword of information warfare with the utmost care, as it threatens to blur the distinction between military and political responsibilities. Governments have to deal more comprehensively with complex and dynamic regional conflicts, instead of placing the highest priority on the seemingly more urgent task of fighting terrorism. The soft dimensions of security are pivotal, in contrast to relying too much on technological superiority. They require a better understanding of local-conflict dynamics and a greater focus on the human conscience as the key battle zone: winning hearts and minds is more important than the physical impact of force.

First trend: decline in inter-state wars, revolution in military affairs

Traditional armed conflicts between states have lost significance at the global level, and there is now a low probability of war between great powers. This can be

5 *Direct Participation in Hostilities*, Summary Report, International Committee of the Red Cross, Geneva, 31 December 2005, available at www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205 (last visited 6 March 2009).

explained first of all by instrumental and structural factors. The end of the Cold War changed the global bipolar and state-centric security system into a more complex one. Stability through superpower domination decreased. In a sense, the lid was lifted off the boiling pot, allowing internal dissent to erupt, with a corresponding peak in intra-state conflicts in the early 1990s.⁶ At the same time the cost–benefit calculation of war between states also changed in line with the development of military technology and increasing economic interdependence on a global scale – the liberal peace thesis.⁷

Second, the decrease in inter-state wars can be explained by ideational factors: democracies do not go to war with each other – the democratic peace thesis.⁸ For besides economic interdependence there is also information interdependence in a globalized world, and in democracies the general population's view of the costs of war differs from that of the elite. Thus while wars between states are still conceivable, they occur primarily in the form of territorial conflicts among regional opponents, or as interventions by great powers or loose coalitions that seek to change the status quo in badly governed states.

Alongside these two broad explanations of why inter-state wars have decreased, trends at a more operational level have also played a key role, namely the revolution in military affairs (RMA) and the privatization of security tasks. Both of these trends are closely intertwined with the growing importance of civilians in armed conflicts.

High-technology warfare has led to a blurring of the military and civilian domain

Today, the United States dominates the military playing field and alone has the option to project its military power almost instantaneously to every corner of the world. The current US dominance in terms of high-tech military forces originated in the 1970s, when Washington began to emphasize technology as a force multiplier in an effort to offset the quantitative superiority of the Soviet forces. As the RMA concept gained ground, the United States placed emphasis on the integration of advanced intelligence, surveillance and reconnaissance systems with stealthy long-range precision weapons systems in order to establish dominance in future battlefield engagements. The implications of the RMA for civilian participation in armed conflict are only tangentially addressed in the burgeoning literature on

6 Human Security Report Project, *Human Security Brief 2007*, Simon Fraser University, Vancouver, 2008, p. 33, available at www.humansecuritybrief.info/ (last visited 6 March 2009).

7 Edward D. Mansfield and Brian M. Pollins, 'The study of interdependence and conflict: recent advances, open questions and directions for future research', *Journal of Conflict Resolution*, Vol. 6 (45) (2001), pp. 834–59; Mark W. Zacher, 'The territorial integrity norm: international boundaries and the use of force', *International Organization*, Vol. 55 (2) (2001), pp. 215–50.

8 See e.g. Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, Princeton, 1993.

the military technological revolution – which is why some aspects are highlighted here.⁹

The development of a high-tech military force had major repercussions for the relationship between the military and the civilian spheres in at least two ways. First, as the technical complexity of modern weapons systems grew, civilian employees became progressively more important for maintaining and operating those systems. Under the paradigm of network-centric warfare the individual sensors, weapons platforms and control systems engaged in an attack could be geographically far apart and spread across continents.¹⁰ Consequently civilian employees far from the actual battlefield also began to perform an increasingly direct and mission-critical support function in many military high-tech engagements. Civilian personnel who administer army battle command systems, communications systems and high-tech weaponry have become a highly specialized component of modern armed forces. They supplement military capabilities in areas of active military operations and are meanwhile an indispensable part of modern warfare.¹¹

Second, the revolution in military affairs expanded the physical battlefield to include the virtual domain and ultimately the human mind. The object of warfare shifted from physical destruction of the adversary's military force to virtual control of the information space. The argument of RMA proponents was that speed, knowledge and precision would enable casualties to be minimized and wars to be rapidly ended. Information superiority, the argument continues, would maximize the political utility of force, reducing the friction inherent in warfare far enough to maintain public support for military operations. Control over the adversary no longer necessarily meant the physical control of objects, territory and personnel; virtual control over the opponent's capability to decide and act independently might be the far cheaper and politically more acceptable solution.¹²

In the context of their emphasis on information processes and content, RMA thinkers thus began to stress the importance of developing information warfare (IW) capabilities to downgrade an adversary's command, control, communications and intelligence systems. As the IW concepts broadened beyond the 'enabler paradigm', their highly problematic consequences for the relationship between the military and the civilian space became more visible. If IW targets the entire political, economic and military information infrastructure of an adversary

9 See e.g. John Arquilla and David F. Ronfeldt (eds.), *In Athena's Camp: Preparing for Conflict in the Information Age*, RAND, Santa Monica, 1996; Eliot Cohen, 'A revolution in military affairs', *Foreign Affairs*, Vol. 75 (2) (1996), pp. 37–54.

10 See e.g. Arthur K. Cebrowski and John J. Garstka, 'Network-centric warfare: its origin and future', *US Naval Institute Proceedings*, Vol. 124 (1) (1998), available at <http://all.net/books/iw/iwarstuff/www.usni.org/Proceedings/Articles98/PROcebwski.htm> (last visited 6 March 2009).

11 Geoffrey S. Corn, 'Unarmed but how dangerous? Civilian augmentees, the law of armed conflict, and the search for a more effective test for defining permissible civilian battlefield functions', *Journal of National Security Law & Policy*, Vol. 2 (2) (2008), p. 275, available at www.mcgeorge.edu/Documents/publications/jnslp/02_cornJCS111008%20PR.pdf (last visited 6 March 2009).

12 See e.g. Steven Metz and Douglas V. Johnson, *Asymmetry and US Military Strategy: Definition, Background, and Strategic Concepts*, Strategic Studies Institute, Carlisle, 2001.

across a continuum of operations between war and peace, then IW activities cannot but blur the boundaries between offence and defence and between war and peace.¹³

In fact, RMA thinkers began to realize over time that IW concepts were a double-edged sword. Modern societies depend heavily on reliable information and communication infrastructures, a problem that affects the military as well because it is heavily reliant on the civilian infrastructure. The risk of computer network attacks against civilian infrastructures highlights the fact that technology may end up being a source of vulnerability rather than the great force multiplier. The blurring of boundaries between civil and military responsibilities is also a critical issue in terms of the protection of a society's critical information infrastructures against cyber-attacks.¹⁴

The rise of private military and security contractors

The maintenance of a high-tech military force is very costly. This explains why the US military began to search for ways to increase its strategic, operational and tactical flexibility once the Cold War ended. After the Soviet Union and the Warsaw Pact had disappeared, the US military saw itself confronted with a very fluid and highly diffuse risk environment in which the tasks and functions of the military rapidly broadened. One way to increase flexibility is to rely on the flexibility of the market. So the US military began to outsource support functions more and more to private contractors, a development that was mirrored by the armed forces of many other countries.¹⁵

However, while outsourcing can increase flexibility, it tends to coincide with a loss of control, because private contractors are driven by a desire for money rather than for public goods such as peace, order and security. While states may be tempted to use private contractors as part of a foreign policy by proxy, farming out mission-critical functions to private military companies (PMCs) and private security companies (PSCs) may in reality weaken the unity of their command structures, result in a loss of control over the level of violence under their authority and/or undermine their control on legitimacy.¹⁶

13 For an excellent overview see Myriam Dunn Cavelty, *Cyber-Security and Threat Politics: US Efforts to Secure the Information Age*, Routledge, London, 2008, ch. 4, pp. 66–91; Edward Waltz, *Information Warfare: Principles and Operations*, Artech House, Boston, 1998.

14 See Dunn Cavelty, above note 13, ch. 5, pp. 91–121.

15 On the rise of private contractors see e.g. Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca, 2003; Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Occasional Paper No. 6, Centre for the Democratic Control of Armed Forces, Geneva, 2005; Elke Krahmann, 'Security governance and the private military industry in Europe and North America', *Conflict, Security & Development*, Vol. 5 (2) (2005), pp. 247–68; Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, Stockholm International Peace Research Institute, Stockholm, 2005.

16 We are indebted to Emmanuel Clivaz, who introduced the 'flexibility-control balance' concept in a recent research note as a tool for analysing the impact of private contractors on the battlefield: Emmanuel Clivaz, 'Private contractors on the battlefield', ISN Case Studies, International Relations and

The rise of PMCs and PSCs during the 1990s is therefore another factor that makes it more and more difficult to distinguish the civilian domain from the military domain. Security companies enjoy an unclear legal status in international and domestic law: should they be considered as business players, or as quasi-state entities acting on behalf of elected governments?¹⁷ Furthermore, this is not only a problem for governments, because in today's complex conflict environments other players, including international organizations, NGOs and private industry, make growing use of the services of contractors.

Today, PMCs and PSCs offer an ever wider range of services. Most private contractors perform functions unrelated to the conduct of combat operations, but some are mandated to participate in major combat activities. Their assignments can range from support services (i.e. logistics) and consultancy (i.e. specialized expertise on technology and training) to the provision of personnel and specialized combat skills for defensive and offensive missions. The closer their functions are linked to the state monopoly on the use of force, the more problematic the engagement of private contractors is in terms of legitimacy. Furthermore, firms frequently offer a mix of services, making a distinction between tasks and their regulation more difficult. On the ground, functions are often very fluid in a rapidly changing conflict environment. Governments must ask themselves which functions can be outsourced and which are inherently governmental.¹⁸

In summary, inter-state wars have decreased since the end of the Cold War owing to structural and ideational factors, as reflected by the liberal and democratic peace theses. At a more operational level, the decrease in inter-state wars has gone hand in hand with the revolution in military affairs and the privatization of security tasks. Both of these trends have led to a blurring of the lines between civilians and combatants.

Second trend: intra-state wars, pervasiveness of civilian agency

The majority of armed conflicts since the end of the Cold War have been non-international. Intra-state armed conflicts started multiplying in the 1960s; their number peaked in the early 1990s, with some fifty armed conflicts worldwide, and then declined again, levelling off at thirty-two armed conflicts during the last three years. This process was largely given momentum by the demise of colonialism and the end of the Cold War. The terms 'intra-state conflicts', 'internationalized

Security Network (ISN), Zurich, September 2008, available at www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=93879&lng=en (last visited 6 March 2009).

17 Juan Carlos Zarate, 'The emergence of a new dog of war: private international security companies, international law, and the new world disorder', *Stanford Journal of International Law*, Vol. 34 (1998), pp. 75–162; Matt Gaul, 'Regulating the new privateers: private military service contracting and the modern marquee and reprisal clause', *Loyola of Los Angeles Law Review*, Vol. 31 (1998), pp. 1489–522; Christopher Kinsey, 'Challenging international law: a dilemma of private security companies', *Conflict, Security and Development*, Vol. 5 (3) (2005), pp. 269–93.

18 Singer, above note 15.

intra-state conflict', 'non-state-based armed conflict' and 'one-sided violence' sum up various categories of organized political violence.¹⁹ Most of these conflicts are related to disagreements over wealth- and power-sharing, declining economies, high dependence on natural resources, bad governance, human rights violations and poor human security conditions. Group cleavages often take place around ethnicity, religion or some other characteristic that can create identity and unite a group.

In Sudan (1983–2002), 2 million people were killed in the war between the north and south of the country, while only about 55,500 of these died directly in battle – although this estimate is subject to debate. In Angola (1975–2002), there were an estimated 1.5 million war deaths, of which about 160,500 were battle deaths.²⁰ In Rwanda, an estimated 800,000 were killed in 'one-sided violence' in the 1994 genocide within a period of 100 days.²¹ These cases illustrate that battle deaths directly resulting from hostilities (i.e. deaths of both combatants and civilians) account for only about 10 per cent of estimated total war deaths in many contemporary conflicts. Most war deaths are caused indirectly by starvation and the spread of diseases typical for combat zones. Civilians – women, children and the elderly – and not uniformed personnel make up the overwhelming number of victims in such conflicts.

Armed conflict in politically fragile and economically weak societies will remain a focal point of international security for decades to come. While intra-state conflicts began to diminish during the 1990s and onsets of war in the new century have been outnumbered by war terminations, the flashpoints of armed conflict remain geographically concentrated in regional conflict zones. These zones largely overlap with areas that are badly governed and/or poorly integrated in regional trade. This indicates that the origins of civil wars are connected to both corrupt leaders and weak political institutions, as political scientists emphasize, and to the build-up of war economies with alternative systems of profit and power, as argued by many economists.²²

However, analysis of the macro-causal conditions of rebellion (i.e. poverty, dependency on natural resources) does not tell us much about group or individual motivations for rebellion. The literature on civil war therefore turned to analysing the micro-level correlates of greed and grievance.²³ The standard political science explanation for the outbreak of civil war has long emphasized the role

19 For standard definitions and data sets, see the home page of the Uppsala Conflict Data Program, available at www.pcr.uu.se/research/UCDP/index.htm (last visited 6 March 2009). For an introduction see Stathis N. Kalyvas, 'The ontology of "political violence": action and identity in civil wars', *Perspectives on Politics*, Vol. 1 (3) (2003), pp. 475–94.

20 Lacina and Gleditsch, above note 2.

21 BBC World News, 'Rwanda: how the genocide happened', available at <http://news.bbc.co.uk/2/hi/africa/1288230.stm> (last visited 6 March 2009); Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, Columbia University Press, New York, 1997.

22 See e.g. Kristian Skrede Gleditsch, *All International Politics is Local: The Diffusion of Conflict, Integration, and Democratization*, University of Michigan Press, Ann Arbor, 2002.

23 See e.g. Macartan Humphreys and Jeremy M. Weinstein, 'Who fights? The determinants of participation in civil war', *American Journal of Political Science*, Vol. 52 (2) (2008), pp. 436–55.

of collective grievances – linked to factors such as ethnic and religious diversity, political repression, inequality and political exclusion – in motivating civilians to rebel.

Only recently have political economy approaches begun to challenge the dominance of these grievance-based explanations of civil war. Transferring the focus from motivation to opportunity, these studies emphasize that, in weak states, small groups with access to loot and financial and natural resources have been sufficiently influential to trigger a process of political mobilization that could lead to armed conflict.²⁴ However, civil wars are not simply caused by the ‘feasibility of predation’;²⁵ different types of conflict causes must be considered, including structural conditions, dynamic (historical) causes, catalytic events and contenders’ decisions. Motives and opportunities interact, pointing to the inadequacy of the ‘greed/grievance’ dichotomy.²⁶

A complex and highly dynamic relationship between civilians and combatants

Much of the recent academic literature depicts the relationship in civil wars between civilians and combatants (be they government or rebel troops) as highly complex and dynamic. Civilians are victims, but they are also perpetrators. Armed elites (government or rebel) manipulate civilians to further their respective interests, but the population’s response also influences the patterns of violence. Given the ambiguity of the relationship, it will remain difficult to distinguish ordinary crime from direct participation in hostilities and to draw a line between civilians and combatants in most of these conflicts.

Key factors relevant to the participation of civilians in intra-state armed conflicts are the focus on rebel recruitment and the determinants for civilians to participate in civil and guerrilla war. In explaining the conversion of civilians to combatants, group-focused approaches emphasize the role of collective grievances, selective incentives and social sanctions.²⁷ Other approaches, however, shift the analytical focus from groups to individuals and the locus of agency from top-down

24 See e.g. Paul Collier and Anke Hoeffler, ‘Greed and grievance in civil wars’, *Oxford Economic Papers*, Vol. 56 (4) (2004), pp. 563–95; James D. Fearon and David D. Laitin, ‘Ethnicity, insurgency, and civil war’, *American Political Science Review*, Vol. 97 (1) (2003), pp. 75–90.

25 Paul Collier, *Economic Causes of Civil Conflict and Their Implications for Policy*, Department of Economics, Oxford University, 2006, available at <http://users.ox.ac.uk/~econpco/research/pdfs/EconomicCausesofCivilConflict-ImplicationsforPolicy.pdf> (last visited 6 March 2009).

26 For a succinct criticism of Collier and Hoeffler’s approach see Laurie Nathan, *The Frightful Inadequacy of Most of the Statistics: A Critique of Collier and Hoeffler on Causes of Civil War*, Crisis States Discussion Paper, LSE, 2005, available at www.research4development.info/PDF/Outputs/CrisisStates/dp11.pdf (last visited 6 March 2009).

27 Paul Richards, *Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone*, Heinemann, Oxford, 1996; Jean-Paul Azam, ‘On thugs and heroes: why warlords victimize their own civilians’, *Economics of Governance*, Vol. 7 (1) (2006), pp. 53–73; Roger D. Petersen, *Resistance and Rebellion: Lessons from Eastern Europe*, Cambridge University Press, Cambridge, 2001.

to bottom-up.²⁸ No longer are civilians perceived as mere objects of violence. Instead, violence, although superficially appearing to be politically motivated, may be a pretext for private vendettas and organized crime. While the convergence of the public and the private in this perspective makes the assessment of individual intent a hopelessly complex business, it also greatly complicates an evaluation of civilian conduct in many situations connected to armed conflict.

The approach focusing on bottom-up civilian agency is also relevant to the nature of civilian–warlord relations. A large body of scholarly work centres on the determinants of rebel group behaviour towards the civilian population and tries to explain why some rebel groups deliberately abuse civilians, whereas other rebel groups foster reciprocal and mutually beneficial relations with non-combatants. Three different theoretical explanations dominate the current debate. A first set of approaches explains the variation in rebel group behaviour as being a result of the political and economic *opportunity structures* for rebellion; according to this view, insurgents in resource-rich environments are more likely to engage in violent behaviour towards civilians than those acting in resource-poor environments.²⁹ However, such findings should be viewed with caution, as they are typically based on macro-level data, but conclusions are drawn with regard to micro-level theories.

A second set of approaches explains the variation in rebel group behaviour as being a result of the *external relations* between groups in the context of state-building processes. Different rebel groups have different and shifting alliances with the various holders of power within the government. According to this view, violent behaviour is more likely if the level of competition between warring groups in areas of contested territory is high. The isolation of a rebel movement from the rest of society may also lead to a situation in which the rebel group becomes lost in its own ‘logic’. The rest of society moves on, and the rebel group’s original political agenda is then out of place or has vanished altogether, leaving it with a purely military and economic agenda – the Revolutionary Armed Forces of Colombia (FARC) is an example of this tendency.³⁰ A third set of approaches focuses on *intra-group dynamics* connected to group organization and structure to explain when and why rebels inflict violence upon civilians. According to this view, it is the initial social and economic endowment of these groups that defines the patterns of interaction between rebels and society.³¹

28 See e.g. Stathis N. Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, Cambridge, 2006.

29 See e.g. Collier and Hoeffler, above note 24. We are indebted to Johannes Hamacher for help with the review of literature on the relationship between civilians and warlords.

30 See e.g. Charles Tilly, *Coercion, Capital and European States: AD 990–1992*, Blackwell, Cambridge, 1990; Virginia M. Bouvier, ‘Colombia’s crossroads: the FARC and the future of the hostages’, *USI Peace Briefing*, June 2008; ‘War and drugs in Colombia’, Latin American Report 11, International Crisis Group (ICG), 27 January 2005, available at www.crisisgroup.org/home/index.cfm?id=3238&l=1 (last visited 6 March 2009).

31 See e.g. Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007.

Civil victimization can be a result of the deliberate targeting of civilians by incumbent authorities and/or one or more insurgent factions. However, the variation in rebel behaviour towards civilians may also be influenced by the behaviour of the civilian population itself. While many studies overlook the impact of civilian agency, warlords and insurgents often depend heavily on a host civilian population (cf. Mao's dictum, 'The people are like water and the army is like fish'). Warlord factions often exist without well-developed war-fighting capacities.³² This gives civilians a degree of leverage regarding the terms of their relations with the militia, at least insofar as the civilian population is the object of the rebel group's political struggle. Arguably, the provision of mission-critical intelligence and logistical support by civilians for insurgents comes close to what some may consider direct participation in hostilities.

The relations between 'civilians' and armed groups may go even further and be characterized by a certain degree of reciprocity. In a situation where state institutions are weak, where there is no functioning judiciary and the separation of powers is lacking, social groups (formed on the basis of, for example, ethnicity, religion or origin) may organize themselves around a patriarch, a 'big man'. The question is not whether he is a statesman or a rebel leader, but whether he can deliver security and material benefits to his constituency. Violence, exhortations and corruption are part of this 'system'. Even if such methods are illegal, they may be legitimate in the eyes of the constituency, as long as they are necessary for its survival. Where democratic accountability is missing, 'civilians' may use the bond of blood or even the threat of traditional witchcraft to keep their 'big man' in check. Thus the form of accountability and degree of reciprocity of these neo-patrimonial links determine the degree of violence used by the 'big man' towards his constituency.³³

Similar ambiguity surrounds the labelling of refugee-warriors as either civilians or combatants. Recent research investigates the conditions of refugee militarization, the role of civilians in the spread of conflict across borders, and the function of refugee flows as a means of trafficking small arms and light weapons. These mechanisms are important, because most intra-state armed conflicts in weak states are fought with such firearms and traditional weapons (machetes, axes, hoes, scythes). Refugee participation in hostilities may be direct, indirect or coerced, once again underscoring the difficulty of drawing a line between civilians and combatants.³⁴

It should be noted, however, that seemingly spontaneous inter-civilian hostility may on closer inspection prove to have strong underlying state support.

32 See e.g. Marie-Joëlle Zahar, 'Protégés, clients, cannon fodder: civilians in the calculus of militias', *International Peacekeeping*, Vol. 7 (4) (2000), pp. 107–28; John MacKinlay, 'Defining warlords', *International Peacekeeping*, Vol. 7 (1) (2000), pp. 48–62.

33 Chabal and Daloz, above note 3.

34 See e.g. Idean Salehyan and Kristian Skrede Gleditsch, 'Refugees and the spread of civil war', *International Organization*, Vol. 60 (2) (2006), pp. 335–66; Sarah Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid*, Cornell University Press, Ithaca, N.Y., 2005.

One example is the organized nature of the genocide in Rwanda: a recent analysis demonstrates the central role played by the Rwandan state in training the militants and distributing traditional weapons and firearms. Elite action was instrumental in organizing an ethnically cohesive ‘civilian self-defence force’.³⁵ This case shows how the literature has moved beyond notions of civilians as passive receptors of elite propaganda and toward a more nuanced view of civilian mobilization. Elite manipulation and the sustained construction of inter-group fears emerge as key factors accounting for direct civilian participation in acts of ethnic cleansing.

Incentives must therefore be created for part-time militants to disengage from the armed wings of their factions and join the political process. If one believes that people can change, which is a key assumption of mediation and negotiation, then it is not helpful to think in terms of a Manichean world view in which ‘good guys’ and ‘bad guys’ compete. Instead, it will be necessary to create the geopolitical context and appropriate peace processes that foster change in attitude and behaviour. Experience shows that most rebels and governments begin peace negotiations for tactical and face-saving reasons, but realize during the process that they stand to gain more from negotiations than from fighting.³⁶

In summary, civilians are not only playing an ever greater role in high-technology warfare, as described with regard to the first trend above, but also an increasingly important and complex role in low-technology conflicts seen in various types of organized political violence within states. In situations where state institutions are weak or non-existent, the lines between the public and private domains are blurred; there is no clear ‘state’, no clear ‘civil society’, and therefore also no clear distinction between civilian and non-civilian players. Both governments and armed non-state players use and target civilians, and are in turn affected by how civilians react to this. Macro-causal structural explanations of intra-state armed conflicts focus on declining economies, the marginalization of groups from political power and the ethno-politicization of group cleavages. Micro-causal explanations focus on dynamic, historical causes, catalytic events, players’ decisions and the mixed motivations of greed and grievance in terms of rebel recruitment and civilian participation in political violence. The violence of rebel groups towards civilians is related to opportunity structures, the external relations of the group and aspects of intra-group organization.

35 See e.g. Philip Verwimp, ‘Machetes and firearms: the organization of massacres in Rwanda’, *Journal of Peace Research*, Vol. 43 (5) (2006), pp. 5–22.

36 Annika Åberg, Sabina Laederach, David Lanz, Jonathan Litscher, Simon J. A. Mason and Damiano Sguaitamatti, ‘Unpacking the mystery of mediation in African peace processes’, report, Mediation Support Project, Center for Security Studies (CSS) and swisspeace, Zurich/Berne, October 2008, available at www.css.ethz.ch/Mediation_in_Africa_full.pdf (last visited 6 March 2009); Simon Mason, ‘Learning from the Swiss mediation and facilitation experiences in Sudan’, working paper, Mediation Support Project, Center for Security Studies (CSS) and swisspeace, Zurich/Berne, May 2007, available at www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/Mason-Learning_from_Swiss_mediation_experiences_in_Sudan_May_2007.pdf (last visited 6 March 2009). See also Chester A. Crocker, Fen O. Hampson and Pamela Aall, *Taming Intractable Conflicts: Mediation in the Hardest Cases*, USIP Press Books, Washington, 2004.

Merging trends: the new complexity of asymmetric conflicts

The growing potential of stateless groups to wield power and wreak destruction that has emerged in the course of globalization has accentuated the civilianization of armed conflict both in Western high-tech warfare and in local intra-state armed conflict. In the present era of growing interconnectedness the two trends outlined above are merging, as globalization establishes ever closer ties between local life and worldwide structures. Although local factors are likely to remain the primary source of conflict even in this global age, local and global factors interact in determining whether and how it will escalate into armed violence. Furthermore, the global consequences of local conflict will become greater. At the same time, global reactions to local conflict are likely to increase as international players seek to promote stability and engage in state-building efforts.³⁷

Serious threats to international stability and security will arise mainly from the convergence of two factors: weak states in regional conflict zones and the spread of global risks. The proliferation of weapons of mass destruction (WMD) and long-range weapons systems, organized crime and global terrorism, global warming and the global spread of diseases all play a multifaceted and interactive part in the dynamics of local armed conflicts in destabilized regions. As civil wars overflow borders, however, their indirect non-military international consequences begin to put pressure on the instruments of homeland security in faraway parts of the world.

Terrorist networks such as al-Qaeda benefit from the existence of weak states and lawless regions. By exploiting the vulnerability of global markets and modern infrastructures, they wage their battle in geographically remote areas and in the dusty recesses of our minds.³⁸ A similar loss in the protective function of geography is also apparent in the realm of organized crime and the illegal trafficking of both people and goods.³⁹ In many countries, active migration and integration policies are gaining strategic significance in terms of domestic security, whilst the inflow of qualified individuals and unimpeded mobility across borders remain a key demand of globalized businesses.

Violent political conflict in the twenty-first century will likely be characterized by asymmetric structures, and thus will be marked by a growing

37 See e.g. Christoph Coker, *Globalization and Insecurity in the Twenty-First Century: NATO and the Management of Risk*, Adelphi Paper 345, International Institute of Security Studies, London, 2002; Richard L. Kugler and Ellen L. Frost, *The Global Century: Globalization and National Security*, National Defense University Press, Fort Lesley J. McNair, Washington, 2001, available at www.ndu.edu/inss/books/Books_2001/Global%20Century%20-%20June%202001/globcencont.html (last visited 6 March 2009); Victor D. Cha, 'Globalization and the study of international security', *Journal of Peace Research*, Vol. 37 (3) (2000), pp. 391–403.

38 See e.g. Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, Cambridge University Press, Cambridge, 2005; Robert Keohane, 'The globalization of informal violence, theories of world politics, and the "liberalism of fear"', *Dialogue-IO*, Vol. 1 (2002), pp. 29–43.

39 See e.g. Cornelius Friesendorf, 'Squeezing the balloon? United States air interdiction and the restructuring of the South American drug industry in the 1990s', *Crime, Law and Social Change*, Vol. 44 (1) (2005), pp. 35–78.

involvement of civilians. A perilous civilianization of armed conflict, resulting from a vicious cycle of interaction between the trends described in this article, can be seen in developments since the end of the Cold War. On the military playing field the gap between the US capability for high-tech warfare and that of all other national militaries widened considerably. The 1991 Gulf War, in particular, seemed to demonstrate the invincibility of the United States in conventional warfare, contributing to a widespread feeling of humiliation in many Arab societies. The lesson was clear: the United States could only be outmanoeuvred by asymmetric warfare. In this context, terrorism as a military tactic was legitimized as a weapon of the weak in their struggle against the overly strong.⁴⁰

Conversely, the terrorist attacks of 11 September 2001 highlighted the vulnerability of the civilian infrastructure of Western societies to such attacks. The clear linkage between the al-Qaeda paramilitary centre of gravity in Afghanistan and the Taliban regime in Kabul enabled Washington to shape a politically robust coalition for the first phase of its 'war on terrorism'. Combining its high-tech capabilities with support for the local opponents of the Taliban, the US-led coalition invaded Afghanistan, overthrowing the Taliban regime and dispersing much of the al-Qaeda leadership.⁴¹

However, Washington – preoccupied by the doomsday scenario of WMD terrorism and prompted by the naive neoconservative project of a swift democratic transformation of the Arab world – went one step further and implemented a policy of military-induced regime change in Iraq. The fact that the United States chose to present the Iraq invasion as a second phase in the 'war on terrorism' did not carry credibility in the eyes of most of its NATO partners, because the link between Saddam Hussein's regime and al-Qaeda's global terrorist network was spurious and the threat emanating from his alleged WMD programmes less than imminent. At the regional level, the Iraq invasion played into the hands of those forces and ideologies that strove to incite intra-Arab tensions to escalate into a 'clash of civilizations'.⁴²

The recent events in Palestine, Lebanon, Iraq, Iran, Afghanistan and Pakistan reveal just how geographical borders seem to disintegrate amid asymmetric conflict. In such conflicts, the human conscience itself increasingly becomes a battle zone. Global terrorism is a communication strategy: the use of violence is thought to instil fear beyond its immediate target; the intended psychological effect of the threat or use of violence is to gain supporters and coerce opponents. Terrorists use hospitals, mosques, video communiqués and the Internet to their advantage as effective instruments of an orchestrated

40 See e.g. Ivan Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2005; Martin van Creveld, *The Transformation of War*, Free Press, New York, 1991.

41 See e.g. Doron Zimmermann and Andreas Wenger (eds.), *How States Fight Terrorism: Policy Dynamics in the West*, Lynne Rienner, Boulder, 2007.

42 See e.g. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996.

communications strategy.⁴³ In response, government agencies have accelerated the development of their information warfare concepts and capabilities.⁴⁴ However, many of these concepts and capabilities also obscure the distinction between war and peace, between offence and defence, and between military and political responsibilities.

A similar asymmetry, albeit on a different scale, can be found between the military capability of authoritarian states and their 'weak' internal opposition groups. Here, too, the frequent lesson learned by armed non-state groups has been that authoritarian states can only be outmanoeuvred by asymmetric warfare. Insurgent groups such as the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, FARC in Colombia or the Sudan Liberation Movement (SLA) and the Justice and Equality Movement (JEM) in Sudan have little hope of a classic military victory against the central government, yet they can control parts of the territory and it is very hard for the central government to defeat them. The result is that large areas of these countries become unstable and a humanitarian crisis ensues, often spilling over into neighbouring countries.

When the global and the local type of asymmetric warfare merge, the 'civilian/combatant' divide becomes highly contested. First, in some cases the link between local and global conflict is of a direct physical nature. For example, countries in the throes of internal armed conflict may 'host' protagonists from a global terrorist network. Osama bin Laden lived in Sudan and had close ties to the National Islamic Front there (which dominated the Sudanese government) in the mid-1990s. Following pressure from the United States, the Sudanese government opted to support the US Central Intelligence Agency (CIA) with information on terrorists, even while continuing their own internal oppression of opposition groups, for example in Darfur. The links between al-Qaeda and the Taliban in Afghanistan is another example of a local contender hosting a global network, although in this case the local government – the Taliban ruling faction – chose not to co-operate with the United States and was consequently ousted by external intervention.

Second, in other cases the link between local and global conflict is indirect and ideological rather than of a direct physical nature. Local opposition movements may be co-opted by the transnational ideology of al-Qaedaism, internationalize their political ambitions and adopt some of al-Qaeda's tactics of asymmetric warfare. In response, it is quite likely that international players will adapt their policies towards these groups, which in turn may result in new categorizations of them. The implication of the overlap between global and local forms of asymmetric warfare for the concept of direct participation in hostilities is that

43 See e.g. Bruce Hoffmann, *Inside Terrorism*, Columbia University Press, New York, 1998, pp. 197–228.

44 See e.g. Myriam Dunn Cavelty, 'Information operations: Trends and controversies', *CSS Analyses in Security Policy*, Vol. 34 (3) (2008), Center for Security Studies, ETH Zurich, available at www.crn.ethz.ch/publications/crn_team/detail.cfm?id=57145 (last visited 6 March 2009).

‘combatants’ and ‘civilians’ are likely to be approached differently, depending on political considerations.

In summary, the origins of local, regional and global conflicts are hardly distinguishable from one another. While the physical links between the various players are difficult to trace, the more intangible links via information warfare and ideological influences are far harder to discern. Western institutions and coalitions find themselves deeply involved in complex internationalized intra-state armed conflicts. How they deal with the blurring of boundaries between the civilian and military domains in these conflicts will be a critical factor for the long-term success of their stabilization and state-building efforts.

Policy implications

The difficulty of distinguishing between combatants and civilians in complex asymmetric conflicts poses political and legal problems, but also very practical ones. These problems limit the applicability of the ‘membership approach’, whereby individuals are legitimate targets of attack if they maintain membership of an organized armed group. However tempting the clear-cut logic of this approach may be from a policy point of view, it does not match the reality of armed conflicts that more often than not involve ruthless factions on all sides, be they government or rebel forces. The actual dynamic interaction that takes place between civilians and combatants reflects the ad hoc character of most armed groups, especially in situations of civil war. Individual membership is often impermanent, and constantly changing coalitions shape the interactions between different groups.

One way of trying to break this deadlock and surmount the danger of political bias when deciding on who is a ‘civilian’ or a ‘combatant’ is to focus on individual conduct rather than on collective labelling. At first this approach seems more or less politically neutral, as the criterion for assessing who should be targeted or protected is the conduct of the individual person, and not the label of the group of which that individual is a member. But even if it makes sense to use conduct, and not the group’s label, as the criterion, new challenges arise. One is the question of how to measure conduct and determine the space between hostile conduct and non-hostile conduct. The same person may kill at night and lead a normal civilian life during the day. How great, then, is the margin between hostile conduct and civilian conduct? How durably must a person lay down his weapon to be considered a non-combatant?

The grey zone between hostile and non-hostile and the way in which it is measured and defined has great implications and will remain a highly political issue. At the policy level, states whose forces are engaged in intra-state armed conflict will tend to argue for an extensive grey zone within which people are still considered to be actively engaged in hostile conduct, so that the operational question of when these people can be targeted is easier to resolve. Humanitarian organizations, on the other hand, will generally argue for a sharp, narrow

delineation between the phase of hostile conduct and the phase of non-hostile conduct, in order to protect innocent civilians.⁴⁵

The fact that this grey zone is a reality unlikely to change soon does not mean that states and international institutions should consider it as the one-sided result of the behaviour of stateless groups, and therefore as a condition of modern armed conflict they simply have to accept. To clarify the legal meaning of the concept of 'direct participation in hostilities' is a necessary part of the process of adapting to the changing nature of armed conflict. Just as important, however, is a recognition by states and international institutions that the long-term legitimacy of their policies for dealing with asymmetric conflicts will depend on the way in which they address this challenge.

At the policy level, the following observations warrant special consideration.

Governments should resist the temptation to subordinate their policies and strategies for dealing with regional conflicts to the seemingly more urgent task of combating global terrorism. A policy that presents terrorism as a political force with territorial ambitions and links to authoritarian states not only concedes undue political status to a underspecified and highly fluid opponent, but it also tends to antagonize the region's moderate elements and enlarge the recruitment pool of the more extremist local forces. While some groups such as al-Qaeda and their paramilitary capabilities call for special attention, terrorism as such should be defined by the nature of the act – representing a deliberate violation of the rules of warfare – rather than by the identity of the perpetrator.⁴⁶

A successful battle against international terrorist groups is predicated upon renewed attention to the local origins of the regional conflicts in the wider Middle East and upon improved living standards for the Arab population. The key challenge lies in the construction of political institutions and state structures that are perceived as legitimate by the local populations, and the creation of economic opportunities aimed at stabilizing countries and regions that have spun out of control. This is a feat that requires the combined endeavours of public, civilian and private players. The reality of complex emergencies must be accepted, since there is always a possibility of groups with transnational networks latching on to local armed conflicts. Nevertheless, the use of force must be tightly controlled and closely linked to political goals, for the targets of counter-insurgency operations are as often individuals as organized military groups.

45 We are indebted to Maurice Voyame for his helpful input on which this paragraph is based. See also Maurice Voyame, 'The notion of "direct participation in hostilities" and its implications on the use of private contractors under international humanitarian law', in Thomas Jäger and Gerhard Kümmel (eds.), *Private Military and Security Companies: Changes, Problems, Pitfalls and Prospects*, VS Verlag für Sozialwissenschaften, Wiesbaden, 2007, pp. 361–76.

46 Hoffmann, above note 43, pp. 1–42.

It is not enough, however, to neutralize individuals through police and military action. Collecting local intelligence and winning the support of the local population are vital aims of counter-insurgency operations. In such an environment, collateral damage resulting from high-tech warfare has a disproportionate tendency to backfire at the political level. The key capabilities are instead those intelligence and security capabilities that are geared towards the overlapping areas of military and police operations. There is moreover a huge gap in essential civilian capabilities needed to reform the security sector and build up education, health and justice systems, and much work remains to be done in the integration of efforts to reduce violence and promote economic development and government reform.⁴⁷

In the same vein, governments should reconsider the balance between uniformed personnel and private contractors, in particular in the phase leading from actual hostilities to nation-building. In the fighting phase, private contractors may serve as a multiplier, enabling the commander to use the capabilities at his disposal with greater flexibility. In a nation-building environment, however, outsourcing mission-critical intelligence or security functions to private contractors may negatively affect a commander's direct control over the level of violence, thus undermining the legitimacy of the whole operation.⁴⁸

In 2007, the number of private contractors in Iraq exceeded the number of soldiers there. The highly visible involvement of such contractors in the Abu Ghraib abuses, in unprepared missions (such as that of the Blackwater agents ambushed in Fallujah) and in several shoot-outs that caused civilian deaths has arguably done considerable damage to the credibility of the United States. Washington, as well as other governments, must ask themselves at what point, in the process of outsourcing military and security functions to private contractors, the benefit in terms of increased flexibility is outweighed by a loss of control over the use of force.

Governments must also clarify the nature and scope of modern information operations aimed at influencing an adversary's information or the attitudes of the civilian population in theatres of armed conflict. In asymmetric conflicts the human conscience is increasingly becoming a battle zone on the broad canvas of the globalized media environment. It is a tremendous challenge to distinguish between information operations in combat and general public information activities, for the transition from public diplomacy activities, including foreign propaganda, political marketing and cultural diplomacy, to military psychological operations, including subversive propaganda and disinformation policies, is a fluid one. Democratic states should, as a matter of urgency, clarify what type of operations and under whose authority are legitimate means of warfare under the rule of law.

47 See e.g. David C. Gompert, John Gordon, IV, Adam Grissom, David R. Frelinger, Seth G. Jones, Martin C. Libicki, Edward O'Connell, Brooke K. Stearns and Robert E. Hunter, *War by Other Means: Building Complete and Balanced Capabilities for Counterinsurgency*, RAND, Santa Monica, 2008, available at www.rand.org/pubs/monographs/MG595.2/ (last visited 6 March 2009).

48 See e.g. Clivaz, above note 16; Dina Rasor and Robert Baumann, *Betraying Our Troops: The Destructive Results of Privatizing War*, Palgrave, New York, 2007.

The past as prologue: the development of the ‘direct participation’ exception to civilian immunity

Emily Camins*

Emily Camins is an Australian solicitor who, at the time of writing this paper, co-ordinated the International Humanitarian Law programme for the Western Australia division of Australian Red Cross.

Abstract

The ‘direct participation’ exception to the principle of distinction, found in Article 51(3) of Protocol I and Article 13(2) of Protocol II, embodies a long-recognized concept in the laws governing armed conflict. For centuries the broad notion that humanity demands the protection only of those citizens who are harmless has found expression in the rules and norms relating to war. This article traces the historical factors and trends which influenced the development of the ‘direct participation’ exception in its current form, revealing a tendency towards ‘humanizing’ the law in favour of civilians, notwithstanding their increased military value.

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International humanitarian law¹ is predicated on a delicate equilibrium between the competing demands of military necessity and humanity.² In the development of any norm of international humanitarian law the challenge is, as stated in the 1868

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St Petersburg Declaration, to establish ‘the technical limits at which the necessities of war ought to yield to the requirements of humanity’.³ This subtle balancing act finds expression in Article 51(3) of Protocol I Additional to the Geneva Conventions of 1949,⁴ which provides that civilians are protected from attack ‘unless and for such time as they take a direct part in hostilities’. By permitting the targeting of civilians who participate directly in hostilities, Article 51(3) is a fulcrum balancing the humanitarian impulse to protect civilians with the dictates of military necessity, which permit attacks on civilians who are harmful to the military.

Civilians – that is, those who are not combatants under Article 4A of the Third Geneva Convention of 1949⁵ or Article 43 of Protocol I⁶ – have come to play roles of increased military significance in armed conflict. Developments in weapons technology,⁷ the asymmetric nature of many conflicts⁸ and increased outsourcing of war-related work to private (civilian) contractors⁹ have seen growing classes of civilians become potentially harmful to enemy forces. While military exigencies may mean that such people are viewed as valuable targets, military necessity is subject to the laws of war,¹⁰ including the general prohibition on attacking civilians. Determining the circumstances in which civilians lose immunity from attack for participating directly in hostilities becomes essential. Not only do civilians who participate directly in hostilities become legitimate targets,¹¹ they may also be prosecuted under national laws on the basis that they are not combatants who are entitled to so participate.¹²

- 1 The term ‘laws of war’ will be used interchangeably, particularly in reference to pre-twentieth century manifestations of the law.
- 2 See, e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, pp. 16–17.
- 3 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, opened for signature 29 November/11 December 1868 (no entry into force) (St Petersburg Declaration), preamble; see further Dinstein, above note 2, p. 17.
- 4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, opened for signature 8 June 1977 (entered into force 7 December 1978) (Protocol I); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, opened for signature 8 June 1977 (entered into force 7 Dec 1978) (Protocol II), Article 13(3), in similar terms; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, Rule 6.
- 5 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, opened for signature 12 August 1949 (entered into force 21 October 1950) (Third Geneva Convention).
- 6 Protocol I, Article 50(1).
- 7 See Michael N. Schmitt, ‘War, technology and international humanitarian law’, Program on Humanitarian Policy and Conflict Research at Harvard University, No. 4, 2005, p. 5; Jean-François Quéguiner, ‘Direct participation in hostilities under international humanitarian law’, Program on Humanitarian Policy and Conflict Research at Harvard University, 2003 (working paper), pp. 5–6.
- 8 See Robin Geiss, ‘Asymmetric conflict structures’, *International Review of the Red Cross*, Vol. 88, No. 864 (2006); Schmitt, above note 7, pp. 35–41.
- 9 See generally Michael N. Schmitt, ‘Humanitarian law and direct participation in hostilities by private contractors or civilian employees’, *Chicago Journal of International Law*, Vol. 5, No. 2 (2004), p. 511.
- 10 See, e.g., Nuremberg Military Tribunals, *Hostage Case (USA v. List et al.)*, 11 NMT 1230, 1253 (1948).
- 11 As set out in Protocol I, Articles 48 and 51(1).
- 12 See Protocol I, Articles 43–45. See further Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Clarendon Press, Oxford, 1995, p. 211, s. 501.

Although Article 51(3) is novel in its codification and phrasing of the ‘direct participation’ exception, the basic idea underpinning it – that humanity demands the protection of citizens, provided they are harmless – is not. The general concept that non-combatants who engage in hostile acts may be exposed to attack (and punishment) dates back several centuries. Against this historical backdrop, this paper will trace the factors and ‘mischiefs’ which influenced the formulation of Article 51(3) and which continue to affect its application.

Recognizing that Article 51(3) closes the conceptual gap between civilians entitled to protection from attack and combatants permitted to participate directly in hostilities, this inquiry commences by considering the development of these interlinked categories of persons. Starting with Grotius in the seventeenth century and proceeding to Rousseau in the eighteenth, it traces the limited right to participate in hostilities and the immunity of non-combatants. This paper illustrates that the development of the two categories has been heavily informed by the paradigms of war in which they have arisen, and also by notions of guilt and innocence, military necessity, chivalry and humanity. Having established these foundations, the second part of the paper considers the challenges posed by civilians participating in hostilities in the nineteenth and twentieth centuries and the international legal responses to such participation. While it is beyond the capacity of this paper to critique these activities or the responses to them in any detail, the hidden factors behind the laws, and how they fit within the dominant paradigm of conflict, are examined. The third part of this paper examines the legislative path to the introduction of Article 51(3) and the increased legal protection it provides for civilians. Such an examination is relevant not only for the current interpretation of the article,¹³ but also for an understanding of the factors underpinning it. Finally, drawing on these factors, this paper analyses some trends in the development of Article 51(3) and the compatibility of these trends with changes in the nature of contemporary armed conflict, particularly the shifting demands of military necessity.

The paper does not consider the specific challenges raised by modern warfare in depth; this has been done elsewhere.¹⁴ Rather, in recognition of the changing methods of warfare adopted over the last three decades, it considers the relevance of some of the major assumptions and biases which underpin Protocol I. In so doing, this paper provides a useful backdrop against which to view current debates about the circumstances in which civilians should forfeit their immunity as non-combatants for taking a direct part in hostilities under Article 51(3).

13 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, opened for signature 23 May 1969 (entered into force 27 January 1980), Article 32, which allows recourse to be had to a treaty’s preparatory works if the meaning of the text is ambiguous or obscure. The ongoing discussions about the meaning of Article 51(3) suggest that this is the case.

14 See, e.g., Quéguiner, above note 7; Schmitt, above note 9; N. Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008.

Background: Grotius to Rousseau

This paper’s inquiry into the development of the ‘direct participation’ exception to civilian immunity begins with Grotius, since his work, along with that of Francisco de Vitoria, is acknowledged as the analytical basis of the contemporary law of land warfare.¹⁵ Grotius, writing in the midst of the Thirty Years War in 1625, recorded the state of the law of nations – the nascent international law – as he perceived it. By the seventeenth century, modern nation-states, although in an incipient form, had emerged as the only legitimate authorities in Europe that could make war on their neighbours and suppress rebellion within their own realms.¹⁶ Their status as such was cemented with the adoption, in 1648, of the Peace of Westphalia, which abolished private armies and conferred a legal monopoly on states for the maintenance of armies and for fighting wars.¹⁷ Developing on the ‘just war’ theories, ideas of military honour and chivalry required that wars be fought ‘publicly and openly’.¹⁸ Those who fought in wars without the authority of the state were considered marauders, brigands and freebooters outside the law of nations,¹⁹ and perfidy was repugnant to the fighting classes.²⁰ In accordance with the ideas of the medieval law of war (the *jus militare*), those who engaged in other than ‘open and public wars’ met short shrift at the hands of the fighting classes.²¹ It is against this background that the writings of Grotius are considered.

Grotius, the practice of nations and restraint in war

Grotius’ starting point was his conception of the effect of a declaration of war on a sovereign’s subjects. In his view, a public war (that is, a war waged between two or more sovereign authorities) was ‘declared at the same time ... upon all a sovereign’s subjects’.²² Accordingly, the ‘right to kill’ which arises in war²³ extended ‘not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy’s territory’.²⁴ Indeed,

15 See, e.g., Richard Shelly Hartigan, *Lieber’s Code and the Law of War*, Precedent, Chicago, 1983, p. 3.

16 Michael Howard, ‘Constraints on warfare’, in 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, p. 9.

17 Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Westphalia), 24 October 1648, available at The Avalon Project, Yale Law School, http://avalon.law.yale.edu/17th_century/westphal.asp (last visited 8 December 2008). Article 118 provided that ‘the Troops and Armys [sic] of all those who are making War in the Empire, shall be disbanded and discharg’d [sic]; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.’

18 G. I. A. D. Draper, ‘The status of combatants and the question of guerrilla warfare’, *British Yearbook of International Law*, Vol. 45 (1971), pp. 173–5.

19 *Ibid.*, pp. 174, 175.

20 *Ibid.*, p. 174.

21 See *ibid.*, p. 175.

22 Hugo Grotius, *The Law of War and Peace* (1625), reproduced in Leon Friedman (ed.), *The Law of War: A Documentary History*, Random House, Inc., New York, 1972, book III, ch. III, s. IX.

23 *Ibid.*, book III, ch. IV, s. V.

24 *Ibid.*, book III, ch. IV, s. VI.

Grotius explicitly stated that the slaughter of infants, women, old men, hostages and 'suppliants' seeking to surrender was permissible in a public war.²⁵ He found ample evidence of the slaughter of non-combatants in the writings of ancient scholars and the 'common practice of nations'.²⁶

Grotius explicitly distinguished, however, between actions which are 'permissible' according to the law of nations (such as those outlined above) and those which were 'right', 'praiseworthy' or 'honourable'.²⁷ He wrote,

when I first set out to explain this part of the law of nations I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part also because coactive tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men.²⁸

His treatment of legally permissible actions may thus be seen as a forced concession to past verdict and practice.²⁹

On the question of what is 'right' or 'honourable' in war (or the *lex ferenda*), Grotius stated as a basic principle, 'One must take care, so far as is possible, to prevent the death of innocent persons, even by accident'.³⁰ While he did not expressly define 'innocent persons', he appears to have been referring to those who are unarmed³¹ and have not committed any serious crimes.³² Citing Livy and Josephus, Grotius observed,

By the law of war armed men and those who offer resistance are killed. ... [I]t is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured.³³

In Grotius' view, children should always be spared, as should women, unless they 'have committed a crime which ought to be punished in a special manner, or unless they take the place of men'.³⁴ Similarly, men 'whose manner of

25 Ibid., book III, ch. IV, ss. VI–XIV.

26 See *ibid.*, book III, ch. I, s. II.

27 Ibid., book III, ch. I, s. II, and book III, ch. X, s. I. See further H. Lauterpacht, 'The Grotian tradition in international law', *British Yearbook of International Law*, Vol. 23 (1946), p. 5, and his criticism of Grotius' research methodology.

28 Grotius, above note 22, book III, ch. X, s. I.

29 See Richard R. Baxter, 'So-called "unprivileged belligerency": spies, guerrillas and saboteurs', *British Yearbook of International Law*, Vol. 28 (1951), pp. 324–5. See further Quincy Wright, *A Study of War*, University of Chicago Press, Chicago, 1942, p. 308.

30 See Grotius, above note 22, book III, ch. XI, s. VIII.

31 See Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 13.

32 Grotius, above note 22, book III, ch. XI, s. XVI.

33 Ibid., book III, ch. XI, s. X.

34 Ibid., book III, ch. XI, s. IX.

life is opposed to war’ – specifically those who perform religious duties or men of letters – should be spared.³⁵

In urging restraint in relation to these categories of civilians, unless they took up arms, Grotius trod a path well worn by earlier commentators such as Gentili, Suarez and Vitoria.³⁶ It was, however, Grotius’ reluctant view that the *lex lata*³⁷ permitted the slaughter of these categories of civilians as they were, according to Grotius’ conception, ‘enemies’ in a public war.

Rousseau’s maxim

From Grotius’ concept of the effect of a declaration of war, the significance of Rousseau’s commentary becomes apparent. In contrast with Grotius, Rousseau took the view that war is a relation between governments, involving the citizens of a state only ‘accidentally’. Writing in 1762, Rousseau said,

War, then, is not a relationship between man and man, but between State and State, in which private persons are only enemies accidentally, not as men, nor even as citizens, but simply as soldiers; not as members of their fatherland, but as its defenders ...³⁸

Rousseau’s maxim explicitly recognized that non-combatant citizens are not, in any real sense, the enemies of an opposing army and should not be made its object.³⁹ Prior to Rousseau’s contribution, the separate identity of the individual and his or her state was not recognized by the law of nations; the identification of one with the other was total.⁴⁰ Rousseau’s maxim is, accordingly, seen by many as forming the modern jurisprudential basis for the principle of non-combatant immunity,⁴¹ or as Best wryly put it, ‘the non-combatant’s supreme talisman’.⁴²

Rousseau’s statement appears to have reflected contemporary practice at the time he was writing.⁴³ Cassese has observed that during the period from 1648 to 1789, war became very much a game between professionals without a great

35 Ibid., book III, ch. XI, s. X.

36 See, e.g., Theodor Meron, ‘Shakespeare’s Henry the Fifth and the law of war’, *American Journal of International Law*, Vol. 86 (1992), pp. 24–5, citing Alberico Gentili, *De Jure Belli Libris Tres*, trans. J. C. Rolfe, ed. Carnegie Endowment for International Peace. Division of International Law, Clarendon Press, Oxford, and H. Milford, London, 1933, pp. 251–4, 427–8.

37 That is, the law as it exists.

38 Jean-Jacques Rousseau, *Du Contrat Social*, 1762, book I, ch. 4, reproduced in Geoffrey Best, *Humanity in Warfare*, Columbia University Press, New York, 1980, p. 56.

39 See Chris af Jochnick and Roger Normand, ‘The legitimization of violence: a critical history of the laws of war’, *Harvard International Law Journal*, Vol. 35 (1994), p. 62, n. 48.

40 Gardam, above note 31, p. 12.

41 Ibid., pp. 12–13; Best, above note 38, pp. 55–9 (although critical of the practical effects of Rousseau’s ‘well-meaning but practically useless maxim’); Draper, above note 18; H. Lauterpacht (ed), *Oppenheim’s International Law*, 7th edn, Longman, London (Vol. II), 1948–52, p. 205.

42 Geoffrey Best, *War and Law Since 1945*, Oxford University Press, Oxford, 1994, p. 32.

43 Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary*, Callaghan & Co., Chicago, 1908, pp. 47–8; cf. Karma Nabulsi, *Traditions of War*, Oxford University Press, Oxford, 1999, pp. 36–7.

deal of involvement of the civilian population.⁴⁴ In contrast with the bloodiness of the Thirty Years War, during which Grotius wrote his treatise, wars in Rousseau's era were fought by professional armies, the expense of which kept conflicts small.⁴⁵ Moreover, military professionalism ensured that a soldier's focus was on mastering armed opponents, not on the civilian population.⁴⁶ Publicists such as Vattel were already cautiously moving towards a judicial statement of non-combatant immunity to match the practical immunity increasingly being achieved in conflict.⁴⁷ Rousseau's statement, however, was appealing for its 'surpassing simplicity'.⁴⁸ It set up an unbridgeable conceptual divide between combatants and non-combatants.⁴⁹

Over the years, many people have criticized aspects of Rousseau's maxim.⁵⁰ It is outside the scope of this paper to examine the merits of these criticisms in detail. Suffice it to note that, although the maxim was, and is, far from universally accepted,⁵¹ its influence is undeniable.⁵² The conceptual gulf it established, coupled with the idea (alluded to by Rousseau and codified in 1868 in the St Petersburg Declaration)⁵³ that the only legitimate object of war is to weaken the military forces of the enemy, brought Grotius' conception of the *lex ferenda* to life. In this way, the concept of innocence, on which Grotius and his contemporaries had focused, expanded and metamorphosed into notions of civilian status and the protection of civilians from attack.⁵⁴ Against the above backdrop, the second part of this paper

44 Gardam, above note 31, p. 12, citing Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, p. 255. On the notion that war in the seventeenth and eighteenth centuries was a game, see further Gunther Rothenberg, 'The age of Napoleon', in 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, p. 86; Wright, above note 29, p. 810; and the Treaty of Amity and Commerce between the United States and Prussia, 8 Stat. 84, 9 July and 10 September 1785, reproduced in Meron, above note 36, p. 25.

45 Howard, above note 16, p. 4; Wright, above note 29, p. 810.

46 Best, above note 42, p. 34; see further, Howard, above note 16, pp. 9–10 (observing that up to the late eighteenth century non-combatants had rarely taken any substantial part in hostilities, and the status of those who did was anomalous).

47 Best, above note 38, p. 56.

48 Ibid.

49 Best, above note 42, p. 258.

50 See, e.g., Best, above note 38, pp. 55–9 (calling the famous maxim 'pretentious and imprudent', 'defective and disadvantageous' and a 'well-meaning but practically useless maxim [which] merely encouraged self-deception among the French'); I. P. Trainin, 'Questions of guerrilla warfare in the law of war', *American Journal of International Law*, Vol. 40 (1946), pp. 537–8; J. Westlake, *International Law*, Cambridge University Press, Cambridge, 1894, p. 259, quoted in Gardam, above note 31, p. 14.

51 See, e.g., Baxter, above note 29, p. 324 (arguing that war is a conflict against populations, in which each national of one belligerent is pitted against each national of the other); *Griswold v. Waddington*, 16 Johns 438, 448 (1819) (in which Chancellor Kent held that '[a] war on the part of the government is a war on the part of all individuals of which that government is composed'); *The Rapid*, 8 Cranch, 155, 161, 3 L. Ed. 520 (1814) (finding that '[e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy – because the enemy of his country'), both cited in Lester Nurick, 'The distinction between combatant and noncombatant in the law of war', *American Journal of International Law*, Vol. 39 (1945), p. 681.

52 See above note 41.

53 St Petersburg Declaration, preamble.

54 Meron, above note 36, p. 25.

considers some of the different ways in which non-combatants have participated in hostilities throughout history, and how the laws of war responded to them.

Law-making and the ‘wars of nations’

Beginning with the revolutionary wars of the late eighteenth century and early nineteenth century, war passed through a transition from the dynastic war of kings to the war of nations-at-arms, in which entire populations were mobilized to support the war effort.⁵⁵ An increasing range of activities involving peasants, such as providing food to partisans and passing on information about the occupying army, came to be regarded as political participation in conflict.⁵⁶ Armed resistance increased alongside political participation, and took many forms, including spontaneous armed resistance, organized acts of resistance in the form of guerrillas and *francs-tireurs*,⁵⁷ and the *levée en masse*.⁵⁸ Any currency Rousseau’s maxim once held was undermined.

During the late eighteenth and nineteenth centuries, the practical response to non-uniformed fighters was usually ferocious.⁵⁹ Due to the ‘treacherous’ threat they posed, armed civilians, regardless of gender, were attacked with ‘a draconian severity’ by opposing armed forces.⁶⁰ Moreover, according to Nabulsi, there was no real legal or practical distinction between non-violent political behaviour and violent resistance.⁶¹ Peasants who, for instance, passed on information about the occupying army, hid escaped prisoners of war or fed illicit fighters, were deemed as criminal as those who physically killed soldiers from the occupying force.⁶² They were also exposed to risks, including being shot, for certain conduct, such as hiding their own crops.⁶³ Due to the relative paucity of historical records on political resistance in the nineteenth century,⁶⁴ it is difficult to determine whether political resisters were targeted directly or executed as a matter of law enforcement. From

55 See, e.g., the French ‘*Levée en masse*’ decree from 1793: ‘Young men shall go to battle; married men shall forge arms and transport provisions; women shall make tents and clothing and shall serve in the hospitals; children shall turn old linen into lint; the aged shall betake themselves to public places in order to arouse the courage of the warriors and preach hatred of kings and the unity of the Republic’, reproduced in Best, above note 38, p. 59. See further Rothenberg, above note 44, p. 86 (dating the development from 1792–1815).

56 Nabulsi, above note 43, p. 42.

57 The phrase ‘*francs-tireurs*’ was used, loosely speaking, to denote citizens who took up arms to resist invading forces. See Nabulsi, above note 43, p. 47. For Lieber’s definition of ‘guerrilla parties’, see below note 75.

58 The *levée en masse* referred to citizens who, on express or assumed orders of the government, took up arms for purely defensive purposes. Nabulsi, above note 43, p. 52.

59 See Jochnick and Normand, above note 39, p. 63. On the treatment of irregular troops in the revolutionary wars in the late eighteenth century, see Best, above note 38, pp. 118–19.

60 A. Brenet, *La France et l’Allemagne devant le droit international, pendant les opérations militaires de la guerre 1870–1871*, A. Rousseau, Paris, 1902, p. 29, quoted in Nabulsi, above note 43, p. 48.

61 Nabulsi, above note 43, p. 45.

62 Ibid., p. 42.

63 Ibid.

64 Ibid., p. 46.

the few records that do exist, however, it appears that, primarily, they were executed as a matter of law enforcement.⁶⁵

How the positive laws of war would deal with the various forms of civilian conduct was yet to be determined. The growing involvement of civilians in political life, including in armed conflict, compelled governments in the nineteenth century to discuss the question of 'normalizing' their involvement in war.⁶⁶ As discussed below, European countries which relied more heavily on the civilian population in armed conflict advocated their recognition as legitimate combatants. The debates around this issue were heavily influenced by the work of Dr Francis Lieber, a German émigré to America.

Lieber and his Code

It was not only in Europe that the participation of non-combatants in war demanded attention. Across the Atlantic, the methods used by the South in the American Civil War compelled the Union government to find ways of addressing the legal status of guerrilla warfare.⁶⁷ According to Hartigan, in the early years of the conflict the Union army tended to equate all irregular troops with 'guerrillas', who in turn were classified as criminals.⁶⁸ As in Europe during the revolutionary wars, this generalization applied not only to those who bore arms for the South, but also to non-combatant civilians who either actively or passively supported irregular troops.⁶⁹ The rebel authorities, on the other hand, claimed the right to engage in guerrilla warfare and be treated as combatants.⁷⁰ Writers on the laws of war had not dealt with the status of these troops in any comprehensive manner.⁷¹ In apparent recognition of the conundrum, Henry Wager Halleck, the general-in-chief of the Union armies, wrote to Lieber in 1862 requesting his assistance in defining guerrilla warfare.⁷² Lieber obliged, initially producing an essay on the topic⁷³ and later completing a more comprehensive field manual. Due to Lieber's substantial influence on the subsequent codification of the laws of war, it is worthwhile examining his contribution in some detail.

65 But see Best, above note 38, p. 199 (discussing instances of German armed forces in 1870 shooting not only at civilians who shot at them, but also those 'who were not so clearly doing so').

66 Trainin, above note 50, p. 536.

67 See generally, Hartigan, above note 15, pp. 1–29.

68 *Ibid.*, p. 9.

69 *Ibid.*

70 *Ibid.*, p. 2.

71 See Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, D. Van Nostrand, New York, 1862, reproduced in Hartigan, above note 15, p. 31. Hereafter all references to this work are to its reproduction in Hartigan.

72 Hartigan, above note 15, p. 2.

73 For the initial essay produced in response to Halleck's request, see Lieber, above note 71, reproduced in Hartigan, above note 15, pp. 31–44. This was implemented by General Order No. 30: Official Orders Dealing with the Application of Lieber's Essay on Guerrilla Warfare, approved 22 April 1863 (General Order No. 30).

Lieber’s essay on guerrilla warfare and the laws of war dealt comprehensively with the treatment of ‘armed parties loosely attached to the main body of the army, or altogether unconnected with it’.⁷⁴ Lieber observed that while several categories of armed bands (the freebooter, marauder, brigand, partisan, free corps, spy, war-rebel or conspirator, highway robber and *levée en masse* or ‘arming of the peasants’) were dealt with by the laws of war, ‘guerrilla parties’⁷⁵ were not.⁷⁶ Guerrillas, according to Lieber, are ‘peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands’.⁷⁷ In reflection of this ‘peculiar’ threat, Lieber argued that, when guerrilla parties aid the main army of the belligerent in ‘fair fight and open warfare’, they should be treated as regular partisans.⁷⁸ If, however, they resort to ‘occasional fighting and the occasional assuming of peaceful habits, and to brigandage’, they should not be protected by the laws of war.⁷⁹

Lieber’s treatment of ‘guerrilla parties’ may be contrasted with his treatment of the *levée en masse*. After noting that most constitutions enshrined the right of the people to possess and use arms, Lieber concluded that it was generally agreed that the rising of the people openly to repel invasion entitled them to the privileges of the laws of war.⁸⁰ The absence of a uniform was immaterial, provided such absence was not used for the purpose of concealment or disguise.⁸¹ Lieber thus gave emphasis to the idea of ‘openness’, a dominant indicator of a lawful war in medieval and post-Westphalian warfare.⁸²

Lieber subsequently completed his manual on the laws of war, which became ‘General Orders, no. 100: Instructions for the Armies of the United States in the Field’.⁸³ Lieber, whose political affiliations were with the anti-slavery North, felt that in order to preserve the Union and free the slaves, it was essential to bring discipline to the Union army and to define precisely the status of the enemy troops and greater population.⁸⁴ In the light of this attitude, it is, perhaps, unsurprising that his Code constituted ‘an admixture of military sternness with basic

74 Lieber, above note 71, p. 31.

75 By ‘guerrilla parties’ Lieber meant

self-constituted sets of armed men in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (*guerrilla*) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter. (ibid., p. 41).

76 Ibid., p. 34.

77 Ibid., p. 41.

78 That is, a member of the regular army who operates separately from the main force: ibid., pp. 35, 42.

79 Ibid., p. 42.

80 Ibid., pp. 38–9.

81 Ibid., pp. 39–40.

82 On the importance of ‘openness’, see Draper, above note 18, p. 174.

83 General Orders, no. 100: Instructions for the Armies of the United States in the Field, approved 24 April 1863 (Lieber Code) (reproduced in Hartigan, above note 15, pp. 45–71).

84 Hartigan, above note 15, pp. 6–7.

humanitarianism'.⁸⁵ This delicate balance is evident in Article 15 of the Code, which codified the permissible destruction of life during war. It provided,

Military necessity⁸⁶ admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war ...

The Code defined the term 'enemy' to include citizens.⁸⁷ Article 15, therefore, emphasized the status of armed enemy citizens as legitimate targets. Other dangerous enemies or people of importance to the government could lawfully be captured.⁸⁸

Article 22 of the Code provided for the immunity of civilians. It stated, 'The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.'⁸⁹ The question of precisely how much 'the exigencies of war will admit' was not further developed in the Lieber Code. It was clear from Article 15 that all armed enemy citizens may be directly attacked.⁹⁰ However, the Code was less direct on the protection from attack provided to hostile, but unarmed, civilians.⁹¹ Some, such as spies and certain types of war traitors,⁹² were to be dealt with under severe rules of law enforcement, which included capture and execution.⁹³ Moreover, those who 'held intercourse' with the enemy were also treated as war traitors and faced 'severe' punishment.⁹⁴ According to General Order No. 30, those who harboured and fed the enemy were to 'suffer death' or such other punishment as ordered by a court martial.⁹⁵ This Order suggests that the 'military exigencies' referred to in Article 22 of the Lieber Code would, under the banner of law enforcement, have permitted the killing of certain unarmed hostile citizens for their participation in hostilities.

85 Frank Freidel, *Francis Lieber*, Louisiana State University Press, Baton Rouge, 1947, quoted in Hartigan, above note 15, p. 15; but see Jochnick and Normand, above note 39, pp. 65–6 (arguing that the Code condoned 'a barbarous system of warfare').

86 That is, 'the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'. Lieber Code, Article 14.

87 Lieber Code, Article 21, provided that the citizen of a hostile country is an enemy and as such subjected to the hardships of war.

88 Lieber Code, Article 15.

89 The Code went on to observe that in modern European wars, the protection of the inoffensive citizen of the hostile country has become the rule, rather than the exception: Lieber Code, Article 25. See also Articles 23 and 25 (which protected the private relations of the 'inoffensive' individual).

90 Lieber Code, Article 15, read with Article 21.

91 The Lieber Code distinguished in Article 155 between loyal citizens and disloyal citizens, and further divided the disloyal citizens into those who sympathise with the rebellion without positively aiding it, and 'those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto'. While loyal citizens were to be protected, disloyal citizens were to have 'the burden of the war' thrown upon them, subjecting them to a 'stricter police' than usual and requiring them to declare their fidelity to the government. Lieber Code, Article 156.

92 For instance, those who '[betray] to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district'. Lieber Code, Article 91.

93 Lieber Code, s. V (esp. Articles 88–101).

94 Lieber Code, Articles 90 and 91.

95 General Order No. 30, pp. 92–97, 96.

Brussels to The Hague

Lieber’s authority as to the laws of war was held by his contemporaries in high regard,⁹⁶ and his Code was widely adopted in Europe.⁹⁷ The Lieber Code formed the basis of the draft text for the Brussels Conference in 1874, which was convened at the behest of Emperor Alexander of Russia.⁹⁸ The Conference gave rise to a Protocol and a Declaration on the laws of war.⁹⁹ The Declaration was not ratified due to the unwillingness of the ‘great powers’, who, according to Jochnick and Normand, considered it too ‘humanitarian’.¹⁰⁰ Many of its rules were, nonetheless, reproduced in military manuals.¹⁰¹

The Brussels Protocol adopted, in slightly looser terms, the principle of restraint laid down six years earlier in the St Petersburg Declaration,¹⁰² stating that the only legitimate object of war is to weaken the enemy without inflicting unnecessary suffering.¹⁰³ The Brussels Declaration went on to specify, in Articles 9 to 11, the classes of people who should be recognized as ‘belligerents’ under the laws of war. Under Article 9, the laws of war applied to armies, and militia and volunteer corps who were commanded by a responsible person, had a fixed distinctive emblem recognisable at a distance, carried arms openly, and conducted their operations in accordance with the laws of war. Like the Lieber Code, this definition of ‘belligerent’ focused on the requirement of ‘openness’ of warfare and reflected an aversion for perfidious methods. According to Risley, writing at the close of the nineteenth century, Article 9 accurately expressed the generally accepted laws of war.¹⁰⁴ Article 10 conferred belligerent status on the members of a *levée en masse*, while Article 11 granted prisoner of war status to non-combatant members of the armed forces.

On the controversial issue of those outside the armed forces or the *levée en masse* who resisted invasion or occupation, the Brussels Declaration said nothing. This omission was not for want of trying. The Russian draft text, for instance, proposed that individuals not qualifying as combatants, but who ‘at one time take

96 Sir Edward Creasy, *First Platform of International Law*, 1876, cited in L. Oppenheim, ‘On war treason’, *Law Quarterly Review*, Vol. 33 (1917), p. 278; Best, above note 42, p. 43 (observing that the Code was ‘universally admired’); but see Gardam, above note 31, p. 17 (stating that it is not clear to what extent the Code represented customary law).

97 Lord Russell of Killowen, ‘International law: the annual address before the American Bar Association’, *Albany Law Journal*, Vol. 54 (1896–7), p. 122 (observing that the manual had been adopted by England, France and Germany).

98 Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd edn, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 25.

99 Final Protocol of the Brussels Conference, opened for signature 27 August 1874, 4 *Martens Nouveau Recueil* (ser. 2) 219 (Brussels Protocol), and Project of an International Declaration Concerning the Laws and Customs of War, not opened for signature, 1874 (Brussels Declaration), both reproduced in *ibid.*, pp. 25–34.

100 Jochnick and Normand, above note 39, p. 67.

101 John Shuckburgh Risley, *The Law of War*, A. D. Innes and Co., London, 1897, pp. 109–10.

102 St Petersburg Declaration, preamble (stating that ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’).

103 Brussels Protocol.

104 Risley, above note 101, p. 111.

part independently in the operations of war, and at another return to their pacific occupations ..., do not enjoy the rights of belligerents, and are amenable, in case of capture, to military justice'.¹⁰⁵ The draft article was, however, withdrawn as a consequence of the opposition of the smaller powers, many of whom viewed the Brussels Conference as an attempt by the military powers to prevent resistance being offered by the civilian population against an invader.¹⁰⁶ The Brussels Declaration did not, therefore, explicitly forbid guerrilla warfare and other forms of civilian participation in hostilities falling outside Article 9.¹⁰⁷ Rather, it merely enumerated conditions (in Articles 9 and 10) under which combatants were to be regarded as lawful.¹⁰⁸ Thus, in the absence of rules protecting civilians, individuals who participated in hostilities in any way continued to do so at their own risk.¹⁰⁹

The Brussels Declaration, while not ratified, provided an important basis for the work of the jurists of the Institute of International Law, who produced the 'Oxford Manual' in 1880.¹¹⁰ The Oxford Manual, which purported to codify 'the accepted ideas of our age so far as this has appeared allowable and practicable',¹¹¹ provided in Article 1,

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.¹¹²

The armed forces of a state were defined in Article 2 and included bodies other than the regular army which, among other things, wore a uniform or 'fixed distinctive emblem' and carried arms openly.¹¹³ The manual went on to forbid the 'maltreatment' of 'inoffensive populations', on the basis that 'The contest (is) carried on by "armed forces" only'.¹¹⁴ Like the Brussels Declaration, however, the Manual did not give further consideration to the question of people who fell in the gap between the 'armed force' and 'inoffensive population', such as civilians who engaged in hostile acts, whether bearing arms or not. The exception to this rule was

105 Reproduced in L. Nurick and R. W. Barrett, 'Legality of guerrilla forces under the laws of war', *American Journal of International Law*, Vol. 40 (1946), p. 565. Cf. Trainin, above note 50, p. 542. See further Nabulsi, above note 43, p. 16.

106 See, e.g., Risley, above note 101, p. 109; Trainin, above note 50, p. 542; Nurick and Barrett, above note 106, p. 565; Nabulsi, above note 43, p. 17.

107 Trainin, above note 50, p. 543; Nurick and Barrett, above note 106, p. 565. This is consistent with the previously prevalent view that international law governs only relations between states: see L. Oppenheim, *International Law*, 6th edn, ed. H. Lauterpacht, Longman, Green, London and New York, 1940, s. 254, cited in Nurick and Barrett, above note 105, pp. 568–9.

108 Nurick and Barrett, above note 106, p. 565.

109 See Best, above note 38, p. 199; Best, above note 42, p. 43.

110 *The Laws of War on Land*, adopted by Institute of International Law on 9 September 1880 (Oxford Manual). See further Nabulsi, above note 43, pp. 8–9.

111 Oxford Manual, preamble.

112 Ibid., Article 1.

113 Ibid., Article 2. The definition of armed forces also included the inhabitants of non-occupied territory who take up arms spontaneously to resist invading enemy troops.

114 Ibid., Article 7.

the treatment of individuals as spies, who could not demand treatment as prisoners of war.¹¹⁵

Although the Manual was ignored by most countries and derided by its contemporaries,¹¹⁶ it formed, along with the Brussels Declaration, the basis of the Hague Conventions on the conduct of land warfare which were adopted in 1899 and 1907.¹¹⁷ These Conventions were, according to their preambles, ‘inspired by the desire to diminish the evils of war, as far as military requirements permit’.¹¹⁸ Both Conventions adopted a set of Regulations Respecting the Laws and Customs of War on Land which were in most material respects identical. As Best has observed, the Hague Regulations have provided the basis for the laws of land warfare ever since.¹¹⁹

In contrast with the Oxford Manual and, to a lesser extent, the Brussels Protocol,¹²⁰ the Hague Conventions did not refer specifically to the immunity of civilians from direct attack.¹²¹ The definition of ‘belligerent’ used in the Brussels Declaration was, however, reproduced in the Hague Regulations without change.¹²² Participants in the *levée en masse* who carried arms openly and respected the laws of war were likewise considered belligerents entitled to the rights and subject to the duties of the laws of war.¹²³ The continued focus on openness was also apparent in the definition of spies. A spy was a person who, acting clandestinely or on false pretences, attempted to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.¹²⁴ Soldiers not wearing a disguise who managed to penetrate the zone of operations of the hostile army to obtain information were not considered spies. Nor were civilians who ‘openly’ carried out their mission to deliver despatches.¹²⁵

The Regulations did not expressly address the fate of other civilians who, falling short of the definition of belligerent, took up arms against an invading or

115 Ibid., Article 23.

116 Nabulsi, above note 43, pp. 8–9.

117 Hague Convention (II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803, opened for signature 29 July 1899 (entered into force 4 September 1900) (1899 Hague Convention) and its Annex, Regulations Respecting the Laws and Customs of War on Land (1899 Hague Regulations); Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1910 UKTS 9, opened for signature 18 October 1907 (entered into force 26 January 1910) (1907 Hague Convention), and its Annex, Regulations Respecting the Laws and Customs of War on Land (1907 Hague Regulations). These documents are reproduced in Schindler and Toman, above note 98, pp. 63–98. On the influence of the Brussels Declaration and Oxford Manual, see Schindler and Toman, above note 98, p. 25.

118 1907 Hague Convention, preamble. The preamble to the 1899 Hague Convention adopts similar wording.

119 Best, above note 42, p. 41.

120 See Oxford Manual, above note 114, Article 7; and, Brussels Protocol, above note 103 and accompanying text.

121 See Gardam, above note 31, p. 19.

122 See 1899 Hague Regulations, Article 1; cf. Brussels Declaration, Article 9. See Knut Ipsen, ‘Combatants and non-combatants’ in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, s. 308, p. 76.

123 1899 and 1907 Hague Regulations, Article 2.

124 Ibid., Article 29.

125 Ibid.

occupying power, or resisted in other ways. This issue therefore remained the province of customary international law.¹²⁶ The 1866 edition of Wheaton's classic text, *Elements of International Law*, stated the law as follows:

[N]o use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted ... all ... public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.¹²⁷

The editor's accompanying note elaborated that non-combatants who 'make forcible resistance, or violate the mild rules of modern warfare, give military information to their friends, or obstruct the forces in possession ... are liable to be treated as combatants'.¹²⁸ Thus, hostile but unarmed civilians could lawfully be targeted for their participation in conflict.

Risley, writing in the closing years of the nineteenth century, appears, at first blush, to have interpreted the law more restrictively in favour of civilians. In language reminiscent of Common Article 3 of the four Geneva Conventions of 1949,¹²⁹ he argued that subjects of a belligerent 'are not liable to be killed or taken as prisoners of war so long as they do not *actively* engage in hostilities'.¹³⁰ Further examination of Risley's argument, however, suggests that participation in hostilities need not in fact have been 'active' for a non-combatant to lose immunity. Risley contended that the immunity of non-combatants was granted on the implicit understanding that the distinction between the classes of combatant and non-combatant be maintained in good faith.¹³¹ Accordingly, immunity was 'forfeited by a non-combatant who commits any hostile act'.¹³² He stated,

Combatants must be open enemies, known and knowable, and non-combatants must be harmless. As soon as an individual ceases to be harmless, he ceases to be a non-combatant, and must be reckoned a combatant; and unless he bears the distinguishing marks of an open combatant, he puts himself

126 See especially, 'Martens clause', 1899 Hague Convention, preamble, and 1907 Hague Convention, preamble, which expressly required states parties to respect customary international law 'and the dictates of public conscience'.

127 Henry Wheaton, *Elements of International Law*, literal reproduction of the edition of 1866 by Richard Henry Dana, Jr, ed. with notes by George Grafton Wilson, Clarendon Press, Oxford, and H. Milford, London, 1936, s. 345, p. 362.

128 Ibid., s. 345, p. 362, note 168, citing H. Halleck, *International Law, or, Rules Regulating the Intercourse of States in Peace and War*, San Francisco, 1861, pp. 427, 428. See further L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, p. 101.

129 Hereafter Common Article 3.

130 Risley, above note 101, p. 107 (emphasis added). According to Gardam, the military manuals of the United States and the United Kingdom provide evidence of Risley's approach in practice. Gardam, above note 31, p. 15.

131 Risley, above note 101, p. 107.

132 Ibid.

outside the laws of war, and is, if captured, liable to be shot as a bandit instead of detained as a prisoner of war.¹³³

In accordance with Risley’s analysis, civilians who ‘actively engaged in hostilities’, ‘ceased to be harmless’, or ‘[committed] any hostile acts’ would have become subject to attack.

The breadth of, and lack of precision in, these phrases would have provided cold comfort to civilians in conflict zones at the turn of the twentieth century. Regrettably, significant gaps in the positive law, such as the lack of a definition of ‘civilian’ and the failure of the world’s powers to agree on the status of individuals who took up arms or otherwise participated in hostilities without meeting the requirements of belligerent status,¹³⁴ persisted for some time. These deficiencies opened the door for arguments in the early part of the twentieth century that all non-combatants whose destruction would be of military value should lose their immunity from attack.

The challenges of ‘total war’

The twentieth century saw a blurring of the distinction between combatants and civilians in armed conflict.¹³⁵ With no positive law protecting (or, indeed, defining) civilians, their immunity from attack was precarious¹³⁶ and vulnerable to arguments that military necessity permitted them to be targeted. Wright observed in his authoritative *A Study of War* in 1942,

As the proportion of the population contributing directly or indirectly to the making of the policy and the military of the enemy have increased, economic and propaganda measures have gained in relative importance. Attacks upon civilians ... have increased under the plea that traditional rules must be applied in the light of ‘military necessity’ as developed under changing technical conditions.¹³⁷

As discussed below, by the Second World War arguments of military necessity were used to justify widespread bombing of civilian and industrial targets. The notion that humanity required the protection of ‘harmless’ civilians, which had come to be the norm at the turn of the twentieth century,¹³⁸ proved largely ineffective in sparing civilian populations from attack.

133 Ibid., p. 108.

134 The status of spies is an exception.

135 See, e.g., Nurick, above note 51, p. 692 (identifying six factors contributing to the near obsolescence of the distinction); Joyce Gutteridge, ‘The Geneva Conventions of 1949’, *British Yearbook of International Law*, Vol. 26 (1949), p. 319.

136 See, e.g., Gardam, above note 31, pp. 23, 113.

137 Wright, above note 29, p. 151.

138 See above note 133.

Quasi-combatants

With increasingly sophisticated methods of warfare, the civilian population became more involved in the war-making machine, including in supplying arms and ammunitions.¹³⁹ One of the great debates during the two world wars revolved around the status of armament and munitions workers. Such persons did not fall within the definitions of ‘combatant’ or ‘non-combatant members of the armed forces’ under the Hague Regulations.¹⁴⁰ In the absence of a positive definition of ‘civilian’, it was also logically problematic to regard them as such, given that their workplaces constituted legitimate military targets under customary international law.¹⁴¹ The need to clarify the status of such workers, whose contribution to the war effort was arguably on a par with that of soldiers,¹⁴² was compounded by the advent of aerial warfare. Aerial warfare enabled belligerents to attack military objectives – such as munitions factories – on a larger and less discriminate scale than previously.¹⁴³ The status of those inside the factories became crucial.

Accordingly, as early as 1916 arguments were made that armament workers should be treated as a category of quasi-combatants who lost their immunity as non-combatants and should be treated as combatants while they were engaged in activities harmful to the enemy. In an article in the *Revue de Droit International* Rolland wrote that armament workers

... occupy a position intermediate between the combatants proper and the non-combatants who are still employed on their peacetime trades and professions. The reasons for sparing them are losing force. Fundamentally they are almost in exactly the same position as the men of the auxiliary services of the armies, and the latter are certainly legitimate objects of attack.¹⁴⁴

This argument was taken up with great vigour by some scholars over the next thirty years.¹⁴⁵ In 1938 Spaight famously urged international law to ‘move with the times’ by accepting that ‘the old clear-cut division of enemy individuals into combatants and non-combatants is no longer tenable without some qualification’.¹⁴⁶ This

139 See, e.g., Gardam, above note 31, p. 23; Gutteridge, above note 135, p. 319.

140 As set out in 1899 and 1907 Hague Regulations, above note 117, Article 3.

141 See, e.g., Hague Rules on Air Warfare, December 1922–February 1923 (not opened for signature), Article 24(2). Although they never became binding, the Hague Rules were considered an authoritative attempt to clarify and formulate rules of law governing aircraft in war. Schindler and Toman, above note 98, p. 207.

142 See, e.g., J. M. Spaight, ‘Non-combatants and air attack’, *Air Law Review*, Vol. 9 (1938), p. 374.

143 See, e.g., *ibid.*, p. 375.

144 L. Rolland, ‘Les pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens’, *Revue de Droit International* (1916), p. 559, cited in J. M. Spaight, ‘Legitimate objectives in air warfare’, *British Yearbook of International Law*, Vol. 21 (1944), p. 162. Rolland’s view was influential: see, e.g., James W. Garner, ‘Proposed rules for the regulation of aerial warfare’, *American Journal of International Law*, Vol. 18 (1924), p. 68.

145 E.g., Spaight, above note 143; c.f. H. Lauterpacht (ed), above note 41, p. 525; cf. Garner, above note 144, pp. 66–67.

146 Spaight, above note 142, pp. 374–5; see also J. M. Spaight, ‘Air bombardment’, *British Yearbook of International Law*, Vol. 4 (1923–4), pp. 31–2, which sets out a similar argument.

argument was, moreover, extended by some to civilian workers who directly supported the war effort, such as those who transported munitions.¹⁴⁷

The Draft Convention for the Protection of Civilian Populations Against New Engines of War, approved in principle by the International Law Association in 1938,¹⁴⁸ reflected Spaight’s argument that munitions factory workers should be, while at work, legitimate objects of war. It protected the ‘civilian population’ from ‘[forming] the object of an act of war’. ‘Civilian population’ was defined as ‘all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment’. ‘Belligerent establishments’ were defined to include ‘military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments’.¹⁴⁹ Thus emerged a precursor to Article 51(3) in the form of the quasi-combatant; that is, a person ‘for the time being employed or occupied in a belligerent establishment’, such as a munitions store or factory. On its face, it appears that once such people ceased employment within belligerent establishments or, arguably, returned to their homes, they would once again receive the protection offered to the civilian population. The Draft Convention, however, was neither signed nor adopted due to the onset of the Second World War.¹⁵⁰ Accordingly, the question of whether, and to what extent, munitions workers constituted a legitimate target remained a topic of dispute for the duration of the Second World War¹⁵¹ and, indeed, well beyond.¹⁵²

Contribution to the war effort

Armament and munitions workers were not the only civilians in danger of attack, particularly from the air, during the two world wars. By the dawn of the Second World War, war had come to be viewed as a totalitarian affair to which all a nation’s citizens contributed through industry and morale.¹⁵³ While states initially sought to avoid the direct targeting of civilians, as the conflict progressed the

147 See, e.g., Spaight, above note 144, p. 162. For similar arguments in the context of Article 51(3), see W. Hays Parks, ‘Air war and the law of war’, *Air Force Law Review*, Vol. 32 (1990); cf. Michael E. Guillory, ‘Civilianizing the force: is the United States crossing the Rubicon?’, *Air Force Law Review*, Vol. 51 (2001), pp. 115–16.

148 *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, adopted by the International Law Association, 29 August–2 September 1938 (not opened for signature) (ILA Draft Convention), reproduced in Schindler and Toman, above note 98, pp. 223–9.

149 ILA Draft Convention, Article 2.

150 Gregory P. Noone, ‘The history and evolution of the law of war prior to World War II’, *Naval Law Review*, Vol. 47 (2000), p. 204.

151 Nurick, above note 51, p. 692.

152 See, e.g., Parks, above note 147; cf. A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 9. See further Nils Melzer, ‘Third expert meeting on the notion of direct participation in hostilities: summary report’, International Committee of the Red Cross and the TMC Asser Institute, 2005, pp. 21, 23, 32–33.

153 Spaight, above note 143, p. 372; Wright, above note 29, p. 73.

perceived demands of military necessity eroded this standard.¹⁵⁴ Consequently, the area and extent of aerial bombardment continually expanded during the Second World War.¹⁵⁵ As Nurick stated,

At first, the bombing was confined to military objectives in the actual theater of operations. Then bombing was extended to military objectives, such as factories, communications, and the like in the rear of the enemy's lines, with some regard for the civilian population. Finally, it was extended in many instances to the bombing of cities in order to affect the morale of the civilians.¹⁵⁶

Best aptly observed that plausible economic reasons for injuring civilians had multiplied, and 'their own apparently willing participation in the decisions to make or to continue war seductively suggested that they deserved to be damaged'.¹⁵⁷ The widespread practice of saturation bombing of civilian targets made it difficult to assert that the direct targeting of civilians remained contrary to international law.¹⁵⁸ Scholarly consensus existed, however, on one point: the illegality of targeting the civilian population for the mere purpose of terrorizing the population.¹⁵⁹

The practice of bombing civilians to negate their general contribution to the war effort or to terrorize them into submitting had a significant effect on the development of Protocol I; terror bombing was clearly prohibited by Article 51(2). Further, as will be discussed in the following section of this paper, the requirement in Article 51(3) that participation in hostilities be direct appears to have been formulated largely to ensure that general contribution to the war effort not be sufficient to expose civilians to attack.¹⁶⁰

The Geneva Conventions of 1949

Enemy attacks by belligerents, whether directly aimed or incidental, were, according to Best, one of the principal causes of civilian suffering in 1939–45.¹⁶¹ Thus, when the International Committee of the Red Cross¹⁶² took up its longstanding project to improve the protection of civilians following the Second World War, the issue was in dire need of attention.¹⁶³ As a result of political circumstances,

154 See Gardam, above note 31, p. 24. On the effectiveness of morale bombing, see Parks, above note 147, p. 21.

155 See Nurick, above note 51, p. 691.

156 Ibid. See further H. Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952), p. 365 (noting that by 1944 Britain had come to view the civilian population as a legitimate target of aerial bombardment).

157 Best, above note 38, pp. 223–4.

158 See Gardam, above note 31, p. 24; Nurick, above note 51, p. 696.

159 Gardam, above note 31, p. 24; Lauterpacht, above note 156, p. 368; but see Jeanne M. Meyer, 'Tearing down the facade: a critical look at the current law on targeting the will of the enemy and air force doctrine', *The Air Force Law Review*, Vol. 51, 2001, pp. 156–7 (arguing that the concept of morale as a legitimate target was universally accepted as one of the advantages provided by air power).

160 See below note 210 and accompanying text.

161 Best, above note 42, p. 115.

162 Here after ICRC.

163 See above, Best, note 42, p. 115

however, the issue of enemy attacks on civilians was not taken up.¹⁶⁴ Rather, the 1949 Diplomatic Conference was tasked only with updating the ‘Geneva law’¹⁶⁵ and not the Hague Regulations governing the conduct of military operations.¹⁶⁶ The ICRC observed in its Commentary to the Fourth Geneva Convention¹⁶⁷ that any provisions in the Convention’s draft text designed to protect the civilian population from the dangers of military operations were systematically removed.¹⁶⁸ Accordingly, the Fourth Geneva Convention only protects those who ‘find themselves ... in the hands of a party to the conflict of which they are not nationals’¹⁶⁹ from arbitrary actions by the enemy. It does not protect civilians against the ‘whole series of dangers which threaten them in warfare’.¹⁷⁰

There is, nonetheless, one provision of the four Geneva Conventions of 1949 which deserves mention in the present context: Common Article 3. This Article sets out minimum guarantees applicable in non-international armed conflict and protects ‘persons taking no active part in the hostilities’ against ‘violence to life and person, in particular murder of all kinds’.¹⁷¹ Although one could argue that Common Article 3 sets out the principle of distinction later codified in the Additional Protocols, this was probably not the intention behind the provision, given the Conference’s focus on the Geneva law.¹⁷² Common Article 3 is, however, significant for its use of the language ‘taking no active part in the hostilities’, a precursor to the phrase later adopted in Article 51(3) of Protocol I and Article 13(3) of Protocol II.¹⁷³

The road to Article 51(3)

Gathering momentum: the work of the ICRC

The failure to update the Hague Regulations following the Second World War left a significant void in the codified laws of war. In the light of this, in 1956 the ICRC

164 Ibid., pp. 115–16 (arguing that ‘[t]he most conspicuous sufferers from bombing, Germany and Japan, were unable to put their case, while the bombing specialists, the USA and the UK, had every reason for preventing the case being put’).

165 That is, the laws designed to protect those who have ceased to fight or have fallen into the power of the adversary.

166 See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987 (ICRC Commentary on Additional Protocols), [1829].

167 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, opened for signature 12 August 1949 (entered into force 21 October 1950) (Fourth Geneva Convention).

168 ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, 1952 (ICRC Commentary on the Geneva Conventions), p. 10; Gardam, above note 31, p. 25.

169 Fourth Geneva Convention, Article 4; cf. Article 5 (allowing derogation from the Convention where a protected person is engaged in hostile activities).

170 ICRC Commentary on the Geneva Conventions (IV), above note 168, p. 10; see also Gardam, above note 31, p. 25.

171 Common Article 3(1).

172 Gardam, above note 31, p. 26.

173 See, e.g., Quéguiner, above note 7, p. 1.

moved beyond its traditional focus on 'Geneva law', promulgating the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.¹⁷⁴ The 1956 Draft Rules reaffirmed some principles of customary law and offered concrete solutions to resolve problems resulting from changes and developments in weaponry.¹⁷⁵ They were directed primarily towards protecting 'civilian populations efficiently from the dangers of atomic, chemical and bacteriological warfare'.¹⁷⁶ Ultimately the 1956 Draft Rules made no headway with the governments intended to implement them.¹⁷⁷ Nonetheless, they remained an important document in the push for an authoritative revision of the laws of war given the 'ever more distressing varieties of war and war techniques'.¹⁷⁸

The 1956 Draft Rules sought to require parties to 'confine their operations to the destruction of ... military resources, and leave the civilian population outside the sphere of armed attacks'.¹⁷⁹ 'Civilian population' was negatively (and somewhat awkwardly) defined as all persons who were not

- (a) Members of the armed forces, or of their auxiliary or complementary organizations; and
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.¹⁸⁰

Under this definition, individuals who took part in the fighting were not considered civilians, even if their usual activities were primarily peaceful. The range of people protected by civilian immunity under the 1956 Draft Rules was, accordingly, considerably narrower than those later protected under Article 51(3). As discussed later in this paper, one of the reasons for broadening the protection afforded to civilians under Article 51(3) was the increased use of citizens engaged in guerrilla warfare in the years preceding 1977.

The ICRC's next, and more subdued, attempt to revise the law of armed conflict was manifested in a draft resolution, which was ultimately adopted by the Twentieth International Red Cross Conference in 1965 in Vienna.¹⁸¹ The resolution

174 *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*, approved by the International Conference of the Red Cross, 1956 (no entry into force) (1956 Draft Rules), reproduced in Schindler and Toman, above note 98, pp. 251–7. See ICRC Commentary on Additional Protocols, above note 166, [1830].

175 ICRC Commentary on Additional Protocols, above note 166, [1831].

176 ICRC, *Introduction to the Draft Rules*, available at www.icrc.org/ihl.nsf/INTRO/420?OpenDocument (last visited 4 December 2008).

177 ICRC Commentary on Additional Protocols, above note 166, [1832]; See Howard S. Levie, 'Book review: *An International Law of Guerrilla Warfare: the Global Politics of Law-making*', *MD Journal of International Law and Trade*, Vol. 9 (1985), p. 251.

178 ICRC Commentary on Additional Protocols, above note 166, [1832]; Best, above note 42, pp. 254–5.

179 1956 Draft Rules, Article 1.

180 *Ibid.*, Article 4.

181 *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna (1965), reproduced in Schindler and Toman, above note 98, pp. 29–30.

on the ‘protection of civilian populations against the dangers of indiscriminate warfare’ relevantly provided that

distinction must be made at all times between persons taking part in hostilities and members of the civilian population to the effect that the latter be spared as much as possible.¹⁸²

Like the 1956 Draft Rules, the resolution, on its face, provided no protection for civilians who intermittently took part in hostilities. According to Pictet’s 1966 analysis of the resolution, the principle it espoused was one of the ‘general principles of customary law which now regulate the question’.¹⁸³ The resolution was, Pictet observed, ‘the only pronouncement of the kind made by an assembly in which governments are represented since the Second World War’.¹⁸⁴ However, no further moves were made to convert the resolution into a binding agreement.¹⁸⁵

It was not until the 1968 Teheran United Nations International Conference on Human Rights¹⁸⁶ that the need to clarify the rules protecting the civilian population gained the necessary traction within the international community.¹⁸⁷ One of the dominant themes at the conference was the law relating to guerrilla warfare.¹⁸⁸ Thanks largely to the behind-the-scenes work of the International Commission of Jurists, the conference resulted in the adoption of Resolution 2444, ‘Respect for Human Rights in Armed Conflicts’.¹⁸⁹ Resolution 2444 affirmed the principle of distinction exactly as drafted in the 1965 Red Cross resolution. Moreover, the resolution from Teheran provided the impetus needed for the International Conference of the Red Cross to request, in 1969, the ICRC to ‘[propose], as soon as possible, concrete rules which could supplement the existing humanitarian law’.¹⁹⁰

182 Ibid.

183 Jean Pictet, ‘The XXth International Conference of the Red Cross: results in the legal field’, *Journal of the International Commission of Jurists*, 1996, p. 14, quoted in Keith Suter, *An International Law of Guerrilla Warfare: The Global Politics of Law-Making*, Francis Pinter, London, 1984, p. 98.

184 Suter, above note 183, p. 98.

185 See *ibid.*, p. 99.

186 *Human Rights in Armed Conflicts*, UN Res. XXIII, International Conference on Human Rights, UN Doc. A/Conf. 32/41 (Sales No. 68.XIV.2) (1968), reproduced in Schindler and Toman, above note 98, pp. 261–2.

187 Suter, above note 183, pp. 21, 93.

188 *Ibid.*, pp. 106–15.

189 *Respect for Human Rights in Armed Conflicts*, GA Res. 2444, UN GAOR, 23rd session, Supp. No. 18 (A/7218) (1968), [1(c)]. The resolution affirmed resolution XXVIII of the XXth International Conference of the Red Cross, above note 181. On the work of the International Commission of Jurists, see Suter, above note 183, pp. 21–5. See also *The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction*, resolution of the Institute of International Law, Edinburgh sess., Vol. 53 II (1969), p. 375, [1] (which protects those who do not participate in hostilities), reproduced in Schindler and Toman, above note 98, pp. 265–6; *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, GA Res. 2675, UN GAOR, 25th sess., supp. no. 28 (A/8028) (1970), [2], which affirms the principle that ‘a distinction must be made at all times between persons taking part in the hostilities and civilian populations’, reproduced in Schindler and Toman, above note 98, pp. 267–8.

190 See *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, ICRC, Res. 13, 21st International Conference of the Red Cross, Istanbul (1969), 98, [1], reproduced in Suter, above note 183, p. 102.

The negotiation of Article 51(3)

Beginning in 1971, the ICRC held a series of Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts.¹⁹¹ The conferences set an essentially conservative path for the future codification of the laws of war by agreeing not to revise or ‘overhaul’ the Geneva Conventions of 1949, but rather to reaffirm them.¹⁹² Moreover, the government experts rejected the proposal of the ICRC to deal with guerrilla warfare *sui generis* via a specific protocol, preferring for it to be addressed in the context of all the other forms of warfare.¹⁹³ Consequently, in 1973 the ICRC distributed drafts of two protocols which built on the Geneva Conventions and addressed the question of guerrilla warfare alongside the other forms of warfare.¹⁹⁴

The Draft Protocols formed the basis for Protocols I and II. A number of the provisions now found in Protocol I relating to the protection of the civilian population underwent only minor amendment during the negotiation process. For example, Draft Protocol I (on international armed conflict) set out the expansive, and much needed,¹⁹⁵ definition of ‘civilian’ now found in Article 50.¹⁹⁶ ‘Civilian’ was, and remains, defined as any person who is not a combatant within the meaning of Article 43 of Protocol I or Article 4A of the Third Geneva Convention.¹⁹⁷ Further, Draft Protocol I expressly prohibited making the civilian population or individual civilians the object of attack, a rule which is now found in Article 51(2).¹⁹⁸ This rule has, of course, been made subject to the exception now set

191 Draper, above note 18, p. 175.

192 ICRC, *Report on the Work of the Conference of Government Experts*, 1971, p. 18, quoted in Suter, above note 183, pp. 64, 110. On the negative effect of this conservatism see Suter, above note 183, pp. 180–1.

193 Suter, above note 183, p. 114.

194 ICRC, First Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol I), reproduced in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Official Records); ICRC, Second Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol II) (on internal armed conflict), reproduced in Official Records, Vol. 1–2. On the context surrounding the Draft Protocols, see ICRC, *Commentary on Draft Additional Protocols to the Geneva Conventions of 12 August 1949*, 1973 (ICRC Commentary on Draft Protocols).

195 See statement of the ICRC delegate at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference*, 1971, Vol. III, p. 17 (‘the absence of any specific norm on this question has already had a too harmful effect on the civilian population during the course of the events which have occurred during this century’), reproduced in Gardam, above note 31, p. 113.

196 Draft Protocol I, Article 45. On the breadth of the definition of ‘civilian’ see Best, above note 42, p. 255.

197 Michael N. Schmitt, ‘Fault lines in the law of attack’, in Susan Breau and Agnieszka Jachec-Neale (eds.), *Testing the Boundaries of International Humanitarian Law*, BIICL, London, 2006, pp. 277, 287, summarizes the category of combatants as including

members of the armed forces, militia, volunteer corps, or members of an organized resistance commanded by a person responsible for subordinates and who wear a distinctive sign or uniform, carry weapons openly, and are subject to a disciplinary system capable of enforcing (the law of international armed conflict); and members of a *levée en masse*.

198 Draft Protocol I, Article 46(1).

out in Article 51(3) of Protocol I involving civilians who participate directly in hostilities.

Draft Article 46(2), the predecessor to Article 51(3), provided that ‘[c]ivilians shall enjoy the protection afforded by this Article unless and for such time as they take a direct part in hostilities.’¹⁹⁹ In contrast with the principle as set out in earlier resolutions, draft Article 46(2) made it clear that civilians lost their immunity only for the period during which they took part in hostilities.²⁰⁰ Once they returned to peaceful activities they would once again be protected by their civilian status. In so providing, draft Article 46(2) shifted the law’s balance between military necessity and humanity further towards the latter than previous formulations of the norm. This progression was consistent with the purpose of draft Article 46 as expressed in the provision’s heading, ‘Protection of the civilian population’.²⁰¹

True to the observation by Suter that the law tends to be concerned with the last war,²⁰² discussions during negotiations seem to have focused on civilians in two historical contexts. On the one hand, a number of states referred to the need to increase the protection afforded to the civilian population in the light of the experience of the Second World War.²⁰³ Other delegations focused attention on the protection of civilians and guerrilla fighters in the context of wars of national liberation. The Chinese representative, for example, argued that

People’s militia and guerrilla fighters in wars of national liberation should be protected, since they were basically civilians who had been forced to take up arms in self-defence against imperialist repression in order to win independence and safeguard their right to survival. When not participating directly in military operations, members of people’s militia or guerrilla movements should have civilian status and benefit from the protection granted to civilians.²⁰⁴

199 See also Draft Protocol II, Article 26(2).

200 The idea behind draft Article 46(2) was, according to the ICRC, ‘that civilians taking a direct part in hostilities would during that time lose the protection afforded by the article’. ICRC statement, Official Records, Meeting of Committee III, CDDH/III/SR.5 (1974). This was interpreted by states to include preparations for combat and return from combat. See Report of Committee III, Official Records, CDDH/215/Rev.1 (1975), 272, [53].

201 This is identical to the title of Article 51. See further the statements made following the provision’s adoption by the Third Committee: Statements of Byelorussian Soviet Socialist Republic, Colombia, German Democratic Republic, Mexico, Romania, Sweden, Ukrainian Soviet Socialist Republic, Official Records, Plenary Meeting, CDDH/SR.41, Annex, 168–173 (1977).

202 Suter, above note 183, p. 93.

203 See, e.g., Statements of Poland, Byelorussian Soviet Socialist Republic, Colombia, German Democratic Republic, Mexico, Romania, Sweden, Ukrainian Soviet Socialist Republic, Official Records, Plenary Meeting, CDDH/SR.41, ANNEX, 166–173 (1977). See also, Swedish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, [7], 137 (1974) (noting that the history and literature of air warfare since the First World War presented evidence that terror raids and area bombardment had limited military value).

204 Chinese Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 135–136, [54] (1974).

Similar sentiments advocating the broad protection of civilian populations fighting wars of national liberation were expressed by other states.²⁰⁵ It appears that both sets of concerns were allayed by draft Article 46(2), as it underwent only minor change during the negotiation process²⁰⁶ and was adopted by consensus in the Third Committee.²⁰⁷

The general acceptance of Article 46(2) may have been partially due to the malleability of the phrase, 'direct participation in hostilities'.²⁰⁸ The ICRC Commentary on Draft Protocol I stated,

What should be understood by *direct part in hostilities*? The expression covers acts of war intended by their nature or purpose to strike at the personnel and matériel of enemy armed forces.²⁰⁹

The meaning was not, however, so broad as to include a civilian's participation in the 'war effort'. The commentary to the draft expressly distinguished the 'direct part which civilians might take in hostilities' from the 'part in the *war effort* which they are called upon to carry out at highly different levels'.²¹⁰ The latter should not expose a civilian to attack, because 'in modern warfare, all the nation's activities contribute in some way or other, to the pursuit of hostilities, and even the people's morale plays its part in this context'.²¹¹ One might surmise from this discussion that the adjective 'direct' was included for the primary purpose of ensuring that general contribution to the war effort was excluded as a ground for the loss of civilian immunity.

The malleability of the phrase 'direct participation in hostilities' is apparent from discussions surrounding an alternative proposal advanced during negotiations about draft Article 46(2). Brazil, Canada, the German Democratic Republic (GDR) (East Germany) and Nicaragua suggested rewording draft Article 46(2) to read, 'Civilians shall enjoy the protection afforded by this Section except when they commit hostile acts or take a direct part in military operations.'²¹² This proposal appears to have been considered by some delegations as being synonymous with draft Article 46(2). The Danish representative, for example, interpreted

205 Albania, for instance, reiterated his delegation's view that 'the main objective of the Conference was to provide effective protection for the civilian population and for freedom fighters in unjust colonial wars'. Albanian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 144, [85] (1974). India was concerned to ensure that civilians lost protection only when they took a direct part in hostilities. Indian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 68, [74] (1974).

206 The word 'Article' was replaced with the wider 'Section'. A comma was also added after the word 'Section', but this did not materially affect the meaning of the Article.

207 ICRC Report, Official Records, Committee III, CDDH/215/Rev.1, 275 (1975).

208 Cf. UK Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, [47], 140 (1974) (noting that the representatives from the United Kingdom and Ghana expressed 'doubts concerning the word 'hostilities', for which a more precise substitute might be found.').

209 ICRC Commentary on Draft Protocols, above note 194, p. 58 (emphasis in original).

210 *Ibid.*, p. 58.

211 *Ibid.*, p. 58 (suggesting that if participation in the war effort were included in the scope of draft Article 46(2), civilians would effectively be denied the protection of international humanitarian law).

212 Proposed amendment CDDH/III/27.

the proposed amendment as having the same meaning as draft Article 46(2).²¹³ Similarly, the Australian representative considered the proposal superfluous, ‘since a civilian committing a hostile act, even an isolated one, would be taking a direct part in hostilities’.²¹⁴ According to Fleck, the GDR representative, the proposed amendment was intended to make draft Article 46 ‘clear and applicable for the serving soldier’.²¹⁵ The proposal was, however, rejected by other states,²¹⁶ and ultimately the ICRC draft was preferred.

The view that Article 51(3) encompasses the carrying out of ‘hostile acts’ nevertheless made its way into the final ICRC commentary on the provision.²¹⁷ The commentary unhelpfully conflated the notion of ‘direct participation in hostilities’ with engaging in ‘hostile acts’.²¹⁸ Thus, while Protocol I on its face narrowed the exception to the norm of non-combatant immunity, the discussions surrounding Article 51(3) demonstrate that there remained considerable latitude in the interpretation of ‘direct participation in hostilities’.

On the whole, the adoption of Protocol I substantially strengthened the protection afforded to civilians in comparison with previous manifestations of the norm of civilian immunity. First, Protocol I adopted a broad definition of ‘civilian’ which includes all those who do not qualify as a ‘combatant’.²¹⁹ Second, it provided that only civilians who take a *direct* part in hostilities lose their protection from attack; *indirect* participation in hostilities is not sufficient to cause the forfeiture of civilian immunity.²²⁰ Arguments that would see civilian populations lose their immunity due to their ‘war sustaining’ activities²²¹ are therefore beyond the legal pale of Article 51(3).²²² Finally, Protocol I expressly recognized that immunity is lost only for such time as civilians participate directly in hostilities.

In the light of these important differences between Article 51(3) and previous formulations of the norm, one might well have doubts about the view expressed by the UK representative during negotiations that Article 51(3) simply reaffirmed existing rules of international law designed to protect civilians.²²³ Rather,

213 Danish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 131, [32] (1974).

214 Australian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 138, [25] (1974).

215 German Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 31, [2] (1974).

216 E.g., USSR Statement, Official Records, Meeting of Committee III, CDDH/III/SR. 7, 134, [44] (1974); Polish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 138, [15] (1974); Finnish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 142, [61] (1974) (observing that the deletion of the words ‘and for such time’ could be taken to mean that a person who had once taken a direct part in hostilities would lose civilian status for the duration of such hostilities).

217 ICRC Commentary on Additional Protocols, above note 166, [1942].

218 *Ibid.*, [1942], [1944].

219 Protocol I, Articles 50(1), 43; Third Geneva Convention, Article 4A.

220 See ICRC Commentary on Additional Protocols, above note 166, [1678] (stating that ‘[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place’).

221 See, e.g., Emanuel Gross, ‘Use of civilians as human shields: what legal and moral restrictions pertain to a war waged by a democratic state against terrorism?’, *Emory International Law Review*, Vol. 16 (2002), p. 544.

222 ICRC Commentary on Draft Protocols, above note 194, p. 58; above note 210. See further Melzer (2005), above note 152, p. 21.

223 UK, Statement at the CDDH, Official Records, CDDH/SR.41, 1977, p. 164, [119].

Article 51(3) has involved a fairly substantial shift in the balance between military necessity and humanity, with a weighting in favour of protecting civilians. The precise scope of Article 51(3), however, remains unclear. With these factors in mind, the final part of this paper analyses the relationship between the evolving requirements of military necessity on the one hand, and the increasingly protective framework of international humanitarian law²²⁴ (and, in particular, Article 51(3)), on the other.

Challenges facing Article 51(3)

At the centre of international humanitarian law is – and always has been – a tug of war between the competing principles of military necessity and humanity. Military necessity admits of such force as is necessary to subdue the enemy.²²⁵ In accordance with the dictates of military necessity, the immunity afforded to civilians has, historically, been predicated on their remaining unarmed and harmless. For Grotius and his contemporaries, notions of honour and righteousness required that only the ‘innocent’ – that is, those who were unarmed and not guilty of serious crime – be protected from attack.²²⁶ Throughout the nineteenth century the requirement of harmlessness prevailed. The influential Lieber Code, for instance, required the sparing of the ‘unarmed citizen ... as much as the exigencies of war [would] admit’.²²⁷ If military necessity required the targeting of harmful civilians, the Lieber Code, with its allowance for the exigencies of war, was sufficiently flexible to accommodate their being put to death, at least as a matter of law enforcement. Subsequent nineteenth-century instruments did nothing to displace this approach or disavow the paramountcy of ‘the exigencies of war’; thus, while civilians were generally protected, their protection remained subject to military demands.²²⁸ By the end of the nineteenth century, therefore, it was established that in order to enjoy immunity from attack, ‘non-combatants must be harmless. As soon as an individual ceases to be harmless, he ceases to be a non-combatant.’²²⁹ This approach, which effectively deprived those who were harmful ‘[took] part in the fighting’²³⁰ from the protection afforded to civilians (thus roughly reflecting Grotius’ conception of the *lex ferenda*), continued until Protocol I.

224 See generally Luc Reydam, ‘A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges’, *International Review of the Red Cross*, Vol. 88, No. 864 (2006).

225 *Hostage Case (USA v. List et al.)*, above note 10, p. 1253.

226 See above note 30 and accompanying text.

227 Lieber Code, Article 22.

228 See, e.g., Brussels Protocol; 1899 Hague Convention, preamble, and 1907 Hague Convention, preamble (both noting the desire to diminish the evils of war as far as military necessities permit); cf. Oxford Manual, Article 1 (providing that the state of war does not admit of acts of violence, save between the armed forces of belligerent states, and that persons not forming part of the armed forces should abstain from such acts).

229 Risley, above note 101, pp. 107–108.

230 E.g., 1956 Draft Rules, Article 4, above note 180.

Protocol I went against the tide of history by expressly conferring civilian status on all those who were not combatants properly so called, regardless of whether or not they were harmless.²³¹ The inclusive definition of ‘civilian’ in Article 50 of Protocol I meant that classes of people not fitting the traditional civilian mould were nonetheless entitled to immunity against attack. This definition may be contrasted with the ICRC’s 1956 Draft Rules, which, on their face, would have deprived those who took part in the fighting of civilian status altogether.²³² As a result of Protocol I’s undifferentiating conception of civilians, international humanitarian law found itself, in the words of Best, ‘teetering on the edge of a credibility gap’, with the law bestowing on all classes of non-combatants the same protection.²³³

Since the adoption of Protocol I in 1977, ways for civilians to harm the enemy have developed and diversified, such that the conduct of a civilian may be as integral to military operations as that of the soldier.²³⁴ We are now far removed from the post-Westphalian paradigm of war as a conflict which takes place on a battlefield between the armed forces of states or state-like entities.²³⁵ As seen in Operation Iraqi Freedom, for instance, military functions are being outsourced to private contractors to an unprecedented degree.²³⁶ Recent years have also seen the rapid development of weapons technology that enables attacks (for example, against computer networks) to be waged with great precision from remote locations by either civilian or military personnel.²³⁷ Advanced weapons technology is, however, far from universally available, and the technological capabilities of the parties to several contemporary international conflicts have been significantly disparate.²³⁸ This military asymmetry appears to have created incentives for the weaker party to resort to more covert or perfidious methods of war which frequently involve civilian participants, such as those seen in the latest conflicts involving international forces in Afghanistan and Iraq.²³⁹ The support of the civilian population becomes, to paraphrase Mao Zedong, as essential to the combatant as water to the fish.²⁴⁰ Increased reliance on civilian populations by the parties to armed conflicts, together with an often pronounced divergence in their ideological and structural make-up and motivations,²⁴¹ blurs conventional understanding about who is and is not a civilian.

231 Protocol I, Article 50(1).

232 1956 Draft Rules, Article 4; see above note 180.

233 Best, above note 42, p. 260.

234 See, e.g., Schmitt, above note 7; Reydams, above note 224; Geiss, above note 8.

235 See, e.g., Reydams, above note 224, pp. 745–6 (likening the present state of global conflict, particularly in weak states, to a pre-Westphalian paradigm of ‘ragged armies and warlords’), 750–2 (on the borderless nature of the belligerent in the ‘war on terror’).

236 See generally Schmitt, above note 9.

237 Schmitt, above note 7, p. 5; Quéguiner, above note 7, pp. 5–6.

238 See, e.g., Geiss, above note 8, pp. 757–60.

239 See *ibid.*, p. 758; Schmitt, above note 7, pp. 35–41.

240 Roger Trinquier, *La Guerre Moderne: Une vision française de la contre-insurrection*, 1961 (English translation with an introduction by Bernard Fall), cited in Reydams, above note 224, p. 742.

241 See, e.g., Geiss, above note 8, p. 758 (referring in particular to the 2006 conflict between Israel and Hezbollah in Lebanon).

The increasing military value of civilians may create doubt as to whether the 'direct participation' exception in Article 51(3) strikes an appropriate balance between the competing considerations of military necessity and humanity. For example, some argue that civilians in 'societies with malevolent propensities' should, as a matter of military necessity, be exposed to attack.²⁴² That such arguments continue to arise despite rules prohibiting terror bombing²⁴³ and attacks against civilians for indirect participation in hostilities²⁴⁴ is testimony to the tension (around which international humanitarian law revolves) between fluctuating perceptions of military necessity and considerations of humanity.

Notions of military necessity suggest that civilians whose actions are harmful to the enemy should lose their immunity from attack. In contrast with previous manifestations of the exception to civilian immunity, however, Article 51(3) does not permit the targeting of all civilians whose attack is necessary from a military perspective. Rather, only those who are participating directly in hostilities may be subject to attack. People whose conduct is indirectly harmful to the enemy are, under Article 51(3), protected from attack. In this respect, Article 51(3) gives rise to complex questions about how to distinguish between direct and indirect participation in hostilities. To this end, it is hoped that the guidelines being published in this issue of the *Review*, a culmination of the international expert process which took place under the auspices of the ICRC and the TMC Asser Institute, will provide much needed interpretative guidance. With the increased role of civilians in armed conflict since 1977, the importance of the 'direct participation' exception has grown. It now requires clarification and re-interpretation if it is to remain workable in the context of modern hostilities. Whether or not this aspect of the law can be interpreted and applied to accommodate the competing dictates of humanitarian protection and military necessity remains to be seen.

242 See C. J. Dunlap, Jr, 'The end of innocence: rethinking noncombatancy in the post-Kosovo era', *Strategic Review* Vol. 28 (2000), p. 14, discussed in Michael N. Schmitt, 'Targeting and humanitarian law: current issues', *Israel Yearbook on Human Rights*, Vol. 34 (2004), pp. 71–2.

243 Protocol I, Article 51(2).

244 Ibid., Article 51(3).

Chained to cannons or wearing targets on their T-shirts: human shields in international humanitarian law

Stéphanie Bouchié de Belle*

Stéphanie Bouchié de Belle is a diplomatic officer with the ICRC.

Abstract

This article examines the legal problems associated with human shields. The author begins by discussing the absolute nature of the prohibition on their use and goes on to consider the precautions to be observed by the party being attacked. A violation of the ban on use of human shields by the attacked party is not an act of perfidy and does not release the attacker from his obligations. Because human shields are civilians, they are not legitimate objects of attack, even where they are acting in a voluntary capacity, as they are not taking direct part in hostilities. Among the attacker's obligations to take precautions, the proportionality principle applies in the classic way, even in the case of voluntary human shields.

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Introduction

Although the phenomenon of the 'human shield' is not new, it has become familiar to the general public in recent years as a result of widespread media coverage.

* Stéphanie Bouchié de Belle holds a LL M in international humanitarian law, winner of the 2008 Henry Dunant Prize for her work on human shields. The author would like to thank Marco Sassòli for his valuable advice. The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.

It also seems to have taken on new forms in today's conflicts, as is borne out by numerous examples.

From forced human shields ...

During 'Operation Iraqi Freedom' in 2003, human shields were commonly used as a counter-targeting technique. 'Iraqi forces, especially the paramilitary Fedayeen, not only took cover (or hid) in locations where civilians were present, but also forcibly used civilians to physically shelter their own actions. In some cases, they hid behind women and children.'¹ During the 1991 Gulf War, Iraq announced publicly its intention of using prisoners of war as human shields in order to ward off attacks on strategic sites. Foreign hostages were also placed near dams, oil refineries and steel mills in order to protect them.²

However, Iraq is by no means the only theatre of conflict where this has been done. Other examples are the Afghan,³ Chechen⁴ and Israeli–Palestinian conflicts,⁵ the conflict in the former Yugoslavia⁶ and the conflict in Lebanon in summer 2006.⁷ The reality behind the human shield phenomenon is complex, as *voluntary* human shields also form a significant part of the picture.

... to voluntary ones

Many people will recall Serbian civilians taking up positions on the bridges of Belgrade to prevent them from being bombed during the NATO campaign to protect Kosovo in 1999,⁸ or Palestinian civilians surrounding Yasser Arafat's headquarters in Ramallah in 2003 to forestall a threatened attack by Israeli forces.

1 Michael N. Schmitt, 'The conduct of hostilities during Operation Iraqi Freedom: an international humanitarian law assessment', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), p. 99.

2 Paolo Fusco, 'Legal status of human shields', Corso in diritto umanitario internazionale Comitato Internazionale della Croce Rossa e dalla Croce Rossa Polacca Varsavia, Pubblicazioni Centro Studi per la Pace, 2003, available at <http://studiperlapace.it/>, p. 6 (last visited 13 October 2007).

3 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 267. In 1997, in connection with the conflict in Afghanistan, the UN General Assembly urged the Afghan parties to put an end to their use of human shields.

4 Fusco, above note 2, p. 10. There have been many allegations of use of human shields in the conflict in Chechnya, both by the Russian forces and by Chechen independence fighters.

5 Roland Otto, 'Neighbours as human shields? The Israel Defense Forces' "Early Warning Procedure" and international humanitarian law', *International Review of the Red Cross*, Vol. 86, No. 856 (2004), p. 771. From 2002 onwards, the 'early warning procedure' allowed the Israel Defense Forces to obtain assistance from Palestinian neighbours in evacuating houses occupied by wanted people and convincing these people to give themselves up.

6 Michael Skerker, 'Just war criteria and the new face of war: human shields, manufactured martyrs, and little boys with stones', *Journal of Military Ethics*, Vol. 3 (2004), p. 29. In 1995, during the siege of Sarajevo, Serbian forces chained UN observers to military objectives in order to deter the international forces from carrying out air strikes.

7 The use of human shields by Hezbollah in that conflict appears to have been common currency. One consequence was the deaths of four UN observers when their observation post in South Yemen was bombed by Israeli forces.

8 Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities', *International Review of the Red Cross*, Vol. 88, No. 864 (2006), p. 815.

Pacifist activists who went to Iraq in 2003 before the start of 'Operation Iraqi Freedom' were encouraged by the Iraqi government to take up positions on or near military targets⁹ such as oil refineries and power stations.¹⁰ However, as these volunteers from abroad had gone there essentially to protect civilian property, they rapidly left the country.¹¹

The concept of human shield can cover a wide range of situations. The technique is used with some degree of frequency in asymmetric armed conflicts where there is a major discrepancy between the weaponry available to the two sides. Can a flagrant imbalance between the belligerents justify this practice, prohibited as it is by international humanitarian law? Where people are used as human shields, what is the status of those people and what protection are they entitled to from the point of view of conduct of hostilities and after they are captured? Those who use human shields and those who choose to act as such do so with the aim of forestalling an attack against a military target. Is their reasoning legally valid? Where a military objective is protected by a human shield, is the attacker obliged to refrain from attacking it? To answer these questions, I shall examine the issues successively from the points of view of the party under attack, the human shield and the attacker.

The ban on use of human shields

The term 'human shield' as used in international humanitarian law means a civilian placed in front of a military objective so that his civilian status will deter the enemy from attacking that objective.¹² The use of human shields is absolutely forbidden. The law also places obligations on the party under attack to take precautions against the effects of attacks.

An absolute prohibition

Scope of the prohibition

The problem of human shields in an international armed conflict is addressed in a number of provisions of the Geneva Conventions.¹³ The ban on using

9 Fusco, above note 2, p. 7.

10 Josiane Haas, 'Voluntary human shields: status and protection under international humanitarian law', in Roberta Arnold and Pierre-Antoine Hildbrand (eds.), *International Humanitarian Law And The 21st Century's Conflicts: Changes and Challenges*, Editions interuniversitaires suisses – Edis, Lausanne/Berne/Lugano, 2005, p. 191.

11 Schmitt, above note 1, p. 100.

12 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977 (hereinafter: Protocol I), Art. 51(7).

13 In the case of prisoners of war, Art. 23(1) of the Third Geneva Convention explicitly addresses the question of human shields. It provides that the presence of a prisoner of war may not be used 'to render certain points or areas immune from military operations'. Art. 28 of the Fourth Geneva Convention repeats the same wording as Art. 23(1) of the Third in respect to 'protected persons'. As explained in the Commentaries, the term 'military operations' has the advantage of covering a wide range of situations, from aerial bombardments to hand-to-hand fighting, either by regular armies or by groups such as

civilians for this purpose was picked up and extended in 1977 by Article 51(7) of Protocol I:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Whereas in 1949 the ban was limited to the scope of the Third and Fourth Geneva Conventions and therefore concerned only prisoners of war and ‘protected persons’, Article 51(7) of Protocol I concerns and consequently protects the civilian population as a whole. The scope of the ban on human shields is thereby extended or clarified not only *ratione personae* but also *ratione materiae*. The ‘presence’ of civilians being used as human shields covers two types of situation: those where civilians are placed on or close to military objectives and those where military objectives are placed in the midst of civilians. Article 51(7) also covers cases where ‘movements’¹⁴ of the civilian population are used to cover military operations.¹⁵

Finally, in the 1998 Rome Statute of the International Criminal Court, the use of human shields during an international armed conflict is classified as a war crime (Article 8(2)(b)(xxiii)).

To demonstrate the existence of a constant and uniform practice and an *opinio juris* within the international community, one possible source is the jurisprudence from the war crimes tribunals that followed the Second World War.¹⁶ A more recent source is the case of *Prosecutor v. Radovan Karadzic and Ratko Mladic* before the International Criminal Tribunal for the former Yugoslavia¹⁷ (ICTY). One may also refer to the military manuals of certain states, which outlaw the practice, as well as the domestic law of some countries and to a number of official

resistance movements, which are placed in the same category as the regular armed forces under Art. 4 of the Third Geneva Convention. The wording ‘certain points or areas’ indicates that the prohibition applies to small sites as well as to wide areas. However, although the scope of the prohibition *ratione loci* covers the belligerents’ own territory as well as to occupied territory, its application *ratione personae* is limited to ‘protected persons’ in the meaning of Art. 4 of the Convention.

- 14 These movements may be spontaneous or provoked by a party to the conflict or an occupying power.
- 15 Protocol I also prohibits the use of medical units (Art. 12(4)) and medical aircraft (Art. 28(1)) in an attempt to shield military objectives from attack. The expression ‘[U]nder no circumstances’, used in Art. 12(1), indicates that the prohibition is *absolute*. The absolute nature of this prohibition is not limited to the use of patients or staff of medical units as human shields but applies to the general prohibition on use of human shields, be they civilians or prisoners of war, which brooks no exception. Legal experts seem to agree that it is an absolute obligation of result. See Quéguiner, above note 8, p. 811.
- 16 Nuremberg Military Tribunal, *The United States of America v. Wilhelm Von Leeb (The German High Command Trial)*, 28 October 1948; British Military Tribunal, *Student Case*, decision of 10 May 1946.
- 17 On 11 July 1996, after reviewing the indictments, the Trial Chamber confirmed all counts set out by the Prosecutor, among them several concerning the use of human shields: the use of civilians held in Bosnian Serb camps as ‘human shields’ and the taking hostage of UN peacekeepers, some of whom were subsequently used as human shields, ‘physically secured or otherwise held ... at potential NATO air targets’. This last count is categorized as a war crime.

statements by states, and by the ICRC, condemning it, which carry a certain weight in the absence of any contrary practice.¹⁸

There is no treaty-based rule that expressly prohibits the use of human shields in non-international armed conflicts. Article 5(2)(c) of Additional Protocol II simply provides, as does Article 19 of the Third Geneva Convention in the case of international armed conflict, for the evacuation of persons deprived of their liberty from combat areas so that they are not exposed to danger. In addition to that provision, the ban on using human shields could be covered by the scope of Article 13(1) of Protocol II, which stipulates that the civilian population and individual civilians must enjoy 'general protection against the dangers arising from military operations'. However, it is customary law that provides the best basis for asserting that the use of human shields is also prohibited in non-international armed conflicts. The prohibition follows from the fundamental obligations to distinguish between combatants and civilians and to take the relevant precautions. Moreover, the use of human shields is often placed on the same footing as hostage-taking, which is forbidden by customary law and also by Article 4(2)(c) of Protocol II.¹⁹ Under the Rome Statute, use of human shields in an international armed conflict can be prosecuted as a war crime. However, this is not the case where the act is committed in a non-international armed conflict.

There is no provision of international human rights law that expressly forbids the use of human shields outside situations of armed conflict. However, it seems logical that such prohibition would fall within the scope of the core fundamental rights such as the right to life or the prohibition of torture and other cruel, inhuman or degrading treatment.²⁰ The physical and mental suffering inflicted, and particularly the fact that such a person is awaiting near-certain and imminent death,²¹ can also serve as a basis for this assertion. Moreover, although the accused in question were being tried for war crimes, the ICTY has also expressed the view

18 Louise Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, I (hereafter the Study), pp. 337 ff.

19 The prohibition on the use of human shields in non-international armed conflicts is also affirmed by the above study (*ibid.*, p. 337), and in Anthony P. V. Rogers and Paul Malherbe (eds.), *Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces*, International Committee of the Red Cross, Geneva, 1999, pp. 169–70, para. 2119.

20 This is the position adopted by the European Court of Human Rights in *Demiray v. Turkey*, against the background of clashes between the Turkish state and the Kurdistan Workers' Party (PKK). European Court of Human Rights, *Demiray v. Turkey*, Judgment of 21 November 2000, Application No. 27308/95. Eric David has also taken the view that inhuman treatment includes the use of human shields, which can also be regarded as humiliating or degrading treatment. David, above note 3, pp. 680, 683. Finally, in a judgment on the subject of the 'early warning procedure', the High Court of Justice of Israel held – admittedly in a situation of international armed conflict – that 'Pictet correctly noted that the use of people as a "human shield" is a "cruel and barbaric" act'. High Court of Justice of Israel, *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, Judgment of 6 October 2005, p. 11, para. 21, available at http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf (last visited 15 October 2007). In this same judgment a judge of the Court also expressed the view that the use of someone as a human shield violated 'his dignity as a human being'. *Ibid.*, p. 17.

21 See European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Application No. 14038/88, in which the expectation of certain death was described as characteristic of the 'death-row phenomenon' which the Court deemed to be inhumane treatment.

on several occasions that the use of human shields constituted ‘inhumane treatment’ and ‘cruel treatment’.

Recurring questions

As we have seen, although the prohibition on the use of human shields is plainly set out, it is nevertheless frequently breached. The question as to how such breaches are to be categorized has arisen on a number of occasions. Moreover, although the prohibition is clear, some of the legal problems associated with it, particularly those concerning the phenomenon of voluntary human shields, appear to be rather less so.

Using human shields seems to be a very ‘treacherous’ practice, but does it qualify as an act of perfidy in legal terms? Some experts hold that, in unbalanced armed conflicts, the weaker party is naturally prompted to hide in more densely populated areas so as to make it more difficult or impossible for the adverse party to identify military objectives.²² However, ‘if the civilian population is intentionally used as a kind of shield to protect defending units, there is no longer any question of permitted deception: this clearly amounts to prohibited perfidy’.²³ The commentaries to Article 28 of the Fourth Geneva Convention could also be interpreted as asserting the same thing, as they contain a lengthy passage distinguishing the use of protected persons as human shields from a ruse of war.²⁴ Yet, traditionally, ruses of war are always opposed to acts of perfidy.

In the present author’s view, despite the absolute prohibition on the use of human shields, to apply the term ‘act of perfidy’ to such acts is not legally appropriate, considering the definition given to the term ‘perfidy’ in international humanitarian law. This definition contains three elements. Two of them are subjective, namely an appeal to the opponent’s good faith and the intention to deceive that good faith. The third, objective, element is that the deceit must concern the existence of a protection granted by international humanitarian law.²⁵ The use of human shields does indeed rely on the protection accorded to civilians or prisoners of war by international humanitarian law, but the enemy is not deceived. The protected status of the people so used is not feigned but genuine. Moreover, for an

22 Frédéric de Mulinen, ‘Distinction between military and civilian objects’, in Christian Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment*, Martinus Nijhoff Publishers, The Hague, 2002, p. 113.

23 Ibid.

24 Jean S. Pictet, *Commentary on the Fourth Geneva Convention, Article 28*, International Committee of the Red Cross, Geneva, 1958, p. 208.

25 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, with the collaboration of Philippe Eberlin, Hans-Peter Gasser, Sylvie-Stoyanka Junod, Jean S. Pictet, Claude Pilloud, Jean de Preux, Yves Sandoz, Christophe Swinarski, Claude F. Wenger and Bruno Zimmermann, International Committee of the Red Cross/Martinus Nijhoff Publishers, Dordrecht, 1986, p. 435. Generally speaking, acts considered as ruses of war are contrasted with acts amounting to perfidy, as in Art. 37 of Protocol I. Art. 37(1) defines and illustrates the concept of perfidious acts, which are strictly prohibited, whereas Art. 37(2) deals with ruses of war, which are not prohibited. The reader might be led to conclude that, according to the Commentaries, the use of protected persons as human shields is not a ruse of war and is therefore an act of perfidy.

act to fall within the definition of perfidy as prohibited by Article 37 of Protocol I, it must have been committed with the intention of killing, wounding or capturing an enemy.²⁶ Some authors go even further, stating that 'if it is used solely for combat against military objects, for example, without affecting any enemy combatant, it is permissible'.²⁷ In the case of human shields, the aim is not to kill, wound or capture the enemy, but to *defend* military objectives against attack. It would therefore appear that the use of human shields does not fit the definition of an act of perfidy and still less that of an act of perfidy as defined in Article 37 of Protocol I and the customary rule codified therein.

The problem of *voluntary* human shields was not explicitly addressed by the drafters of the Conventions and their Additional Protocols. Does that mean that voluntary human shields are not covered by the prohibition on human shields? That seems unlikely. The party benefiting from their presence does not necessarily need to have gone looking for them and stationed them forcibly in front of a military target. Nor is it required that the people used as human shields should be unaware of the fact.²⁸ On the contrary, it appears that this prohibition 'applies both when the civilians are hostages and when they have volunteered to shield military targets'.²⁹ The essential element in the prohibition on use of human shields is rather the intention to use the presence of humans as shields to shelter a military objective. This is corroborated by the International Criminal Court's Elements of Crimes.³⁰ The material element there is moving or taking advantage of the location of protected persons; the mental element is the intention to shield a military objective from attack or to shield, favour or impede military operations. There is no trace of any requirement that there be ignorance on the part of the people concerned or that they be constrained. However, the criterion of intention is always tricky. How can one be certain that tolerance or inaction in relation to people who have voluntarily stationed themselves on strategic sites should be understood as an intention to take advantage of their presence to shield a military objective from attack? However, a finding of intention can often be arrived at inductively on the basis of the factual circumstances.³¹

26 Ibid., p. 436, para. 1491; Michael Bothe, Karl Josef Parsch and Waldem A. Solf, *New Rules for victims of armed conflicts*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, pp. 203–4; Stefan Oeter, 'Methods and means of combat', in *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York, 1995, p. 201. This ban has customary law status in both international and non-international armed conflict, irrespective of any doubt there may be as to the customary nature of the 'capture' factor. Doswald-Beck and Henckaerts, above note 18, pp. 221, 225.

27 Oeter, above note 26, pp. 201–2.

28 Quéguiner, above note 8, p. 815.

29 Haas, above note 10, p. 207.

30 Elements of Crimes, adopted by the Assembly of States Parties to the ICC, 9 September 2002.

31 Quéguiner, above note 8, p. 816: 'For example, where civilians gather on a bridge of military value in order to protest against the enemy's earlier destruction of other similar bridges will probably not imply an intention on the part of the belligerent. However, if, on the same bridge, civilian demonstrators set up camp for a long period of time and the authorities take no action to remove them, then this inaction will lead to a clear presumption that the authorities intend to use the civilians' presence to shield the bridge from an enemy attack. An even clearer presumption of intention will arise where the civilian volunteers are briefed by the armed forces on which military sites are to be "protected".'

If the authorities allow such a thing to happen without taking any action, that could be considered all the more revelatory of an intention to use human shields, since, in addition to the absolute negative obligation never to do so, the authorities also have positive obligations, albeit relative ones this time, to take various precautionary measures, including keeping civilians away from military targets.

The relative obligation under Article 58³²

Article 58 of Protocol I, entitled ‘Precautions against the effects of attacks’, sets out obligations incumbent on the party under attack which, while not absolute, are directly linked to the question of human shields and further bolster the prohibition on their use:

The Parties to the conflict shall, to the maximum extent feasible:

- a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- b) avoid locating military objectives within or near densely populated areas;
- c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.³³

32 It should be noted that there is debate as to whether or not Art. 58 represents customary law, particularly in a non-international armed conflict. According to the recent study on customary international humanitarian law, the obligations contained in this provision are indeed customary law, at least in an international armed conflict. Cf. Doswald-Beck and Henckaerts, above note 18, pp. 68, 71, 74; see also Jean-Marie Henckaerts, ‘The conduct of hostilities: target selection, proportionality and precautionary measures under international humanitarian law’, in Netherlands Red Cross, *Protecting Civilians in 21st-Century Warfare*, 2001, p. 20. However, the Study considers that there is a good case for saying that these rules form part of the fabric of general international law applicable in non-international armed conflicts. Doswald-Beck and Henckaerts, above note 18, Vol. I, pp. 71, 74. Without these precautionary measures, the general protection accorded to the civilian population by Art. 13(1) of Protocol II against the dangers arising from military operations would remain a dead letter. However, not everyone shares this view. For J. Gardam, although Art. 51(7), which is complementary to Art. 58, is a customary rule, Art. 58 itself is a ‘new development’. Judith G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 156. According to M. Sassòli and L. Cameron, only the United States and Iraq have ever claimed that the obligation not to place military targets in densely populated areas was customary, and only the prohibition on the use of human shields is truly customary. Marco Sassòli and Lindsey Cameron, ‘The protection of civilian objects – current state of the law and issues *de lege ferenda*’, in Natalino Ronzitti and Gabriella Venturini (eds.), *Current Issues in the International Humanitarian Law of Air Warfare*, Eleven, Utrecht, 2006, pp. 72, 73.

33 For further details on the obligations, positive and negative (abstention), under Art. 58, see Sandoz, Swinarski and Zimmermann, above note 25, p. 710, para. 2244; *ibid.*, p. 711, paras. 2246, 2247; *ibid.*, p. 712, paras. 2250, 2251, 2254, 2256, 2257. See also Bothe, Partsch and Solf, above note 26, p. 372, para. 2.4.2.; *ibid.*, p. 373, para. 2.5.; *ibid.*, p. 374, para. 2.8; Doswald-Beck and Henckaerts, above note 18, Rule 22, p. 70, pp. 73–4; Quéguiner, above note 8, p. 819; Jean-François Quéguiner, ‘Le principe de distinction dans la conduite des hostilités, un principe traditionnel confronté à des défis actuels’, doctoral thesis, Université de Genève, 2006, p. 403; Frédéric de Mulinen, *Manuel sur le droit de la guerre*

These obligations bind any party having control over the civilian population concerned, be they members of its own population or foreigners, refugees or any other persons. Any territory under the *de facto* authority of the party must have the benefit of these precautions. This applies to occupied territories as well as national ones.³⁴ The fact that the law imposes on states the obligation to take measures they would have to apply on their national territory was perceived by some states as interference with their sovereignty.³⁵ To answer their concerns, the words 'to the maximum extent feasible' were added to qualify these obligations. Unlike the prohibition on the use of human shields, these obligations are therefore not absolute. However, they are not mere pious recommendations, as some commentators affirm,³⁶ but genuine legal obligations of means which bind states. Removing civilians from the vicinity of military objectives, avoiding the location of military objectives within or near densely populated areas and taking the necessary precautions to protect civilians are therefore an overarching aim to be achieved if possible, whereby the circumstances, feasibility and military advantage will be taken into account.³⁷ As regards the obligation to take the necessary precautions to protect civilians, soldiers may be employed to that end.³⁸ As they can be legitimate objects of attack, however, their very presence is a risk factor for the civilians they are supposed to be protecting. The attacker must therefore comply with the obligation to take precautions, particularly those arising from the proportionality principle, in order to provide human shields with the protection to which they are entitled. This protection arises first and foremost from the legal status enjoyed by human shields.

Status and protection of human shields

The protection to which a person being used as a human shield is entitled will depend to a large extent on that person's legal status. Both status and protection have given rise to controversy, particularly on account of divergent interpretations of certain fundamental concepts in the law that governs the conduct of hostilities in international armed conflicts. These concepts also pose problems when we attempt to transpose them into internal situations of armed conflict.

pour les forces armées, ICRC, Geneva, 1989, p. 108, para. 439; *ibid.*, p. 109, paras. 443–444; *ibid.*, p. 109, para. 445; de Mulinen, above note 22, p. 111; Oeter, above note 26, p. 167; Rogers and Malherbe, above note 19, p. 78, para. 1201.5.b., 1205.5.c; Hans-Peter Gasser, 'Protection of the civilian population', *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York, 1995, pp. 223–4.

34 Sandoz, Swinarski and Zimmermann (eds.), above note 25, p. 712, para. 2255. Occupying powers may not 'ignore the fate of the population of the occupied territory and only take into account the fate and the safety of their own troops'.

35 Cf. Bothe, Partsch and Solf, above note 26, p. 372, para. 2.3.

36 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 129.

37 Bothe, Partsch and Solf, above note 26, p. 372, para. 2.4.2.

38 Gasser, above note 33, p. 224.

The legal status of a human shield: civilian or not?

This is not simply a matter of ‘sticking a label’ on someone for the sake of legal ‘tidiness’. Defining the legal status of a human shield, that is, determining whether that person is a combatant or a civilian, has certain consequences. The first consequence arises in connection with the conduct of hostilities. In application of the fundamental principle of distinction, only military objectives can be attacked.³⁹ Civilians⁴⁰ cannot be attacked in any circumstances, provided that they do not take direct part in hostilities.⁴¹ If the human shield is a civilian, he therefore enjoys the protection associated with civilian status and cannot be targeted during an attack. If the human shield is considered to be a combatant, however, he becomes a legitimate object of attack. The same applies to civilians who take direct part in hostilities, for as long as they do so.⁴² A second consequence arises in connection with detention options. In the case of a combatant who falls into enemy hands, the enemy can detain him for the duration of the conflict without the need for any reason other than his combatant status. If a human shield is a civilian, however, reasons are needed to detain him.⁴³ A number of guarantees should also apply.⁴⁴ During his detention a combatant will enjoy the highly regulated status of a prisoner of war (see the Third Geneva Convention of 1949). Finally, a combatant can in no circumstances be prosecuted for the simple fact of having taken part in hostilities, that is, for lawful acts of war he has performed. In contrast, a civilian who has taken a direct part in hostilities can be prosecuted not only if he has committed war crimes but also for the very fact of taking up arms.

In international humanitarian law, everyone is either a civilian or a combatant. The person who is held and positioned in front of a military objective against his will can of course hardly be considered a combatant. However, the question does arise in connection with voluntary human shields. In some people’s view, a person who deliberately places himself in front of a military objective in order to protect it from attack is a combatant. However, human shields do not fit the definition of a combatant as set out either in Article 4 of the Third Geneva Convention or in Article 43 of Protocol I. They do not belong to the armed forces of a party to a conflict and, even if they are persuaded by a party to the conflict to

39 Protocol I, Arts. 48 and 52(2).

40 Protocol I, Art. 51(2), and Protocol II, Art. 13(2).

41 Protocol I, Art. 51(3), and Protocol II, Art. 13(3).

42 Ibid.

43 In occupied territories, protected persons can only be interned ‘for imperative reasons of security’. GCIV, Art. 78. Elsewhere than in occupied territories, ‘internment ... of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary’. GCIV, Art. 42.

44 Regular procedure and competent body, even if organized by the occupying power, right of appeal, speedy processing and periodic review of the decision on internment, if possible every six months. Art. 78. ‘Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.’ GCIV, Art. 43. ‘The court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit’. Ibid.

serve as human shields for its benefit, it is hard to imagine them belonging to an organization under a command responsible to that party, *a fortiori* where they are volunteers as in Iraq. A distinctive sign is a possibility, but its purpose will not be to distinguish them from the civilian population, but, on the contrary, to indicate that they are members of the civilian population. After all, the whole point of a human shield is to play on the enemy's concern not to take the risk of killing or wounding civilians, in order to ward off military attack. If the shield can be regarded as belonging to an organized group, for example a pacifist non-governmental organization (NGO), he is not armed or carrying arms openly.

A civilian's status generally determines the protection to which he is entitled. However, the case of voluntary human shields does raise questions. The extent of the protection afforded to a civilian does vary depending on whether or not he takes direct part in hostilities. We may also consider the extent to which acting as a voluntary human shield could be considered a crime.

What protection does a human shield enjoy?

Every civilian should enjoy general protection against the effects of hostilities and may not be an object of attack.⁴⁵ The same therefore applies to human shields. However, this protection enjoyed by civilians goes hand in hand with a prohibition on taking direct part in hostilities.⁴⁶ If civilians take direct part in hostilities, their protection ceases for such time as they do so and they can be the object of a lawful attack. In the case of *voluntary* human shields, the question arises in the following terms: if we can consider that the volunteer is taking direct part in hostilities, he loses his protection as a civilian for as long as that state of affairs lasts. If captured, he could be prosecuted simply for having taken part in hostilities, as we have seen above. If we are to understand the real risks run by a voluntary human shield, we must therefore determine whether his acts can be regarded as taking direct part in hostilities. At the same time, it may be interesting to examine the phenomenon of voluntary human shields in the light of the fact that the use of human shields is categorized as a war crime.

The difficulty to consider acting as a voluntary human shield as tantamount to taking direct part in hostilities

Experts are very divided on the question of whether or not acting as a voluntary human shield is tantamount to taking direct part in hostilities.⁴⁷ Nevertheless, there are a number of jurists who do take the view that acting as a voluntary human

⁴⁵ Protocol I, Art. 51.

⁴⁶ Protocol I, Art. 51(3).

⁴⁷ Summary Report, Second Expert Meeting, Direct Participation in Hostilities under International Humanitarian Law, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, The Hague, 25–26 October 2004, p. 6.

shield – that is, deliberately trying to ward off an attack on a military objective – is indeed tantamount to taking direct part in hostilities.⁴⁸ It follows from this that voluntary human shields lose their protection as civilians because they are taking direct part in hostilities.⁴⁹ According to this analysis, human shields are acting in exactly the same way as anti-aircraft defence systems, only more effectively.⁵⁰ The High Court of Justice of Israel took a similar position in a recent judgment on targeted killings of ‘terrorists’, in which it examined the question of what the law is regarding civilians serving as a ‘human shield’. The Court found that ‘if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking direct part in the hostilities’.⁵¹ Others do not share this view, claiming that it would be incorrect to state that people who place themselves voluntarily in front of a legitimate target are taking direct part in hostilities.⁵²

Hostile acts do not necessarily involve the use of weapons and taking direct part in hostilities includes ‘attacks’.⁵³ Attacks include offensive and defensive acts.⁵⁴ It would therefore be possible to consider that voluntary human shields who place themselves unarmed in front of military objectives in order to ward off an attack, in other words to defend it, are taking direct part in hostilities.

However, ‘hostile acts’ and taking ‘direct part’ in hostilities can be defined as ‘acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’ of the enemy.⁵⁵ If we adopt this definition of taking direct part in hostilities, the actions of the voluntary human shield do not fit it very well. The voluntary human shield does not strike the enemy forces; he merely protects by a passive attitude the personnel or hardware of his own armed forces. One could extrapolate and say that he strikes the enemy forces indirectly, since by protecting his own military hardware and personnel, he preserves them and enables them to strike the enemy. However, this interpretation does not square with the use of the word ‘actual’ and still less with the Commentaries, which describe direct participation in hostilities as acts that ‘present an immediate threat to the [adverse] party’.⁵⁶ Even if it could be said that human shields present a threat to the adverse party because they protect military targets that themselves present such a threat, this threat is not immediate. Although

48 Dinstein, above note 36, p. 130.

49 Schmitt, above note 1, p. 100.

50 Michael N. Schmitt, ‘Targeting and humanitarian law: current issues’, *Israel Yearbook on Human Rights*, Vol. 34 (2004), p. 95.

51 High Court of Justice of Israel, *The Public Committee v. The Government of Israel*, Judgment, 14 December 2006, para. 36, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last visited 10 October 2007).

52 Laurent Colassis, cited by Ludovic Monnerat, *Le problème des boucliers humains volontaires dans les opérations contemporaines*, CheckPoint, information site of the Swiss military, 15 March 2003, available at www.checkpoint-online.ch/CheckPoint/Monde/Mon0047-ProblemeBoucliersHumains.html (last visited 10 November 2008).

53 Sandoz, Swinarski and Zimmermann, above note 25, p. 633, para. 1943.

54 Protocol I, Art. 49.

55 Sandoz, Swinarski and Zimmermann, above note 25, p. 633, paras. 1942, 1944.

56 Bothe, Partsch and Solf, above note 26, p. 301, para. 2.4.1.

it could certainly contribute to a state's 'war capabilities', the human shield's participation is only indirect. The voluntary human shield cannot therefore be regarded as taking direct part in hostilities.

However, the degree of actualness or immediacy a threat must possess in order to count as direct part in hostilities can be difficult to define. The High Court of Justice of Israel⁵⁷ has taken the view that 'the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "direct part". The same goes for the person who decided upon the act, and the person who planned it'. This notwithstanding, '[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.'⁵⁸ The essential difficulty, however, is to determine the intensity required to create this causal relationship. It would seem important not to take too broad an approach: to interpret it too loosely would lead to voluntary human shields easily being placed on the same footing as people taking direct part in hostilities, which would mean, as some experts have pointed out, that they could be attacked 'during their preparation, namely when moving towards the military objective to be shielded by their presence'.⁵⁹ There is, however, no military necessity to attack them when they are not protecting a military target. Nor is there any point in targeting the human shield himself in addition to the military target he is trying to protect!⁶⁰ If the causal relationship is stretched too far, just about anything could be seen as taking direct part in hostilities, including the attitude of the general civilian population, because by undermining the morale of the population, it is possible to weaken its allegiance to the state, and hence the state itself. In that case the fundamental principle of distinction would disappear and we would be giving carte blanche to total war. Finally, as some experts point out, the causal relationship should not be read too broadly because the law must be applicable on the ground.⁶¹

At all events, we can safely say that the acts of voluntary human shields do not square easily with what we can consider as taking direct part in hostilities. Moreover, to argue the contrary seems utterly self-defeating. The whole point of human shields is that their civilian status, that which makes them 'unattackable', is used to protect a military objective. However, if they were taking direct part in hostilities, they could themselves be an object of attack. Their presence in front of a military target would therefore be entirely pointless. In that case,

57 *The Public Committee v. The Government of Israel*, above note 51, para. 37. See also William J. Fenrick, 'The targeted killings judgment and the scope of direct participation in hostilities', *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 336.

58 Sandoz, Swinarski and Zimmermann, above note 25, p. 522, para. 1679.

59 Summary Report, Second Expert Meeting, above note 47, p. 6.

60 Schmitt, above note 50, p. 96.

61 Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute, Geneva, 23–25 October 2005, p. 30, available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) (last visited 24 September 2007).

no one would voluntarily position himself in front of a potential target! At the same time, one can have the feeling that, from the point of view of direct participation in hostilities, there are voluntary human shields and voluntary human shields. There seems to be little common ground between a human shield on the roof of a missile launching pad and, to take an example cited by an expert, ‘a Somali woman who walked across the street holding her arms up and hiding behind her one or two fighters, who would fire their weapons from behind her flowing white gown’.⁶² The ICTY in the *Tadić* case adopted a case-by-case approach:

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.⁶³

We cannot therefore affirm in general and absolute terms that a voluntary human shield is or is not taking direct part in hostilities. This can only be ascertained by an appraisal *in concreto* of the way in which the human shield indeed tries to protect the military objective in question.

When it comes to determining whether a voluntary human shield, in defending a military objective, is or is not taking part in hostilities, the criterion of the real, *physical* shield he constitutes against a potential attack seems to be an interesting avenue of approach. For example, some minimum fighting would be required from an infantry division to get through a crowd of people standing between it and a military objective. In contrast, a small number of human shields standing near a military objective to protect it from an air strike do not constitute a real obstacle for the attacking party in the *material* sense of the word. In this case, the presence of a human shield is only a *legal* obstacle for the attacker, who hesitates to attack only out of fear of violating international humanitarian law with the attendant political and media impact. It would therefore seem overbold to declare an obstacle of that nature to be direct participation in hostilities.

The inherent risk run by the voluntary human shield

As a voluntary human shield cannot in most cases be regarded as taking direct part in hostilities, he retains the full protection due to a civilian status. It is plain, however, that his position in front of a military objective makes his situation more dangerous than that of a civilian who is nowhere near any potential military targets. His condition can be compared with that of workers working in armaments

62 Summary Report, Second Expert Meeting, above note 47, p. 7.

63 ICTY, *The Prosecutor v. Dusko Tadić*, Judgement, 7 May 1997, Case No. IT-94-1-T, para. 616.

or munitions factories.⁶⁴ As civilians who take only an indirect part in the hostilities, these workers continue to enjoy protection.⁶⁵

The idea of the 'ordinary' risk to which these civilians are exposing themselves is also to be found in the writings of Frédéric de Mulinen: 'Les personnes civiles se trouvant à l'intérieur d'un tel objectif [d'un objectif militaire] ou dans son environnement immédiat partagent le danger auquel il est exposé.'⁶⁶

In the specific case of voluntary human shields, Josiane Haas seems to be of the same opinion:

[A]lthough VHS [voluntary human shields] do not lose their right to protection as civilians, they may lose *de facto* protection by staying close to a military target. Like journalists embedded in military units, VHS lose the protection granted to civilians not participating directly in hostilities because of their proximity to a lawful target, provided, of course, that the attack is not indiscriminate. They thus act at their own *risk*.⁶⁷

She goes on to say that the attacker is, of course, always bound by the principles of distinction and proportionality. In short, human shields do not lose their protection as civilians. They are simply close to a military objective and, as a result, 'these civilians will bear the risk of falling victim to a legitimate attack on the shielded object'.⁶⁸

64 Human Rights Watch, 'International humanitarian law issues in a potential war in Iraq', 20 February 2003, available at <http://hrw.org/backgrounders/arms/iraq0202003.htm#1> (last visited 29 September 2007).

65 At first sight, Dinstein does not appear to share this opinion: 'These civilians enjoy no immunity while at work.' Dinstein, above note 36, pp. 124–5. However, there are grounds for supposing that Dinstein is not referring to the loss of legal immunity, but only to a *de facto* loss. He goes on to say, 'If the industrial plants are important enough (munitions factories being the paradigm), civilian casualties – even in large numbers – would usually come under the rubric of an acceptable collateral damage.' Ibid. So if Dinstein's workers are no longer protected, it is only after the proportionality calculation has been made and turned out in their disfavour, that is to say the commanders have taken the view that the military advantage is such that the collateral damage is acceptable (I shall return to questions of proportionality), rather than in a general way, simply because they are inside a military objective. 'Upon leaving the factories, civilian labourers shed the *risk* of being subject to attack' (emphasis added), or, more accurately, subject to the risk of an attack on the military objective being decided on (after a proportionality appraisal) and of suffering the consequences. Ibid. I hope that this interpretation of Dinstein's words is the correct one, as he goes on to say that '[s]hould the workforce live within the 'target area', civilian labourers are not protected in their homes!' Ibid. Moreover, he extends this vision of things to other civilians such as those who accompany armed forces and those who approach military targets such as major transport routes: 'When civilians are travelling in wartime on a major motorway, taking a mainline train, going to an airport etc., they are running a discernible *risk* in case of an air raid' (emphasis added). Ibid. It would certainly seem that Dinstein is speaking of a *de facto* risk and not a loss of legal protection, as he again refers to the proportionality principle: 'Given the significant military advantage that can generally be gained from the destruction of a strategically located bridge, relatively high civilian casualties would ordinarily be deemed a reasonable collateral damage' (it should be borne in mind that the proportionality calculation is a test to be applied *in concreto*, depending on 'the circumstances ruling at the time'). Ibid.

66 De Mulinen, above note 33, p. 14, para. 56.

67 Haas, above note 10, p. 210 (emphasis added).

68 Quéguiner, above note 8, p. 817.

Is the voluntary human shield a war criminal?

As we have seen, using human shields is one of the acts classified as a war crime by the Rome Statute of the International Criminal Court (Art. 8(2)(b)(xxiii)). We may therefore ask ourselves whether a person who places himself in front of a military objective is also committing a war crime, as that person is after all mis-using his status as a civilian.

According to Elements of Crimes, adopted in 2002, the elements of the war crime of using protected persons as shields are:

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The three last conditions can perfectly well be met by a voluntary human shield. However, the first element poses a problem. It is fairly clear from the wording that the drafters were referring to people who had moved or taken advantage of the presence of protected persons to shield a military objective, and, in the case of voluntary human shields, not the shields themselves. The elements of this crime suggest that the prohibition refers to taking advantage of *other* civilians or exposing them to danger. It should be borne in mind that the principles of criminal law are to be interpreted restrictively and that reasoning by analogy is not allowed. Moreover, if a civilian taking direct part in hostilities is not *ipso facto* a war criminal, we may ask ourselves *a fortiori* why a human shield who, as we have just seen, can scarcely be regarded as taking direct part in hostilities, should be regarded as such.⁶⁹

Human shields in non-international armed conflicts

In both non-international and international armed conflicts, civilians may not be the object of attack unless they are taking direct part in hostilities.⁷⁰ For such time as they do so, they become legitimate targets. The meaning of taking direct part in hostilities is the same whether the conflict is of an international or a non-international nature. We may therefore consider that the conclusions we arrived at concerning the status and protection of human shields, be they voluntary or

69 The question of the complicity of voluntary human shields in war crimes committed by the belligerent taking advantage of their presence could also arise.

70 Protocol II, Art. 13(3).

otherwise, can be transposed into the framework of an internal armed conflict. Civilians used by a party to a conflict to shelter military hardware or personnel can still be regarded as civilians, and those who voluntarily act in the same way should not be regarded as taking direct part in hostilities. The attacker is under an obligation not to target human shields.

The attacker's obligations vis-à-vis human shields

The party under attack has an absolute obligation not to use human shields. But if the attacked party violates this ban, the question may arise as to how the attacker who is aware of this fact should react. In other words, can it attack the military objective despite the presence of human shields protecting it, and, if so, how?

The possibility to attack a military objective protected by human shields, or the use of a classic proportionality test?

One question that may arise at the outset is whether the fact that the adverse party has violated its obligations under international humanitarian law by using human shields releases the other party from some of its own obligations. However, this cannot be so in view of the unanimously accepted non-application of the *tu quoque* principle (principle of reciprocity) when it comes to international humanitarian law.⁷¹ Article 51(8) of Protocol I states that '[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.' The obligation incumbent on a belligerent state to spare the civilian population and take the measures prescribed to that effect does not therefore depend on the adversary's compliance with the ban on using human shields. However, although the attacking party is under a constant obligation to spare civilians, including human shields, that does not mean that it must in all cases abstain from attacking a military objective protected by human shields. Just as the presence of military objectives in an area occupied by the civilian population does not rob those people of their civilian status,⁷² an 'objectif militaire demeure un objectif militaire même si des civils se trouvent à l'intérieur'⁷³ or in its immediate vicinity. Military objectives protected by human shields do not cease to be legitimate targets for attack simply because of the presence of those shields.

It follows that when a commander asks himself whether or not he can attack such a military objective, he must reason as in the case of any other

71 This is reflected in Art. 60(5) of the 1969 Vienna Convention on the Law of Treaties, which rules out suspension of a treaty for wrongful conduct of a party in the case of 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.

72 Protocol I, Art. 50(3).

73 De Mulinen, above note 33, p. 14.

legitimate military objective an attack on which runs the risk of causing collateral damage to civilians who, in this case, are the human shields protecting the target. An attack will be possible if and only if the potential damage to civilians is not 'excessive in relation to the concrete and direct military advantage anticipated'.⁷⁴ This means that the expected civilian losses must be weighed against the size of the concrete military advantage to be anticipated if the military objective is neutralized.⁷⁵ The attacker is also obliged to take precautions as required by Article 57 of Protocol I.⁷⁶ The presence of human shields will not therefore systematically prevent an attack – even if conducting an attack despite their presence may have a considerable media and political impact. This is something that should be made widely known, particularly to potential voluntary human shields.

The case of involuntary human shields

If the concrete and direct military advantage anticipated proves sufficiently significant in relation to the potential damage to the human shields, the attack may take place. The appraisal must be *in concreto* and must always take into account the military advantage, which can shift, for example over time (a bridge of fundamental importance one day may have little strategic significance the next day depending on where the front line lies at the time), and the extent of collateral damage that will be caused to civilians. The extent of that damage may depend, among other things, on the number of civilians likely to be affected. A particular

74 Protocol I, Art. 51(5)(b).

75 Protocol I, Art. 52(2).

76 However, according to E. David, the primacy of the principle of protection of civilians should cause the attacker not to go ahead with the attack. David, above note 3, p. 268. The author considers this position to be dangerous at a number of levels. David seems to believe that human shields have a privileged status in relation to other civilians. This could give the impression that the status of civilians is not uniform but carries variable degrees of protection, and that there is therefore a hierarchy among civilians. In international humanitarian law, a person either is or is not a civilian, and all civilians enjoy identical protection by virtue of that status. Moreover, a systematic prohibition on launching an attack on a military objective protected by human shields would be tantamount to rewarding violation of international humanitarian law, as the party in violation of the ban on use of human shields would benefit from the effective immunity from attack it has succeeded in giving the protected military objective. Violating international humanitarian law by using human shields would therefore become a veritable 'force multiplier'. Michael Newton, 'Human shields: can abuse of the law of war be a force multiplier?', Discussion, in Andru E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, US Naval War College, International Law Studies, Vol. 78, 2002, p. 298. As such, it would constitute a temptation to ignore the law and could ultimately jeopardize the very principle of distinction, which is one of the fundamental pillars of international humanitarian law. Finally, this line of reasoning also calls into question the whole principle of proportionality. If we accept the premise that a military objective protected by human shields cannot be attacked, the principle of humanity automatically prevails over military necessity. In absolute terms, that would not of course be a bad thing, as it would be in the victims' interests. However, it would be totally incompatible with the realities of war, which the proportionality principle, as a pragmatic compromise, takes into account. David also seems to be aware of the questionable nature of his position, as he remarks that 'it will probably be argued that the right to attack military objectives close to concentrations of civilians should be transposed to apply to the present hypothesis', which would subordinate the possibility of attack to respect for the principles of proportionality and precautions in attack. David, above note 3, p. 268.

military advantage may thus be regarded as sufficiently important to justify an attack on a military objective protected by five people being used as human shields. However, if the object is protected by five hundred human shields, the outcome of the deliberation may change. In practice then, there is no doubt that in certain cases, the attacked party can effectively protect the military objective by placing sufficient human shields on or around it! Some authors understandably reject this conclusion, which they consider shocking, and recommend human shields not be taken into account by a commander applying the proportionality principle while preparing for or deciding on an attack.⁷⁷ For example, the commander could apply the proportionality test in such a way as to comply *a priori* with Articles 57(2)(a)(iii) and 51(8) of Protocol I, but the human shields would simply not be taken into account on the side of the equation concerning damage to civilians. However, I do not consider this interpretation to be correct. Civilians, whether they are human shields or not, cannot simply *be left out* of the equation. The fact that civilians are close to a military objective because the attacker has breached his obligations makes no difference. It would be against both the spirit and the letter of Article 51(8) if civilians were to 'pay' for the wrongs of a beligerent party.⁷⁸

The case of voluntary human shields

According to Michael N. Schmitt, since voluntary human shields are to be regarded as taking direct part in hostilities, they lose their protection as civilians and can themselves be an object of attack. Accordingly, 'voluntary shields ... are excluded in the estimation of incidental injury when assessing proportionality'.⁷⁹ However,

⁷⁷ Schmitt, above note 50, p. 91.

⁷⁸ According to Dinstein, 'the principle of proportionality remains prevalent'. Dinstein, above note 36, p. 131. But he goes on to say, 'However, ... the actual test of excessive injury to civilians must be relaxed. That is to say, the appraisal whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that ... civilian casualties will be higher than usual.' Ibid. If we suppose that human shields must be taken into account in an appraisal of proportionality, it is hard to understand why the fact that more civilian losses are anticipated should be used to weaken the importance of civilian losses in the equation! By analogy, the fact that there are more civilians living close to a military objective, so that there will potentially be greater damage to civilians, does not reduce the weight given to the 'civilian losses' side of the equation in relation to the 'military advantage' side; on the contrary, it gives it greater weight. Why would it be otherwise in the case of human shields, who are fully fledged civilians? To apply such reasoning would be tantamount to 'punishing' the civilians acting as human shields for the violation of the law committed by the attacked party. On this point, it is also possible to disagree with J.-F. Quéguiner, who considers that the wrong committed by the attacked party should be taken into account in the appraisal of proportionality: 'authors have submitted that the enemy party's fraudulent conduct may be taken into account in the attacking commander's assessment of collateral damage versus military advantage. This approach ... can indeed be considered appropriate.' Quéguiner, above note 8, p. 814. This reasoning leads to the same result as Dinstein's: the human shield should be taken into account in the appraisal of proportionality, but less than any other civilian. I would tend to share the opinion expressed by Schmitt: 'there is no *de jure* relaxation of the proportionality standard'. Schmitt, above note 50, pp. 92–3. Simply, the fact of being used as a human shield increases *de facto*, as we have seen earlier, the 'chances' of a civilian being part of collateral damage because he is on or near to a military objective.

⁷⁹ Schmitt, above note 1, p. 100.

the same author remarks that there is no military necessity to attack the human shield *per se*. The necessity is attached only to the military objective he is protecting. Accordingly, 'the only practical impact of their willingness to serve as shields is that they need not be included in proportionality calculations'.⁸⁰ As we have already seen, I do not think that a voluntary human shield should be regarded as taking direct part in hostilities. Schmitt's statement nevertheless raises an interesting question, namely whether the voluntary nature of their presence can have an impact on the appraisal of proportionality. Intuitively, one could indeed have the feeling that a human shield who is in front of a military objective by his own choice should not count in the same way as someone chained to a military objective against his will. However, if we were to take into account the voluntary nature of a human shield's action, it would be tantamount to assigning a lesser value to voluntary human shields. In mathematical terms, in an equation that balances military advantage and damage to civilians, a lower coefficient would be applied to the weighting of the civilian side of the equation. An approach based on the human shield's willingness or otherwise would also run the risk of dangerously eroding civilian protection. If a human shield should have less weight in the equation because he has chosen to guard a military objective, a civilian who remains close to a military objective despite warnings should also weigh more lightly in the balance. The same would apply to a civilian who lives close to an obvious potential military objective such as a military barracks but who has chosen not to leave his home. There would be a real risk of this approach being abused by the attacker, who could be tempted to classify all civilians close to a military objective he is targeting as voluntary human shields, if as a result he could make his proportionality appraisal on a more flexible basis.

Furthermore, could not we consider that this method of taking a civilian's willingness into account should be regarded as contrary to the principle of inalienability of rights, enshrined in Article 8 of the Fourth Geneva Convention, for example, which states that protected persons 'may never renounce ... the rights secured to them' by that Convention. Would this not include the principle that subtends those rights, namely the fact that civilians may not be attacked unless they are taking direct part in hostilities? To conclude on this point, I would refer to another practical element that pleads in favour of treating human shields the same way, whether they are voluntary or not. For the commander faced with the reality on the ground, it is not always easy to distinguish civilians placed in front of a military objective against their will from those who are standing there of their own volition. Except in cases where the voluntary nature of the human shield's action has been given media coverage, or at least brought to the attacker's attention, how is he to distinguish between a willing human shield and an unwilling one? It is very difficult to determine whether the human shield is really in front of the military objective of his own volition. An individual who appears to be acting of his own

80 Schmitt, above note 50, p. 96. The author makes an exception only in the case of children acting as human shields, as their lack of legal capacity negates the voluntary nature of their participation.

free will may turn out to have been simply giving in to pressure.⁸¹ In short, although a distinction based on willingness could have some relevance in a criminal case, it has no place in the conduct of hostilities as it cannot be applied on the ground.

Other precautions to be taken when attacking a military objective protected by human shields⁸²

The precautionary measures to be taken in attack are set out in Article 57 of Protocol I.

*The obligation to take constant care to spare civilians when conducting military operations*⁸³

Article 57(1) has a broader scope than the subsequent sections, which specifically concern ‘attacks’; paragraph 1 applies to ‘military operations’ in a more general way. The term covers ‘any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat’.⁸⁴ Over and above the specific precautions set out in the subsequent paragraphs of Article 57, the parties must therefore also take constant care to spare human shields.

*The obligation to verify that the objectives to be attacked are military objectives*⁸⁵

In the case of human shields, we have seen that a sufficiently significant military advantage in relation to the danger to which human shields are exposed could render an attack on a military objective legitimate despite their presence. It is therefore all the more vital to be sure of the military nature of the objective, as attacks on civilians and civilian property are categorically prohibited. The information to be gathered in the course of this verification concerns not only the nature of the target itself but also its environment. As we have seen, even in the presence of a military objective, an attack can prove to be prohibited, for example if far too many civilians are being used as human shields and would be endangered

81 In connection with the ‘prior warning procedure’, whereby the IDF (Israel Defense Forces) send Palestinian civilians into neighbouring houses to tell the occupants suspected of terrorism to leave, the President of the High Court of Justice of Israel, Aharon Barak, noted with good sense, that ‘It is very hard to verify willingness.’ B’Tselem, ‘Human shields’, timeline of events, available at www.btselem.org/english/Human_Shields/Timeline_of_Events.asp (last visited 10 October 2007).

82 When listing the conditions an attacker must respect when attacking a military objective guarded by human shields, Eric David refers to the principle of proportionality and the other precautions to be taken to avoid harming human shields, but the author also asserts that the attacker must have ‘épuisé tous les moyens licites possibles pour persuader l’attaqué de retirer les “boucliers humains”’. David, above note 3, p. 268. However, even if this measure seems desirable, it is not among the legal obligations incumbent on an attacker under international humanitarian law. Quéguiner, above note 8, p. 815.

83 Protocol I, Art. 57(1).

84 Sandoz, Swinarski and Zimmermann, above note 25, p. 698, para. 2191.

85 Protocol I, Art. 57(2)(a)(i).

by the attack in relation to the size of the military advantage to be derived from it. One particular difficulty is raised by ‘emerging targets’.⁸⁶ In contrast with planned operations, an ‘emerging target’ situation calls for an instant determination of the military nature of the target and the conduct to be adopted if it is protected by human shields. The commander is required to ‘do everything feasible’ to verify the nature of the objective, as no one can be obliged to do the impossible.

*The obligation to choose means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects*⁸⁷

For example, to comply with this obligation, and still remain subject to ‘feasibility’, if human shields are not in front of the military objective all the time, an attack should be launched at a time when they are not present. Similarly, where the military objective is protected by human shields, the attacker should use weapons that will destroy the target without harming the human shields around it or will harm them as little as possible. This means that the attacker should try to avoid using ‘missiles and remotely controlled weapons ... (unless the attack uses the new generation of remotely controlled “precision-guided munitions”), since the targeting capabilities of remotely controlled weapons are traditionally extremely bad’.⁸⁸ Although this does not mean that the parties have to acquire precision-guided weapons, even if they have the means to do so, if they do have such weapons certain situations require that they use them where it is possible and feasible to do so.⁸⁹

*The obligation to cancel or suspend an attack if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack would be disproportionate*⁹⁰

Unlike Article 57(2)(a), this obligation is addressed not only to those planning or deciding on an attack but also to those carrying it out. It may be difficult for someone carrying out an attack to assess its proportionality, as the part he is carrying out may seem disproportionate while the attack as a whole remains fully in compliance with the proportionality principle. However, when it comes to the obligation set out in Article 57(2)(b), the role of those carrying out the attack remains essential, as there may have been a mistake or fresh information may

86 Quéguiner, above note 8, p. 798.

87 Protocol I, Art. 57(2)(a)(ii): those planning or deciding on an attack must ‘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 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’.

88 Oeter, above note 26, p. 166.

89 Quéguiner, above note 8, pp. 802–3; Michael N. Schmitt, ‘Precision attack and international humanitarian law’, *International Review of the Red Cross*, Vol. 87, No. 859 (2005), p. 462.

90 Protocol I, Art. 57(2)(b).

appear and change the original premises. For example, if a pilot has received the order to bomb an objective but he realizes at the last minute that it is protected by a human shield, he should suspend the attack and refer back to his command.

*The obligation to give effective advance warning of attacks which could affect the civilian population 'unless circumstances do not so permit'*⁹¹

Can this requirement be regarded as met when the attacker issues a general list of the various items of infrastructure he considers to be military objectives?⁹² Although it might seem possible to reply in the affirmative, there will be cases when efforts should be made to give a more specific warning. When the military objective is protected by human shields, a warning before an attack on the objective will let the party using the human shields – thinking that they will forestall an attack – know that the stratagem has not worked, and give it a chance to remove the human shields from the target. Voluntary human shields might also discover in this way that their presence will not prevent an attack on the military objective they are guarding and have the time to leave the area. 'Effective advance' warning must be given that is sufficiently in advance to allow the evacuation of civilians, including human shields. However, care should be taken not to give the warning too far in advance. Otherwise civilians may think that the danger has passed, and human shields, or those who have positioned them, may think that their presence has forestalled the attack, whereas the attack will still happen but a little later. Finally, it should be remembered that complying with the obligation to warn does not release the attacker from his duty to take other precautionary measures. He cannot therefore consider an entire area as a military objective simply because he has recommended that it be evacuated. Even if he were to regard any civilians remaining as voluntary human shields, they would, as argued above, still enjoy the same protection as any other civilians.

*The obligation, when there is a choice between two military objectives for obtaining a similar military advantage, to choose the one which may be expected to cause the least danger to civilians*⁹³

This rule, referred to as the choice of 'the lesser evil',⁹⁴ leaves much to subjective appreciation, particularly as the two targets are legitimate military objectives.⁹⁵ A choice of this kind is generally only possible where the military objectives in question are lines of communication. For example, if human shields are positioned on a bridge and the communication line can be broken by attacking another bridge

91 Protocol I, Art. 57(2)(c).

92 Quéguiner, above note 8, p. 808.

93 Protocol I, Art. 57(3).

94 Sandoz, Swinarski and Zimmermann, above note 25, p. 705, para. 2226.

95 Quéguiner, above note 8, p. 805.

that is not surrounded by civilians, the obligation set out in Article 57(3) obliges the attacker to take that option.

Conclusion

It would seem that there is no reason to draw a distinction between voluntary and involuntary human shields, as such distinction would have no legal consequences. Moreover, contrary to what some have claimed,⁹⁶ there would not appear to be any real need for new law on the status of human shields, since all cases are already covered by international humanitarian law as it stands. The scenarios that raise questions are not specific to the case of human shields but are linked with two of the greatest challenges that international humanitarian law faces today, namely the proper interpretation of ‘proportionality’ and of ‘taking direct part in hostilities’.

⁹⁶ Fusco, above note 2, p. 31.

Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals

Carolyn Wuerzner

Carolyn Wuerzner was editorial assistant for the *International Review of the Red Cross* and is now working with UNHCR.

Abstract

Three main arguments may explain why few cases in international (and national) criminal law include charges for attacks against civilians or civilian objects. The law may be not sufficiently clear, there may be a lack of evidence or the selection of military targets may be based on mainly subjective considerations, which make it very hard to establish individual culpability. This article examines some legal and practical reasons for the difficulties the prosecutor faces when trying to charge individuals with such crimes. Although there are few examples, the ICTY has shown that it is generally possible to hold individuals responsible for such crimes.

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“NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or

investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high-level accused or against lower accused for particularly heinous offences”¹.

This result of the International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor’s Committee² reflects the main difficulties linked to the prosecution of conduct of hostilities charges. Fewer than 10 per cent of more than 100 judgments before the ICTY deal with attacks on civilians or civilian objects.³ Similarly, very few domestic cases deal with conduct of hostilities crimes.⁴ But what exactly makes it so hard to prosecute such crimes, and how can these difficulties be overcome? By looking at two specific crimes, namely the crime of attacking civilians and that of attacking civilian objects, I shall attempt to identify the main difficulties and examine the ways in which they have been dealt with in case law, in particular that of the ICTY.

Attacks on civilians or civilian objects

The most basic and essential principle for the conduct of hostilities is laid down in Article 48 of 1977 Protocol I Additional to the 1949 Geneva Conventions, namely that belligerents must distinguish between the civilian population and combatants and between civilian objects and military objectives. In addition, in non-international armed conflicts the main treaty rule is Article 13(2) of 1977 Protocol II, which prohibits belligerents from making the civilian population as such, or individual civilians, the object of attack. The protection of this article extends to all civilians, with the proviso ‘unless and for such time as they take a direct part in hostilities’. Protocol II does not, however, contain any provision protecting civilian objects in general. Only a few objects, namely those indispensable to the survival of the civilian population (Art. 13), those containing

- 1 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 90, available at www.un.org/icty/pressreal/nato061300.htm (last visited 25 August 2008) (hereinafter NATO Bombing Campaign, ICTY Report).
- 2 The Committee was established by the Prosecutor to review the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia. Its task was to advise the Prosecutor on whether to initiate investigations into the alleged violations of international humanitarian law (IHL) by NATO, in accordance with Article 18 of the International Criminal Tribunal for the former Yugoslavia (ICTY). It gave its final recommendation to the Prosecutor in September 2000. Ibid.
- 3 See in particular *The Prosecutor v. Dario Kordić and Mario Čerkez* (IT-95-14/2), *The Prosecutor v. Tihomir Blaškić* (IT-95-14), *The Prosecutor v. Stanislav Galić* (IT-98-29), *The Prosecutor v. Pavle Strugar* (IT-01-42), *The Prosecutor v. Milan Martić* (IT-95-11), *The Prosecutor v. Mirjan Kupreškić et al.* (IT-95-16), *The Prosecutor v. Slobodan Milošević* (IT-02-54), available at www.icty.org (last visited 14 January 2009).
- 4 One of the few examples is *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and others*, HCJ 769/02, The Supreme Court Sitting as the High Court of Justice, 11 December 2005 (hereinafter the *Targeted-Killing case*), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last visited 25 August 2008).

dangerous forces (Art. 16) and cultural objects and places of worship (Art. 17), are placed under its protection.

Customary nature of the rules

The ICTY Appeals Chamber in the *Tadić* case established that the rules on the conduct of hostilities in international armed conflicts have been widely accepted as being very similar to those applicable to internal armed conflicts.⁵

Specifically concerning attacks on civilian objects, the trial chamber in the *Blaškić* case stresses that customary international law prohibits unlawful attacks upon civilians and civilian property whatever the nature of the conflict.⁶ The trial chamber in the *Strugar* case further underlines that Article 52, referred to in connection with the charge of attacking civilian objects, is a 'reaffirmation and reformulation of a rule that had previously attained the status of customary international law'.⁷ In the light of the debates about the classification of the conflict as international or non-international and the discussion on the customary nature of these conduct of hostilities offences, the Office of the Prosecutor in the *Blaškić* case used the 1977 Additional Protocols, together with customary international law, as its legal basis for the charge of unlawful attack on civilians. The 'unlawful attack on a civilian objective' charge was equally based on that law and Additional Protocol I.⁸ A further important statement in the *Blaškić* case is that 'the specific provisions of Common Article 3 [of the four 1949 Geneva Conventions] also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II'.⁹

Although it has been established that the rules are applicable in any armed conflict, owing to their rather general and abstract nature they still leave much space for states and individuals to interpret them according to their own interests.

5 It claims that 'at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts'. ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 118, available at www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited 14 January 2009) (hereinafter *Tadić* Case, AC). The ICRC's Customary Law Study also includes these crimes in Rules 1, 6 and 7. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, *Rules*, ICRC, Cambridge University Press, Cambridge, 2005. 'Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians' (p. 3); 'Rule 6. Civilians are protected against attack unless and for such a times as they take a direct part in hostilities' (p. 19); 'Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects' (p. 25).

6 ICTY, *The Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Trial Chamber I, Judgement of 3 March 2000, para. 162 (hereinafter *Blaškić* Case, TC).

7 ICTY, *The Prosecutor v. Pavle Strugar*, IT-01-42-T, Trial Chamber II, Judgement of 31 January 2005, para. 223 (hereinafter *Strugar* Case, TC).

8 William J. Fenrick, 'A first attempt to adjudicate conduct of hostilities offences: Comments on aspects of the ICTY trial decision in the *Prosecutor v. Tihomir Blaškić*', *Leiden Journal of International Law*, Vol. 13 (2000), p. 937.

9 *Blaškić* Case, TC, above note 6, para. 170.

This explains the importance of dealing with them before courts. ‘The more frequently courts of law pronounce upon the permissibility and impermissibility of military actions, the more extensive and forceful are preventive restraints on military behaviour’.¹⁰

Criminalization of certain conduct

In international armed conflicts, Article 85(3) of Additional Protocol I criminalizes attacking the civilian population and individual civilians by recognizing such an act as a grave breach when committed wilfully and when the act causes death or serious injury to body or health. It also criminalizes indiscriminate attacks against civilian objects, wilfully launched in the knowledge that the consequences thereof will be excessive. In non-international armed conflicts there is no treaty-based criminalization of such attacks, but in the *Tadić* case the ICTY has stated that ‘serious violations of Common Article 3, as well as general principles and rules on the protection of victims of internal armed conflict and fundamental principles and rules regarding means and methods of combat in civil strife are criminalized under customary law’.¹¹

Application of the provisions before the ICTY

The crime of attacking civilians or civilian objects is chargeable under Article 3 of the ICTY Statute. This article, entitled ‘Violations of the laws and customs of war’, includes a non-exhaustive list of breaches of international humanitarian law (IHL), which the ICTY has understood as including conduct of hostilities charges. When a case brought to the attention of the Prosecutor includes the injury or death of one or more civilians or damage to civilian objects during combat activities, the principle of distinction leads to the *prima facie* assumption that this could constitute a war crime. For this article to apply, however, certain conditions must be fulfilled.

The application of Article 3 of the ICTY Statute

The elements required for the prosecution of such war crimes are enumerated in the *Tadić* case. According to the ICTY Appeals Chamber, war crimes must be ‘serious’ violations of IHL, meaning that they must ‘constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim’.¹² Furthermore, the Chamber stresses that the rule violated must be a

10 Antonio Cassese, ‘On some merits of the Israeli judgment on targeted killings’, *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 341.

11 *Tadić* Case, AC, above note 5, para. 134.

12 *Ibid.*, para. 94.

rule of international humanitarian law, based on either treaty law or customary law. The third element needed to charge a person for having committed a war crime is the criminalization of such a violation. This means that the rule must entail individual criminal responsibility.

In the *Galić* case the ICTY trial chamber clearly stated that ‘the act of making the civilian population or individual civilians the object of attack (such as attacks committed through a campaign of sniping and shelling as alleged in the Indictment), resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I. It would even qualify as a grave breach of Additional Protocol I [Art. 85(3)(a)]’.¹³ In addition, the chamber subsequently notes in the *Strugar* case that ‘the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities. The Chamber is of the opinion that the experiencing of such a risk by a civilian is in itself a grave consequence of an unlawful attack, even if he or she, luckily, survives the attack with no physical injury’.¹⁴

The statement that no result is required to find that there has been a serious violation of IHL is strange, as the trial chamber in the *Blaškić* case, basing its findings on the grave breaches provision of Additional Protocol I (Art. 85(3)), had stated that the attack against civilians and civilian property must have ‘caused deaths and/or serious bodily injury within the civilian population or damage to civilian property’.¹⁵ There thus seems to be a contradiction between the two statements.

Nonetheless, it is surprising that the Court requires a result when bringing charges for the crime of attacking civilians or civilian objects under Article 3, as there is no such express requirement.¹⁶ It is not quite clear why the ICTY introduced this result requirement of the said Article 85. Its customary law status is more than questionable, as demonstrated by the fact that the Statute of the International Criminal Court (ICC), which is largely seen as an expression of customary law, does not require a result for the crime of attacking civilians and civilian objectives to have been perpetrated.

The Court finds in the *Strugar* case that ‘similarly to what it has found in respect of the attacks on civilians, the Chamber considers that, in view of the fundamental nature of this prohibition, any attack against civilian objects, even if it did not cause any damage, can be considered a serious violation of international

13 ICTY, *The Prosecutor v. Stanislav Galić*, IT-98-29, Trial Chamber, Judgement of 5 December 2003, para. 27 (hereinafter *Galić* Case, TC). This statement may be misleading, as it can only be considered a grave breach and thus fall under Article 2 of the ICTY if it resulted in death or serious injury. See Additional Protocol I, Art. 85(3).

14 *Strugar* Case, TC, above note 7, para. 221.

15 *Blaškić* Case, TC, above note 6, para. 180.

16 If it were charging under Article 2, which criminalizes grave breaches of the Geneva Conventions, this would be necessary.

humanitarian law’.¹⁷ However, it also stresses that the question as to whether the threshold of ‘grave consequences’ is met if no harm or damage occurred would have to be examined on a case-by-case basis.

Therefore, in order to charge a person for committing the crime of attacking civilians or civilian objects, the Prosecutor will have to prove that there has been a serious violation of a criminalized rule of IHL. This must include proof that (i) the attack was directed at civilians or a civilian object, (ii) this was done wilfully, and (iii) the attack resulted in serious injury, death or damage.

Apart from the practical difficulties this may pose, there are a number of others linked to the legal classification of the attack as an attack directed against civilians or civilian objects as defined under IHL. These include the determination of whether the attack really did constitute an ‘attack’ in accordance with the definition given in IHL, whether it was really ‘directed’ at civilians or civilian objects and whether the objects were indeed ‘civilian’. Where it is not clear that it was directed at civilians or civilian objects, it is also necessary to examine whether it was a ‘proportional’ attack and whether the requisite ‘precautionary measures’ were taken. These notions are defined in IHL. However, as their definitions are very general, their application in criminal cases presents various problems. For practical reasons, this article will be confined to examining the notions of ‘civilian’, ‘direct participation in hostilities’, ‘civilian object’ and ‘proportionality’.

The notion of ‘civilian’

The *Kupreškić* trial chamber judgment identified three exceptional circumstances in which this protection of civilians may cease entirely or be reduced or suspended: ‘(i) when civilians abuse their rights; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (iii) at least according to some authorities, when civilians may legitimately be the object of reprisals’.¹⁸

When charging a person with attacking civilians, the special challenge is to show that the alleged perpetrator knew that the people he attacked were civilians and that his attack was not based on the reasonable belief that one of the two first exceptions mentioned above applied.

When it came to determining the *mens rea*, the trial chamber in the *Galić* case decided that ‘the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian.

17 *Strugar* Case, TC, above note 7, para. 225.

18 ICTY, *The Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber II, Judgement of 14 January 2000, para. 522 (hereinafter *Kupreškić* Case, TC). The latter circumstance is controversial.

However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.¹⁹

This raises two important elements for the prosecution of such a crime. First, there is the expression 'should have been aware of the civilian status', which lowers the mental requirement of knowledge about the civilian nature of the target. As mentioned above, this can be justified, because the ICTY requires the attack to have resulted in serious consequences.²⁰ Second, the Tribunal establishes that the standard of proof must be that of a 'reasonable person'. It must be stressed that even the existence of some military activities would not necessarily deprive the population of its civilian character. This is consistent with the fact that, in the *Blaškić* case, little attention was paid to the activities of poorly armed or trained part-time 'soldiers' defending their own villages when assessing whether or not the villages contained military objectives.²¹

Relevant evidence that an attack was wilfully directed against a civilian population can include a variety of things. One of those the trial chamber relied on in the *Strugar* case to show that an attack had been directed at civilians, and that the commander knew or should have known this, is that the existence of the Old Town of Dubrovnik as a living town was 'a renowned state of affairs which had existed for centuries'.²² The trial chamber further stated that 'Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian'.²³ Whilst this may be enough to prove the existence of a civilian population in the most clear-cut cases, there are many cases where the situation is not as straightforward.

When the cases become more complicated, '[t]he clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian'.²⁴ In the *Strugar* case the Court even uses testimony from a JNA (Yugoslav People's Army) officer, who stated that he did not feel jeopardized by the 'civilians', as additional proof of the civilian character of the population.²⁵ Although this is a subjective judgement, it can thus serve as evidence.

Other relevant factors taken into account to determine whether the perpetrator could have reasonably ascertained the non-combatant status of the individuals targeted in the *Galić* case²⁶ were the distance of the victim(s) from the

19 *Galić* Case, TC, above note 13, para. 55.

20 See Gerhard Werle, *Principles of International Criminal Law*, Asser Press, Cambridge, 2005, p. 344.

21 Fenrick, above note 8, p. 943.

22 *Strugar* Case, TC, above note 7, para. 285.

23 *Ibid.*, para. 287.

24 *Galić* Case, TC, above note 13, para. 50.

25 *Strugar* Case, TC, above note 7, para. 287.

26 See Daniela Kravetz, 'The protection of civilians in war: the ICTY's *Galić* case', *Leiden Journal of International Law*, Vol. 17 (2004), p. 531.

alleged perpetrator(s),²⁷ the visibility at the time of the event²⁸ and the proximity of the victim(s) to possible military targets.²⁹

The latter factor is very important, because if there are military objectives and the attack was launched in the belief that those objectives existed, the attacks could be justified.³⁰ But even the presence of military objectives does not, of course, necessarily mean that the attacks were not directed at civilians. In the *Blaškić* case there were Bosnian Muslim troops present in the towns that were attacked. Nevertheless, no Bosnian military casualties were reported. The vast majority of victims were civilians and, moreover, Muslim areas of the town were shelled, whereas Croatian or mixed areas were not damaged during the attack.³¹ These facts were evidence that the attack was directed against civilians, not against the military objects present in the area at the time of the attack.

In some cases, such as the *Blaškić* case, the incident is part of a plan or strategy that can be inferred from public statements. In this case, the planning and organization that preceded the attack were accompanied by political statements that showed the nature and purpose of the attack, namely, to exterminate the Muslim civilian population.³²

Another possibility is to examine the means used to carry out the attack. If, for example, it is claimed that a precise, geographically limited military objective was the object of attack, it is unlikely that weapons would be used that cannot be precision-guided, or which have a very large radius of destruction. In the *Blaškić* case, ‘baby bombs’ were used during the attack on Stari Vitez, leading primarily to civilian casualties and the destruction of civilian objects. As these are blind

27 *Galić* Case, TC, above note 13, paras. 355–356. In one instance the Chamber held that ‘At a distance of 1100 metres ... the perpetrator would have been able to observe the civilian appearance of Zametica, a 48 year old civilian woman, if he was well equipped, or if no optical sight or binoculars had been available. The circumstances were such that disregarding the possibility that the victim was civilian was reckless. Furthermore, the perpetrator repeatedly shot toward the victim preventing rescuers from approaching her. The Trial Chamber concludes that the perpetrator deliberately attacked the victim. The mere fact that the chance of hitting a target deteriorates at the distance of 1100 metres does not change this conclusion.’ *Ibid.*, para. 355.

28 *Ibid.*, para. 522: ‘Although it is convinced that at 6:00 hours in a July morning there is light, given the absence of explicit indications as to the exact level of luminosity at the time of the incident, the Majority cannot exclude the possibility that the person firing at Mejra Jusović failed to notice that she was a middle-aged civilian woman carrying wood. Nonetheless, the Majority is satisfied that the absence of military presence in the area of the incident, which consisted of open space except for three nearby houses, should have cautioned the perpetrator to confirm the military status of his victim before firing.’

29 *Ibid.*, para. 428, ‘Ramiza Kundo acknowledged that from 1992 to 1994 there was fighting and gunfire in the area where she lived but that there were no soldiers, military equipment or military activity in the vicinity at the time of the incident. Given the circumstances of the incident, the occurrence of similar incidents in the vicinity, the positions of the warring parties beneath the hill of Brijesko brdo, and evidence that there was no on-going combat activity in the relevant area at the time of the incident, the Majority does not accept the Defence’s suggestion that the victim was hit by a stray bullet or a ricochet as a consequence of a regular combat activity.’

30 *Strugar* Case, TC, above note 7, para. 284.

31 *Blaškić* Case, TC, above note 6, paras. 509–511.

32 *Ibid.*, para. 390.

weapons, their use was held to be indiscriminate and was considered proof that the attack was directed against civilians.³³

The notion of 'direct participation in hostilities'

The evaluation of whether the attack was unlawful includes an examination of whether the civilians who were the object of the attack had lost their immunity by taking a direct part in hostilities. This is important, as civilians may only be attacked if they are taking a direct part in hostilities. If they do so, they lose their immunity from attack. According to the *Galić* judgment, confirming the ICRC *Commentary* (see note 40 below), 'to take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces Combatants and other individuals directly engaged in hostilities are considered to be legitimate military targets.'³⁴

The practical question is, of course, how a commander or simple soldier is to know when civilians are taking a direct part in hostilities and when they are not. This is especially difficult where the armed groups mingle with the civilian population.

The trial chamber in the *Galić* case 'understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant'.³⁵ This, of course, requires the Prosecutor to know what the person contemplating the attack knew at the time he decided to attack. In the absence of clear evidence, it may be sufficient to show that the commander should have known that the population was civilian, based on common sense, or because it was a known state of affairs.³⁶

The notion of 'civilian object'

Civilian objects are defined in Article 52 of Additional Protocol I. However, even though the definition of this article is generally recognized as reflecting customary law, there is no agreement among all states about the exact definition of a military objective. The United States, for example, has included the specification that they 'effectively contribute to the opposing force's war-fighting and war-sustaining capability' in its definition of military objectives.³⁷ The term 'war-sustaining capability' is broader than the definition given in Article 52 of Protocol I, as it

³³ *Ibid.*, para. 512.

³⁴ *Galić* Case, TC, above note 13, para. 48.

³⁵ *Ibid.*, para. 50.

³⁶ On the precise meaning of the notion of 'direct participation in hostilities', see the ICRC report in this issue of the *International Review of the Red Cross*.

³⁷ US Department of Defence, Military Commission Instruction No. 2, available at www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf (last visited 25 August 2008).

implies ‘something not quite so directly connected with the actual conduct of hostilities’.³⁸

Nevertheless, the definition given in IHL is the one used as the basis for this crime before the ICTY. In the *Blaškić* case, civilian property was interpreted as covering any property that could not be legitimately considered a military objective.³⁹

In order to clarify better what constitutes a military objective, there have been attempts to draw up non-exhaustive lists of objects that are generally recognized as military objectives. The ICRC, for instance, made such an attempt in 1956.⁴⁰ The defence counsel in the *Strugar* case also gave a list of examples of military objectives, namely buildings and objects that provide administrative and logistical support for military objectives, as well as examples of objects that in certain circumstances may constitute military objectives: transport systems for military supplies and transport centres where lines of communication converge.⁴¹ It is, however, impossible to rely on a list in order to define the term ‘military objective’. Practically everything can become a legitimate target, as long as two conditions are cumulatively met: the object’s contribution to military action must be ‘effective’, and the military advantage of its destruction must be ‘definite’.⁴² Both criteria must be fulfilled ‘in the circumstances ruling at the time’.⁴³ Furthermore, in this definition of the term ‘military’ the said advantage and contribution are strictly limited to what is purely military, thus excluding objects of political, economic and psychological importance to the enemy.⁴⁴

Whether the aforesaid elements are present depends on what exactly was considered, at that time, to offer a ‘definite military advantage’ and on whether the object in question offered an ‘effective contribution to military action’. The applicable test thus includes two steps and contains an objective and a subjective element. The objective element is the determination of whether the object offers an effective, that is, direct, contribution to military action, according to its nature, location, purpose or use. Thus, for the Prosecutor to determine whether the targeted object contributed effectively to the military action, he or she needs to

38 Horace B. Robertson, Jr, ‘The principle of the military objective in the law of armed conflict’, *United States Air Force Academy Journal of Legal Studies*, Vol. 8 (1997), p. 50.

39 *Blaškić* Case, TC, above note 6, para. 180.

40 Yves Sandoz, Christoph Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), Martinus Nijhoff, The Hague, 1987, pp. 632–3. The list was drawn up by the ICRC with the help of military experts and presented as a model, subject to modification.

41 *Strugar* Case, TC, above note 7, para. 278.

42 Possible exceptions are those objects that benefit from special protection, such as dams and hospitals, which should never be used for military actions and thus cannot become military objectives. See Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, Vol. I, ICRC, Geneva, 2nd edn, 2006, p. 201.

43 Marco Sassòli, ‘Legitimate targets of attacks under international humanitarian law’, background paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 27–29 January 2003, p. 3, available at www.ihlresearch.org/ihl/pdfs/Session1.pdf (last visited 25 August 2008).

44 See *ibid.* for a further discussion of this subject.

know what the use, purpose, location or use of the object was at that time and what information the military had about the object. Could a commander have reasonably thought that this target contributed effectively to the enemy's military action?

The subjective element is that referred to in the *Galić* case, namely the assessment of whether the object's destruction, capture or neutralization, in the circumstances ruling at the time, offered a definite military advantage.⁴⁵ This excludes potential or indeterminate advantages or advantages that are not substantial. It further requires the commander to have sufficient information about the object before attacking it. In order to determine whether the destruction offered a definite military advantage, the Prosecutor must therefore reconstruct the assessment carried out by the military regarding the military necessity of destroying the target. This requires knowledge of the tactical and strategic goals of the belligerents at that time, as the determination of what is militarily necessary may be relative to the goals of the warring party concerned – which may change during the conflict and are usually confidential.

A case before the ICTY illustrates how this provision has been applied in practice. In the *Blaškić* case, the defence claimed that civilian buildings destroyed in the course of the attack on Vitez and Stari Vitez had been used for military purposes and had thus been turned into legitimate military targets. However, the trial chamber came to the conclusion that this was not the case, as there was no military installation, fortification or trench in the town on that day, there were no reports of any military victims or of the presence of soldiers from the Bosnia-Herzegovina army, and the Muslim military did not put up any defence. It further stated that the houses that were torched belonged to civilians and could not in any circumstances be construed as military targets.⁴⁶ 'Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez.'⁴⁷ The chamber thus looked at the overall situation and result of the attack, rather than at every specific object, in order to conclude that the attack was directed at civilian objects rather than military ones. This facilitated the task of proving that the attack was unlawful, but may only have been possible because the nature of the targets seems to have been pretty clear and did not require a more detailed analysis.

In a less clear situation, the trial chamber in the *Galić* judgment stresses that

In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the

45 *Galić* Case, TC, above note 13, para. 51.

46 *Blaškić* Case, TC, above note 6, para. 509.

47 *Ibid.*, para. 510.

information available to the latter, that the object is being used to make an effective contribution to military action.⁴⁸

The Appeals Chamber in the *Kordić* case further clarifies that ‘the imperative “in case of doubt” is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution.’⁴⁹ The Israeli Supreme Court, on the other hand, took a different approach. In the case of the targeted killings, it states that ‘if there is an alleged attack against civilians, the burden of proof on the attacking army is heavy’.⁵⁰ The ICTY may have chosen the expression more in favour of the accused, because it took into account the difficulty commanders face when having to decide rapidly whether an object is military or civilian. For the Prosecutor, however, this means that where the situation is not clear-cut, which is very often the case, it is up to him or her to prove beyond reasonable doubt the culpability of the perpetrator for having attacked a civilian object.

When it comes to the mental element, the attack must have been conducted ‘intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity’.⁵¹ In other words, the civilian character of the object must or should have been known to the perpetrator and, similar to the *mens rea* of the crime of attacking civilians, the attack must have been wilfully directed at civilian objects.⁵²

Furthermore, the Prosecutor’s report on the NATO bombing campaign analyses the nature of a number of targets, thus giving some guidance for future cases. The Commission stressed that all targets must meet the criteria of military target. ‘A general label is insufficient’⁵³ and it is also not sufficient to claim that the objects are traditional military objectives.⁵⁴ It further specified that as a bottom line, civilian morale as such is not a legitimate military objective.⁵⁵

However, there remain many open questions and a broad grey zone in which it is hard to define an object as military or civilian. The classification becomes especially difficult when the objects are dual-use objects, that is, they can be used for both civilian and military purposes. With many objects, including communications systems, transport systems, manufacturing plants and so on, the question of how to classify them is of great importance. However, there is no relevant case law that could help resolve this question. As a general rule, it can be said that as soon as the object is actually (not potentially) used for military

48 *Galić* Case, TC, above note 13, para. 51.

49 *The Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgement of 17 December 2004, para. 53 (hereinafter *Kordić* Case, AC).

50 *The Targeted-Killing Case*, above note 4, para. 40.

51 *Blaskić* Case, TC, above note 6, para. 180.

52 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2005, p. 152.

53 NATO Bombing Campaign, ICTY Report, above note 1, para. 55.

54 *Ibid.*

55 *Ibid.*

purposes, or where its secondary use is military, it is a military objective and may, in principle, be attacked. In the *Strugar* case, the trial chamber emphasized that each case must be determined on its facts.⁵⁶

The Prosecutor's report on the NATO bombing campaign also stresses that in determining whether or not the *mens rea* requirement of an unlawful attack has been met,

[I]t should be borne in mind that commanders deciding on an attack have duties: a) to do everything practicable to verify that the objectives to be attacked are military objectives, b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.⁵⁷

The questions that must thus be asked by the Prosecutor are what the attacker knew about the object, whether the necessary precautionary measures were taken and whether the principles of proportionality and distinction were respected. Some of the factors that can serve as evidence that the attack was unlawful are the time and place of the attack, its planning, the weapons used and the balance between the anticipated military advantage and the expected loss of civilian life or damage to civilian objects. This is valid for all attacks, not only attacks against civilian objects.

The above examination of cases dealing with the very general IHL norms of 'civilians', 'direct participation in hostilities' and 'civilian objects' shows that whilst these notions have been clarified to some extent, their application remains extremely difficult. The cases in which the norms were applied made it possible to find an individual criminally responsible for a violation because the nature of the people attacked was easy to determine and clearly known to the perpetrator. However, there remain many open questions and situations that have not yet been addressed.⁵⁸ Existing case law can thus serve only as a rough guideline and as a source of clarification that may enhance the principle of legality.

The notion of 'proportionality'

In order to show that a civilian or a civilian object was targeted, the possibility of that person or object being 'collateral damage' justified by military necessity, for instance, must be excluded.⁵⁹ What can be considered 'collateral damage' or not

⁵⁶ *Strugar* Case, TC, above note 7, para. 295.

⁵⁷ NATO Bombing Campaign, ICTY Report, above note 1, para. 28.

⁵⁸ For instance, if a person takes up arms to defend him/herself or his/her family – is this always considered as directly participating in hostilities, or could it be individual self-defence, as indicated in the UNSCR 780 Commission of Experts Report (UN Doc. S/1994/674)? For further discussion see William J. Fenrick, 'The prosecution of unlawful attack cases before the ICTY', *Yearbook of International Law*, Vol. 7 (2004), pp. 172–4.

⁵⁹ See discussion in this paper and in Fenrick, above note 58, p. 157.

depends, among other things, on whether or not an attack was proportionate. In the *Galić* case, ‘the Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence’.⁶⁰ Concerning the notion of proportionality and indiscriminate attacks, the trial chamber in the *Kupreškić* case states that the rule of proportionality must be applied in conjunction with the prohibition of negligent and indiscriminate attacks.⁶¹

Any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.⁶²

The *Galić* case further clarifies that ‘one type of indiscriminate attack violates the principle of proportionality’.⁶³

The link between the crime of attacking civilians or civilian objects and indiscriminate attacks is that the latter may in certain circumstances give rise to the inference that civilians or civilian objects were actually the object of the attack.⁶⁴ However, whether and in which circumstances this would be the case is not clear. The Appeals Chamber in *Galić* refers to the *Kunarac et al.* and *Blaškić* appeals judgments when clarifying that whether an attack is ‘directed’ against a civilian or a civilian population depends on the factual circumstances, which could for example include the

means and methods used in the course of the attack, ... the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of the war.⁶⁵

An example is the use of indiscriminate weapons, which was equated with a deliberate attack on civilians by the ICJ in its advisory opinion on the legality of the threat or use of nuclear weapons.⁶⁶ This possibility was also mentioned by the

60 *Galić* Case, TC, above note 13, para. 60.

61 Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge Studies in International and Comparative Law, Cambridge, 2004, p. 95. Cf. also *Kupreškić* Case, TC, above note 18, para. 524.

62 *Kupreškić* Case, TC, above note 18, para. 524.

63 *Galić* Case, TC, above note 13, para. 58. This also implies that indiscriminate attacks generally do not need to be disproportionate in order to constitute unlawful attacks.

64 *Ibid.*, paras. 57–58. This was also confirmed by the Appeals Chamber.

65 ICTY, *The Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber, Judgement of 30 November 2006, para. 132 (hereinafter *Galić* Case, AC).

66 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, [1996] ICJ Rep. 225, para. 78.

trial chamber in the *Martić* case.⁶⁷ In the *Strugar* case, the trial chamber reaffirms the theoretical possibility that attacks incidentally causing excessive damage could qualify as attacks directed against civilians or civilian objects, but avoids addressing the question any further.⁶⁸

The prohibition on causing disproportionate injury, death or damage is very difficult to apply before a court of law, as it implies a value-based judgement. It requires military commanders to strike a balance between the expected harm to civilians or civilian objects and the anticipated military advantage of the attack. Complete good faith on the part of the belligerents and the desire to comply with the general principle of respect for civilians in combat operations are thus required to put this provision into practice.

The Final Report to the ICTY Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia draws up a list of unresolved questions with regard to the application of the principle of proportionality:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space? and
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?⁶⁹

The first crucial step is to define the term 'concrete and direct military advantage'. This poses difficulties similar to those of defining the term 'definite military advantage' (Protocol I, Art. 52(2)), which was discussed above. The other question is, what should be considered when determining whether foreseeable damage, injury or death is proportional?

A further uncertainty is whether the cumulative effect of attacks can be taken into consideration. In the *Kupreškić* case, the Court clarifies that

[I]t may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in

67 ICTY, *The Prosecutor v. Milan Martić*, IT-95-11-T, Trial Chamber I, Judgement of 12 June 2007, para. 69 (hereinafter *Martić* Case, TC). 'In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.'

68 *Strugar* Case, TC, above note 7, para. 280.

69 NATO Bombing Campaign, ICTY Report, above note 1, para. 49.

keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.⁷⁰

However, instead of acknowledging that a number of attacks, although deemed to be lawful, can amount to a disproportionate attack, the NATO Bombing Review Committee interpreted this statement as referring to an overall assessment of the totality of civilian victims as against the goals of the military campaign.⁷¹

When looking for further guidance in case law, it is noticeable that only very few of the above-mentioned questions have been examined by the ICTY. In the *Galić* case, the trial chamber stated that '[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'⁷² This statement sets the standard of 'a reasonable person', but is not very helpful, as the evaluation of what is excessive mainly depends on who makes the evaluation. A human rights lawyer will have a different understanding of what is excessive than a military commander, for example. And even among military commanders, this evaluation can vary largely, depending on their doctrinal backgrounds, their combat experience or their national military history.⁷³

In fact, it is mainly this subjectivity that makes it so hard to charge individuals for disproportionate attacks. The trial chamber in the *Galić* case notes that the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words 'expected' and 'anticipated'.⁷⁴ It goes on to say that 'To establish the *mens rea* of a disproportionate attack the Prosecution must prove ... that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.'⁷⁵ Such circumstances, which influence the danger incurred by civilians, can include the location of the military objective (vicinity of civilian objects), the accuracy of the weapon (its dispersion, range, ammunition used, etc.), the weather conditions (wind or low visibility), the specific nature of the military objective (fuel tanks, main roads, etc.), technical skills of the combatants and so on.

The trial chamber also goes on to emphasize that even if a party does not comply with its obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives, and to avoid locating military objectives within or near densely populated areas (see Protocol I, Art. 58), this does not

70 *Kupreškić* Case, TC, above note 18, para. 526.

71 NATO Bombing Campaign, ICTY Report, above note 1, para. 52.

72 *Galić* Case, TC, above note 13, para. 58.

73 NATO Bombing Campaign, ICTY Report, above note 1, para. 50.

74 *Galić* Case, TC, above note 13, para. 58.

75 *Ibid.*, para. 59.

relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.⁷⁶

Practical difficulties of bringing charges for conduct of hostilities crimes

Determination of the facts

As described by Fenrick, 'a first step in conducting an investigation concerning unlawful attacks should be an attempt to develop a general overview of the military situation, including, if possible, an indication of the relevant information available or readily available to the potential accused'.⁷⁷ This step already involves a series of complications.⁷⁸ In order to get an accurate overview of the military situation it is necessary to examine the tactics of both sides, the means and methods of warfare used by them, their objectives and constraints and the number of civilians and civilian objects in the area. With respect to the mental element of the crime, this overview should include knowledge of the information available to the military at the time of the attack and at the time of the decision-making process. The Prosecutor must rely not only on military and weapons experts, but also on witnesses who have survived the attack and, most importantly, on the armed forces themselves.

Establishing the big picture vs. identifying separate incidents

One of the first steps in establishing the extent of the harm an attack has caused is to conduct an investigation after the event. This may be extremely difficult, as it is not always practicable to determine precisely when and how particular incidents occurred. When reconstructing the facts, it may not always be possible to assess each single incident, as the number of attacks and incidents may simply be too high to allow an incident-by-incident approach.⁷⁹ It might therefore be necessary to make a global assessment and focus on the total effect of an attack. This may, however, be problematic when it comes to determining guilt. In the *Strugar* case, for instance, the chamber acknowledged the difficulty of identifying particular buildings damaged during the attack on Dubrovnik of 6 December 1991, but while

⁷⁶ Ibid., para. 61.

⁷⁷ William J. Fenrick, 'Riding the rhino: attempting to develop usable standards for combat activities', *Boston College International and Comparative Law Review* (Winter 2007), p. 108.

⁷⁸ Although not all the complications described are limited to the crimes of attacking civilians and the civilian population, they must nevertheless be considered, as they add to the difficulty of bringing charges for these crimes. They may also become especially relevant when combined with the legal difficulties inherent in the prosecution of unlawful attacks on civilians and civilian objects, which makes the whole process particularly complicated.

⁷⁹ William J. Fenrick, 'Attacking the enemy civilian as a punishable offense', *Duke Journal of Comparative & International Law*, Vol. 7 (1997), p. 564.

finding that there was widespread and substantial damage to the Old Town of Dubrovnik, it stated that ‘it is only this particularised and proved damage ... which will be taken into account for the purpose of determining guilt and innocence’.⁸⁰

As this may not always be satisfactory, because it does not fully reflect the widespread and systematic nature of the attack, the Prosecutor in the *Galić* case alleged that the sniping and shelling directed at civilians amounted to a campaign. In this case, the court thus also looked at evidence that demonstrated whether the alleged planned incidents, if proved attacks, were not isolated incidents but representative of a ‘widespread’ or ‘systematic’ pattern of behaviour. It nevertheless ‘[t]ried to the extent that was possible and reasonable to assess each scheduled incident on its own terms, *but also with a limited reference to other evidence concerning the situation of civilians in Sarajevo*’.⁸¹ While having managed to move from the micro to the macro level to some extent, the Prosecutor must nevertheless particularize a number of incidents in the indictment and focus on proving their unlawfulness, rather than referring only to the whole situation.

Independently of this, acknowledgement of the overall situation is important, as it can be an indicator of culpable conduct such as disproportionate attacks on military objects, indiscriminate attacks, a lack of precautionary measures or deliberate attacks on civilians or civilian objects.

The problem with focusing only on a few incidents is that the Prosecutor will, obviously, choose those incidents that clearly constitute violations and can be proved reasonably easily. The few cases brought before the ICTY so far, therefore, have not obliged the judges to deal with very complicated situations, such as those where the loss of civilian life is not clearly disproportionate or where the nature of the population is unclear.

Battlefield damage assessment

A second difficulty in conducting inquiries is to guarantee impartial and effective investigations into the legality of particular aspects of the attack. While the attacks continue, it may be extremely dangerous to gather information as to where projectiles landed, what they damaged and who they wounded or killed. Right after the attack, it is often the armed forces themselves that will, by carrying out a ‘battlefield damage assessment’ (BDA), record the damage caused. In many situations there are also independent investigations and damage assessments, carried out by the UN or other third parties present in the area of conflict. In any case, it is necessary to ensure that the investigations are impartial and efficient. In the *Strugar* case, a commission made up of JNA officers conducted an investigation into the attack of 6 December only two days after the attack.⁸² In the commission’s report, the attack

80 *Strugar* Case, TC, above note 7, para. 179.

81 *Galić* Case, TC, above note 13, para. 207 (emphasis added).

82 *Strugar* Case, TC, above note 7, para. 177. A retired lieutenant-general of the then JNA (Yugoslav Peoples’ Army), Pavle Strugar was charged with crimes allegedly committed from 6 to 31 December 1991

was claimed to have caused very little damage. This evaluation was found by the chamber to misrepresent the true situation and to give misleading views; the chamber consequently deemed that the investigation was not a genuine attempt to record the nature or extent of the damage caused by the attack.

Need for military experts

A further difficulty with regard to establishing the facts is the need for military and weapons experts. Information as to the weapons and tactics used, the number of projectiles fired and the geographical location from which the attack originated can be necessary to prove who launched the attack, whether it was deliberate or whether the damage, injury or death it caused was perhaps a mistake that could possibly eliminate criminal responsibility.

In addition to the evidence that may be found in military communications or logs, the facts of the case may be indicators of culpable conduct. If, for example, a tactic is used by which 'mortar shells are fired from mortars in fixed emplacements aimed at specific areas, it is reasonable to conclude that the specific areas are intentionally hit'.⁸³ And concerning the choice of weapon, it is reasonable to assume that if a precision weapon such as a sniper rifle is used and the sniper hits a child, it was his intention to do so. The planning of an attack, including the choice of weapon, can thus be evidence for the lawfulness or otherwise of the attack. There are manuals for each type of weapon system that show the effective zone, that is, the area around the point of impact within which the munition may cause death or injury.⁸⁴ These manuals also contain tables that can be used to predict the size of the error ellipse, or area around the point of aim within which the munition could land, and they show how many munitions of certain types are necessary to destroy a certain military objective. Artillery doctrine requires the use of these manuals as part of a 'methodical and deliberate targeting process for the use of artillery'.⁸⁵ The process also includes drawing up a list of targets and their descriptions, together with fire plans and allocations of ammunition.

Ideally, it should be possible to reconstruct whether and how the different steps were taken by looking at the plans, logs and diaries. However, as with the battlefield damage assessment, it may happen that some documents are falsified in order to avoid criminal culpability, as in *Strugar*.⁸⁶ If the Prosecutor finds that the

during a JNA military campaign in and around Dubrovnik in Croatia in October, November and December 1991. The Indictment alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion and the arts and sciences, were damaged.

83 Fenrick, above note 79, p. 565.

84 Cf. Fenrick, 'The prosecution of unlawful attack cases', above note 58, pp. 161–3.

85 Ibid., p. 163.

86 *Strugar* Case, TC, above note 7, para. 96: 'The Chamber notes that in this report, Admiral Jokić ornamented the story even further by adding that Captain Kovačević acted in the general action plan of the Attack Order of 9 November 1991, which had included the objective of taking Srd, an objective which had not been achieved by 6 December 1991. In the Chamber's finding, these entries were contrived and

said process was flawed or was not carried out at all, this may also be evidence of an indiscriminate attack or an attack directed at civilians or civilian objects. The questions that must be asked when examining whether this is the case are: was the type of weapon system and ammunition selected appropriate for the target, was the effect limited to that necessary to do the job, and was a BDA actually conducted? In any case, the principles of distinction and proportionality must be complied with – even in situations where the commander did not have the appropriate weapon system available and thus had to rely on a different weapon to achieve his or her military goal.

If the logs do not contain the requisite information on the above-mentioned factors or the Prosecutor has no access to them, it may not always be easy to determine what weapon was used or who launched the attack. A good example of the difficulty involved in establishing these facts was an incident examined by the court in the *Galić* case – an explosion in a Sarajevo market that killed 60 people and injured 140.⁸⁷ Four different expert reports were compiled to ascertain from where the attack had been launched, as this information was crucial to determine whether it had been launched from an SRK (Sarajevo Romanija Corps) position or not. To determine this, it was necessary to know what explosive had been used and from what distance and direction it had been fired. The level of technical precision and detail required – which also explains the different results reached by the experts – shows how hard it is to reconstruct the facts and reach a decision ‘without reasonable doubt’ concerning such an attack if there is no other evidence.

Access to confidential information

A further problem is that in some cases it might be necessary to know the overall plans for the defence of the country, such as the weaponry stocked for that purpose or the separation of military objectives from civilian objectives. As this information is usually confidential, the Prosecutor has access to it only insofar as the armed forces permit. An example of the limits imposed by the confidential nature of facts relating to military and high-level political decisions can be found in the Israeli Winograd Commission’s report on the 2006 Lebanon war. It states

false. The reports were deliberately deceptive. The attack was not spontaneous on the part of Captain Kovačević on 6 December 1991. The attack was entirely pre-planned and coordinated on 5 December 1991 by 9 VPS staff including Warship-Captain Zec.’

87 *Galić* Case, TC, above note 13, para. 397, n. 1351. The Indictment alleges that on 4 February 1994 ‘a salvo of three 120 mm mortar shells hit civilians in the Dobrinja residential area. The first landed to the front of a block of flats at Oslobodilaca Sarajeva Street hitting persons who were distributing and receiving humanitarian aid and children attending religious classes. The second and third landed among persons trading at a market in an open area to the rear of the apartment buildings at Mihajla Pupina Street and Oslobodilaca Sarajeva Street. Eight people, including 1 child under the age of 15 years, were killed and at least 18 people, including 2 such children, were wounded. The origin of fire was from VRS-held territory, approximately to the east’, available at www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf (last visited 25 August 2008).

that 'the unclassified Report does not include the many facts that cannot be revealed for reasons of protecting the state's security and foreign affairs'.⁸⁸

Determination of the individual responsible

Further difficulties are linked to the choice of the accused. As the offence of attacking civilians or civilian objects is usually the result of a decision taken by military leaders or is even part of a general military tactic or strategy, the accused is most likely to be a high-level official. Charging these people thus also corresponds to the aim of international criminal tribunals to prosecute the 'big fish', rather than the ordinary soldier who is following an order.

Military structure

It might be difficult to identify the person or persons responsible for the attacks and to ascertain whether civilians or civilian objects were deliberately attacked. Especially in the case of rebel groups with a loose hierarchical structure, it may be hard to determine who is responsible for the attack, either directly or indirectly. And, as mentioned above, when taking their decisions commanders rely heavily on military or intelligence information, which could be incorrect, without always having the opportunity to check the accuracy of the information they are given.

Establishment of the required intent

There is thus always a possibility that the attack was a mistake, or that the commander did not know the object was civilian rather than military. In the *Galić* case, these two possibilities were ruled out without further explanations when it came to examining the attack on the market (see above).⁸⁹ However, to rule on the deliberate nature of the attack and the qualification of an object or person as civilian by the military is not as simple as it seems when reading this part of the *Galić* judgment. Without going into the legal questions related to the *mens rea* of the offence of attacking civilians or civilian objects, which was discussed above,⁹⁰ it must be remembered that the Prosecutor needs to gain insight into what the attacker knew about the target before and at the time of the attack. This is required, for to create criminal culpability, the attack must be 'deliberate', meaning that the perpetrator wilfully directed his attack against civilians or civilian objects.⁹¹ This reconstruction of the decision-making process before and during military operations is extremely arduous, as these are obviously highly confidential issues that are rarely made public. But it is precisely this information that is so important, as 'an individual

88 'Summary findings of the Winograd Commission on Israel's 2006 Lebanon War', available at <http://middleeast.about.com/od/israel/a/me080130.htm> (last visited 25 August 2008).

89 *Galić* Case, TC, above note 13, para. 449.

90 The *mens rea* of attacking civilians or civilian objects was discussed elsewhere in this paper.

91 *Galić* Case, TC, above note 13, para. 56.

should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question'.⁹² The Prosecutor therefore has to make a great effort to gain access to this information, possibly by negotiating with the armed forces or the government and, if necessary, even by applying political pressure on them to co-operate.

Decisions taken in the 'fog of war'

The defence counsel in the *Strugar* case further claimed that commanders cannot be held to a standard of perfection in reaching their decisions.⁹³ This argument raises questions as to the standard of proof required when charging a high-level official for decisions he or she took in the 'fog of war'. Given the importance of these decisions and the consequences they may have, leaders should be expected to act with due responsibility, precaution and foresight. They can also be held individually responsible for failing to prevent or repress unlawful attacks committed by subordinates who are under their effective command and control or effective authority and control (ICC Statute, Art. 28(a)). On the other hand, their task is to defeat the enemy, which obliges them to make fast and difficult decisions based on the information available to them at the time. When prosecuting them for wrong choices, it is therefore important to strike a balance between the rights of the accused and the aim of preventing the use of unlawful methods of combat in future wars. Whilst intentional acts must be punished (according to ICTY case law, this means wilful acts, which include recklessness), due regard must be paid to the circumstances leading to the death or injury of civilians or damage to civilian objects. The Final Report on the NATO bombing campaign thus warns that simply establishing the fact that civilian deaths have occurred does not unequivocally lead to the assumption that war crimes have taken place.⁹⁴ It further notes that there are numerous reasons why unintended civilian deaths are not necessarily unlawful.⁹⁵ The challenge of prosecuting conduct of hostilities crimes is precisely to exclude all these possibilities 'without reasonable doubt'.

Access to direct evidence of culpability

In order to achieve this, the Prosecutor needs information about the decision-making process within the armed forces. The difficulty here is that the information must be given to the Prosecutor by members of the armed forces themselves. It is

92 'The Hostages Trial: Trial of Wilhelm List and Others' (Case No. 47), 8 *L.Rpts. of Trials of War Criminals* 34, 57 (U.N. War Crimes Comm. 1948), para. 69.

93 *Strugar* Case, TC, above note 7, para. 278.

94 See Richard John Galvon, 'The ICC Prosecutor, collateral damage, and NGOs: evaluating the risk of politicized prosecution', *University of Miami International and Comparative Law Review* (Fall 2005), pp. 58–9.

95 NATO Bombing Campaign, ICTY Report, above note 1, para. 51.

easy to imagine why this could cause problems. Either the other military officers involved in the decision-making process or otherwise involved in the attack fear incriminating themselves and therefore do not give reliable evidence,⁹⁶ or there is a general reluctance to support the Prosecutor in his endeavour to prove the guilt of the accused. From a military point of view, this latter attitude is understandable to some extent. States are reluctant to have the 'judgement of leaders on the front line second-guessed by hostile judges at the risk of incurring long terms of imprisonment' for having taken 'on the spot decisions as to what is a military or civilian target or whether an assault on a particular target will cause extreme collateral damage, disproportionate to its military benefits, so as to bring it within the definition of a war crime'.⁹⁷ Such a risk of prosecution, it is said, will deter those leaders from making the hard choices and courageous judgements that make the difference between victory and defeat.

This fear is further accentuated by the loose and opaque nature of the rules governing the conduct of hostilities, as these create uncertainty about the kind of attack that may end up constituting a war crime. It is in fact the combination of imprecise rules and practical difficulties that explains why there have been so few cases concerning attacks against civilians and civilian objects.

Conclusion

Detailed examination of some of the difficulties, both legal and practical, has shown how hard it is to charge individuals for attacks on civilians or civilian objects. One such difficulty is the loose nature of the rules. These rules were originally created to guide states in their conduct of hostilities and to determine state responsibility for unlimited military operations, not for evaluating the individual responsibility of commanders in specific incidents. This also explains why the rules include highly subjective notions such as 'proportionality' or 'military advantage'. While such notions may serve for a general qualification of military operations, applying them before a court of law is an uphill task, as they involve value-based, individual judgements. Finally, there is the practical difficulty of collecting the evidence needed to prove the individual's guilt. It includes knowledge of the orders

96 One example is the *Strugar* case (above note 7, para. 88): Lieutenant-Colonel Jovanović had testified that there had been a meeting (Kupari meeting) with Admiral Jokić before the attack on the Old Town, and that his presence gave him every justification for understanding that the attack was authorized. As stated by the Court, 'Lieutenant-Colonel Jovanović has a significant personal interest in having Admiral Jokić present at the Kupari meeting. Lieutenant-Colonel Jovanović, curiously, was temporarily appointed to command the 3/5 mtbr on 5 December 1991, the actual commander having been granted temporary leave, and was summarily relieved of his temporary command on the evening of 6 December 1991 on the order of Admiral Jokić. It is Lieutenant-Colonel Jovanović's evidence that he was never told the reason for his removal but that he knew it had nothing to do with the shelling of the Old Town. Admiral Jokić testified that he replaced Lieutenant-Colonel Jovanović because he had given artillery support to Captain Kovačević without his approval.'

97 Patricia M. Wald, 'Is the United States' opposition to the ICC intractable?', *Journal of International Criminal Justice*, Vol. 2, No. 1 (2004), pp. 23–4.

given, the weapons used, the strategic goals of each party, the information available to them at that time and the decision-making process within the military. It is the combination of these elements that makes a prosecution for this type of offence so laborious.

However, the underlying problem behind these difficulties is a political one. While states have readily agreed in the past that crimes against humanity or other crimes committed away from the battlefield must be punished, crimes related to the conduct of hostilities are a much more delicate matter. They are at the very heart of war, and the dividing line between necessary military operations in order to win the conflict and attacks targeting civilians or causing disproportionate suffering and destruction is very thin. To bring prosecutions in this area is seen as limiting the freedom of manoeuvre of states and discouraging commanders from taking 'bold' decisions in cases where information about the target may be unclear.

Nevertheless, the prosecution must continue its efforts to bring such cases before the court, as there must be some form of sanctioning that goes beyond the determination of state responsibility in order to punish and prevent unlimited, incautious and badly planned military operations. Even if only the most clear-cut and obvious violations of the rules of conduct of hostilities are prosecuted, this will have some effect on military commanders' behaviour. If the means and methods of war are to be limited, the fact that decisions on the battlefield must be taken rapidly and based on intelligence information cannot excuse mistakes caused by inadequate precautions, nor can it on any account excuse indiscriminate attacks or attacks directed against civilians or civilian objects. It is the duty of commanders to know and apply the rules in good faith and to do everything feasible to protect civilians from the effects of war. This is a sufficiently clear obligation, and where the *actus reus* and *mens rea* of such a crime can be proven, the perpetrators must be punished. The existing cases before the ICTY, which have dealt with these questions, have shown that it is indeed possible to prosecute individuals for such crimes. This development should continue before the ICC.

The equal application of the laws of war: a principle under pressure

Adam Roberts*

Adam Roberts is Senior Research Fellow, Department of Politics and International Relations, Oxford University, Emeritus Fellow of Balliol College, Oxford, and President-Elect of the British Academy. He was Montague Burton Professor of International Relations at Oxford University in 1986–2007.

Abstract

The ‘equal application’ principle is that in international armed conflicts, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justice of their causes. The principle, which depends on maintaining separation between jus ad bellum and jus in bello, faces serious challenges in contemporary armed conflicts and discourses. Some variations of the principle may be inevitable. However, it has a firm basis in treaties and in historical experience. It is the strongest practical basis that exists, or is likely to exist, for maintaining certain elements of moderation in war. The rival proposition – that the rights and obligations of combatants under the laws of war should apply in a fundamentally unequal manner, depending on which side is deemed to be the more justified – is unsound in conception, impossible to implement effectively and dangerous in its effects.

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The equal application of the laws of war: a principle under pressure

The ‘equal application principle’ is that the laws of war apply equally to all belligerent parties in an international armed conflict, irrespective of the question of how the war began or the relative justice of the causes involved.¹ Under this principle, the laws of war (otherwise called *jus in bello*, law of armed conflict and international humanitarian law) apply equally to all those who are entitled to participate directly in hostilities – and, so far as the application of the law is concerned, it is not relevant whether a belligerent force represents an autocracy or a democracy, nor is it relevant whether it represents the government of a single country or the will of the international community.

The principle is closely related to, indeed based on, another principle, namely the separation between *jus in bello* and *jus ad bellum* – the law relating to the lawfulness of the use of force.² In practice that separation has never been absolute, and is not so today. Among the connections between the two bodies of law are the following. (i) In many modern conflicts, violations of norms of humanitarian law by one or more parties have been cited as a basis for military intervention or economic sanctions by outside powers and international organizations.³ (ii) One meaning of the principle of proportionality is about the proportionality of a military action in relation to a grievance and/or to the issues at stake in a war, thus forming a link between *jus ad bellum* and the manner of conduct of hostilities.⁴ (iii) The self-defence of a state is sometimes seen as a basis for justifying actions that might otherwise be problematic under *jus in bello*.⁵ (iv) The use of sanctions and force with international authorization, for example by the UN Security

1 The term ‘principle of equal application’ and variants thereto is used here because it is consistent with the intent of the ‘scope of application’ provisions of the Geneva Conventions and other treaties on the laws of war. In Rodin and Shue, above note *, some contributors use the phrase ‘symmetry thesis’ to refer to this principle. I have not followed this usage because what is at stake is an established legal principle, not a mere thesis or proposition; and the principle does not depend on an assumption that there is symmetry between belligerents.

2 For a useful discussion, including extensive references to sources, see Marco Sassòli, ‘*Ius ad bellum* and *ius in bello* – the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?’, in Michael N. Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Leiden, 2007, pp. 241–64.

3 Adam Roberts, ‘Humanitarian issues and agencies as triggers for international military action’, *International Review of the Red Cross*, No. 839 (2000), pp. 673–98.

4 Christopher Greenwood, ‘The relationship between *ius ad bellum* and *ius in bello*’, *Review of International Studies*, Vol. 9 (4) (1983), pp. 221–34. See also ‘The applicability of international humanitarian law and the law of neutrality to the Kosovo campaign’, *Israel Yearbook on Human Rights*, Vol. 31 (2001), pp. 111–44, esp. at p. 143, where he emphasizes that a *jus ad bellum* requirement that the use of force should be proportionate ‘should never be used to undermine the principle of the equal application of the *jus in bello*’.

5 See, e.g., the International Court of Justice’s reference to ‘an extreme circumstance of self-defence’ in the advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons*, 1996, para. 105(2) E. Self-defence is discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 42.

Council, is sometimes associated with a variation of the normal rights and duties of a belligerent (and also of neutral states) under *jus in bello*.⁶

Granted that the separation of *jus in bello* and *jus ad bellum* is less than absolute in contemporary conflicts, it is not surprising that the equal application principle is under serious challenge. There are many arguments to the effect that the rights and obligations of combatants under the laws of war should apply unequally to opposing sides in a war, depending on which side is deemed to have the more justified or righteous cause. Such arguments, while far from new, have revived in the post-Cold War era, often in the form of mere implications, assumptions or piecemeal decisions, rather than as part of a fully developed critique of the scope of application of the laws of war. These arguments for varying the application of the law in favour of certain parties, which are explored further in a later section of this article, include claims that certain UN-authorized or US-led uses of force are of such a special character that the normal rules should not be applicable to them without significant variation. Often these arguments are based on an assumption that adversary forces are not lawful belligerents – for example, because they have defied the will of the international community on some issue, are engaged in criminality or are associated with ‘terrorists’.

The logical outcome of such arguments is what can be termed the ‘unequal application proposition’, which is that combatants justified under *jus ad bellum* should have wider *jus in bello* rights than unjustified combatants.⁷ There are, potentially, two implications of this ‘unequal application’ proposition: (i) that the laws of war should be revised to make explicit allowance for different rules applying to the different sides in a conflict; or (ii) that the laws should remain the same, but their mode of application should be varied in particular cases. Either way, the ‘unequal application’ proposition is superficially attractive but it is based on weak reasoning and is dangerous in its potential effects.

Another proposition, which critiques the equal application principle from a slightly different angle, is that many soldiers in a conflict, even perhaps some or all of those on the ‘aggressor’ side, may be individually so innocent of blame that they should not be legitimate targets. In this view the laws of war, by appearing to permit attacks on the soldiers of a belligerent state, can be morally questionable, at least as regards certain conflicts or certain parties in conflicts. The problem of the ‘innocent soldier’ is indeed serious. However, as is indicated below, it is not a problem to which existing law and practice are blind. Moreover, it is questionable whether the problem of the innocent soldier could ever be usefully addressed either by unequal application of the laws of war, or by viewing the laws of war as an obstacle rather than a solution because of their apparent tolerance of attacks on soldiers.

6 The effects of UN authorization on the principle of equal application are discussed further below in the section on certain arguments for varying the law in favour of particular parties, text at note 53.

7 For explorations by two philosophers of the proposition that *jus in bello* should be applied in an unequal manner, e.g., to help protect soldiers who are fighting in a cause which has been authoritatively accepted as just under *jus ad bellum*, see the chapters by Jeff McMahan and David Rodin in Rodin and Shue (eds.), above note *, pp. 19–43, 44–68.

In this survey there are only brief references to conflicts within states (i.e., civil wars) and to terrorism. These two phenomena have always raised difficult challenges in relation to application – let alone equal application – of the laws of war. In both civil wars and counter-terrorist campaigns there is, typically, a legitimate question about whether the law relating to international armed conflict is formally applicable. Governments are generally reluctant to recognize that their adversaries have a formal status as a party to the conflict; and in particular that they can be entitled to full prisoner-of-war status. Yet in many instances of largely internal conflict the case for application of the laws of war may be strong. The 2001 agreement extending the application of the 1980 UN Convention on Certain Conventional Weapons (CCW) to non-international armed conflicts is one significant formal recognition of this.⁸ In addition, the application of the laws of war in largely or wholly internal conflicts may be urged by international bodies including the UN Security Council.⁹ Similarly, the Council has recognized that in the struggle against terrorism, states must ‘comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law’.¹⁰ Even in instances where full application of the laws of war is rejected by states – as in US policy in certain aspects of the ‘war on terror’ – there may be strong arguments for applying particular provisions of the law such as Common Article 3 of the 1949 Geneva Conventions. This was the conclusion of the US Supreme Court in June 2006 in the case of *Hamdan v. Rumsfeld*.¹¹

The main focus here is on international armed conflicts of various types, and on two central questions. Should one particular form of distinction, based on the justice or legal status of the cause of one side in a conflict, affect the legal protections and duties of belligerents? And do the laws of war have a response to the problem of the ‘innocent soldier’? I will approach these questions by breaking them up into nine topics:

1. Three misleading assumptions about the laws of war.
2. Treaty basis of the principle that the laws of war apply equally to all belligerents.
3. Four historical reasons for this principle.

8 Amendment Article 1 of the 1980 Convention on Certain Conventional Weapons, 21 December 2001. There are 63 states parties to this amendment. Information from www.icrc.org/ihl (last visited 1 October 2008).

9 See, e.g., the following UN Security Council resolutions reaffirming (in armed conflicts that were to a significant degree non-international in character) that all parties are bound to comply with their ‘obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949’: SC Res. 764 of 13 July 1992 on Bosnia and Herzegovina, and SC Res. 1193 of 28 August 1998 on Afghanistan.

10 SC Res. 1624 of 14 September 2005, passed at a ‘summit’ meeting of the UN Security Council attended by heads of state and government.

11 In its judgment on 29 June 2006 in the case of *Hamdan v. Rumsfeld*, which concerned the status and treatment of detainees suspected of involvement in terrorism, the US Supreme Court placed emphasis on both Common Article 3 of the 1949 Geneva Conventions, and Article 75 of 1977 Additional Protocol I. This confirmed a more general tendency to view the provisions of Common Article 3 as applicable in a wider range of circumstances than simply civil war within a state (which is what a strict reading of that article’s ‘scope of application’ wording might suggest).

4. Reciprocity and reprisals: their bearing on equal application.
5. Distinctions between different categories of people in the laws of war.
6. Certain arguments for varying the application of the law in favour of particular parties.
7. The difficulty of agreeing which side is more justified in its resort to force.
8. The 'innocent soldier' in the law and conduct of war.
9. Conclusion: why the equal application principle should be respected.

Three misleading assumptions about the laws of war

Sometimes, but by no means always, supporters of the 'unequal application' proposition and its variants base their viewpoint on one or more misleading assumptions about the laws of war – assumptions which have in common that they tend to exaggerate the role and influence of the laws of war. Three of these assumptions need to be addressed briefly here in order to clear the way for exploration of more substantive issues.

The first misleading assumption is that this body of law grants belligerents certain 'rights', including the right to shoot at the soldiers of an opposing army – with the implication, therefore, that the law can expand or withdraw that right in particular cases. It would be more accurate, both historically and legally, to say that the law recognizes certain rights of belligerents, or even that it suffers them to take certain actions: it is not the source of such rights. Essentially, the laws of war are not a general regime that governs the whole of war in all its aspects: rather, they are a modest and limited set of rules that establish certain limitations in war. Indeed, a large part of the rules relates, not to the conduct of armed conflict itself, but rather to the treatment of those persons (prisoners, sick and wounded, and inhabitants of occupied territory) who are in the hands of the adversary as a consequence of armed conflict. In other words, the role of law in war is not to constitute 'the rules of the game', but rather to provide a modest body of rules applicable to certain aspects and consequences of war. Seen in this light, it is hard to see how the laws of war could be a basis for a set of ad hoc variations expanding or withdrawing something so intrinsic to war as the right to attack the armed forces of an adversary.

The second misleading assumption is that the laws of war amount for the most part to a systematic constraint on the effective conduct of operations – and one that may make a successful outcome more difficult for a belligerent applying them. In this view, relaxing the application of certain rules by the side deemed to be more justified, or granting that side more *jus in bello* privileges, might help that side to achieve a successful outcome. This is an oversimplification of a much more complex reality. The laws of war can properly be seen as providing a set of rules that, while seeking to minimize various side effects of war, are compatible with and may positively assist the effective and professional conduct of operations. By contrast, systematic violations of the law often contribute to failure, especially if they have the effect of assisting coalition-building against the offending state.

The third misleading assumption sometimes encountered is that the equal application of the laws of war to all belligerents is based on the premise that there is ‘moral equality on the battlefield’. The implication of this is that, since in many cases it is inappropriate to view the belligerents as having any kind of moral equality under *jus ad bellum*, the equal application of the laws of war is problematic or even plain wrong. However, the laws of war are not dependent on a notion of moral equality between belligerents. On the contrary, the laws of war are compatible with the idea that in any given war there may be very strong reasons for viewing one party as preferable to the other, including in moral terms. It is natural that such reasons should inform not just the preferences of individuals but also the policies of certain states and also some international bodies. There may be international war crimes investigations into the conduct of belligerent parties (whether conducted by the International Criminal Court, by an ad hoc tribunal established by the UN Security Council or by a state or alliance) that conclude by being more critical of one side than the other. There may be Security Council condemnation of the acts of one party. For example, in respect of the war in Bosnia and Herzegovina in 1992–5 the UN Security Council took certain actions which plainly inclined towards favouring one side in the war, yet at the same time it upheld the principle of equal application of the laws of war.¹² While this basic approach to the war in Bosnia was problematic, it showed that equal application of the laws of war is not the same thing as moral equality on the battlefield.

Treaty basis of the principle that the laws of war apply equally to all belligerents

It is a cardinal principle of *jus in bello* that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*, and applies equally to all belligerents. This principle has been recognized for at least 150 years as a basis of the laws of war, and it finds reflection in numerous treaty provisions.¹³ In the four 1949 Geneva Conventions there is no hint that the nature of the cause of a war, or the justness of any party, could affect the application of the law. Common Article 1 states, in full, ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’¹⁴ Common Article 2 specifies that the law applies irrespective of whether there is

12 The application of the laws of war in the war in Bosnia and Herzegovina in 1992–5 is discussed further below under the headings ‘UN-authorized forces in enforcement actions’ and ‘UN peacekeeping forces’.

13 All laws-of-war treaties mentioned in this survey may be found at www.icrc.org/ihl (last visited 3 September 2008). Agreements concluded up to 1999 are in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, 3rd edn, Oxford University Press, Oxford, 2000.

14 For an authoritative account of the origins and meanings of Common Article 1 of the 1949 Geneva Conventions, see Frits Kalshoven, ‘The undertaking to respect and ensure respect in all circumstances: from tiny seed to ripening fruit’, *Yearbook of International Humanitarian Law*, Vol. 2 (1999), T. M. C. Asser Press, The Hague, 2000, pp. 3–61.

a declaration of war, and even if the state of war is not recognized by one of the parties to a conflict.¹⁵ The Geneva Conventions were negotiated and agreed just a few years after the Allies had fought what was widely held to have been a justified war against a particularly violent and dangerous political system – yet there was no provision for those who fight in the nobler cause to have privileged application of the rules.

The principle of equal application of the laws of war to all parties to a particular conflict is stated even more explicitly in 1977 Protocol I additional to the Geneva Conventions of 1949. Its preamble reaffirms ‘that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’.¹⁶ Article 1 repeats the 1949 undertaking ‘to respect and to ensure respect for the present Convention in all circumstances’, and goes on to specify that the situations to which the Protocol applies ‘include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’.¹⁷ Many were worried about this formula, which seems to favour one side in certain types of war, but the view that one side might have the more just cause was not translated into any argument that the law should apply unequally. On the contrary, the Protocol spelled out in detail how an entity such as a national liberation movement should take the appropriate steps to apply the Conventions and the Protocol, with the same rights and obligations as any other party.¹⁸

Four historical reasons for equal application of the laws of war

Why has the equal application principle come to be so widely accepted? It is the product of hard-won experience, over at least half a millennium, of four main kinds: (i) between the sixteenth and the eighteenth centuries the equal application principle emerged as part of the underlying philosophy of the laws of war for the good reason that other ideas were more problematic; (ii) in the nineteenth century it became part of a strong and sound tradition of seeking a uniform set of rules in the form of treaties; (iii) in the twentieth and twenty-first centuries the principle has become deeply entrenched in court decisions, state practice and the opinions of lawyers; and (iv) the principle has been reinforced by the practical experience of the International Committee of the Red Cross.

15 1949 Geneva Conventions, Common Article 2.

16 1977 Protocol I, preamble.

17 *Ibid.*, Article 1(1) and (4).

18 *Ibid.*, Article 96(3).

Underlying philosophy of the laws of war

The first historical reason for emphasis on equal application arises from the fact that this principle was a key foundation of the body of political philosophy that contributed to the development of the laws of war between the sixteenth and the eighteenth centuries. There is a long and distinguished tradition of thought which views the laws of war as applicable to both sides in a war. Alberico Gentili (1552–1608) and Hugo Grotius (1583–1645) were among those who played key parts in the emergence of this view, even though both of them believed in the distinction between lawful and unlawful resort to war, and in the deep importance of just war for the maintenance of international society. In particular, Grotius' emphasis on *temperamenta belli* – essentially a moral and prudential plea for moderation in war – put the focus on humane limitations regarding the means by which wars were waged.¹⁹

The separation of *jus in bello* from *jus ad bellum* was rendered explicit in the writings of Emmerich de Vattel (1714–67), with his insistence that 'regular war, as to its effects, is to be accounted just on both sides', and that 'whatever is permitted to the one in virtue of the state of war, is also permitted to the other'.²⁰ The position he thus expounded was by no means free of flaws. While he recognized the risk that states might transgress the bounds of 'the common laws of war', he did not specify the effect of such conduct on the equal application of the law. His whole theory was based on the idea of 'natural principles of the law of nations' which he deduced 'from nature itself'.²¹ His ideas were open to challenge and his influence was limited. Yet the explicit emphasis on the equal application of the laws of war was important.

At about the same time Jean-Jacques Rousseau developed the idea, based more on political philosophy than on strict law, that all combatants in war are deserving of such protection as can be provided. In his view combatants in war are essentially innocent. Rousseau was a consistent advocate of limitations in war – in particular through doctrines that would prohibit the killing of prisoners and the enslavement of conquered peoples. His view of war was influenced by the fact that – at least by comparison with events in the twentieth and twenty-first centuries – the eighteenth century was a time of limited wars, fought with limited means for limited objectives. It was against this background that he developed a

19 On the ambiguities of the Grotian tradition of thought about limitations in war and their relation to *jus ad bellum* issues, see Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Clarendon Press, Oxford, 1990, pp. 15–26 (Kingsbury and Roberts), and pp. 194–207 (Draper).

20 Emmerich de Vattel, *Le droit des gens* (posthumous edition, 1773 [1758]). The edition cited here is *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty, Sweet, Stevens and Maxwell, London, 1834, pp. 382–3. The citation is from book III, ch. 12, §§ 190–1.

21 *Ibid.* §§ 191–2.

view of war that had profound and enduring implications for the application of the laws of war:

War is then not a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. Finally, any State can only have other States, and not men, as enemies, inasmuch as it is impossible to fix a true relation between things of different natures.

...

Since the aim of war is the destruction of the enemy State, one has the right to kill its defenders as long as they bear arms; but as soon as they lay down their arms and surrender they cease to be enemies or the enemy's instruments, and become simply men once more, and one no longer has a right over their life. It is sometimes possible to kill the State without killing a single one of its members; and war confers no right that is not necessary to its end. These principles are not those of Grotius; they are not founded on the authority of poets, but follow from the nature of things, and are founded on reason.²²

Rousseau did not succeed completely in reconciling his view of soldiers as simply 'enemies by accident' with his advocacy elsewhere of the militia system in which each citizen is pledged to defend the fatherland. Also, his attacks on Grotius, implying that he was too tolerant of whoever wielded power, were not always fair. Indeed, Rousseau's emphasis on restraint in war was in more of a Grotian tradition than he liked to admit. Yet his emphasis on the equal application of the rules to all belligerents was one of his most important legacies. It is not by accident that the International Committee of the Red Cross was to be founded (in 1863) in his beloved Geneva, nor that it has frequently drawn on Rousseau's classic statement quoted above as a key foundational basis for the law that the Red Cross supports and the activities it undertakes.²³

The pursuit of a uniform set of rules

The second historical reason for equal application of the laws of war is that the modern laws of war, as they have emerged in treaty form since the mid-nineteenth century, have been based on recognition of the need for a uniform and universally accepted set of rules. Having different rules applying to, or applied by, different belligerent parties has long been seen as a recipe for chaos. In the Crimean War (1853–6) different European states followed different rules about the capture of

22 Jean-Jacques Rousseau, *Du Contrat Social, ou Principes du Droit Politique* (1762), paragraph I.iv, in *Rousseau: The Social Contract and other Later Political Writings*, ed. and trans. Victor Gourevitch, Cambridge University Press, Cambridge, 1997, pp. 46–7.

23 See, e.g., François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Oxford, 2003, pp. 125, 717.

property at sea. There were inconsistent practices between allies, causing much confusion and inefficiency, especially in their relations with states that were neutral in this conflict. After the war, as part of the peace agreement concluded in Paris, the parties to the peace negotiations agreed the terms of the 1856 Paris Declaration on Maritime Law, which begins memorably:

Considering:

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point; ...²⁴

The 1856 Paris Declaration has special significance. It appears to be the first multilateral convention that was open to accession by all states. In other words, it is the first example of what is now seen as the standard form in which international law finds expression. It may seem paradoxical that the type of instrument which is the very basis of modern international law emerged in the field of the laws of war. However, it was no accident. War is pre-eminently a field in which certain rules of conduct are needed – and they have to be available before the outbreak of hostilities, as it is so difficult to create new rules once war has broken out.

This pressure to develop rules that are uniform for all belligerents is a continuous thread running through the subsequent development of the laws of war. The four 1949 Geneva Conventions provide striking evidence – both in the manner of their original negotiation, and in the subsequent adherence by states. The negotiations at Geneva in April–August 1949, convened by the Swiss government, were attended by the representatives of sixty-four states: this was five more states than the membership of the United Nations at the time.²⁵ Today, in 2008, there are 194 states party to the 1949 Geneva Conventions: two more than the current membership of the United Nations. These figures are testimony to the success of the effort to secure at least formal adherence to the laws of war on the basis of their uniform application.²⁶

Court decisions, state practice and the opinions of lawyers

The third historical reason for equal application is the degree of support that the principle has received in court decisions, in practice, and in writings – to all of

24 1856 Paris Declaration on Maritime Law, preamble.

25 Official lists show that as at May 1949 there were 59 member states of the UN. Information from www.un.org/members (last visited 1 October 2008).

26 Information on states party to the 1949 Geneva Conventions from www.icrc.org/ihl (last visited 1 October 2008).

which only the briefest reference can be offered here. Although in the course of the twentieth century the idea of the illegality of the aggressive use of force gained strength, this did not lead to a weakening of the principle of equal application of *jus in bello* irrespective of which side had responsibility, or even legal culpability, for the outbreak of the war. In 1946 the International Military Tribunal at Nuremberg, in rejecting certain excuses for non-application of the law, implicitly accepted the equal application principle.²⁷ Subsequently, the US military tribunals, also at Nuremberg, explicitly accepted the principle. This was clearest in the *Hostages* case (*USA v. Wilhelm List et al.*), in which US Military Tribunal V, citing the international lawyer L. Oppenheim as its authority, ruled on 19 February 1948:

Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law ...²⁸

A significant body of subsequent state practice and legal writing attests to the continued salience of the principle of equal application of the laws of war.²⁹

The ICRC's experience

The fourth historical reason for the equal application principle is that its importance has been confirmed by the experience of the International Red Cross and Red Crescent Movement and, above all, the Movement's main body concerned with taking action in wars – the International Committee of the Red Cross, founded in 1863 as 'the Geneva Committee' that was soon to become the International Committee for Relief to Wounded Soldiers. Throughout the ICRC's existence, its role as an impartial humanitarian organization has been spelled out in laws-of-war treaties, especially in the 1949 Geneva Conventions and in 1977 Additional Protocol I.

The International Conference of the Red Cross and Red Crescent, the main deliberative body of the Movement, has repeatedly passed resolutions favouring equal application of international humanitarian law. For example, the 25th International Conference, held in Geneva in 1986, strongly reiterated the traditional Red Cross principles of neutrality towards belligerents, thus never to

27 On the IMT at Nuremberg, see section on reciprocity below, text at note 36.

28 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946–April 1949*, 15 vols., Government Printing Office, Washington DC, 1949–53, XI, p. 1247.

29 See, e.g., the clear enunciation of 'universal application of the law of armed conflict' in *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, p. 34; and the excellent discussion of 'equal application of the *jus in bello*' by Yoram Dinstein in his *War, Aggression and Self-Defence*, 4th edn, Cambridge University Press, Cambridge, 2005, pp. 156–63.

take sides or engage in controversy, and of impartiality in the relief of suffering, without discrimination based on nationality, race, religious beliefs, class or political opinions. It also passed a resolution stating, *inter alia*, that the International Conference

- (1) *regrets* that disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law and the ICRC's work,
- (2) *appeals* to all Parties involved in armed conflicts to fully respect their obligations under international humanitarian law and to enable the ICRC to carry out its humanitarian activities.³⁰

In its customary law study, published in 2005, the ICRC appears to take it for granted that the rules must be applied equally. It indicates that this is an absolute obligation, not one dependent on reciprocity between the parties. Its distillation of customary international law regarding compliance is, 'Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control'.³¹ In addition, as the ICRC study notes, UN Security Council and General Assembly resolutions on a wide range of conflicts have called on all the parties to implement international humanitarian law.³²

For the ICRC, the principle of impartiality, which is the essential basis of its capacity to work in the field, is intimately linked to the equal application principle.³³ Likewise, the principle of humanity means that it would make no sense to make the application of the rules dependent on political criteria. Since the ICRC not only works at the rough end, dealing with the practicalities of humanitarian relief in war, but also has a significant role in the development and implementation of *jus in bello*, its strongly held view favouring equal application of the laws of war merits respect. However, the ICRC's emphasis on equal application is so absolute that it sometimes appears to neglect the principle of reciprocity, which merits brief consideration here.

Reciprocity and reprisals: their bearing on equal application

In the long history of the laws of war, two concepts – reciprocity and reprisals – have had a significant bearing on the principle of equal application. Reciprocity is the idea that compliance by one party is in some respects dependent on compliance

30 Resolution I, 'Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions', *Handbook of the International Red Cross and Red Crescent Movement*, 13th edn, ICRC and IFRC, Geneva, 1994, p. 752.

31 Rule 139, in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Cambridge, 2005, I (*Rules*), p. 495.

32 For a useful listing of such UN resolutions see *ibid.*, II (*Practice*), pp. 3168–72.

33 Jelena Pejic, 'Non-discrimination and armed conflict', *International Review of the Red Cross*, No. 841 (2001), pp. 183–94.

by the other party. Reprisals is the idea that certain otherwise illegal acts of retaliation may be carried out by one party to a conflict in response to illegal acts of warfare and intended to cause the enemy to comply with the law. Both ideas, in their own distinct ways, reflect the proposition that if one side does not comply with *jus in bello*, then its adversary may be entitled to depart from some of the rules. While both of these ideas are thus based on possible variations in the application of *jus in bello*, neither of them link this to *jus ad bellum*. Despite this, both ideas are relevant to the present enquiry because of the light they shed on the proposition that significant variations in the application of the laws of war as between belligerents may be practicable and useful.

Reciprocity

Elements of the principle and practice of reciprocity could be found in the following:

- The provisions, found in numerous treaties of the laws of war, that the rules apply to all cases of armed conflict between the parties to the treaty concerned; and that the rules will also govern relations with a state that is not a party, provided that the state concerned 'accepts and applies' the treaty's provisions.³⁴
- The reservation made by many states party to the 1925 Geneva Protocol on Gas and Bacteriological Warfare to the effect that the Protocol was binding only in relation to other states bound by it, and would cease to be binding if an enemy or its allies failed to respect the prohibitions embodied in the Protocol.³⁵

The idea that the laws of war are applicable only in circumstances where there is reciprocity has evolved, and has been duly modified. Many developments have contributed to a recognition that there is an obligation to respect the law that does not depend completely on reciprocity. Three such developments derive directly from the experience of warfare in the twentieth century. (i) The 1946 Judgment of the International Military Tribunal at Nuremberg stated that the laws of war, provided that the rules in question were generally accepted as 'being declaratory of the laws and customs of war', had to be implemented even if some of the belligerents in a war were not parties to a particular treaty.³⁶ (ii) In certain wars in which one side conspicuously violated basic provisions of the laws of war there has been no suggestion that this would have entitled the other side to abandon its policy of adherence to the law. For example, in the 1991 Gulf War a number of violations by Iraq, in a range of matters including treatment of prisoners and

34 1949 Geneva Conventions, Common Article 2, the terms of which are reflected in 'scope of application' provisions of a number of subsequent treaties on the laws of war.

35 Some of the states that had made such reservations to the 1925 Geneva Protocol subsequently withdrew them, because preserving any right of like-for-like retaliation against biological or chemical weapons was considered inconsistent with their obligations under the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention prohibiting possession of such weapons.

36 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, HMSO, London, 23 vols., 1946–51, Part 22, p. 467.

wanton destruction resulting in pollution of the air above Kuwait and of the waters of the Gulf, did not lead to demands that the US-led coalition should abandon adherence to the law. (iii) In certain conflicts in which the forces of states have been used against non-state entities using terrorist methods, there has been a recognition on the part of the state that certain rules based on the laws of war should be applied – even if the circumstances were different from those of normal inter-state war, adversaries did not meet the requirements for prisoner-of-war status and the formal applicability of the treaty regime to the conflict was not accepted. The UK role in Northern Ireland after the disasters of 1971–2 is a possible case in point.

All three of these developments suggest a retreat from certain strict notions of reciprocity. Indeed, they suggest that, at times, observance of the law may be regarded as a duty irrespective of the adversary's actions: not 'equal application', but rather 'invariable application'. They indicate that the laws of war are capable of being applied in, or adapted to, a wider range of circumstances than was originally envisaged in the treaties.

This conclusion is reinforced by the 1969 Vienna Convention on the Law of Treaties. Although this provides that a party's material breach of a multilateral treaty may enable other parties to suspend the treaty in whole or in part, it specifies that this cannot be done with respect to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.³⁷ This clearly prohibits belligerents from suspending (whether as reprisals or in the name of reciprocity) key humanitarian provisions of laws-of-war treaties.

In its customary law study, the ICRC concluded (citing much practice in support) that 'the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.³⁸ While there has certainly been a legal trend in this direction, it is not self-evident that reciprocity in the application of the laws of war is completely dead in legal theory or in the practice of states. As to legal agreements, the ICRC study did not discuss the provisions of Common Article 2 of the 1949 Geneva Conventions, which suggest an element of reciprocity in the implementation of the conventions in wartime, and which have been reflected in later treaties.³⁹ As regards the practice of states in armed conflict, while simple notions of a right of reprisal have come under heavy pressure, it is hard to believe that the principle of reciprocity has entirely ceased to have residual value as one means of inducing compliance with the law.

Although reciprocity may still constitute one basis, however imperfect, for applying the laws of war, there is no serious suggestion in any legal writings that it could be accompanied by unequal application depending on an evaluation of the cause of each side under *jus ad bellum*. Indeed, reciprocity and unequal application

37 1960 Vienna Convention on the Law of Treaties, Article 60(5).

38 Rule 140 in Henckaerts and Doswald-Beck, above note 31, I, pp. 498–9. In the account of this and the preceding rule there is no exploration of reciprocity in observance of the conventions.

39 Including the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Article 3(2).

do not fit well together: to have two separate bases for varying the application of the law would be a recipe for confusion. If, alternatively, the principle of reciprocity is as dead as the ICRC suggests, it is clear that what replaces it is a strong obligation on states to observe the same body of rules in all armed conflicts or occupations in which they are engaged, irrespective of the statements or actions of adversaries.

Belligerent reprisals

In theory, belligerent reprisals are a precise and well-defined means of responding to a serious problem. They are based on the proposition that certain specific acts that would otherwise be contrary to the law may be carried out by a belligerent with the stated purpose of compelling an opponent to desist from violations of the laws of war. The history of reprisals in modern war does not inspire confidence in this particular approach. On the contrary, it suggests that such departures from strict application of the law, even in response to a pattern of violations, are often open to misunderstanding and can lead to an escalation of hostilities and a general pattern of violations of the law.⁴⁰ This chequered history of reprisals has led to progressive restrictions on the right of belligerents to engage in them. In particular, 1977 Additional Protocol I contains important prohibitions on various types of reprisal. However, certain declarations and reservations made at ratification of Protocol I or accession thereto indicate that some states are concerned to keep open the possibility of reprisals, especially if an adversary makes serious and deliberate attacks against civilians and civilian objects.⁴¹ This concern may well be justified. However, the fact that the ancient institution of reprisals is not completely dead does not mean that there would be merit in introducing, through the idea of 'unequal application' of the laws of war, further possibilities of varying the application of the law on the ground of a claimed legal or moral distinction between adversaries.

Distinctions between different categories of people in the laws of war

Although the laws of war, as they have evolved over centuries, do not draw a distinction between belligerents based on the presumed morality of their respective causes, they do encompass numerous distinctions between different classes of people based on the nature of their relationship to the armed conflict and their right (or otherwise) to participate in hostilities. For example, particular legal

40 For a critical view of reprisals see Frits Kalshoven, *Belligerent Reprisals*, Sijthoff, Leyden, 1971.

41 The limitations on reprisals in 1977 Additional Protocol I are mainly in Articles 51–56. Certain states, when indicating adherence to the treaty, made reservations and declarations to these articles. That of the United Kingdom – statement 'm' in Roberts and Guelff, above note 13, p. 511 – is notably explicit on this point.

protections, duties and prohibitions apply to each of the following distinct categories of people:

- combatants entitled to prisoner-of-war status if captured
- civilians in occupied territory
- civilians in or near areas of combat
- medical personnel
- representatives of the ICRC
- mercenaries
- unlawful (or unprivileged) combatants
- persons suspected of war crimes (i.e. crimes under *jus in bello*)
- nationals of a state which is not at war with either of the belligerents
- personnel in UN operations other than enforcement operations
- UN forces when they are involved in armed hostilities

This tendency to identify different categories of individuals is fundamentally different from the approach of human rights law, which seeks to identify rights that pertain to all human beings, generally without distinctions being drawn. The laws-of-war emphasis on distinct categories is essential for the application of legal rules in warfare, for reasons that are obvious. For example, soldiers on active duty simply cannot have the same immunities as, say, Red Cross workers or civilians.

This capacity of the law to distinguish between different categories of people might be thought to suggest a capacity to distinguish between people on the basis of their status under *jus ad bellum*. There are many reasons, as indicated in the next section, why such variations in application of the law might be thought desirable.

Certain arguments for varying the application of the law in favour of particular parties

Naturally there are often pressures to apply the laws of war selectively, or even to accord particular privileges to one party or another, on account of the justice of the cause. There is even some practice that amounts to a claim for special rights under the law. Possible arguments for applying the law unequally as between the parties to an international armed conflict include:

- A state or alliance which is acting in self-defence following an initial act of aggression by the adversary should be entitled to take measures against that adversary that would not be lawful in other circumstances.
- Unequal combats, in which a weaker party faces a larger and more powerful adversary, often involve pressures to violate the rules, and sometimes give rise to claims that one side should be entitled to certain exemptions, or is not bound at all by *jus in bello*.
- Major powers, especially those with a worldwide series of military commitments, sometimes claim that equal application of certain rules, and submission

to supranational judicial procedures, would be detrimental to their status and to the efficient execution of their international roles.

- A UN-authorized military force, conducting an enforcement action, might be proclaimed to be immune from all hostile action, so that any attacks on it would constitute a war crime.
- UN peacekeeping operations have legal protection from attack, and might thus appear to be a case where the laws of war do already apply unequally.

All these arguments are serious, and illustrate only too clearly the range of pressures for unequal application of the law. They are considered in turn. The purpose of the very brief survey that follows is simply to outline each of these arguments and to give a rough indication of whether they have influenced the conduct of belligerents, and not to engage in appraisal or rebuttal.

State or alliance fighting a war in self-defence

The argument that an initial act of aggression is a crime of a nature to put one side in a war in a special legal category as regards application of *jus in bello* is just one example of the type of claim that can be made in support of the 'unequal application' approach. In the conduct of warfare it is often possible to detect an implicit claim that the adversary's violations (including in the original decision to resort to force) provide an excuse for extreme acts by one's own side that might otherwise be doubtful under *jus in bello*. The long history of such claims attests to the attraction of the idea of unequal application of the laws of war, but it also suggests that there are many dangers in such an approach, which is contrary to the existing law.

A possible example of a claim to special rights in war on account of (among other things) the opponent's initiation of war is in this statement made by President Truman in a broadcast to the American people three days after the bombing of Hiroshima on 6 August 1945:

Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.

And we shall continue to use it until we completely destroy Japan's power to make war. Only a Japanese surrender will stop us.⁴²

Japan in fact surrendered five days later, on 14 August 1945. Whatever one thinks of the US atomic bombing of Hiroshima and Nagasaki, or of

42 'Radio report to the American people on the Potsdam Conference', 9 August 1945, *Public Papers of the Presidents of the United States: Harry S. Truman, 1945*, GPO, Washington DC, 1961, p. 212. This broadcast was on the day of the Nagasaki bombing.

President Truman's statements in justification, the case does suggest that there is already more than enough of a tendency to use the circumstances of how a conflict broke out as a justification for extreme acts in response. The question as to whether it is desirable to give formal legitimacy to that tendency must be asked.

Another version of the argument that the defensive side should be privileged is the idea that a party fighting a defensive war against invaders on its own territory should be allowed to engage in actions that might otherwise be prohibited. To some extent there is already provision for this in the laws of war – for example, the reference to the *levée en masse* in Article 2 of the 1899 and 1907 Hague Regulations was particularly sought by small states that feared attack by more powerful ones. Other outcomes of such thinking have included the proposition, which finds reflection in 1977 Additional Protocol I, that a party fighting defensively to oppose ongoing foreign control is entitled to hide among the population, being only required to put on uniforms or insignia immediately before engaging in acts of military resistance.

Unequal combat

Most military contests are unequal, with the inequalities assuming many forms. In some cases the inequalities are of such a character that there is a genuine question whether the laws of war are fully applicable anyway, while in other cases the applicability of the law is basically accepted, but there may be claims for unequal application of the law as regards particular issues. Here, the first form of unequal combat to be considered is that which includes an element of established government versus unlawful insurgency.

Many wars (including some international ones) encompass situations in which organized armed forces under government control are in combat against lightly armed irregular forces, often termed 'guerrillas' or 'terrorists'. In such situations forces representing governments frequently deny the right of their adversaries to participate in hostilities at all: rather, the insurgent forces are seen as criminals and outlaws. In asymmetric combat of this kind there are pressures on both sides to violate basic rules, or to regard them as not strictly applicable to the situation at hand.⁴³ Often the irregular forces have little interest in observing the law, partly because they appear to have no chance of being treated upon capture as prisoners of war, and partly because their organization and targeting both depend on some blurring of the crucial distinction between soldiers and civilians. For their part, and especially if they are poorly trained and led, the government forces involved in countering irregulars may be under pressures (such as the

43 Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, No. 857 (2005), pp. 149–74. In the conclusion he states, 'International humanitarian law should not be overstretched. It cannot be extended to situations other than those it was intended to cover without giving wrong directives' (p. 173).

difficulty of distinguishing combatant from civilian) that lead to violations of basic rules.⁴⁴

If the conflict is a pure case of civil war, the application of the full range of the laws of war governing international armed conflict is likely to be called into question: governments of all political colours have historically opposed granting to rebels within their territories the same status and rights as the soldiers of a foreign state. The issue becomes more complex in situations such as the following types, all three of which are familiar features of our times: (i) the 'internationalized civil war' in which outside countries intervene on one or both sides in a civil war; (ii) a belligerent in an international war faces guerrilla opposition within territory it has occupied; or (iii) an international war is part of an overall international campaign against terrorism. In all three cases international armed conflict overlaps with a conflict against parties who are seen by their adversaries as not entitled to participate in hostilities. It is not surprising that in these circumstances there are pressures to apply the laws of war unequally.

Asymmetric warfare can also arise in the context of wars of a purely international character. The principle of equal application applies to such asymmetric wars, and has often been explicitly accepted by belligerents as applicable. For example, in asymmetric bombing campaigns from Iraq 1991 onwards, the United States has accepted that a laws-of-war framework applies. This is not necessarily a triumph for the principle of equal application. A key problem regarding the conformity of these US-led bombing campaigns to the laws of war concerns the notably broad US definition of 'military objectives', which has come to encompass the adversary regime's sources of power.⁴⁵

In armed conflicts between sovereign states of conspicuously unequal capacities there is sometimes a particular kind of unequal application, or rather abuse, of the law. Some relatively less powerful states (as well as non-state bodies) have engaged in consistently unlawful operations against the more powerful adversary such as hostage-taking, co-location of their military objects with civilian objects, use of human shields, use of suicide bombers disguised as civilians, indiscriminate attacks, use of proxy forces to engage in unlawful operations while denying all responsibility for their actions and deliberate attacks on civilians. Such unlawful operations have been prevalent during the period of US military dominance since the end of the Cold War, and can be seen as a response to the US ability to fight war from the air with impunity and with a high degree of accuracy. In many cases, they are intended to lure the United States and its coalition partners into causing civilian damage and incurring international criticism: as such, they are part of what Charlie Dunlap of the US Air Force has called 'lawfare', or 'the

44 See especially A. P. V. Rogers, 'Unequal combat and the law of war', *Yearbook of International Humanitarian Law*, Vol. 7 (2004), pp. 3–34. See especially the list of reasons why things go wrong, at pp. 33–4.

45 This issue is explored further in Adam Roberts, 'Air power, accuracy, and the law of targeting: why no brave new world?', in Richard B. Jaques (ed.), *Issues in International Law and Military Operations*, International Law Studies, Vol. 80, US Naval War College, Newport, Rhode Island, 2006, pp. 133–50.

strategy of using – or misusing – law as a substitute for traditional means to achieve an operational objective’.⁴⁶

In pursuing an approach to operations which violates basic rules of the laws of war, many parties do not attempt to make specific arguments showing why they should be exempted from an otherwise valid body of law. Often they simply assert their absolute right to take such action as they see fit, or even claim authority from a supreme deity. However, insofar as legal arguments can be inferred from the public statements of such parties, they appear to be based on a mixture of *jus ad bellum* and *jus in bello* considerations. The particular claim that a virtuous cause under *jus ad bellum* entitles belligerents to ignore aspects of *jus in bello* is as disturbing here as it is in other instances.

In some unequal combats, more modest and limited claims are made, or implied, that militarily weaker parties, because they cannot act in the same manner as their adversaries and cannot observe the law in the same way, are in some way exempted from certain obligations under the laws of war. Sometimes such claims are limited and specific to a tactical situation, and may be based on an underlying respect for the law. One example might be that a party lacking a safe rear area adjacent to its ongoing military operations, or even any permanent control over territory at all, might claim to be relieved of the obligation to keep POWs in camps that are not exposed to the fire of the combat zone.

Major powers question particular rules and procedures

Major powers have often had doubts about the equal application of the laws of war. Sometimes, of course, they have sought to influence the development of the law in their favour – as evidenced, for example, by the natural interest of major powers in the inter-war years in prohibiting certain forms of submarine warfare that threatened their control of the sea.⁴⁷ However, if major powers do not succeed in shaping the law in ways compatible with their interests, they sometimes seek a degree of ‘unequal application’ either by choosing not to become parties to certain treaties that are perceived as problematic, or by rejecting international procedures for implementing the laws of war. It is sobering to note that China, India, Russia and the United States are not parties to the 1997 Ottawa Convention on Anti-Personnel Mines, nor to the 1998 Rome Statute of the International Criminal Court. India and the United States are not parties to either of the 1977 Protocols additional to the Geneva Conventions.⁴⁸

46 Brig. Gen. Charles Dunlap, ‘Air and information operations: a perspective on the rise of “lawfare” in modern conflicts’, presentation prepared for the US Naval War College Conference on Current Issues in International Law and Military Operations, Newport RI, 25–27 June 2003. For a brief summary of his views on ‘lawfare’, see his chapter, ‘Legal issues in coalition warfare: a US perspective’, in Anthony M. Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force*, International Law Studies, Vol. 82, US Naval War College, Newport, RI, 2006, at pp. 227–8.

47 See, e.g., the terms of the 1936 London *Procès-Verbal* on Submarine Warfare against Merchant Ships.

48 Information on states parties to these treaties from www.icrc.org/ihl (last visited 1 October 2008).

The United States is the best-known and most criticized of these cases of partial abstention from the current laws-of-war regime. Although it has taken action in 2008 to ratify five agreements on the laws of war,⁴⁹ it remains a non-party to certain key agreements. The United States refused to ratify 1977 Additional Protocol I, perceiving it (rightly or wrongly) as a 'terrorist's charter', or (slightly more plausibly) as privileging participants in national liberation struggles. Despite refusing ratification of Protocol I, the United States indicated that it would observe those parts of this agreement that it regarded as reflecting customary international law, or as acceptable as a matter of policy; but since 2004 it has ceased to make this commitment.⁵⁰ As for the Ottawa landmine convention, the United States refused to become a party mainly because it continued to see a certain military utility in landmines, including those on the border between North and South Korea. It rejected the ICC Statute for a wide variety of reasons, including concern that members of the US forces, deployed in a wide range of situations globally, might be subjected to politically motivated investigations or prosecutions.⁵¹ At the same time, the United States has developed an approach to the conduct of war which concentrates on weakening the enemy's government rather than its armed forces. This approach, which can be problematic vis-à-vis the laws of war, is discussed further below.⁵²

In addition, there is the familiar problem that the United States views the laws of war, including treaties to which the United States is a party, as of limited application in the 'war on terror', principally on the grounds that the terrorist movements which it is combating do not meet the criteria laid down in the laws of war for prisoner-of-war status. In this special version of the 'unequal application' proposition, the cause represented by al Qaeda is so deeply wrong that those deemed to be adherents of the movement should not benefit from the standard treatment for detainees and prisoners of war as outlined in the conventions on the laws of war – or even (in some interpretations) from the plain meaning of basic rules of universal application set out in the 1984 Convention on Torture.

The positions taken by the United States and other powers that seek in various ways to limit the full application of the law, or even to apply it unequally

49 In September 2008 the US Senate gave favourable advice and consent to US ratification of the following five agreements: 1954 Hague Cultural Property Convention, 2001 CCW amended Article 1 (expanded scope of application), 1980 CCW Protocol III (incendiary weapons), 1995 CCW Protocol IV (blinding laser weapons), and 2003 CCW Protocol V (explosive remnants of war). Information from www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm (last visited 1 October 2008). Acts of ratification with depositaries were expected to follow promptly.

50 Several US official publications indicated that the US viewed certain provisions of 1977 Protocol I as either legally binding as customary international law or acceptable practice although not legally binding. See, e.g., *Operational Law Handbook 2003*, US Army, International and Operational Law Department, Judge Advocate General's School, Charlottesville, VA, ch. 2, p. 11. Subsequent editions of this handbook have not contained this statement.

51 US attempts to secure immunity for its forces from investigation and prosecution by the ICC have included UN Security Council resolutions mentioned below in note 54; and the pursuit of bilateral immunity agreements (often called 'Article 98 agreements') with individual states.

52 See below discussion of the problem of the 'innocent soldier', pp. 28–31.

in a particular conflict, contain many distinct strands, some stronger and more durable than others. As regards the specific question of what light US practice sheds on the ‘unequal application’ proposition, the answer has to be that it adds to the doubts about it. The two issues on which the United States has come closest to advocating ‘unequal application’ are evident in its attitude to detainees in the ‘war on terror’, and in its attitude to the International Criminal Court. In both of these matters, the US position is widely perceived internationally as hypocritical, with the United States advocating standards and procedures for others that it does not follow consistently or rigorously itself. On both these matters ‘unequal application’ contributed to a degree of US isolation even from some of its close allies.

UN-authorized forces in enforcement actions

The capacity of the United Nations to implement sanctions, to establish peace-keeping forces, and to authorize uses of force, raises complex questions about whether the laws of war (including the law of neutrality) apply in exactly the same manner to such actions as they do to states acting individually or in alliances. Some writers have sought to advance the radical proposition that forces acting under the authority of the United Nations, whether in enforcement or peacekeeping mode, should have a general immunity from attack.⁵³ On a more limited issue, the UN Security Council, citing among its reasons ‘that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council’, sought in 2002 and 2003 a general exemption of limited duration from investigation and prosecution by the International Criminal Court for personnel from a contributing state that is not a party to the Rome Statute who are taking part in any UN-established or authorized operation. This resolution, passed at US instigation, linked a *jus ad bellum* issue to a partial exemption from *jus in bello*, but the resolution did not imply that personnel in a UN operation (whether in peacekeeping or enforcement mode) were exempt from the substantive rules of the laws of war, only that the enforcement should be within national jurisdictions.⁵⁴

Although they sometimes merge in practice, the two basic modes of UN action by forces in the field – enforcement and peacekeeping – are conceptually distinct, especially as regards the application of the laws of war. Forces engaged in enforcement actions will be considered first, before the separate matter of UN peacekeepers.

53 See, e.g., Walter Gary Sharp, ‘Protecting the avatars of international peace and security’, *Duke Journal of International and Comparative Law*, Vol. 7 (1996), pp. 93–183. This article contained as an appendix (pp. 175–83) a draft additional protocol to the 1949 Geneva Conventions which would have provided that personnel in any operation authorized or mandated by the competent organ of the UN may in no circumstances be attacked.

54 SC Res. 1422 of 12 July 2002. Renewed by SC Res. 1487 of 12 June 2003. Not renewed in 2004 owing to the controversy over the Abu Ghraib scandal. Not renewed subsequently.

The application of the laws of war to forces fighting with UN authorization has many dimensions.⁵⁵ As indicated, one question that has attracted attention is whether forces fighting with UN authority for UN-proclaimed objectives should be granted immunity from attack. If the UN Security Council wished to support this position – or indeed to grant peacekeepers immunity – it could make the claim that under the UN Charter it has the powers to do so. Article 103 provides that states' obligations under the Charter shall prevail over their obligations under any other international agreement. The Council is well aware of this, and certain of its resolutions have explicitly given precedence to the provisions of the resolution concerned over any international agreement or contract that member states had entered into.⁵⁶ This might seem to be a legal basis, and an authoritative procedure, for varying the application of the laws of war.

Yet in practice neither the Security Council, nor major states leading coalitions under its authorization, have sought as a matter of general principle to apply the laws of war unequally in ongoing operations. This could have been because of respect for the *jus cogens* status of such basic rules as those in the Geneva Conventions, or because of the more practical consideration that troop-contributing states saw no advantage in casting any doubt on the application of the laws of war. Thus the general assumption has been that UN-authorized national or coalition armed forces should be bound by the laws of war in the same manner as their adversaries. Examples of explicit recognition of the equal application principle include:

- *The US-led coalition in the Korean War, 1950–53.* In 1951 the US-led UN Command in Korea instructed all forces under it to observe the provisions of all four 1949 Geneva Conventions, even if participants had not yet ratified them.
- *The US-led forces in the 1991 Gulf War.* Statements from the US leadership of the coalition reflected the explicit assumption that the laws of war applied to coalition operations.
- *The US-led 'multinational force' in Iraq following the 2003 invasion.* Security Council Resolution 1546 of 8 June 2004 explicitly called on all forces in Iraq 'to act in accordance with international law, including obligations under international humanitarian law'.

While the equal application principle is clear from such cases, there have been some variations. Thus in respect of the occupation of Iraq under the Coalition Provisional Authority, a Security Council resolution of May 2003 appeared to relieve certain states of the responsibilities, and stigma, of occupying powers when it indicated that 'other States that are not occupying powers are working now or in the future may work under the Authority'; and the same resolution

55 For a useful exploration see Christopher Greenwood, 'International humanitarian law and united nations military operations', *Yearbook of International Humanitarian Law*, Vol. 1 (1998), pp. 3–34.

56 See, e.g., SC Res. 757 of 30 May 1992, imposing economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro), para. 11.

went on to proclaim certain goals for the occupation that went beyond the confines of the 1907 Hague Regulations and the Fourth Geneva Convention (protection of civilians) of 1949.⁵⁷ These variations, while reflecting the exigencies of a particular situation and the imperious nature of the US transformative vision for Iraq, are open to interpretation as favouring one party against another. However, it is significant that this rare case of ‘unequal application’ occurred during an occupation rather than an armed conflict as such, and at a time when opposition to the occupation of Iraq had not yet coalesced into a new phase of hostilities.

Some Security Council resolutions authorizing particular uses of force have undoubtedly involved a degree of discrimination against one side in an ongoing armed conflict in matters relating to its use of force on the battlefield. In respect of the war in Bosnia in 1992–5, for example, several UN measures relating to the authorizations of military actions by NATO and the United Nations Protection Force (UNPROFOR) also prohibited certain military acts by the Bosnian Serbs and by their co-belligerents in the Yugoslav armed forces. One such case was the ban on military flights that was established in October 1992.⁵⁸ A subsequent resolution in March 1993 extending the ban and providing for enforcement measures (which were to be carried out through NATO) contained at least the implicit message that the Serb forces should not attack NATO aircraft carrying out their mandate to ensure compliance with the ban, but at the same time it required any measures taken by NATO to be ‘proportionate to the specific circumstances and the nature of the flights’.⁵⁹ Similarly, the resolutions in 1993 establishing the six ‘safe areas’ in Bosnia prohibited armed attacks or any other hostile acts against those areas.⁶⁰ While all this might seem to be applying rules in a partial way, with a main aim being to restrain Serb military activities, it was not asserted that Serb military actions in violation of these resolutions would necessarily constitute war crimes. When, in May 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) was adopted by the UN Security Council, its specific purpose was to address ‘serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’, not to charge people with ignoring or undermining UN Security Council resolutions, nor indeed for violations of *jus ad bellum*. The ICTY Statute’s list of crimes was soundly based in long-established law under *jus in bello*, and it did not at any point assert that violations of the terms of UN Security Council

57 SC Res. 1483 of 22 May 2003, preamble and para. 8. For a discussion see Marten Zwanenberg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, *International Review of the Red Cross*, No. 854 (2004), pp. 745–68.

58 SC Res. 781 of 9 October 1992, establishing the ban on military flights over Bosnia. The ban did not apply to UNPROFOR flights or to other flights in support of UN operations.

59 SC Res. 816 of 31 March 1993, extending the ban to encompass helicopters and authorizing members states to use ‘all necessary measures’ to enforce the ban.

60 SC Res. 819 of 16 April 1993, establishing Srebrenica as a ‘safe area’; SC Res. 824 of 6 May 1993, extending the concept of ‘safe areas’ to Sarajevo, Tuzla, Zepa, Gorazde and Bihac; and SC Res. 836 of 4 June 1993, providing for enforcement by UNPROFOR and by member states (i.e. NATO).

resolutions constituted a crime *per se*.⁶¹ The Statute applied to all parties taking military action in the former Yugoslavia, and could potentially apply to actions of outside forces, including NATO. In general, these actions in relation to the war in Bosnia suggest a strong concern to maintain the principle of equal application of the laws of war, even at the same time as leaning towards one side in the war.

UN peacekeeping forces

Unlike armed forces authorized to take military action to achieve UN purposes, UN peacekeeping forces have generally been considered to have immunity from attack. They are not participants in hostilities: indeed, they are typically deployed in a post-conflict situation. However, in the early 1990s UN peacekeeping forces were often deployed, or their mission was continued, in the midst of ongoing armed conflict. There were repeated severe challenges to the special status of UN peacekeeping forces. The principle of their immunity from attack was openly flouted in certain conflicts, UN peacekeepers being attacked and abducted in Angola, Rwanda, Somalia and Bosnia. This led to new lawmaking, resulting in the 1994 UN Convention on the Safety of United Nations and Associated Personnel. Not a document of the laws of war as such, it confirms the principle that personnel on certain UN operations shall have immunity from attack; and it criminalizes attacks on them. In all the treaties with a bearing on the conduct of war, this is the one which might seem to come closest to privileging one particular group of soldiers over others. However, it does so only to a limited extent, because it specifically provides:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.⁶²

This statement reflects the long-standing principle that UN forces engaged in armed conflict are subject to the laws of war in the normal way. Further confirmation of this came in 1999 with the UN Secretary-General's 'Bulletin on observance by United Nations forces of international humanitarian law'.⁶³

Thus the application of the Convention on the Safety of UN Personnel is primarily to UN peacekeeping forces. Even in that regard, in the light of events since its text was concluded in 1994 and entered into force in 1999, its value

61 Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by SC Res. 827 of 25 May 1993. In the drafting process there was no suggestion that violations of Security Council resolutions *per se* might form part of the subject matter of the Tribunal.

62 1994 UN Convention on the Safety of United Nations and Associated Personnel, Article 2(2). The provisions of this convention are reflected in the 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(iii) and (e)(iii).

63 Promulgated in UN Doc. ST/SGB/1999/13 of 6 August 1999. Reprinted in Roberts and Guelff, above note 13, pp. 725–30.

appears uncertain. There may have been an effect in helping to reduce the number of fatalities among UN peacekeepers, but it is hard to prove. The high casualty figures during 1993–5 were largely due to the untypical situation of maintaining UN peacekeeping personnel in the midst of ongoing conflicts in Somalia and Bosnia. Fatalities decreased in 1996–9 as the UN involvements in certain other ongoing conflicts were wound down. However, in the period 2004–7, following an increase in UN peacekeeping commitments, there was an increase in fatalities, although not to quite the level of 1993–5.⁶⁴ While all these figures must be viewed with caution, they do raise a question about the effectiveness of the 1994 Convention; they also raise a question about the value of legal rules seeking to privilege a particular group of soldiers.⁶⁵

The difficulty of agreeing which side is more justified in its resort to force

When war is raging, it has always been difficult to secure agreement among the belligerent parties as to which side is the more legitimate under *jus ad bellum*. Even getting agreement among third parties and international bodies has been remarkably difficult. Situations in which a clear and widely accepted distinction can be drawn between the just and the unjust users of force are rare. This problem remains difficult today, despite the existence of the UN Security Council as a major body charged with making determinations about threats to the peace and breaches of the peace. The following two considerations illustrate some of the hazards in reaching determinations about the lawfulness of uses of force.

The first is essentially factual, and concerns the nature of wars. Their causes can seldom be identified in simple terms of right versus wrong. A war which begins with a plainly wrong act, such as aggression out of the blue against a recognized independent state, or a wilful act of violence which is self-evidently contrary to an international treaty regime, is a rarity – as are military responses that are free of taint in one form or another. Wars much more commonly begin with deep fears and grievances on both sides, understandable but clashing interests, conflicting understandings of key events and the responsibility for them, and rival complaints about violations of international law by the adversary. They may begin as civil wars and then become internationalized. On both sides there may be amalgams of high moral purposes and more mundane motives.

The second consideration is legal. There is a notable lack of reliable objective standards as to what constitutes the crime of aggression. The record of attempts to establish such standards is not encouraging. In the League of Nations

64 See detailed statistics in 'UN peacekeeping fatalities by year and incident type', available at www.un.org/Depts/dpko/fatalities (last visited 3 September 2008).

65 For a critical general survey of the UN Security Council's involvement in a range of matters relating to the laws of war see Andréa Viotti, 'In search of symbiosis: the Security Council in the humanitarian domain', *International Review of the Red Cross*, No. 865 (2007), pp. 131–53.

in the inter-war years, the efforts to define aggression encountered numerous difficulties. At the International Military Tribunal at Nuremberg in 1945–6, in determinations of guilt and sentencing there were more difficulties regarding the charges of aggression or ‘crimes against peace’ (i.e., crimes concerning *jus ad bellum*) than there were regarding the charges of ‘war crimes’ and ‘crimes against humanity’ (i.e., crimes concerning *jus in bello*).⁶⁶ The adoption in 1945 of the United Nations Charter, with its recognition of self-defence as the main justification for the use of force by states, strengthened the international legal basis for determining when the use of force is lawful, but the application of its rules to certain types of situation (such as preventive uses of force, assistance to liberation movements, and humanitarian intervention) has been problematic. Indeed, since 1945 the United Nations has likewise run into numerous difficulties in its many attempts to define aggression. In 1974 it concluded such a definition only in the modest form of a General Assembly resolution rather than a treaty.⁶⁷ This pattern has continued. As noted, the 1993 ICTY Statute did not include aggression within the Yugoslav Tribunal’s subject matter. In contrast, the 1998 Rome Statute of the International Criminal Court leaves open the possibility of a definition of aggression to be encompassed within the Statute seven years after its entry into force (which was on 1 July 2002).⁶⁸ However, there is no chance at all of this being achieved. The best instrument that exists for determining whether a particular use of force is illegal remains the UN Security Council. Yet this body only rarely interprets the actions of parties to conflicts as being generally ‘illegal’ on one side and ‘legal’ on the other in a *jus ad bellum* sense; and even when it has done so, as it essentially did over Korea in 1950 and Kuwait in 1990, it has not called for unequal application of the laws of war.

These two types of consideration, factual and legal, point to the inherent ambiguity or arguability of most decisions to use force. They help to explain why international trials of political and military leaders regarding responsibility for the initiation of war have been extremely rare. Such trials of subordinates have been even rarer: the international legal liability of the ordinary soldier for crimes under *jus ad bellum* is not clear. In these circumstances, the idea that there could be a distinctive *jus in bello* regime which varied according to the supposedly agreed *jus ad bellum* nature of a conflict resembles the proverbial house built on shifting sands.

The ‘innocent soldier’ in the law and conduct of war

Does the argument for the equal application of the law mean that nothing can be done about the innocent soldier? After all, soldiers may be innocent not only

66 For findings of guilt, sentences and dissenting opinion at Nuremberg on 1 October 1946, see *The Trial of German Major War Criminals: Proceedings of the IMT at Nuremberg*, Part 22, pp. 485–547.

67 GA Res. 3314 (XXIX) of 14 December 1974, which includes ‘Annex: Definition of Aggression’.

68 1998 Rome Statute of the International Criminal Court, Articles 5(2), 121 and 123.

because they are on the side considered to be acting more in conformity with *jus ad bellum*, but also because they are fighting (even if on the ‘wrong’ side) in a war they did not create, and into which they were dragged more or less reluctantly by their rulers. This view, recognized and respected at least since the time of Jean-Jacques Rousseau, has informed the development of the laws of war. Yet there is no room for complacency, as achievements in alleviating the lot of the soldier have been limited.

It might be argued that the problem of the ‘innocent soldier’ is a matter of a fundamental human right of each human being, namely the right to life. It could thus be seen as a problem to be addressed by international human rights law. The human rights stream of law merges with the laws of war at many points, and is often relevant to situations of armed conflict and military occupation.⁶⁹ However, in relations between belligerents in an armed conflict, which is the crucial issue at stake here, it is not self-evident that human rights law – designed first and foremost to govern relations between citizens and their own government – supplants the laws of war, which remain the main point of reference.

The laws of war can easily seem to be rigid on the principle that the soldier is a legitimate target in war. The massive killings of soldiers on both sides in the First World War were not self-evidently violations of the then-existing laws of war – an uncomfortable fact which may help to explain why, in the inter-war years, the laws of war were viewed as of limited significance. The conscripts on both sides in the hideous carnage of the First World War, or the Iraqi troops in occupied Kuwait in 1990–1, can indeed be deemed innocent in this sense, and worthy of protection.

The laws of war have never been blind to the claims of soldiers. The 1864 Geneva Convention, a pioneering treaty in this field, stated, ‘Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.’⁷⁰ Or, as the 1868 St Petersburg Declaration renouncing the use of certain explosive projectiles put it in its preambular clauses,

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

69 For a recent survey see Adam Roberts, ‘Human rights obligations of external military forces’, in *The Rule of Law in Peace Operations: ‘Recueils’ of the International Society for Military Law and the Law of War, 17th International Congress, Scheveningen, 16–21 May 2006*, ISMILLW, Brussels, 2006 (i.e. February 2007), pp. 429–49.

70 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Article 6.

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; ...⁷¹

The prohibitions of superfluous injury and unnecessary suffering are reflected in several subsequent agreements, including the 1980 UN Convention on Conventional Weapons,⁷² and the 1998 Rome Statute of the International Criminal Court.⁷³ In addition, of course, the laws of war make extensive provision for the protection of soldiers who are injured, who surrender, or who are taken prisoner. The St Petersburg acceptance of the purpose of disabling ‘the greatest possible number of men’ remains problematic, and is discussed further below.

Some of the most important means of reducing the costs of war borne by essentially innocent soldiers may derive, not so much from observance of formal legal provisions, but rather from other approaches to, or changes in, the conduct of war. In particular, three approaches – all of them involving moral ambiguity – have been evident in the conduct of certain operations in the post-Cold War period, as follows.

Force protection

Belligerents can seek to protect their own forces from the effects of war by taking a wide range of measures. Among the means to this end are: provision of body armour, avoidance of close contact with the enemy, and use of remote vehicles and remotely delivered weapons. Extraordinary results may be achieved by such measures, as was indicated by the almost casualty-free (for the United States) waging of war by the US Air Force over Kosovo in 1999 and Afghanistan in 2001. Such measures are in principle consistent with the laws of war. However, in practice there can be tensions. Acts of force protection, especially as one part of campaigns against adversaries who locate themselves among the people, often involve a risk of killing civilians – for example, in a school close to an anti-aircraft position, or in a crowd from which one shot may have been fired. An armed force perceived as ultra-protective of its own personnel, but willing to risk the lives of civilians as well as the adversary’s soldiers, is liable to be viewed with suspicion and even hatred. Force protection is no cure-all, and in some circumstances the safety of forces may be achieved as much by their mixing with the population (even at some risk) as by the use of firepower. However, force protection remains one important means of reducing risks to soldiers.

71 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, preamble.

72 1980 UN 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, and its Protocols.

73 1998 Rome Statute of the International Criminal Court, Article 8(2)(b)(xx).

Avoiding direct attacks on enemy personnel

Is it really inevitable that belligerents should have as a purpose ‘to disable the greatest possible number of men’? Belligerents can take numerous actions which, while allowing for effective prosecution of a war, may save members of the adversary’s armed forces from its effects. Three possible means of achieving this can be identified. The first is that aspect of the strategy of indirect approach which emphasizes that the aim of war is not the defeat of the enemy in battle, but rather the use of manoeuvre and threat in such a way as to compel the adversary to surrender.⁷⁴ The second approach to the problem of saving enemy personnel is the credible announcement that all those who surrender will have humane treatment in accordance with the Geneva Conventions, thus possibly increasing the numbers willing to give themselves up before being attacked. The third approach involves limiting attacks, wherever possible, to enemy equipment as distinct from enemy personnel. For example, in the 1991 Gulf War the US-led coalition went to exceptional lengths, mainly through leaflets, to inform Iraqi soldiers that they would not be targets if they got out of their military vehicles and stayed away from them – a campaign that appears to have had considerable effect.⁷⁵ Actions such as those of the types indicated here are completely consistent with the laws of war, and may significantly reduce the numbers of enemy soldiers who die in a campaign.

Concentrating on weakening the enemy’s government rather than armed forces

Sometimes in war the attempt is made to target the enemy regime and its apparatus of government power as distinct from its armed forces. The operations of the US armed forces in the 1999 war over Kosovo and in the 2001 war in Afghanistan showed evidence of thinking along these lines. This approach can have the effect of reducing the adversary’s military casualties. However, it is often problematic vis-à-vis the laws of war, mainly because it may involve attacks on targets widely perceived to be civilian rather than military.⁷⁶

In short, a great deal has been done in the attempt to alleviate the fate of the innocent soldier, and no doubt more could be done. Most of the efforts in this direction (with the possible exception of certain attacks on government power) are either contained in, or are at least consistent with, the laws of war. It must be

74 For the classic exposition see B. H. Liddell Hart, *Strategy: The Indirect Approach*, rev. edn, Faber, London, 1967.

75 For details see Adam Roberts, ‘The laws of war in the 1990–91 Gulf conflict’, *International Security*, Vol. 18 (Winter 1993/94), pp. 170–2. For a wide range of propaganda leaflets, including those used in the 1991 Gulf War to encourage Iraqis to walk away from their military vehicles, see the Aerial Propaganda Leaflet Database of the website of the PsyWar Society, available at www.psywar.org/leaflets.php (last visited 3 September 2008).

76 For a critical evaluation of the US strategy of bringing the effects of war home to enemy civilians, see Ward Thomas, ‘Victory by duress: civilian infrastructure as a target in air campaigns’, *Security Studies*, Vol. 15 (January–March 2006), pp. 1–33.

doubtful whether unequal application of the law would do more to protect soldiers.

Conclusion: why the equal application principle should be respected

The principle of equal application of the laws of war, irrespective of the *jus ad bellum* aspects of a particular conflict, was not always accepted, but emerged and gained strength over time because other approaches proved more problematic. It is closely associated with the idea that the soldiers involved in an international armed conflict have a right to participate in hostilities. The essential foundation of the principle of equal application, namely the separation of *jus in bello* from *jus ad bellum*, faces serious challenges from several directions, and there have been some modifications of it in practice, especially as regards UN operations. Yet a principle may be important precisely because there are significant challenges to it, some of which may need to be accommodated, others rejected.

Equal application is not the same as universal application. The continued effectiveness of the principle of equal application depends in part on maintaining the distinction between international armed conflict (in which the principle is most clearly relevant) and other kinds of conflict (in some of which the principle is difficult to apply). Yet in certain situations that differ in some respects from the pure case of international armed conflict between sovereign states there can be persuasive reasons for maintaining the principle of equal application – as the UN Security Council indicated regarding the wars in Bosnia in 1992 and Afghanistan in 1998.

The most fundamental weakness of the ‘unequal application’ proposition derives from the fact that, in the midst of war, it is always difficult to secure agreement on which side exemplifies justice. In addition, proposals for ‘unequal application’ often stem from a misunderstanding of the nature of the existing laws of war. Such proposals have not been accompanied by any detailed outline of what any revision of the existing law would look like, nor have they shown recognition of the fact that when the laws of war have been developed or interpreted in a way that can be perceived as privileging one side in a conflict because of the nature of its cause, the other side has often shown a tendency to ignore or downgrade the law. At a time when *jus in bello* is under considerable pressure, not least from both sides (in different ways) in the ‘war on terror’, a philosophical-cum-legal approach that provides some basis for relativizing the application of the law on account of the alleged justice of the cause could only too easily be misused, for example to minimize still further the already attenuated body of rules applied to detainees.

Nor is the ‘unequal application’ proposition likely to address effectively the undoubtedly serious issue of what to do about the problem of the ‘innocent soldier’. Attempts to privilege one belligerent over another may merely add an additional layer of confusion to an already difficult situation. A better approach, soundly based in existing law and practice, is to focus on general immunities for

certain types of person; on provisions aimed at preventing superfluous injury and unnecessary suffering; and on other strategies and policy measures, including in matters relating to force protection and targeting, aimed at limiting the impact of war on soldiers.

The final problem of the ‘unequal application’ proposition is practical. So far as the laws of war are concerned, those who have the right to participate in hostilities need to be trained to observe a single set of rules. If their training is on the basis that the application of the rules, by their adversaries and by themselves, may vary in every mission, the law will risk losing not only its moral standing but also its practical value as a single, widely respected grab-bag of rules that are inherent in the idea of military professionalism.

Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law

Jasmine Moussa*

Jasmine Moussa has an LL M in public international law from the London School of Economics and Political Science, and an MA in international human rights law from the American University in Cairo.

Abstract

The theoretical separation of jus ad bellum and jus in bello provides important protection during armed conflict. It guarantees that jus in bello will apply regardless of the cause of a conflict. However, this distinction has been challenged by the view that in some cases a situation of self-defence may be so extreme, and the threat to the survival of the state so great, that violations of jus in bello may be warranted. The situation is compounded by the confusion of the principles of necessity and proportionality under jus ad bellum and jus in bello in both academic writing and the jurisprudence of international courts. The dangers of blurring the distinction will be elucidated by examining how jus ad bellum considerations have affected the application of jus in bello in armed conflicts between states and non-state actors.

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International law represents, in essence, a struggle against the subjectivity of politics.¹ Nowhere is this more evident than in the law of armed conflict, which seeks to regulate the conduct of states in an apparently extra-legal situation. After more

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than five decades, Lauterpacht's statement that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law',² remains relevant. However, in spite of the criticisms that may be levelled against international humanitarian law³ for its subjectivity and indeterminacy, in reality – when adequately enforced – it offers important protections for victims of armed conflict.

Strict adherence to international humanitarian law has become all the more imperative in the post Cold-War era, as state practice pushes at the limits of *jus contra bellum* in an endeavour to expand its exceptions to include notions such as pre-emptive self-defence, humanitarian intervention, intervention through UN peace enforcement and combating international terrorism. Inherent in some of these notions is the perception of a 'just' or 'legitimate' cause struggling against some grave and immoral evil, justifying, in the eyes of many, a response that goes beyond the boundaries of international humanitarian law. A case in point is the US-led 'war on terror' in which self-defence against the grave threat of terrorism has been invoked to justify all kinds of excesses, while also implying that the terrorist, whose recourse to force is clearly illegal, is prevented from enjoying the protections of international humanitarian law.

This paper makes a case for the separation of *jus ad bellum* and *jus in bello*, the antithesis of the so-called 'just war' theory, which subordinates *jus in bello* to *jus ad bellum* considerations. This principle of separation provides that international humanitarian law binds all belligerents, regardless of who is the aggressor. However, this distinction has been challenged by recent attempts – deliberate or otherwise – to link the two bodies of law. The first section of this article will examine the relationship between *jus ad bellum* and *jus in bello*, with emphasis on the risks associated with any notion that makes the application of international humanitarian law contingent on a valid *jus ad bellum* case. The next section examines the enigmatic decision of the International Court of Justice (ICJ) in the *Advisory Opinion on the Threat or Use of Nuclear Weapons* and the law on state responsibility to discern whether there exists an 'extreme self-defence' or 'state survival' exception that would allow a state to violate international humanitarian law. In the third section, the paper will address how the conflation of the principles of proportionality and necessity under *jus ad bellum* and *jus in bello* and the confusion of the concepts of 'self-defence', 'necessity', 'emergency' and 'military necessity' have further blurred the distinction between these two bodies of law. In this regard, the jurisprudence of international war crimes tribunals since Nuremburg will be examined, with a view to elucidating how it simultaneously reaffirms and undermines the distinction between the two bodies of law. Finally, the paper will show the dangers of blurring the distinction, by examining how

1 Martti Koskeniemi, 'The politics of international law', *European Journal of International Law*, Vol. 1 (1990), p. 4.

2 Hersch Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952), p. 382.

3 Hereinafter used interchangeably with the terms *jus in bello*, law of armed conflict, and laws of war.

jus ad bellum considerations have affected the application of *jus in bello* in armed conflicts between states and non-state actors. The aim is to underscore the inherent limits of the 'just war' model, as well as to highlight the importance of maintaining the distinction between *jus ad bellum* and *jus in bello* and their limiting principles (necessity and proportionality under *jus ad bellum*, and military necessity and proportionality under *jus in bello*) in all types of conflict.

The relationship between *jus ad bellum* and *jus in bello*

The relationship between *jus ad bellum* and *jus in bello* has been described as one of inevitable tension. Contemporary *jus ad bellum* prohibits the use of force, with the exception of the right to individual or collective self-defence⁴ and Security Council enforcement measures.⁵ *Jus in bello*, on the other hand, has as its aim the conciliation of 'the necessities of war with the laws of humanity'⁶ by setting clear limits on the conduct of military operations.⁷ Theoretically, *jus ad bellum* and *jus in bello* are two distinct bodies of law; each has different historical origins and developed in response to different values and objectives.⁸ In addition, the consequences of violating *jus ad bellum* differ from those attached to violations of *jus in bello*.⁹ However, the fact that most of the principles of *jus in bello* predate the prohibition of the use of force¹⁰ led some to conclude that modern *jus ad bellum* has rendered international humanitarian law superfluous. This tension surfaced in the International Law Commission's first consideration of the codification of the laws of war.¹¹ Needless to say, this is no longer a view that holds currency. For, in spite of

4 Charter of the United Nations, 26 June 1945, Art. 51.

5 *Ibid.*, Art. 42. See Saul Mendlovitz and Merav Datan, 'Judge Weeramantry's Grotian quest', *Transnational Law & Contemporary Problems*, Vol. 7 (1997), p. 425.

6 1868 St Petersburg Declaration, in Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, Oxford University Press, Oxford, 2000.

7 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226 (hereafter *Nuclear Weapons case*), para. 77.

8 Enzo Canizzaro, 'Contextualising proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war', *International Review of the Red Cross*, Vol. 88 (864) (2006), p. 791. The principles of *jus in bello* can be traced back to practices of ancient civilizations. Modern *jus in bello* finds its sources in both customary and treaty law, including the Hague Conventions and Regulations, and the 1949 Geneva Conventions and their Additional Protocols (1977). On the other hand, modern *jus ad bellum* finds its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact and the UN Charter. See Malcolm Shaw, *International Law*, 4th edn, Cambridge University Press, Cambridge, 1997, pp. 807–8. See also Judith Gardam, 'Proportionality and force in international law', *American Journal of International Law*, Vol. 87 (1993), p. 391.

9 Christopher Greenwood, 'The relationship between *jus ad bellum* and *jus in bello*', *Review of International Studies*, Vol. 9 (1983), p. 227.

10 François Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire', *International Review of the Red Cross*, Vol. 84 (2002), p. 528.

11 'It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that although the term "laws of war" ought to be discarded, a study of the rules governing use of armed force – legitimate or illegitimate – might be useful ... It was considered that if the Commission ... were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of

the general prohibition of the use of force, armed conflict remains an everyday reality that necessitates some degree of regulation.

‘Just war’ theory and the development of the principle of distinction

Attempts to place war within a legal framework date back to the earliest articulation of the theory of ‘just war’, by virtue of which war was considered a ‘just’ response to illegal aggression.¹² Ultimately, it was a means to restore the rights offended by the aggressor as well as a means of punishment. By relying on the validity of the cause for war, this doctrine brought into place a legal regime that reflected ‘the belligerent’s right to resort to force’.¹³ As such, belligerents were not placed on an equal footing when it came to the application of international humanitarian law; they had different rights and obligations depending exclusively on the validity of their cause. In essence, if the cause was just, any means to achieving that end could be justified.¹⁴

There are important moral and logical defences for the ‘just war’ doctrine. According to the legal maxim *ex injuria non oritur jus*, one should not be able to profit from one’s own wrongdoing. In other words, in moral terms, it seemed unacceptable that an aggressor should benefit from the protections afforded by the laws of armed conflict.¹⁵ However, this view was eventually discarded due to the practical and humanitarian considerations underlying the principle of separation.

Although the distinction between *jus ad bellum* and *jus in bello* appeared in the writings of Grotius,¹⁶ Vitoria and Vattel,¹⁷ it was Kant who first, in the nineteenth century, explicitly distinguished between ‘(1) the Right of going to War; [and] (2) Right during War’.¹⁸ This distinction coincided with the rise of the modern nation-state, and the pre-eminence of the notion of *raison d’état*; war came to be seen as a neutral, de facto situation, such that the cause of war was no longer relevant. This view of violence as a process to be regulated in and of itself is what set the stage for the development of the modern laws of war, by severing their ‘historical dependence on the *jus ad bellum*’.¹⁹ However, the distinction did not really become relevant until the use of force became prohibited in international

the United Nations for maintaining peace.’ *Yearbook of the International Law Commission*, United Nations, New York, 1949, p. 281, para. 18.

12 Robert Kolb, ‘Origin of the twin terms *jus ad bellum* and *jus in bello*’, *International Review of the Red Cross*, No. 320 (1997), p. 554.

13 *Ibid.*

14 *Ibid.*, p. 555. However, Gardam points out that some scholars emphasize that respect for *jus in bello* was an essential element of traditional and modern just war theory. Gardam, above note 8, p. 395.

15 Hersch Lauterpacht, ‘Rules of warfare in an unlawful war’, in G. A. Lipsky (ed.), *Law and Politics in the World Community (Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law)*, University of California Press, Berkeley, 1953.

16 Gardam, above note 8, p. 396.

17 Kolb, above note 12, p. 557.

18 He also distinguished a third category ‘Right after War’, which he describes as the obligation, rather, to establish peace. Immanuel Kant, *The Philosophy of Law. An Exposition on the Fundamental Principles of Jurisprudence as the Science of Right*, 1887, para. 53.

19 Gardam, above note 8, p. 397.

relations,²⁰ as it brought to the fore the question of whether an ‘aggressor’ was entitled to benefit from *jus in bello*.

The fundamental distinction between *jus ad bellum* and *jus in bello*

The law of armed conflict is unique in that it grants rights to individuals (enemy nationals, whether combatants or non-combatants) vis-à-vis a belligerent state. Because of its overriding humanitarian objective, *jus in bello* theoretically applies equally as between all belligerents. This principle, known as the equality of application of international humanitarian law, finds articulation in Article 2 of the 1949 Geneva Conventions and in the Preamble to Additional Protocol I (AP I).²¹ The principles of humanitarian law were also formulated with the realization that they should not make the conduct of warfare impossible, neither should they make a criminal out of every soldier. If this were so, the law would simply undermine itself. It is thus recognized that a certain degree of infliction of violence, death and devastation by all belligerents is to be tolerated as a natural consequence of the conduct of warfare.²²

The humanitarian argument in favour of the separation principle is convincing: essentially, victims on both sides of a conflict are equally worthy of protection. Equally cogent are the pragmatic considerations; it could never be hoped that the belligerents would respect humanitarian law if there were not some element of reciprocity in its application. Arguably, linking *jus in bello* to *jus ad bellum* would lead to either of two equally undesirable scenarios. The first is that *jus in bello* would not apply to a war of aggression in its entirety and hence would bind neither of the parties. Needless to say, such an invitation to unrestricted warfare must be rejected on moral and humanitarian grounds. The second scenario is that *jus in bello* restricts only the aggressor and not the party acting in self-defence. Such a proposition is equally problematic, as, without the element of reciprocity, it is inconceivable that either party will respect the principles of international humanitarian law.²³ This is compounded by the fact that there is always controversy surrounding which party is the aggressor; each will undoubtedly argue that they are acting in self-defence and in complete compliance with *jus ad bellum*.²⁴

The implications of the distinction are that *jus in bello* has to be completely distinguished from *jus ad bellum*, and must be respected independently of any

20 Kolb, above note 12, p. 557.

21 Additional Protocol I stipulates that the principles of international humanitarian law ‘must be applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties’. Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), *International Legal Materials*, Vol. 16, p. 1391.

22 The Preamble to Hague Convention IV stipulates that the Regulations are formulated with a view to ‘diminish[ing] the evils of war, so far as military requirements permit’, reflecting the pragmatic approach adopted in the codification of the laws of armed conflict. See 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, in Roberts and Guelff (eds.), above note 6, p. 67.

23 See Lauterpacht, above note 15.

24 See Gardam, above note 8, p. 394.

argument concerning the latter. This is so because ‘the two sorts of judgement are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules’.²⁵ In other words, ‘the limitation on *jus ad bellum* has no influence on *jus in bello*’.²⁶ This is so even though the two bodies of law operate simultaneously in many situations. For, although the mainstream view is that the two bodies of law apply at different stages of a conflict (*jus ad bellum* affects the legality of the initial recourse to force, whereas *jus in bello* logically applies after hostilities have begun), it is questionable that this sequential distinction is still relevant. Recent developments have entailed that the two bodies of law no longer operate at different stages; once hostilities begin it is necessary to consider and apply both.²⁷ *Jus ad bellum* thus applies ‘not only to the act of commencing hostilities’ but also to each subsequent act involving the use of force, which has to be justified by reference to the principles of necessity and proportionality.²⁸ Simultaneous application of *jus ad bellum* and *jus in bello* should not imply that the two concepts are linked or interdependent. Acts that are in complete conformity with *jus in bello* may nonetheless be prohibited under *jus ad bellum*. Similarly, an attack that is inconsistent with *jus in bello* does not necessarily affect the legality of the use of force.²⁹

Can *jus ad bellum* override *jus in bello*? Rejecting the ‘state survival’ trump card

Should the perceived ‘justness’ of a belligerent’s cause modify the application of *jus in bello* as between the parties? This question, which raises questions not only of law but also of competing normative principles, admits no easy answer. Just over a decade ago, the ICJ grappled with this question in its 1996 *Advisory Opinion on the Threat or Use of Nuclear Weapons*. The Court’s controversial conclusion, the result of a process of negotiated compromise,³⁰ was that international law was unclear on the issue. While such a finding vindicates neither side of the debate, it

25 Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, Basic Books Classics, New York, 1997, p. 21.

26 Daniel Warner, ‘The Nuclear Weapons Decision by the International Court of Justice: Locating the *raison* behind the *raison d’état*’, *Millennium: Journal of International Studies*, Vol. 25 (1998), p. 311. Although the aggressor may not be denied the right to rely on international humanitarian law during the war, this view is questionable in the area of the law of neutrality, and possibly belligerent rights after the cessation of hostilities (including acquisition of title over property, but not rights and duties in Occupation of a humanitarian character). See Lauterpacht, above note 15, pp. 104–10 and Greenwood, above note 9, p. 230.

27 Greenwood, above note 9, p. 222.

28 *Ibid.*, p. 223.

29 Gardam, above note 8, p. 392.

30 See Théodore Christakis, ‘De maximis non curat praetor? L’affaire de la licéité de la menace ou de l’emploi d’armes nucléaires’, *Revue Hellénique de Droit International*, Vol. 49 (1996), pp. 355–99. See also Burns Weston, ‘Nuclear weapons and the World Court: ambiguity’s consensus’, *Transnational Law & Contemporary Problems*, Vol. 7 (1997), p. 384.

unfortunately opens the door to the possibility that *jus ad bellum* may override *jus in bello* in certain circumstances.

The ICJ *Nuclear Weapons* Advisory Opinion: a return to 'just war' theory?

The *Nuclear Weapons* Advisory Opinion, in its key operative paragraph – paragraph 2E of the *dispositif* – reflects the extent of this controversy. The Court, by a vote of seven in favour and seven against, and with the casting vote of the President, held that

In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or 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.³¹

Coupled with the preceding statement that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law', one may be led to the conclusion that the use of nuclear weapons may be justified in 'extreme circumstances of self-defence', even if such use violates international humanitarian law. The endless polemical debates inspired by the perplexing wording of paragraph 2E are manifest in the declarations and separate and dissenting opinions of the judges.³² As Christakis aptly puts it, 'la construction "pythienne" du paragraphe vise à laisser le champ libre au jeu sans fin des interprétations, avec l'espoir que toutes les possibilités s'excluraient mutuellement, la non-conclusion de la cour ayant le don de changer de forme à volonté, comme le mythique Protée!'³³

Judge Fleischhauer – who criticized the Court's use of 'hesitating, vague and halting terms' – reached the conclusion that nuclear weapons could be used in violation of international humanitarian law in an extreme situation of self-defence threatening the very existence of the state.³⁴ Presenting the problem as one of competing principles of international law, he contended that any interpretation of paragraph 2E that gives precedence to international humanitarian law over the

31 *Nuclear Weapons* case, above note 7, para. 2E, *dispositif*.

32 For the first time in its history, each of the Court's judges drafted an individual opinion. Judges Guillaume, Fleischhauer and Higgins and Vice-President Schwebel supported the view that recourse to nuclear weapons is lawful under certain conditions, whereas Judges Shahabuddeen, Weeramantry, Koroma, Ranjeva, Ferrari Bravo and Herczegh held it to be categorically unlawful.

33 Christakis, above note 30, p. 391. 'The "snake-like" construction of the paragraph aims to leave the field open for endless interpretation games, with the hope that all possibilities will mutually exclude each other; the non-conclusion of the Court has the gift of changing forms at will, like the mythical Proteus!' (author's translation).

34 Separate Opinion of Judge Fleischhauer, 35 ILM, p. 834, para. 4. The only other judge on the Court who seems to share a similar opinion is Judge Vereshchetin, who held that the Court was 'debarred' from finding a general rule of international humanitarian law that comprehensively proscribes recourse to nuclear weapons. See Declaration of Judge Vereshchetin, 35 ILM, p. 809, para. 2.

inherent right of self-defence is an incorrect statement of the law. Such a contention would deny a state its legitimate right to self-defence, particularly if recourse to nuclear weapons was the last means available to it.³⁵ Arguing that the rules of international humanitarian law and the right to self-defence are ‘in sharp opposition to one another’ as far as the use of nuclear weapons is concerned, he referred to the general principle that ‘no legal system is entitled to demand the self-abandonment, the suicide, of one its subjects’.³⁶ This finding goes beyond the claims of any of the nuclear weapons states that appeared before the Court.

By linking application of *jus in bello* with the reasons for going to war,³⁷ Fleischhauer’s interpretation skews the ‘classical legal distinction between *jus ad bellum* and *jus in bello*’.³⁸ Such a view relies on the principle of ‘*raison d’état*’ – a Hobbesian notion that subordinates international humanitarian law to the ‘right’ of state survival, obliterating ‘the distinction between the limitations on self-defence and the limitations within humanitarian law’.³⁹ It also creates a new threshold, that of ‘state survival’, that gives rise to a different level of self-defence, one in which the state is no longer bound by the circumscriptions of humanitarian law.⁴⁰ The right to self-defence thus becomes limitless, with huge implications for the rights of victims of armed conflict, as well as for the security of states. Such a loophole represents new ‘doctrinal terrain’,⁴¹ the danger of which is compounded by the Court’s failure to clarify the scope of that separate category of self-defence, and the possible limitations that may apply to it.⁴² According to Akande, ‘there is no basis in international law for introducing the notion of the survival of the state as a legitimate excuse for violating the law of armed conflict’.⁴³ Such a dangerous proposition, after all, would allow states to justify any violation of international humanitarian law – not specifically related to nuclear weapons – in the face of so-called extreme circumstances that threaten their survival. With no international

35 This is in sharp contrast to the view espoused by Higgins that, ‘in the present case, it is the physical survival of peoples that we must constantly have in view’. See Dissenting Opinion of Judge Higgins, 35 ILM, p. 934, para. 41.

36 Fleischhauer, above note 34, para. 5.

37 Warner, above note 26, p. 311.

38 *Ibid.*, p. 301.

39 *Ibid.* He further contends that the ‘right’ to state survival is a right that ‘has never been heard of before’. Dissenting Opinion of Judge Koroma, 35 ILM, p. 926.

41 Richard Falk, ‘Nuclear weapons, international law and the World Court: A Historic Encounter’, *American Journal of International Law*, Vol. 91 (1996), p. 64.

42 It is further unclear what the Court meant by the ‘very survival of a State’; it could possibly mean the ‘political survival of the government of a State, the survival of a State as an independent entity, or the physical survival of the population’. Michael J. Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’, *American Journal of International Law*, Vol. 91 (1997), p. 430. On the other hand, Weiss contends that the term ‘extreme circumstances’ implies that the exception is to be construed very narrowly (physical destruction of inhabitants, or absorption of the functions of statehood by another state). See Peter Weiss, ‘The World Court tackles the fate of the earth: an introduction to the ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons’, *Transnational Law & Contemporary Problems*, Vol. 7 (1997), pp. 325–6. However, in the light of this, would Kuwait have been permitted to use nuclear weapons against Iraq to repel the 1990 invasion?

43 Dapo Akande, ‘Nuclear weapons, unclear law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court’, *British Yearbook of International Law*, Vol. 68 (1997), p. 209.

arbitrator to determine the existence of such circumstances, allowing states to make a determination of 'extreme self-defence' would inevitably lead to a situation of subjectivity, arbitrariness and unpredictability.

However, did the Court really say that extreme situations of self-defence were unlimited under international humanitarian law? In fact, the Court clearly asserted that any threat or use of nuclear weapons contrary to the provisions of the UN Charter was illegal, and that the exercise of the right to self-defence was limited by the conditions of necessity and proportionality.⁴⁴ The Court also affirmed in no uncertain terms that the principles of humanitarian law apply to nuclear weapons.⁴⁵ In paragraphs 90 and 91, the Court found that whereas recourse to nuclear weapons was 'scarcely reconcilable' with humanitarian law, it could not ascertain that it would necessarily violate international humanitarian law in every circumstance.⁴⁶ This goes hand in hand with the assertions made by nuclear weapons states that such weapons can be used in a variety of different circumstances with different effects. In light of these findings, various interpretations have been advanced to avoid the controversial subordination of *jus in bello* to *jus ad bellum*. One suggestion is that the Court envisioned a scenario in which nuclear weapons could be used within the limits imposed by humanitarian law.⁴⁷ This is the conclusion reached by Judge Schwebel in his dissenting opinion.⁴⁸

According to Judge Higgins, the ambiguous wording of paragraph 2E – in particular the peculiar use of the word 'generally' in the first sentence – raises many questions and 'answers none of them'.⁴⁹ In her view, it can be presumed that the second sentence of paragraph 2E does not refer to those exceptional circumstances of self-defence where the use of nuclear weapons is compatible with international humanitarian law. It is counterintuitive to suggest that the Court could not judge whether the use of nuclear weapons in a way that complied with both Article 51 of the UN Charter and international humanitarian law was lawful or not. By way of logic, the Court must have been addressing those 'general' circumstances in which recourse to nuclear weapons would contravene humanitarian law – and that 'it is addressing whether in those circumstances a use of force *in extremis* and in conformity with Article 51 of the Charter, might nonetheless be regarded as lawful ...'.⁵⁰ To that question, the Court's answer is that it does not know, leaving

44 *Nuclear Weapons* case, above note 7, para. 42. However, it also emphasized that the proportionality principle cannot rule out, a priori, any recourse to nuclear weapons.

45 *Ibid.*, para. 86.

46 The Court was of the view that there was nothing in international law that prohibited nuclear weapons per se. The answer was thus to be found in the examination of these two bodies of law. *Ibid.*, para. 36.

47 See Christopher Greenwood, 'The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law', *International Review of the Red Cross*, No. 316 (1997), p. 65.

48 'The use of nuclear weapons is ... exceptionally difficult to reconcile with the rules of international law applicable in armed conflict But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict with those rules of international law. On the contrary, as the *dispositif* in effect acknowledges, while they might 'generally' do so, in specific cases they might not ...'. Dissenting Opinion of Vice-President Schwebel, 35 ILM, p. 840.

49 Higgins, above note 35, para. 25.

open ‘the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful’.⁵¹ This controversial pronouncement of a *non-liquet* is what opened the door to interpretations of the decision that subordinated *jus in bello* to *jus ad bellum*.⁵² In order to avoid this controversy, Judge Higgins concludes that recourse to nuclear weapons may be lawful if it complies with the principles of necessity and proportionality. However, as will be further illustrated, this analysis has conflated the proportionality requirements under *jus ad bellum* and *jus in bello*, further contributing to the blurring of the distinction between the two bodies of law.

The question of competing legal principles

The question of whether or not international humanitarian law forms part of the corpus of *jus cogens* could also shed light on how to resolve the apparent conflict between the two bodies of law. Several of the states that appeared before the Court were of the view that the principles of international humanitarian law were of *jus cogens* nature, and hence could not be trumped by any other principle of international law.⁵³ Displaying its traditional reluctance to pronounce on the issue of *jus cogens*,⁵⁴ the Court used a novel term – ‘intransgressible’ – to describe the principles of international humanitarian law.⁵⁵ Arguably, a principle that is ‘intransgressible’ is one that admits no derogation, and is hence also a peremptory norm of international law. However, the Court does not seem to be saying so; it explicitly stated in paragraph 83 that it was unnecessary to make a pronouncement on the *jus cogens* nature of these norms. Has the Court thus invented a new – and rather ambiguous – normative category, that of ‘intransgressible principles of customary international law’?⁵⁶ In essence, what the Court seems to be saying is that the principles of international humanitarian law may or may not be of *jus cogens*

50 *Ibid.*, para. 28.

51 *Ibid.*, para. 29.

52 Paragraph 90 set the stage for the controversy that resulted in the pronouncement of a *non-liquet* in paragraph 2E of the *dispositif*. The Court’s pronouncement of a *non liquet* is itself a matter of much controversy. Does it imply that the conduct in question is acceptable (as per the *Lotus* principle)? According to Judge Higgins, rather than pronouncing a *non liquet*, the Court should have embraced the difficult task of weighing the competing legal claims against each other. Higgins, above note 35, para. 37–40. See also Falk, above note 41, p. 66.

53 It has also been argued that at least certain cardinal principles of international humanitarian law form part of *jus cogens*, such as the prohibition of means of warfare that have indiscriminate effects or cause unnecessary suffering. Separate Opinion of President Bedjaoui, [1996] ICJ Rep. 268 and 46, para. 21.

54 See Christakis, above note 30, p. 380.

55 This term leaves open many questions: ‘S’agit-il, comme on aurait automatiquement tendance à penser, d’une autre manière pour appeler les principes ‘impératifs’, le *jus cogens*?’ *Ibid.* [Does it mean, as we automatically have the tendency to think, another way of naming the non-derogable principles of *jus cogens*? (author’s translation)]

56 The Court is thus slipping into the dangerous territory of ‘relative normativity’. See Prosper Weil, ‘Towards a relative normativity in international law?’, *American Journal of International Law*, Vol. 77 (1983), p. 413.

nature, but in any case they are not simply regular customary rules, but 'in-transgressible' ones.⁵⁷

In order to avoid simplistic assumptions regarding the admissibility (or otherwise) of violating international humanitarian law in circumstances of extreme self-defence, it is necessary to consider the result had the Court made a determination in favour of the *jus cogens* nature of international humanitarian law. Arguably, in that case, the answer would have been clear-cut: under no circumstances could derogation from such norms be permitted.⁵⁸ However, this proposition does not answer the question, but leads us to ask another one: how can we balance two competing norms of *jus cogens* (the prohibition of the use of force, with its built-in exceptions, on the one hand, and the principles of international humanitarian law, on the other)? There seems to be no clear answer in international law. What we have, in effect, is 'a head-on collision of fundamental principles, neither of which can be reduced to the other'.⁵⁹ The question thus seems hardly relevant, and the resolution of the paradox lies not in the nature of either body of law, but rather in the nature of the interaction between them and how best to achieve the objectives they seek to serve.

Does extreme self-defence preclude state responsibility for breaches of *jus in bello*?

In further support of the separation of *jus ad bellum* and *jus in bello*, the 2001 Draft Articles on State Responsibility clearly indicate that international humanitarian law may not be subordinated to *jus ad bellum*. Article 21 of the Draft Articles stipulates that 'the wrongfulness of an act of state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.⁶⁰ However, the Commentary states in no uncertain terms that self-defence may not preclude the wrongfulness of violations of international humanitarian law and that a state acting in self-defence is 'totally restrained' by international obligations that are intended to apply as a definitive constraint in armed conflict.⁶¹ Self-defence must be taken 'in conformity with the Charter of the United Nations', an allusion to the conditions of necessity and proportionality. Article 21 is only intended to preclude the wrongfulness of the 'non-performance of certain obligations under Article 2(4) of the Charter provided that such non-performance is related to the breach of that provision'.⁶² In other words, the only

57 Christakis, above note 30, p. 381.

58 However, Dominicé raises the important question as to 'si le *jus cogens* relève uniquement du droit des traités, ou si ... il prohibe tous les actes matériel ou juridiques qui lui sont contraires'. See Christian Dominicé, 'Application par la Cour Internationale de Justice', in *Les Nouvelles Frontières du Droit International Humanitaire*, Institut d'études de droit international, Paris, 2003, pp. 81–8.

59 *Ibid.*

60 James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 166.

61 *Ibid.*, p. 167.

62 *Ibid.*, p. 166.

conduct justified by the principle of self-defence is that which is taken in response to violations of Article 2(4) of the UN Charter and is within the legal limits of necessity and proportionality.

However, this analysis must be taken a step further. In its 1996 decision, the ICJ referred to ‘extreme circumstances’ of self-defence, which if considered as a separate category of self-defence, might fall under another provision of the Draft Articles. A likely candidate is the principle of necessity (Article 25). However, this possibility is to be excluded as, unlike self-defence, necessity ‘does not presuppose a wrongful act on the part of the other State’.⁶³ But necessity can arise in another context, namely as a pretext, in itself, for violations of international humanitarian law. The pleas of necessity and military necessity are frequently brought up by defendants in war crimes trials to justify violations of international humanitarian law.⁶⁴ Necessity may be invoked in some limited circumstances in order to preclude the wrongful conduct of a state. However, the doctrine of military necessity is not covered by Article 25, as it is taken into account in the formulation of the obligations set out in humanitarian conventions, some of which ‘expressly exclude reliance on military necessity’.⁶⁵ The concept of military necessity thus cannot justify violations of international humanitarian law, since the purpose of the latter is to subordinate the narrow interests of a belligerent to a higher interest, the dictates of humanity. States adopted these rules in full awareness that they were limiting themselves from complete freedom of action in conducting warfare. As such, military necessity should be seen as a limitation on the rights of belligerents, the effect of which is one of ‘non-necessity’; it is a circumstance that precludes the *lawfulness* of conduct normally allowed.⁶⁶ This proposition is an important one, as some states have been inclined to widen the concept of military necessity or invoke a right of self-preservation to justify violations of international humanitarian law. In short, the maxim that *Not kennt kein Gebot* (‘necessity knows no law’) ‘finds no place in *jus in bello*’.⁶⁷

Conflating proportionality and necessity under *jus ad bellum* and *jus in bello*

It is contended that any act that contravenes *jus in bello* cannot be considered a proportionate and reasonable measure of self-defence under *jus ad*

63 Marcelo G. Kohen, ‘The notion of state survival in international law’, in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, p. 307.

64 It is important to distinguish between the concepts of necessity as a criminal defence, necessity as a situation precluding the wrongfulness of a state, and military necessity as the condition which allows a belligerent to derogate from the law of peace in order to achieve victory over the enemy. The latter is both an *exception* and a *principle of limitation*. See Paul Weidenbaum, ‘Necessity in international law’, *Transactions of the Grotius Society*, Vol. 24 (1938), p. 113.

65 Crawford, above note 60, p. 185.

66 Commentary to Article 33 (Necessity) of 1996 Draft Articles on State Responsibility, in *ILC Annual Report*, 1996, para. 27.

67 Kohen, above note 63, p. 311.

bellum.⁶⁸ In support of this proposition, which clearly links *jus ad bellum* and *jus in bello*, the following statement of the ICJ is cited: ‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law’.⁶⁹ There are, however, two ways of looking at this statement. According to the first view, in order for any use of force to be legal, it must respect both the *jus ad bellum* limit of proportionality and the principles of *jus in bello*. Proportionality in self-defence is thus a necessary, but not a sufficient, element in determining legality. In other words, any lawful use of force must meet the conditions of both bodies of law, independently. The second interpretation is that in order for self-defence to be proportionate, it must respect international humanitarian law. This view unnecessarily conflates *jus ad bellum* with *jus in bello*.

The ICJ has affirmed that under *jus ad bellum* self-defence is limited by the principles of necessity and proportionality.⁷⁰ Similarly, the principles of proportionality and military necessity under *jus in bello* place important limitations on how force is used, although they apply in a different manner. Although these principles are, in theory, distinct, they have often been applied in a way that unnecessarily blurs the distinction between *jus ad bellum* and *jus in bello*.

Proportionality under *jus ad bellum* and *jus in bello*

Prevailing legal scholarship clearly distinguishes between the application of the proportionality principle as a limit to the use of force in self-defence (under *jus ad bellum*) and as a limit to the extent to which the adversary can be injured under *jus in bello*. However, this distinction is not always apparent. Although scholars have expressed concern about the limits of proportionality and the vagueness of its definition, the relationship between its two aspects has been infrequently addressed.⁷¹

Self-defence and proportionality

The requirement of proportionality in the *jus ad bellum* context limits a state’s ability to resort to force, as well as the degree of force it can use. In other words, such force must only be used defensively and must be strictly confined to that defensive objective.⁷² Proportionality remains relevant throughout the duration of the conflict. In other words, a state may not assess proportionality only when determining the initial recourse to force, then dispense with it completely.⁷³

68 Greenwood, above note 9, p. 231.

69 *Nuclear Weapons* case, above note 7, para. 42.

70 ICJ, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, [1986] ICJ Rep., para. 194; *Nuclear Weapons* case, above note 7, para. 41.

71 Gardam, above note 8, p. 392.

72 Akande, above note 43, p. 191.

73 Gardam, above note 8, p. 404.

There is an important doctrinal debate regarding whether this principle implies proportionality to the scale of the attack suffered by the state (backward-looking) or proportionality to the objective that the state acting in self-defence is seeking to achieve (forward-looking). Canizzaro distinguishes between what he calls the quantitative and qualitative tests of proportionality. Under the former, proportionality entails that the defensive action must conform to quantitative features of the aggressive attack, ‘such as the scale of the action, the type of weaponry, and the magnitude of the damage’.⁷⁴ On the other hand, a qualitative test focuses instead on whether the defensive act is appropriate in relation to the ends sought, namely to repel the attack. Under this test the defender may depart from an ‘exact correspondence’ with the aggressive attack, which has a significant effect on determining the limits of what is considered proportional.⁷⁵ Because of the indeterminacy of the principle of proportionality, it is a term that can easily lend itself to confusion and abuse.⁷⁶

Proportionality under jus in bello

The proportionality principle takes on a different structure under *jus in bello* and is based on a different logic. Assessing proportionality under *jus in bello* entails balancing the harm caused by an attack – in terms of suffering or collateral damage (principles of humanity) – against the value of the anticipated military advantage to be achieved by the belligerent.⁷⁷ It is based on the ‘fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy’.⁷⁸ It includes both the ‘proportionality’ of civilian collateral damage,⁷⁹ as well as the ‘proportionality’ of the degree of injury or suffering caused to combatants⁸⁰ in relation to the military ends pursued. Proportionality under *jus in bello* is measured by reference to the ‘immediate aims’ of *each single military attack*, rather than the ‘ultimate goals’ of the broader military action. It is part of both customary international law and treaty law, as inferred from various provisions of AP I.

Conflating the two proportionality principles

The difference between the two proportionality principles can be described as the limitation on the overall force used to respond to a grievance (under *jus ad bellum*) as opposed to the balance between the anticipated military advantage of attacking a particular objective, weighed against the resulting losses, under *jus in bello*.⁸¹ The

⁷⁴ Canizzaro, above note 8, p. 783. See also Higgins, above note 35, para. 5.

⁷⁵ Canizzaro, above note 8, pp. 783–4.

⁷⁶ However, it is possible that this infinite flexibility is both a strength and a weakness. See Gardam, above note 8, p. 412.

⁷⁷ Akande, above note 43, p. 208.

⁷⁸ Gardam, above note 8, p. 391.

⁷⁹ API, Art. 51(5)(b).

⁸⁰ *Ibid.*, Art. 35(2).

⁸¹ Gardam, above note 8, p. 391. See also Akande, above note 43, p. 191.

proportionality requirement in each of the two bodies of law is based on a different logic. Whereas 'the legal regulation of the use of force is based on a superior right of the attacked state in regard to the attacker, the legal regulation of the means and methods of warfare is dominated by the principle of the parity of the belligerents and by the concomitant principle of the respect owed by each of them to interests and values of a humanitarian nature'.⁸² The difference in the normative values underlying *jus ad bellum* and *jus in bello*, with their associated different standards of legality, accounts for the different structure of the two proportionality principles. Although this distinction may be apparent in theory, in practice the two proportionality principles are often merged.⁸³ Arguably, applying the proportionality principle under *jus ad bellum* has implications for *jus in bello*, such as the choice of weaponry.⁸⁴ On the other hand, it has also been argued that the proportionality requirement under *jus ad bellum* has no humanitarian content (it was traditionally related exclusively to limitations on the damage of the territory of a state and of third states).⁸⁵ Whatever the merits of either argument, the *practical end result* of applying the *jus ad bellum* proportionality principle will be to affect the degree of force used and hence the degree of suffering inflicted upon belligerents. If it is applied as a principle of limitation, it will result in greater protection for the victims of armed conflict. However, this should be distinguished from the notion of proportionality under *jus in bello*, which has a strictly humanitarian objective.

Although there is a large area of overlap between the two proportionality rules, there are also situations where 'strict application of the *jus ad bellum* standard would make it impossible to achieve the aims of *jus in bello*'.⁸⁶ A case in point is the international coalition's extension of the military campaign against Iraq in 1991 beyond the borders of Kuwait, the use of massive aerial bombardment before the deployment of troops and the large-scale destruction of Iraqi infrastructure essential to civilian life. Arguably, this was essential for the early capitulation of Iraq and hence proportionate in relation to the objective of achieving rapid Iraqi withdrawal from Kuwait. However, in light of the devastating impact on Iraqi civilians, did the choice of targets and the methods and means of warfare employed meet the proportionality test under *jus in bello*, in each separate attack? This proposition is far more questionable.⁸⁷ However, a finding that an attack or series of attacks did not meet the proportionality test under *jus in bello* should have no bearing on whether the conflict is a legitimate exercise of self-defence, a notion that many writers fail to recognize. Whereas the first breach is a war crime, a breach of *jus ad bellum* invokes both state and individual criminal responsibility, the latter in

82 Canizzaro, above note 8, p. 782.

83 *Ibid.*, p. 781.

84 Christopher Greenwood, '*Jus ad bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion', in Boisson de Chazournes and Sands, above note 63, p. 258.

85 Judith Gardam, 'Necessity and Proportionality in *jus ad bellum* and *jus in bello*', in Boisson de Chazournes and Sands, above note 63, p. 277.

86 Canizzaro, above note 8, p. 781.

87 Gardam, above note 8, pp. 404–05.

the form of a crime of aggression.⁸⁸ At another level, some writers have questioned the proportionality (under *jus ad bellum*) of the overall campaign against Iraq, arguing that the use of force was more than that proportionate to the end of repelling Iraq's invasion. According to Walzer, the scale of force used served an 'unjust' aim: the overthrow of Saddam Hussein's regime.⁸⁹ Again, such a contention has no bearing on whether the proportionality test was met with respect to each individual military operation under *jus in bello*.

It has been argued that application of the principle of proportionality to the question of recourse to nuclear weapons may reconcile the perceived dichotomy between the use of nuclear weapons in self-defence and the adherence to international humanitarian law standards. In her dissenting opinion to the *Nuclear Weapons Advisory Opinion*, Judge Higgins made the argument that the suffering associated with nuclear weapons (a *jus in bello* consideration) can conceivably meet the test of proportionality when balanced against 'extreme circumstances' such as 'defence against untold suffering or the obliteration of a State or peoples'.⁹⁰ An attack is thus 'proportionate' if the 'military advantage' is one 'related to the very survival of a State or the avoidance of infliction ... of vast and severe suffering on its own population'.⁹¹ Arguably, such an interpretation does not place *jus ad bellum* above *jus in bello*, but rather underscores that the extent of damage caused by nuclear weapons is such that it can only be justified by a military objective as important as preserving the state's very survival. However, such an application of the proportionality principle falls into the trap of conflating the proportionality principle under *jus ad bellum* and *jus in bello*. Ultimately, under *jus in bello*, the extent of suffering is to be measured against the 'concrete and direct military advantage anticipated' from an attack. No consideration should be given to the overall goals of the military action, whether they are self-defence against unlawful aggression that threatens to obliterate the state, or otherwise. Conversely, under *jus ad bellum*, the proportionality of the attack is to be measured against the overall military goals such as subordinating the enemy, or fending off or repelling an attack. Conflating the two proportionality principles in such a manner transforms it from a principle of limitation to one that can be invoked to justify a degree of injury and destruction which would otherwise be considered clearly excessive in the proportionality equation under *jus in bello*. In other words, the argument that recourse to nuclear weapons in compliance with *jus ad bellum* 'might of itself exceptionally make such a use compatible with humanitarian law'⁹² erroneously confuses proportionality under *jus ad bellum* with that under *jus in bello*.

Since proportionality is a slippery concept, there are bound to be differences in opinion in the course of its application. State practice suggests that the

88 *Ibid.*

89 Walzer, above note 25.

90 Higgins, above note 35, para. 18.

91 *Ibid.*, para. 21.

92 *Ibid.*, para. 25.

perceived legality of a state's recourse to force has a subtle impact on its assessment 'of the means that can be legitimately used to achieve its goal'.⁹³ In the 1991 Gulf War, for instance, the 'justness' of the Coalition's cause and the 'unjustness' of perceived Iraqi aggression legitimated the aim of minimizing Coalition casualties and hence the pursuit of a policy of aerial bombardment.⁹⁴ It is unlikely that the 'international community would have tolerated the scale of civilian casualties ... if it were not for the consensus that Iraq's action had no legal or moral basis'.⁹⁵ This analysis can undeniably be extended to encompass the decision to resort to high-altitude precision bombing in the 1999 'humanitarian intervention' (undoubtedly the epitome of the 'just cause') in Kosovo, at the expense of increased civilian casualties. This is unfortunate, since the application of the proportionality principle under *jus ad bellum* should, in fact, limit the degree of damage that can be inflicted on the enemy.

Necessity under *jus ad bellum* and *jus in bello*

According to the limit of necessity under *jus ad bellum*, a state may not resort to armed force unless it has no other means to defend itself.⁹⁶ One of the factors that have contributed to linking *jus ad bellum* and *jus in bello* has been the way in which the separate notions of necessity as a limit to self-defence, and military necessity as a limit to a belligerent's conduct in warfare, have been confused. The terms 'necessity', 'military necessity', 'urgent military necessity', 'self-defence' and 'self-preservation', which all mean different things, have been used interchangeably to justify violations of the laws of armed conflict. Writing in 1952, Dunbar distinguished between 'necessity in the interest of self-preservation' or the use of force in self-defence and 'military necessity' or 'necessity in war', which relates to the actual conduct of hostilities. He argued that owing to the frequent use of the term 'necessity in self-preservation' to justify acts of a hostile nature carried out by states as a matter of military expediency, the meaning assigned to the two concepts became obscured.⁹⁷

Military necessity and jus in bello

In the early classicist writings, infringements of *jus in bello* were tolerated in cases of 'urgent military necessity'.⁹⁸ In general, international lawyers 'regard[ed]' military necessity as the *bête noir* of international jurisprudence, destroying all legal restriction and allowing uncontrolled brute force to rage rampant over the battlefield

93 Gardam, above note 8, p. 393.

94 *Ibid.*, p. 404.

95 *Ibid.*, p. 412.

96 Gardam, above note 85, p. 278.

97 N. C. H. Dunbar, 'Military necessity in war crimes trials', *British Yearbook of International Law*, Vol. 29 (1952), p. 443.

98 Weidenbaum, above note 64, pp. 116–17.

or wherever the military have control'.⁹⁹ The term 'military necessity' was used in the past to mean three different things. First, it was construed in the Lieber code to signify those measures, taken in conformity with international law, to bring about the submission of enemy forces, including the scope and degree of force that may be lawfully employed to destroy enemy life, limb and property.¹⁰⁰ Second, it denoted 'exceptional circumstances of practical necessity' that were expressly mentioned in the Hague Regulations and other relevant conventions, and which allowed certain acts that would otherwise be proscribed.¹⁰¹ In other words, it included that category of rules which were expressly qualified in the relevant conventions.

The final conception of 'military necessity' was the most controversial and appeared in German scholarly writing on the First World War, although it has been widely discredited since the adoption of the Hague Conventions.¹⁰² Essentially it was based on the German doctrine of *Kriegsraison geht vor Kriegsmanier*, by virtue of which some argued that obligations under the laws of armed conflict 'may be displaced by urgent and overwhelming necessity'.¹⁰³ This notion was purportedly based on a fundamental right of 'self-preservation', and entails that a belligerent may disregard international humanitarian law if the observance of its rules will endanger its own armed forces. Proponents of this view based their case on the practical consideration that commanders will inevitably act on it in spite of the existence of any rule to the contrary.¹⁰⁴ However, since the effect of the Hague Conventions was expressly to undermine that doctrine by requiring a balance between military necessity and the dictates of humanity, the question that arose was whether a distinction could be made between mere military necessity and 'dire or genuine necessity'. Scholars advancing this doctrine attempted to draw a line between military necessity in relation to a single military unit, and overruling necessity arising out of 'an extreme emergency of a state as such'.¹⁰⁵ This latter type of necessity was construed as having the force of overruling any law, including the Hague Conventions. However, as previously illustrated, international law envisions no such exception, as affirmed by the Draft Articles on State Responsibility. In effect, historical interpretations of 'military necessity' are now obsolete; it has been repeatedly affirmed that this principle cannot be invoked to justify violations

99 William Gerald Downey, Jr, 'The law of war and military necessity', *American Journal of International Law*, Vol. 47 (1953), p. 254.

100 See General Orders 100, Instructions for the Government of the Armies of the United States in the Field, Art. 14, available at www.yale.edu/lawweb/avalon/lieber.htm (last visited 25 August 2008).

101 Dunbar, above note 97, p. 444.

102 Weidenbaum, above note 64, p. 110.

103 Dunbar, above note 97, pp. 444–5. Although the doctrine of *Kriegsraison* was essentially non-binding, it was often invoked to circumvent legal obligations. Similar notions can be traced in the declarations of statesmen such as Rostow, who held that '[m]ost states will sacrifice the law of armed conflict if the price of obedience is defeat or annihilation', and Dean Acheson, who stated that '[I]aw simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty ... No law can destroy the state creating the law. The survival of states is not a matter of law.'

104 *Ibid.*, p. 446.

105 Weidenbaum, above note 64, pp. 110, 112–13.

of international humanitarian law.¹⁰⁶ Conversely, it prohibits acts that are not essential to achieve a 'direct and concrete military advantage'.¹⁰⁷ As such, the notion of military necessity 'proscribes, indirectly, what might otherwise constitute lawful acts of warfare by laying down the principle that 'no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances'.¹⁰⁸ However, the concept of 'state survival' as it appears in various interpretations of the *Nuclear Weapons Advisory Opinion* – including Judge Fleischhauer's controversial opinion – strikes dangerous parallels with the *Kriegsraison* doctrine.

International jurisprudence: simultaneously reaffirming and blurring the distinction

The jurisprudence of international courts has, by and large, affirmed the distinction between *jus ad bellum* and *jus in bello*. Such courts have endeavoured to balance the laws of humanity on the one hand with the practical exigencies of military action on the other, regardless of any *jus ad bellum* considerations, such that the application of *jus in bello* would not render the conduct of warfare impossible. However, what is also notable is the confusion – whether intentional or accidental – of terms such as 'self-defence', 'necessity' and 'military necessity', which may have further contributed to blurring the distinction between *jus ad bellum* and *jus in bello*.

War crimes trials following the Second World War

At face value it can be argued that the case law of the International Military Tribunal at Nuremberg, which was held in the aftermath of the Second World War, subordinated *jus in bello* to *jus ad bellum* considerations. However, a closer examination reveals that this was not the case, but rather that there was a degree of confusion caused by the inaccurate use of terms such as 'emergency', 'necessity' and 'military necessity' in the Tribunal's case law. For instance, in the *Ministries Trial*, the Tribunal held that

By resorting to armed force, Germany violated the Kellogg-Briand Pact. It thereby became an international outlaw and every peaceable nation had the right to oppose it without becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim. The doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violation of that law.¹⁰⁹

106 Gardam, above note 85, p. 282.

107 Michael Schmitt, 'Green War: An Assessment of the Environmental Law of the Law of Armed Conflict', *Yale Journal of International Law*, Vol. 22 (1997), p. 52.

108 Dunbar, above note 97, p. 444.

109 *USA v. Weizsäcker et al.*, quoted in Dunbar, above note 97, p. 446.

Although the justification of self-defence was clearly unavailable to Germany as an aggressor, the doctrine of military necessity, which belongs to the domain of *jus in bello*, should apply irrespective of that determination. What appears to have happened in this case is that the Tribunal used the two terms interchangeably. It can be discerned from the Tribunal's application of the concept of military necessity in other cases that its intention could not have been to claim that Germany, as an aggressor, could not invoke 'military necessity' in respect of any of its belligerent actions. In the *Justice Trial*, for instance, the Tribunal dismissed the view that 'by reason of the fact that the war was a criminal war of aggression, every act which would have been legal in a defensive war was illegal in this one'.¹¹⁰ It proceeded to state that, under such reasoning, 'the rules of land warfare upon which the prosecution has relied would not be the measure of conduct, and the pronouncement of guilt in any case would become a mere formality'.¹¹¹ Similarly, in the *Hostages Trial*, the Tribunal emphatically rejected the view that Germany could not invoke the law of belligerent occupation since the occupation was based on an illegal use of force. It stated that

The Prosecution advances the contention that since Germany's war against Yugoslavia and Greece were aggressive wars, the German occupant troops were there unlawfully and gained no rights whatever as an occupant ... [W]e accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime ... At the outset, we desire to point out that international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in the occupied territory.¹¹²

Quoting Oppenheim, the Tribunal further held that '[t]he rules of international law apply to war from whatever cause it originates'.¹¹³ Of particular relevance is the Tribunal's approach to the plea of 'necessity', which was invoked in relation to two charges: (i) killing of innocent members of the population, and (ii) destruction of property in the occupied territories.¹¹⁴ With regard to the first

110 *USA v. Alstötter et al.*, Law Reports of Trials of War Criminals, Vol. VI, United Nations War Crimes Commission, London, 1947–9, p. 52.

111 *Ibid.*

112 *USA v. William List et al.* (Case No. 7), Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, 1950, p. 1247.

113 The Tribunal also stated that 'whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other'. *Ibid.*, pp. 1247–8.

114 *Ibid.*, p. 1253. The plea of necessity was also rejected in the *Peleus* trial, which involved the murder of the unarmed crew of the sunken Allied ship *Peleus* under the orders of Heinz Eck, the commander of a German U-boat. In his summing up, the Judge Advocate affirmed that the prohibition of killing unarmed enemies was a fundamental usage of war. However, he added that circumstances might arise which would justify a belligerent's killing of an unarmed enemy person for the sake of preserving his own

charge, the Tribunal found that 'it is apparent from the evidence of these defendants that they considered military necessity a matter to be determined by them, a complete justification of their acts ... Military necessity or expediency do not justify a violation of positive rules'.¹¹⁵ The plea was thus rejected because the relevant provisions of the Hague Regulations contained no military necessity qualification, and therefore 'the rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise'.¹¹⁶

The Tribunal's approach to Count 2 of the indictment, which included devastation of property unjustified by military necessity, further indicates its consideration of the practicalities of waging war as balanced against humanitarian principles. Paragraph 9(a) of the indictment charged General Lothar Rendulic with ordering what became known as the 'scorched-earth policy' carried out in the Norwegian province of Finnmark.¹¹⁷ Evidence revealed that Rendulic's forces, who had been required to withdraw from Norway in an unreasonably short period of time (fourteen days), had become engaged with the superior Russian forces in such a way that it appeared to Rendulic at the time that the scorched-earth policy was necessary to avoid complete subjugation. The Court also pointed out that the evacuation of the civilian population had been carried out 'with consideration'.¹¹⁸ Observing that the Hague Regulations were obligatory and superior to the most urgent military necessities except where they specifically provided for the contrary, the Tribunal accepted the defence plea of military necessity. It seemed that, in light of the extreme difficulty confronting the German forces, the destruction could be tolerated by virtue of the express exceptions included in Article 23(g) of the Hague Regulations. The Tribunal concluded that 'the conditions, *as they appeared to the defendant at the time* were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made'.¹¹⁹ The decision granted the defendant a large degree of discretion based upon the information that was available to him, and the immediacy with which the action had to be taken.

In the case of *USA v. Krupp et al.*, the Tribunal reached a different conclusion. In this case, it was seen that the measures of expropriation, spoliation and devastation of public and private property violated the law of belligerent occupation, as they constituted measures that were beyond the needs of the German

life, although no such circumstances arose in the present case. Because no judgment was delivered, it is unclear whether the Tribunal found any merit in this view. The *Peleus* Trial, Law Reports of Trials of War Criminals, Vol. I, pp. 11–12.

115 *Ibid.*, p. 1255.

116 *Ibid.* Dunbar draws similar conclusions from the *von Manstein* trial, in which the Advocate-General stated that 'the purpose of war is the overpowering of the enemy. The achievement of this purpose justifies any means including, in the case of necessity, the violation of the laws of war, if such violation will afford either the means to escape from imminent danger or the overpowering of the opponent.' However, he advised that 'the doctrine has no application to the laws of war except where the latter are actually qualified by explicit reference to military necessity'. Dunbar, above note 97, p. 445.

117 The scorched-earth policy involved the devastation of property and evacuation of inhabitants during the retreat of German forces. *USA v. List*, above note 112, p. 1113.

118 *Ibid.*, pp. 1124–36, 1295–6.

119 *Ibid.*, p. 1297 (emphasis added).

occupation and were executed without regard to the local population.¹²⁰ The Tribunal rejected the defence that these measures were justified by the ‘great emergency’ which confronted the German war economy, stating that

The contention that the rules and customs of warfare can be violated if either party is hard pressed in war must be rejected ... It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare ... To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.¹²¹

The Tribunal had to deal with this controversy once more in the *High Command* case. Advancing a ‘just war’ kind of argument, the prosecution contended that ‘the defence of military necessity can never be utilised to justify destruction in occupied territory by the perpetrator of an aggressive war’ as it would result in a ‘farical paradox’.¹²² Since Germany had committed the ‘criminal act’ of aggression, it could not extricate itself from the consequences of its unjust war by recourse to the laws of war. The Tribunal rejected this reasoning, holding that the plea of military necessity was, indeed available to Germany; that would not, however, exculpate it from any violations of international humanitarian law. It stated that, were the concept of military necessity to grant belligerents unlimited rights, it ‘would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilised nations’.¹²³ As such, it rejected the plea with respect to the charge of deportation and enslavement of civilians.¹²⁴ However, as concerns the charges of looting, spoliation and devastation of property, the Tribunal reached a similar decision as in the *Rendulic (Hostages)* trial, holding that

[T]he devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances.¹²⁵

120 *USA v. Krupp et al.* (Case no. 10), Trials of War Criminals before the Nuernberg Military Tribunals, Vol. IX, pp. 1338–46.

121 *Ibid.*, p. 1347.

122 *USA v. Wilhelm von Leeb et al.*, Law Reports of Trials of War Criminals, Vol. 12, p. 124.

123 *USA v. Wilhelm von Leeb et al.*, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, p. 541.

124 *Ibid.*, p. 603.

125 *Ibid.*, p. 541.

In these cases, it is evident that the Tribunal applied the principle of military necessity as a limitation rather than an authorization,¹²⁶ and strictly allowed for its use as an exception where international humanitarian law permitted such a qualification. In fact, the Tribunal reaffirmed the distinction between *jus ad bellum* and *jus in bello* in two ways. In general, it rejected the claim brought forward by the prosecution that Germany, as an aggressor, was not entitled to invoke international humanitarian law or belligerent rights. Simultaneously, it applied the concept of military necessity to limit Germany's ability to inflict suffering, but not in a way that would make the conduct of warfare impossible, and without regard to the illegality of the war's cause.

Contemporary international criminal tribunals

Since the trials of the major war criminals of the Second World War there has been a sea change in the substantive rules of international humanitarian law. The four Geneva Conventions were adopted in 1949, and their Additional Protocols in 1977. Coupled with the establishment of the two *ad hoc* international criminal tribunals – for the former Yugoslavia and Rwanda – these developments allowed for the consolidation of the laws of armed conflict and the clarification of their substantive rules, particularly with regard to the most prominent type of conflict of the twentieth and twenty-first centuries, non-international armed conflict. In such conflicts, it is more difficult not only to secure adherence to the principles of international humanitarian law, but also to point out which party has resorted to a 'legitimate' use of force.¹²⁷ This concern was evident in the debates surrounding the adoption of Article 1(4) of Additional Protocol I, by virtue of which the provisions of the Protocol were extended to apply to national liberation movements.¹²⁸

The International Criminal Tribunal for the former Yugoslavia (ICTY) grappled with some of these issues in the final Report to the Prosecutor of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia,¹²⁹ considered by some as illegal intervention by NATO, and by others as constituting legitimate 'humanitarian intervention'. The

126 Schmitt, above note 107, p. 52.

127 In *Tablada* the Inter-American Commission on Human Rights stated that the law of armed conflict applies equally as between the parties (the Argentine government and the rebels), who both have the same duties under IHL. It also reaffirmed that 'application of the law is not conditioned by the causes of the conflict'. See Report No. 55/97, Argentina, Doc. 38, 1997, paras. 173–174. Similarly, the Colombian Constitutional Court held that 'the compulsory nature of IHL applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties ... All armed individuals, whether or not they are part of a State force', are under an obligation to respect those rules. See Columbia, *Constitutional Conformity of Protocol II*, Ruling No. C-225/95, para. 8.

128 Various parties abstained from voting on this provision as it was construed as 'making the motives behind a conflict a criterion for the application of international humanitarian law'. See Declaration by the UK, VI, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of IHL Applicable in Armed Conflicts*, Geneva, 1974–7, p. 46.

129 Final Report to the Prosecutor, in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Intersentia, Oxford, 2003, p. 21.

prosecution rejected the contention that the cause of the conflict had any bearings on the application of international humanitarian law. On the one hand, it dismissed the view that because ‘NATO’s resort to force was not authorized by the Security Council or in self-defence, that [it] was illegal and, consequently, all forceful measures taken by NATO were unlawful’.¹³⁰ It also rejected the other side of the debate, namely that the so-called ‘good’ party in a conflict was entitled to breach international humanitarian law, whereas the ‘bad’ party had to comply with it. It noted that although the ‘precise linkage between *jus ad bellum* and *jus in bello* is not completely resolved’, as a matter of practice the Tribunal has limited itself to the confines of the latter.¹³¹

The ICTY’s case law has also avoided the controversial subordination of *jus in bello* to *jus ad bellum*. In the trial of *Kordic and Cerkez*, the ICTY trial chamber addressed the defence plea of self-defence, according to which the actions of the Bosnian Croats were justified because they were engaged in defensive action against Bosnian Muslim aggression. Whereas this is a clear invocation of a *jus ad bellum* argument to justify violations of international humanitarian law, the trial chamber addressed the issue strictly from the perspective of self-defence as a criminal defence. It began by defining self-defence as a ground for excluding criminal responsibility, namely as ‘providing a defence to a person who acts or defends himself or his property (or another person or person’s property) against attack, provided that the actions constitute a reasonable, necessary, and proportionate reaction to the attack’.¹³² Since no such defence could be found in the Tribunal’s statute, it turned to the general principles of criminal law and customary international law, as codified in Article 31(1)(c) of the Statute of the International Criminal Court.¹³³ From there, the Tribunal set out the conditions for lawful self-defence, namely that the act be carried out in response to ‘an imminent and unlawful use of force’ against a ‘protected’ person or property, and that it be ‘proportionate to the degree of danger’.¹³⁴ The effect of this approach is that each defensive action or operation would have to be examined on its own merits, rather than making a determination that the war itself was one fought in self-defence. The trial chamber emphasized that, according to the last sentence of Article 31(3)(c), a person’s involvement in ‘defensive’ action is not in itself a ground for excluding criminal liability.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2, Judgement, 26 February 2001, para. 449.

¹³³ ‘... A person shall not be criminally responsible if, at the time of that person’s conduct: ... (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.’ See 1998 Rome Statute of the International Criminal Court, in Roberts and Guelff, above note 6, p. 667.

¹³⁴ *Prosecutor v. Kordic*, above note 132, p. 451.

The ICTY has also reaffirmed this principle by applying the concept of military necessity equally, without any distinction between the parties to the conflict. In the *Kordic* trial the prosecution asserted that military necessity ‘does not justify a violation of international humanitarian law insofar as [it] was a factor which was already taken into account when the rules governing the conduct of hostilities were drafted’.¹³⁵ However, where the trial chamber unexpectedly departs from the jurisprudence of the post-Second World War tribunals is in its *expansion* of the concept of military necessity. In relation to the charge of attacks against civilians, the ICTY held that ‘prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity’.¹³⁶ In *Blaskic*, the trial chamber reached a similar conclusion,¹³⁷ which was, however, overturned by the Appeals Chamber.¹³⁸ The inconsistency of the ICTY’s jurisprudence on this matter is disconcerting, since, traditionally, there has been no military necessity exception to the principle of distinction. The notion that civilians may not be made the object of attack is a general principle that admits no qualification.¹³⁹ To accept that ‘military necessity’ can overrule a principle of international humanitarian law erodes the protections afforded to civilians under *jus in bello*, and departs from the practice of international criminal tribunals that have consistently rejected the plea of military necessity unless it relates to a rule of international humanitarian law that expressly provides for such an exception.¹⁴⁰

Contemporary threats to the distinction: war between states and non-state actors

Perhaps the most dangerous threat to the principle of separation of *jus ad bellum* and *jus in bello* arises in the context of what is now known as asymmetric warfare, or conflict between a state and non-state actors. Often labelled by states as ‘terrorists’, these groups come to embody the immoral and ‘unjust’ cause, and are hence judged according to different moral and legal standards. Every act that they commit is criminal and subversive; they are thus not entitled to the rights enjoyed by combatants under international humanitarian law. The perceived (un)justness of the ‘terrorist’ cause is the determinant of the (non-)application of *jus in bello*.

135 *Ibid.*, para. 344.

136 *Ibid.*, para. 342.

137 ICTY, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, Judgement, 3 March 2000, para. 180.

138 ‘[T]he Appeals Chamber deems it necessary to rectify the Trial Chamber’s statement, contained in paragraph 180 of the Trial Judgment, according to which “[t]argeting civilians or civilian property is an offence when not justified by military necessity”.’ It further underscored the absolute prohibition on the targeting of civilians in customary international law. See ICTY, *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, para. 109.

139 Higgins, above note 35, para. 20; AP I, Art. 51 (2).

140 The ICTY’s jurisprudence on wanton destruction of property is more consistent on this matter.

The immorality of the ‘terrorist’ cause justifies the adoption by the state of an equally immoral and extra-legal response.¹⁴¹

Although international humanitarian law was originally conceived to apply as between states, the proliferation of intra-state conflict, particularly in the post-Cold War era, has entailed the extension of this body of law to non-state actors.¹⁴² Is it conceivable, however, that the principle of distinction will be upheld in a war between a state and non-state actors? International practice indicates that states remain reluctant to extend the so-called ‘privileges’ of belligerency to non-state actors, adopting instead a ‘just war’ model to defend their violations of *jus in bello*. For instance, counterterrorism measures, justified by reference to the principle of self-defence against the grave and imminent threat of ‘terrorism’, have involved violations of *jus in bello* by the United States in Afghanistan and Iraq, including the toleration of a greater number of civilian casualties, and practices such incommunicado detention, torture and cruel and degrading treatment.¹⁴³ Similarly, countries such as Colombia, Israel and Russia have invoked so-called self-defence measures to justify curfews, house demolitions, extra-judicial killings and other excesses, distorting the limits of ‘necessity’ and ‘proportionality’ in the process.¹⁴⁴ Ironically, this kind of logic is similar to the argument that could be used by the very armed groups the state is attempting to subvert. Although expressed in non-legal terms, such groups equally believe that their cause is both just and superior, excusing disregard for humanitarian considerations. Coupled with a wide and permissive interpretation of necessity to justify targeting civilians (arguably the only means available and hence ‘necessary’ to subjugate the enemy), many such groups fail to recognize that there can be no military necessity that justifies such violations. Neither is there a *casus belli* that can excuse the deliberate targeting of civilians.

The prevalence of the ‘just war’ logic in asymmetric conflicts threatens the validity of the distinction between *jus ad bellum* and *jus in bello*. It is widely argued that the so-called ‘terrorist’ should not be allowed to benefit from the privileges of lawful belligerency including the protections and immunities of international humanitarian law. Like the ‘aggressor’ under the ‘just war’ doctrine, the ‘terrorist’ remains outside the purview of the law, rendering it unlikely that he will adhere to its dictates. This is so because

no amount of legal argument will persuade a combatant to respect the rules when he himself has been deprived of their protection ... This psychological

141 See Theodore Seto, ‘The morality of terrorism’, *Loyola of Los Angeles Law Review*, Vol. 35 (2002), p. 1227.

142 A clear indication is the adoption of the Second Additional Protocol to the Geneva Conventions (1977), as well as the case law of the ICTY and ICTR.

143 See Human Rights Watch, ‘Troops in contact: air strikes and civilian deaths in Afghanistan’, 8 September 2008, available at <http://hrw.org/reports/2008/afghanistan0908/> (last visited 12 October 2008).

144 See, for instance, Housing and Land Rights Network of the Habitat International Coalition and the World Organization against Torture, Joint Urgent Action Appeal, discussing Israel’s policy of house demolitions in violation of international law for alleged reasons of self-defence. See also Amnesty International, ‘Colombia’, *Amnesty International Report 2008*, 2008, available at <http://thereport.amnesty.org/eng/regions/americas/colombia> (last visited 13 October 2008).

impossibility is the consequence of a fundamental contradiction in terms of formal logic ... It is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime because of the mere fact that the act was carried out in the context of a war of aggression.¹⁴⁵

The question that thus arises is: should the principle of distinction between *jus ad bellum* and *jus in bello* be modified in the case of war between a state and a non-state actor? For obvious reasons, such a proposition is dangerous. It allows both parties to justify their violations by reference to the 'justness' of their cause, as well as to use expansive notions of self-defence and military necessity to excuse their disregard for international humanitarian law. As long as both parties make the application of *jus in bello* contingent on the validity of the other party's *jus ad bellum* case, the result will be a reciprocal failure to ensure respect for the rules of international humanitarian law.

Conclusion

The dangers of linking *jus ad bellum* and *jus in bello* are evident, which is why the distinction between them has been maintained in theory. Although there are some challenges to this distinction, it is inaccurate to assume that it has become irrelevant or that there exists in international law an exception that would allow states to use force in violation of *jus in bello* in 'extreme circumstances of self defence', 'self-preservation' or 'military necessity'. In order to avoid the controversial subordination of *jus in bello* to *jus ad bellum*, there has been an apparent conflation of the limiting principles of proportionality, necessity and military necessity under the two bodies of law, which has been employed in a way to justify a greater extent of suffering and damage than seems to have been originally envisioned by international humanitarian law. By equating the criterion of 'direct and concrete military advantage' in the *jus in bello* proportionality equation with the *jus ad bellum* concept of 'defence of the state', a wider margin of collateral damage and suffering is tolerated. Similarly, the confusion of the concepts of 'self-defence', 'necessity', 'self-preservation' and 'military necessity', among others, in legal writing and jurisprudence has contributed to linking the two bodies of law. This is coupled with a stretching of the principle of military necessity so that it no longer becomes a limiting concept, but rather one that is invoked to justify violations of international humanitarian law.

Determining the existence of a 'just' or legal *jus ad bellum* cause is essentially a political and hence subjective exercise. Throughout its history, the UN Security Council has largely avoided making a determination of aggression, leaving the matter, essentially, to the discretionary determination of states. Allowing such

145 Bugnion, above note 10, p. 538.

a determination to colour, in any way, the application of *jus in bello* undermines the rule of law in an area of international law that requires strict restraining principles. The matter is even more controversial in the case of conflict between a state and non-state actors, in which both parties tend to subordinate international humanitarian law to *jus ad bellum*. The determination of whether an armed group is involved in ‘terrorism’ or legitimate struggle is a subjective endeavour that should not justify laxity in the application and enforcement of international humanitarian law standards. Neither should the notion of ‘extreme self-defence’ or ‘necessity’ override the imperative of respecting the principles of humanity.

REPORTS AND DOCUMENTS

Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law

Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009

The present document resulted from an expert process initiated and conducted by the ICRC from 2003 to 2008. Dr. Nils Melzer, Legal Adviser at the ICRC, who has been responsible for the expert process since 2004, is the author of the Interpretive Guidance and most background documents and expert meeting reports produced during the process. The ICRC would like to express its gratitude to the experts, all of whom participated in the process in their personal capacity.

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Introduction

1. Purpose and nature of the Interpretive Guidance

The purpose of the Interpretive Guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities. Accordingly, **the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted** in light of the circumstances prevailing in contemporary armed conflicts.

The Interpretive Guidance draws on a variety of sources including, first and foremost, the rules and principles of customary and treaty IHL and, where necessary, the *travaux préparatoires* of treaties, international jurisprudence, military manuals, and standard works of legal doctrine. Additionally, it draws on the wealth of materials produced in the course of an expert process, jointly initiated by the ICRC and the TMC Asser Institute with the aim of clarifying the notion of direct participation in hostilities under IHL.¹ Five informal expert meetings were conducted from 2003 to 2008 in The Hague and Geneva, each bringing together 40 to 50 legal experts from academic, military, governmental, and non-governmental circles, all of whom participated in their private capacity.²

The Interpretive Guidance is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. It endeavours to propose a balanced and practical solution that takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL. **Ultimately, the responsibility for the Interpretive Guidance is assumed by the ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of IHL.**³ Although a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves, the ICRC hopes that the comprehensive legal analysis and the careful balance of humanitarian and military interests underlying the Interpretive Guidance will render the resulting recommendations persuasive for States, non-State actors, practitioners, and academics alike.

The Interpretive Guidance consists of 10 recommendations, each of which summarizes the ICRC's position on the interpretation of IHL on a particular legal question, and a commentary explaining the bases of each recommendation. Throughout the text, particularly where major divergences of opinion persisted among the experts, footnotes refer to the passages of the expert meeting reports and background documents where the relevant discussions were recorded. **The sections and recommendations of the Interpretive Guidance are closely inter-related and can only be properly understood if read as a whole.** Likewise, the examples offered throughout the Interpretive Guidance are not absolute statements on the legal qualification of a particular situation or conduct, but must be read in good faith, within the precise context in which they are mentioned and in accordance with generally recognized rules and principles of IHL. They can only illustrate the principles based on which the relevant distinctions ought to be made,

1 This is the full text of the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law". This text, along with all other materials produced in the expert process, such as reports, background documents, etc. will be available at www.icrc.org.

2 For more information on the expert process, see the document "Overview of the ICRC's Expert Process (2003–2008)."

3 See, e.g., Art. 5 [2] (c) and (g), Statutes of the International Red Cross and Red Crescent Movement.

but cannot replace a careful assessment of the concrete circumstances prevailing at the relevant time and place.

Lastly, it should be emphasized that the Interpretive Guidance **examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities**. Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty. Moreover, although the Interpretive Guidance is concerned with IHL only, **its conclusions remain without prejudice to an analysis of questions related to direct participation in hostilities under other applicable branches of international law, such as human rights law or the law governing the use of interstate force (*jus ad bellum*)**.

2. The issue of civilian participation in hostilities

The primary aim of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.

Recent decades have seen this pattern change significantly. A continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict. Moreover, military operations have often attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations.

All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces – unable to properly identify their

adversary – run an increased risk of being attacked by persons they cannot distinguish from the civilian population.

3. Key legal questions

This trend underlines the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do and, respectively, do not take a direct part in hostilities. Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations.⁴ Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of IHL. However, despite the serious legal consequences involved, neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities. This situation calls for the clarification of three questions under IHL applicable in both international and non-international armed conflict:

- *Who is considered a civilian for the purposes of the principle of distinction?* The answer to this question determines the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities.⁵
- *What conduct amounts to direct participation in hostilities?* The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack.⁶
- *What modalities govern the loss of protection against direct attack?* The answer to this question will elucidate issues such as the duration of the loss of protection against direct attack, the precautions and presumptions in situations of doubt, the rules and principles governing the use of force against legitimate military targets, and the consequences of regaining protection against direct attack.

4 For the purposes of this Interpretive Guidance, the phrases “direct participation in hostilities”, “taking a direct part in hostilities” and “directly participating in hostilities” will be used synonymously.

5 The status, rights, and protections of persons outside the conduct of hostilities does not depend on their qualification as civilians but on the precise personal scope of application of the provisions conferring the relevant status, rights, and protections (e.g., Art 4 GC III, Art 4 GC IV, common Article 3, Art 75 AP I and Arts 4 to 6 AP II).

6 For the sake of simplicity, when discussing the consequences of civilian direct participation in hostilities, the Interpretive Guidance will generally refer to loss of protection against “direct attacks”. Unless stated otherwise, this terminology includes also the suspension of civilian protection against other “dangers arising from military operations” (Arts 51 [1], [3] AP I and 13 [1], [3] AP II). This entails, for example, that civilians directly participating in hostilities may not only be directly attacked themselves, but also do not have to be taken into account in the proportionality assessment when military objectives in their proximity are attacked.

Part 1: Recommendations of the ICRC concerning the interpretation of international humanitarian law relating to the notion of direct participation in hostilities

I. The concept of civilian in international armed conflict

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. The concept of civilian in non-international armed conflict

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

III. Private contractors and civilian employees

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

IV. Direct participation in hostilities as a specific act

The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

V. Constitutive elements of direct participation in hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

VI. Beginning and end of direct participation in hostilities

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

VII. Temporal scope of the loss of protection

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

VIII. Precautions and presumptions in situations of doubt

All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

IX. Restraints on the use of force in direct attack

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.

X. Consequences of regaining civilian protection

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

Part 2: Recommendations and Commentary

A. The concept of civilian

For the purposes of the principle of distinction, the definition of civilian refers to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities.⁷ Where IHL provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, but not necessarily identical with, direct participation in hostilities.⁸ Before interpreting the notion of direct participation in hostilities itself, it will therefore be necessary to clarify the concept of civilian under IHL applicable in international and non-international armed conflict.

I. The concept of civilian in international armed conflict

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

1. Mutual exclusiveness of the concepts of civilian, armed forces and *levée en masse*

According to Additional Protocol I (AP I),⁹ in situations of international armed conflict, civilians are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.¹⁰ While treaty IHL predating Additional Protocol I does not expressly define

7 Arts 51 [3] AP I; 13 [3] AP II. See also Henckaerts/Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, 2005), Rule 6 [hereafter: *Customary IHL*]. Regarding the terminology of “loss of protection against direct attacks” used in the Interpretive Guidance see above note 6.

8 For example, medical and religious personnel of the armed forces lose their protection in case of “hostile” or “harmful” acts outside their privileged function (Arts 21 GC I, 11 [2] AP II; *Customary IHL*, above note 7, Vol. I, Rule 25). Combatants *hors de combat* lose their protection if they commit a “hostile act” or “attempt to escape” (Art. 41 [2] AP I).

9 As of 1 November 2008, 168 States were party to AP I. At the same time, the ratification of GC I–IV was virtually universal (194 States parties).

10 Art. 50 [1] AP I. According to *Customary IHL*, above note 7, Vol. I, Rule 5, this definition of civilian reflects customary IHL in international armed conflict. The categories covered by Art. 4 A [1], [2] and [3] GC III are included in the general definition of armed forces under Art. 43 [1] AP I. See also Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), §1916 f. [hereafter: *Commentary AP*].

civilians, the terminology used in the Hague Regulations (H IV R) and the four Geneva Conventions (GC I–IV) nevertheless suggests that the concepts of civilian, of armed forces, and of *levée en masse* are mutually exclusive, and that every person involved in, or affected by, the conduct of hostilities falls into one of these three categories.¹¹ In other words, under all instruments governing international armed conflict, the concept of civilian is negatively delimited by the definitions of armed forces and of *levée en masse*,¹² both of which shall in the following be more closely examined.

2. Armed forces

a) *Basic concept*

According to Additional Protocol I, the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.¹³ At first glance, this broad and functional concept of armed forces seems wider than that underlying the Hague Regulations and the Geneva Conventions. Although these treaties do not expressly define armed forces, they require that members of militias and volunteer corps other than the regular armed forces recognized as such in domestic law fulfil four requirements: (a) responsible command, (b) fixed distinctive sign recognizable at a distance, (c) carrying arms openly, and (d) operating in accordance with the laws and customs of war.¹⁴ Strictly speaking, however, these

11 For example, Art. 22 [2] of the Brussels Declaration (1874) and Art. 29 H IV R (1907) refer to “civilians” in contradistinction to “soldiers”. Similarly, as their titles suggest, the Geneva Conventions (1949) use the generic category of “civilian persons” (GC IV) as complementary to members of the “armed forces” (GC I and GC II). Even though the scope of application of each convention does not exactly correspond to the generic categories mentioned in their respective titles, the categories of “civilian” and “armed forces” are clearly used as mutually exclusive in all four Conventions. For example, GC I, GC II and GC IV refer to “civilian” wounded, sick and shipwrecked (Art. 22 [5] GC I; Art. 35 [4] GC II; Arts 20, 21, 22 GC IV) as opposed to the generic categories protected by GC I and GC II, namely the wounded, sick and shipwrecked of the “armed forces” (titles GC I and GC II). Similarly, Art. 57 GC IV refers to “military” wounded and sick as opposed to the generic category protected by GC IV, namely “civilian persons”. Other provisions of the conventions also use the term “civilian” as opposed to “military” (Art. 30 [2] GC III: “military or civilian medical unit”; Art. 32 GC IV: “civilian or military agents”; Art. 144 [1] GC IV: “military and civil instruction”; Art. 93 [2] GC III: “civilian clothing”, presumably as opposed to military uniform; Arts 18, 19, 20, 57 GC IV: “civilian hospitals”, presumably as opposed to military hospitals; Art. 144 [2] GC IV: “civilian, military, police or other authorities”) or to “combatants and non-combatants” (Art. 15 GC IV). None of these instruments suggests the existence of additional categories of persons who would qualify neither as civilians, nor as members of the armed forces or as participants in a *levée en masse*.

12 Affirmative also *Commentary AP* (above note 10), § 1914. The ICTY defined the concept of civilians for situations of international armed conflict as “persons who are not, or no longer, members of the armed forces” (ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment of 3 March 2000, § 180). For the relevant discussion during the expert meetings see: Report DPH 2005, pp. 43 f., 58, 74; Report DPH 2006, pp. 10, 12 f., 19 f.; Report DPH 2008, pp. 35, 37.

13 Art. 43 [1] AP I; *Customary IHL*, above note 7, Vol. I, Rule 4.

14 Art. 1 H IV R; Arts 13 [1], [2], [3] and [6] GC I and GC II; Art. 4 A [1], [2], [3] and [6] GC III.

requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict.

Thus, while members of irregular armed forces failing to fulfil the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture,¹⁵ it does not follow that any such person must necessarily be excluded from the category of armed forces and regarded as a civilian for the purposes of the conduct of hostilities.¹⁶ On the contrary, it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.¹⁷

b) Meaning and significance of “belonging to” a party to the conflict

In order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict. While this requirement is made textually explicit only for irregular militias and volunteer corps, including organized resistance movements,¹⁸ it is implied wherever the treaties refer to the armed forces “of” a party to the conflict.¹⁹ The concept of “belonging to” requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.²⁰ Without any doubt, an organized armed group can be said to belong to a State if its conduct is attributable to that State under the international law of State responsibility.²¹ The degree of control required to make a State responsible for the conduct of an organized armed group is not settled in international

15 In the ICRC’s view, in international armed conflict, any person failing to qualify for prisoner-of-war status under Art. 4 GC III must be afforded the fundamental guarantees set out in Art. 75 AP I, which have attained customary nature and, subject to the nationality requirements of Art. 4 GC IV, also remains a “protected person” within the meaning of GC IV.

16 As illustrated by the treatment of spies (Arts 29–31 H IV R; Art. 46 AP I) and of other combatants failing to distinguish themselves as required by IHL (Art. 44 AP I), loss of entitlement to combatant privilege or prisoner-of-war status does not necessarily lead to loss of membership in the armed forces.

17 While the prevailing opinion during the 2006 expert meeting was supportive of this interpretation, some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV (Report DPH 2006, pp. 15 f.). For the ICRC’s position in this respect see, e.g., above note 15.

18 See Arts 13 [2] GC I and GC II and Art. 4 A [2] GC III.

19 See, e.g., Art. 3 H IV R; Art. 4 A [1] GC III; Art. 43 AP I.

20 Pictet (ed.), *Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), p. 57 [hereafter: *Commentary GC III*].

21 See also Report DPH 2006, p. 16.

law.²² In practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities on behalf and with the agreement of that party.²³

Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict, whether under Additional Protocol I, the Hague Regulations, or the Geneva Conventions. They are thus civilians under those three instruments.²⁴ Any other view would discard the dichotomy in all armed conflicts between the *armed forces of the parties to the conflict* and the *civilian population*; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors.²⁵ Organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict provided that the violence reaches the required threshold.²⁶ Whether the individuals are civilians or members of the armed forces of a party to the conflict would then have to be determined under IHL governing non-international armed conflicts.²⁷

22 For the basic positions in this respect, see, most notably, ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 115; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-A, Judgment of 15 July 1999 (Appeals Chamber), § 145; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007, § 413; ILC, Report to the General Assembly on the work of its 53rd session (2001), UN Doc. A/56/10, Draft Article 8, Commentary § 5.

23 See also below note 26.

24 This was the prevailing opinion during the expert meetings (Report DPH 2006, pp. 16 ff.; Report DPH 2008, pp. 43 f.). For recent national case law reflecting this position, see: Israeli High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, (HCJ 769/02), Judgment of 13 December 2006, § 26, where the Court held that, under IHL governing international armed conflict, independent Palestinian armed groups operating in a context of belligerent occupation necessarily qualified as civilians. With regard to the temporal scope of loss of protection for members of such groups, the Court nevertheless concluded that: “a civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility” (*ibid.*, § 39).

25 See also Report DPH 2006, pp. 16 ff., 52 f.; Report DPH 2008, pp. 43 f. For States party to Additional Protocol I, the law governing international armed conflicts also applies to armed conflicts between States and national liberation movements within the meaning of Article 1 [4] AP I.

26 According to *Commentary GC III* (above note 20), p. 57: “Resistance movements must be fighting on behalf of a ‘Party to the conflict’ in the sense of Art. 2, otherwise the provisions of Art. 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a ‘Party to the conflict’”. The *travaux préparatoires* are silent on the possible parallel existence of international and non-international aspects within the greater context of the same armed conflict. For the relevant discussion during the expert meetings see Report DPH 2005, p. 10; Report DPH 2006, pp. 17 ff. and 53 f.; Report DPH 2008, pp. 43 f. It should be noted that “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (Art. 1 [2] AP II) do not reach the threshold of “protracted armed violence”, which is required for the emergence of a separate non-international armed conflict (ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, § 70).

27 See Section II below.

Lastly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals.²⁸

c) *Determination of membership*

For the regular armed forces of States, individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into State armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist.

Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.²⁹

3. *Levée en masse*

As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.³⁰ Participants in a *levée en masse* are the only armed actors who are excluded from the civilian population although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.

4. Conclusion

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection

28 See Report DPH 2006, p. 16; Report DPH 2008, pp. 44, 49.

29 See Section II.3.(b) below and, with regard to private contractors, Section III.2.

30 Art. 2 H IV R; Art. 4 [6] GC III. See also the reference to Art. 4 [6] GC III in Art. 50 [1] AP I.

against direct attack unless and for such time as they take a direct part in hostilities. Membership in irregularly constituted militia and volunteer corps, including organized resistance movements, belonging to a party to the conflict must be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

II. The concept of civilian in non-international armed conflict

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

1. Mutual exclusiveness of the concepts of civilian, armed forces and organized armed groups

a) Lack of express definitions in treaty law

Treaty IHL governing non-international armed conflict uses the terms ‘civilian’, ‘armed forces’ and ‘organized armed group’ without expressly defining them. These concepts must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.³¹

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict).³² Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the

31 Art. 31 [1] Vienna Convention on the Law of Treaties.

32 See *Customary IHL*, above note 7, Vol. I, p. 19.

conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.³³ As the wording and logic of Article 3 common to the Geneva Conventions (GC I–IV) and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.

b) Article 3 common to the Geneva Conventions

Although Article 3 GC I–IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population in non-international armed conflict. Most notably, Article 3 GC I–IV provides that “each Party to the conflict” must afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”.³⁴ Thus, both State and non-State parties to the conflict have armed forces distinct from the civilian population.³⁵ This passage also makes clear that members of such armed forces, in contrast to other persons, are considered as “taking no active part in the hostilities” only once they have disengaged from their fighting function (“have laid down their arms”) or are placed *hors de combat*; mere suspension of combat is insufficient. Article 3 GC I–IV thus implies a concept of civilian comprising those individuals “who do not bear arms” on behalf of a party to the conflict.³⁶

c) Additional Protocol II

While Additional Protocol II³⁷ has a significantly narrower scope of application and uses terms different from those in Article 3 GC I–IV, the generic categorization of persons is the same in both instruments.³⁸ During the Diplomatic Conference of

33 On the danger of extending the concept of direct participation in hostilities beyond specific acts, see also Section IV.2 below. During the expert meetings, the approach based on continuous direct participation in hostilities was criticized as blurring the distinction made by IHL between loss of protection based on conduct (civilians) and on status or function (members of armed forces or organized armed groups). See Background Doc. DPH 2004, p. 36; Background Doc. DPH 2005, WS IV–V, p. 10; Report DPH 2005, pp. 44, 48, 50. See also the discussions in Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.

34 Art. 3 GC I–IV (emphases added).

35 According to *Commentary GC III* (above note 20), p. 37: “Speaking generally, it must be recognized that the conflicts referred to in Art. 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ – conflicts, in short, which are in many respects similar to an international war ...”.

36 According to Pictet (ed.), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 40: “Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians – that is to people who do not bear arms” (emphasis added).

37 As of 1 November 2008, 164 States were party to AP II.

38 For the high threshold of application of Additional Protocol II, see Art. 1 [1] AP II.

1974–77, Draft Article 25 [1] AP II defined the concept of civilian as including “anyone who is not a member of the armed forces or of an organized armed group”.³⁹ Although this article was discarded along with most other provisions on the conduct of hostilities in a last minute effort to “simplify” the Protocol, the final text continues to reflect the originally proposed concept of civilian. According to the Protocol, “armed forces”, “dissident armed forces”, and “other organized armed groups” have the function and ability “to carry out sustained and concerted military operations”;⁴⁰ whereas the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” carried out by these forces “unless and for such time as they take a direct part in hostilities”.⁴¹

d) *Reconciliation of terminology*

In Additional Protocol II, the term “armed forces” is restricted to State armed forces, whereas the armed forces of non-State parties are referred to as “dissident armed forces” or “other organized armed groups”. The notion of “armed forces” in Article 3 GC I–IV, on the other hand, includes all three categories juxtaposed in Article 1 [1] AP II, namely State armed forces, dissident armed forces, and other organized armed groups. Thus, similar to situations of international armed conflict, the concept of civilian in non-international armed conflict is negatively delimited by the definition of “armed forces” (Article 3 GC I–IV) or, expressed in the terminology of Additional Protocol II, of State “armed forces”, “dissident armed forces” and “other organized armed groups”.⁴² For the purposes of this Interpretive Guidance, the armed forces of States party to a non-international armed conflict are referred to as “State armed forces”, whereas the armed forces of non-State parties are described as “organized armed groups”.⁴³ Where not stated otherwise, the concept of “organized armed group” includes both “dissident armed forces” and “other organized armed groups” (Article 1 [1] AP II).

39 Draft Art. 25 [1] AP II was adopted by consensus in the Third Committee on 4 April 1975 (O.R., Vol. XV, p. 320, CDDH/215/Rev.1). See also the ICRC’s Commentary (October 1973) on the original version of Art. 25 [1] of the Draft of AP II submitted to the Diplomatic Conference of 1974–1977: “[...] sont considérés comme civils tous les êtres humains qui se trouvent sur le territoire d’une Partie contractante où se déroule un conflit armé au sens de l’article premier et qui ne font pas partie des forces armées ou groupes armés” [emphasis added].

40 Art. 1 [1] AP II.

41 Art. 13 [1] and [3] AP I. This interpretation is further supported by the respective contexts in which the Protocol refers to “civilians” (Arts 13, 14, 17 AP II) and the “civilian population” (title Part IV AP II; Arts 5 [1] (b) and (e), 13, 14, 15, 17 and 18 AP II).

42 Affirmative ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment of 8 October 2008, §§ 300–302. This was the prevailing view also during the expert meetings (see Report DPH 2005, pp. 43 f.; Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.).

43 Note that the concept of organized armed group is also used in IHL governing international armed conflict to describe organized armed actors other than the regular armed forces which operate under a command responsible to a party to the conflict and, therefore, qualify as part of the armed forces of that party (Art. 43 [1] AP I, see Section I above).

2. State armed forces

a) *Basic concept*

There is no reason to assume that States party to both Additional Protocols desired distinct definitions of State armed forces in situations of international and non-international armed conflict. According to the *travaux préparatoires* for Additional Protocol II, the concept of armed forces of a High Contracting Party in Article 1 [1] AP II was intended to be broad enough to include armed actors who do not necessarily qualify as armed forces under domestic law, such as members of the national guard, customs, or police forces, provided that they do, in fact, assume the function of armed forces.⁴⁴ Thus, comparable to the concept of armed forces in Additional Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State.⁴⁵

b) *Determination of membership*

At least as far as regular armed forces are concerned, membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into the armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or of the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist. Just as in international armed conflict, membership in irregular State armed forces, such as militia, volunteer or paramilitary groups, generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict.⁴⁶

44 See the *Commentary AP* (above note 10), § 4462: “The term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, ‘regular armed forces’, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)”, referring to O.R., Vol. X, p. 94, CDDH/I/238/Rev.1. On the potential qualification of police forces as part of the armed forces of a party to the conflict, see also the discussion in Report DPH 2005, p. 11; Report DPH 2006, pp. 43, 52 f.; Report DPH 2008, pp. 54, 64, 68.

45 According to Bothe *et al.*, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 672, the terms “organized” and “under responsible command” in Art. 1 [1] AP II “inferentially [...] recognize the essential conditions prescribed under art. 43 of Protocol I: that the armed force be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command”.

46 See Section I.2.(c) above and Section II.3.(b) below.

3. Organized armed groups

a) *Basic concept*

Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State's armed forces that have turned against the government.⁴⁷ Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.

In both cases, it is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g. an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group).⁴⁸ As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict.

b) *Determination of membership*

Dissident armed forces: Although members of dissident armed forces are no longer members of State armed forces, they do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the State armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well.

Other organized armed groups: More difficult is the concept of membership in organized armed groups other than dissident armed forces. Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to "membership"

47 See the *Commentary AP* (above note 10), § 4460.

48 Although Art. 1 AP II refers to armed conflicts "between" State armed forces and dissident armed forces or other organized armed groups, the actual parties to such a conflict are, of course, the High Contracting Party and the opposing non-State party, and not their respective armed forces.

within the meaning of IHL. In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family.⁴⁹ In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.

As has been shown above, in IHL governing non-international armed conflict, the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.⁵⁰ Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”).⁵¹ Continuous combat function does not imply *de jure* entitlement to combatant privilege.⁵² Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.⁵³

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or

49 Background Doc. DPH 2005, Armed Groups (IV–V), p. 15.

50 On the collective or individual nature of continuous combat function, see Report DPH 2008, pp. 55 ff.

51 On the qualification of conduct as direct participation in hostilities, see Section V below.

52 Combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse* (Arts 1 and 2 H IV R; Art. 43 [1] AP I). Although all privileged combatants have a right to directly participate in hostilities, they do not necessarily have a function requiring them to do so (e.g. cooks, administrative personnel). Conversely, individuals who assume continuous combat function outside the privileged categories of persons, as well as in non-international armed conflict, are not entitled to combatant privilege under IHL (see also Section X below).

53 During the expert meetings, the prevailing view was that persons cease to be civilians within the meaning of IHL for as long as they continuously assume a function involving direct participation in hostilities (“continuous combat function”) for an organized armed group belonging to a party to a non-international armed conflict (Expert Paper DPH 2004 (Prof. M. Bothe); Report DPH 2005, pp. 43 f., 48 ff., 53 ff., 63 ff., 82 f.; Report DPH 2006, pp. 9 ff., 20 ff., 29–32, 66 f.; Report DPH 2008, pp. 46–60).

active membership, leave the armed group and re-integrate into civilian life. Such “reservists” are civilians until and for such time as they are called back to active duty.⁵⁴

Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.⁵⁵ Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.⁵⁶ The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature.⁵⁷ Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.⁵⁸ As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation. Whatever criteria are applied in implementing the principle of distinction in a particular context, they must allow to reliably distinguish members of the armed forces of a non-State party to the conflict from civilians who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis.⁵⁹ As will be shown, that

54 See also Sections I.2.(c) and II.2.(b) above and, more generally, Section VII.2 below.

55 See Section III below.

56 Regarding the qualification of recruiting and training, financing and propaganda as direct participation in hostilities, see Sections V.2.(a) and (b); VI.1 below.

57 Regarding the qualification as direct participation in hostilities of purchasing, smuggling, transporting, manufacturing and maintaining of weapons, explosives and equipment, as well as of collecting and providing intelligence, see Sections V.1.(a); V.2.(a), (b) and (g); VI.1 below.

58 Obviously, such lack of “membership” does not exclude that civilian supporters of organized armed groups may incur criminal responsibility for their activities under national and, in the case of international crimes, also international law. See Section X below.

59 See also Report DPH 2006, pp. 25 ff.; Report DPH 2008, pp. 49–57.

determination remains subject to all feasible precautions and to the presumption of protection in case of doubt.⁶⁰

4. Conclusion

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

III. Private contractors and civilian employees

Private contractors and employees of a party to an armed conflict who are civilians (see I and II above) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

1. Particular difficulties related to private contractors and civilian employees

In recent decades, parties to armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions traditionally performed by military personnel.⁶¹ Generally speaking, whether private contractors and employees of a party to an armed conflict are civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as would apply to any other civilian.⁶² The special role of such personnel requires that

⁶⁰ See Section VIII below.

⁶¹ This trend led to an initiative by the Swiss government, in cooperation with the ICRC, to address the issue of private military and security companies. This initiative resulted in the ‘Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict’ of 17 September 2008, agreed upon by 17 participating States.

⁶² On the concept of civilian, see Sections I and II above. On the concept of direct participation in hostilities, see Sections IV to VI below.

these determinations be made with particular care and with due consideration for the geographic and organizational closeness of many private contractors and civilian employees to the armed forces and the hostilities.

It should also be noted that the purpose of the distinction between civilians and members of the armed forces may not be identical under domestic and international law. Depending on national legislation, membership in the armed forces may have administrative, jurisdictional, and other consequences irrelevant to the principle of distinction in the conduct of hostilities. Under IHL, the primary consequences of membership in the armed forces are the exclusion from the category of civilian and, in international armed conflict, the right to directly participate in hostilities on behalf of a party to the conflict (combatant privilege). Where the concepts of civilian and armed forces are defined for the purpose of the conduct of hostilities, the relevant standards must be derived from IHL.⁶³

The great majority of private contractors and civilian employees currently active in armed conflicts have not been incorporated into State armed forces and assume functions that clearly do not involve their direct participation in hostilities on behalf of a party to the conflict (i.e. no continuous combat function).⁶⁴ Therefore, under IHL, they generally come within the definition of civilians.⁶⁵ Although they are thus entitled to protection against direct attack, their proximity to the armed forces and other military objectives may expose them more than other civilians to the dangers arising from military operations, including the risk of incidental death or injury.⁶⁶

In some cases, however, it may be extremely difficult to determine the civilian or military nature of contractor activity. For example, the line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement/defence of self or others) may be thin. It is therefore particularly important in this context to observe the general rules of IHL on precautions and presumptions in situations of doubt.⁶⁷

2. International armed conflict

Civilians, including those formally authorized to accompany the armed forces and entitled to prisoner-of-war status upon capture, were never meant to directly participate in hostilities on behalf of a party to the conflict.⁶⁸ As long as they are not

63 See Report DPH 2005, pp. 74 f.

64 On the concept of continuous combat function, see Section II.3.(b) above.

65 Report DPH 2005, p. 80.

66 Report DPH 2006, pp. 34 f.

67 See Section VIII below.

68 Of the categories of persons entitled to prisoner-of-war status under Art. 4 [1] to [6] GC III, those described in Art. 4 [4] GC III (civilians accompanying the armed forces) and Art. 4 [5] GC III (civilian

incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. Where such personnel directly participate in hostilities without the express or tacit authorization of the State party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts.⁶⁹

A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function.⁷⁰ Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.⁷¹

3. Non-international armed conflict

The above observations also apply, *mutatis mutandis*, in non-international armed conflicts. Thus, for such time as private contractors assume a continuous combat function for an organized armed group belonging to a non-State party, they become members of that group.⁷² Theoretically, private military companies could even become independent non-State parties to a non-international armed conflict.⁷³ Private contractors and civilian employees who are neither members of State armed forces nor members of organized armed groups, however, must be regarded as civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities.

crew members of the merchant marine or civil aircraft) are civilians (Art. 50 [1] AP I). As any other civilians, they are excluded from the categories entitled to combatant privilege, namely members of the armed forces and participants in a *levée en masse* (Art. 43 [1] and [2], 50 [1] AP I; Arts 1 and 2 H IV R) and, therefore, do not have a right to directly participate in hostilities with immunity from domestic prosecution. See also Section X below, as well as the brief discussion in Report DPH 2006, pp. 35 f.

69 Report DPH 2005, p. 82.

70 On the concept of continuous combat function, see Section II.3.(b) above. On the subsidiary functional determination of membership specifically in international armed conflict, see Section I.3.(c) above.

71 The prevailing view expressed during the expert meetings was that, for the purposes of the conduct of hostilities, private contractors and employees authorized by a State to directly participate in hostilities on its behalf would cease to be civilians and become members of its armed forces under IHL, regardless of formal incorporation. It was noted that, from the historical *letters of marque and reprisal* issued to privateers to the modern combatant privilege, direct participation in hostilities with the authority of a State has always been regarded as legitimate and, as such, exempt from domestic prosecution. See Report DPH 2003, pp. 4 f.; Report DPH 2004, pp. 11 ff., 14; Expert Paper DPH 2004 (Prof. M. Schmitt), pp. 8 ff.; Report DPH 2005, pp. 74 ff. and 80 f.; Background Doc. DPH 2005, WS VIII-IX, p. 17.

72 See Report DPH 2005, pp. 81 f.

73 *Ibid.*

4. Conclusion

Whether private contractors and employees of a party to the conflict qualify as civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as are applicable to any other civilian. The geographic and organizational closeness of such personnel to the armed forces and the hostilities require that this determination be made with particular care. Those who qualify as civilians are entitled to protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death. This does not rule out the possibility that, for purposes other than the conduct of hostilities, domestic law might regulate the status of private contractors and employees differently from IHL.

B. The concept of direct participation in hostilities

Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL.⁷⁴

Where treaty law refers to hostilities, that notion is intrinsically linked to situations of international or non-international armed conflict.⁷⁵ Therefore, the concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature.⁷⁶ Moreover, even during armed conflict, not all conduct constitutes part of the hostilities.⁷⁷ It is the purpose of the present chapter to identify the

⁷⁴ Art. 31 [1] Vienna Convention on the Law of Treaties.

⁷⁵ The concept of hostilities is frequently used in treaties regulating situations of international and non-international armed conflict, for example in the following contexts: opening of hostilities, conduct of hostilities, acts of hostility, persons (not) taking part in hostilities, effects of hostilities, suspension of hostilities, end of hostilities. See Title and Art. 1 H III; Title Section II H IV R; Art. 3 [1] GC I–IV; Art. 17 GC I; Art. 33 GC II; Title Section II and Arts 21 [3], 67, 118 and 119 GC III; Arts 49 [2], 130, 133, 134 and 135 GC IV; Arts 33, 34, 40 and 43 [2], 45, 47, 51 [3], 59 and 60 AP I and Title Part IV, Section I AP I; Arts 4 and 13 [3] AP II; Arts 3 [1] – [3] and 4 ERW Protocol.

⁷⁶ According to Art. 1 [2] AP II, such situations do not constitute armed conflicts.

⁷⁷ In fact, armed conflict can arise without any occurrence of hostilities, namely through a declaration of war or the occupation of territory without armed resistance (Article 2 GC I–IV). Furthermore, considerable portions of IHL deal with issues other than the conduct of hostilities, most notably the exercise of power and authority over persons and territory in the hands of a party to the conflict. See also Report DPH 2005, pp. 13, 18 f.

criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities.

In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct amounts to direct participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place.⁷⁸ Nevertheless, the importance of the circumstances surrounding each case should not divert attention from the fact that direct participation in hostilities remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of IHL.

IV. Direct participation in hostilities as a specific act

The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

1. Basic components of the notion of direct participation in hostilities

The notion of direct participation in hostilities essentially comprises two elements, namely that of “hostilities” and that of “direct participation” therein.⁷⁹ While the concept of “hostilities” refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,⁸⁰ “participation” in hostilities refers to the (individual) involvement of a person in these hostilities.⁸¹ Depending on the quality and degree of such involvement, individual participation in hostilities may be described as “direct” or “indirect”. The notion of direct participation in hostilities has evolved from the phrase “taking no active part in the hostilities” used in Article 3 GC I–IV. Although the English texts of the Geneva Conventions and Additional Protocols use the words “active”⁸² and “direct”⁸³, respectively, the consistent use of the phrase “*participant directement*” in the equally authentic

78 See also Section VIII below. See further: Report DPH 2006, pp. 25 ff., 70 ff.

79 Report DPH 2005, p. 17; Background Doc. DPH 2005, WS II-III, p. 2.

80 See Art. 22 H IV R (Section II on “Hostilities”). Treaty law does not establish uniform terminology for the conduct of hostilities but refers, apart from “hostilities”, also to “warfare” (Title Part III, Section I and Art. 35 [1] AP I), “military operations” (Art. 53 GC IV; Art. 51 [1] AP I; Art. 13 [1] AP II), or simply “operations” (Art. 48 AP I).

81 See Arts 43 [2] AP I, 45 [1] and [3] AP I, 51 [3] AP I, 67 [1] (e) AP I and 13 [3] AP II.

82 Art. 3 GC I–IV.

83 Arts 51 [3] AP I and Arts 43 [2] AP I; 67 [1] (e) AP I and 13 [3] AP II.

French texts demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.⁸⁴ Furthermore, as the notion of taking a direct part in hostilities is used synonymously in the Additional Protocols I and II, it should be interpreted in the same manner in international and non-international armed conflict.⁸⁵

2. Restriction to specific acts

In treaty IHL, individual conduct that constitutes part of the hostilities is described as direct participation in hostilities, regardless of whether the individual is a civilian or a member of the armed forces.⁸⁶ Whether individuals directly participate in hostilities on a spontaneous, sporadic, or unorganized basis or as part of a continuous function assumed for an organized armed force or group belonging to a party to the conflict may be decisive for their status as civilians, but has no influence on the scope of conduct that constitutes direct participation in hostilities. This illustrates that the notion of direct participation in hostilities does not refer to a person’s status, function, or affiliation, but to his or her engagement in specific hostile acts.⁸⁷ In essence, the concept of hostilities could be described as the sum total of all hostile acts carried out by individuals directly participating in hostilities.⁸⁸

84 This was the prevailing view also during the expert meetings (Report DPH 2005, p. 29; Report DPH 2006, p. 62). Affirming the synonymous meaning of the notions of “active” and “direct” participation in hostilities: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, § 629. At first sight, it may appear that the Preparatory Committee for the Establishment of an International Criminal Court implied a distinction between the terms “active” and “direct” in the context of the recruitment of children when it explained that: “The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat” (*emphases added*). Strictly speaking, however, the Committee made a distinction between “combat” and “military activities linked to combat”, not between “active” and “direct” participation.

85 This was the prevailing view also during the expert meetings (Background Doc. DPH 2004, p. 30; Report DPH 2004, pp. 15 ff.; Report DPH 2005, p. 13). Of course, this does not exclude that some of the consequences, particularly with regard to immunity from prosecution for having directly participated in hostilities, may be regulated differently for the various categories of persons involved in international and non-international armed conflicts.

86 See Arts 43 [2] AP I, 51 [3] AP I, 67 [1] (e) AP I and 13 [3] AP II.

87 This was the prevailing view also during the expert meetings (see Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17–24; Report DPH 2006, pp. 37 f.; Report DPH 2008, pp. 33 ff.).

88 For purposes of this Interpretive Guidance, the notion of “hostile” act refers to a specific act qualifying as direct participation in hostilities. According to the *Commentary AP* (above note 10), § 1943: “It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”. Verri, *Dictionary of the International Law of Armed Conflict* (Geneva: ICRC, 1992), p. 57, defines hostilities as: “acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience”, and Salmon, *Dictionnaire de droit international public* (Bruxelles: Bruylant, 2001), p. 550 (hostilités): “Ensemble des actes offensifs ou défensifs et des opérations militaires accomplis par un belligérant dans le cadre d’un conflit armé” (*all emphases added*). See also the use of the term “hostile act” in Arts 41 [2] and 42 [2] AP I. On the meaning and interrelation of the notions of “hostilities” and “hostile acts” see further Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17–24; Report DPH 2006, pp. 37 f.

Where civilians engage in hostile acts on a persistently recurrent basis, it may be tempting to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the future.⁸⁹ However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status- or function-based loss of protection* (due to combatant status or continuous combat function).⁹⁰ In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL.⁹¹ Consequently, in accordance with the object and purpose of IHL, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts.⁹²

3. Conclusion

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted synonymously in situations of international and non-international armed conflict. The treaty terms of “direct” and “active” indicate the same quality and degree of individual participation in hostilities.

89 Report DPH 2006, pp. 28 f.; Report DPH 2008, pp. 35–40. For a similar argument made in recent domestic case law, see: Israel HCJ, *PCATI v. Israel*, above note 24, § 39.

90 See also Section II.3 above. On the distinct temporal scopes of the loss of protection for organized armed actors and civilians see Section VII below.

91 Report DPH 2008, pp. 36–42.

92 This also was the prevailing view during the expert meetings (see Report DPH 2006, p. 38).

V. Constitutive elements of direct participation in hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.⁹³ Although these elements are very closely interrelated, and although there may be areas of overlap between them, each of them will be discussed separately here.

1. Threshold of harm

In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.

For a specific act to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold.⁹⁴ This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack. The qualification

⁹³ On the cumulative nature of these requirements, see also Report DPH 2006, pp. 40 f., 43 ff., 49 f.

⁹⁴ Background Doc. DPH 2004, pp. 27 f.; Background Doc. DPH 2005, WS II-III, p. 6.

of an act as direct participation does not require the *materialization* of harm reaching the threshold but merely the objective *likelihood* that the act will result in such harm. Therefore, the relevant threshold determination must be based on “likely” harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.⁹⁵

a) Adversely affecting the military operations or military capacity of a party to the conflict

When an act may reasonably be expected to cause harm of a specifically *military nature*, the threshold requirement will generally be satisfied regardless of quantitative gravity. In this context, military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects,⁹⁶ but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict.⁹⁷

For example, beyond the killing and wounding of military personnel and the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communication. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. For instance, denying the adversary the military use of certain objects, equipment and territory,⁹⁸ guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them),⁹⁹ and clearing mines placed by the adversary¹⁰⁰ would reach the required threshold of harm. Electronic interference with military computer networks could also suffice, whether through computer

95 Background Doc. DPH 2004, p. 25; Report DPH 2005, p. 33.

96 The use of weapons or other means to commit acts of violence against human and material enemy forces is probably the most uncontroversial example of direct participation in hostilities (*Customary IHL*, above note 7, Vol. I, Rule 6, p. 22).

97 During the expert meetings, there was wide agreement that the causation of military harm as part of the hostilities did not necessarily presuppose the use of armed force or the causation of death, injury or destruction (Report DPH 2005, p. 14), but essentially included “all acts that adversely affect or aim to adversely affect the enemy’s pursuance of its military objective or goal” (Report DPH 2005, pp. 22 f., 31). The concerns expressed by some experts that the criterion of “adversely affecting” military operations or military capacity was too wide and vague and could be misunderstood to authorize the killing of civilians without any military necessity are addressed below in Section IX (see Report DPH 2006, pp. 41 f.).

98 Report DPH 2005, pp. 11, 29.

99 The prevailing view during the expert meetings was that guarding captured military personnel was a clear case of direct participation in hostilities (Background Doc. DPH 2004, pp. 9; Report DPH 2005, pp. 15 f.). Nevertheless, to the extent practically possible, the guarding of captured military personnel as a means of preventing their liberation by the enemy should be distinguished from the exercise of administrative, judicial and disciplinary authority over them while in the power of a party to the conflict, including in case of riots or escapes, which are not part of a hostile military operation. This nuanced distinction was not discussed during the expert meetings. See also the discussion on “exercise of power or authority over persons or territory”, below notes 163–165 and accompanying text.

100 Report DPH 2005, p. 31.

network attacks (CNA) or computer network exploitation (CNE),¹⁰¹ as well as wiretapping the adversary's high command¹⁰² or transmitting tactical targeting information for an attack.¹⁰³

At the same time, the conduct of a civilian cannot be interpreted as *adversely* affecting the military operations or military capacity of a party to the conflict simply because it fails to *positively* affect them. Thus, the refusal of a civilian to collaborate with a party to the conflict as an informant, scout or lookout would not reach the required threshold of harm regardless of the motivations underlying the refusal.

b) Inflicting death, injury or destruction on persons or objects protected against direct attack

Specific acts may constitute part of the hostilities even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict. In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction.¹⁰⁴ The most uncontroversial examples of acts that can qualify as direct participation in hostilities even in the absence of military harm are attacks directed against civilians and civilian objects.¹⁰⁵ In IHL, attacks are defined as “acts of violence against the adversary, whether in offence or in defence”.¹⁰⁶ The phrase “against the adversary” does not specify the target, but the belligerent nexus of an attack,¹⁰⁷ so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in

101 CNA have been tentatively defined as “operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves” (Background Doc. DPH 2003, pp. 15 ff., with references) and may be conducted over long distances through radio waves or international communication networks. While they may not involve direct physical damage, the resulting system malfunctions can be devastating. CNE, namely “the ability to gain access to information hosted on information systems and the ability to make use of the system itself” (*ibid.*, with references), though not of a direct destructive nature, could have equally significant military implications. During the expert meetings, CNA causing military harm to the adversary in a situation of armed conflict were clearly regarded as part of the hostilities (Report DPH 2005, p. 14).

102 See Report DPH 2005, p. 29.

103 During the expert meetings, the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking enemy forces. The decisive criterion for the qualification of her conduct as direct participation in hostilities was held to be the importance of the transmitted information for the direct causation of harm and, thus, for the execution of a concrete military operation. See Report DPH 2004, p. 5.

104 During the expert meetings, it was held that the required threshold of harm would clearly be met where an act can reasonably be expected to cause material damage to objects or persons, namely death, injury or destruction (Report DPH 2005, pp. 30 f.; Background Doc. DPH 2004, pp. 5 f., 9 f., 28).

105 Accordingly, Section III of the Hague Regulations (entitled “Hostilities”) prohibits the “attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended” (Art. 25 H IV R).

106 Article 49 [1] AP I. Attacks within the meaning of IHL (Art. 49 [1] AP I) should not be confused with attacks as understood in the context of crimes against humanity (see below note 167), or with armed attacks within the meaning of the *jus ad bellum*, both of which are beyond the scope of this study.

107 On belligerent nexus, see Section V.3 below. For the relevant discussions on Draft Art. 44 AP I during the Diplomatic Conference of 1974–1977, see CDDH/III/SR.11, pp. 93 f.

hostilities.¹⁰⁸ For example, sniper attacks against civilians¹⁰⁹ and the bombardment or shelling of civilian villages or urban residential areas¹¹⁰ are likely to inflict death, injury, or destruction on persons and objects protected against direct attack and thus qualify as direct participation in hostilities regardless of any military harm to the opposing party to the conflict.

Acts that neither cause harm of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of “warfare”¹¹¹ or, respectively, of “injuring the enemy”,¹¹² as would be required for a qualification as hostilities. For example, the building of fences or road blocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, they would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities.

c) Summary

For a specific act to reach the threshold of harm required to qualify as direct participation in hostilities, it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. In the absence of military harm, the threshold can also be reached where an act is likely to inflict death, injury, or destruction on persons or objects protected against direct attack. In both cases, acts reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the requirements of direct causation and belligerent nexus.

2. Direct causation

In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.

108 Needless to say, such attacks are invariably prohibited under IHL governing both international and non-international armed conflict. See, for example, Arts 48 AP I, 51 AP I and 13 AP II; *Customary IHL*, above note 7, Vol. I, Rule 1.

109 For the qualification of sniping as an attack within the meaning of IHL, see, e.g. ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment of 5 December 2003, § 27 in conjunction with § 52.

110 ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005, §§ 282 f. in conjunction with § 289.

111 Art. 35 [1] AP I.

112 Art. 22 H IV R (Section II on Hostilities).

a) *Conduct of hostilities, general war effort, and war-sustaining activities*

The treaty terminology of taking a “direct” part in hostilities, which describes civilian conduct entailing loss of protection against direct attack, implies that there can also be “indirect” participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person’s direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.¹¹³

Generally speaking, beyond the actual conduct of hostilities, the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while war-sustaining activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods).

Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause – i.e. bring about the materialization of – the required harm, the general war effort and war-sustaining activities also include activities that merely maintain or build up the capacity to cause such harm.¹¹⁴

¹¹³ According to the *Commentary AP* (above note 10), § 1679, “to restrict this concept [i.e. of “direct participation in hostilities”] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants [...]”. Similarly *ibid.*, *Commentary Art. 51 AP I*, § 1945. Affirmative also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment of 17 July 2008, §§ 175–176. See also the distinction between “taking part in hostilities” and “work of a military character” in Art. 15 [1] (b) GC IV. The position reflected in the *Commentary* corresponds to the prevailing opinion expressed during the expert meetings (Report DPH 2005, p. 21).

¹¹⁴ According to the *Commentary AP* (above note 10), § 1944, “[...] ‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”. Affirmative also ICTY, *Prosecutor v. Strugar, Appeal*, (above note 16), § 178. During the expert meetings, it was emphasized that “direct participation” in hostilities is neither synonymous with “involvement in” or “contribution to” hostilities, nor with “preparing” or “enabling” someone else to directly participate in hostilities, but essentially means that an individual is personally “taking part in the ongoing exercise of harming the enemy” (Report DPH 2004, p. 10) and personally carrying out hostile acts which are “part of” the hostilities (Report DPH 2005, pp. 21, 27, 30, 34).

b) *Direct and indirect causation*

For a specific act to qualify as “direct” rather than “indirect” participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm.¹¹⁵ Standards such as “indirect causation of harm”¹¹⁶ or “materially facilitating harm”¹¹⁷ are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack.¹¹⁸ Instead, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.¹¹⁹

In the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets,¹²⁰ or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services)¹²¹ would have a potentially important, but still indirect, impact on the military capacity or operations of that party. Other examples of indirect participation include scientific research and design,¹²² as well as production¹²³ and transport¹²⁴ of

115 According to the *Commentary AP* (above note 10), § 4787: “The term ‘direct participation in hostilities’ [...] implies that there is a sufficient causal relationship between the act of participation and its immediate consequences”. See also Report DPH 2005, pp. 30, 34 ff.

116 Report DPH 2005, p. 28.

117 Background Doc. DPH 2004, p. 27; Report DPH 2005, pp. 28, 34.

118 See also Background Doc. DPH 2004, pp. 27 f.; Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

119 According to the *Commentary AP* (above note 10), § 1679: “Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place” (*emphasis added*).

120 Background Doc. DPH 2004, pp. 9 f.; Report DPH 2005, pp. 14 f.

121 Background Doc. DPH 2004, pp. 14 f.

122 Although, during the expert meetings, civilian scientists and weapons experts were generally regarded as protected against direct attack, some doubts were expressed as to whether this assessment could be upheld in extreme situations, namely where the expertise of a particular civilian was of very exceptional and potentially decisive value for the outcome of an armed conflict, such as the case of nuclear weapons experts during the Second World War (Report DPH 2006, pp. 48 f.).

123 During the expert meetings, there was general agreement that civilian workers in an ammunitions factory are merely building up the capacity of a party to a conflict to harm its adversary, but do not directly cause harm themselves. Therefore, unlike civilians actually using the produced ammunition to cause harm to the adversary, such factory workers cannot be regarded as directly participating in hostilities (see Report DPH 2003, p. 2; Report DPH 2004, pp. 6 f.; Report DPH 2005, pp. 15, 21, 28 f., 34, 38; Report DPH 2006, pp. 48 ff., 60; Report DPH 2008, p. 63). The experts remained divided, however, as to whether the construction of improvised explosive devices (IED) or missiles by non-State actors could in certain circumstances exceed mere capacity-building and, in contrast to industrial weapons production, could become a measure preparatory to a concrete military operation (see Report DPH 2006, pp. 48 f., 60).

124 On the example of a civilian driver of an ammunition truck, see Section V.2.(e) below.

weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm. Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect.¹²⁵ Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.¹²⁶

Moreover, for the requirement of direct causation to be met, it is neither necessary nor sufficient that the act be indispensable to the causation of harm.¹²⁷ For example, the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm. On the other hand, a person serving as one of several lookouts during an ambush would certainly be taking a direct part in hostilities although his contribution may not be indispensable to the causation of harm. Finally, it is not sufficient that the act and its consequences be connected through an uninterrupted causal chain of events. For example, the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly.

c) Direct causation in collective operations

The required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations. For example, attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander.¹²⁸ While all of these persons are integral to that operation and directly participate in hostilities, only a few of them carry out activities that, in isolation, could be said to directly cause the required threshold of harm. The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes

125 Report DPH 2004, p. 10; Report DPH 2005, pp. 35 f. For dissenting views, see: Report DPH 2006, pp. 26, 65; Report DPH 2008, pp. 51, 53 ff.

126 See Sections V.2.(c) and VI.1 below.

127 For the discussion during the expert meetings on “but for”-causation (i.e. the harm in question would not occur “but for” the act), see Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

128 Report DPH 2005, p. 35.

such harm.¹²⁹ Examples of such acts would include, *inter alia*, the identification and marking of targets,¹³⁰ the analysis and transmission of tactical intelligence to attacking forces,¹³¹ and the instruction and assistance given to troops for the execution of a specific military operation.¹³²

d) *Causal, temporal, and geographic proximity*

The requirement of direct causation refers to a degree of *causal* proximity, which should not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, it has become quite common for parties to armed conflicts to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps and timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks. The causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal or geographical proximity. Conversely, although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link between such support activities and the causation of the required threshold of harm to the opposing party to a conflict remains indirect. Thus, while temporal or geographic proximity to the resulting harm may indicate that a specific act amounts to direct participation in hostilities, these factors would not be sufficient in the absence of direct causation.¹³³ As previously noted, where the required harm has not yet materialized, the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation (“likely” harm).¹³⁴

e) *Selected examples*

Driving an ammunition truck: The delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities.¹³⁵ Transporting ammunition from a factory to a port for

129 Report DPH 2004, p. 5; Report DPH 2005, pp. 35 f.

130 Background Doc. DPH 2004, p. 13; Report DPH 2004, pp. 11, 25; Report DPH 2005, p. 31.

131 Report DPH 2005, pp. 28, 31. See also the example provided in note 103, which was described as the equivalent of a “fire control system”.

132 Report DPH 2004, p. 10; Report DPH 2005, pp. 33, 35 f.

133 Report DPH 2005, p. 35.

134 See Section V.1 above.

135 Background Doc. DPH 2004, p. 28; Report DPH 2006, p. 48. Similar reasoning was recently adopted in domestic jurisprudence with regard to “driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations” (U.S. Military Commission, *USA v. Salim Ahmed Hamdan*, 19 December 2007, p. 6) and “driving the ammunition to the place from which it will be used for the purposes of hostilities” (Israel HCJ, *PCATI v. Israel*, above note 24, § 35).

further shipping to a storehouse in a conflict zone, on the other hand, is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly. Although the ammunition truck remains a legitimate military objective, the driving of the truck would not amount to direct participation in hostilities and would not deprive a civilian driver of protection against direct attack.¹³⁶ Therefore, any direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.¹³⁷

Voluntary human shields: The same logic applies to civilians attempting to shield a military objective by their presence as persons entitled to protection against direct attack (voluntary human shields). Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.¹³⁸ This scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.¹³⁹

Conversely, in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective. Instead, the presence of civilians around the targeted objective may shift the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage.¹⁴⁰ The very fact that voluntary human shields are in practice considered to pose a *legal* – rather than a *physical* – obstacle to military operations demonstrates that they are recognized as protected against direct attack or, in other words, that their conduct does not amount to direct participation in hostilities. Indeed, although the presence of voluntary human shields may eventually lead to the cancellation or suspension of an operation by the attacker, the causal relation between their

¹³⁶ Report DPH 2006, p. 48.

¹³⁷ See also Report DPH 2005, pp. 32 f. Although it was recognized during the expert meetings that a civilian driver of an ammunition truck may have to face the risk of being mistaken for a member of the armed forces, it was also widely agreed that any civilian known to be present in a military objective had to be taken into account in the proportionality equation, unless and for such time as he or she directly participated in hostilities (Report DPH 2006, pp. 72 f.).

¹³⁸ This view was generally shared during the expert meetings (Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.).

¹³⁹ During the expert meetings, this scenario was illustrated by the concrete example of a woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her (Report DPH 2004, pp. 6 f.).

¹⁴⁰ See Art. 51 [5] (a) AP I and, for the customary nature of this rule in international and non-international armed conflict, *Customary IHL*, above note 7, Vol. I, Rule 14. For the relevant discussion during the expert meetings, see Report DPH 2004, pp. 6 f.; Report DPH 2006, pp. 44 ff.; Report DPH 2008, p. 70.

conduct and the resulting harm remains indirect.¹⁴¹ Depending on the circumstances, it may also be questionable whether voluntary human shielding reaches the required threshold of harm.

The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.¹⁴² Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.¹⁴³

f) Summary

The requirement of direct causation is satisfied if either the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold. However, even acts meeting the requirements of direct causation and reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the third requirement, that of belligerent nexus.

3. Belligerent nexus

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

a) Basic concept

Not every act that directly adversely affects the military operations or military capacity of a party to an armed conflict or directly inflicts death, injury, or destruction on persons and objects protected against direct attack necessarily amounts to direct participation in hostilities. As noted, the concept of direct

141 While there was general agreement during the expert meetings that involuntary human shields could not be regarded as directly participating in hostilities, the experts were unable to agree on the circumstances in which acting as a voluntary human shield would, or would not, amount to direct participation in hostilities. For an overview of the various positions, see Report DPH 2004, p. 6; Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.

142 See also Arts 51 [7] and [8] AP I, according to which any violation of the prohibition on using civilians as human shields does not release the attacker from his obligations with respect to the civilian population and individual civilians, including the obligation to take the required precautionary measures.

143 See Report DPH 2004, p. 7; Report DPH 2008, pp. 71 f.

participation in hostilities is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.¹⁴⁴ Treaty IHL describes the term hostilities as the resort to means and methods of “injuring the enemy”,¹⁴⁵ and individual attacks as being directed “against the adversary”.¹⁴⁶ In other words, in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus).¹⁴⁷

Conversely, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of “participation” in hostilities taking place between these parties.¹⁴⁸ Unless such violence reaches the threshold required to give rise to a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.¹⁴⁹

b) Belligerent nexus and subjective intent

Belligerent nexus should be distinguished from concepts such as subjective intent¹⁵⁰ and hostile intent.¹⁵¹ These relate to the state of mind of the person concerned,

¹⁴⁴ See above Section IV.

¹⁴⁵ See Art. 22 H IV R (Section II on “Hostilities”).

¹⁴⁶ See, most notably, the definition of “attacks” as acts of violence “against the adversary ...” (Art. 49 [1] AP I). Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 ff.

¹⁴⁷ The requirement of belligerent nexus is conceived more narrowly than the general nexus requirement developed in the jurisprudence of the ICTY and the ICTR as a precondition for the qualification of an act as a war crime (see: ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgment of 12 June 2002 (Appeals Chamber), § 58; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment of 26 May 2003 (Appeals Chamber), § 570). While the general nexus requirement refers to the relation between an act and a situation of armed conflict as a whole, the requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict. During the expert meetings, it was generally agreed that no conduct lacking a sufficient nexus to the hostilities could qualify as direct participation in such hostilities. See Report, DPH 2005, p. 25 and, more generally, Background Doc. DPH 2004, pp. 25 f.; Report DPH 2004, pp. 10, 25; Background Doc. DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 9 f., 22 ff., 27, 34.

¹⁴⁸ Report DPH 2006, pp. 51 f.

¹⁴⁹ The same applies, for example, to armed violence carried out by independent armed groups in international armed conflict (see also above notes 24–27 and accompanying text). During the expert meetings there was general agreement regarding the importance of distinguishing, in contexts of armed conflict, between law enforcement operations and the conduct of hostilities. See Report DPH 2005, pp. 10 f.; Report DPH 2006, pp. 52 f.; Report DPH 2008, p. 49, 54, 62 ff.

¹⁵⁰ During the expert meetings, there was almost unanimous agreement that the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for “split second” targeting decisions. See Report DPH 2005, pp. 9, 26, 34, 66 f.; Report DPH 2006, pp. 50 f.; Report DPH 2008, p. 66.

¹⁵¹ During the expert meetings, there was agreement that ‘hostile intent’ is not a term of IHL, but a technical term used in rules of engagement (ROE) drafted under national law. ROE constitute national command and control instruments designed to provide guidance to armed personnel as to their conduct in specific contexts. As such, ROE do not necessarily reflect the precise content of IHL and cannot be used to define the concept of direct participation in hostilities. For example, particular ROE may for political or

whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.¹⁵² As an objective criterion linked to the act alone, belligerent nexus is generally not influenced by factors such as personal distress or preferences, or by the mental ability or willingness of persons to assume responsibility for their conduct. Accordingly, even civilians forced to directly participate in hostilities¹⁵³ or children below the lawful recruitment age¹⁵⁴ may lose protection against direct attack.

Only in exceptional situations could the mental state of civilians call into question the belligerent nexus of their conduct. This scenario could occur, most notably, when civilians are totally unaware of the role they are playing in the conduct of hostilities (e.g. a driver unaware that he is transporting a remote-controlled bomb) or when they are completely deprived of their physical freedom of action (e.g. when they are involuntary human shields physically coerced into providing cover in close combat). Civilians in such extreme circumstances cannot be regarded as performing an action (i.e. as *doing something*) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized. As a result, these civilians would have to be taken into account in the proportionality assessment during any military operation likely to inflict incidental harm on them.

c) Practical relevance of belligerent nexus

Many activities during armed conflict lack a belligerent nexus even though they cause a considerable level of harm. For example, the exchange of fire between police and hostage takers during an ordinary bank robbery,¹⁵⁵ violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use,¹⁵⁶ may cause the required threshold of harm, but are not

operational reasons prohibit the use of lethal force in response to certain activities, even though they amount to direct participation in hostilities under IHL. Conversely, ROE may contain rules on the use of lethal force in individual self-defence against violent acts that do not amount to direct participation in hostilities. Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to hostile intent for the purpose of defining direct participation in hostilities. See Report DPH 2005, p. 37.

152 Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 f.

153 It should be noted, however, that civilians protected under the Fourth Geneva Convention may not be compelled to do work “directly related to the conduct of military operations” or to serve in the armed or auxiliary force of the enemy (Arts 40 [2] and 51 [1] GC IV), and that civilian medical and religious personnel may not be compelled to carry out tasks which are not compatible with their humanitarian mission (Art. 15 [3] AP I; Art. 9 [1] AP II).

154 Therefore, all parties to an armed conflict are obliged to do everything feasible to ensure that children below the age of 15 years do not directly participate in hostilities and, in particular, to refrain from recruiting them into their armed forces or organized armed groups (Arts 77 [2] AP I and 4 [3] (c) AP II; *Customary IHL*, above note 7, Vol. I, Rule 137). Of course, as soon as children regain protection against direct attack, they also regain the special protection afforded to children under IHL (Arts 77 [3] AP I and 4 [3] (d) AP II).

155 See also Report DPH 2005, pp. 9, 11.

156 Report DPH 2004, p. 25.

specifically designed to support a party to the conflict by harming another. Similarly, the military operations of a party to a conflict can be directly and adversely affected when roads leading to a strategically important area are blocked by large groups of refugees or other fleeing civilians. However, the conduct of these civilians is not specifically designed to support one party to the conflict by causing harm to another and, therefore, lacks belligerent nexus. This analysis would change, of course, if civilians block a road in order to facilitate the withdrawal of insurgent forces by delaying the arrival of governmental armed forces (or vice versa). When distinguishing between the activities that do and those that do not amount to direct participation in hostilities, the criterion of belligerent nexus is of particular importance in the following four situations:

Individual self-defence: The causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus.¹⁵⁷ For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimizing a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities.¹⁵⁸

Exercise of power or authority over persons or territory: IHL makes a basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory. As a result, the infliction of death, injury, or destruction by civilians on persons or objects that have fallen into their “hands”¹⁵⁹ or “power”¹⁶⁰ within the meaning of IHL does not, without more, constitute part of the hostilities.

For example, the use of armed force by civilian authorities to suppress riots and other forms of civil unrest,¹⁶¹ prevent looting, or otherwise maintain law and order in a conflict area may cause death, injury, or destruction, but generally it would not constitute part of the hostilities conducted between parties to an armed conflict.¹⁶² Likewise, once military personnel have been captured (and, thus, are

157 This was also the prevailing opinion during the expert meetings (see Report DPH 2003, p. 6; Background Doc. DPH 2004, pp. 14, 31 f.).

158 The use of force by individuals in defence of self or others is an issue distinct from the use of force by States in self-defence against an armed attack, which is governed by the *jus ad bellum* and is beyond the scope of this study.

159 E.g. Art. 4 GC IV.

160 E.g. Art. 5 GC III; Art. 75 [1] AP I.

161 On the belligerent nexus of civil unrest, see below note 169 and accompanying text.

162 Treaty IHL expressly confirms the law enforcement role, for example, of occupying powers (Art. 43 H IV R) and States party to a non-international armed conflict (Art. 3 [1] AP II).

hors de combat), the suppression of riots and prevention of escapes¹⁶³ or the lawful execution of death sentences¹⁶⁴ is not designed to directly cause military harm to the opposing party to the conflict and, therefore, lacks belligerent nexus.¹⁶⁵

Excluded from the concept of direct participation in hostilities is not only the lawful exercise of administrative, judicial or disciplinary authority on behalf of a party to the conflict, but even the perpetration of war crimes or other violations of IHL outside the conduct of hostilities. Thus, while collective punishment, hostage-taking, and the ill-treatment and summary execution of persons in physical custody are invariably prohibited by IHL, they are not part of the conduct of hostilities.¹⁶⁶ Such conduct may constitute a domestic or international crime and permit the lawful use of armed force against the perpetrators as a matter of law enforcement or defence of self or others.¹⁶⁷ Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behaviour but a consequence of military necessity in the conduct of hostilities.¹⁶⁸

Civil unrest: During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury and destruction and, ultimately, may even benefit the general war effort of a party to the conflict by undermining the territorial authority and control of another party through political pressure, economic insecurity, destruction and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities.¹⁶⁹

Inter-civilian violence: Similarly, in order to become part of the conduct of hostilities, use of force by civilians against other civilians, even if widespread, must be specifically designed to support a party to an armed conflict in its military

163 E.g. Art. 42 GC III.

164 E.g. Arts 100–101 GC III.

165 See also above note 99 and accompanying text.

166 See, for example, Arts 3 GC I–IV; 32 GC IV and 75 [2] AP I. For the divergence of opinions expressed during the expert meetings on the qualification of hostage-taking as direct participation in hostilities, see Report DPH 2004, p. 4; Report DPH 2005, p. 11; Report DPH 2006, pp. 43 f.; Report DPH 2008, pp. 67 ff.

167 The concept of “attack” in the context of crimes against humanity does not necessarily denote conduct amounting to direct participation in hostilities under IHL. As explained by the ICTY “[t]he term ‘attack’ in the context of a crime against humanity carries a slightly different meaning than in the laws of war. [It] is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention” (ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgment of 22 February 2001 (Trial Chamber), § 416 (*emphasis added*), confirmed by the Appeals Chamber in its Judgment in the same case of 12 June 2002, § 89). See also Report DPH 2006, pp. 42 f.

168 For the relevant discussion during the expert meetings, see Report DPH 2008, pp. 63–65.

169 See also Report DPH 2004, p. 4; Report DPH 2008, p. 67.

confrontation with another.¹⁷⁰ This would not be the case where civilians merely take advantage of a breakdown of law and order to commit violent crimes.¹⁷¹ Belligerent nexus is most likely to exist where inter-civilian violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.

d) *Practical determination of belligerent nexus*

The task of determining the belligerent nexus of an act can pose considerable practical difficulties. For example, in many armed conflicts, gangsters and pirates operate in a grey zone where it is difficult to distinguish hostilities from violent crime unrelated to, or merely facilitated by, the armed conflict. These determinations must be based on the information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors.¹⁷² In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian's loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the person concerned must be presumed to be protected against direct attack.¹⁷³

e) *Summary*

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another. As a general rule, harm caused (a) in individual self-defence or defence of others against violence prohibited under IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities.

4. Conclusion

Applied in conjunction, the three requirements of *threshold of harm*, *direct causation* and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities

170 See also Report DPH 2004, p. 4; Report DPH 2005, pp. 8, 11.

171 With regard to the existence of a general nexus between civilian violence and the surrounding armed conflict, a similar conclusion was reached in ICTR, *Prosecutor v. Rutaganda* (above note 147), § 570.

172 Report DPH 2005, pp. 9 f., 22, 26, 28, 34, 40.

173 See Section VIII below.

and, therefore, do not entail loss of protection against direct attack.¹⁷⁴ Even where a specific act amounts to direct participation in hostilities, however, the kind and degree of force used in response must comply with the rules and principles of IHL and other applicable international law.¹⁷⁵

VI. Beginning and end of direct participation in hostilities

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

As civilians lose protection against direct attack “for such time” as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation in hostilities must be determined with utmost care.¹⁷⁶ Without any doubt, the concept of direct participation in hostilities includes the immediate execution phase of a specific act meeting the three criteria of *threshold of harm*, *direct causation* and *belligerent nexus*. It may also include measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.¹⁷⁷

1. Preparatory measures

Whether a preparatory measure amounts to direct participation in hostilities depends on a multitude of situational factors that cannot be comprehensively described in abstract terms.¹⁷⁸ In essence, preparatory measures amounting to direct participation in hostilities correspond to what treaty IHL describes as “military operation[s] preparatory to an attack”.¹⁷⁹ They are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they

174 The use of force in response to activities not fulfilling these requirements must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.

175 See Section IX below.

176 See also the discussion in Report DPH 2006, pp. 54–63. On the temporal scope of the loss of protection, see Section VII below.

177 See also the related discussion on direct causation in collective operations, Section V.2 above. (c).

178 For the relevant discussions during the expert meetings, see: Background Doc. DPH 2004, pp. 7, 10, 13, 21; Background Doc. DPH 2005, WS VI–VII, p. 10; Report DPH 2005, p. 19; Report DPH 2006, pp. 56–63. Regarding the distinction of preparatory measures, deployments and withdrawals entailing loss of protection against direct attack from preparations, attempts and other forms of involvement entailing criminal responsibility, see Report DPH 2006, pp. 57 ff.

179 Art. 44 [3] AP I.

already constitute an integral part of that act. Conversely, the preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. In line with the distinction between direct and indirect participation in hostilities, it could be said that preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.¹⁸⁰

It is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before (temporal proximity) or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution. For example, the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities. This is the case even if the operation will not be carried out until the next day, if the target will be selected only during the operation, and if great distance separates the preparatory measure from the location of the subsequent attack. Conversely, transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future would constitute a general preparatory measure qualifying as mere indirect participation.

Similarly, if carried out with a view to the execution of a specific hostile act, all of the following would almost certainly constitute preparatory measures amounting to direct participation in hostilities: equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. Examples of general preparation not entailing loss of protection against direct attack would commonly include purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors.¹⁸¹ It should be reiterated that these examples can only illustrate the principles based on which the necessary distinctions ought to be made and cannot replace a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action.¹⁸²

180 See above note 114 and accompanying text, as well as Section V.2.(b).

181 On the qualification of such activities as direct participation in hostilities see also Section V.2.(a)(b) above.

182 During the expert meetings, it was emphasized that the distinction between preparatory measures that do and, respectively, do not qualify as direct participation in hostilities should be made with utmost care so as to ensure that loss of civilian protection would not be triggered by acts too remote from the actual fighting. In order for the word “direct” in the phrase direct participation in hostilities to retain any meaning, civilians should be liable to direct attack exclusively during recognizable and proximate preparations, such as the loading of a gun, and during deployments in the framework of a specific military operation (Report DPH 2006, pp. 55, 60 f.).

2. Deployment and return

Where the execution of a specific act of direct participation in hostilities requires prior geographic deployment, such deployment already constitutes an integral part of the act in question.¹⁸³ Likewise, as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*.¹⁸⁴ A deployment amounting to direct participation in hostilities begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.

Whether a particular individual is engaged in deployment to or return from the execution of a specific hostile act depends on a multitude of situational factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both the deployment and return be carried out as an integral part of a specific act amounting to direct participation in hostilities. That determination must be made with utmost care and based on a reasonable evaluation of the prevailing circumstances.¹⁸⁵ Where the execution of a hostile act does not require geographic displacement, as may be the case with computer network attacks or remote-controlled weapons systems, the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act.

3. Conclusion

Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific act or operation amounting to direct participation in hostilities, they extend the beginning and end of the act or operation beyond the phase of its immediate execution.

183 See the *Commentary AP* (above note 10), §§ 1679, 1943, 4788, which recalls that several delegations to the Diplomatic Conference of 1974–1977 had indicated that the concept of hostilities included preparations for combat and return from combat. In their responses to the 2004 Questionnaire, a majority of experts considered that deployment to the geographic location of a hostile act should already qualify as direct participation in hostilities and, though more hesitant, tended towards the same conclusion with regard to the return from that location. See Background Doc. DPH 2004, pp. 7 (I, 1.3.), 10 (I, 2.4.), 13 (I, 3.4.), 20 (I, 6.4.). See also Report DPH 2005, pp. 65 f.

184 While this was also the prevailing opinion during the expert meetings (see Report DPH 2005, p. 66) some experts feared that the continued loss of protection after the execution of a specific hostile act invited arbitrary and unnecessary targeting (Report DPH 2006, pp. 56 f., 61 ff.).

185 See Report DPH 2005, p. 66, Report DPH 2006, p. 55.

C. Modalities governing the loss of protection

Under customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of State armed forces or organized armed groups belonging to a party to an armed conflict.¹⁸⁶ In view of the serious consequences for the individuals concerned, the present chapter endeavours to clarify the precise modalities that govern such loss of protection under IHL. The following sections examine the temporal scope of the loss of protection against direct attack (VII), the precautions and presumptions in situations of doubt (VIII), the rules and principles governing the use of force against legitimate military targets (IX), and the consequences of regaining protection against direct attack (X).

In line with the aim of the Interpretive Guidance, this chapter will focus on examining loss of protection primarily in case of direct participation in hostilities (civilians), but also in case of continuous combat function (members of organized armed groups), as the latter concept is intrinsically linked to the concept of direct participation in hostilities.¹⁸⁷ It will not, or only marginally, address the loss of protection in case of membership in State armed forces, which largely depends on criteria unrelated to direct participation in hostilities, such as formal recruitment, incorporation, discharge or retirement under domestic law.¹⁸⁸ Subject to contrary provisions of IHL, this does not exclude the applicability of the conclusions reached in Sections VII to X, *mutatis mutandis*, to members of State armed forces as well.

VII. Temporal scope of the loss of protection

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see II above), and lose protection against direct attack, for as long as they assume their continuous combat function.

186 Regarding the terminology of “loss of protection against direct attacks” used in the Interpretive Guidance see above note 6.

187 On the concept of continuous combat function, see Section II.3.(b) above.

188 On the applicability of the criterion of continuous combat function for the determination of membership in irregularly constituted militia, volunteer corps and resistance movements belonging to States, see Section I.3.(c) above.

1. Civilians

According to treaty and customary IHL applicable in international and non-international armed conflict, civilians enjoy protection against direct attack “unless and for such time” as they take a direct part in hostilities.¹⁸⁹ Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended. The phrase “unless and for such time” clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities.¹⁹⁰ This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (the so-called “revolving door” of civilian protection).

The revolving door of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat. In contrast to members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate. Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.¹⁹¹ As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends.¹⁹² Until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence.

Although the mechanism of the revolving door of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains

189 Arts 51 [3] AP I and 13 [3] AP II; *Customary IHL*, above note 7, Vol. I, Rule 6. The customary nature of this rule was affirmed also in ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment of 29 July 2004, § 157, with references to earlier case law. For recent domestic jurisprudence expressly accepting the customary nature of Art. 51 [3] AP I, including the phrase “for such time as”, see: Israel HCI, *PCATI v. Israel*, above note 24, § 30.

190 On the beginning and end of direct participation in hostilities see Section VI above.

191 Regarding the practical impossibility of reliably predicting future conduct of a civilian, see also Report DPH 2006, pp. 66 ff.

192 According to the *Commentary AP* (above note 10), § 4789: “If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked”. See also the description of direct participation in hostilities as potentially “intermittent and discontinuous” in ICTY, *Prosecutor v. Strugar, Appeal*, (above note 16), § 178. Although, during the expert meetings, the mechanism of the revolving door of protection gave rise to some controversy, the prevailing view was that, under the texts of Art. 3 [1] GC I–IV and the Additional Protocols, continuous loss of civilian protection could not be based on recurrent acts by individual civilians, but exclusively on the concept of membership in State armed forces or an organized armed group belonging to a non-State party to the conflict. See Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 63 f.; Report DPH 2006, pp. 64–68; Report DPH 2008, pp. 33–44.

necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.

2. Members of organized armed groups

Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.¹⁹³ Formally, therefore, they no longer benefit from the protection provided to civilians “unless and for such time” as they take a direct part in hostilities. Indeed, the restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians and cannot be applied to organized armed groups. It would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis. This imbalance would encourage organized armed groups to operate as farmers by day and fighters by night. In the long run, the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessively liberal interpretations of IHL to outright disrespect for the protections it affords.¹⁹⁴

Instead, where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group.¹⁹⁵ In other words, the “revolving door” of protection starts to operate based on membership.¹⁹⁶ As stated earlier, membership in an organized armed group begins at the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.¹⁹⁷ Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an

193 On the mutual exclusivity of the concepts of civilian and organized armed group, see Section II.1 above. On the concept of continuous combat function, see Section II.3.(b) above.

194 Report DPH 2005, p. 49; Report DPH 2006, p. 65.

195 According to the *Commentary AP* (above note 10), § 4789: “Those who belong to armed forces or armed groups may be attacked at any time”. See also Expert Paper DPH 2004 (Prof. M. Bothe). Protection against direct attack is restored where members of armed groups fall *hors de combat* as a result of capture, surrender, wounds or any other cause (Art. 3 [1] GC I–IV. See also Art. 41 AP I.).

196 During the expert meetings, this widely supported compromise was described as a “functional membership approach”. For an overview of the discussions, see Report DPH 2003, p. 7; Background Doc. DPH 2004, pp. 34 ff.; Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 49, 59–65; 82 ff.; Report DPH 2006, pp. 29 ff., 65 f.

197 See Section II.3 above. See also Report DPH 2005, p. 59.

exclusively non-combat function (e.g. political or administrative activities). In practice, assumption of, or disengagement from, a continuous combat function depends on criteria that may vary with the political, cultural, and military context.¹⁹⁸ That determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.¹⁹⁹

3. Conclusion

Under customary and treaty IHL, civilians directly participating in hostilities, as well as persons assuming a continuous combat function for an organized armed group belonging to a party to the conflict lose their entitlement to protection against direct attack. As far as the temporal scope of the loss of protection is concerned, a clear distinction must be made between civilians and organized armed actors. While civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, members of organized armed groups belonging to a party to the conflict are no longer civilians and, therefore, lose protection against direct attack for the duration of their membership, that is to say, for as long as they assume their continuous combat function.

VIII. Precautions and presumptions in situations of doubt

All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

One of the main practical problems caused by various degrees of civilian participation in hostilities is that of doubt as to the identity of the adversary. For example,

198 See also Section II.3 above. During the expert meetings, it was emphasized that the question of whether affirmative disengagement had taken place must be determined based on the concrete circumstances (Report DPH 2005, p. 63). On the precautions and presumptions to be observed in situations of doubt, see Section VIII below.

199 During the expert meetings, it was repeatedly pointed out that, while the revolving door of protection was part of the rule on civilian direct participation in hostilities expressed in Arts 51 [3] AP I and 13 [3] AP II, the practical distinction between members of organized armed groups and civilians was very difficult. During *reactive* operations carried out in response to an attack, the operating forces often lacked sufficient intelligence and had to rely on assumptions that were made based on individual conduct. Therefore, such operations would generally be restricted to the duration of the concrete hostile acts to which they responded. Conversely, *proactive* operations initiated by the armed forces based on solid intelligence regarding the function of a person within an organized armed group could also be carried out in a moment when the targeted persons were not directly participating in hostilities (see Report DPH 2006, pp. 56 f.)

in many counterinsurgency operations, armed forces are constantly confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to distinguish reliably between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities. To avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, there must be clarity as to the precautions to be taken and the presumptions to be observed in situations of doubt.

1. The requirement of feasible precautions

Prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets.²⁰⁰ Once an attack has commenced, those responsible must cancel or suspend the attack if it becomes apparent that the target is not a legitimate military target.²⁰¹ Before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if so, whether he or she is directly participating in hostilities. As soon as it becomes apparent that the targeted person is entitled to civilian protection, those responsible must refrain from launching the attack, or cancel or suspend it if it is already under way. This determination must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation.²⁰² As stated in treaty IHL, “[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.²⁰³ In addition, a direct attack against a civilian must be cancelled or suspended if he or she becomes *hors de combat*.²⁰⁴

200 Art. 57 [2] (a) (i) AP I. According to *Customary IHL*, above note 7, Vol. I, Rule 16, this rule has attained customary nature in both international and non-international armed conflict.

201 Art. 57 [2] (b) AP I. According to *Customary IHL*, above note 7, Vol. I, Rule 19, this rule has attained customary nature in both international and non-international armed conflict.

202 Report DPH 2006, p. 70 ff.

203 Arts 3 [4] CCW Protocol II (1980); 1 [5] CCW Protocol III (1980); 3 [10] CCW Amended Protocol II (1996). See also the French text of Art. 57 AP I (“faire tout ce qui est pratiquement possible”).

204 Apart from the determination as to whether a civilian is directly participating in hostilities, the principle of precaution in attack also requires that all feasible precautions be taken to avoid and in any event minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. It also obliges those responsible to refrain from launching, to cancel or suspend attacks that are likely to result in incidental harm that would be “excessive” compared to the anticipated military advantage (see Art. 57 [2] (a) (ii); Art. 57 [2] (a) (iii) and Art. 57 [2] (b) AP I and, with regard to the customary nature of these rules in both international and non-international armed conflict, *Customary IHL*, above note 7, Vol. I, Rules 17, 18 and 19).

2. Presumption of civilian protection

For the purposes of the principle of distinction, IHL distinguishes between two generic categories of persons: civilians and members of the armed forces of the parties to the conflict. Members of State armed forces (except medical and religious personnel) or organized armed groups are generally regarded as legitimate military targets unless they surrender or otherwise become *hors de combat*. Civilians are generally protected against direct attack unless and for such time as they directly participate in hostilities. For each category, the general rule applies until the requirements for an exception are fulfilled.

Consequently, in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities.²⁰⁵ The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict.²⁰⁶ Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

The presumption of civilian protection does not exclude the use of armed force against civilians whose conduct poses a grave threat to public security, law and order without clearly amounting to direct participation in hostilities. In such cases, however, the use of force must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.²⁰⁷

3. Conclusion

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so,

205 During the expert meetings, it was agreed that, in case of doubt as to whether a civilian constituted a legitimate military target, that civilian had to be presumed to be protected against direct attack (Report DPH 2005, pp. 44 f., 67 f.; Report DPH 2006, p. 70 ff.).

206 For situations of international armed conflict, this principle has been codified in Art. 50 [1] AP I. With regard to non-international armed conflicts, see also the *Commentary AP* (above note 10), § 4789, which states that, "in case of doubt regarding the status of an individual, he is presumed to be a civilian".

207 See also Report DPH 2005, pp. 11 f.

whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

IX. Restraints on the use of force in direct attack

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.

Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law. It is a fundamental principle of customary and treaty IHL that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited”.²⁰⁸ Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

1. Prohibitions and restrictions laid down in specific provisions of IHL

Any military operation carried out in a situation of armed conflict must comply with the applicable provisions of customary and treaty IHL governing the conduct of hostilities.²⁰⁹ These include the rules derived from the principles of distinction, precaution, and proportionality, as well as the prohibitions of denial of quarter and perfidy. They also include the restriction or prohibition of selected weapons and the prohibition of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (*maux superflus*).²¹⁰ Apart from the prohibition or restriction of certain means and methods of warfare, however, the specific provisions of IHL do not expressly regulate the kind and degree of force permissible

208 Article 22 H IV R. See also Article 35 [1] AP I: “In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited”.

209 See also Report DPH 2006, p. 76; Report DPH 2008, pp. 24, 29 ff.

210 See, for example, the prohibitions or restrictions imposed on the use of poison (Art. 23 [1] (a) H IV R; 1925 Geneva Protocol prohibiting asphyxiating, poisonous or other gases and analogous liquids, materials or devices), expanding bullets (1899 Hague Declaration IV/3) and certain other weapons (CCW-Convention and Protocols of 1980, 1995 and 1996, Ottawa Convention on Anti-Personnel Mines of 1997, Convention on Cluster Munitions of 2008), as well as the prohibition of methods involving the denial of quarter (Art. 40 AP I; Art. 23 [1] (d) H IV R) and the resort to treachery or perfidy (Art. 23 [1] (b) H IV R; Art. 37 AP I). See also Report DPH 2006, p. 76; Report DPH 2008, pp. 18 f.

against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct “attacks”, that is to say, from “acts of violence against the adversary, whether in offence or in defence”.²¹¹ Clearly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered “right” to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.

2. The principles of military necessity and humanity²¹²

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted.²¹³ Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.²¹⁴

Today, the principle of military necessity is generally recognized to permit “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”.²¹⁵ Complementing

211 Article 49 [1] AP I.

212 During the expert meetings, Section IX.2. of the Interpretive Guidance remained highly controversial. While one group of experts held that the use of lethal force against persons not entitled to protection against direct attack is permissible only where capture is not possible, another group of experts insisted that, under IHL, there is no legal obligation to capture rather than kill. Throughout the discussions, however, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection against direct attack, nor that such a person could lawfully be killed in a situation where there manifestly is no military necessity to do so. For an overview of the relevant discussions see Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 44. ff., 50, 56 f., 67; Report DPH 2006, pp. 74–79; Report DPH 2008, pp. 7–32.

213 See, most notably: *Commentary AP* (above note 10), § 1389.

214 Report DPH 2008, pp. 7 f., 19 f. See also the statement of Lauterpacht that “the law on these subjects [i.e. on the conduct of hostilities] must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being” (cited in: *Commentary AP* (above note 10), § 1394).

215 United Kingdom: Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), Section 2.2 (Military Necessity). Similar interpretations are provided in numerous other contemporary military manuals and glossaries. See, for example, NATO: *Glossary of Terms and Definitions* (AAP-6V), p. 2-M-5; United States: Department of the Army, *Field Manual 27-10* (1956), § 3; US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1–14M/MCWP 5–12-1/COMDTPUB P5800.7A (2007), § 5.3.1, p. 5–2; France: Ministry of Defence, *Manuel de Droit des Conflits Armés* (2001), pp. 86 f.; Germany: Federal Ministry of Defense, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (August 1992) § 130; Switzerland: Swiss Army, *Regulations 51.007/IV, Bases légales du comportement à l’engagement* (2005), § 160. Historically, the modern concept of

and implicit in the principle of military necessity is the principle of humanity, which “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes”.²¹⁶ In conjunction, the principles of military necessity and of 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.²¹⁷

While it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.²¹⁸ What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgement of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.²¹⁹

military necessity has been strongly influenced by the definition provided in Art. 14 of the “Lieber Code” (United States: *Adjutant General’s Office, General Orders No. 100*, 24 April 1863).

216 United Kingdom, *Manual of the Law of Armed Conflict* (above note 215), Section 2.4 (Humanity). Although no longer in force, see also the formulation provided in: United States: Department of the Air Force, *Air Force Pamphlet, AFP 110–31* (1976), § 1–3 (2), p. 1–6. Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations that must be balanced against each other as expressed in the specific provisions of IHL.

217 See *Commentary AP* (above note 10), § 1395. See also the determination of the International Court of Justice that the prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering to combatants constitutes an intransgressible principle of international customary law and a cardinal principle of IHL, which outlaws the causation of “harm greater than that unavoidable to achieve legitimate military objectives”. See ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, § 78.

218 See also the Declaration of St Petersburg (1868), which states: “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable [authentic French version: *mettre hors de combat*] the greatest possible number of men”.

219 It has long been recognized that matters not expressly regulated in treaty IHL should not, “for want of a written provision, be left to the arbitrary judgment of the military commanders” (Preamble H II; Preamble H IV) but that, in the words of the famous Martens Clause, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience” (Art. 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law. See, e.g., Preambles H IV R (1907), AP II (1977), CCW (1980); Arts 63 GC I, 62 GC II, 142 GC III and 158 GC IV (1949); ICJ, *Nuclear Weapons AO* (above note 217), § 78; ICTY, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment of

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.²²⁰

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to

January 2000, § 525). For the discussion on the Martens Clause during the expert meetings, see Report DPH 2008, pp. 22 f.).

220 For recent national case law reflecting this position see: Israel HCJ, *PCATI v. Israel*, above note 24, § 40, where the Court held that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. [...] Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required [...]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities [...]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used”.

refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.²²¹ In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets. Lastly, although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of inter-State force (*jus ad bellum*).²²²

3. Conclusion

In situations of armed conflict, even the use of force against persons not entitled to protection against direct attack remains subject to legal constraints. In addition to the restraints imposed by IHL 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.

221 It is in this sense that Pictet's famous statement should be understood that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil". See Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Nijhoff 1985), pp. 75 f. During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations (Report DPH 2006, pp. 75 f., 78) and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or the opportunity to capture rather than kill (Report DPH 2006, p. 63).

222 According to Art. 51 [1] AP I the rule expressed in Art. 51 [3] AP I is "additional to other applicable rules of international law". Similarly, Art. 49 [4] AP I recalls that the provisions of Section I AP I (Arts 48–67) are "additional to the rules concerning humanitarian protection contained [...] in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians [...] against the effects of hostilities". While these provisions refer primarily to sources of IHL other than AP I itself, they also aim to include "instruments of more general applicability that continue to apply wholly or partially in a situation of armed conflict" (see the *Commentary AP* (above note 10), §§ 128–131), such as "the regional and universal Conventions and Covenants relating to the protection of human rights" (*ibid.*, Commentary Art. 49 AP I, § 1901) and other applicable treaties, which "can have a positive influence on the fate of the civilian population in time of armed conflict" (*ibid.*, Commentary Art. 51 [1] AP I, § 1937). During the expert meetings, some experts suggested that the arguments made in Section IX should be based on the human right to life. The prevailing view was, however, that the Interpretive Guidance should not examine the impact of human rights law on the kind and degree of force permissible under IHL. Instead, a general savings clause should clarify that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law (Report DPH 2006, pp. 78 f.; Report DPH 2008, p. 21 f.).

X. Consequences of regaining civilian protection

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

1. Lack of immunity from domestic prosecution

IHL provides an express “right” to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts and participants in a *levée en masse*.²²³ This right does not imply an entitlement to carry out acts prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict (the so-called combatant privilege).²²⁴ The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL²²⁵ nor criminalized under the statutes of any prior or current international criminal tribunal or court.²²⁶ However, because civilians – including those entitled to prisoner of war status under Article 4 [4] and [5] GC III – are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL.²²⁷

223 Art. 43 [2] AP I (except medical and religious personnel); Arts 1 and 2 H IV R.

224 Conversely, combatant privilege provides no immunity from prosecution under international or national criminal law for violations of IHL.

225 This was also the prevailing view during the expert meetings (see Report DPH 2006, p. 81). The experts also agreed that the legality or illegality of an act under national or international law is irrelevant for its qualification as direct participation in hostilities (Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, p. 50).

226 Neither the statutes of the Military Tribunals that followed the Second World War (i.e. the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo), nor the current statutes of the ICTY, the ICTR, the ICC and the SCSL penalize civilian direct participation in hostilities as such.

227 The Martens Clause (above note 219) expresses a compromise formulated after the States participating in the 1899 Peace Conferences had been unable to agree that civilians taking up arms against an established occupying power should be treated as privileged combatants or as *franc-tireurs* subject to execution. Since then, States have successively extended the combatant privilege to participants in a *levée en*

Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict²²⁸ may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.).²²⁹

2. Obligation to respect international humanitarian law

The case law of international military tribunals that followed the Second World War,²³⁰ the ICTY and the ICTR consistently affirms that even individual civilians can violate provisions of IHL and commit war crimes. It is the character of the acts and their nexus to the conflict, not the status of the perpetrator, that are decisive for their relevance under IHL.²³¹ There can be no doubt that civilians directly participating in hostilities must respect the rules of IHL, including those on the conduct of hostilities, and may be held responsible for war crimes just like members of State armed forces or organized armed groups. For example, it would violate IHL for civilians to direct hostile acts against persons and objects protected against direct attack, to deny quarter to adversaries who are *hors de combat*, or to capture, injure or kill an adversary by resort to perfidy.

In practice, the prohibition on perfidy is of particular interest, as civilians directly participating in hostilities often do not carry arms openly or otherwise distinguish themselves from the civilian population. When civilians capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack, this may amount to perfidy in violation of customary and treaty IHL.²³²

masse, militias and volunteer corps (H IV R, 1907), organized resistance movements (GC I-III, 1949) and certain national liberation movements (AP I, 1977). As far as civilians are concerned, however, IHL still neither prohibits their direct participation in hostilities, nor affords them immunity from domestic prosecution.

228 Obviously, where Additional Protocol I is applicable, members of the armed forces of national liberation movements within the meaning of Article 1 [4] AP I would benefit from combatant privilege and, thus, from immunity against prosecution for lawful acts of war, even though the movements to which they belong are non-State parties to an armed conflict.

229 See also Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, pp. 80 f.

230 See above note 226.

231 For the nexus criterion as established by the ICTY and the ICTR see, most notably, ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal (above note 26), §§ 67, 70; ICTY, *Prosecutor v. Kunarac et al.* (above note 147), §§ 55 ff.; ICTR, *Prosecutor v. Rutaganda* (above note 147), §§ 569 f.

232 Arts 23 [1] (b) H IV R and 37 [1] AP I (international armed conflict). For the customary nature of this rule in non-international armed conflict, see *Customary IHL*, above note 7, Vol. I, Rule 65. Under the ICC Statute, the treacherous killing or wounding of “individuals belonging to the hostile nation or army” (international armed conflict: Art. 8 [2] (b) (xi)) or of a “combatant adversary” (non-international armed conflict: Art. 8 [2] (e) (ix)) is a war crime.

3. Conclusion

In the final analysis, IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, when civilians cease to directly participate in hostilities, or when individuals cease to be members of organized armed groups because they disengage from their continuous combat function, they regain full civilian protection against direct attack. However, in the absence of combatant privilege, they are not exempted from prosecution under national criminal law for acts committed during their direct participation or membership. Moreover, just like members of State armed forces or organized armed groups belonging to the parties to an armed conflict, civilians directly participating in hostilities must respect the rules of IHL governing the conduct of hostilities and may be held individually responsible for war crimes and other violations of international criminal law.

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